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## Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary "No"

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# ARTICLES

## DOES DOJ'S PRIVILEGE WAIVER POLICY THREATEN THE RATIONALES UNDERLYING THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE? A PRELIMINARY "NO"

Julie R. O'Sullivan\*

I.	INTRODUCTION . . . . .	1238
II.	<i>UPJOHN CO. v. UNITED STATES</i> . . . . .	1251
III.	INTERNAL CORPORATE INVESTIGATIONS . . . . .	1258
	A. <i>The Investigation</i> . . . . .	1258
	B. <i>"Selective Waiver"</i> . . . . .	1263
IV.	CONSIDERATION OF DOJ'S WAIVER POLICY . . . . .	1266
	A. <i>Rationale Behind DOJ Waiver Policy</i> . . . . .	1266
	B. <i>Scope of DOJ Waiver Policy in Practice</i> . . . . .	1268
	1. <i>The McNulty Memo</i> . . . . .	1268
	2. <i>"Attorney Client Protection Act" and the Filip Memo</i> . . . . .	1272
V.	<i>UPJOHN</i> REVISITED . . . . .	1278
	A. <i>Will the Corporation Cease Seeking Legal Advice Absent Privilege Protections?</i> . . . . .	1278
	B. <i>Will Counsel Stop Investigating?</i> . . . . .	1279
	C. <i>Will the Quality of Corporate Investigations Suffer Because of DOJ Policy?</i> . . . . .	1285
	D. <i>Will Employees Stop Talking to Counsel if Their Communications May be Revealed?</i> . . . . .	1289
VI.	ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION AS FIFTH AMENDMENT SURROGATE . . . . .	1292
VII.	CONCLUSION . . . . .	1295

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\* Professor, Georgetown University Law Center. My thanks to the fine student editors at the ACLR. © 2008, Julie R. O'Sullivan.

## I. INTRODUCTION

According to white-collar defense practitioners, the demise of the corporate attorney-client privilege and work product doctrine is imminent.<sup>1</sup> While a variety of assaults have been identified,<sup>2</sup> by far the most oft-cited culprit is the U.S. Department of Justice (DOJ), whose prosecutors, it is charged, have routinely insisted that corporations waive these protections to secure cooperation credit and declination of criminal action against the corporate actor and/or consideration at sentencing.<sup>3</sup> DOJ has, by and large, vigorously defended its policies in this regard. Congress now threatens to inject itself into the debate: legislation entitled the "Attorney-Client Privilege Protection Act" has been introduced that would bar federal prosecutors from asking organizations to disclose information protected by the attorney-client privilege or the work product doctrine or conditioning coopera-

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1. See, e.g., Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why it is Misguided)*, 48 VILL. L. REV. 469 (2003); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147 (2000); see also Am. College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307 (2003); *Counsel Group Assails Prosecution Policy Compelling Corporations to Waive Privileges*, 67 Crim. L. Rep. (BNA) No. 11, at 391 (June 14, 2000); Joseph F. Savage, Jr. & Melissa M. Longo, 'Waive' Goodbye to Attorney-Client Privilege, BUS. CRIMES BULL., Oct. 2000, at 1; Breckinridge L. Willcox, *Attorney/Client Privilege Waiver: Wrongheaded Practice?*, BUS. CRIMES BULL. Jan. 2000, at 1.

2. See Cole, *supra* note 1 *passim*; *Counsel Group Assails Prosecution Policy Compelling Corporations to Waive Privileges*, *supra* note 1, at 391.

3. See AMERICAN CHEMISTRY COUNCIL, ASSOCIATION OF CORPORATE COUNSEL ET AL., THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT: SURVEY RESULTS (2006) 4 [hereinafter ACC 2006 STUDY RESULTS], available at <http://www.acca.com/Surveys/attyclient2.pdf> (mentioning, as a key theme in the survey, the DOJ's insistence that its policies come first). For the evolving DOJ policy pronouncements, generally issued in the form of a memorandum from the then-reigning Deputy Attorney General, see Memorandum from Deputy Attorney General Mark R. Filip to Heads of Department Components and United States Attorneys on Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008) [hereinafter Filip Memo], available at <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>; Memorandum from Deputy Attorney General Paul J. McNulty to Heads of Department Components and United States Attorneys on Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memo], available at [http://www.usdoj.gov/05publications/05\\_3\\_p.html](http://www.usdoj.gov/05publications/05_3_p.html); Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and U.S. Attorneys on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memo], available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm); Memorandum from Deputy Attorney General Eric H. Holder, Jr. to All Component Heads and United States Attorneys on Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter Holder Memo], available at <http://www.usdoj/criminal/fraud/docs/reports/1999/chargingcorps.html>, reprinted in Justice Department Guidance on Prosecution for Corporations, 66 Crim. L. Rep. (BNA), No. 10, at 189 (Dec. 8, 1999). The SEC's cooperation policy runs a close second in the unpopularity poll. See, e.g., Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006) (known as the "SEC Financial Penalties Statement"), <http://www.sec.gov/news/press/2006-4.htm>; Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 34-44969, 76 SEC Docket 220, 222 n.3 (Oct. 23, 2001) (known as the "Seaboard Report"), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>. Many other agencies call for voluntary corporate disclosure of statutory or regulatory violations. See, e.g., Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1118-35 (2006).

tion credit or civil or criminal charging decisions on whether an entity has waived these protections (the Act does not, however, affect organizations' ability to volunteer to waive).<sup>4</sup> The principal aim of this article is to explain why the proposed Act is responsive to a problem that does not exist, and non-responsive to the actual source of the defense bar's unhappiness.<sup>5</sup>

The first iteration of DOJ waiver policy was set forth in a 1999 Memorandum issued by then-Deputy Attorney General Eric Holder (the "Holder Memo"), which sets forth the factors that prosecutors ought to consider in evaluating whether to charge a corporation with a criminal offense. One of the ten factors prosecutors were instructed to examine in making these decisions was identified as the corporation's "cooperation and voluntary disclosure."<sup>6</sup> Prosecutors were instructed that they could consider, in "assessing the adequacy of a corporation's cooperation," "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."<sup>7</sup> The Memo explained that such waivers

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4. The Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007), H.R. Rep. No. 110-445, at 8 (2007). In relevant part, the Bill provides:

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

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

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

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

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

....

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

The Senate version, S. 186, is virtually identical. Charles Doyle, CRS Report for Congress, *The McNulty Memorandum: Attorneys' Fees and Waiver of Corporate Attorney-Client and Work Product Protection* CRS-26 (Nov. 26, 2007).

5. Until recently, few have questioned the bona fides of the bar's objections to DOJ's waiver policy. See, e.g., Julie R. O'Sullivan, *The Last Straw: The Department of Justice's Privilege Waiver Policy and the Death of Adversarial Justice in Criminal Investigations of Corporations*, 57 DEPAUL L. REV. 329 (2008); Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295 (2008); Preet Bharara, *Corporations Cry Uncle and their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 96 (2007); Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 897-900 (2006).

6. Holder Memo, *supra* note 3, at 6.

7. *Id.* at 7.

“permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements” and “are often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation.”<sup>8</sup> The Holder Memo concluded, however, that such waivers were only one consideration and were not “an absolute requirement.”<sup>9</sup> Finally, in a footnote, the Memo cautioned that any waivers “should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue.”<sup>10</sup>

Mr. Holder’s memo was updated in 2003 by then-Deputy Attorney General Larry Thompson, in major part to emphasize that prosecutors ought to scrutinize carefully the authenticity of a corporation’s cooperation, but with no change to the substance of the above-stated policy. Fairly read, the Holder/Thompson policy on its face does not “require” or even encourage corporate privilege waivers. The defense bar’s objection, then, was not so much to the language of the policy as to what they viewed as the policy’s implicit invitation to prosecutors to “request” privilege waivers in virtually every case—an invitation the bar contends prosecutors accepted with uniform alacrity. It is important to note that there is a serious contest over the issue of the frequency of waiver requests. In this regard, the government and the defense appear to be practicing in different worlds, and both sides present surveys attesting to their particular reality.<sup>11</sup> According to defense practitioners, “[w]aiver of the privilege is now a routine part of discussing a corporate resolution” of a criminal investigation.<sup>12</sup> Indeed, even Mr. Holder, now in private practice, has complained that “[t]oday, it’s maddening . . . . You’ll go into a prosecutor’s office . . . and fifteen minutes into our first meeting they say, ‘Are you going to waive?’”<sup>13</sup> Predictably, DOJ responds, just as emphatically, that its prosecutors have been judicious in requesting privilege waivers,<sup>14</sup> doing so only

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8. *Id.*

9. *Id.*

10. *Id.* at 7 n.2.

11. Compare, e.g., Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 597-98 (2004) (discussing survey of 94 U.S. Attorneys Offices conducted in 2002, which indicated that “requests for waivers simply are not the norm”), with ACC 2006 STUDY RESULTS, *supra* note 3, *passim* (finding that “contrary to the claims of many prosecutors and other regulators, privilege waiver demands are neither uncommon nor rarely exercised”), and ACC, EXECUTIVE SUMMARY, ASSOCIATION OF CORPORATE COUNSEL SURVEY: IS THE ATTORNEY/CLIENT PRIVILEGE UNDER ATTACK? (2005) [hereinafter ACC 2005 STUDY RESULTS], available at <http://www.abanet.org/buslaw/attorneyclient/publichearing20050421/testimony/hackett1.pdf>.

12. Savage & Longo, *supra* note 1, at 4.

13. See Posting of Peter Lattman to Law Blog, <http://blogs.wsj.com/2006/12/13/the-holder-memo/> (Dec. 13, 2006, 08:47 EST).

14. See, e.g., Buchanan, *supra* note 11; Joan C. Rodgers, *DOJ Official Suggests Corporate Defendants Do Not Have to Waive Privilege But it Helps*, 21 Law. Man. On Prof. Conduct (BNA) 391, 391 (July 27, 2005) (noting Acting Assistant Attorney General John C. Richter’s claim that “waiver of privilege is not a requirement and is not a litmus test for cooperation with the government”); Philip Urofsky, *Interview with United States Attorney James*

where necessary to determine the underlying facts and to test the completeness of corporate efforts to cooperate.

Reacting to what its members viewed as an inappropriate and counter-productive assault on the attorney-client privilege and work product doctrine, a self-described “Coalition to Preserve the Attorney-Client Privilege” commenced an aggressive campaign for a legislative “fix”: the proposed “Attorney-Client Protection Act.” The Coalition includes in its membership an impressive array of political muscle: the American Bar Association, the U.S. Chamber of Commerce, the Business Roundtable, the Financial Services Roundtable, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, and the Association of Corporate Counsel. This Coalition has worked hard for its bill, and has enlisted such “A” list lawyers as former U.S. Attorneys General Richard Thornburg and Edwin Meese to support it. The success of the Coalition in gaining the attention of lawmakers pressured DOJ to adopt a revised policy, reflected in the so-called “McNulty Memo,” in December 2006.<sup>15</sup> This Memo—authored by then-Deputy Attorney General Paul McNulty—continued to contemplate requests for corporate privilege waivers, but required prosecutors to weigh identified factors before requesting waivers, was more detailed regarding the types of materials that could be requested, and mandated that requests be considered (and in some cases) approved at the highest levels of Main Justice.<sup>16</sup>

The ink was barely dry on the McNulty Memo before American Bar Association President Karen J. Mathis issued a press release stating that these guidelines “fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections during government investigations.”<sup>17</sup> A few practitioners issued faint praise,<sup>18</sup> while others expressed significant reservations<sup>19</sup> or flat-out rejected DOJ’s olive branch.<sup>20</sup> The Coalition continued its lobbying and, as a consequence, the Attorney-Client Privilege Protection Act of 2007 sailed through House committee consideration a month

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*B. Comey Regarding Department of Justice’s Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection*, in CORPORATE COUNSEL FORUM (2004), at 639, 641-42 [hereinafter *Comey Remarks*].

15. Jason McLure, *The Life and Death of the Thompson Memo*, LEGAL TIMES, Dec. 18, 2006, available at <http://nacdl.org/public.nsf/whitecollar/WCnews065>.

16. See generally McNulty Memo, *supra* note 3.

17. Statement by ABA President Karen J. Mathis regarding revisions to the Justice Department’s Thompson Memorandum, American Bar Association, Dec. 12, 2006, <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59>.

18. See, e.g., David Z. Seide, Email Alerts, Wilmer Hale, Department of Justice McNulty Memo Curtails Controversial Portions of Thompson Memo—Legislation Introduced in the Senate (Dec. 13, 2006), <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=3507> (noting that “[a]s a practical matter, the Memorandum is likely to substantially curtail privilege waiver demands from line prosecutors” principally by placing “what appear to be meaningful hurdles in the path of any line prosecutor bent on making such demands” in the form of DOJ approval requirements).

19. See, e.g., Abbe D. Lowell, et al., *Is the DOJ’s New Policy on Prosecuting Corporations Real Reform or Business as Usual?*, LAW.COM, Jan. 31, 2007, <http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1170151352731>.

after its introduction and was passed with virtually no objection three months later, on November 12, 2007.<sup>21</sup>

Because DOJ promised to again revise its policy, potentially obviating a legislative solution, the Senate held off on a similar bill. When DOJ was perceived to be dragging its feet, Senator Arlen Specter, and twelve co-sponsors, introduced on June 26, 2008 a bill similar to that passed by the House, entitled "Attorney-Client Protection Act of 2008." With this not-so-subtle reminder of congressional concern, DOJ, in the person of Deputy Attorney General Mark Filip, finally issued another revision of its policy in August 2008.<sup>22</sup> This third iteration of DOJ policy on the substance and effect of corporate "cooperation" in criminal charging decisions in five years is now referred to as the "Filip Memo."<sup>23</sup> The Filip Memo seems to simplify matters considerably, at least measured against the detailed—and now apparently obsolete—guidelines and approval requirements embedded in the McNulty policy. Its bottom line is clear: (1) privilege waivers are not (and assertedly have never been) a prerequisite for cooperation credit or for declination of criminal charges; (2) a corporation may freely waive its privileges if it wishes; (3) *but* that waiver may not be considered when a prosecutor decides whether to give a corporation credit for its cooperation in charging; (4) rather, the critical determinant is *whether the entity has provided prosecutors with the facts necessary for them to investigate the matter fairly and responsibly.*<sup>24</sup> Some in practice have correctly summarized the ultimate DOJ message as: "we don't care if you waive, just provide the relevant facts," leaving it to practitioners to sort out if and how that can be achieved while maintaining the privilege protections.<sup>25</sup> Although the above appears to respond to the proposed legislation, the revised policy does not institute Congress's proposed bar on prosecutorial requests for waivers. The policy seemingly permits prosecutors to ask for waivers of "fact" work product and privileged communications, but it does provide that corporations "need not produce, and prosecutors may not request," such "core" work product and attorney-client privileged materials as attorneys' notes of witness interviews and advice given to the client concerning the legal implications of the putative misconduct at issue "as a condition for the corporation's eligibility to receive cooperation credit."<sup>26</sup>

Such is the status of the debate regarding DOJ waiver policy to date. As of this

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20. See, e.g., Richard Ben-Veniste & Raj De, *The "McNulty Memo": A Missed Opportunity to Reverse Erosion of Attorney-Client Privilege*, 22 LEGAL BACKGROUNDER No. 3 (Wash. Legal Found.) (Jan. 19, 2007), available at <http://www.wlf.org/upload/1-19-07%20ben-veniste.pdf>.

21. See, e.g., Doyle, *supra* note 4, at CRS-1.

22. See Filip Memo, *supra* note 3.

23. *Id.* at 2.

24. *Id.* at 10.

25. White Collar Update, Memorandum from Davis Polk & Wardwell to Interested Persons (Sept. 5, 2008), available at <http://www.dpw.com/1485409/clientmemos/09.05.08.Filip.Stein.Client.Memo.pdf>.

26. Filip Memo, *supra* note 3, at 10 n.3, 11-12. This last injunction is subject to the standard exceptions: where the advice of counsel defense is asserted; where the communications at issue are subject to the crime-fraud exception to privilege rules; and where the conduct at issue constitutes criminal obstruction. *Id.* at 12.

writing, it is too soon to judge whether DOJ's latest efforts will foreclose Senate action on the proposed "Attorney-Client Privilege Protection Act of 2008."<sup>27</sup> Due to the vagaries of publishing deadlines, this article cannot await the resolution of the DOJ-Senate stand-off. I hope this means that time remains to affect the outcome because I believe that the participants in this lengthy controversy are concentrating on the wrong issue. Thus, in this article, I first address at some length whether the articulated rationale for this legislation holds weight: that is, whether DOJ's waiver policy actually undermines the policies served by the attorney-client privilege and work product doctrine in corporate investigations. Second, having answered that question, at least preliminarily because of the absence of good empirical data, in the negative, I will try to divine *why* the bar has spent so much time and political capital insisting otherwise.

My second query may surprise, so some context should help. One might posit that it is the type of conduct at issue here that raises the hackles of those in the bar and on the Hill. But, as Professor Dan Richman has pointed out, waivers of all kinds are exceedingly common in the federal criminal system.<sup>28</sup> Indeed, approximately 95% of federal criminal defendants (including about 90% of charged corporations)<sup>29</sup> waive *all* their constitutional trial rights in pleading guilty every year. Why, then, should we be particularly concerned about corporate privilege waivers?

The element of "coercion" in these "compelled-voluntary"<sup>30</sup> waivers is often bemoaned. Yet non-white-collar criminal defendants are, with the Supreme Court's approval, regularly required to choose between craggier rocks and more extreme hard places, whether by statute or prosecutorial whim. Thus, the Court had no problem upholding a plea that even it apparently recognized was extorted through the statutory availability of a death sentence only after a jury trial.<sup>31</sup> Nor is it improper prosecutorial practice to offer a defendant a deal so good that the

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27. Letter from Senator Arlen Specter to Dep'y Attorney Gen. Mark Filip (July 10, 2008), available at [http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord\\_id=09ee0cfc-978b-d2cb-c6e6-511bec8ea4ea&IsPrint=true](http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=09ee0cfc-978b-d2cb-c6e6-511bec8ea4ea&IsPrint=true) ("I think it is asking too much for the legislative process to await a written revision of McNulty and then await a review of the implementation of a new memorandum . . ."). The pending Senate bill, S. 3217 (replacing the 109th Congress' S. 30 and the 110th Congress' S. 186), largely tracks the bill, H.R.3013, that passed in the House. See <http://www.govtrack.us/congress/bill.xpd?bill=s110-3217>. For differences between the two, see Senator Specter's floor statement, available at <http://www.acc.com/resource/getfile.php?id=9857&title=Senate+Floor+Statement+of+The+Honorable+Arlen+Specter+%28R-PA%29%2C+re-introducing+S.+186+as+The+Attorney-Client+Privilege+Protection+Act+of+2008&author=&year=2008&materialtype=no+document+type&keywordlist=Attorney-Client+Privilege%2CCollections+%26+Solicitations%2CCompetition&doc=true>.

28. See Richman, *supra* note 5, *passim*.

29. See, e.g., ACC 2006 STUDY RESULTS, *supra* note 3, at 34, 40.

30. See Brown, *supra* note 5, at 901.

31. *Brady v. United States*, 397 U.S. 742 (1970). In *Brady*, the Supreme Court held that a defendant may not constitutionally complain when he determined to plead guilty, thus limiting his exposure by statute to life imprisonment, rather than face the possibility of a capital sentence, which penalty was available only after a jury trial. *Id.* at 758. The Court noted:



innocent but risk-averse will find it virtually impossible to turn down—such as pleading to a five year count under threat that, absent plea, the defendant may receive a life sentence after trial.<sup>32</sup> Indeed, prosecutors can, and do, secure pleas—and thus waivers of constitutional trial rights as well as the Fifth Amendment—by threatening to indict family members.<sup>33</sup>

In sum, requiring corporations regularly to waive their privileges in white-collar crime cases—if that is indeed what is going on—in return for a possible *declination* of prosecution seems positively benign in contrast to what goes on in “white powder” cases. The question is not whether the corporation *could* be charged—that is often a foregone conclusion under existing corporate liability standards.<sup>34</sup> Concededly, the language of the policy was originally not very precise in this regard, but its implied message then (confirmed by remarks delivered by various DOJ officials over time) and its very clear message now under the Filip Memo is that what the government is looking for is the *facts*.<sup>35</sup> Given that the

[E]ven if we assume that [the defendant] would not have pleaded guilty except for the death penalty provision [of the statute], this assumption merely identifies the penalty provision as a ‘but for’ cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as a voluntary act.

*Id.* at 750.

32. See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (explaining that “the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution” did not violate due process).

33. See, e.g., *Miles v. Dorsey*, 61 F.3d 1459, 1468 (10th Cir. 1995) (holding a plea not coerced when tendered in exchange for leniency for the rest of the defendant’s family). Some assert that the corporate context is unique in that “individual defendants do not hold sway over third parties in the way that corporations do over their employees . . . . The onerous pressure upon a corporation to cooperate with a governmental investigation thus arguably imposes an unfair hardship on one set of third parties (its employees who are criminal targets) . . . .” Bharara, *supra* note 5, at 96; see also Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311 (2007) (focusing on the effect of DOJ’s white collar enforcement policies on individuals). My objection to this line of analysis—which ultimately depends on the “unfairness” that the waiver policy holds for corporate employees who mistakenly relied on the corporate attorney-client privilege and who now face the prospect that their corporation will waive its privilege and turn their statements over to the government—is both factual and conceptual. As noted, in cases such as *Miles*, third-party fall-out is not uncommon even in individual cases, for good or ill. Second, speaking as we are now about *corporate* counsel, such concerns are not competent considerations unless problems for individuals translate into concrete harm to the health or prospects of the entity. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.13 (2004).

34. See, e.g., Bharara, *supra* note 5, *passim*.

35. See *Comey Remarks*, *supra* note 14, at 641 (contending that “[p]rosecutors are generally seeking the facts: what happened, who did, how they did it. Although the facts gathered by an attorney . . . [may be privileged], prosecutors are not generally seeking legal advice or opinion work product; they are just seeking facts.”); see also Buchanan, *supra* note 11, at 596-97. U.S. Attorney Mary Beth Buchanan asserts, for example, that

the information disclosed pursuant to a waiver is nearly always attorney work product concerning the underlying facts, rather than privileged communications. Further, the work product protection, as opposed to the attorney-client privilege, is not absolute, so that disclosure to a civil litigant may be ordered upon a showing of substantial need, pursuant to Federal Rule of Civil Procedure 26(b)(3). Even with respect to work product, the government rarely seeks the attorney’s mental impressions of witness interviews. To avoid any such disclosure unnecessarily, experienced attorneys will refrain from including mental impressions and strategy in their notes of witness

corporation and its counsel are seeking a significant dispensation from the government, one could legitimately argue that that dispensation need not be cost-free, particularly if the “cost” (waiver) is intended not to punish but rather to permit the government to get to the bottom of criminal conduct. In former Deputy Attorney General James Comey’s words, DOJ policies “do not require waiver, and do not even require cooperation” and “for a corporation to get credit for cooperation, it must help the Government catch the crooks.”<sup>36</sup>

As the above may indicate, my initial reaction to the bar’s vehement denunciation of compelled-voluntary waivers was to shrug it off as a specialized tempest in a teapot. Defense counsels’ objections could also be discounted as the raging of a bar whose ox has been gored; no professional defense lawyer wishes to have an adversary reading her work product over her shoulder or second-guessing her judgments. Recall, too, that what is at stake here is a declination of charges against the corporation through cooperation, and achieving this goal may well require throwing individual members of management under the bus if they are not cooperative with the government or have some connection to the wrongdoing. Thus, it may often be in the corporation’s best interest to volunteer a waiver, but such waivers may disadvantage those individuals still in management who have shared what they know with corporate counsel but do not wish that information to be conveyed to the government (for a variety of reasons, including potential criminal exposure). It is ultimately individuals in management, then, that are most at risk if DOJ is successful in pressuring waivers—and not surprisingly it is the same group that presumably has approved and promoted corporate opposition to DOJ’s waiver policy. Finally, one could certainly attribute the attention this issue has attracted to the nature of the clients and counsel involved: these are a relatively high-profile, politically astute, and wealthy group of possible witness/subjects/targets and their lawyers. These folks know that if they make a big enough stink, they at least have the opportunity to get some push-back (as, indeed, they have).<sup>37</sup>

What made me reconsider my first, dismissive, view, is the nature of the outrage expressed. It is so public, so sustained, so widespread, and seemingly so sincere that one has to take it seriously. After due consideration, I believe that the defense objections *do* have weight, but not for the reasons the bar generally articulates.

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interviews. While disclosure of the underlying facts may in some cases reveal some of the questions asked of employees by counsel for the organization, any such intrusion into counsel’s mental processes is minimal.

*Id.* (footnotes omitted).

36. *Comey Remarks*, *supra* note 14, at 641-42.

37. *See, e.g.*, U.S. SENTENCING COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES 45 (May 18, 2006), available at <http://www.ussc.gov/2006guid/FinalUserFrdly.pdf> (eliminating, effective Nov. 1, 2006, final sentence of Application Note 12 to § 8C2.5, which stated “[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization”).

Turning to the merits, then, the predominant, though not sole,<sup>38</sup> reasoned objection to DOJ's (and other regulators') compelled-voluntary waiver policy is founded on the rationales underlying the attorney-client privilege and, to a lesser extent, the work product doctrine. As Professor Lonnie Brown explains, those who object to governmental "requests" for corporate privilege waivers primarily argue that the "escalating pressure to waive these protections is eroding the desired atmosphere of mutual candor and trust that has traditionally been the hallmark of the attorney-client relationship."<sup>39</sup> This erosion, in turn, "is adversely affecting counsel's desire and ability to conduct the thorough factual investigations lauded by the Supreme Court"<sup>40</sup> in its leading opinion on the application of the attorney-client privilege in the corporate internal investigation context, *Upjohn Co. v. United States*.<sup>41</sup> "The upshot, so the argument goes, is the inevitable provision of ineffective legal representation."<sup>42</sup>

In particular, Professor Brown identifies the "parade of horrors" envisaged by defense lawyers to include:

(1) the erosion of trust between attorney and client—corporate executives and employees will cease to be forthcoming out of a fear that whatever they communicate will ultimately be disclosed, and corporate counsel will understandably be more skeptical of the accuracy or completeness of the information communicated to them; (2) lawyers' internal investigations will become "paperless"—counsel will refrain from taking notes or preparing memoranda in connection with corporate representations to avoid future provision of a blueprint for culpability to regulators and perhaps third parties; and (3) lawyers and clients will cease to conduct internal investigations altogether, in an effort to evade the waiver issue entirely, which will invariably lead to a decrease in corporate legal compliance.<sup>43</sup>

The first and third objections rest on the policy reasons for the attorney-client privilege, while the second picks up the theme developed in work product cases. To consider seriously the wisdom of a governmental policy that relies on waiver requests to uncover the facts and test the *bona fides* of corporate cooperation, then, one must evaluate the extent to which these objections are well-founded. In particular, one should begin by questioning the logical premise of these arguments and of the *Upjohn* holding: that promoting the full and free flow of information and

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38. See, e.g., William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 622 (2006) (arguing that, over time, the erosion in the adversarial process and skewing of the balance of power between the defense and the government "may well drive a wedge between the corporate entity and the executives and employees the company relies upon for the shareholders' benefit, even when these individuals have done nothing wrong"); see also sources cited *supra* note 1.

39. Brown, *supra* note 5, at 900.

40. *Id.*

41. 449 U.S. 383, 390 (1981).

42. Brown, *supra* note 5, at 900.

43. *Id.* at 900-01.

advice between client and counsel requires that otherwise relevant and probative information should be shielded from discovery in the corporate, as well as the individual, context. Although some have questioned whether corporations should enjoy *any* attorney-client privilege,<sup>44</sup> those who do so are generally lonely voices consigned to footnotes in the apparent belief that the Court is unlikely to move from the position it adopted in *Upjohn*. Whether or not that is true—and I think there is some room for doubt, as is demonstrated below—reconsidering the bases for recognizing a corporate privilege is relevant to our evaluation of the wisdom of DOJ's waiver policy.

If the survey results proffered by the defense bar and the prosecution regarding the frequency of privilege waiver requests could be trusted, one might use them to determine the likely impact of DOJ policy. It seems at least to this author, however, that the surveys were not conducted with even minimal rigor, at least tested by the standards required in academic circles. Certainly the surveys that the defense bar cites *ad nauseum* in its lobbying materials<sup>45</sup> do not withstand scrutiny, a fact that the survey authors acknowledge in footnotes but that Congress failed to pick up on when quoting the results in the House report accompanying H.R. 3013.<sup>46</sup> Until

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44. *Id.* at 923 (noting that “the fundamental notion that the existence of a privilege helps to encourage clients to seek the assistance of counsel in connection with their legal problems is less convincing in the corporate setting because businesses ‘are forced by circumstances and impelled by business necessity to resort to lawyers.’”) (citation omitted); *see also* DAVID LUBAN, *LAWYERS AND JUSTICE* 218 (1988) (explaining that this “standard justification of confidentiality . . . is very dubious in the organizational context”); Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 887 n.116 (2003) (questioning the value of privilege in the context of antitrust violations, where the punishment for failing to self-report wrong-doing far exceeds the costs of doing so); John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 464 (1982) (noting that corporate clients are “candid with their attorneys not because of privilege but because they realize that the costs of withholding information” are far greater than the “disadvantages flowing from the risk that the communication will later be divulged.”); Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 159 (1993) (disputing the typical justifications for privilege and examining the resulting harmful consequences); Brian E. Hamilton, Note, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, 1997 ANN. SURV. AM. L. 629, 648 (1997) (“Government, not an evidentiary privilege, is the ultimate enforcer of government regulations.”); *cf.* Daniel R. Fischel, *Lawyers and Confidentiality*, 64 U. CHI. L. REV. 1 (1998) (arguing for abolition of the attorney-client privilege in general). *But see* *Radiant Burners, Inc. v. Am. Gas Ass’n*, 320 F.2d 314 (7th Cir. 1963) (discussing sources, debating the issue, and holding that corporation could claim the attorney-client privilege).

45. *See, e.g., The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the H. Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 83 (2007) (statement of Richard T. White); *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 129 (2006) (statement of Edwin Meese III); *id.* at 140-41 (statement of Richard Thornburgh); *id.* at 85-87 (statement of Karen Mathis); *id.* at 134-35 (statement of Mark B. Sheppard).

46. *Compare, e.g., ACC 2006 STUDY RESULTS, supra* note 3, at 3 n.7 (“We believe the survey’s response rate can be considered robust; but since we are not an independent surveying company or statisticians, we can make no proffer that the sampling is statistically significant or representative of the entire profession.”), *with* H.R. REP. NO. 110-445, at 3 (2007) (citing “recent empirical evidence” but not discussing the methods of the survey). The authors of the survey make clear that they did not attempt a scientific sampling. Instead, they directed the survey solely to the constituencies with the most to gain from the legislation (in-house counsel and outside counsel who

social scientists get involved and conduct empirical studies, then, it is impossible to know—definitively rather than anecdotally—whether compelled-voluntary waivers do indeed affect the information flow between client and counsel, the quality or quantity of legal advice provided by lawyers, and ultimately corporate clients' compliance with the law.

How then did I come to the "preliminary 'no'" mentioned in my title? By the only method left to us and seemingly employed by all sides in this debate: educated guessing about the likely effects of certain rules or practices on the reasonable client or the rational lawyer. Given the empirical uncertainties here, much would seem to rest on the default position one adopts. I believe that the burden of proof should lie on those seeking to defend the corporation's entitlement to these protections for a number of reasons. The first is the old saw that sets the default rule when examining scope of waiver claims: because the privilege constitutes "an obstacle to the investigation of the truth," it should be "strictly confined within the narrowest possible limits consistent with the logic of its principle."<sup>47</sup>

Second, and relatedly, this is an area in which important public policy concerns pull in *both* directions. Whatever the cost of privilege waivers, that cost must be weighed against whatever gains they permit in the effective identification and remediation of corporate criminal wrongs and the efficient allocation of government resources. This piece of the equation is often ignored in the practitioners' literature.<sup>48</sup>

Finally, while the corporate lawyer's duties run to the entity, the entity's duties are generally said to run to the shareholders.<sup>49</sup> Where do shareholders' best

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are members of the ABA Business Law and Criminal Justice Section, the National Association of Defense Lawyers and/or the Association of Corporate Counsel). Apparently, the authors did not approach academics or government employees. ACC 2006 STUDY RESULTS, *supra* note 3, at 3 n.7. The responses indicated that 40% of the in-house counsel who responded to the survey indicated that their company had been the subject of a governmental investigation in the past five years, thus further skewing the results at least on certain queries. "Moreover, without raw data, it is difficult to discern the degree to which those responses reflected general perceptions rather than personal experiences." Richman, *supra* note 5, at 303. Finally, the questions were often phrased in a leading manner, compromising the integrity of the survey results (and, indeed, the survey was entitled *Is the Attorney-Client Privilege Under Attack?*). See ACC 2006 STUDY RESULTS, *supra* note 3. Given these circumstances, it is amazing that some of the information embedded in the surveys actually undermines the Coalition's position. For example, in its 2005 report entitled *The Decline of the Attorney-Client Privilege in the Corporate Context*, the Coalition noted "roughly half of all investigations or other inquiries experienced by survey respondents resulted in privilege waivers"—meaning, presumably, that the other half did not. ACC 2005 STUDY RESULTS, *supra* note 11, at 3. Indeed, the "[e]xperiences relating to waiver" reported did not support the assertion of a near-total "culture of waiver" posited in testimony. See *id.* at 5-6.

47. *Radiant Burners Inc.*, 320 F.2d. at 323.

48. One of the notable exceptions being a piece authored by former prosecutors and SEC enforcement officials. See McLucas et al., *supra* note 38.

49. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."); ABA Comm. on Corp. Laws, *Other Constituency Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2255 (1990) (noting that the view that the management of corporations should be pursuing shareholders' interests

interests generally lie? Although there is no one-size-fits-all answer to this query, it would seem to me that in the general run of cases, shareholders would be better served if the entity were to do whatever it could—including tendering privilege waivers—to cooperate with the government and thus secure a prompt and hopefully positive resolution of the criminal investigation. Certainly, as will be discussed within Part III.B, in particular cases the waivers necessary to achieve this result may well be costly because they may (for example) render the corporation more vulnerable to civil liability. But in the general run of cases I believe one can safely assume that the costs to shareholders of the waiver will be less than the costs of a possible criminal indictment.<sup>50</sup> To the extent that the proposed legislation helps anyone, then, it is generally not the corporations or their shareholders; rather, it is the individuals, likely within corporate management, who gave the lawyers the information proposed to be shared—probably to their individual detriment—with DOJ.

I will begin our inquiry by discussing the Supreme Court's foundational decision in *Upjohn v. United States*.<sup>51</sup> The *Upjohn* Court accepted, based on the government's concession, the proposition that corporations should be able to claim the attorney-client privilege. The Court then went on to adopt a generous view of the scope of the attorney-client privilege in the context of internal corporate investigations based on two key, yet unsupported, assumptions: *first*, that the risk of civil or criminal liability does not suffice to ensure that corporations will investigate allegations of wrongdoing, or at least guarantee that they will do so effectively; and *second*, that the application of the privilege in this context is necessary to induce corporate employees to provide their attorneys with information that, in the absence of the privilege, they otherwise would not.

Next, we will update *Upjohn*, exploring how corporate counsel conduct corporate internal investigations today; we then will be in a position to determine what DOJ wants from corporations in the way of attorney-client privileged or work product protected materials and the reasonableness of these expectations. My conclusion is, if prosecutors read the Filip Memo correctly and (and were required to follow the rules in the McNulty Memo), the instant debate is not worth having, *at least if the conversation is restricted to the wisdom of the compelled waiver doctrine alone*. What the government would seek in the usual case would be facts to which it is often otherwise entitled under federal privilege law, and counsel should be able to alter their investigative practices to accommodate the govern-

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"has prevailed to the present. With few exceptions, courts have consistently avowed the legal primacy of shareholder interests when management and directors make decisions"). *But cf.* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 281 (1992) (explaining that the conception of the corporation is evolving to reflect the changing "nature and purpose of our social life").

50. *Cf.* Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315 (1991).

51. 449 U.S. 383 (1982).

ment's request without compromising the quality of their investigation. Further, analysis suggests that the proposed congressional "fix" will not solve much, and indeed may make matters worse. But we will soldier on in the certainty that the defense bar will disagree with me about both the likelihood that prosecutors *will* follow the rules, the impact of fact-related waivers on their investigative efforts, and the wisdom of congressional intervention.

Ultimately, then, we will need to test the continuing viability of the *Upjohn* reasoning. Among the questions before us are whether the Supreme Court's critical assumptions remain valid twenty-five years after *Upjohn*. I will use Professor Brown's excellent synopsis of the "parade of horrors," quoted above, to guide my analysis. My conclusion by now may not surprise: that the traditional rationales advanced to support the attorney-client privilege and, to a lesser degree, the work product doctrine, simply do not apply in the corporate context in the same way they do in the case of individuals' consultation with counsel. To the extent that the Courts' reasoning in *Upjohn* ever had merit, it does not now. The defense bar's attempt to rely on such arguments, then, must fail.

What are the implications of this conclusion? I should make clear that I am *not* arguing, on this basis alone, that the defense bar has no ground for objecting to the government's compelled-voluntary privilege waiver policy. What I am arguing is that the bar is making the *wrong* argument. A fuller explication of this thesis can be found in other literature,<sup>52</sup> but I will briefly sketch it out in Part VI. One question (and its answer) ought to illustrate my point: would the compelled-voluntary privilege waiver policy have caused a stir if corporate counsel had the bargaining leverage necessary to tell prosecutors what they can do with their waiver "requests"? The answer, of course, is "no." The real problem lies not in the policy so much as in the variety of circumstances that conspire to make the adversary system a myth in the context of corporate criminal liability, including the absence of a corporate Fifth Amendment right, the overbroad standard of liability, the malleable nature of the federal criminal code, and the range and harshness of sanctions applicable upon conviction. DOJ is not responsible for these circumstances, but it is happy to exploit them to ensure that its privilege waiver "requests" are often irresistible. It is these factors that make privilege waiver "requests" a problem, because they effectively remove corporations' ability to resist them.<sup>53</sup>

Why, then, has this particular issue galvanized the bar? Because privilege waivers are, quite simply, the last straw. As will be demonstrated *infra*, public

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52. See, e.g., Bharara, *supra* note 5, *passim*; O'Sullivan, *supra* note 5, *passim*.

53. See, e.g., Memorandum from John F. Savarese & David B. Anders, Attorneys, Wachtell, Lipton, Rosen, & Katz LLP, DOJ Adopts Revised Policies on Corporate Prosecution (Dec. 13, 2006) (noting that "nothing in the McNulty memo changes the fundamental principle that corporations are liable, in virtually all cases, for criminal misconduct by their employees. Thus, prosecutors will continue to have enormous leverage over corporations and corporations will, in turn, continue to have powerful incentives to try to appear as cooperative as possible to prosecutors"), available at <http://online.wsj.com/public/resources/documents/wachtell121306.pdf>.

corporations generally *must* investigate material allegations of wrongdoing. Lacking a Fifth Amendment privilege against self-incrimination, they do so through counsel because lawyers' work is shielded from discovery by government agents. These protections give corporations the breathing space to decide whether wrongdoing has indeed occurred, attempt to halt and remediate it, and determine how they propose to deal with the information garnered—that is, by resisting government inquiries or, as is more usual given the above-described circumstances, attempting to cooperate with the government. When DOJ demands that these protections be waived, there is no more room for resistance; counsel's work product will provide DOJ—and potentially others—with a roadmap to corporate liability.

Certainly, the public interest is served when the government is able efficiently and effectively to allocate its investigatory resources in fighting corporate crime—the interest claimed to be served by DOJ's cooperation and waiver policies. But the defense bar would tell you that this is not the *only* value worth considering—that the adversarial process is as critical in corporate cases as in individual cases, for a variety of reasons. It must be acknowledged that not *every* government investigation is worthy and not *every* theory of corporate liability is sound. Sometimes, then, push-back by the corporation may actually serve the public interest, especially when one considers the considerable consequences of an overzealous or unwise prosecution. The stakes are often very high both in terms of dollars *and* in the effect that criminal or regulatory action can have on the livelihood and lives of countless innocent persons, including blameless employees and shareholders.

In short, my belief is that these privileges have assumed the job of the Fifth Amendment in the context of corporate investigations: they are virtually the last means by which corporations can resist government efforts to impose potentially ruinous liability on corporate actors, whether or not such consequences are warranted. It is these circumstances, I suggest, that both account for the bar's full-throated roar in objection to DOJ policy and for the reason why we should take it seriously.

## II. *UPJOHN CO. v. UNITED STATES*

Upjohn Company's independent auditors informed the company's general counsel, Gerard Thomas, that one of the company's foreign subsidiaries had made questionable payments (*i.e.*, bribes) to foreign government officials to secure government business. After consulting with the chairman of Upjohn's board and outside counsel, Thomas launched an internal investigation; later, a magistrate found that this factual investigation was launched "to determine the nature and extent of the questionable payments *and to be in a position to give legal advice to the company with respect to the payments.*"<sup>54</sup> Thomas sent questionnaires, over the

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54. *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981) (emphasis original).



chairman's signature, to all foreign managers seeking detailed information regarding the questioned payments. His communications noted that several American companies had made "possibly illegal" payments to foreign government officials," emphasized that management needed full information regarding any such payments made by Upjohn, and identified Upjohn's general counsel as the person chosen by the Chairman to conduct an internal investigation into the matter.<sup>55</sup> The chairman directed that managers were to treat the investigation as "highly confidential," were not to discuss it with anyone other than the Upjohn employees who might be helpful in responding to the questions presented, and ordered that responses be sent directly to Thomas.<sup>56</sup> Thomas and outside counsel also interviewed many current and former employees as part of the investigation.<sup>57</sup> Pursuant to the Upjohn Chairman's orders, the responses to the questionnaires and counsel's notes of the interviews were "treated as confidential material and [were] not . . . disclosed to anyone except Mr. Thomas and outside counsel."<sup>58</sup>

The reason Upjohn found itself fighting to retain the confidentiality of these materials was that, after concluding that it had a disclosure obligation, Upjohn had filed a preliminary report with the SEC, copied to the IRS, disclosing questionable payments totaling \$2,710,000 in 22 of the 136 countries served by the company over a five-year period (the illegal payments for this span of time were eventually estimated at over \$4 million).<sup>59</sup> The IRS began investigating the tax consequences of the payments.<sup>60</sup> Although Upjohn gave the IRS a list of all employees who had been interviewed and who had responded to the questionnaire,<sup>61</sup> the IRS wanted more.<sup>62</sup> The government clearly felt that Upjohn was limiting the extent of information and access provided in order to shield itself from a full IRS accounting regarding the payments. The IRS therefore issued a summons to the company calling for the production of the "written questionnaires sent to managers of [Upjohn's] foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees" of Upjohn and its subsidiaries.<sup>63</sup> Upjohn declined to produce these materials, claiming that they were protected from disclosure by the attorney-client privilege and the work product doctrine.<sup>64</sup> And so the litigation commenced.

As an initial matter, the *Upjohn* Court did not examine *de novo* whether

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55. *Id.* at 386-87.

56. *Id.* at 387.

57. *See id.* at 387, 394 n.3.

58. *Id.* at 395 n.5.

59. Brief for the United States and Federal Respondent at 4, *Upjohn Co. v. United States*, 449 U.S. 383 (1980) (No. 79-886), 1980 WL 339280 [hereinafter Brief for the United States].

60. *Upjohn Co. v. United States*, 449 U.S. 383, 387 (1981).

61. *Id.*

62. Brief for the United States, *supra* note 59, at 6.

63. *Upjohn*, 449 U.S. at 387-88.

64. *Id.* at 388.

corporations should be entitled to claim an attorney-client privilege; rather, it relied on the government's concession and moved on.<sup>65</sup> One could argue that the government's concession was too hasty. After all, although the Court has found that corporate "persons" are entitled to claim many constitutional rights,<sup>66</sup> it has also denied such "persons" the Fifth Amendment right against self-incrimination—a critical right in criminal cases.<sup>67</sup> Further, it did so based in major part on the supposition that a contrary ruling would effectively frustrate governmental efforts to enforce the criminal laws against corporations.<sup>68</sup> Certainly a non-frivolous argument could be made to similar effect in this context. Even if one were to concede that corporations should have the benefit of the privilege in civil litigation, one could argue that, at least in criminal investigations, corporations, like governmental actors,<sup>69</sup> should not be able to hide crimes behind this evidentiary privilege.

The government elected to make a more circumscribed argument. Where its employees have acted in a way to expose the corporation to liability, the government argued, corporations will investigate allegations of wrongdoing whether or not the privilege applies: "the potential costs of undetected noncompliance are themselves high enough to ensure that corporate officials will authorize investigations regardless of an inability to keep such investigations completely confidential."<sup>70</sup> The facts in *Upjohn* itself were advanced as a good example of this dynamic. "At the time *Upjohn* initiated this investigation, the scope of the attorney-client privilege in the corporate context was unsettled. Thus, the corporation had no guarantee that the information provided by the lower-level employees

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65. *Id.* at 390.

66. *See, e.g.,* Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 803-04, 806 (1996); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 578, 580-81 (1990).

67. *See* *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906).

68. Many have pointed to passages in the *Hale* opinion that indicate that the Court's decision was dictated by pure practical exigency. *See, e.g.,* Mitchell Lewis Rothman, *Life After Doe? Self-Incrimination and Business Documents*, 56 U. CIN. L. REV. 387, 394 (1987) (arguing that the *Hale* decision "is animated almost entirely by social control concerns"). For example, after concluding that appellants, as agents, could not assert the rights of their corporate principal for Fifth Amendment purposes, the *Hale* Court reasoned:

As the combination or conspiracies provided against by the Sherman Anti Trust Act can ordinarily be proved only by the testimony of the parties thereto, in the person of their agents or [employees], the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject?

*Hale*, 201 U.S. at 70.

69. *See, e.g., In re Lindsey*, 158 F.3d 1263, 1278 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915 (8th Cir. 1997); *see also In re Witness Before Special Grand Jury 2000-02*, 288 F.3d 289, 292-94 (7th Cir. 2002).

70. Brief for the United States, *supra* note 59, at 30 (quoting *In re Grand Jury Investigation (Sun Co.)*, 599 F.2d 1224, 1237 (3d Cir. 1979)).

was protected by the attorney-client privilege. The investigation nevertheless proceeded."<sup>71</sup>

Finally, the Solicitor General rejected the company's argument that, in absence of a broad privilege, corporate counsel "'will be uncomfortably aware that any information he elicits [from a lower-ranking employee] might later be used against the corporation or employee by an adversary' and, hence, 'will be hesitant to probe deeply.'"<sup>72</sup> Even in the absence of the absolute protection afforded by the attorney-client privilege, the Solicitor General noted, communications with counsel and corporate employees would be protected by the qualified work product privilege.<sup>73</sup> Second, and in all events,

a guarantee of secrecy does not establish or narrow an attorney's obligation in the giving of legal advice to his client. If an attorney is to fulfill his ethical obligation to the corporation to which he is rendering legal advice, he should resolve any fear he may have of disclosure in favor of a complete and comprehensive investigation. A claim that attorneys will ignore their ethical obligations to their clients in the absence of the protection of the attorney-client privilege is poor justification indeed for an extension of the privilege.<sup>74</sup>

The *Upjohn* Court's response to this argument is summary and completely unsatisfying. Rejecting the Solicitor General's contention that "the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege,"<sup>75</sup> the Court stated first that the government's position "ignore[d] the fact that the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken."<sup>76</sup> Second, the Court noted that a similar argument could be made with respect to individuals, yet "the common law has recognized the value of the privilege in further facilitating communications."<sup>77</sup> This, then, is the first critical—and highly contestable—assumption upon which the Court validated the application of the attorney-client privilege in the context of internal corporate investigations: that, absent the privilege, corporations will not seek counsel's assistance when wrongdoing is uncovered, or at least that investigations would not be as complete or careful were they unprotected by privilege.

The Court's other critical assumption is revealed in its analysis of the "test" that ought to apply when measuring corporate privilege assertions. Prior to the Court's

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71. Brief for the United States, *supra* note 59, at 31. It is worth noting in this respect that the investigation was in part prompted by petitioner's desire to participate in the SEC's voluntary disclosure program. *Id.* at 31 n.20.

72. *Id.* at 31-32 (quoting Brief for the Petitioner at 35, *Upjohn Co. v. United States*, 449 U.S. 383 (1981), 1980 WL 339279 (No. 79-886)).

73. Brief for the United States, *supra* note 59, at 32.

74. *Id.* (citations omitted).

75. *Upjohn v. United States*, 449 U.S. 383, 393 n.2 (1981).

76. *Id.*

77. *Id.*

*Upjohn* decision, the circuits had been split on the question of how to conceptualize the application of privilege rules when the allegedly protected communications are between counsel and corporate employees. The Sixth Circuit in *Upjohn* adopted the “control group” test for measuring the scope of the attorney-client privilege in the corporate context, reasoning that only corporate management possesses “an identity analogous to the corporation as a whole.”<sup>78</sup> Put another way, the “control group” “is (or personifies) the corporation” in communicating with counsel.<sup>79</sup> Under this approach, communications with counsel were protected if initiated by corporate management;<sup>80</sup> thus, “only those 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” were privileged from disclosure.<sup>81</sup> Where communications were made to counsel by subordinate corporate employees, such communications were *not* subject to the attorney-client privilege, although they would be protected under the work product doctrine. Accordingly, the Sixth Circuit remanded, instructing the district court to determine who was within *Upjohn*’s “control group.”<sup>82</sup> A competing test used in other circuits, called the “subject-matter” approach, dictated that where a corporate agent—whether in management or in some subordinate position within the entity—is “in possession of information acquired in the ordinary course of business relating to the subject matter of his employment, and the information is communicated confidentially to corporate counsel to assist him in giving legal advice to the corporation, then the communication is privileged.”<sup>83</sup>

The United States made a strong pitch for the adoption of the “control group” test. The Solicitor General’s brief in this respect is worth in-depth discussion because if it was arguable then, it is, in my view, indisputable now. The United States argued that “since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.”<sup>84</sup> In the corporate internal investigations context, the government argued, the company had not demonstrated that these communications *would not have been made absent the privilege*.<sup>85</sup> The government contended that “the attorney-client privilege did not play any part in encouraging *Upjohn*’s employees to make the

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78. *United States v. Upjohn Co.*, 600 F.2d 1223, 1226-27 (6th Cir. 1979), *rev’d*, 449 U.S. 383 (1981).

79. *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962).

80. *Upjohn*, 600 F.2d at 1226.

81. *Id.*

82. *Id.* at 1227-28.

83. *Id.* at 1226; *see Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609-11 (8th Cir. 1977) (en banc).

84. Brief for the United States, *supra* note 59, at 26 (emphasis added) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

85. Brief for the United States, *supra* note 59, at 14, 26.

required disclosures; they did so in compliance with an order issued to them in the corporate chain of command."<sup>86</sup> The United States further reasoned that because the privilege belongs to the corporation, and the corporation can waive the privilege regardless of the witness' consent, "such employees could not depend upon any assurance of confidentiality conferred by the privilege because, in fact, there is none from their standpoint."<sup>87</sup> Clearly, the "destiny" of employee communications "necessarily rests in the hands of the control group; and, like them, the corporation's counsel owes his professional loyalty to his corporate client rather than to the individual non-control group employees."<sup>88</sup> As the Solicitor General summarized:

[T]he subordinate employee's willingness to cooperate with corporate counsel is therefore solely a function of his deference to the corporate chain of command and bears no relationship to the availability of the attorney-client privilege. Since extension of the attorney-client privilege to protect the employees' communications would not achieve its purpose of encouraging candid disclosure, the privilege should not apply to such evidence.<sup>89</sup>

While the *Upjohn* Court "decline[d] to lay down a broad rule or series of rules to govern all conceivable future questions in this area,"<sup>90</sup> it clearly rejected the "control group" test as inconsistent with the underlying rationale for the privilege and, in particular, with the type of free flow of information contemplated by the privilege: "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."<sup>91</sup> The Court ignored the Solicitor General's discussion, concluding without any apparent basis of support that "[t]he control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."<sup>92</sup> The Court's rejection of the "control group" test, then, is founded on another critical—and, again, unsupported—assumption: that corporate employees outside the control group would not frankly and fulsomely provide counsel with needed information unless the *corporation's attorney-client privilege* covered their communications.

For purposes of later analysis, it is worth noting that the Court also rejected the argument that its ruling would impose a "broad 'zone of silence' over corporate affairs," noting that the "privilege only protects disclosure of communications; it

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86. *Id.* at 27.

87. *Id.* at 28.

88. *Id.*

89. *Id.*

90. *Upjohn v. United States*, 449 U.S. 383, 386 (1981).

91. *Id.* at 390.

92. *Id.* at 392.

does not protect disclosure of the underlying facts by those who communicated with the attorney.”<sup>93</sup> The *Upjohn* Court concluded—as we shall see, again in error—that the government could interview the persons identified by Upjohn if it wished and thus that it was in “no worse position than if the communications had never taken place.”<sup>94</sup>

Like courts using the “subject-matter test,” then, the *Upjohn* Court held that, where corporations conduct an internal investigation in the manner Upjohn did in that case, communications from non-management employees to counsel would be protected, as well as legal advice tendered by counsel to non-control group members. This holding, the Court determined, disposed of the case so far as “the responses to the questionnaires and any notes reflecting responses to interview questions are concerned.”<sup>95</sup> The attorney-client privilege ruling did not, however, resolve the entire dispute.

The *Upjohn* Court also felt that it had to reach the question of the applicability of the work product doctrine because Thomas had testified that “his notes and memoranda of interviews go beyond recording responses to his questions.”<sup>96</sup> He described these notes as containing

what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances, they might even suggest other questions that I would have to ask or things that I needed to find elsewhere.<sup>97</sup>

The government had asserted that, under the Court’s first affirmation of the work product doctrine in *Hickman v. Taylor*,<sup>98</sup> as incorporated in Federal Rule of Civil Procedure 26(b)(3), it had “made a sufficient showing of necessity to overcome” work product protections.<sup>99</sup> The Court ruled that *Hickman* and Rule 26 afford special protection to work product that reveals “the mental impressions, conclusions, opinions or legal theories of an attorney”<sup>100</sup>—what is commonly referred to as “opinion work product.”

The Court ruled that if Thomas’s notes

reveal[ed] communications, they [were], in this case, protected by the attorney-client privilege. To the extent that they [did] not reveal communications, they reveal[ed] the attorney’s mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed

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93. *Id.* at 395.

94. *Id.*

95. *Id.* at 397.

96. *Upjohn v. United States*, 449 U.S. 383, 397 (1981).

97. *Id.* at 400 n.8.

98. 329 U.S. 495 (1947).

99. *Upjohn*, 449 U.S. at 399.

100. *Id.* at 400.

simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.<sup>101</sup>

The Court pointed out that some courts have concluded that “no showing” of necessity is sufficient to explode the protections of opinion work product; but ultimately declined to articulate a test, noting only that “we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure.”<sup>102</sup>

### III. INTERNAL CORPORATE INVESTIGATIONS<sup>103</sup>

#### A. *The Investigation*

The *Upjohn* investigation was cutting-edge at the time; since then, internal corporate investigations have become commonplace, whether required by law<sup>104</sup>

101. *Id.* at 401.

102. *Id.* at 401-02.

103. For an excellent and comprehensive volume on this subject, see DAN K. WEBB ET AL., CORPORATE INTERNAL INVESTIGATIONS (2008). Many practitioners have also published articles discussing how internal corporate investigations are conducted. I have included here cites to just a portion of this literature; it constitutes a fairly random snapshot of practitioners' views (which are remarkably consistent) in 2006-07. *See, e.g.*, Thomas R. Mulroy & Eric J. Muñoz, *The Internal Corporate Investigation*, 1 DEPAUL BUS. & COMM. L.J. 49 (2002) (authors attorneys at Mulroy Scandaglia Marrinson Ryan); Daniel H. Bookin et al., *Obstruction of Justice Under Computer Associates: Legal, Tactical and Ethical Implications for Attorneys Conducting Internal Investigations*, 1564 PLI/CORP. 259 (2006) (authors attorneys at O'Melveny & Myers LLP); Andrew J. Ceresney, et al., *The Attorney-Client Privilege and Internal Investigations: Privilege Issues in Structuring an Investigation and Interviewing Witnesses*, 163 PLI/NY 207 (2006) (authors attorneys at Debevoise & Plimpton LLP); Timothy J. Coleman & Christine Y. Chi, *Internal Investigations: Who, What, When, Why and How*, 1561 PLI/CORP. 265 (2006) (author attorney at Dewey Ballantine LLP); Sheila Finnegan, *The First 72 Hours of a Government Investigation: A Guide to Identifying Issues and Avoiding Mistakes*, 1571 PLI/CORP. 901 (2006) (author attorney at Mayer, Brown, Rowe & Maw LLP); Hector Gonzalez, *Conducting Internal Corporate Investigations*, 1571 PLI/CORP. 881 (2006) (author attorney at Mayer, Brown, Rowe & Maw LLP); Nancy Kestenbaum & Jason P. Criss, *Credit Where Credit is Due? The Role of Internal Investigations in the Outcome of Government Investigations*, 1564 PLI/CORP. 121 (2006) (authors attorneys at Covington & Burling LLP); Aaron R. Marcu, *Investigating Indications of Wrongdoing: Necessary and Proper in the Post-Enron Era*, 1564 PLI/CORP. 199, 202 (2006) (author attorney at Covington & Burling LLP); John A. Reding & Edward Han, *The Horns of a Dilemma: Coerced Waivers in the Name of "Cooperation"*, 1557 PLI/CORP. 445 (2006) (authors attorneys at Paul, Hastings, Janofsky & Walker LLP); Paul D. Sarkozi, *Internal Investigations: An Overview of the Nuts and Bolts and Key Considerations in Conducting Effective Investigations*, 1564 PLI/CORP. 95 (2006) (author attorney at Hogan & Hartson LLP); Jonathan R. Tuttle & Emily S. Pierce, *Navigating the "Minefield": Avoiding Ethical Pitfalls and Other Liabilities in Conducting Internal Investigations*, 1557 PLI/CORP. 465 (2006) (authors attorneys at Debevoise & Plimpton LLP); Kenneth B. Winer, et al., *Internal Investigations and the Foreign Corrupt Practices Act*, 1588 PLI/CORP. 28, 302 (2007) (author attorneys at Foley & Lardner LLP); Bruce E. Yannett, *Conducting Internal Investigations*, 1571 PLI/CORP. 947 (2006) (author attorney at Debevoise & Plimpton LLP); Marjorie J. Pearce & Peggy M. Cross, *Independent Corporate Investigations*, BUS. CRIMES BULL., Jan. 2007, at 1 (authors attorneys at Stillman & Shaw); Jeffrey Thomas & Susan T. Stead, *Attorney-Client Privilege and Confidentiality Issues in Internal and External Investigations*, THE BRIEF, Summer 2006, at 13 (authors attorneys at Mitchell Williams Selig Gates Woodyard, PLLC and Nelson, Levine, deLuca & Horst, respectively).

104. *See infra* notes 189-192 and accompanying text.

or by corporate imperatives.<sup>105</sup> Some investigations are commissioned as a prophylactic matter, but most are triggered by some circumstance that hints at corporate malfeasance, such as questionable stock trading, irregularities discovered during audits, anonymous tips, customer complaints, regulatory inspections, and, of course, the service of civil complaints or criminal grand jury subpoenas. Such circumstances are not always sufficiently serious to require the commitment of time and resources consumed by a lawyer-led investigation. And investigations can in some cases, as is discussed further below, render the corporation more vulnerable to civil, if not criminal, liability rather than less. Nevertheless, according to much of the practice-oriented literature, “the internal investigation has become the standard of care whenever credible allegations of significant misconduct are raised in organizational settings.”<sup>106</sup>

Some internal corporate investigations will, like Upjohn’s, be conducted by in-house counsel. Increasingly, however, large-scale or particularly sensitive investigations are conducted by outside counsel from a law firm expert in such inquiries.<sup>107</sup> A variety of circumstances are identified as relevant to this choice, but two stand out.

First, because it lacks a Fifth Amendment privilege, a corporation can protect the results of its investigation—at least until it chooses how it will act on the report—only by using lawyers who can shield their work under the attorney-client privilege and work product doctrine. Invocation of the attorney-client privilege and work product doctrine obviously must be based on the provision of legal services.<sup>108</sup> “To the extent that an internal corporate investigation is made by management itself, there is no attorney-client privilege, and by the same token, no work-product protection.”<sup>109</sup> Thus, the investigation must be pursued for the purpose of securing legal advice (attorney-client) or done in anticipation of litigation (work product). While these rules are clear enough, their application may not be in the case of in-house counsel. In their case, “legal and business considerations may frequently be inextricably intertwined.”<sup>110</sup> “[B]ecause of their unique position as both lawyers and employees of the corporation, in-house counsel are often called upon to provide business advice as well as legal counsel . . . . [Therefore] communications with in-house counsel have been subjected to

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105. See, e.g., Duggin, *supra* note 44, at 871-883 (tracing evolution of the internal corporate investigation); McLucas, et al., *supra* note 38, at 624-29.

106. Duggin, *supra* note 44, at 886.

107. See, e.g., Marcu, *supra* note 103, at 3; Peerce & Cross, *supra* note 103, at 1 (noting that “[i]n this age of regulatory and prosecutorial focus on corporate compliance, companies increasingly are relying on special outside counsel to conduct internal corporate investigations into potential wrongdoing”).

108. See, e.g., *In re Grand Jury Subpoenas Dated March 9, 2001*, 179 F. Supp. 2d 270, 274 (S.D.N.Y. 2001) (holding that lawyers representing Marc Rich in connection with his presidential pardon application could not rely on the work product doctrine or attorney-client privilege to withhold testimony or documentary evidence because they were not “providing legal services in an adversarial context”).

109. *In re Grand Jury Subpoena*, 599 F.2d 504, 510 (2d Cir. 1979) (citations omitted).

110. *Coleman v. Am. Broad. Co.*, 106 F.R.D. 201, 206 (D.D.C.1985).



stricter and more skeptical scrutiny than similar communications with outside counsel.”<sup>111</sup>

Second, at least when the investigation is announced publicly, as it often is,<sup>112</sup> the company is hoping to reassure a number of constituencies beyond criminal prosecutors regarding the corporation’s remediation of the problem. For example, “[o]ne of the company’s primary goals in retaining investigatory counsel is to conduct a fair, thorough and complete investigation so it can assure investors, regulators and employees that it has discovered the extent of any problems that exist and has a plan not only to correct them but to prevent their recurrence.”<sup>113</sup> As Marjorie Peerce notes,

Whether the company succeeds in providing these assurances depends in significant part on the degree of confidence these groups have in the outside counsel conducting the investigation. One thing is certain: unless they trust that the investigation was truly an independent one, they are not likely to have faith in the outcome. Such a lack of faith can have devastating consequences for the company: valuable employees distrustful of management may leave, investors may pull their support, and regulators may disregard the results of the internal investigation and decide to conduct their own, disrupting the company and further undermining the investing public’s faith in it. And if regulators feel that the investigation was deliberately compromised by the lack of independence, they may decide to investigate the company and its senior management further.<sup>114</sup>

Ensuring the appearance of “true” independence often translates into hiring an outside firm to conduct the internal investigation under the control and instruction of the Board of the company or one of its subcommittees.

If the entity decides to engage an outside law firm to conduct the investigation, outside counsel and corporate representatives—usually the Board or a committee thereof—must decide on the appropriate scope of the proposed investigation and preliminarily, at least, discuss how the results are to be presented to the Board. The lawyers must then begin their work, and quickly. If the government has not yet shown an interest in the subject-matter, counsel will want to get ahead of the curve,

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111. H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 Ky. L.J. 1191, 1207-09 (1998-99); see also Todd Presnell, *A Higher Standard: Claiming Attorney-Client Privilege is Tougher for In-House Counsel*, BUS. L. TODAY, May/June 2005, at 19.

112. See, e.g., Peerce & Cross, *supra* note 103, at 6.

A company that retains outside counsel to investigate potential misconduct is likely to have announced the retention and possibly the scope of the investigation in a press release aimed at reassuring investors and regulators that the company has the situation under control. At the conclusion of the investigation, the company may issue another press release describing counsel’s conclusions and outlining actions it plans to take in response.

*Id.*

113. *Id.*

114. *Id.*

so she can advise the company how to mitigate adverse consequences. If the government is on the case, the time pressures are magnified. There may be a rush to the courthouse among potential cooperators; certainly the benefits yielded by cooperation either at the charging phase or at sentencing decline with each passing day.

Internal investigations generally focus on two categories of information: document review (including review of computer records and financial data) and interviews of corporate employees and other agents. Generally, counsel will try to piece together the facts from the documents and then interview witnesses.<sup>115</sup> Because the corporation cannot claim a Fifth Amendment privilege to resist government subpoenas *duces tecum*, and because mere review by a lawyer of pre-existing, unprivileged documents does not confer upon those documents attorney-client-privileged or work product status, documentary proof generally cannot be shielded from disclosure (although lawyers may claim as protected work product their own choice, categorization, or organization of the key documents).

Witness interviews present a variety of challenges, many of which flow from the fact that counsel's ethical duties are owed to the entity itself, not to any of its constituencies—whether those constituencies are the Board, shareholders, or members of management.<sup>116</sup> “That notwithstanding, legal constructs are notoriously difficult to reach on the phone, and they are highly unreliable about appearing at meetings. Thus, a lawyer representing a corporation must of necessity communicate with—and receive direction from—the client through its officers, directors, and employees.”<sup>117</sup> Counsel may find themselves in the awkward position of interrogating the very management with whom they are coordinating their investigation or the board members who engaged them on behalf of the entity.

Of great (if unquantifiable) concern to those conducting internal investigations is the question of the effect of the internal investigation—and *how it is conducted*—on employees' morale and their trust in and loyalty to the entity. On the one hand, a number of factors (including DOJ's cooperation policy) may dictate that corporate counsel advise the entity to play hard-ball with employees (whose culpability, of course, is not proven at this point) by firing those who refuse to cooperate with them or the government. On the other hand, the corporation and its lawyers must be very careful how they treat employees or the fall-out in terms of intangibles like morale, trust, and loyalty; perceived heavy-handedness or “unfairness” may convince some valued employees to jump ship or move culpable

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115. See, e.g., Finnegan, *supra* note 103, at 928 (stating, with respect to employee interviews, that “[w]hen possible, key documents should be reviewed beforehand as long as this will not unduly delay the interviews”).

116. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.13 (2004); William W. Horton, *A Transactional Lawyer's Perspective on the Attorney-Client Privilege: A Jeremiad for Upjohn*, 61 BUS. LAW. 95, 97 (Nov. 2005) (stressing that “[w]here a lawyer represents a corporation, he or she owes professional duties to the entity and not to any officer, director, employee, or shareholder or other constituent thereof”).

117. Horton, *supra* note 116, at 97.

employees to run to cooperate with the government. The entity's interest, then, lies in maximizing the information flow while minimizing the extent to which counsel, in pumping the well, alienate those from whom they are seeking evidence. Finally, counsel face the inevitable challenge of inducing employees to trust them enough to talk to them fully and frankly.

The results of witness interviews *are* protected under federal law, which is critical in that these interviews are "the heart of the internal investigation," through which documentary "words and numbers come to life through the stories related by real people."<sup>118</sup> First, at least under *Upjohn*, the communications made by corporate employees (of any rank) to counsel in furtherance of their employer's request for legal advice are protected from compelled disclosure by the attorney-client privilege. Second, to the extent that counsel memorializes employee interviews in a debriefing memorandum, that memo is protected attorney work product.

Counsel will also likely produce, during the course of an internal investigation, a variety of what can best be characterized as analytical or summary work product. One of the first tasks facing counsel will be to get a sense of the organizational hierarchy (perhaps reflected in a chart to memorialize counsel's findings or witness interview schedule) and to prepare a chronology of the relevant events (based on documents and witness interviews and probably annotated with references to the same). Counsel may catalog (perhaps in a computer program) "key" documents and other smoking guns. Certainly, counsel will prepare agendas for meetings, questions for various witnesses, "to do" lists of all sorts, and summary documentation regarding what has been learned and what remains to be uncovered. Legal memos regarding possibly applicable law will be commissioned. Finally, counsel will likely write debriefing memos to memorialize, and analyze, all interactions with government investigators. All this, if kept confidential, is protected work product.

At the conclusion of the investigation, a report in some form is generally rendered to the corporate client, whether in an oral presentation or a written summary of some sort. The report will summarize at greater or lesser length what counsel discovered after reviewing the documents and interviewing the relevant corporate agents. Note that these reports may make reference to the content of interviews with employees and may contain lawyers' assessments of credibility and the like, although they are unlikely to contain the lawyers' actual debriefing memos. The report may include some material reflecting counsel's analytical work product (e.g., charts, identification of "key" documents, a form of chronology). Counsel's report will also generally contain prospective advice, such as recommended steps the corporation might take to remediate any wrongdoing or to prevent future missteps. If, as is often the case, the corporation fears imminent

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118. Duggin, *supra* note 44, at 864.

regulatory or prosecutorial scrutiny of the relevant events, the report may suggest a course of action to reduce the corporation's exposure. Where a government investigation has not yet been launched, counsel will have to deal with the agonizing issue of whether the corporation should self-report; where an investigation has been launched, the corporation will need to quickly decide whether to cooperate with relevant authorities.<sup>119</sup> Again, should a prosecutor seek to subpoena any written reports or records of the investigation, the corporation could not resist on Fifth Amendment grounds. These reports are, however, presumptively protected from disclosure as communications under the attorney-client privilege and as attorney work product.<sup>120</sup>

The protected nature of such reports is critical because, absent such protection, the internal investigative report may well provide prosecutors and regulators with a roadmap to liability. Counsel will have done the government's document and computer review for it—often a huge task—and identified the important needles in the haystack. They will have gathered the statements of the relevant witnesses, at least some of whom may choose not to speak to government agents at all. With these materials, the government also will have the expert assessment of experienced criminal counsel regarding the corporation's likely exposure under federal law.

### B. "Selective" Waiver

There is another consequence of exposing investigative findings to government agents which is not of DOJ's making but which is said to exacerbate the unfairness of its waiver policy: the disclosure of protected materials to the government will probably result in a waiver of any privilege as to other persons—such as civil plaintiffs, shareholders pursuing shareholder derivative actions, and state regulators—seeking disclosure of the same materials for purposes of civil litigation. The corporate bar often cites this as "the most serious over-arching concern with regard to compelled-voluntary waiver."<sup>121</sup>

With respect to the attorney-client privilege, all the circuits to consider the issue except the Eighth Circuit have rejected a "selective" waiver theory. They have ruled that where otherwise privileged materials are shown to third-parties—either in an attempt to head off regulatory or criminal action against the corporation, in the course of the corporation's business, or in the conduct of litigation—the protections of the attorney-client privilege are waived *as to any other person*.<sup>122</sup> Only the Eighth Circuit has adopted a limited doctrine of "selective" waiver whereby voluntary disclosure to a government agency constitutes a waiver of the

119. See, e.g., Marcu, *supra* note 103, at 206.

120. See, e.g., Zornow & Krakaur, *supra* note 1, at 152.

121. Brown, *supra* note 5, at 947.

122. See, e.g., *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179 (10th Cir. 2006) (collecting cases).

attorney-client privilege *only* as to that agency.<sup>123</sup>

Under the work product doctrine, exposure of protected materials to third parties does not automatically waive the doctrine's protection.<sup>124</sup> "[A] party who discloses documents protected by the work-product doctrine may continue to assert the doctrine's protection only when the disclosure furthers the doctrine's underlying goal."<sup>125</sup> Generally, this inquiry turns on whether the disclosure was made to one deemed an "adversary," in which case work product protection is lost, or whether it is turned over to one with a "common interest" under circumstances that indicate a legitimate expectation of continued confidentiality, in which case the work product protections will be sustained.<sup>126</sup> Where the disclosing party knows that an investigation is ongoing by the recipient entity, that will certainly suffice to demonstrate an adversary relationship.<sup>127</sup> All the circuits to consider this issue have rejected a "selective" waiver theory or a "fairness" analysis. They hold that disclosure of work product to one adversary is sufficient to waive the doctrine as to all adversaries.<sup>128</sup>

The government, recognizing that this dynamic is a roadblock to access to privileged materials, has entered into confidentiality agreements that purport, by contract, to institute a "selective waiver" policy. The SEC has been particularly active in this area, though DOJ, too, has sometimes tried to accommodate cooperating companies in this regard.<sup>129</sup> Again, the problem is (mostly) the courts. Although the law is unsettled as to the significance of an express assurance of confidentiality by the government agency to which the original disclosure was made,<sup>130</sup> it is fair to say that courts generally have not been sympathetic.

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123. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) (attorney-client privilege *not* waived as to civil plaintiff where documents had been voluntarily disclosed to SEC).

124. See *United States v. MIT*, 129 F.3d 681, 687 n.6 (1st Cir. 1997).

125. *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1429 (3d Cir. 1991).

126. See, e.g., *MIT*, 129 F.3d at 687; *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234-36 (2d Cir.1993).

127. See *Steinhardt Partners*, 9 F.3d at 234; *Westinghouse*, 951 F.2d at 1428.

128. See, e.g., *Westinghouse*, 951 F.2d at 1428-29.

129. See, e.g., *Thomas & Stead*, *supra* note 103, at 15; For example, the SEC has supported federal legislation that would permit a selective waiver by persons who wish to make disclosures to the SEC, so that disclosure to the SEC is not considered a waiver as to any other party. See Section 4 of the Securities Fraud Deterrence and Investor Restitution Act of 2003, H.R. 2179, 108th Cong. § 4 (introduced May 21, 2003); Prepared Testimony of Mr. Stephen M. Cutler, Director, Division of Enforcement, SEC, before the H. Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises (June 5, 2003), available at [www.sec.gov/news/testimony/060503tssmc.htm](http://www.sec.gov/news/testimony/060503tssmc.htm).

130. For example, the D.C. and Third Circuits have held that even an express agreement by the government agency to preserve the confidentiality of the disclosures offers no protection against waiver of the *attorney-client privilege*. See *Westinghouse*, 951 F.2d at 1426-27; *Permian Corp. v. United States*, 665 F.2d 1214, 1219-22 (D.C. Cir. 1981). The D.C. Circuit, however, has upheld a disclosing party's claim of *work product protection* because an agreement with the SEC established a protective attitude of confidentiality which demonstrated the disclosing party's intent to preserve its work product as against another government "adversary." See *Permian*, 665 F.2d at 1217-19; see also *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1374 n.12 (D.C. Cir. 1984). The Second Circuit has also indicated that an express assurance of confidentiality by the government agency would bar a finding of waiver in the work product context. See *Steinhardt Partners*, 9 F.3d at 236. The Third Circuit, by contrast, has

In 2006, an amendment to Federal Rule of Evidence 502 was proposed, which stated that

in a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client or work product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.<sup>131</sup>

In April 2007, after noting that this proposed revision to Rule 502 was “adamantly opposed by bar groups and private lawyers” but “enthusiastically favored by government offices and agencies,” the Advisory Committee on Evidence Rules decided to drop the provision on selective waiver.<sup>132</sup> This deletion was noted in the subsequent congressional report on Rule 502, but no objection was made to the committee’s decision.<sup>133</sup>

Professor Lonnie Brown proposes one creative and sensible solution to corporations’ cooperation dilemma: implementation (presumably through legislation) of the “control group” test for corporate privilege assertions. This approach, he argues, has a number of advantages, one of which is that

the 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., . . . waiver as to third parties.<sup>134</sup>

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.” One might think that if the corporate bar *truly* wanted to cooperate with the government, it would be all for proposed Federal Rule of Evidence 502(c). As the author of the proposed selective waiver provision, Professor Daniel Capra, has explained, however, “[t]he committee thought it was doing corporations a favor by giving them some protection when they cooperated with the government . . . . We knew we’d get grief from the plaintiffs’ counsel, but

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ruled that the existence of a confidentiality agreement between the disclosing party and the “adversary” agencies to whom the work product was disclosed would not change its determination that the disclosure effected a waiver. *Westinghouse*, 951 F.2d at 1430.

131. Proposed FED. R. EVID. 502(c).

132. Minutes of the Advisory Comm. on FED R. EVID. 14-16 (Apr. 12-13, 2007).

133. S. Rep. No. 110-264, 110th Cong., 2d Sess. 4 (Feb. 25, 2008).

134. Brown, *supra* note 5, at 956.

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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.” One might think that if the corporate bar *truly* wanted to cooperate with the government, it would be all for proposed Federal Rule of Evidence 502(c). As the author of the proposed selective waiver provision, Professor Daniel Capra, has explained, however, “[t]he committee thought it was doing corporations a favor by giving them some protection when they cooperated with the government . . . . We knew we’d get grief from the plaintiffs’ counsel, but

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ruled that the existence of a confidentiality agreement between the disclosing party and the “adversary” agencies to whom the work product was disclosed would not change its determination that the disclosure effected a waiver. *Westinghouse*, 951 F.2d at 1430.

131. Proposed FED. R. EVID. 502(c).

132. Minutes of the Advisory Comm. on FED R. EVID. 14-16 (Apr. 12-13, 2007).

133. S. Rep. No. 110-264, 110th Cong., 2d Sess. 4 (Feb. 25, 2008).

134. Brown, *supra* note 5, at 956.

documents and testing the credibility of witnesses. It may also be that prosecutors are able to make *more accurate*, as well as more expeditious, decisions regarding the appropriate allocation of individual blame or responsibility when they have the benefits of counsel's informational and positioning advantages.

Second, and perhaps more important, is the question of access to the witnesses themselves. It is assumed that corporate employees will speak more willingly—and more frankly—to lawyers who are “on their side” than they will to government agents. (I will challenge this assumption in part, *infra* in Part V.D). Whether or not this is true, the corporation has a “stick” with which to coerce compliance that is not available to the government: employment consequences for those who do not cooperate. Thus, many companies take the position that employees who assert their Fifth Amendment rights against self-incrimination in internal investigations will be disciplined, and perhaps fired.<sup>139</sup> At least where the government has not instructed the corporation to take this approach, the resulting statements are not deemed “compelled” by state actors within the meaning of the Fifth Amendment and thus are freely usable by the government.<sup>140</sup>

Finally, as was the case in *Upjohn*, witnesses may be, quite literally, beyond the reach of federal prosecutors. For example, the company may not be able to make former employees available for interviews (and those witnesses may assert the Fifth Amendment in response to grand jury subpoenas), meaning that the only way the government can get their statements is through counsels' interview notes. Many of the persons interviewed by counsel in *Upjohn* were not U.S. citizens and resided in countries beyond the jurisdiction of the court; accordingly, they were not subject to compulsory process.<sup>141</sup> It is only through the cooperation of the company that those witnesses, or their statements, can be made available to the government. Further, as the *Upjohn* magistrate found, “even if such employees were made available for interviews, . . . it was ‘not unreasonable to expect some hesitancy, if not actual hostility, in answering questions with respect to payments

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which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence.

McNulty Memo, *supra* note 3, at 7.

139. See generally T.H. Waters III, Note, *Between a Rock and a Hard Place: An Examination of a “Costly” Right to Silence for Corporate Employees in Criminal Investigations*, 25 REV. LITIG. 603 (2006).

140. Cf. *United States v. Stein*, 440 F. Supp. 2d 315, 336-38 (S.D.N.Y. 2006) (Kaplan, J.) (finding that KPMG's actions coerced its employees to cooperate in the investigation and were “fairly attributable” to DOJ's cooperation policy and prosecutors' actions, and thus ruling that the employees' “coerced statements and their fruits must be suppressed”).

141. See Brief for the United States, *supra* note 59, at 8-9. The magistrate's finding that the government had showed the “substantial need” and “undue hardship” necessary to have access to counsel's witness statements turned in part on the unavailability of foreign witnesses. *Id.*



which might have been made in violation of local [i.e. foreign] law.”<sup>142</sup>

### B. Scope of DOJ Waiver Policy in Practice

The government might have legitimate reasons for wanting access to the results of counsel's corporate internal investigation and the information underlying their results. But has the government been reasonable in pursuing such materials? In assessing the corporate bar's continuing objection to privilege waiver requests, it is helpful to outline the substance of the Filip Memo in relation to both its predecessor, the McNulty Memo, and the proposed congressional “fix.”

#### 1. The McNulty Memo

This Memo authorized prosecutors actively to seek waivers, but cabined prosecutorial decision-making in significant respects as compared with earlier policy iterations. First, under the McNulty policy, before asking for a waiver, prosecutors had to balance various policy considerations and could proceed only if they concluded that “there [was] a legitimate need for the privileged information to fulfill their law enforcement obligations” (not if “it [was] merely desirable or convenient to obtain privileged information”).<sup>143</sup> The “important policy considerations” to be balanced in evaluating whether such a waiver request is appropriate were:

- (1) the likelihood and degree to which the privileged information will benefit the government's investigation;
- (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
- (3) the completeness of the voluntary disclosure already provided; and
- (4) the collateral consequences to a corporation of waiver.<sup>144</sup>

Of these, the last was a significant nod to the expressions of concern voiced by the defense bar regarding the outsized potential consequences that may ensue in terms of increased exposure to civil liability, in absence of a “selective waiver” rule, should the government insist on a privilege waiver. Some in the defense community contended, however, that this first step will not represent a significant hurdle for Assistant United States Attorneys (AUSAs) and that in many cases the line prosecutor would conclude that she “needed” a waiver.<sup>145</sup>

The second step in the McNulty policy, then, was more important. Once prosecutors determine to ask for a waiver, they had to “seek the least intrusive

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142. *Id.* (citation omitted).

143. McNulty Memo, *supra* note 3, at 8-9.

144. *Id.* at 9.

145. *See, e.g.,* Ben-Veniste & De, *supra* note 20, at 3 (“The relatively vague balancing test to show a ‘legitimate need’ is easily satisfied, and it is almost guaranteed that no prosecutor would ever concede that Category I information is sufficient to conduct a ‘thorough investigation’ (especially as there is no neutral arbiter making either determination).”).

waiver necessary to conduct a complete and thorough investigation.”<sup>146</sup> In service of this instruction, prosecutors were required first to consider restricting their request to so-called “Category I” materials—described as those that contain “purely factual information, which may or may not be privileged, relating to the underlying conduct.”<sup>147</sup> Category I was said to include such materials as “copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel.”<sup>148</sup> To request such materials, the prosecutor had to obtain the written authorization of the relevant U.S. Attorney, who in turn had to consult with the Assistant Attorney General for Criminal Division before saying “yea” or “nay.” The waiver request had to be communicated in writing to the corporation, and the corporation’s response to this Category I request could then “be considered in determining whether a corporation has cooperated in the government’s investigation.”<sup>149</sup>

“Only if the purely factual information provide[d] an incomplete basis to conduct a thorough investigation should prosecutors then request that the corporation provide attorney-client communications or non-factual attorney work product,” or so-called “Category II” materials.<sup>150</sup> Category II information included “legal advice given to the corporation before, during, and after the underlying conduct occurred.”<sup>151</sup> Before requesting that a corporation turn over Category II materials, the relevant U.S. Attorney was required to obtain the written approval of the Deputy Attorney General; if authorized, the U.S. Attorney then had to send the request to the company in writing. If this approval requirement did not make the point sufficiently clear, the memo added that prosecutors were “cautioned that Category II information should only be sought in rare circumstances” and provided that if a corporation declines such a waiver “prosecutors may not consider this declination against the corporation in making a charging decision” although they could “always favorably consider a corporation’s acquiescence” to the request in evaluating corporate cooperation.<sup>152</sup>

The defense bar reacted to this policy with a distinct lack of enthusiasm,<sup>153</sup> but does this more explicit policy seem reasonable? *Considered only on its own terms,*

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146. McNulty Memo, *supra* note 3, at 9.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. McNulty Memo, *supra* note 3, at 10.

153. See, e.g., Jodi Misher Peikin & James R. Stovall, *Penance But No Absolution: The Paradox of Corporate Criminal Liability*, BUS. CRIMES BULL., Jan. 2007, at 3 (arguing that the changes made in the McNulty Memo “are a step in the right direction, but the Judiciary Committee testimony regarding the Thompson Memorandum’s effect on the right to counsel in corporate investigations highlighted problems that cannot be resolved simply by revising the Memorandum’s privilege waiver and fee-advancement provisions”).

without reference to the overall context examined in Part VI, *infra*, I think so. There is anecdotal evidence (mine and others<sup>154</sup>) that prosecutors in U.S. Attorneys Offices are extremely adverse to the thought of “wasting” time and energy securing approvals from Main Justice. The policy’s Main Justice consideration and/or approval requirements—which are quite stringent—should have deterred an AUSA from bothering with borderline requests under DOJ policy. This, then, should have gone a long way toward alleviating whatever concerns the defense bar has about the frequency of these requests. The record-keeping mandates also could have helped ensure accountability—as well as possibly resolving the empirical disputes about the true incidence of waiver requests.

The policy coincided nicely with the long-standing divide in privilege law between facts and the communications or work product in which they are embedded. As the *Upjohn* Court stressed, the attorney-client privilege protects qualifying communications between client and counsel, but does not privilege the facts communicated.<sup>155</sup> And, on the spectrum of work product protection, “fact” work product receives much less protection than “opinion” work product.<sup>156</sup> *Upjohn* recognized that while materials that reflect the attorney’s mental impressions and opinions are virtually undiscoverable,<sup>157</sup> materials that simply contain facts can be had “upon a showing of substantial need and undue hardship.”<sup>158</sup>

One problem presented by this policy, however, was that it is easier to talk about “fact” versus “opinion” work product than to actually distinguish between such animals in real life. Is a “fact chronology” that is based on witness statements and documents, but that also obviously reflects throughout the preparing lawyer’s opinions regarding what is pertinent and what is not, “fact” or “opinion” work product? What about witness statements that do not purport to be verbatim summaries, though they do not obviously include lawyers’ speculations and conclusions? “[E]ven nearly verbatim interview summaries reflect attorney work product in the selection of questions, the relative time and detail allotted to various topics, etc.”<sup>159</sup>

To some extent, these potential difficulties would have fallen to case-specific resolution. There might have been tough calls and tough negotiations. But the policy, which is more specific than the Holder/Thompson Memo, would have been

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154. See, e.g., Seide, *supra* note 18, at 2.

155. See *supra* note 94 and accompanying text.

156. See FED. R. CIV. P. 26(b)(3); *Upjohn Co. v. United States*, 449 U.S. 395, 398-99 (1981).

157. The *Upjohn* Court did not decide what standard should apply to opinion work product, noting only that disclosure of such “special[ly] protect[ed]” materials “is particularly disfavored,” is warranted in only “rare” situations, and has even been held to be barred in lower court decisions. See *Upjohn*, 449 U.S. at 399-401. In the circumstances of that case, the Court held that the magistrate had clearly applied the wrong standard—that is, the “substantial need and inability to obtain the equivalent without undue hardship” standard applicable to fact work product. *Id.* at 400.

158. *Id.* at 401

159. Ben-Veniste & De, *supra* note 20, at 3.

easier for counsel to work around without compromising the integrity of their investigations. For example, can counsel keep notes of witness interviews, without fear that such notes will inevitably find their way into prosecutors' hands complete with attorneys' credibility calls, opinions regarding the state of the witness's recollection, reflections on how the testimony fits into the government's proposed theory of wrongdoing, assertions regarding how the witness's statements actually bear out the corporation's position, notes regarding future follow-up questions, and the like? I believe that the answer is "yes"; this would be relatively easy to achieve, although it may take the note-taking associates more time. Having written literally thousands of witness debriefing memos during my time in private practice, I cannot imagine that lawyers could not sanitize reports of witness interviews of all but the faintest echoes of opinion work product. Would the statement of facts elicited inevitably contain some element of subjectivity? Probably. But competent lawyers could be taught to confine themselves to facts confidently asserted, and save for another document—whose work product privilege would remain intact—their impressions, opinions, and professional conclusions. It also strikes me that the other items on the government's list of analytical work product are equally "do-able" and unthreatening if counsel is disciplined.

Category II, which encompasses those types of attorney-client advice and opinion work product that are at the heart of the defense effort, was—under the McNulty Memo—well nigh unattainable given approval requests. This assertion is borne out by practice: as Deputy Attorney General Filip informed Senator Specter on July 9, 2008, "in the eighteen months since the Principles were last amended, the Department has approved no requests by prosecutors to obtain from corporations core attorney-client communications or non-factual attorney work product."<sup>160</sup> The McNulty Memo provided that what would normally be Category II information was subject only to Category I approval requirements, however, where: (1) the corporation or one of its employees "is relying upon an advice-of-counsel defense" (in which case legal advice contemporaneous with the underlying misconduct is relevant); or (2) the materials sought come within the crime-fraud exception.<sup>161</sup> Although these exceptions might threaten the stringency with which Category II materials would be treated, it is difficult to argue with them. After all, both exceptions are already authorized by existing waiver principles, meaning that the corporate defendants are sooner or later going to have to turn these things over, waiver or no.

My bottom line is that this waiver policy, *considered solely on its own terms and without reference to the context discussed in Part VI*, was as reasonable as could be expected. It should reduce significantly the frequency of prosecutorial "requests"

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160. Letter from Deputy Attorney General Mark Filip to Senator Patrick Leahy (July 9, 2008), at 2 [hereinafter Filip Letter].

161. McNulty Memo, *supra* note 3, at 10.

and it should give the bar more leverage in bargaining over what will be turned over (as well as instruction in eliminating opinion work product from that which is produced). Wholesale abuse by line prosecutors should not be presumed; if it eventuates, the defense bar has already amply demonstrated its ability to pressure DOJ into remedying its transgressions.

## 2. *The “Attorney Client ‘Protection Act’” and the Filip Memo*

The proposed legislative “fix” to DOJ’s policy raises a great many questions, some of them foundational issues such as the constitutionality of a congressional attempt to direct how the executive branch exercises its prosecutorial discretion.<sup>162</sup> Significantly, the bill addresses governmental conduct beyond the criminal realm—including all civil and criminal matters—and governmental policies beyond the attorney-client privilege issues referenced in its title.<sup>163</sup> In short, the defense bar gets a great deal more in this piece of legislation than a “fix” for the “compelled” privilege waiver policy that has been at the heart of this debate.

There are two principal features of the bill that passed the House with which we are concerned: “in any Federal investigation or criminal or civil enforcement matter, any agent or attorney of the United States” is barred from:

- (1) demanding, requesting, or conditioning treatment “on the disclosure by an organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work product”; and
- (2) conditioning a civil or criminal charging decision against an organization or affiliated individual on, or using as a factor in determining whether such persons is cooperating with the government, “any valid assertion of the attorney-client privilege or privilege for attorney work product.”<sup>164</sup>

The bill also provides, however, that “[n]othing in this Act is intended to prohibit an organization from making, or an agent or attorney of the United States from accepting, a voluntary and unsolicited offer to share the internal investigation materials of such organization.”<sup>165</sup>

Before inquiring into how these provisions would affect DOJ policy, it may be worthwhile to resolve a couple of ambiguities that their text raises. First, the proper

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162. See, e.g., White Collar Crime Prof Blog, [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2006/week49/index.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/week49/index.html) (Dec. 9, 2006) (raising this and other issues).

163. Thus, it applies “[i]n any Federal investigation or criminal or civil enforcement matter.” H.R. 3013, 110th Cong. § 3(a) (as reported by the House of Representatives, Nov. 13, 2007). It also purports to bar an “agent or attorney of the United States” from conditioning a civil or criminal enforcement decision on, or using as a factor in determining the extent of cooperation, assertions of the privilege, provision of legal fees for individuals, entry into a joint defense, sharing of defense information, or the failure to terminate employees because of their assertion of fifth amendment rights. *Id.*; see also S. 186, 110th Cong. § 3(a) (referred to S. Comm. on the Judiciary, Jan. 4, 2007).

164. H.R. 3013 § 3(a); see also S. 186 § 3(a).

165. H.R. 3013 § 3(a); see also S. 186 § 3(a).

reading of the initial prohibition is that it bars prosecutors from requesting or conditioning treatment on *waivers*; although the provision could perhaps be read to bar prosecutors from asking for anything—including facts imbedded in protected communications or work product—that, with or without the prosecutor’s knowledge, ends up being subject to some privilege claim, this reading would seem not only counterproductive but also nonsensical.

Another question is whether the bill bars *any* governmental consideration of waiver decisions. The emphasis in the second prohibition on the “valid assertion of the attorney-client privilege or privilege for attorney work product” suggests that *assertions* cannot be considered as a negative but perhaps *waivers* can be as a positive in the corporation’s favor. It would also be odd to read the Act as stating that an entity’s willingness to turn over investigative materials that are also privileged can *never* figure in any governmental decision because the bill makes clear that it does *not* affect “voluntary disclosures” of internal investigative materials. In such circumstances, then, one would assume that the bill does not purport to prevent prosecutors from considering such voluntary disclosures as a factor *in the corporation’s favor*—only valid assertions of privilege as a negative consideration. The text of the bill appears to require this result, but this reading is subject to some question. First, the House Judiciary Committee’s report on the “Attorney Client Protection Act of 2007” states that “[t]here should be no differentials in an assessment of cooperation (i.e., *neither a credit nor a penalty*) based upon whether or not the materials disclosed are protected by attorney-client privilege or attorney work product.”<sup>166</sup> Second, one might ask whether this result is truly possible as a conceptual matter—that is, if one gives credit for waivers, isn’t a failure to get a credit for a waiver actually a penalty for asserting it?

Having attempted to clarify the import of the bill, the next question is how it would affect DOJ policy. The legislation would, of course, have eviscerated the McNulty Memo. First, it would prevent the government from asking for *any* waivers—without distinguishing between Category I or Category II materials. Second, it would bar DOJ from considering refusals to waive, again making no distinction (as does the McNulty Memo) between Category I and II. All of the McNulty Memo’s directions regarding the circumstances in which waiver requests are appropriate, and all the approval and recordkeeping requirements, would have been rendered obsolete. The only part of the policy that would have remained was the recognition that corporations could volunteer to waive and presumably could be rewarded in charging determinations for that decision.

What of the Filip Memo—does the revised policy address the concerns to which the bill is responsive? Deputy Attorney General Filip, appearing before Congress in July 2008, summarized the important changes he proposed to make in his rewriting of the corporate charging policy as follows:

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166. H.R. Rep. No. 110-445, at 4 (2007) (emphasis added).

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.

Federal prosecutors will not demand the disclosure of "Category II" information as a condition for cooperation credit. To be eligible for cooperation credit, a corporation need not disclose, and the government may not demand, what the McNulty Memo defines as "Category II information"—namely, non-factual attorney work product and core attorney-client privileged communications. (Of course, attorney-client communications that were made in furtherance of a crime or fraud, or that relate to an advise-of-counsel defense, are excluded from the protection of the privilege by well-settled case law and will therefore continue to fall outside the principles.)<sup>167</sup>

In short, it seems that the DOJ attempted to split the baby: it agreed to forswear *considering* waiver decisions, per se, in its cooperation and charging determinations, but did not agree to forgo *requesting* waivers in some circumstances.

First, AUSAs are barred from considering corporate waiver determinations in evaluating cooperation or making judgments about charging. The Filip Memo states that cooperation will be measured by the information surrendered, not by the waivers provided.<sup>168</sup> Is this an important development? The amount of information (not the existence, per se, of a waiver) *should* have been the metric all along. For example, the earliest iteration of the policy, put forth in the Holder Memo, made clear that, in "assessing the adequacy of a corporation's cooperation," the "completeness of its disclosure" was key—and that could but did not have to include privilege waivers. Although this change appears to be directly responsive to the threatened legislation, it also appears to go beyond the bill's text—potentially to the disadvantage of corporate targets. Thus, although the text of the bill implies that volunteered waivers *can* be considered in the "plus column" for corporations in making cooperation and charging determinations, DOJ policy quotes the House Report and makes it clear that waiver decisions should be irrelevant for all purposes.<sup>169</sup>

Second, and notably in light of the threatened statutory provisions, the DOJ does *not* say that it will not *request* any privilege waivers. Congress did not choose to distinguish between so-called "Category I" and "Category II" materials in its legislative bar on prosecutorial waiver solicitations, but DOJ attempts to maintain its consistent distinction—laid out most explicitly in the McNulty Memo—

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167. Filip Letter, *supra* note 160, at 2.

168. *Id.*; see Filip Memo, *supra* note 3, at 9.

169. See Filip Memo, *supra* note 3, at 10 (quoting H.R. Rep. No. 110-445 at 4 (2007)).

between “factual” and “core” work product and privileged communications.<sup>170</sup> Thus, prosecutors can ask for waiver of Category I materials—apparently without the explicit guidelines, record-keeping, and approval requirements set forth in the McNulty Memo. Prosecutors are barred from asking for Category II materials “as a condition for the corporation’s eligibility to receive cooperation credit” (and subject to the advice-of-counsel-defense and crime-fraud exceptions articulated in the McNulty Memo).<sup>171</sup> Again, the procedural safeguards of the McNulty Memo are not reflected in the new policy with respect to Category II materials.

In sum, DOJ is still fighting Congress for the right to ask for Category I materials, and (apparently) to ask for Category II where that waiver is not a condition for cooperation credit. The next question must be: why—what valid needs are served by these exemptions? Those of us outside DOJ can only guess in this respect, but my speculations lead me to believe that the first reservation is more legitimate than the second. DOJ’s original policy valued waivers—quite apart from the facts revealed through such waivers—as helpful in that they “expedite[d] its investigation” and assisted prosecutors in “evaluat[ing] the accuracy and completeness of the company’s voluntary disclosure.”<sup>172</sup> I assume that DOJ’s continuing assertion of a right to ask for Category I materials stems from similarly practical considerations. For example, if the actual “Category I” fact summaries, chronologies, and (non-opinion-laden) witness statements generated by counsel contemporaneous with the internal investigation are not turned over through waiver, just how are the facts embedded in these materials to be communicated to the prosecutor? Will counsel pick and choose facts from these materials to be, after the fact, turned over in a new piece of work product? If so, will this document—which may well have the feel of an advocacy piece rather than a summary of facts or statements—be as effective for the prosecution’s purposes? Will it permit prosecutors—as does a waiver—to obtain what it needs quickly and efficiently or will the “facts” to be turned over have to be negotiated? Ultimately, how will prosecutors be able to assess whether all the “facts” they need have been provided?

DOJ’s reservation with respect to Category II materials is both less justified and ultimately less important. It is not clear what might be a legitimate request in this regard—that is, when will Category II materials not be requested “as a condition for cooperation credit”? Reserving the right to ask for Category II materials in order to “double-check” that the corporation has “told all” by asking for counsel’s opinion work product is much more questionable than a similar effort to check the completeness of factual productions. Defense counsel’s job at this point is a

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170. See Filip Memo, *supra* note 3, at 11 (“Communications [with corporate counsel], which are both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice, lie at the core of the attorney-client privilege.”).

171. *Id.* at 12.

172. McNulty Memo, *supra* note 3, at 8.



difficult one. To paraphrase one expert white-collar defense lawyer, one wants to situate one's client on either side of the road—either fighting like hell or cooperating fully. Trying to navigate the middle of the road—that is, appearing to cooperate but resisting in reality—is an invitation to be run over.<sup>173</sup> Nonetheless, counsel's job, even should the client elect to cooperate fully, is never wholly that of a deputy of the government. Throughout, counsel will be subtly advocating, “spinning” the facts, trying to ensure that the client gets the best possible deal (and that the deal sticks). It hard to conceive of why the government should be entitled to rifle through counsel's files to see what counsel believes might be the “worst case” scenarios for the client or otherwise to delve into the particulars of counsel's delicate advocacy. Finally, whatever the scope or purpose of this exemption, experience since 2006 indicates that this is not a much-used waiver category in actual fact.<sup>174</sup>

What value, then, is there in Congress pressing for a full bar on *any* requests for waivers? Presumably defense counsel believe that in the absence of such a bar, prosecutors will continue to request at least Category I waivers in every case. The procedural hurdles the McNulty Memo put in place—with respect to documentation and approval requirements—would have addressed this concern. Defense lawyers may also be concerned that prosecutors whose requests for waiver are respectfully declined will—consciously or not—continue secretly to factor this in to their evaluation of corporate cooperation, regardless of the bar on such consideration in the Filip policy.

In considering whether this last objection has validity, one must ask whether an additional, statutory bar will be effective in removing waiver issues entirely from prosecutorial decision-making. One of the defense's most frequent objections to the McNulty policy is relevant to this question. The procedural hurdles for both Category I and Category II were not, under the terms of that policy, applicable where the corporation “voluntarily” offered privileged documents “without a request by the government” (although records of such “voluntary” waivers had to be maintained by the U.S. Attorney).<sup>175</sup> A number of practitioners pointed to this exception as one that could well have swallowed all the other rules and approval requirements. Richard Ben-Veniste and Raj De, for example, argued that it was “inevitable that a new kabuki dance will be born—between prosecutors seeking privileged material but wanting to avoid the hassle of the McNulty Memo's authorization hurdles on the one hand, and corporations seeking to curry favor with the prosecutors . . . by ‘voluntarily’ producing such material in an effort to seem accommodating” on the other.<sup>176</sup> “As a practical matter, what board of

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173. Thanks to Scott Muller.

174. See *supra* text accompanying note 160 (in eighteen months of operation, no requests for Category II waivers).

175. McNulty Memo, *supra* note 3, at 11.

176. Ben-Veniste & De, *supra* note 20, at 3.

directors will opt to take a principled stand opposing waiver when a ‘voluntary’ waiver may be the determinative factor in the prosecutor’s charging decision?”<sup>177</sup>

It seems exceedingly likely that were a complete bar on waiver “requests” to be adopted by statute, the same “kabuki” dynamic would be created given that the proposed legislation expressly states that its provisions do not affect “voluntary” waivers of protected materials. How can this “kabuki” be avoided—by barring *any discussion* of waivers? Barring corporations from ever “volunteering” to waive? That either course would *not* be in the best interests of the *clients* is illustrated by the further question of why defense counsel *ever* recommend that their clients accede to government privilege waiver “requests” if such waivers are indeed likely to have so adverse an affect on corporate interests.

As Deputy Attorney General Paul J. McNulty noted in his congressional testimony,

What is not often discussed in this debate is that a privilege waiver is often volunteered or agreed to by a company for specific, business reasons. When a criminal investigation is launched, receipt of subpoenas must be publicly reported, stock prices fall, and the company undergoes the protracted and disruptive process of responding to multiple document subpoenas and providing employees to the government for interviews and grand jury testimony. At the same time, the company’s lawyers are conducting their internal investigation or have already completed it. If the company decides to cooperate, it can face additional delay while the government duplicates the company’s efforts in collecting documents and interviewing witnesses, or it may choose to waive privilege and offer the results of its internal investigation so that the government moves faster. The choice to waive often allows the government to make a charging decision within months rather than years, and saves the company money and employee time and protects the value of its stock.<sup>178</sup>

The answer, then, is that counsel are required to serve the interests of *this* client in *this* case, and that often means waiving, regardless of what effect that individual waiver will have on the next case, and the next, and the next. Individual corporate waivers may cumulatively have unfortunate systemic consequences, but it would be a grave disservice to corporate clients to *bar* them from doing that which may most certainly be in their best interests.

If waivers cannot be barred consistent with the best interests of those the legislation seeks to protect, what is the best course of action? A legislative bar that basically pushes *all* waiver negotiations underground, promoting “kabuki” in every case, is certainly not optimal. The McNulty approach strikes the most promising balance. It permits some waiver requests, and thus means some of the

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177. *Id.* at 3-4.

178. *The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 116 (2006) (statement of Paul J. McNulty, Deputy Att’y Gen. of the United States).

kabuki is avoided. By making requests subject to explicit requirements that prosecutors explicitly justify their choices, choose the least intrusive approach, seek approval at senior levels of the Department, and keep records that ensure accountability, abusive practices can be avoided or at least policed—something not possible where the entire dance takes place off the record. And what kabuki remains is still subject to review; prosecutors under the McNulty policy were required to keep records even of “volunteered” waivers. Thus, if this “kabuki dance” became common, the defense could do what it has for years: complain loudly and vigorously, up and down the DOJ chain of command and elsewhere, about misuse of waiver policies—this time with DOJ’s own records as proof.

A legislative fix, then, is not the answer measured in substance. If one could graft the substantive changes wrought in the Filip Memo onto the procedural bones of the McNulty policy, what we would have is an approach responsive to legitimate prosecutorial *and* defense concerns. Moreover, there is a real question about the efficacy of a legislation solution. It is unclear how (if at all) the bill’s provisions are enforceable, and at whose instance, and what remedies might appropriately be applied. If courts are inclined to hold hearings into prosecutorial investigative practices and charging decisions based on this statute, it would be a huge departure from the current near-total judicial reluctance to get into such matters, usually on separation-of-powers or judicial competency grounds.<sup>179</sup>

#### V. UPJOHN REVISITED

The defense bar has already shown a disinclination to adopt my optimistic view of DOJ policy and certainly disagrees about the efficacy of the Attorney Client Protection.<sup>180</sup> Accordingly, we must return to the basics: that is, to the fundamental question whether the corporate attorney-client privilege and work product doctrine are necessary given the policy imperatives underlying these protections.

##### A. Will the Corporation Cease Seeking Legal Advice Absent Privilege Protections?

The question whether the protections of the attorney-client privilege and the

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179. See, e.g., *United States v. Goodwin*, 457 U.S. 368 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

180. There is also disagreement over the empirical fall-out of the changes in DOJ policy. Compare, e.g., *Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearing before the S. Comm. on the Judiciary*, 110th Cong. 6-7 (Sept. 18, 2007) (statement of Karin Immergut) (noting that between the implementation of the McNulty Memo in December 2006 and the date of her testimony on September 18, 2007, the Criminal Division received ten requests for factual information under Category I, only five of which involved a request for privileged documents actually covered by the Memorandum, and four of the five requests were approved; noting further that the Office of the Deputy Attorney General has not processed any requests for Category II information), with Letter from E. Norman Veasey to Hon. Patrick Leahy & Hon. Arlen Specter (Sept. 13, 2007) (summarizing, as a “neutral” asked to do so by the ACC and the NACDL, anonymous reports of abuses, but noting that no independent verification of the facts alleged was attempted).

work product doctrine are necessary to ensure that corporations consult with legal counsel for purposes of legal compliance does not require a great deal of thought. At the outset, one must put the forced-waiver question in context. The attorney-client privilege, and the work product doctrine, are “evidentiary in nature, protecting against the compelled disclosure by the attorney or client of communications between them that satisfy the requisite elements.”<sup>181</sup> But lawyers also have an ethical duty to guard the confidences of their clients, and this duty is unaffected by DOJ policy:<sup>182</sup>

The chief difference between the professional duty of confidentiality and the evidentiary attorney-client privilege is that the former applies to virtually all information coming into a lawyer’s hands concerning a client, and forbids virtually all disclosures, whereas the latter only applies when the question is whether a lawyer can be *compelled* to testify about her professional communications *with a client*.<sup>183</sup>

In short, “the professional duty of confidentiality remains a central part of the lawyer’s ethical obligations, and continues to encompass far more, and to be far more broadly applicable, than the attorney-client privilege.”<sup>184</sup>

Given that the duty of confidentiality provides security in the general day-to-day conduct of corporate business, I assume that most corporate actors will continue—despite DOJ policy—to feel comfortable seeking legal advice. Even if those contemplating seeking legal advice on close questions have, in the backs of their minds, the possibility that (1) litigation may eventually ensue from a particular decision, (2) a privilege waiver may be requested and granted, and (3) they or the corporation will be in trouble in the event the advice eventually sought is disregarded or wrong, a wealth of “[i]ndependent legal and economic incentives exist that may inspire corporations to strive for legal compliance irrespective of the prospect of privilege waiver.”<sup>185</sup> Even the *Upjohn* Court seems to have conceded this point,<sup>186</sup> so we shall press on to Professor Brown’s “parade of horrors.”

### *B. Will Counsel Stop Investigating?*

Only a slightly more credible concern is that which was central to the argument

181. Brown, *supra* note 5, at 908.

182. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2004).

183. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 9.7 (3d ed. 2001) (emphasis original).

184. Horton, *supra* note 116, at 101-02.

185. Brown, *supra* note 5, at 903, 923-24; See also LUBAN, *supra* note 44, at 887; Duggin, *supra* note 44, at 887; Sexton, *supra* note 44, at 464; Hamilton, *supra* note 44, at 648.

186. See *Upjohn Co. v. United States*, 449 U.S. 387, 392 (“In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, ‘constantly go to lawyers to find out how to obey the law.’”) (quoting Bryson P. Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 *BUS. LAW.* 901, 913 (1969)).

in *Upjohn*: whether lawyers and clients will simply cease to conduct internal investigations when allegations of wrongdoing arise. To respond to this concern, one must consider why corporations *do* feel obligated—*despite DOJ policy and the lack of a selective waiver doctrine*—to continue undertaking internal investigations. The answer is that the waiver issue is only one consideration in the complex of factors. And as white-collar defenders conclude when they are writing *not* about the horrors of DOJ waiver policy but instead about the whys and wherefores of internal corporate investigations, this complex of factors in the usual case will demand investigation of alleged wrongdoing *even with the possibility or even certainty of an eventual waiver*. There appears to be no evidence that—despite DOJ policy and the lack of a selective waiver doctrine—corporations have declined to conduct investigations where they otherwise would; and, as Professor Dan Richman notes, “should existing incentives be insufficient in this regard, policymakers could increase them, particularly on the civil or criminal sanctioning side.”<sup>187</sup>

At the most general level, companies need to know the facts in order to defend themselves. As Nancy Kestenbaum summarizes:

Companies . . . reap numerous affirmative benefits by conducting their own investigations. Even if the government is not investigating a company, a company that conducts an internal investigation on its own gains the advantage of knowing what the facts are, and, if there is no legal requirement that such investigation be disclosed, can then take appropriate internal action and then decide whether or not to bring such results to the government’s attention . . . . [O]ccasionally the company can persuade the government not to investigate at all or to narrow the issues under investigation. Even if the government does investigate, a company that has conducted its own investigation is armed with the facts, can make informed decisions, can take appropriate remedial action and can better craft defenses—all of which will leave the company better-positioned to deal with the government, whether or not the government expressly gives the company cooperation credit for conducting its own investigation.<sup>188</sup>

Beyond these general considerations, a variety of external circumstances make internal investigations wise (or imperative), some of which existed at the time *Upjohn* was decided but many of which have developed since that date.

The most obvious reason to conduct an internal investigation into alleged wrongdoing is that such investigations are required, in some instances, by statute, such as the Anti-Kickback Enforcement Act of 1986,<sup>189</sup> the Medicare Fraud

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187. Richman, *supra* note 5, at 311; see also *Comey Remarks*, *supra* note 14, at 2 (“We have seen no evidence at all that corporations refrain from conducting internal investigations because, in order to obtain leniency for cooperating, they might be asked to waive a privilege.”).

188. Kestenbaum & Criss, *supra* note 103, at 151-52.

189. 41 U.S.C. § 57 (2000).

Reporting Act,<sup>190</sup> and federal banking regulations.<sup>191</sup> These statutes and other regulations were put in place only after *Upjohn*. For example, after *Upjohn*, industry regulators and associations, such as the New York Stock Exchange, the American Stock Exchange, and the National Association of Securities Dealers, put into place rules that “require ongoing investigation and/or disclosure in situations involving suspicious circumstances or allegations of wrongdoing . . . .”<sup>192</sup>

Another obvious reason to investigate is to ensure that whatever wrongdoing has gone on has ceased. Especially where DOJ, regulators, or others have raised questions about the allegations, letting the conduct continue is an invitation for harsh sanctions. Even where the allegations come from within the organization—in the form of anonymous reports or questions from internal auditors or others—the corporation is risking a great deal if it determines to play ostrich, betting on its ability to contain the allegations. Marcu suggests that the

very human and understandable reluctance to look for trouble . . . is likely to be regarded by prosecutors in today’s overly crime-conscious environment as indifference to or even tacit approval of wrongdoing. With scandals like Enron and WorldCom still fresh in the public memory and new stories about companies under investigation breaking every day, corporate executives do not have the luxury of hoping it goes away when the hint of criminality appears.<sup>193</sup>

Finally, even if the conduct itself has ceased, the organization must recognize that, unless it takes prompt remedial action, the wrongdoing may morph into other legal problems. For example, in *Upjohn*, the IRS was investigating in part to determine whether *Upjohn* improperly treated the “questionable payments” (i.e., bribes) as deductible business expenses.<sup>194</sup> Assuming that the criminal activity is reflected in the bottom line, that bottom line may need to be restated or future accounting based on the earlier numbers may itself be misleading, and criminally actionable.

Business or regulatory considerations are often cited as critical to decisions to investigate allegations of wrongdoing. Especially today, in light of enforcement emphasis on combating corporate deprecations and general public unease given global financial turmoil, investigations may be necessary to reassure various corporate stakeholders—including investors, employees, clients or customers, auditors, regulators and the like.<sup>195</sup> A somewhat related—and very important—advantage of investigation is that it permits companies to meet whatever reporting requirements constrain them under state or federal law. For example, the *Upjohn* investigation was prompted not only by a desire to take advantage of a SEC

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190. 42 U.S.C. § 1320-a7(b) (2000).

191. See, e.g., 12 C.F.R. § 21.11 (2007).

192. Duggin, *supra* note 44, at 885-86.

193. Marcu, *supra* note 103, at 202; see also Kestenbaum & Criss, *supra* note 103, at 151.

194. See Brief for the United States, *supra* note 59, at 23 n.15.

195. See *supra* notes 113-115 and accompanying text.

voluntary disclosure policy that would have mitigated any criminal or civil sanctions from the wrongdoing, but also to meet Upjohn's obligations under SEC regulations controlling the disclosure requirements for publicly-traded companies.

Among the most compelling reasons to initiate internal investigations are those arising from increased federal interest in pursuing corporations civilly and criminally, the sentencing regime for organizations created by the U.S. Sentencing Commission, and the proliferation of compliance programs in part responsive to these circumstances.<sup>196</sup> The U.S. Sentencing Guidelines that control the sentencing of organizations for most federal criminal violations (the "organizational guidelines") became effective on November 1, 1991.<sup>197</sup> One manifestation of the organizational guidelines' underlying "carrot and stick" philosophy—which has as its object galvanizing organizational efforts to *prevent* organizational wrongdoing—is an important sentencing credit that organizations can claim for having in place an "effective program to prevent and detect violations of law." This "carrot" is critical in many corporate crime cases because of the potentially harsh restitution, fine, and corporate probation requirements that constitute the guidelines' "stick."

The organizational guidelines have been commonly credited with creating a boom in organizational compliance efforts. As a consequence, a consulting industry has been created and significant organizational attention—in a wide variety of industries and businesses—has been devoted to determining how best to structure and maintain effective compliance programs. The organizational guidelines also undoubtedly focused prosecutorial and regulatory attention on the subject. The guidelines provided governmental actors with a template upon which to build on when formulating their own policies regarding what constitutes an "effective program" for purposes of making decisions regarding the appropriate imposition of civil and criminal penalties. Finally, the organizational guidelines influenced corporate law, spurring most notably the Delaware Chancery Court, in *In re Caremark*, to authorize judicial scrutiny of directors' duties *vis-à-vis* compliance.<sup>198</sup>

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196. See, e.g., Duggin, *supra* note 44, at 868-85.

197. U.S. SENTENCING GUIDELINES MANUAL ch. 8 (1992). In 2005, the Supreme Court ruled that the statutes that made the guidelines mandatory violated individual defendants' Sixth Amendment jury trial rights. See *United States v. Booker*, 543 U.S. 220 (2005). The Supreme Court has not yet decided whether corporations have a jury trial right, so one could argue that the organizational guidelines should continue to bind sentencing judges. For a discussion of this question and the law relevant to it, see Timothy A. Johnson, Note, *Sentencing Organizations After Booker*, 116 YALE L.J. 632 (2006). Whether or not the organizational guidelines are formally binding, courts are generally adhering to the "advisory" guidelines regime in sentencing, even post-*Booker*, and where they are not, it is generally at the government's request. See, e.g., ACC 2006 STUDY RESULTS, *supra* note 3, at 36.

198. See *In re Caremark International Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996). In *Caremark*, the Delaware Chancery Court was asked to approve the settlement of a shareholder derivative action alleging that the Caremark directors had breached their duty of care by failing to supervise the conduct of Caremark's employees. The court approved the settlement, but in so doing raised the question "what is the board's responsibility with respect to the organization and monitoring of the enterprise to assure that the corporation functions within the law

Compliance programs of the sort contemplated by the guidelines require that organizations faced with allegations of wrongdoing conduct some sort of internal investigation, stop the conduct, and remedy its effects. Other regulators such as the SEC and the New York Stock Exchange have, building on the guidelines model, issued policies stating that regulatory action will turn in part on the quality of companies' investigations of alleged malfeasance.<sup>199</sup> What does all this mean? Because compliance programs generally require the initiation of an internal investigation when allegations of wrongdoing surface, such investigations are embedded in many corporations' standard operating procedures; the question is not whether to investigate, but what the scope of the investigation should be and who ought to conduct it. If a company deviates from its own compliance program and foregoes an investigation in such a situation, that itself is a huge red flag that can invite investigation.

Another reason for conducting an investigation is that such a practice generally *works* if the object is to avoid criminal sanction and minimize regulatory exposure. One informal study of available data on the effect of the conduct of an internal investigation on the government concluded:

[T]he evidence shows a clear correlation between a specific reference by DOJ or the SEC to a company's internal investigation and a more favorable conclusion to a government investigation for the company . . . . [Further, t]here are presumably numerous cases—and we are aware of many from our own practice—in which, without any public mention, the government has given a company substantial credit for conducting an internal investigation and the

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to achieve its purposes?" *Id.* at 968–69. The Chancery Court stated that “[m]odernly this question has been given special importance by an increasing tendency, especially under federal law, to employ the criminal law to assure corporate compliance with external legal requirements” and by the organizational guidelines, “which impact importantly on the prospective effect these criminal sanctions might have on business corporations.” *Id.* at 969. The guidelines “offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts.” *Id.* The court concluded:

[A] director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.

*Id.* at 970. The Chancery Court's remarks in *Caremark* have raised the prospect—however attenuated—of directors' derivative liability for others' failures to ensure that adequate compliance programs are in place. Consequently, the *Caremark* decision, which was significantly influenced by the Organizational Guidelines, “gave the movement toward corporate self-policing—known as compliance planning—a kick in the pants.” John Gibeaut, *Getting Your House in Order*, 85 A.B.A. J. 65, 66 (1999).

199. With respect to the SEC, see the SEC charging documents cited *supra* note 3. With respect to other regulators, see, for example, Memorandum from the New York Stock Exchange to All Members, Member Organizations and Chief Operating Officers, No. 05-65 (Sept. 14, 2005), available at <http://overregd.lingquist.com/archives/NYSE%20Information%20Memo%205-65.pdf>.



investigation played a significant role in the government's willingness not to charge the company or to settle a case on more favorable terms.<sup>200</sup>

Finally, and unavoidably, there are the personal and professional imperatives faced by high-ranking individuals within the corporation. In reaction to the potential "risks posed by the criminalization of business conduct, and largely spurred by the enactment of the Sarbanes-Oxley Act, public corporations—and their Audit Committees—find themselves increasingly relying on internal investigations as both a way to ferret out potential wrongdoing and to *insulate themselves and their directors and officers from liability*."<sup>201</sup> Indeed, many Board members—particularly the "independent" directors—may conclude that:

[T]he decision as to whether an internal investigation should be conducted is not really a discretionary one. Under Sarbanes-Oxley, Audit Committees and company management are required to address whistleblower complaints and other indicia of potential wrongdoing or face liability. Similarly, under Delaware and other states' corporate law, a failure to address "red flags" may be found to constitute a breach of fiduciary duty.<sup>202</sup>

Curious as to whether my educated guessing was supported by practical experience, I reviewed a random sampling of practitioners' recent writings on the subject of internal corporate investigations.<sup>203</sup> The results were strikingly consistent with the above conclusions.<sup>204</sup> In the words of one lawyer: "when evidence of possible employee wrongdoing comes to management's attention, there really is no choice any more" because "[m]anagement's early and aggressive investigation

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200. Kestenbaum & Criss, *supra* note 103, at 151; see also Andrew C. Hruska, *What's Really Going On in Corporate Charging Decisions?*, N.Y.L.J., Nov. 10, 2005, col. 4:

[A]n analysis of the Justice Department's corporate charging decisions over the past three years demonstrates that a different dynamic is at work . . . . [I]ncreasingly often, companies that cooperate with government investigators have successfully minimized the damage even from significant criminal conduct by senior managers. In a few cases, the benefits of superlative cooperation have been so substantial as to avoid conviction even when companies initially obstructed government investigations.

201. Sarkozi, *supra* note 103, at 97 (emphasis added).

202. *Id.* at 99.

203. See, e.g., sources cited *supra* note 103.

204. Some more cynical, colleagues have suggested that financial self-interest might motivate this advice. I take comfort from the fact that the practitioners' literature generally does not treat the question as a "no-brainer" and instead acknowledges that internal investigations are not without cost. For example, investigations may uncover additional criminality that may not otherwise have surfaced, and they can increase the likelihood that negative information will reach the ears of the government or become publicly available. As discussed above, the possibility exists that the government will "request" a privilege waiver and that, if such a "request" is accepted, the results of the investigation will also have to be provided to others seeking to exact civil damages. Internal investigations can also be expensive and disruptive to business operations; they distract management and may create serious morale problems. Finally, investigations may compel organizations to change remunerative business practices, terminate business relationships, or fire otherwise productive and valued employees. See generally sources cited *supra* note 103.

of such a problem is the company's best chance of maximizing control over what otherwise could become an unmanageable situation and minimizing the risk of both criminal exposure and public scandal."<sup>205</sup>

### C. Will the Quality of Corporate Investigations Suffer Because of DOJ Policy?

The defense bar argues that a second "horrible" results from a lack of protection for attorney work product in internal investigations: "lawyers' internal investigations will become 'paperless'—counsel will refrain from taking notes or preparing memoranda in connection with corporate representations to avoid future provision of a blueprint for culpability to regulators and perhaps third parties."<sup>206</sup> This, of course, relates to the rationale underlying the work product doctrine, which assumes that if lawyers cannot maintain the privacy of their work product, they simply will not record their thoughts rather than provide the results of their investigation and their strategizing to the adversary. If this dynamic indeed existed in this context, it would be a serious problem because an internal investigation of any seriousness *requires* papering. Counsel will talk to dozens of witnesses (or more), review reams of records (including accounting or other financial materials), and try to integrate all the facts and figures learned by various lawyers into some kind of comprehensive whole. It is simply impossible to do this effectively, much less efficiently, without generating significant written work product.

Could counsel be arguing that their duty of effective representation requires them to compromise the investigation? I must be missing something, because it sounds very much to me like an argument that a lawyer's ethical duty to the entity requires—in light of the possibility of prospective privilege waiver requests—that lawyers commit malpractice while investigating. I believe it appropriate at this juncture to adopt the sanguine view expressed by the Solicitor General in *Upjohn*: that this argument does a disservice to the professionalism of counsel<sup>207</sup> and is, ultimately, (paraphrasing here) just plain silly.

When the bar is *not* objecting to the compelled-voluntary waiver policy but

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205. Marcu, *supra* note 103, at 203; *see also, e.g.*, Thomas & Stead, *supra* note 103 ("In the current environment, a corporation presented with credible evidence of wrongdoing is expected to conduct a thorough internal investigation and cooperate willingly with any external investigation."); Kestenbaum & Criss noted:

In the current enforcement environment, conducting an internal investigation is clearly the safer response to an indication of wrongful conduct by an employee. Investigating will not only leave the company in the best position to deal with the government, but the evidence is now clear that it also can help the company gain significant benefits from the federal government for having done so.

*Supra* note 103, at 152.

206. Brown, *supra* note 5, at 901.

207. *See supra* text accompanying note 75; *see also* Brown, *supra* note 5, at 942 (noting that a "lawyer's ethical duty of competency combined with a fear of malpractice liability or the possibility that some other civil or criminal action will be instituted against [corporate counsel] seem to provide ample motivation for careful documentation and record-keeping" in an internal corporate investigation).

rather is lending general advice on the effective conduct of internal corporate investigations, it is able to call malpractice malpractice. As noted above, white-collar lawyers consistently emphasize that an internal investigation must be thorough and credible to be of any assistance to the corporation, either in evaluating its position or in the course of cooperation with the government. Indeed, far from cautioning counsel to stop taking notes of potentially inculpatory statements made in witness interviews, some practitioners stress that such material *must* be included in the *final report* because a “balanced report is more informative to the company officials who must act on” it and a “report that includes both exculpatory and incriminating evidence is fair to the individuals and entities that may be criticized in the report.”<sup>208</sup> Most importantly, “[i]f the company decides to disclose the report to the Government, a report that presents the incriminating evidence as well as the exculpatory evidence is more likely to be credited by law enforcement officials; government officials are likely to discount a report that ignores incriminating evidence.”<sup>209</sup> Indeed, a poorly executed investigation, or a biased, selective report, is worse than no report at all because the government is likely to view it, at best, as a whitewash or an attempt to protect management<sup>210</sup> and, at worst, as obstruction. The latter possibility is to be avoided at all costs, of course, given the government’s penchant of late for applying the criminal obstruction statutes in this context.<sup>211</sup> In short, if it is in the client’s best interest to do an investigation, it is also in the client’s interest that it be done thoroughly, fairly, and well.

Finally, the compelled-voluntary waiver policy of DOJ and other federal regulators is not the greatest threat to the sanctity of corporate privileges in this context. As the Supreme Court explained in *Upjohn Co. v. United States*, “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”<sup>212</sup> If, as the bar seems to argue, any prospective uncertainty in the viability of the privilege in an internal investigation compromises the quality of such investigations, then these investigations must already be shoddy beyond redemption.

Rather than cataloguing all the generally-applicable exemptions or waiver doctrines (such as the crime-fraud exception, the reliance-on-counsel-defense,

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208. Winer et al., *supra* note 103, at 334.

209. *Id.*

210. *See, e.g.*, Finnegan, *supra* note 103, at 927 (noting that it “is paramount that counsel conducting the internal investigation solely represent the interests of the corporate entity and not any individual employee, officer, or Board member . . . . Failure to do this will undermine the credibility of the investigation and put the corporation at serious risk”).

211. *See, e.g.*, Julie R. O’Sullivan, *DOJ Risks Killing the Golden Goose Through Computer Associates’ Singleton Theories of Obstruction*, 44 AM. CRIM. L. REV. 1447 (2007) [hereinafter O’Sullivan, *Golden Goose*]; Julie R. O’Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 677 (2006) [hereinafter O’Sullivan, *Code as Disgrace*].

212. *Upjohn, Co. v. United States*, 449 U.S. 383, 393 (1981).

exceptions to privilege protections in shareholder derivative litigation, partial and inadvertent disclosure waiver rules, waivers by new management, and the rules permitting attorneys to void the privilege in self-defense<sup>213</sup>), let us simply note a few common threats to the certainty of privilege protection in this particular context for which our discussion has already laid the foundation:

(1) Some investigations may have been conducted *both* to assist in contemplated litigation with the government *and* to serve business interests, such as persuading regulators, customers, suppliers, competitors, or the general public that the wrongdoing was the act of a rogue employee and that the corporation is acting diligently to prevent future occurrences of misconduct. Where an investigation is launched both in anticipation of business needs *and* possible litigation, the work product privilege may not attach unless the corporation (as proponent of the privilege) can make a record that the internal investigation would not have happened “but for” anticipated litigation.<sup>214</sup>

(2) Relatedly, waivers occur when the results of internal investigations into corporate wrongdoing are revealed to others for imperative business reasons. These may not feel to corporations and their counsel like “voluntary” waivers, but privileged materials are fair game to the government and others once revealed to independent auditors verifying the company’s financial statements,<sup>215</sup> counsel for underwriters,<sup>216</sup> government contract performance auditors,<sup>217</sup> and government regulators, either to secure approval of a proposed corporate action<sup>218</sup> or to avert regulatory enforcement action.<sup>219</sup> Given the frequent incidence of these cases, it appears that the possibility that business concerns will prompt a waiver may approach that of a DOJ “request” under the cooperation policy.

(3) As is sensible, corporate counsel faced with investigating allegations of wrong-doing within a corporation attempt to shield their investigative interviews, results, and advice by modeling their investigations on *Upjohn*. What the literature seems to ignore, however, is that much of the information protected from federal regulators and prosecutors by *Upjohn* is *not* consistently protected under either U.S. state or foreign law. Counsel, then, will hope for the application of the *Upjohn* subject-matter test, but cannot rely on that protection.

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213. For the content of these rules, see JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME* (3d ed. 2007), at 98 (good faith reliance on counsel defense and waiver consequences), 952-56 (inadvertent waiver rules), 969-77 (crime-fraud exception), 977-83 (governmental actors).

214. See, e.g., *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998). The Fifth Circuit employs a more rigorous standard, holding that litigation must be “the primary motivating purpose behind the creation of the document.” *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981).

215. See, e.g., *In re John Doe Corp.*, 675 F.2d 482, 488 (2d Cir. 1982); *United States v. El Paso Co.*, 682 F.2d 530, 539-42 (5th Cir. 1982).

216. See, e.g., *In re John Doe Corp.*, 675 F.2d at 488-89.

217. See, e.g., *United States v. MIT*, 129 F.3d 681, 683 (1st Cir. 1997).

218. See, e.g., *Permian Corp. v. United States*, 665 F.2d 1214, 1216 (D.C. Cir. 1981).

219. See, e.g., *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1417-18 (3d Cir. 1991); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1369-75 (D.C. Cir. 1984).

A good number of U.S. states have *not* adopted the *Upjohn* standard to test the scope of the attorney-client privilege. Indeed, although many appear to have endorsed no standard at all, a number have endorsed the “control group” test that *Upjohn* rejected.<sup>220</sup> Obviously, “[t]he lack of uniformity between states in this regard poses a major problem for national corporations with presences in various jurisdictions.”<sup>221</sup> In particular, corporations that conduct internal investigations may not, at least in state litigation, count on the application of the broad protections of the *Upjohn* “subject-matter”-like test. Wise counsel will assume that the most restrictive test—the “control group” test—is the only one that a corporation which operates in a number of states may safely rely upon.<sup>222</sup> This means that communications from non-control group employees to counsel *are not* covered by the attorney-client privilege in these jurisdictions, apparently without the adverse effects on the flow of information between client and counsel posited by *Upjohn* and cited by the defense bar in reaction to the compelled-waiver policy.

On the international plane, most countries recognize some form of attorney-client privilege.<sup>223</sup> However, the contours of the privilege differ—sometimes drastically—around the globe.<sup>224</sup> “In today’s world, where the same facts may form the basis for worldwide litigation, the differences in disclosure rules from one country to another may result in the creation of communications that, while immune from disclosure in a foreign country, must be turned over to opposing counsel in U.S. litigation.”<sup>225</sup> In short, “[t]he gaps in the privilege at the international level present a major problem for general counsel.”<sup>226</sup>

In sum, if an investigation is to be launched, good practice demands that it be done correctly—that is, without favor or prejudice in its conduct. Absent extraordinary circumstances, this counsels against “paperless” practices and other attempts

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220. See Christopher Scott D’Angelo & Robert P. Blood, *The Scope and Use of the Attorney-Client Privilege in the U.S. and Its Applicability to Communications at Home and Abroad*, DEF. COUNS. J. 343, 348 & n.41 (2006) (noting that as of 1997, at least, only fourteen states use “tests” based on or similar to that articulated in *Upjohn*, eight states followed the “control group” test, and twenty-eight states, including Delaware, New Jersey, New York, and Pennsylvania, had not articulated any particular test); see also Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33, 60 (1997) (elaborating on the use of the “control group test” by a number of states).

221. Brown, *supra* note 5, at 934.

222. See generally Hamilton, *supra* note 44, at 629-30; Jerold S. Solovy & Robert L. Byman, *Lowest Common Privilege*, NAT’L L.J., Sept. 20, 2004, at 14.

223. See, e.g., Maurits Dolmans, *Attorney-Client Privilege for In-House Counsel: A European Proposal*, 4 COLUM. J. EUR. L. 125 (1998).

224. See, e.g., AM. ASS’N OF CORP. COUNSEL, AKZO DELIVERS HIT TO EUROPEAN IN-HOUSE PRIVILEGE (2007), <http://www.acc.com/> (discussing cases by European Court of First Instance and European Court of Justice holding that the legal professional privilege in the EU does not extend to communications between parties and their in-house lawyers).

225. Fredrick M. Zullow & Rekha Ramani, *Privilege is No Longer Simply a Domestic Issue: Care Should Be Taken in Complex Litigations, as Foreign Privilege Rules May Become a Factor*, NAT’L L.J., Jan. 13, 2003, at A31.

226. Joseph Pratt, *The Parameters of the Attorney-Client Privilege for In-House Counsel at the International Level: Protecting the Company’s Confidential Information*, 20 NW. J. INT’L L. & BUS. 145, 147 (1999).

to manipulate the evidence likely to be uncovered or created during the course of an investigation. And if, as is sometimes argued, the uncertainty in protection for the results of the investigation mean that the investigation itself will be half-hearted, the many ways in which the privilege can be invaded or exploded currently means that the investigations are likely to be compromised independent of DOJ policy.

*D. Will Employees Stop Talking to Counsel if Their Communications May be Revealed?*

All of the above rules limiting the applicability of the attorney-client privilege and work product doctrine, and providing for their waiver in certain situations, are also relevant to the other key assumption upon which *Upjohn* is based: that, absent the protection of the *corporate* attorney-client privilege, corporate executives and employees “will cease to be forthcoming out of a fear that whatever they communicate will ultimately be disclosed, and corporate counsel will understandably be more skeptical of the accuracy or completeness of the information communicated to them.”<sup>227</sup> The policy underlying the attorney-client privilege is founded on assumptions regarding what “reasonable” persons will do in light of known disclosure rules. Because we must therefore assume that we are dealing with sophisticated, rational actors, the above-outlined uncertainties ought to cause such persons to recognize that the extent to which they can confidently rely on the privilege to protect their communications with corporate counsel in future is questionable.

Those corporate agents who have no real worries about their own behavior—i.e., those who are strictly witnesses—are not likely to be as influenced by concerns about confidentiality as they are about their situation within the company. Even if they are uncomfortable in a lawyer interview, or are hostile to the investigation out of personal loyalty to those in hot water, employees faced with the threat of employment consequences for a lack of cooperation have a strong incentive to be helpful. As far as employees who are (or are likely to be) subjects or targets of the investigation, there are more important reasons why employees who have inculpatory things to say should be *extremely* wary of sharing fulsomely with counsel—whether or not there is any prospect of a compelled-voluntary waiver under DOJ policy. The first consideration for such persons is, of course, self-preservation. An employee whose conduct has triggered sufficient concern to prompt an internal corporate investigation is likely to know that (even if she thought she had the green light or at least a wink and a nod encouraging her allegedly wrongful activities) the Board is likely to very unhappy about the state of events. Regardless of whether the employee contemplates that she might be subject to criminal sanction, then, she may well be reluctant to share the ins and

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227. Brown, *supra* note 5, at 900-01.

outs of her alleged wrongdoing for fear of employment retribution.

Second, and more important, the simple fact is that employees do not control the corporation's privilege; it would be an irrational actor, then, who would disclose alleged wrongdoing to corporate counsel simply because she was asked. Professor Brown states the case nicely:

[T]he privilege's principle justification—encouraging candor between attorney and client so as to facilitate effective legal representation—on its face, appears to have little application in the corporate environment. This is so because the privilege, to the extent recognized, would belong to the corporation, as the client, and not to its directors, officers and employees individually. Accordingly, there really is no personal incentive for corporate constituencies to be candid with counsel. The confidential protection that is guaranteed is not theirs; and hence, privilege purists would argue that these individuals would most likely refrain from disclosing information that might reflect poorly on them.<sup>228</sup>

The Solicitor General made this argument in *Upjohn* but the Court ignored it; it was wrong then, and it is even “wronger” now.

To understand why, further background may be appropriate. In 1980, as now, the rule is that when a corporate employee makes a communication to counsel for the corporation and the corporation later decides to waive applicable privileges, the individual employee, with few exceptions, may not assert a privilege to shield his communication from disclosure.<sup>229</sup> The irrationality of an employees' decision to share all despite a lack of control over the privilege is even greater post-*Upjohn*, though, because now there is little doubt that the witness will be *warned*, by counsel, of this dynamic. There is widespread agreement that corporate counsel, before interviewing corporate employees, *must* give what is commonly referred to as an “*Upjohn* warning.” Although expressed in different ways, the warning generally is as follows: (1) counsel represents the company—not the employee—and is interviewing the employee to gather information in order to provide legal advice to the company; (2) the interview is confidential and covered by the attorney-client privilege; (3) the privilege belongs to and is controlled by the company; (4) because the company—not the employee—owns the privilege, the company, but not the employee, may elect in future to waive any privilege and

228. *Id.* at 923 (citations omitted).

229. For example, in *United States v. International Brotherhood of Teamsters*, 119 F.3d 210 (2d Cir. 1997), the Second Circuit explained that

[r]ecognizing that entities can act only through agents, courts have held that any privilege that attaches to communications on corporate matters between corporate employees and corporate counsel belongs to the corporation, not to the individual employee, and that employees generally may not prevent a corporation from waiving the attorney-client privilege arising from such communications.

*Id.* at 215; see also *In re Bevil, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 124 (3d Cir.1986).

provide information derived from the interview to third parties, including prosecutors or regulators.<sup>230</sup>

Note that this warning is appropriate whether or not a corporation is contemplating a compelled-voluntary waiver. In other words, were DOJ's policy suspended tomorrow, employees would still be advised of these facts. Why? First, one must recall that disclosure to DOJ is not the only reason why corporations may wish to waive the privileged nature of these interviews; as noted above, they may also disclose the results of their investigations in response to business or regulatory pressures. Second, and relatedly, the advice is given as much for the corporation's benefit as out of any sense of obligation to the employee or ethical imperative for counsel. Some courts "have been willing to allow corporate employees to assert a personal privilege with respect to conversations with corporate counsel, despite the fact that the privilege generally belongs to the corporation,"<sup>231</sup> although the employees bear a heavy burden in making such a claim and generally are unsuccessful.<sup>232</sup> Thus, the "*Upjohn* warning" is given to "prevent the employee from later claiming to have believed the attorney represented the employee during the interview, in an effort to invoke the attorney-client privilege and prevent the company from disclosing the employee's statements" to others.<sup>233</sup> Second, as discussed above, corporate counsel recognize that it is in the entity's interest not to unnecessarily alienate employees and other corporate constituencies in deciding how to conduct the investigation. Accordingly, "corporate counsel will to some extent have to consider whether it is 'only fair' to employees to warn them of their peril . . . in order to promote these other values of importance to their client."<sup>234</sup>

With this as context, let us now return to the critical issue identified by the Solicitor General in *Upjohn*: in the corporate internal investigations context, will employees communicate facts to counsel that they *otherwise would not absent the protection of a corporate attorney-client privilege*? To the extent that the extension of the *corporate* privilege to these circumstances carries with it an obligation to

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230. See, e.g., MODEL RULES OF PROF'L CONDUCT 1.13(f) (2004) ("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."); Brown, *supra* note 5, at 938-39; Coleman, *supra* note 103, at 285; Finnegan, *supra* note 104, at 928-29; Reding & Han, *supra* note 103, at 454-55; Tuttle & Pierce, *supra* note 103, at 474; see generally Duggin, *supra* note 44, at 940-41 (surveying ethical rules applicable to corporate counsel's interviews with employees).

231. *Teamsters*, 119 F.3d at 215.

232. An employee's unarticulated "reasonable belief" is not sufficient to confer upon the employee control of the privilege. *Id.* at 214-16. The rationale is that "[t]his standard would provide employees seeking to frustrate internal investigations with an exceedingly powerful weapon, and would stray quite far from the principle that the attorney-client privilege should be 'strictly confined' in order to allow public access to 'every man's evidence.'" *Id.* at 216 n.2 (citations omitted). If such a privilege is to be claimed, the onus is on the employee to make it clear to corporate counsel that he seeks legal advice on personal matters. See *In re Grand Jury Proceedings*, Detroit, Mich., Aug., 1977, 434 F. Supp. 648, 650 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978).

233. Finnegan, *supra* note 103, at 929; see also Reding & Han, *supra* note 103, at 454-55.

234. See, e.g., O'Sullivan, *Golden Goose*, *supra* note 211, at 1475.



warn the witness that she does not own or control the privilege and that her statement is confidential only so long as the corporation wishes it to be, the privilege may actually *inhibit* fulsome communication. It is, in any case, difficult to credit that the existence of a *corporate* privilege would reassure the rational employee. At this point, the reasonable subject or target should be thinking only about the privilege *she owns* (the Fifth Amendment) and how to use that privilege to her advantage (or to minimize damage). We all know that many people are not (entirely) rational actors and thus it may well be that the existence of the privilege will give employees the (false) sense of security necessary to open up to corporate counsel. But in these instances, it is not a rational reliance on the corporation's attorney-client privilege that truly motivates employees. Rather, it is the threat of being fired, combined with a misapprehension of their interests *vis-à-vis* those of the corporation.

Even indulging an assumption that the "unreasonable" employee deserves some accommodation, however, the advocates of the privilege must show that whatever marginal additional disclosure is obtained through irrational employee choices outweighs the efficiency and effectiveness advantages of a narrow or non-existent attorney-client privilege in this context. As noted above, this they cannot do because, given that counsel's conversation with the unreasonable employee would otherwise be protected by work product in most cases, the effect of, and need for, the attorney-client privilege—viewed alone—is indeed negligible.

#### VI. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION AS FIFTH AMENDMENT SURROGATE

My default position, as explained in the introduction, is that corporations and their champions bear the burden of proving that DOJ's waiver policy, *considered alone*, actually results in the "parade of horrors" they posit. This they cannot do. Between educated guessing and my reading of some of the practice-oriented literature, I believe that it is clear beyond peradventure that the Supreme Court simply got it wrong in *Upjohn*. First, the attorney-client privilege is *not* necessary to ensure that corporations continue soliciting legal advice or conducting competent internal investigations when allegations of wrongdoing arise. To the extent that this was contestable in 1981, it is not today. Further, I think that the Solicitor General had it right in *Upjohn*: extending the scope of the attorney-client privilege in the internal investigation setting is unlikely to induce at least the rational employee to share information with counsel that he would not otherwise disclose. Again, the Supreme Court may have ignored this dynamic in 1980, but to do so in today's environment would be a breathtaking victory of hope over experience. In short, at least in this context, *and measured only by the rationales underlying these privileges*—the privileges' "benefits are all indirect and speculative" but their

“obstruction is plain and concrete.”<sup>235</sup>

Do these conclusions necessarily validate DOJ policy and/or invalidate the defense bar’s objections to it? No, because one simply cannot evaluate the effect of the policy *taken alone*—that is, without reference to the entire context in which corporate criminal practitioners operate. When that context is considered, the bar *does* have valid reason for objection—just not the reason generally relied upon.

The deck is most definitely stacked against the corporation in criminal investigations. Three culprits are worth brief mention. The standards governing corporate criminal liability are irrational and overbroad.<sup>236</sup> Exacerbating this circumstance is the nature of the federal criminal code; its overbreadth and elasticity mean that it is not difficult to find *something* to hang on the corporation.<sup>237</sup> Finally, the consequences of criminal convictions for corporations (including not only restitution and fines, but also civil damages and de-licensing and debarment from government contracting) are so harsh and wide-ranging that many public corporations have no valid option but to prostrate themselves at the feet of any prosecutor who wanders by. Which is why, I posit, the defense bar resists DOJ’s compelled-voluntary privilege waiver policy so vigorously: this invasion is the last straw because it removes virtually the only means left to corporations to withstand the government juggernaut.

To explain, we must examine how corporate defense counsel operate in an environment that is so heavily weighted in favor of the government. In the pre-charge stage, when most white-collar cases are viewed as won or lost, the challenges facing defense counsel are: (1) divining, without the benefit of formal discovery or other means of compelling the production of most types of information, what the government is investigating; (2) tracing or, with luck, keeping a step ahead of the government in learning the facts; (3) limiting, consistent with ethical and legal constraints, government access to incriminating evidence; and (4) using the facts, law, and equitable arguments to persuade the government to decline prosecution. Information control is *the* central function of the defense enterprise.<sup>238</sup> One therefore cannot evaluate the importance of the attorney-client privilege and the work product doctrine in the defense of corporate clients in white-collar cases without understanding that *corporations cannot claim a Fifth Amendment right against self-incrimination*.

235. Brief for the United States, *supra* note 59, at 20 (citation omitted).

236. See, e.g., Julie R. O’Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal*, 16 GEO. J. LEGAL ETHICS 1, 38-39 (2002) (collecting sources).

237. See, e.g., O’Sullivan, *Code as Disgrace*, *supra* note 211, *passim*.

238. See, e.g., KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 5 (Yale Univ. Press 1985) (“But above all, and this is the central theme of the white-collar crime defense function, the defense attorney works to keep potential evidence out of government reach by controlling access to information.”); *Id.* at 171 (quoting white-collar lawyer as stating “[m]y own belief is that the more information you control as [a] defense lawyer, the more effective you are, meaning that the only weapon you have as a defense lawyer in my view is control of information”).

Given the lack of a Fifth Amendment right, the only way that corporations have any capacity to control information is to enlist lawyers to investigate the circumstances of alleged wrongdoing, ensuring that the information gleaned during both the factual investigation and the legal evaluation of the corporation's position is protected by the attorney-client privilege and the work product doctrine. Practitioners' writings on the conduct of internal corporate investigations make one point crystal clear: the *true* function the attorney-client privilege and the work product doctrine serve is to give the corporation a fighting chance of resisting a government investigation or at least to buy it breathing space to make a decision regarding its best interests, *not* to encourage self-investigation or employee candor or any of the other rationales traditionally said to underpin the attorney-client privilege and work product doctrine.

In short, the attorney-client privilege and work product doctrine have essentially been enlisted in aid of another enterprise entirely—that is, filling in for the absence of a corporate right against self-incrimination. Even the Solicitor General in *Upjohn* understood this. Although unaddressed by the Court, a consistent theme in the government's brief was the argument that the “subject-matter” test permitted corporations to abuse the privilege:

[T]he overly broad subject matter test would encourage corporations to create a ‘zone of silence’ around any information that has potential legal consequences *by funneling such information through house counsel*. Such *manipulation* of the attorney-client privilege and *the use of corporate executives (such as petitioner Thomas) who happen to be lawyers to perform what are essentially non-legal fact gathering tasks would undermine the legitimate right of law enforcement agencies ‘to satisfy themselves that corporate behavior is consistent with the law and the public interest.’*<sup>239</sup>

That the Solicitor General thought that this was an abuse of the privilege is evident in its outraged mention that a former SEC Commissioner (of all people) had recommended at a professional conference that any internal investigation conducted by a corporation into possible wrongdoing should be undertaken by outside counsel and “at all events, it should not be undertaken by nonlawyers.”<sup>240</sup>

The Solicitor General was correct in arguing that the rationales underlying the attorney-client privilege do not warrant its use in this way, but that does not, in my mind, resolve the issue of whether the privilege is being “abused.” The question remains whether the attorney-client privilege and work product doctrine are serving a useful, if unintended, purpose which warrants a reconsideration of DOJ policy. The answer to this query depends on two further questions, the first of which is whether one believes that the current imbalance between government and corporations is good or bad. This is a topic that demands in-depth consideration

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239. Brief for the United States, *supra* note 59, at 16 (emphasis added).

240. *Id.* at 41.

that is beyond the scope of this article, but my initial reaction is that if we deem the adversary system the best and fairest means of testing criminal culpability, it should be a reality for all persons, real or legal.

The second question is, assuming that it *is* a bad thing that corporations are—as is vehemently asserted by the defense bar—effectively denied the benefits of an adversarial criminal process, what should be done about it? In absence of a narrowing of corporate liability standards, an overhaul of the federal criminal code, and a rethinking of the sanctions that can be visited upon corporations—all of which seem unlikely—the fundamental problem will remain. And use of the attorney-client privilege and work product doctrine as a stand-in for the Fifth Amendment is, while not supported by the modern rationales underlying those protections, consistent at least with one of the historical rationales underlying the privilege: reinforcing a defendant's right to remain silent by preventing adversaries from circumventing that right by calling counsel in his client's stead.<sup>241</sup>

## VII. CONCLUSION

Using the attorney-client privilege and the work product doctrine as a stand-in for the Fifth Amendment privilege to resist governmental investigations is far from the perfect solution to the imbalance of power existing between corporations and the government in the criminal sphere. The attempted substitution of these protections for the Fifth Amendment right is ineffective in part because the rules applicable to privilege and work product claims (such as the waiver rules) are not crafted for this purpose. For example, while an individual defendant does not waive his Fifth Amendment right for all purposes should he decide to tell his story to a prosecutor, a corporation that attempts to share the results of its internal corporate investigation will find that those results are now fair game—obtainable by regulators, private plaintiffs, and the press. Instead of trying to jam a round peg into a square hole (that is, by trying to resist privilege waivers on the basis of the rationales underlying the privileges when they are being used for a different purpose entirely), it would be better to attack the circumstances that essentially gut the adversity of the criminal process in corporate cases. But, as noted, that campaign is exceedingly unlikely to succeed.

It appears, then, that the defense bar is doing all it can to right the existing imbalance by co-opting whatever arguments it can to maintain its one means of resistance when the government comes knocking—claiming the protections of work product and the privilege. DOJ has had no qualms about exploiting the overbroad corporate criminal liability standards, the overbroad criminal code, and the outsized sanctions available, in service of its waiver policy. One could argue that it is only fair that the defense bar be able to engage in similar hard-ball tactics—that in view of the immense and dangerous advantages the government

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241. See Brown, *supra* note 5, at 913.

enjoys, the limited arsenal of weapons available to the defense, and the high stakes involved (measured in millions of dollars and possibly the effect on innocent corporate stakeholders), the defense bar's rearguard guerrilla warfare to maintain *some* adversity in the corporate criminal context is not entirely inappropriate.

My own bottom line is this: I am not willing to concede defeat on attempting to refocus the issues. If the amount of time, effort, and political good will that was expended on this "Attorney-Client Protection Act" chimera were addressed to the actual causes of the defense's problem—for example, if they caused Congress to take a hard look at the over-extensive standard for corporate criminal liability—we might actually achieve something. I hope, then, that the "Coalition to Preserve the Attorney-Client Privilege" and the Congress will redirect their resources and tackle the critical questions facing us: whether and how to reintroduce adversity into corporate criminal cases.