In the

Supreme Court of the United States

UPJOHN COMPANY ET AL.,	)	
	)	
PETITIONERS,	)	
	)	
V.	)	No. 79-886
	)	
UNITED STATES ET AL.,	)	
	)	
RESPONDENTS.	)	
	)	

Washington, D.C.
November 5, 1980

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ORIGINAL

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UPJOHN COMPANY ET AL.,

Petitioners,

v. No. 79-886

UNITED STATES ET AL.,

Respondents.

Washington, D. C.

Wednesday, November 5, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:56 o'clock p.m.

APPEARANCES:

DANIEL M. GRIBBON, ESQ., 888 Sixteenth Street, N.W., Washington, D.C. 20006; on behalf of Petitioners.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Upjohn Company v. United States.

Mr. Gribbon, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF DANIEL M. GRIBBON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GRIBBON: Mr. Chief Justice, and may it please the Court:

A writ has been issued in this case to review the decision of the Court of Appeals of the 6th Circuit in which both in applying the attorney-client privilege and the work product rule sharply curtails the ability of a client to obtain informed legal advice.

I shall devote the bulk of my argument to that part of the decision which limits the scope of the attorney-client privilege in the case of the corporation. And thereafter I will briefly discuss what is left of the work product issue in the light of the Solicitor General's concession that the 6th Circuit erred in holding that there was no such protection in response to a summons from the Internal Revenue Service.

The court below held in the case of a corporation, the attorney-client privilege protects only communications between a limited number of corporate officials and the corporation's lawyer, those officials being the ones who have the

authority to act for the corporation upon such advice as is given by the lawyer. In so limiting the privilege the 6th Circuit associated itself with with the 3rd and the 10th Circuits and disagreed with the decisions of the 7th and 8th Circuits. Those circuits have adopted the so-called subject matter test pursuant to which the attorney-client privilege extends to communications between the corporation's lawyers and employees of the corporation who communicate with the lawyer concerning matters within the scope of their responsibilities for the purpose of obtaining legal advice or guidance.

The decision of the 7th Circuit adopting this subject matter test, Decker v. Harper & Row, was affirmed here almost ten years ago by an equally divided Court. It is petitioner's contention that this test, the subject matter test, is more consistent with the underlying purpose of the attorney-client privilege in the administration of justice.

Now, this case arises in these circumstances. Upjohn is a manufacturer and seller of pharmaceuticals in the United States and some 150 foreign countries . Early in 1976 Gerard Thomas, Upjohn's general counsel, who is also a director and officer of the Company, was informed by the Company's independent accountants that there was reason to believe that some of Upjohn's foreign affiliates had made payments to or for the benefit of foreign governmental officials in the promotion

of Upjohn business. Mr. Thomas with the advice of outside counsel and with the full support of the chairman of the board set about conducting an investigation to put himself in a position to render legal advice to the corporation concerning all aspects of these payments, including the possibility of civil and criminal litigation.

The investigation that Mr. Thomas and outside counsel conducted consisted really of two parts. One was a questionnaire prepared by them which was sent to some 53 managers of Upjohn's foreign affiliates asking them to put down on paper whatever knowledge they had about possible payments to or for the benefit of foreign governments. Each of these men was advised that his response would be treated as confidential and to this day it has been so treated.

Now, the second part of the investigation consisted of interviews conducted by Mr. Thomas and outside counsel of some 86 employees of Upjohn and its subsidiaries which had responsibility of one kind or another with respect to payments made in foreign countries. Some of those were within the United States and some of them were outside the United States.

The interviewing lawyers made handwritten notes during the course of those interviews. The record shows that those notes reflect factual information obtained from the employees as well as the lawyers' impressions, conclusions, opinions, and speculations at the time.

Shortly after this investigation was completed, Upjohn filed a Form 8-K with the Securities and Exchange Commission which described in generic terms without naming countries or specific amounts that there had been some payments. That was the last heard from the SEC. At no time did the SEC investigate or charge any kind of Securities Act violations on the part of Upjohn.

Now, a copy of this report was simultaneously submitted to the Internal Revenue Service. Thereupon the Service commenced an investigation of Upjohn --

QUESTION: By the SEC or by your client?

MR. GRIBBON: It was submitted by my client. Upjohn submitted it to the Internal Revenue Service at the same time or simultaneously with the submission to the SEC. The Revenue Service very shortly thereafter commenced an investigation of the tax years that were involved in this report and at the very outset of its investigation, before any witnesses had been interrogated, any documents examined, a special agent served upon Mr. Thomas the summons in question here. That summons specifically asked for production of the questionnaires that had been obtained from Upjohn's employees and for all of the notes of interviews conducted by Upjohn.

QUESTION: Is it your submission, Mr. Gribbon, that both items requested were work product?

MR. GRIBBON: Yes.

QUESTION: I know we're not in that aspect of the case now.

MR. GRIBBON: They're both work product and both covered by the privilege. Both work product, because they were done in contemplation of litigation. At this -- and one of the magistrates so found on that.

QUESTION: I know we're talking now about the privilege, not about work product.

MR. GRIBBON: Yes.

QUESTION: And since I've already interrupted you, quite apart from what the scope of the privilege may be in this context or any other, who is the beneficiary of the privilege?

MR. GRIBBON: The corporation is the beneficiary.

QUESTION: The client?

MR. GRIBBON: The client; the corporation.

QUESTION: Not the lawyer, the client?

MR. GRIBBON: Yes. It is the corporation and Mr. --

QUESTION: So only the client would --

MR. GRIBBON: Only the client can assert the privilege. And the client can reject it, waive it, or do anything he wants to --

QUESTION: But the lawyer is the beneficiary of the work product?

MR. GRIBBON: The lawyer is the beneficiary of the work product. There is that difference. I don't think there

is any dispute on that one.

QUESTION: Right. All right.

QUESTION: Mr. Gribbon, while we have you interrupted, does the record show how many of the interviewees have been talked to by the Government?

MR. GRIBBON: The record shows it to this extent, at the time the summons was issued some 25 of the 86 interviewees had been talked to by the Service. I am informed that since that time approximately 20 more have been talked to, so that a number, but less than half, have been interrogated by the Internal Revenue Service.

QUESTION: So that the Service has found a way to get to them?

MR. GRIBBON: Well, they should have. They apparently are not satisfied that they have found a way, and this is really the point I want to make here, that during the course of this investigation and before an action was filed in court to enforce the summons, Upjohn cooperated with the Internal Revenue Service and really gave them everything they could reasonably ask for except the questionnaires and the lawyers' notes, and responded to almost 300 document requests. They gave them a list of the people who had been interviewed and had submitted questionnaires, told them what their positions were, cooperated in permitting them to be examined.

On one point they did have a difference with the

Revenue Service. That is, Upjohn's lawyers took the position that they instructed their witnesses not to respond to questions that did not have an impact on Upjohn's United States income tax returns.

Now, the Revenue Service never did pursue that matter. They never sought the summons directed to the witness and indeed subsequently the Service in a published opinion just really acquiesced, substantially, in that position, that is the scope of the inquiry of the Internal Revenue Service, something that has to do with U.S. income taxes.

Ultimately, of course, this action was filed in court seeking to enforce the summons directed at the questionnaire and the interview notes.

QUESTION: Mr. Gribbon, one minor detail. Did you give them the blank questionnaire?

MR. GRIBBON: Yes. They have the blank questionnaire and the --

QUESTION: But no answers yet?

MR. GRIBBON: No answers. The District Court adopted the view of a magistrate to whom he had referred this matter. which held that the control group test should apply as far as the attorney-client privilege was concerned, and further that none of the people who had been interviewed or sent questionnaires were within the control group. He also found that there had been a showing of need on the part of the

Service for the work product and directed that all of the interviews and questionnaires be turned over to the Internal Revenue Service.

The Court of Appeals affirmed the finding of the District Court and the magistrate so far as the control group test was concerned. It did remand for a determination as to whether any members of this group could be regarded as within the control group. So far as the work product is concerned, in a footnote it rather cursorily said, there is no work product when it comes to answering a summons from the Internal Revenue Service. Now, that is the portion of the opinion which the Solicitor General has conceded is in error.

Now, on brief -- I'll treat this briefly -- the Solicitor General has tendered two reasons why he says, despite the grant of the writ the Court should not resolve the scope of the attorney-client privilege. I submit that neither of these, neither of which was mentioned in his acquiescence in the grant of the writ that neither of them has merit.

It is now urged that the investigation conducted by Mr. Thomas, Upjohn's general counsel, with the assistance of outside counsel, was not for the purpose of rendering legal advice. Now, this contention was not even advanced by any of the government people in the courts below. The magistrate found, as did both the District Court and the Court of

Appeals, that the purpose of the investigation was to put Mr. Thomas in the position to render legal advice to the corporation with respect to all of these matters. And that finding is amply supported by the record and there is no evidence to the contrary.

QUESTION: If Mr. Thomas, even though he'd gone to law school were, say, vice president in charge of personnel, and had sent out this questionnaire, would --

MR. GRIBBON: I don't think the privilege would apply.

QUESTION: So when does it apply?

MR. GRIBBON: When he's acting in his legal capacity.

QUESTION: Not to any --

MR. GRIBBON: Not in non-legal capacities. Now this -- he can have some non-legal duties. It seems to me that in this case, when the chairman says to him, look, this may be troublesome. Go out and find out what you can about it and tell us what our legal situation is.

QUESTION: Well, tell us what the factual situation is. Or his personal situation is.

MR. GRIBBON: NO -- and advice.

QUESTION: That was the purpose of the inquiry, wasn't it? And that could have been delegated, at least arguably, just as well to the vice-president in charge of finance?

MR. GRIBBON: I think conceivably, at least as far as human beings are concerned --

QUESTION: Even though that vice president might be a member of the bar somewhere, he wouldn't be acting as a lawyer. He was getting factual information.

MR. GRIBBON: But I think that Mr. Thomas as a trained lawyer and the Company's chief lawyer, particularly with the assistance of outside counsel, was in a far better position to ask the right questions and to get the answers, and to formulate what was necessary for him to give the corporation truly decent legal advice.

QUESTION: Weren't they factual inquiries?

MR. GRIBBON: They were factual, largely, but inquiries as to when did you do it, who was present, were you aware of the laws, things of that kind, the very things that a lawyer would do when a client walks into the office and says, I may be in trouble here.

QUESTION: Other people might do it too.

MR. GRIBBON: But I don't think they do it as well, Your Honor, and that's why the privilege has been given to the lawyer and not to the financial adviser.

QUESTION: What did you do, and when did you do it?

MR. GRIBBON: No, that's a preliminary question, but in asking him what he does he maybe comes up with something. Well, I was there, I wasn't there, so-and-so was there, three

other people were there. In all legal investigations there are factual inquiries.

QUESTION: Are you saying that the first thing a lawyer should do when he is confronted with a problem by a client is to get the facts?

MR. GRIBBON: I am, Your Honor.

QUESTION: And then he can't have any opinion about the law until he has some facts to which to apply the law?

MR. GRIBBON: Or any opinion he has about the law without the necessary facts isn't worth very much.

QUESTION: Mr. Gribbon, what if the general counsel without the authorization of the board simply felt that there's something wrong here and I'm going to blow the whistle on this board because I think they're covering up some stuff, and went around and conducted exactly the same interviews? Would you claim the same privilege for him then?

MR. GRIBBON: If he was acting for the corporation and I think in the case you have given he would be acting for the best interests of the corporation, I think the corporation would have the privilege. Now, he wouldn't be able to waive it, but the corporation would have the privilege for whatever materials and whatever opinions and whatever impressions he gathered with respect to his inquiry.

QUESTION: What would happen if you get two corporations and one gets his general counsel to do it and another

one gets its vice president who is not a lawyer to do the exact same thing? One's governed by one rule and the other is not.

MR. GRIBBON: I think the indications are that in that situation where a senior official not a lawyer did the job that no privilege would attach.

QUESTION: And then the next corporation did the exact same thing with a man who happened to be a member of the bar?

MR. GRIBBON: More than a member of the bar?

QUESTION: The same question now.

MR. GRIBBON: A trained lawyer.

QUESTION: The same questionnaire.

MR. GRIBBON: But I say -- well, it might be or it might not. That's --

QUESTION: To the client it would be the same.

MR. GRIBBON: Well, if you'd --

QUESTION: If you buy that, you're going to be in trouble. I can't hold you to it. I can't hold you.

MR. GRIBBON: If a finance president can do exactly the same job that a trained lawyer can do, then I have to go along with your answer. But the theory on which the privilege has been there, the theory on which lawyers work is that they bring some insight, they bring some skill to this matter, in developing the facts and in forming opinions that can't be

done by the personnel director or by the financial vice president or even by the --

QUESTION: I'm glad to see somebody else recognize the difference between a lawyer and a member of the bar. Thank you.

QUESTION: Mr. Gribbon, supposing when he got all through when his investigation, he said to the president, my advice to you is to fire the ten branch managers. Would the privilege survive?

MR. GRIBBON: I think the privilege would survive as to the communications. I'm not sure that there's privilege on the advice, fire the 10 managers. But I think on the communications that the managers I presume you're speaking of, Your Honor, may --

QUESTION: What I'm really inquiring is, how do we know whether the advice that this executive, who is both a lawyer and an executive, gives is properly considered legal advice, because it may well be kind of a blend of management and legal advice?

MR. GRIBBON: Well, I suppose that's probably true even if an outside counsel had done it entirely. We're not in airtight compartments. But in this case, where there clearly were legal problems, not only domestic tax problems, SEC problems, shareholder suits, but local problems in the country in which they were operating, you clearly needed a trained

lawyer to find the facts and assess them. And that's what Mr. Thomas did. I suppose the ultimate answer to what you're suggesting is an in camera examination by a judge to see whether the matters that were here are privileged or not. I think most judges prefer not to do that and I think in this case it wasn't necessary and it wasn't done. But on the face of it, what Mr. Thomas assisted by outside counsel was doing was a lawyer's job and not -- he's not a financial man anyway.

QUESTION: But this is -- this wasn't the rationale below, I take it, whether it was legal advice or not?

MR. GRIBBON: No.

QUESTION: But the Government would like to make it --

MR. GRIBBON: The Government now feels that they'd like to back away from the scope question by saying it wasn't legal advice. That's a rather late entry in the matter and I submit that it is clearly on this record in both the courts below and the magistrate, who were not particularly sympathetic to Upjohn's position, assumed and found that it was legal advice.

QUESTION: Do you think the Government is entitled to make, as a respondent entitled to make this argument? Or would it change their relief?

MR. GRIBBON: I think they're probably entitled. I believe under the decisions of this Court they can make

almost any kind of an argument of this kind.

QUESTION: Unless it would expand their relief.

MR. GRIBBON: No, I don't think it would, necessarily. It's just another ground. I raise it because I think their tardiness in bringing it forth is a very good indication of the validity of the argument that they're putting to you.

QUESTION: Well, they couldn't rely on it at all if they had not preserved it on their appeal from the District Court to the Court of Appeals.

MR. GRIBBON: Well, they didn't, they didn't preserve the matter of whether it was legal advice or not. That came into the case in the Supreme Court in the respondent's brief. Now, the graver point, the second point, was made by the Government below but it was rejected by the Court of Appeals. The second reason they have suggested for not getting to the scope of the privilege is that Upjohn by cooperating with the Internal Revenue Service and giving them various facts regarding these payments waived the privilege. And to that one, the law is clear that it is only when you give up communications that you are in a position to waiver, and not simply when you give facts that may have been disclosed, may have been obtained, even in the course of an investigation. But on that one the Court of Appeals did find against them, and there was nothing in their response to the Petition for cert. which said anything about that point.

In that respect, the lower federal courts have recently in a number of opinions said that where a corporation or anybody else is voluntarily cooperating with the law enforcement authorities, that that in and of itself would not be regarded as a waiver of whatever privilege that they might have.

But, basically, the waiver comes down to waiving something that was communicated, and that wasn't done here. I submit, therefore, that the Court should proceed to resolve this matter of the scope of the privilege which has bred confusion in the lower courts for about 20 years now.

And while this case involves a corporation, I submit there is no reason in principle why what is decided here should not be equally applicable to any other organization whose structure is such that many people can act for it and bind it, but only a relatively few are able to make the decisions.

Now, examples of such organizations would be agencies of the Federal Government, labor unions, fraternal organizations. This point is particularly emphasized in the brief filed here on behalf of the Federal Bar Association, which points out that agencies of the Federal Government will be handicapped in their ability to carry on if this control group test as adopted by the lower court is to be adopted by this Court.

It's been generally agreed that the justification for

the privilege is to promote observance of the law and effective administration of justice. It does this by permitting attorneys to be and become fully informed of the relevant facts. As this Court earlier this year in the Trammell case, in discussing the attorney-client privilege, said, that the basis for it is to permit the lawyer to know everything about the client's reasons for seeking representation if his professional mission is to be carried out.

Corporations -- certainly no less and I submit, to a greater extent than individuals -- require legal advice. Most of the business of this country is conducted by corporations. They are daily met with a maze of laws and regulations. I would note that the interest of the bar which is shown here by briefs filed in support of petitioners' position should not be taken to mean that the scope of the attorney-client privilege is merely a convenience for lawyers in the practice of their profession. If the control group test were to be adopted, I am sure there will be a great deal of professional frustration on the part of lawyers in trying to advise corporations.

But the real losers, if that test is applied, is not going to be the lawyers. It's the clients who need legal guidance, corporations, government agencies, and other organizations of that kind where the authority is greatly diffused and yet where individuals without authority can certainly bind

the corporation.

QUESTION: Do you think it would have a tendency to lead lawyers to write less and have long distance telephone calls more?

MR. GRIBBON: I think it would, Your Honor. I can't say certainly that it would but it seems to me that if everything they do in advising their client is going to be turned over to their adversary, it's just human nature that they're going to be more careful, which is unfortunate. They should be candid at all times. The ethics call for them to be candid. And what's going to happen if their intimate conversations with clients and from the lawyer's point of view, these employees, whether they're decision makers or not, are clients, because they are giving them facts that are necessary for the lawyer to have in order to advise the corporation.

Two reasons, basically, as I understand it in all that has been written about the control group test since Judge Kirkpatrick first set it out about 20 years ago, two reasons appear to be what come forward as the reason why the control group test should be adopted.

First of these is simply that there's no necessity for it. It is argued that corporate employees, unlike other individuals, will speak candidly, voluntarily, whether there's a privilege or not. They don't have the apprehensions of ordinary individuals, or if they do, they will subordinate

them to the will of the superior officer.

Now, I think one looks back at the privilege itself insofar as an individual is concerned, it probably never could be established that in fact the privilege is necessary in order to encourage people to be candid and frank with their lawyers. There are a lot of reasons apart from the privilege which would indicate such candor. On the other hand experience shows that many people do not speak candidly. For a couple of centuries we have embraced the notion that it is helpful not to the individuals involved but to the effective administration of justice to encourage people, all kinds of people, to be completely candid by letting them know that what they say to their lawyer is not going to be used the next day against them.

So therefore, I think the no necessity argument really is without merit. It is true, as the proponents of the control test urge, that the employee does not get complete protection. The protection the client protects, the privilege is not his, it's the corporation's. That is true, of course, not only of the subordinate employees but also of the management employees. And just because they're management today doesn't mean that they're going to be management tomorrow, because the directors are not going to waive that privilege. The privilege is for the benefit of the corporation. But in this respect the employees are in this position of tension

between their individual likes and dislikes and those of the organizations to which they belong, but it's not at all unique --

QUESTION: Well, isn't there tension in more ways than one here, isn't there? Because the corporation as you describe it is a very abstract entity and -- the board of directors are human beings who may have tensions and conflicting interests themselves.

MR. GRIBBON: I think that's right. I didn't mean to suggest it was so abstract, but there are a lot of different people that are involved and ultimately, I presume, the shareholders. And in some instances shareholders have come in and waived the privilege. That isn't so likely in a big, publicly held corporation, but it's not impossible. And certainly the directors, certainly a new management can come in, so that on this ground there is really no solid basis for distinguishing between the subordinate employees who fairly frequently will have the facts that are necessary to give informed information, and the top management people. Neither group has complete protection in the way that an individual does. But they do have some protection, and experience shows that it has been exceedingly helpful in obtaining their cooperation and experience shows that in most instances the corporation does not lightly waive that privilege. It behaves as Upjohn is behaving here, zealously guarding the privilege

of some 80 employees throughout the world.

The second argument that is made for the control group test is something in the nature of saying that it hides facts from discovery and it also enables the top management to close its eyes to disagreeable facts. Now, as to the discovery argument, I submit, though it has often been made it is without merit, because the privilege does not hide facts from discovery. Indeed, Rule 33 of the Federal Rules requires that a corporation go on out and get all the facts that all of its employees have, so that if you work under the rules you can get all these facts. All that is hidden, all that is kept from disclosure, is the communication.

Indeed, in this case the Internal Revenue Service --

QUESTION: The privilege generally carries both the communications from the client to the lawyer as well as the advice that the lawyer gives the client, isn't that correct? It's a two-way communication between the two, isn't it?

MR. GRIBBON: Generally speaking -- yes, on the theory that the lawyer can't really give the advice without incorporating some of the facts.

QUESTION: Without having factual knowledge. So the privilege, quite apart again from the particular scope of the privilege with respect to a corporate client, the privilege generally covers the two-way communications brtween lawyer and client?

MR. GRIBBON: Yes, Your Honor. And that is the way that we would have it interpreted here. And I was going to say that in this case, rather than hindering the Internal Revenue Service in its efforts, what Upjohn has given to the Internal Revenue Service as a result of this precautionary investigation that it undertook, has given them an ideal road map to the repositories of the information. It hasn't given them the lawyers' analysis of the facts, or the impressions they had but it has certainly given them everything short of that, and in most instances that's one of the risks that a corporation takes when it embarks on an investigation of this sort.

Now, so far as insulating the top management from disagreeable facts, I submit that that is sheer speculation. There was no evidence of that in this case, there's no evidence in any other case that's been cited that that is likely to be the fact. It's true that the top management doesn't know all the facts of corporate actions. But that isn't the result of the privilege or the lack of the privilege. That reflects the breadth and complexity of the modern corporation's activities. And surely there may be some changes in corporate governments; it's been under discussion for a long time. But I would submit that whatever changes are made in the relations between shareholders, directors, public bodies, the public interest is still going to require that observance of

the law and the efficient administration of the justice are best served by having a corporation get a full opportunity to have informed legal advice.

For all the reasons I've submitted, the subject matter test rather than the control group test stands the best chance of achieving those objectives.

MR. CHIEF JUSTICE BURGER: Mr. Wallace?

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. WALLACE: Mr. Chief Justice and may it please the Court:

The principal question before the Court is how to accommodate the attorney-client privilege to the corporate form of doing business.

Analytically, at one logical extreme, the privilege would not apply at all to corporations, because it's only the corporation who is the client and it is only to the entity that the lawyer owes his professional responsibility and the communications by necessity are with individuals to whom the lawyer does not owe this kind of fiduciary responsibility.

We do not advocate this approach to it, but this is one analytical, logical extreme. At the other logical extreme, all communications between an attorney for the entity and any employee of the entity would be privileged. Because the entity can communicate only through its employees, this would result

in a much more expansive scope of the privilege in the corporate form of doing business than what we understand the privilege to be with respect to employees of a proprietorship or of a partnership and indeed, what the Court in Hickman v. Taylor understood the scope of the privilege to be with respect to employees of a partnership.

QUESTION: Doesn't the privilege extend to any agent of a client who's acting as an agent of the client?

MR. WALLACE: Acting as an agent. But there is considerable ambiguity in the law about that. I really planned to get to that a little bit later on, but there's a difference between acting as an agent and communicating what the client knows and wishes to communicate. The graphic example is the translator, or a communication from the agent who is --

QUESTION: Imparting his own impressions.

MR. WALLACE: -- himself -- imparting his own knowledge that the client may not know.

QUESTION: Which the principal may not know.

MR. WALLACE: That is correct. And there has been much confusion in analysis about this.

Between the two extremes that I have posed, no approach to accommodating the privilege to the corporate form of doing business is without some analytical inconsistency. And yet we think that a reasonable accommodation should be made, and that the privilege does apply, and the courts have

strained to make a reasonable accommodation.

QUESTION: We're dealing here only with a proposed evidentiary rule in the federal courts. Is that correct?

MR. WALLACE: That is correct, Mr. Justice, under Rule 501 of the Rules of Evidence this Court and the other federal courts are to apply the common law interpreted in the light of reason and experience to federal question cases.

QUESTION: And that's -- those are the metes and bounds of our inquiry.

MR. WALLACE: That is the metes and bounds. Now, there is an attraction for the legal profession, one might even say a temptation, to take an expansive view of this particular privilege, a view that would encourage communication as much as possible to attorneys and thus enable them to improve their representation of clients, and incidentally reduce the possibilities that they may have to be in the capacity of witnesses at any time.

QUESTION: Can a lawyer from whom advice is sought properly perform his function if there isn't a complete and free flow of information, factual material from the client to the attorney, whether it's a corporation, an individual, or whatever?

MR. WALLACE: Well, the lawyer has to get information from whatever sources he can and of course --

QUESTION: But isn't the primary source the client

in most cases?

MR. WALLACE: It is the primary source, but the point I was about to make, Mr. Chief Justice, was that indeed the information that the lawyer is able to secure and the services that he would be able to perform for the client would be enhanced if the privilege were to extend to third party witnesses that the lawyer wants to interview in doing the client's business, and it has never been contended that the privilege extends that far.

Our position is that the proper starting point in approaching the question of how best to accommodate it is the starting point that this Court has used with respect to all privileges, and that is that the public has the right to every man's evidence and that each privilege should be construed no more broadly than necessary to protect the weighty and legitimate competing interest. This is the approach that has been used in construing the President's executive privilege and construing privileges asserted on behalf of the press --

QUESTION: Well, you don't have to go outside of the attorney-client field for a precedent, do you? How about Cardozo's opinion in United States v. Clark, where he says that if the information communicated suggests fraud or crime, it's not privileged.

MR. WALLACE: Well, indeed, in a more recent opinion

this Court said that the same principle applies to this privilege and to the legal profession, and that is an issue against the United States. From this starting point, and with a view toward the need to encourage legal advice to corporations and to encourage corporate self-regulation and with a view toward concerns of the Federal Government itself, we concluded after a survey of the views of a large number of government agencies -- I might say, an unusually large number in preparing the brief for this Court -- to ask this Court to adopt the so-called control group test which has been the prevalent approach in this area. And I might add that no agency that we consulted dissented from this conclusion.

QUESTION: I suppose whatever evidentiary rule is established in this case would be -- arguably, at least, equally applicable to a governmental agency, wouldn't it, federal governmental agency?

MR. WALLACE: Well, we understand this.

QUESTION: Well, wouldn't it be? That's a question.

MR. WALLACE: I'm not sure of that.

QUESTION: I'm not sure either.

MR. WALLACE: We're willing to make the argument of whether or not that is the case.

QUESTION: But it wasn't in that connection that you conducted an investigation or an inquiry among the various agencies?

MR. WALLACE: It was about the position to take with respect to corporations. There was some awareness that the decision here might affect privilege within the Government, but it -- that's affected by so many other laws at this point, Mr. Justice, that we're not sure that it would have a meaningful impact.

In any event, in all candor, the agency that showed the most interest in the question, outside of the Department of Justice, was the Securities and Exchange Commission, which is not concerned about disclosures from itself.

Now, the advantages that we see in the control group test include in no small measure its simplicity and its flexibility, its adaptability to the situation of the particular legal advice being sought, and the particular information being secured. And we regard it as a proper analog to the application of the privilege in a non-corporate context. Speaking of its simplicity, unlike the other tests that have been proposed, where there seems to be constant discussion of possible qualifications or refinements, the control group test has remained unchanged since its original formulation by Judge Kirkpatrick in 1962 in a case which we quoted, page 37 of our brief, the City of Philadelphia v. Westinghouse Corporation. It's the test that has been adopted by the Uniform Rules of Evidence, which six states have adopted by statute during the 1970s. And while some other states have taken a

different view in their judicial decisions, it has been the prevalent view in the federal courts as well as perhaps the prevalent view in the states. Many of the states -- some specifically to this question.

QUESTION: Did the Proposed Rules of Evidence for the Federal Courts prior to their amendment in Congress take a position on this?

MR. WALLACE: The -- a draft originally control group test but after this Court's 4-to-4 affirmance in the Harper case, that was changed to not to try to resolve it, just to leave the question unresolved.

QUESTION: So that's the way it went to Congress?

MR. WALLACE: That's the way it went to Congress. I think directly because of this Court's decision.

Indeed, the 8th Circuit's en banc decision in Diversified Industries in 1977 referred to the control group test which that court was rejecting as the most widely used test, and the test that predominates. That's on page 608 of Volume 572 of the Federal Reporter, 2d, which is another way of saying that perhaps that is the test that reflects the common law at that time, which the Court of course is free to interpret in light of reason and experience in applying Section 501. The main thing that has happened since that decision of the 8th Circuit is that two more Courts of Appeals have spoken on the subject. And both of them have adopted the control group test.

The court below is the second of these. The first of the courts to do this was the 3rd Circuit in 1979 in an opinion by Chief Judge Seitz, a former chancellor of the State of Delaware, who is certainly one of the most informed judges on the federal bench about the realities of corporate life, and of corporate legal practice. In our view --

QUESTION: Mr. Wallace, can I just ask one background question? You suggest this is more or less the common law test, by virtue of history, am I not correct in remembering that Judge Kirkpatrick's opinion is the first announcement of this test?

MR. WALLACE: You are correct, Mr. Justice.

QUESTION: And it was a replacement, or at the time it was being considered as -- an alternative that was considered was the Radiant Burners test of no privilege at all. So there isn't really any law in common law that supports it.

MR. WALLACE: There's not a law in common law but we have to under Section 501 use whatever common law has been developed.

QUESTION: Well, what was the test or was there before that, before the control group test was invented?

MR. WALLACE: Other than what Mr. Justice Stevens has suggested, the possibility that there was no privilege at all, there really hadn't been developed any test in the corporate context. Indeed --

QUESTION: Well, has it been denied?

MR. WALLACE: I'm not aware of it, Mr. Justice.

QUESTION: Well, in one case, the Radiant Burners case, denied it, and that was rejected.

MR. WALLACE: Other than Radiant Burner I'm not aware of early law on the question. The canons of ethics and most legal writings have proceeded on the assumption that you know who the client is and it's the communications from the client that are privileged and have given scant attention to this problem of the client as an entity other than to say that the lawyer's duties are to the entity.

QUESTION: Is it appropriate or necessary that we fish or cut bait right at this moment in view of the wording of the rules? I mean, do we have to choose for all time between one and the other in every given possible situation?

MR. WALLACE: Not necessarily, but it's hard for me to see how the rationale adopted won't cut one way or the other.

QUESTION: Well, but common law developed over three or four centuries and it certainly grew by accretion.

MR. WALLACE: Yes, that is correct. It's possible that the Court's decision here could be distinguished in some way in a future case, depending on how it's written, but nothing has occurred to me that wouldn't require the Court to consider the rationale of the two principal tests that have been developed, other than the alternative grounds for

affirmance, which we have raised. But we're not urging the Court to avoid the principal question on which it granted certiorari. We felt constrained to raise them in our analysis of what was presented here.

Now, I'd like with the Court's permission to turn --

QUESTION: May I ask one other question -- two kind of factual questions, if I may.

First of all, do you have the identity of the people who received the questionnaires for the Government?

MR. WALLACE: I believe so.

QUESTION: Is there any reason why the Government couldn't have -- it has the questionnaire, I understand. It couldn't have just sent the same questionnaire to all these people? I was wondering what --

MR. WALLACE: If we have the current addresses. I'm not sure we have the current addresses. Some of them are no longer employed by the Company, but we could send them. But they would not be under legal compulsion to answer them, nor would we have any way of knowing whether the answers are the same as the answers that they gave to Mr. Thomas.

QUESTION: No, but presumably they'd be truthful answers; that's all.

MR. WALLACE: If they were answered. There is testimony to the effect that the Company has instructed them not to disclose anything except with respect to those

transactions that the Company has decided bear on the Company's tax liabilities.

The problem with these payments is that for the most part they're to third persons -- and what the Company was trying to -- rather than to government officials. And the Company was trying to find out, according to its testimony, whether those were legitimate commissions to non-governmental persons or whether those persons were in effect a conduit for payment to a public official.

And the Company having sorted out for itself, is asking the Internal Revenue Service to accept its judgment about which ones may be pertinent to its tax liability.

QUESTION: May I also ask, on the interview aspect of the inquiry, it's the Government's view, I gather, that if these people had been, say, grand jury witnesses or something like that, but junior employees, but they were interviewed after testifying before a grand jury for the purpose of advising the corporation as to what position to take in response to a pending indictment, something like that, there'd be no privilege attached to those interviews? Because the people, by hypothesis, were not -- the witnesses would not be in the control group.

The fact that it's a tax investigation isn't particularly important in your analysis. The relevant test is what I'm asking.

MR. WALLACE: I think that is correct. That is correct. The opinion of the 3rd Circuit, to which I want to commend the Court's attention, is to us the most penetrating opinion written in this field, because it refers to and responds to all of the authorities on which the petitioners rely here in advocating that it's time for the control group test to be abandoned, and responds, we think, in a very convincing way. And if I may, I'd like to refer briefly to some excerpts from Chief Judge Seitz's opinion for the 3rd Circuit, interspersed with some comments of our own.

QUESTION: Does this direct itself to both the privilege and to the work product?

MR. WALLACE: It does not relate to the work product question, although work product is referred to in the course of the discussion.

And the first thing that the Court of Appeals recognizes is that criticism of the control group test usually begins with the observation that in the corporate setting the people who know the relevant facts and the people who make the decisions are seldom the same. And if an attorney is to give sound advice to the control group, he must secure information from outside the control group.

And the Court says, "Although we agree that an attorney often needs to secure information from lower echelon employees, we are not convinced that extension of the corpora-

tion's attorney-client privilege would enhance his or her ability to secure that information. The confidentiality offered to non-control group employees would be quite illusory from their standpoint, because they have no control over the privilege itself. Their communications remain confidential only in the sense that they are not released to outsiders, and only as long as the corporate control group desires to assert the privilege.

"If the employees had engaged in questionable activity the corporation clearly would have the power to waive the privilege and to turn the employees' statements over to law enforcement officials.

"Privilege or no privilege, lower level employees would confide in corporate counsel at their own risk. Conversely, where no questionable activity is involved, non-control group employees have little reason not to relate information to corporate counsel, especially where a superior has instructed them to do so."

Now, this seems to us to be directly relevant to the usual approach of trying to determine whether a substantial and weighty competing interest requires a privilege to be more broadly construed than its applicability to those who have the authority to seek the advice of counsel, to act on the advice that is sought, and indeed to waive the privilege.

Ordinarily, in a lawyer-client relationship, the

attorney can disclose the confidential communication to no one else. Here you start off on the premise that it's being secured in order to be disclosed to other higher officials in the corporation, or in this case, perhaps, to be acted on by the general counsel himself in one of his other capacities.

QUESTION: Would you think that in some circumstances, Mr. Wallace, the lawyer would be precluded from even conceding or responding with an answer that he was representing the client?

MR. WALLACE: Well, that is what the American Bar Association is now struggling with in revising the Code of Ethics that was adopted as recently as 1970, but one of the shortcomings that the committee working on them now has found is that it doesn't adequately address this problem of who is the client, and the draft now being circulated includes a provision for giving a so-called Miranda-type warning to the employee when counsel is interviewing the employee so that the employee knows that he's not really going to have the benefits of the confidential communication.

QUESTION: Well, I'm thinking of a situation specifically where a government agent would come to a lawyer and say, I want to talk to you about this client, naming the client. And first, I understand you are representing this man or this company. Is the lawyer free or not free to say, I will not discuss anything with you including whether I am or whether I

am not representing him?

MR. WALLACE: My understanding is that the attorney-client privilege never has extended to the fact of representation, that it did not protect from disclosure whether or not the attorney represented the individual. That has been my understanding. It isn't a matter that we looked into with reference to this case.

QUESTION: Well, surely, many lawyers have acted on that assumption that they would not respond to any questions about whether they represented a given client.

MR. WALLACE: If they did, they were in error, Mr. Chief Justice. But as I say, it's not a matter we looked into with reference to this case. The attorney in this case is the attorney for the corporation.

QUESTION: But it bears on how far the relationship can be penetrated, does it not? They can be --

MR. WALLACE: I always thought that it did not extend either to the identity of the client or to the fees, if I recollect the law correctly.

QUESTION: Mr. Wallace, under the subject matter test, if the lawyer makes the investigation and collects the statements from the witnesses and then writes an opinion letter to a member of the control group who asked him to do it, and who had told the employees to cooperate, he writes a letter but he attaches all the statements. Are those statements

privileged in the hands of the member of the control group from discovery from that member by the Government?

MR. WALLACE: I think that's an arguable question under the subject matter test. You posited the question under the subject matter test.

QUESTION: Mr. Wallace, suppose a member of the control group himself had carried out the investigation and had collected all the statements from the witnesses, surely you could get them then?

MR. WALLACE: Surely.

QUESTION: But instead he tells the lawyer to gather them, and the lawyer gathers them and then gives them to the control group member.

MR. WALLACE: Well, we would certainly want to argue that using the attorney as a conduit in that fashion would not insulate from discovery, what would otherwise be discoverable.

QUESTION: And you'd say that, Mr. Wallace, under either test?

MR. WALLACE: Under either test we would make that argument.

QUESTION: Mr. Wallace, this question arises, I suppose, most frequently, or at least frequently, not in the international context of this case but rather in the more mundane case of a truck owned by the corporation getting involved in an automobile accident or a products liability claim

or something like that, in which the lawyer is going to talk to the employees of the corporation that are directly involved, and probably the top officers or directors of the corporation don't know or care anything about that particular lawsuit. How would your test apply there? How would either test apply there?

MR. WALLACE: Well, one has to inquire who it is that has the authority to ask for the legal advice and to --

QUESTION: Well, a lawyer represents the corporation and the corporation will be liable under respondeat superior if it's found that its agent was liable in driving the truck, or if its product was what caused harm.

MR. WALLACE: Well, I think the control group with respect to that question is whoever in the corporation has the authority to direct counsel as to what to do in the case, whether to settle for a certain figure or to litigate, or something.

QUESTION: Well, nobody directs -- the foreman, the man's foreman just said, our lawyer is Joe Smith, call him, Mr. Joseph Smith. Nobody who's very high in the corporation ever knows about this, or cares about it.

MR. WALLACE: Well, someone has directed the foreman about who will represent the corporation in these circumstances so that the foreman knows what to say to the person on the other side and it seems to me that the control group has to be

whoever can make the decision or contribute substantially to the decision with respect to how the litigation should be resolved.

QUESTION: Presumably somebody in the control group or the control group generally decided to hire Mr. Joseph Smith as its general counsel, Smith & Jones. But from then on, the general counsel just does that kind of work for the corporation. And many of these, much of its legal work, would be in cases about which the higher echelon control group would not know or care.

MR. WALLACE: Well, the --

QUESTION: But if you apply the test, Mr. Wallace, would it not be true that say, you had an insurance manager or somebody who handled personal injury settlements. Communications between him and the lawyer would be privileged but the interview between the lawyer and the truck driver and the man who loaded the truck about what happened at the accident scene, all that would be open season. There would be no privilege.

MR. WALLACE: Not open season. The work product --

QUESTION: But no privilege would apply.

MR. WALLACE: -- and that is a qualifying exception --

QUESTION: Oh, no, I see. There would not be attorney-client privilege.

MR. WALLACE: That's -- the attorney-client

privilege is an absolute bar. The work product privilege is what was involved in --

QUESTION: Qualified privilege.

QUESTION: -- Hickman v. Taylor, and that indeed was interviews of witnesses. They were called in the opinion, but they were --

QUESTION: But they would be just like third-party witnesses as far as the test was concerned?

MR. WALLACE: They would be treated like third-party witnesses. And indeed, at one point in the Hickman opinion they were referred to as if they were third parties, even though they were actually employees

QUESTION: Of course, they're not treated as third-party witnesses in court, are they? In court they're treated -- well, they'd have to be a managing agent, wouldn't they?

QUESTION: Well, if a corporation has a general counsel and he's just simply authorized to settle or litigate all personal injury actions against the corporation, and he does the investigations and does the settling, and he just sends something to the treasurer when he settles one. I suppose you would say the corporation has no -- there is no privilege in that situation?

MR. WALLACE: There is privilege but only if he communicated with someone who had authority to act on his legal advice.

QUESTION: Yes, but although he is the sole person who is authorized, who has been authorized to make these settlements and decide them on the part of the corporation, he would not be a control group person as far as you are concerned, and you wouldn't recognize that he's communicating with himself?

MR. WALLACE: That's right, Mr. Justice.

QUESTION: So you'll just say, in that circumstance there just isn't any attorney-client privilege?

MR. WALLACE: Yes. It seems to be the implication, and it isn't something that we've given attention to.

QUESTION: Yes, I just wanted to --

MR. WALLACE: Perhaps it's something that could be reserved for another day, as Mr. Justice Rehnquist --

QUESTION: I wanted to find out what your position was.

MR. WALLACE: Well, I have limited time. I do want to mention that in the 3rd Circuit's opinion the court also directed its attention to other asserted problems with the control group test and answered them in ways that all we can do is at this point commend to the attention of the Court.

The contention that in some way the use of legal services will be diminished by a narrow privilege or a narrower scope to the privilege should be reflected upon in light of this Court's decision in Couch, which noted that there is no

privilege at all for communications between an accountant and his client. My time has expired.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Gribbon?

ORAL ARGUMENT OF DANIEL M. GRIBBON, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. GRIBBON: May it please the Court:

I should like to remark on two matters covered by opposing counsel. First, Mr. Justice White, in answer to your question, there was law before Radiant Burners and Judge Kirkpatrick's opinion. In 1950 Judge Wyzanski in the United Shoe Machinery case, a characteristically scholarly opinion, enunciated the subject matter test, and as far as I know it was never questioned. It was taken to be the law thereafter.

Judge Kirkpatrick in the early 60s articulated this test, and I think the problem with it is that he made the assumption that the subordinate employees are not part of the corporation, they are witnesses.

QUESTION: Did he have Judge Wyzanski's opinion?

MR. GRIBBON: I don't think he had -- if it was there? I'm not sure, Your Honor, whether he distinguished it or not. He had Radiant Burners in front of him, but Judge Wyzanski's opinion was well publicized and was really hornbook law at that time until Judge Kirkpatrick's decision came along. What I'm saying is that he took the view

that anybody outside the control group was simply a witness or an observer and should be treated that way. And I submit to you that that is just an incorrect view. These people that Mr. Thomas and outside counsel interviewed are the actors, they're the participants. It isn't the control group back in Kalamazoo that's going to know anything about this matter if it's ever litigated.

QUESTION: Mr. Gribbon, when you talk about decisions in the federal court. But I suppose that there must have been a lot of state litigation involving these questions?

MR. GRIBBON: Your Honor, I believe there'd been very little. I think it has simply been assumed that when you spoke with a client, anybody who was a part of the client was entitled to have the privileged communication. And the employees were required to --

QUESTION: Did Judge Wyzanski treat it as if he was writing on a clean slate, or --

MR. GRIBBON: Not really -- he more or less did. It was put to him in the course of a discovery proceeding in a major antitrust case, and then he resolved it, and I think it was consistent with what had been in the law before then.

Now, it is this distinction of who is the client and who is the witness or observer that I think is basically incorrect in the control group test, because I don't think it meets the question that the lawyer has got to be completely

informed and the only way he's going to be informed is by talking with those who were doing the questioned action --

QUESTION: Well, Mr. Gribbon, has there been some litigation, either in the state or federal courts, where in an individual proprietorship when the same question comes up about employees of the individual proprietorship?

MR. GRIBBON: It has, Your Honor.

QUESTION: Or employees of a partnership?

MR. GRIBBON: Agents of an individual are covered by the privilege.

QUESTION: Or agents' employees?

MR. GRIBBON: Employees? Yes.

QUESTION: Say there's an individual proprietorship and he has an employee that drives a truck, who gets in a wreck, and the individual proprietor tells a lawyer to go out and investigate that, and he does. And the truck driver is told to cooperate with the lawyer, and he does. Now, are there cases like that around saying it's privileged?

MR. GRIBBON: There are cases, they do mix up the work product with attorney-client privilege.

QUESTION: But are there attorney-client privilege cases that say that's privileged?

MR. GRIBBON: Attorney-client privilege? Yes, Your Honor. The ordinary master-servant relationship.

QUESTION: Well, how is it that the uniform rules

came out the other way?

MR. GRIBBON: The Code of Evidence came out that way without very much discussion and has been adopted without very much discussion. The reason cases in the state courts now deal with this matter and tend very strongly to go to the subject matter test as being more responsive to the purposes of the privilege.

Let me finally comment, counsel's contention that the control group test is simple and easy to apply couldn't be more misleading. It is dreadfully difficult to apply, because until after the fact you don't know who is in the control group. There are cases that say a vice president is and cases that say a vice president isn't. And as long as it is unpredictable, like that, you've got to be on the safe side and assume that very few people are going to be in there. For predictability, the subject matter test has all the advantages.

QUESTION: Is yours easy to apply?

MR. GRIBBON: I think it is, Your Honor. The attorney-client privilege is a complex subject. There are a lot of tantalizing questions, but I think as a test it is far easier, far more predictable than the control group test.

In closing, Your Honor, I would just like to say that I think Justice Stevens' questions about why the Internal Revenue Service didn't go after the people who were interviewed

and who signed these questionnaires really discloses what the Internal Revenue Service is doing here. They're not interested in the facts, they either have them or they can get them. What they want is the lawyer's input. And that's what we're fighting about here.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:59 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

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No. 79-886

Upjohn Company et al.

v.

United States et al.

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BY: William J. Wilson