

The Burger Court Opinion Writing Database

Upjohn Co. v. United States

449 U.S. 383 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



19. Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

No. 79-886, Upjohn Co. et al. v.
United States et al.

From: The Chief Justice

Circulated: JAN 8 1981

Not circulated: _____

CHIEF JUSTICE BURGER, concurring in part.

I join in Parts I and III of the opinion of the Court and in the judgment. As to Part II, I agree fully with the Court's rejection of the so-called "control group" test, its reasons for doing so, and its ultimate holding that the communications at issue are privileged. As the Court states, however, "if the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected." Ante, at 8. For this very reason, I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts.

The Court properly relies on a variety of factors in concluding that the communications now before us are privileged. See ante, at 9-10. Because of the great importance of the issue, in my view the Court should make clear now that, as a general rule, a communication

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

From: The Chief Justice

No. 79-886

Circulated: _____

Upjohn Company et al.,
Petitioners.
v.
United States et al.

On Writ of Certiorari to the United
States Court of Appeals for the
Sixth Circuit.

Circulated: JAN 9 1981

[January —, 1981]

CHIEF JUSTICE BURGER, concurring in part and concurring
in the judgment.

I join in Parts I and III of the opinion of the Court and in the judgment. As to Part II, I agree fully with the Court's rejection of the so-called "control group" test, its reasons for doing so, and its ultimate holding that the communications at issue are privileged. As the Court states, however, "if the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected." *Ante*, at 8. For this very reason, I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts.

The Court properly relies on a variety of factors in concluding that the communications now before us are privileged. See *ante*, at 9-10. Because of the great importance of the issue, in my view the Court should make clear now that, as a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any the following functions:
(a) evaluating whether the employee's conduct has bound

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 16, 1980

RE: No. 79-886, Upjohn v. United States

Dear Bill:

I expect to be able to join your fine opinion in this case. But recognizing that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected," Court opinion, at 8, would you consider stating the test for application of the privilege more concretely? One possible formulation would be that the privilege applies when a lawyer, acting in a legal capacity at the authorization of the management of a corporation, communicates on a confidential basis with an employee whose actions or statements may legally bind the corporation, whether by the doctrine of respondeat superior or otherwise, on a matter related to such actions or statements. Any statement of exceptions could be left to future case development.

Sincerely,



Justice Rehnquist
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 19, 1980

Re: No. 79-886, Upjohn Co. v. United States

Dear Bill:

Thank you for your response to my suggestion. Under the
circumstances, I shall join your opinion as it is.

Sincerely,

A handwritten signature in cursive script that reads "Bill".

Justice Rehnquist

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 11, 1980

Re: No. 79-886, Upjohn Co. v. U.S.

Dear Bill,

I am glad to join your opinion for
the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 11, 1980

Re: 79-886 - Upjohn Co. v. U.S.

Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Rehnquist

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 8, 1981

Re: No. 79-886 - Upjohn Company et al. v.
United States et al.

Dear Bill:

Please join me.

Sincerely,

T.M.
T.M.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 22, 1980

Re: No. 79-886 - Upjohn Co. v. United States

Dear Bill:

I go along.

Sincerely,

H. A. Blackmun

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 16, 1980

79-886 Upjohn Company v. United States

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: DEC 10 1980

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-886

Upjohn Company et al.,
Petitioners,
v.
United States et al. } On Writ of Certiorari to the United
States Court of Appeals for the
Sixth Circuit.

[January —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. With respect to the privilege question the parties and various *amici* have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

I

Petitioner Upjohn manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of petitioner's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants so informed Mr. Gerard Thomas, petitioner's Vice-President, Secretary,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 16, 1980

Re: No. 79-886 Upjohn v. United States

Dear Bill:

Thank you for your suggestion that I state in more concrete form the attorney-client privilege test and its metes and bounds. I found that to be one of the difficulties in writing the opinion in the first place -- everybody wanted to reject the "control group" test, as I read it, but not too much else was said. At first blush, your suggested formulation of the test seems to me to introduce by the back door the very "control group" test which the opinion as now written turns away at the front door. But I fully agree with you as to the desirability of predictability, insofar as possible, in this area, and will reexamine my opinion to see if I can clarify the statement of the attorney-client privilege and its applicability to corporate situations. My present feeling is that I will not be able to agree with the "one possible formulation" which you describe in your letter, but will go over the opinion again to see if the principles by which the privilege is to be governed can be clarified.

Sincerely,



Mr. Justice Brennan

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 18, 1980

Re: No. 79-886 Upjohn Co. v. United States

Dear Bill:

I have struggled with your suggested formula and, after much reflection, have decided that in the long run there is more loss than gain in endeavoring to articulate a multi-part "rule" designed to govern all future cases. This is particularly so when, as is the case here, the suggested rule decides controversial issues which are not presented by the case before us. (For example, Upjohn and several amici resist an "authorization of the management" component such as you have in your formula, although such an authorization was present here, and they would not require the subject matter of the communications to be governed by respondeat superior but rather simply require that the subject matter of employees' communications be "within their knowledge as employees."). As presently advised, I am inclined to leave the opinion as is.

Sincerely,



Mr. Justice Brennan

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 11, 1980

Re: 79-886 - Upjohn v. United States

Dear Bill:

Please join me.

Respectfully,



Mr. Justice Rehnquist

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