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PROVIDING GREATER PROTECTION FOR  
ENVIRONMENTAL AUDITS:  
A PROPOSAL FOR A  
SELF-EVALUATIVE PRIVILEGE

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, the United States Army, or any other governmental agency.

by Captain Christopher M. Murphy, JA  
United States Army

41ST JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1993

PROVIDING GREATER PROTECTION FOR  
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ABSTRACT: There is growing public concern over the effects of polluting the environment. The Army, like private corporations, has responded to this concern by initiating an audit to evaluate the environmental hazards at its facilities. This audit benefits society and satisfies the public policy that encourages self-policing. Also, the audit can result in civil and criminal liability. A self-evaluative privilege should protect the results of this audit from disclosure.

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# Providing Greater Protection for Environmental Audits:

## A Proposal for a Self-Evaluative Privilege

By Christopher M. Murphy

Captain, U.S. Army

The foremost policy behind the . . . [self-evaluative privilege] is the public interest in . . . self-policing and the belief that such review will be curtailed if exposed to public view.<sup>1</sup>

### I. INTRODUCTION

The law of privileges is in a constant struggle between competing values.<sup>2</sup> Privileges recognize the need to preserve the confidentiality of some statements.<sup>3</sup> On the other hand, the public values access to all available evidence.<sup>4</sup> Courts must balance these competing interests whenever a claim of privilege arises.

Few privileges are codified in federal law. Rather, Congress intended that the law of privileges remain elastic.<sup>5</sup> Thus, as societal values change, so does the law of privileges. Currently, privileges are under increasing scrutiny by courts, commentators and the bar. Often the claim of privilege fails when it competes

with the value of full disclosure. As a result, courts have reduced the scope of existing privileges and are hesitant to create new ones.<sup>6</sup>

Nonetheless, in *Bredice v. Doctors Hospital, Inc.*<sup>7</sup>, the court created a qualified self-evaluative privilege.<sup>8</sup> The privilege applied to the minutes of a hospital committee meeting. At the meeting, the hospital staff conducted a critical critique of hospital procedures.

The self-evaluative privilege has been expanded in recent years. Courts have applied the privilege to other documents that were prepared during an internal review. In each case, the court determined that the free flow of information was important to the critique. Denying the privilege stifles the flow of information.<sup>9</sup>

Increasingly, private companies are conducting internal investigations of their corporate procedures.<sup>10</sup> There is overwhelming public interest in corporate self-policing.<sup>11</sup> The Supreme Court has recognized the valuable contributions of these efforts.<sup>12</sup> Internal corporate reviews enable the corporation to ensure its practices are in compliance with law. This review is particularly useful when the laws are complex.<sup>13</sup>

In recent years, the laws designed to protect the environment have multiplied. These laws affect a corporation's daily

operation. At the same time, civil and criminal penalties for violations of these laws have escalated. As a result, corporations are conducting environmental audits in record numbers.<sup>14</sup>

An environmental audit evaluates corporate practices to ensure compliance with environmental laws. The audits often reveal that current practices are in violation of the laws. The audits also may reveal that the corporation has created an environmental hazard. In addition, the audits contain a corrective action plan. This plan details the required change in the corporate practice. It also blueprints the steps necessary to clean-up the hazard the corporation created. The audits often contain information that can act to the corporation's legal detriment.

There is insufficient protection for the results of an environmental audit. These documents do not fall within the attorney-client privilege.<sup>15</sup> They are not privileged under the attorney work-product doctrine.<sup>16</sup> It is in the public's interest that corporations conduct these audits. Thus, a self-evaluation privilege should protect the results of environmental audits.

This article reviews the history of privileges, specifically the attorney-client privilege and the privilege of the attorney work-product. This article then discusses the attorney's professional responsibilities.<sup>17</sup> An ethical dilemma for the attorney may arise during an environmental audit. This dilemma



may be particularly obvious for the attorney who advises a client through the client's agents.

This article also discusses the history of the public welfare doctrine<sup>18</sup> and its application to federal environmental laws.<sup>19</sup> The article proposes to resolve the conflict between a self-evaluation privilege and the furtherance of the public welfare.<sup>20</sup> The article will conclude with a proposal for a self-evaluation privilege.

## II. PRIVILEGED COMMUNICATIONS

Common Law recognized the sanctity of some relationships. To further communications in these relationships, the communications were privileged. Thus, no court could order disclosure of what they said to each other. In theory, privileges protect the free flow of information between those involved in a relationship.<sup>21</sup>

These privileges continued in American jurisprudence.<sup>22</sup> Moreover, courts and legislatures created additional privileges.<sup>23</sup> Courts, however, summarily dismissed other privileges.<sup>24</sup>

### A. *The Attorney-Client Privilege*

In a society as complicated . . . as ours . . . , expert legal advice is essential. To . . . furnis[h] . . . such advice . . . freedom and honesty of communication

of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said . . . to be a necessity. The social good derived from the . . . performance . . . of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases.<sup>25</sup>

The attorney-client privilege is the most firmly-rooted of all privileges. Its history stems from the Roman days when its purpose was to promote the honor of the attorney. No attorney on his "oath and honor as [a] gentlem[an]" revealed the confidences of a client.<sup>26</sup> The privilege, as a gentlemen's privilege, permitted other witnesses to claim it whenever their honor was at stake. Thus, a witness might invoke the privilege because he made a private vow of secrecy.<sup>27</sup> The privilege effectively deprived the court of valid evidence.

The desire for access to evidence emerged as a stronger social need and the privilege fell into disfavor. A social utilitarian purpose emerged as the reason for the attorney-client privilege. Commentators agree that its modern day purpose is to encourage candid communications between the client and his attorney.<sup>28</sup> At least one commentator thinks that the honor of the attorney might still be a significant reason for the privilege.<sup>29</sup>

The law today is a complex structure of rules and regulations.<sup>30</sup> The modern day lay person, if involved in legal difficulties, cannot survive in that jungle of laws without proper legal advice.<sup>31</sup> Likewise, the attorney advising this client cannot provide the proper advice unless he knows all the underlying facts. Clients, however, without assurance of confidentiality, may not tell the whole story to the attorney. Effective advice, therefore, depends on the attorney-client privilege.

Professor Saltzburg analyzes the privilege using the fifth and sixth amendments.<sup>32</sup> The sixth amendment guarantees an accused the assistance of counsel. Counsel, if forced to disclose information learned from the client, may not be as effective. The privilege, therefore, may be necessary to guarantee this constitutional right. Nonetheless, Professor Saltzburg concludes that an attorney-client *relationship* can exist "without a concomitant privilege."<sup>33</sup>

Analyzed together with the fifth amendment right against self-incrimination, the two amendments become a "more powerful" constitutionally-based argument for the privilege.<sup>34</sup> An attorney disclosing a client confidence in court deprives the client of the fifth amendment right against self-incrimination.<sup>35</sup> Thus, the "client effectively sacrifices her privilege against self-incrimination by asserting her right to counsel."<sup>36</sup>

Nonetheless, not all communications between an attorney and client receive the benefit of this privilege. The legal profession receives the full benefit of the privilege only by limiting its application.<sup>37</sup> Significantly, the privilege applies to many communications made to an attorney. If the communication was made while seeking legal advice, and the communication was confidential, the privilege will apply.<sup>38</sup>

Under common law, the privilege applied only to communications made during on-going litigation. Once that litigation was complete, the communication was no longer privileged. This rationale prevailed because the justification for the privilege was the attorney's honor. Thus, after litigation, his honor was no longer at stake.<sup>39</sup>

Gradually, the scope of the privilege expanded to include other communications to the attorney.<sup>40</sup> Of course, under the modern day rationale for the privilege--that of social utility and promoting candor--the protection of all communications to the attorney, regardless of impending litigation, is vital.

The attorney-client privilege is an absolute privilege. The privilege belongs to the *client*--not to the attorney. Thus, the attorney cannot waive the privilege over an objection by the client. Moreover, it protects all *confidential* communications the client makes to the attorney while seeking legal advice.<sup>41</sup>

Despite a century in formulation and decades of litigation, application of the privilege is still troublesome. Before, courts settled its application to simple cases with one single client and one single attorney. Now courts struggle with the application of the privilege to modern day corporations. Who is the client for a corporate counsel? Who is the client for a government counsel? Also, who in this legal entity can invoke the privilege on behalf of it?

Likewise, though the privilege protected *communications* to the attorney, there was no protection for the client's acts or documents. In addition, even when preparing for litigation on behalf of a client, the privilege did not protect witness interviews. Nor did it protect memoranda, briefs or other communications prepared by the attorney. The attorney-client privilege was not that broad in scope.

#### B. *The Federal Rules of Civil Procedure*

Congress passed the Federal Rules of Civil Procedure in 1938. Their passage significantly changed the approach to discovery.<sup>42</sup> For decades in American litigation, attorneys dominated the courtroom with secrets and surprises. They guarded their evidence and concealed their trial strategies. Opponents discovered key

evidence only when opposing counsel presented it at trial.<sup>43</sup> Trials were delayed--or even dismissed--because of this evidence.

The passage of the federal rules of civil procedure was intended to avoid courtroom surprises. The hope was that extensive pre-trial discovery would eliminate those surprises. Litigants should have the fullest possible knowledge of the facts before trial. This, then, will narrow and clarify for trial the basic issues between the parties.<sup>44</sup>

The federal rules are often criticized.<sup>45</sup> They were intended to be a time saving mechanism. Before docketing a case and occupying the judge's time, attorneys were expected to narrow the issues. Then, if an attorney was surprised by evidence, the surprise occurred during the pre-trial discovery stage. The case might terminate before ever being docketed.<sup>46</sup>

Instead, discovery has become an expensive, time-delaying process. The federal rules of civil procedure allow parties to go on "fishing expeditions."<sup>47</sup> The rules allow blanket discovery requests of most documents. The documents must be relevant and not otherwise privileged.<sup>48</sup> Moreover, the rules permit many avenues of discovery including depositions, interrogatories, and the production of documents.

Under the federal rules, any person--not just a party to the litigation--may be deposed or required to produce documents. Although the rules intend that parties conduct pre-trial discovery themselves, the trial judge may rule on discovery issues. He may order reluctant witnesses to submit to a deposition.<sup>49</sup> In *Hickman v. Taylor*,<sup>50</sup> the issue for the trial judge was whether a document sought through discovery was privileged.

### *C. The Attorney Work-Product Doctrine*

Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.<sup>51</sup>

In *Hickman*, the issue concerned the scope of pre-trial discovery under the relatively new rules of civil procedure. On February 7, 1943, a tug boat sank while it was helping tow a car float across the Delaware river. Five of its crew members drowned. The cause of the accident was unknown. Expecting litigation, the owners of the tug promptly hired a law firm.

The attorney representing the tug owners interviewed four surviving crew members. He reduced their statements to writing and had each member sign their statement. He also interviewed other witnesses and recorded their statements in personal memorandums.

A year later, after civil litigation had begun, the owners received an interrogatory requesting any statements made by the surviving crew members. The tug owners refused to provide copies of the statements. In addition, the owners would not reveal the contents of the statements. The owners claimed the statements were privileged.

The court concluded, summarily, that the statements were not protected by the attorney-client privilege. The court held that the privilege does not extend to statements taken from witnesses on behalf of the client. These witnesses were also the company's employees. The court, however, did not discuss any agency implications.

The documents sought were relevant, not otherwise privileged, documents. The court knew that the new rules required liberal interpretation. Thus, these documents should be discoverable. However, they also were documents an attorney prepared in anticipation of trial. Citing public policy reasons, the court denied the discovery. In so ruling, the court carved out an exception known as the attorney work-product doctrine.

The doctrine created a qualified privilege for documents prepared by counsel in anticipation of litigation. It protects statements, private memoranda and personal recollections prepared



by counsel.<sup>52</sup> To qualify for the privilege, however, the documents must have been prepared for litigation. The privilege also extends to those documents prepared in reasonable anticipation of litigation.<sup>53</sup> This privilege is more expansive than the attorney-client privilege. It protects matters obtained from persons other than the client.

The work-product doctrine does not protect all that an attorney discovers during his investigation. His mental impressions and trial strategies are protected. The underlying facts that may form this impression, however, are not protected. The federal rules of civil procedure require disclosure of the underlying facts. The work-product privilege is only a qualified privilege. Counsel can overcome the privilege by a showing of exceptional need. If the evidence sought is relevant, essential to the preparation of the opponent's case, and cannot be obtained elsewhere, the evidence is discoverable.

The attorney work-product doctrine promotes a different societal goal than that of the attorney-client privilege. The attorney-client privilege promotes candid communications between the attorney and client. The attorney work-product doctrine promotes attorney diligence. If the work of attorneys was discoverable, attorneys may be reluctant to document their investigations. By protecting those documents, attorneys are encouraged to be thorough and diligent in their investigations.

The attorney work-product doctrine is codified in the federal rules of civil procedure. Rule 26(b)(3) is more expansive than the *Hickman* rule, however. The *Hickman* doctrine protected statements obtained by the attorney. The federal rule also protects statements obtained by the attorney's representative.<sup>54</sup>

The work-product doctrine provides, in part, the basis for exemption five of the Freedom of Information Act (FOIA).<sup>55</sup> Unlike Rule 26(b)(3), however, exemption five has no provision for overcoming the privilege based on exceptional need. If the requested matter qualifies for the exemption, there is no provision to overcome it.<sup>56</sup>

#### *D. The Freedom of Information Act*

FOIA was enacted in 1966, replacing section three of the Administrative Procedure Act.<sup>57</sup> While section three favored nondisclosure of agency records, FOIA intended to provide full and open disclosure to these records.<sup>58</sup> FOIA was significant in that, by providing access to agency records, it intended to make the government more accountable to the people. It also intended to encourage governmental responsibility.

FOIA provides, in part, that any person may request access to agency records. Thus, all persons--citizens, aliens, corporations

and even foreign corporations--are entitled to equal access.<sup>59</sup> Agencies provide access to information by three different means.

Agencies must make certain information available to the public.<sup>60</sup> This includes information about the agency's organization and its methods of operation. Normally agencies disclose this information by publishing it in the Federal Register.<sup>61</sup>

Agencies also must disclose all policy statements, and final adjudicating opinions. Public disclosure of these decisions prevents the agency from creating secret law.<sup>62</sup> Also, if internal staff instructions affect the public, the agency must disclose these instructions. Agencies accomplish these disclosures by indexing the information.<sup>63</sup>

The third method of access to agency records is by a reasonable request. A request is reasonable if, *inter alia*, it is in writing and sufficiently describes the requested document. The document is sufficiently described if an employee, familiar with the subject matter, could identify it.<sup>64</sup>

Should the government refuse to produce the requested record, the burden of nondisclosure is on the government. FOIA allows a requestor to seek judicial review when an agency has improperly withheld information. Courts can decide cases *de novo* and can conduct *in camera* inspections.<sup>65</sup>

Though under FOIA, disclosure is the rule, rather than the exception, the statute does provide nine, specific exemptions to the general policy of disclosure.<sup>66</sup> Exemption five protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."<sup>67</sup> This exemption encompasses, *inter alia*, the attorney-client privilege, the attorney work-product privilege, and the deliberative process privilege.<sup>68</sup>

In *Mead Data Central Inc. v. United States Department of the Air Force*,<sup>69</sup> the court squarely addressed the application of the attorney-client privilege to a FOIA request. In *Mead Data*, the Air Force tried to exclude several documents from disclosure on the basis of attorney-client privilege. The documents were to legal opinions from the Judge Advocate General's Office. The opinions referred to on-going negotiations for a licensing agreement between West Publishing Company and the Air Force. The court held that the attorney-client privilege applies equally to agency attorneys and their clients. Nonetheless, the court reversed the district court's decision. At the lower court level, the Air Force did not establish that the communications were confidential. The legal opinions were based upon these communications.

In *Coastal States Gas Corporation v. Department of Energy*,<sup>70</sup> the court refused to exclude documents claimed exempt under attorney-client privilege. The agency failed to show the statement was made confidentially. They also failed to show that confidentiality was maintained since the time the communication was made.

Unlike the attorneys in *Mead Data*, who were performing traditional legal work for a client,<sup>71</sup> the attorneys in this case were providing advice to auditors. The auditors were conducting audits of private industries to ensure compliance with energy laws. If the auditor had a question, he called the attorney. The attorney gave a legal interpretation of the regulation to the auditor.

This legal advice is in the form of "question and answer guidelines which might be found in an agency manual."<sup>72</sup> Thus, the court questioned whether the attorney-client privilege ever attaches in this situation.<sup>73</sup>

The *Coastal States* court also refused to exempt the documents under the work-product privilege. Though Congress specifically intended to assimilate the attorney work-product privilege into exemption five,<sup>74</sup> the privilege only applies to documents prepared *in anticipation of litigation*.<sup>75</sup> The Department of Energy did not

show this. "To argue that every audit is potentially the subject of litigation is to go too far."<sup>76</sup>

Exemption five also assimilates the deliberative process privilege, also known as the executive privilege.<sup>77</sup> This privilege protects the processes that led to an agency decision. This includes "advisory opinions, recommendations and deliberations."<sup>78</sup>

The rationale for this privilege was set out in the act's legislative history. "[I]t would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. . . . [E]fficiency of Government would be greatly hampered if . . . all Government agencies were prematurely forced to 'operate in a fishbowl.'"<sup>79</sup> The privilege protects the agency's *pre-decisional* process. It affords no protection once the policy is adopted. There is an acute "public interest in knowing the basis for the agency policy adopted."<sup>80</sup> Disclosure after adoption of the decision will not affect the quality of the decision.<sup>81</sup>

Agencies must disclose any "reasonable segregable portion of a record."<sup>82</sup> For instance, though a document is otherwise exempt, facts in that document are never exempt. Thus, the agency must separate the facts from the rest of the document. Those portions that are not exempt must be released.<sup>83</sup> Sometimes the facts are so

commingled with the policy recommendation that segregation is impossible. Then, the entire document is exempt.<sup>84</sup> Pre-decisional documents lose their exempt status if the documents are incorporated by reference in the agency's final decision.<sup>85</sup>

#### *E. The Self-Evaluative Privilege*

The self-evaluative privilege is not one of the privileges specifically recognized under exemption five of FOIA. Under exemption five, however, a court could use this privilege to exclude documents from disclosure.

In *United States v. Weber Aircraft Corporation*,<sup>86</sup> the Supreme Court considered the scope of exemption five. Specifically, the Court determined the meaning of documents "which would not be available by law to a party . . . in litigation." While piloting an Air Force F-106B airplane, Captain Richard Hoover ejected from the plane after its engine failed. He suffered serious injuries when he ejected. He later sued, *inter alia*, Weber Aircraft company, one of the firms responsible for the design and manufacture of the ejection seat.<sup>87</sup>

Immediately after the accident, the Air Force conducted two investigations. One was an accident investigation and the other a safety investigation. Weber Aircraft sought access to the results of those investigations. The Air Force, though releasing

much of the results, refused to disclose confidential portions of the safety investigation.<sup>88</sup> The documents withheld included an unsworn statement by Captain Hoover and an unsworn statement by the airman who rigged his parachute.

Weber sought these documents through civil discovery. The Machin privilege prevented their discovery. This privilege protects confidential statements made to air crash safety investigators.<sup>89</sup> Thus, when Weber could not obtain these documents through civil discovery, the company filed a FOIA request with the Air Force. The Air Force refused to disclose them, claiming privilege under exemption five.

The D.C. Circuit Court held that exemption five does not include all civil discovery privileges. To be exempt, the document must fall within a privilege specifically gleaned from the FOIA's legislative history. Thus, the court held that the Machlin privilege did not apply.<sup>90</sup> The Supreme Court reversed.

The Court agreed that not every "novel privilege, or one that has found less than universal acceptance,"<sup>91</sup> falls within exemption five. However, all privileges that are available to a party in litigation are included. These include common law privileges and statutory privileges.<sup>92</sup> The Court noted that Congress specifically reserved the development of privileges to the courts.<sup>93</sup> Thus, the



Machin privilege applied and the documents were exempt from disclosure.

The self-evaluative privilege is not a novel privilege. Like the Machin privilege, it was created by case law. Although the self-evaluative privilege is not yet universally accepted, the privilege applies to the results of many internal investigations.<sup>94</sup> The self-evaluative privilege is available to a litigant at trial. Thus, the self-evaluative privilege may exempt disclosure of environmental audits under exemption five.

### III. WHO CONSTITUTES THE CLIENT?

#### A. *The Unitary Executive Doctrine*

The executive Power shall be vested in a President of the United States.<sup>95</sup>

The unitary executive doctrine<sup>96</sup> guarantees that all executive power is under the control of one executive, namely the President.<sup>97</sup> The doctrine requires the President to supervise subordinate officers to ensure "unitary and uniform execution of the laws" for which the Constitution designates him to execute.<sup>98</sup>

Nonetheless, the President may delegate many of his responsibilities.<sup>99</sup> The unitary executive doctrine places

responsibility for all executive decisions on the President. It ensures that he remains accountable for all decisions.<sup>100</sup>

The unitary executive doctrine has made it difficult to apply the attorney-client privilege to government attorneys. A government attorney "'assumes a public trust, for the government, overall and in each of its parts.' The lawyer . . . 'is responsible to the people of our democracy with its representative form of government.'" <sup>101</sup> This suggests that the public is the government attorney's client.<sup>102</sup>

The government attorney's client, however, is the agency that employs him.<sup>103</sup> "[T]he government and each department or agency contained therein needs to have legal advice and assistance like individuals and other groups. Therefore, there ought to be a confidential relationship between the government, its departments, its officials and the lawyers who advise them and work for them."<sup>104</sup> The Army maintains the same position.

The Army Rules of Professional Conduct govern all uniformed and civilian attorneys employed by the Department of the Army.<sup>105</sup> The rules were promulgated in October 1987 and replaced the ABA Model Code of Professional Conduct.<sup>106</sup> Under Rule 1.13, the Army lawyer's client is the Army.<sup>107</sup>

There are two exceptions to this rule. When the attorney is appointed to provide legal assistance to an individual, that individual is the lawyer's client. Likewise, if the attorney is assigned to defend an individual at a disciplinary hearing, the defendant is the lawyer's client.<sup>108</sup> This is also supported by the Military Rules of Evidence.<sup>109</sup>

"A 'client' is a person . . . who receives professional legal services from a lawyer . . . ." <sup>110</sup> The lawyer must be "a person . . . detailed, assigned, or otherwise provided to represent a person in a court-martial case. . . ." <sup>111</sup> In all other cases, no attorney-client relationship is formed.<sup>112</sup>

To represent the Army, the attorney advises the Army's agents. These agents include the heads of the various organizations, such as company, battalion, or brigade commanders, and their designated staffs. At no time does an attorney-client relationship exist between the commander and the attorney. The relationship exists between the lawyer and the Army, as represented by the commander.<sup>113</sup> Thus, a conflict of interest arises if the commander acts contrary to the Army's interests.

The Army's position is criticized. The Agency attorney is similar to a corporate attorney. Neither the president of the company nor any of his staff is the lawyer's client. The

corporation, alone, is the client. By analogy, the agency is not the attorney's client, rather the federal government is.<sup>114</sup>

This position does not consider the stark realities of a large executive branch. Although all working under one executive, agencies may have competing interests.<sup>115</sup> Executive Order 12146, in spite of the unitary executive doctrine, recognizes these competing interests.<sup>116</sup>

#### *B. The Corporate Client*

American corporations are legal entities. They are not corporeal, but created only by legal documents. Corporations vary in size from the small, neighborhood grocery store to large, industrial companies that employ thousands. Corporations, like individuals, face legal dilemmas sometimes. Corporations, like individuals, seek a lawyer's advice at those times.

In *Radiant Burners, Incorporated v. American Gas Association*,<sup>117</sup> Chief Judge Campbell of the Northern District Court in Illinois wrote that the "privilege against self-incrimination . . . is historically and fundamentally personal in nature."<sup>118</sup> Since the privilege belongs to the client, it follows that the privilege can "be claimed only by natural individuals and not by mere corporate entities."<sup>119</sup>

Chief Judge Campbell proffered another reason why the privilege should not apply to corporations. To claim the attorney-client privilege, the communications between counsel and client must be confidential. If the privilege applied to corporations, "then we are immediately presented with the anomalous situation of determining what persons within the corporate structure hold its confidence . . . ." <sup>120</sup> Nonetheless, the Chief Judge did apply the attorney work-product privilege. The work-product privilege is not dependent on the client for the privilege belongs to the attorney. <sup>121</sup>

The Seventh Circuit Court of Appeals reversed. <sup>122</sup> The purposes of the privilege do not relate entirely to the personal nature of the privilege. The purpose for the privilege is in fostering societal good. <sup>123</sup> The court concluded that the privilege does apply to corporations. <sup>124</sup>

The court did not answer who in the corporation could hold the corporations confidences. The court reserved that decision for case-by-case analyses. One rigid rule could not meet the broad differences in size and purpose of corporations. <sup>125</sup> Thus, the scope of the privilege became fertile ground for litigation.

As predicted by Chief Judge Campbell, the application of the privilege to a corporation is particularly difficult. The corporation is an impersonal, hierarchical organization. By

necessity, directors, officers and shareholders are in charge of its affairs. Each of these individuals, though having a personal stake in the corporate business, do not personify the corporation. They are the corporation's agents.<sup>126</sup>

The attorney, on the other hand, can not advise the corporation directly. He necessarily advises the agents of the corporation. As agents, these individuals do not have an attorney-client relationship with the attorney.<sup>127</sup>

Courts have developed two separate tests to define the scope of the privilege. The control group test limited the privilege to employees who were in policy-making positions. The subject matter test broadened the scope of the privilege. Communications from lower-level employees are privileged if: (1) the employee was directed by a superior to discuss the matter, and; (2) the communication related to the employees performance of duty.<sup>128</sup>

### *C. The Control Group Test*

In *City of Philadelphia v. Westinghouse Electric Corporation*,<sup>129</sup> Judge Kirkpatrick grappled with the question raised by Chief Judge Campbell: who in the corporation holds its confidences?<sup>130</sup> He resolved this question by asking another? Who in the corporation personifies the corporation?<sup>131</sup> Judge

Kirkpatrick held that the privilege applies to those individuals who personify the corporation.

[I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he . . . personifies . . . the corporation . . . and the privilege would apply.<sup>132</sup>

This test was called the control group test. If the employee was in a position to formulate policy, he was in the control group. His communications to the attorney were privileged. This test was widely received because it created a bright line, easy to apply test.<sup>133</sup> However, in practice, only communications from top-level management met the test. Thus, the scope was too narrow.<sup>134</sup>

Thus, this restriction drew its critics. The control group test is impractical considering the current hierarchy in corporations. It hampers the ability of the attorney to gather facts. Normally, it is the lower-level employees who have the knowledge of a situation. If that employee tells the attorney, the attorney can provide legal advice to management. Often,

management is too far removed from the everyday goings-on of the company to know the facts themselves.

The control group test aids in pre-trial discovery, however, because it limits the number of communications excluded under the privilege. Drawing on the original purposes of the attorney-client privilege--to promote candor between attorney and client-- Professor Alexander submits that this narrow test provides adequate protection.<sup>135</sup>

#### *D. The Subject Matter Test*

In *Harper & Row Publishers v. Decker*,<sup>136</sup> the court applied the privilege to communications made to a corporate attorney. However, the communications did not come from an employee within the control group.<sup>137</sup>

In *Harper & Row*, the attorneys involved were all corporate counsel of the defendant publishing companies. Various plaintiffs were suing the companies plaintiffs for damages resulting from a conspiracy to inflate book prices. The attorneys took statements from lower-level employees. None of these employees had responsibilities to formulate company policy.<sup>138</sup>

Several employees testified before a grand jury investigating the conspiracy. The attorneys debriefed the employees after their



testimony. The attorneys then prepared written memorandums of these interviews.<sup>139</sup>

The plaintiffs sought discovery of the memoranda in the subsequent civil litigation. The district court, applying the control group test, granted access to the documents.<sup>140</sup> The Court of Appeals reversed, finding the control group test inadequate.<sup>141</sup>

Instead, the court espoused a new test, now known as the subject matter test.

We conclude that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.<sup>142</sup>

Under the subject matter test, corporations could shield documents by channeling them through an attorney. The test permitted corporations to shield evidence from discovery. This contravened the liberal discovery policy favored by the federal rules. Thus, the exception engulfed the rule. The privilege no

longer fostered the public interest of promoting candor between attorney and client. Instead, it created a corporate zone of silence.

Considering these criticisms, the court in *Diversified Industries, Inc. v. Meredith*,<sup>143</sup> modified the test. To qualify for the privilege, the court imposed two additional requirements. One, the purpose of the communication with the attorney must be to obtain legal advice, and; two, the information is disseminated only to those employees with a "need-to-know."<sup>144</sup> These restrictions, the court held, will better foster the policy reasons for the attorney-client privilege.<sup>145</sup>

This modified test prevents corporate abuses of the privilege. The privilege will apply only when the communication was made to secure legal advice. This deters corporations from routing trivial documents through the legal office. In addition, the requirement for confidentiality prevents the corporation from shielding its routine matters. If the document was distributed beyond those employees with a "need-to-know," the confidentiality is breached. Thus, the document is not protected. The modified subject matter test addressed adequately all the criticisms of the original test.

*E. Upjohn Company v. United States*

The control group test met its demise in *Upjohn Company v. United States*.<sup>146</sup>

The Upjohn Company is a large manufacturer of pharmaceuticals. It has operations in America and abroad. In 1976, an independent auditor discovered evidence of a "questionable payment" at one of Upjohn's foreign subsidiaries. To get a contract with a foreign government, Upjohn employees paid a bribe to foreign government employees. These payments were illegal.

The auditor told the General Counsel about the payment. The General Counsel, after consultation with the Chairman of the Board, decided to conduct an internal investigation. Outside legal counsel was hired to help conduct the investigation. The purpose of the investigation was to see how widespread this practice was among Upjohn's foreign subsidiaries.

The Chairman of the Board sent a letter to all foreign subsidiary managers. He told them the General Counsel was conducting an investigation, and instructed them to cooperate fully. The managers were told to treat the investigation as confidential. Sent along with the letter was a questionnaire which sought detailed information about any payments. Managers sent their responses directly to the General Counsel. After receiving the responses, the General Counsel interviewed the managers.

Naturally, the investigation revealed that the questionable payment practice was widespread among the Upjohn subsidiaries.

The company voluntarily disclosed this information to the Securities and Exchange Commission (SEC). The Internal Revenue Service (IRS) received a copy of the report. IRS agents immediately began a criminal investigation. The IRS requested Upjohn to produce, *inter alia*, copies of the questionnaires it received from the foreign managers. When Upjohn refused, claiming they were protected under the attorney-client privilege, the IRS sought an enforcement action in federal court.

Applying the control group test, the district court enforced the summons. The Court of Appeals for the Sixth Circuit affirmed. The Supreme Court reversed.

Although the Court abandoned the control group test, it refused to delineate a new test.<sup>147</sup> Rather, it limited its decision to the facts in the case before it. The Court noted that it is typically actions of middle- and lower-level employees who "embroil the corporation in serious legal difficulties."<sup>148</sup> The control group test "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to [the corporation's] attorneys."<sup>149</sup>

The Court noted with favor the requirements of *Diversified's* modified subject matter test. In *Upjohn*, the employees were interviewed about matters within their scope of duties. Additionally, the employees knew the purpose of the interview was so the corporation could receive legal advice.<sup>150</sup> Nonetheless, the Court refused specifically to adopt the test.

#### *F. Professional Responsibility Issues*

The lawyer's dilemma is no more acute as when he faces a conflict of interest. Government service and corporate law practice provide fertile ground for conflicts of interest for attorneys. The Army is the Army attorney's client. The commander who receives the advice is only the client's agent.

The Army Rules of Professional Conduct<sup>151</sup> require advising the agent of the identity of the client only when it is "apparent that the Army's interests are adverse" to the agent's.<sup>152</sup> The agent may invoke neither the attorney-client privilege nor the rule of confidentiality for his own benefit. He may be invoke them for the benefit of the client.

The Rules provide little guidance to the Army lawyer who learns that the commander, as agent, is acting contrary to the Army's interests.<sup>153</sup> Rule 1.13 requires only that the attorney proceed "in the best interests of the Army."<sup>154</sup>

The Rule offers some suggested avenues upon which to proceed: (1) ask the commander to reconsider his action; (2) advise the commander to receive another legal opinion; (3) advise the commander of the conflict of interest and suggest the commander receive personal legal advice; (4) advise commander that the matter may be discussed with higher headquarters, and; (5) refer the issue to higher headquarters.<sup>155</sup> The Rule requires the attorney to consider his options and weigh them against the seriousness of the violation.

If the commander still intends to act *in clear violation of law*, the Rule allows the attorney to terminate representation. It specifically prohibits the attorney from participating in the illegal actions. Yet, if the action is not in violation of law, but merely contrary to the Army's interests, the attorney must continue to advise the commander.<sup>156</sup>

Rule 1.6 protects confidential information learned from a client. This Rule *mandates* disclosure of certain future crimes. Disclosure is required if the crime "is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel aircraft, or weapon system."<sup>157</sup>

The Rules do not permit disclosure of any other prospective crimes. Nor do the rules allow disclosure of past crimes.<sup>158</sup> The Rules are silent on the attorney's duty to report misconduct by the agent. If the attorney learns of past misconduct by the commander, may he report this? The rule of confidentiality belongs to the Army, not to the agent. Thus, the attorney breaches no ethical obligation by disclosing the information.<sup>159</sup>

#### IV. Public Welfare Statutes

##### *A. Background of Public Welfare Statutes*

Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure, and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety, and welfare.<sup>160</sup>

The Supreme Court described public welfare statutes as Congress' response to the industrial revolution. These statutes regulate those matters that are so beyond the control of the public

that they are unable to protect themselves. Congress, therefore, has enacted statutes to regulate strictly those areas.

Public welfare statutes require those dealing in hazardous industries to exercise greater caution and care. Participation in the regulated industry is an implied acceptance of the greater responsibilities. Unless those in the industry exercise these extra precautions, the public will be helpless.

Congress doubted that those in the industry would accept these responsibilities voluntarily. Therefore, Congress enacted statutes that strictly regulated these areas. These statutes allow stiff penalties for violations. The risk of penalties was seen as an effective means of enforcement. Courts recognize the public policies behind public welfare statutes. Courts do not hesitate in applying the statutes to corporate defendants.

The significance of public welfare statutes is that they impose a high duty of care. Breaches of this duty expose the corporation to penalties. Breaches of this duty also expose corporate management to the risk of civil and criminal penalties. Public welfare statutes also waive the traditional requirement of *mens rea*. Thus, strict liability can be imposed on those in the regulated industry. With strict liability enforcement of public welfare statutes, the public is in a better position to receive the benefits of them.



*B. United States v. Dotterweich*<sup>161</sup>

The purposes of the legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.<sup>162</sup>

With the above quote, the *Dotterweich* Court coined the phrase "public welfare statutes." The statute in *Dotterweich* was a provision from the Food and Drug Act. Congress has enacted many more public welfare statutes. Many aspects of daily corporate practice is regulated.

In *Dotterweich*, the court upheld the conviction of Joseph Dotterweich under a provision of the Food, Drug, and Cosmetic Act (FDCA). Dotterweich was the President of the Buffalo Pharmacal Company. The company bought drugs from manufacturers and the shipped them under its own label. Pharmacal did not manufacture any of its own drugs.

Dotterweich and his company were both brought to trial for shipping misbranded and adulterated drugs in violation of the FDCA. There was no evidence that Dotterweich participated in any of the crimes. In fact, there was no evidence that Dotterweich even knew of the misbranding or adulteration. The cases of both defendants

went to the jury. The jury returned a guilty verdict only against Dotterweich.

The court, after a discussion of the public welfare doctrine, upheld his conviction. The court dismissed any inconsistency in the jury's verdict. Dotterweich argued it was unfair that only he, and not the corporation, was found guilty. "Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty . . . is immaterial. Juries may indulge in precisely such motives."<sup>163</sup>

The Court held that Dotterweich's conviction supports the policy behind public welfare statutes. Though criminal sanctions apply to corporations, a corporation cannot go to jail. Thus, criminal sanctions against corporations often include fines. To a corporation, a fine becomes merely a cost of doing business.

On the other hand, by finding Dotterweich guilty, the jury held accountable the individual responsible for the crime. As the corporation's president, he stood in responsible relation to it.

The Court stated:

The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement

for criminal conduct--awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in *responsible relation* to a public danger.<sup>164</sup>

Justice Murphy vehemently dissented from this holding. He claimed that Dotterweich is guilty only because "[g]uilt is imputed to [him] solely on the basis of his authority and responsibility as president and general manager of the corporation." Dotterweich should not be criminally liable for actions for which he knew nothing of, let alone participated in. Instead, as a corporate officer, he may be civilly liable to his shareholders for mismanagement. Guilt is personal and should not be imputed lightly to another.

Despite the dissent, the doctrine laid down in *Dotterweich* survives. Moreover, though the FDCA statute upon which Dotterweich was prosecuted had no *mens rea* requirement, courts have expanded the doctrine to other public welfare statutes; even those with a knowing requirement.

### C. *The Responsible Corporate Officer (RCO)*

In *United States v. Park*,<sup>165</sup> another case dealing with a violation of the FDCA, the Supreme Court upheld the conviction of John Park, President of Acme Markets, a large national food chain.

The company maintained 874 retail stores and 16 regional warehouses. The conviction of Park was based on the application of the RCO doctrine.

In *Park*, the company and its President were both charged with allowing food shipped in interstate commerce to become contaminated by rodents, in violation of the FDCA. At trial, Park was found guilty. The company pleaded guilty.

The corporation's headquarters, where Park worked, is in Philadelphia. The company maintained a warehouse in Baltimore, Maryland. Food stuffs were kept in this warehouse while awaiting shipment to one of the retail stores. The warehouse had fallen into such a state of disrepair that rats were entering the warehouse. Some of the stored food had rodent holes chewed into it.

In 1971, agents of the Food and Drug Administration (FDA) inspected the Baltimore warehouse and cited these deficiencies. The year before, agents notified Park of similar conditions in his Philadelphia warehouse. Despite this notice, the company did not correct the deficiencies. The same conditions existed in the Baltimore warehouse during a March, 1972 inspection.

In his defense, Park admitted he received notice of the violations. He claimed he asked his legal counsel about the

violations. Counsel told that the vice-president in charge of the Baltimore warehouse was correcting the deficiencies. Park admitted at trial that, as President of the Company, he was responsible for the company's overall operation. To perform that job, however, he delegated specific responsibilities to his subordinates. Those subordinates, in turn, had staffs of their own to carry out specific missions. One area that he delegated was sanitation. Park claimed he was justified in relying on his staff to correct the deficiencies.<sup>166</sup>

The Court upheld the conviction. Managers are those persons in responsible positions in the company. They stand in a superior relation to others in the corporation. They have the power to prevent violations. Managers may be as guilty of the crime as the employee who committed it.<sup>167</sup>

The president of a company can be guilty of a crime even though he had no intent to commit one. He may be guilty of the crime even when he had no knowledge of the offense. Public welfare statutes impose an affirmative duty on RCOs.

[The statutes impose] not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will ensure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate

agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.<sup>168</sup>

Park was convicted of a statute that had no *mens rea* requirement. Dotterweich, too, was convicted of a statute that had no *mens rea* requirement. In *United States v. International Minerals & Chemical Corporation*,<sup>169</sup> the Court applied strict liability to a statute with a *mens rea* requirement.

The case concerned a regulation promulgated by the Interstate Commerce Commission (ICC). The regulation prohibited the shipment of hazardous liquids without proper labels. The statute authorizing the ICC to promulgate these regulations made knowing violations of the regulations criminal offenses. The defendant company shipped sulphuric acid without labelling it as required by the regulation.

The government contended that it was enough that the defendant knew the materials were hazardous to satisfy the *mens rea*. Actual knowledge of the regulation was not necessary. The defendant company claimed that, to be guilty, it had to know that the materials were hazardous and that it knew of the regulation

requiring the labels. The Supreme Court held that proof of the *mens rea* was satisfied if the government proved the company knew the materials were hazardous.

The court insisted that it was not applying a strict liability standard. It explained that to be guilty, knowledge of the hazardous material was still necessary. Nonetheless, the court ruled that knowledge of the regulation is not necessary because "ignorance of the law is no defense."<sup>170</sup> The court acknowledged "[p]encils, dental floss, and paper clips may also be regulated." There, however, actual knowledge of the regulation may be required. "But where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to know of the regulation."<sup>171</sup>

In another case, the Court required proof of actual knowledge of the wrongfulness of the conduct. In *Liparota v. United States*,<sup>172</sup> the court reversed the conviction of a restaurant owner, holding that the defendant must have actual knowledge of the wrongfulness of his conduct.

On three different occasions, an undercover agent entered the defendant's restaurant and sold him food stamps. The defendant paid a meager sum for them. The statute did not authorize this

restaurant to receive food stamps. Unauthorized possession or acquisition of food stamps is a criminal offense.

At trial, the defendant admitted buying the food stamps. However, he claimed he didn't know this was illegal. He claimed that to convict, the government must prove he knew that this purchase was illegal.

The government proffered the *International Minerals* rationale. To convict, it is enough if the government shows that the defendant knew he acquired food stamps. Knowledge that the manner of acquisition was unlawful is not required. Ignorance of the law is no defense.

The Court disagreed with the government. Food stamps do not involve the kind of conduct that a reasonable person would know is regulated. Thus, the government must prove that the defendant knew his conduct was unlawful. To hold "otherwise would be to criminalize a broad range of apparently innocent conduct."<sup>173</sup>

The distinction between *Dotterweich*, *Park*, *International Minerals*, and *Liparota* is that the three former cases dealt with statutes regulating conduct that "may seriously threaten the community's health or safety."<sup>174</sup> The offense in *Liparota*, though a public welfare offense, "can hardly be compared to . . . the selling of adulterated drugs."<sup>175</sup>



#### *D. Federal Environmental Laws*

Environmental laws are public welfare laws. They protect the public from ills that are largely beyond self-protection.<sup>176</sup> Two environmental laws, in particular, are significant. One is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>177</sup> also known as the Superfund Act. This statute is largely concerned with past acts of hazardous releases. It is a statutory scheme to clean-up sites that already have been contaminated and pose a threat to health and welfare.<sup>178</sup>

The other statute is the Resource Conservation and Recovery Act (RCRA).<sup>179</sup> While CERCLA concentrates on past hazardous spills, RCRA is a "cradle-to-grave" regulatory scheme concerned with the handling of hazardous materials. RCRA regulates hazardous waste from the moment it is generated until it is properly disposed. RCRA regulates all those who generate hazardous waste, transport hazardous waste, or treat it.<sup>180</sup> RCRA, however, provides for criminal sanctions only when there is a knowing violation of the statute.

A detailed analysis of these statutes is beyond the scope of this article. I will limit this section to an examination of the knowing requirement of section 6928(d) of RCRA.<sup>181</sup> The Circuit's are split about to what extent the government must prove knowledge

to convict under the statute.<sup>182</sup> The Supreme Court has yet to rule on the issue.

One of the first cases to rule on the issue was *United States v. Johnson & Towers, Inc.*<sup>183</sup> The prosecution arose because one of the plants owned by Johnson & Towers generated hazardous waste. The company then disposed of the waste. Contrary to the statute, it did not have a permit.

The Government alleged that to convict the defendant, it need only show that the defendant knew it was disposing of waste. The knowing provision of the statute did not extend either to the waste's hazardous composition or to the need for a permit. The defendant argued the contrary, maintaining that the government had to prove that it knew the waste was hazardous. The defendant claimed the government also had to prove the defendant discharged waste without a permit although it knew it needed a permit.

The Court analyzed the legislative history of the statute and acknowledged that RCRA was a public welfare statute. Thus, the RCRA statute was similar to the ICC regulation interpreted by the Supreme Court in *International Minerals*. There, the Court held that knowledge of the specific regulation was immaterial.<sup>184</sup> Nonetheless, the court held that the knowing requirement applied to all elements of the RCRA statute. To convict the defendant, the

government must prove the defendant discharged waste without a permit and that he knew he needed a permit.<sup>185</sup>

Recently, the Fourth Circuit held the opposite when it decided the same issue. In *United States v. Dee*,<sup>186</sup> the court held that the government need not prove the defendants knew they were violating the law.<sup>187</sup> It was sufficient to prove the defendants knew they were treating waste and that they knew the waste was hazardous.

The defendants in *Dee* were three high-ranking civilian employees of the Army. They each held supervisory positions in the Army's chemical research laboratory at Aberdeen Proving Ground, near Baltimore, Maryland. The laboratory generated hazardous waste. The defendants knew of the RCRA requirements.

The defendants failed to instruct their subordinates on the proper handling of hazardous waste. In addition, the defendants did not supervise their subordinates properly. As a result, the laboratory was storing hazardous wastes improperly. Moreover, the defendants were told that hazardous wastes were stored at the site improperly. Yet, they still failed to comply with the RCRA requirements.

In upholding their conviction, the court noted the defendants were supervisors. They could influence subordinates to ensure

proper handling of the hazardous waste.<sup>188</sup> The significance of this decision is that it applied the RCO doctrine to environmental crimes.<sup>189</sup> The decision also affirms the "ignorance of the law is no defense" rationale.

The *Dee* defendants were convicted because their lack of proper management and supervision allowed the environmental violations to occur. Public welfare statutes impose a duty of vigilance and foresight on managers.<sup>190</sup>

This case should serve as an example to all government employees--whether civilian or military. As one former Assistant Justice official stated: "It has been, and will continue to be, Justice Department policy to conduct environmental criminal investigations with an eye toward identifying, prosecuting, and convicting the highest ranking, truly responsible corporate officials."<sup>191</sup>

The U.S. Attorney's Office received much criticism about the *Dee* prosecutions. The gist of the complaints was that the military chain of command was not prosecuted. The military commanders are responsible for allowing a lax compliance attitude to prevail.<sup>192</sup> At trial, the *Dee* defendants claimed they had inherited the environmental violations when they were promoted to their jobs. There is no prohibition on applying the RCO doctrine to government officials.<sup>193</sup>

## V. Federal Facility Compliance with Environmental Laws

### A. *Past Requirements and History of Compliance*

President Carter issued Executive Order 12088 on October 13, 1978.<sup>194</sup> In it, he mandated that all executive agencies comply with existing pollution laws. The executive order, however, was not a waiver of sovereign immunity. It did not create a cause of action for its violation. It contained no enforcement mechanisms.<sup>195</sup>

In issuing the order, President Carter intended to reverse a long standing practice in federal agencies. Typically, agencies performed their federal mission with no concern for the effects on the environment. Most environmental violations by agencies occurred when there was little emphasis placed on environmental protection.<sup>196</sup>

In the Department of Defense, many environmental violations are decades old. The hazards were created in the years following World War II.<sup>197</sup> Nonetheless, federal agencies, including the Department of Defense, refused to change their practices even after public sentiment had changed.

Often citing conflicts with their assigned missions, agencies refused to abide by environmental laws. Agencies had no

money to clean up hazardous sites at their facilities. They were not given money to modernize their facilities. State regulators were barred from inspecting federal facilities.<sup>198</sup> Thus, they were often unaware of the hazardous conditions at these facilities. Environmental concerns were not federal concerns. Environmental compliance remained a low priority at federal agencies.<sup>199</sup> The result has been staggering.

At the end of Fiscal Year 1988, sixty percent of federal facilities were in non-compliance with environmental requirements.<sup>200</sup> There are more than 17,000 defense sites at over 1800 military installations that are being studied for environmental clean-up. In addition, there are 116 federal facilities that are on the National Priorities list (NPL). Ninety-four of these are defense facilities.<sup>201</sup> The NPL is a listing by the EPA of the worst environmental hazards. These sites pose the gravest danger to health and safety. The cleanup of the sites listed on the NPL is normally paid out of Superfund funds. For military sites on the NPL, clean-up is paid for out of funds from the Defense Environmental Restoration Account (DERA).<sup>202</sup> In 1993, this amounted to 1.3 billion dollars.<sup>203</sup>

The statutory schemes of RCRA and CERCLA envisioned a unique relationship between the federal government and state governments. Though the federal government remained the primary author of environmental laws, the states would become the primary enforcers

of them. Overall supervision of environmental regulation and cleanups would come from the EPA Administrator.<sup>204</sup>

Under this scheme, once a site was identified, the state was responsible for the supervision of the clean-up. The EPA would intervene only when the state's response was untimely or not consistent with federal environmental standards.

Now all major federal environmental laws waive sovereign immunity.<sup>205</sup> However, when Congress passed the amendments to CERCLA in 1986, it enacted section 120. This section applies specifically to federal facilities.<sup>206</sup> Once a federal facility is listed on the NPL, the EPA Administrator is responsible for the over-all clean-up of the site. To effect the clean-up, section 120 mandates federal agencies with sites on the NPL to enter into an interagency agreement (IAG) with the EPA.

An IAG is similar to a consent decree. The EPA remains responsible for the clean-up of a site on the NPL. However, the agency who controls the site is the lead agency effecting the clean-up. Thus, the EPA determines the standard of the clean-up and how fast it will be done. The IAG is the agreement between the agency and the EPA about how the site will be cleaned up. The site is exempt from state regulatory control.

IAGs allow periodic review of the progress by the EPA. The EPA is permitted to comment and make suggestions on the clean-up efforts. The EPA has overall supervision of the project. Ultimately, the project must be approved by the EPA.

Significantly, the IAGs provide for payment of stipulated penalties by the agency if their progress on the clean-up is too slow or unacceptable. These provisions were unenforceable.<sup>207</sup> Because of the application of the unitary executive doctrine,<sup>208</sup> one agency cannot sue or fine another agency. Instead the legal dispute must be resolved by the Attorney General.<sup>209</sup> If the issue concerned only funding disputes, the sole mediator is the Director of the Office of Management and Budget.<sup>210</sup> The EPA can only "cajole and bargain" to convince another agency to comply with the laws. The EPA must rely upon voluntary compliance agreements.<sup>211</sup>

One of the frustrations concerning federal compliance with federal laws is that, absent state authority to regulate, federal compliance still has been poor. The only "federal facilities 'we have good results with are all the result of threatened or actual litigation.' "<sup>212</sup>

The complaints of poor federal compliance continue, in part, because DOJ closely guards any waivers of sovereign immunity.<sup>213</sup> DOJ maintains that Congress has not waived sovereign immunity for the payment of civil fines or for the payment of various fees.



Maintaining that any waivers of sovereign immunity must be "clear and unambiguous,"<sup>214</sup> courts have upheld this position. In addition, DOJ has steadfastly defended the federal government's position as the primary enforcer of environmental laws at federal facilities.<sup>215</sup>

The result, critics claim, is like the fox guarding the hen house. In *Colorado v. United States Department of the Army*,<sup>216</sup> the district judge questioned the propriety of DOJ attorneys representing the Army.<sup>217</sup> He, too, questioned the Army's response to the cleanup effort. "[T]he Army's obvious interest is to spend as little money and effort as possible on the cleanup . . . ."<sup>218</sup>

The Army used the Rocky Mountain Arsenal near Denver, Colorado, for many years. The arsenal was constructed in 1942 to manufacture chemical agents. The Army leased part of the facility to private companies, one of which was Shell Oil Company. In 1956, the Army constructed Basin F at the arsenal. Basin F was used to store and dispose of toxic wastes from pesticide and nerve gas production.<sup>219</sup> This basin was an open waste lagoon that spanned over ninety-three acres. In 1988, it held more than eleven million gallons of waste product.<sup>220</sup> It was described as the "the worst hazardous and toxic waste site in America."<sup>221</sup>

The litigation between Colorado and the Army has been ongoing since 1983. Because of the hazardous conditions at the Rocky

Mountain Arsenal, most of it was placed on the NPL. The Army was the lead agency for the clean-up project. The Army entered into an IAG with the EPA.

The State of Colorado, however, was unhappy with the progress at the arsenal and particularly at Basin F. It filed a RCRA action against the Army. The court noted that the Army had completed little or no progress on its cleanup project. Additionally, the Army continually violated the terms of the IAG.<sup>222</sup>

The Army argued that CERCLA, not RCRA, applied. Rocky Mountain was listed on the NPL. Though Basin F was not yet listed on the NPL, it "should be listed soon." Thus, argued the Army, Colorado has no jurisdiction to enforce cleanup standards.

The court disagreed. Since Basin F was not yet on the NPL, the court said Colorado had jurisdiction to maintain a RCRA action. Commenting on the Army's past performance and the EPA's inability to enforce its IAG, the court said "[w]ere I to dismiss . . . [Colorado's RCRA] action, the Army's cleanup efforts would go unchecked by any parties whose interest (sic) are in any real sense adverse to those of the Army."<sup>223</sup>

The court remained particularly disturbed by the apparent conflict of interest for Justice Department attorneys.<sup>224</sup> Only with state involvement can a truly thorough cleanup be

accomplished. State involvement also ensures a "truly adversarial proceeding." The state is ultimately responsible to its citizens and to those "generations yet unborn." <sup>225</sup>

The court also noted with sarcasm that CERCLA intended to "speed up" the clean-up process--not delay it. The Army's cleanup of the basin so far has accomplished little and "has been a process on going for more than 5 years."<sup>226</sup> Nonetheless, within a month of the court's decision, Basin F was put on the NPL. This action circumvented the state's regulation of its cleanup.<sup>227</sup>

States, local officials and citizen groups have become impatient. They are critical of the federal government's noncompliance with environmental laws. They are equally critical of the slow agency response to cleanups for previous environmental conditions. Criticisms abound that the federal government cannot be its own watchdog. The states or the citizens must be the EPA's surrogates.<sup>228</sup>

Under current statutes, there was little incentive for federal agencies to comply.<sup>229</sup> "Having the State actively involved as a party would guarantee the salutary effect of a truly adversarial proceeding that would be more likely, in the long run, to achieve a thorough cleanup."<sup>230</sup> This is the core of federalism. As Professor Amar stated, the purpose of the federalist system is the state government "protecting their citizens against the federal

government,"<sup>231</sup> particularly "when the federal government is acting egregiously."<sup>232</sup>

#### *B. Current Requirements*

I will insist that in the future federal facilities meet or exceed environmental standards. The government should live within the laws it imposes on others.<sup>233</sup>

Congress responded to the growing complaints about federal facility noncompliance with environmental laws. In October, 1992, it passed amendments to the Federal Facility Compliance Act. This statute requires all agencies of the federal government to comply with all federal, state, and local laws on management, control and abatement of hazardous waste.<sup>234</sup>

Significantly, the statute specifically waives sovereign immunity, to include the payment of reasonable service charges.<sup>235</sup> Federal facilities are now also subject to the payment of all civil fines and penalties "regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations."<sup>236</sup> Moreover, agencies must pay these fines out of their operating budgets; DERA funds are not available.<sup>237</sup> The agencies now have an incentive to comply with environmental laws.

No employee or agent of the government, however, can be held personally liable for a civil penalty arising from an act or omission that occurred while performing his official duties. This prohibition, however, does not apply to criminal prosecutions for such acts or omissions.<sup>238</sup>

The statute also waives sovereign immunity for any injunctive relief. Neither the United States nor its agents shall be immune from sanctions of any injunctive relief.<sup>239</sup> This waiver of sovereign immunity is "clear and unambiguous." Though this waiver needs to be tried and tested, the day may be quite near when "air pollution laws might stop [military] training."<sup>240</sup>

One student commentator noted that the "federal facility compliance program sits on the horns of . . . [a] dilemma," needing to choose between compliance with environmental laws and completion of the agency mission.<sup>241</sup> The "[d]efense and the environment is not an either/or proposition."<sup>242</sup> They are mutually compatible, and need to be, "in this real world of serious defense threats and genuine environmental concerns."<sup>243</sup>

The amendments also make it easier for the EPA to enforce environmental laws on federal facilities. Now, the EPA is specifically authorized to fine other executive agencies for non-compliance with IAGs.<sup>244</sup> In addition, the EPA can bring an enforcement action in district court against another agency. The

administrative order is not final until the agency confers with the EPA Administrator.<sup>245</sup>

The 1992 amendments have put an arsenal of firepower at the hands of state and local governments. These amendments, along with DOJ's policy of prosecuting the highest government officer responsible for the violation, have made government employees wary. Although still immune from civil penalties, they do remain criminally responsible for their actions.

In addition, in these days of shrinking budgets for executive agencies, the prospect of paying civil fines for environmental violations--to be paid from the agency's own operating budget--has had a chilling effect. As reflected in the remarks from then-Secretary of Defense Cheney, agency heads, commanders, soldiers, and civilian employees alike have "buil[t] a new environmental ethic into the daily business of defense."<sup>246</sup>

### *C. Call to Arms--Citizen Suits*

[T]he real work must be done by individuals, and politicians need to assist citizens in their efforts to make new and necessary choices.

This last point is crucial: men and women who care must be politically empowered to demand and help effect remedies to ecological problems . . . .<sup>247</sup>

As a result of the growing frustration with the National Air Pollution Control Administration (NAPCA) to enforce air pollution abatement laws, Congress authorized individuals to bring citizen suits. The NAPCA was the forerunner to the current EPA.<sup>248</sup> Such citizen suits were intended to supplement the NAPCA and thereby aid in the enforcement of the statute.<sup>249</sup> Even with the creation of the EPA in 1970, however, states and citizens remained frustrated with the agency's ability to enforce the laws. Every major federal environmental law now provides for citizen suits.<sup>250</sup>

Citizen suit provisions grant universal standing for any person to bring suit. Individual states are included in the definition of any person. Whether this grant of standing is constitutional, however, is another question.

The constitution limits the jurisdiction of federal courts to matters that are cases and controversies.<sup>251</sup> A case or controversy only exists when the plaintiff has standing to bring the suit; that is, that the plaintiff has suffered a direct injury. Plaintiffs find it difficult to establish standing when they seek to challenge the constitutionality of a statute. Standing is also difficult when seeking review of a governmental action.<sup>252</sup> In these cases, standing requires satisfaction of three principles. *Jus tertii* requires the plaintiff to assert his own interests and not those

of third parties. The plaintiff's injury must be personal and direct; it cannot be a generalized injury suffered by all taxpayers. Lastly, the plaintiff's interests must fall within the "zone of interest;" that is, within the interests the statute was designed to protect.<sup>253</sup> Despite the citizen suit provisions found in environmental laws, commentators question how many individuals will meet these prudential rules for standing.<sup>254</sup>

The citizen suit provisions in current environmental laws are also attempts to supplement the EPA's enforcement efforts. Presently, EPA investigative efforts are focused on large, national companies or companies that have an established history of non-compliance. Its enforcement efforts are thereby limited. The EPA encourages public involvement and participation as a means to identify polluters. The EPA cites the fact that during a recent initiative, thirty percent of the new cases reported was from public notification.<sup>255</sup>

An individual has no financial stake by bringing a citizen suit under one of the environmental laws. Though a plaintiff can seek civil penalties against an environmental polluter, he does not share in the final judgment. Rather, the intent of the citizen suit provisions is to encourage citizen participation as private attorneys general.<sup>256</sup> The provisions are intended to supplement the investigative efforts of the EPA. Nonetheless, an individual may be reimbursed for his reasonable attorney fees.<sup>257</sup>



Some commentators criticize the federal government for its actions that impair the efforts of citizen enforcement groups.<sup>258</sup> As an example, they cite a citizen suit brought against Union Oil Company in San Francisco. The citizen group reached a settlement with the polluter wherein the civil penalties lodged against the company would be used to clean-up the environmental problems it caused. DOJ objected to the settlement, claiming the civil penalties must be added to the federal treasury.<sup>259</sup> This position frustrates the purpose of the citizen suit provisions. They are intended to supplement available resources.<sup>260</sup> This settlement would have furthered the overall purposes of environmental laws--to clean up the environment for the benefit of the general public.<sup>261</sup>

As private attorneys general, citizens also can sue an executive agency for violating an environmental law.<sup>262</sup> The federal government so far has been successful in avoiding such suits. Citizen suits are not that easy. They require time, effort, and substantial resources. Without the assistance of the EPA, very few citizens or citizen groups will have the available resources to bring such suits.<sup>263</sup>

CERCLA has acted as the agency's trump.<sup>264</sup> Like the situation at Basin F in Colorado,<sup>265</sup> agencies avoid citizen suit actions by entering into an IAG with the EPA. The IAG constitutes the

initiation of a remedial action. Other actions, including citizen suits, are barred as inconsistent with the remedial action.<sup>266</sup> However, at Basin F, the Army did not comply with its IAG and took over eight years to complete its remedial investigation. The EPA was unable to enforce the IAG through civil penalties or criminal prosecution.

The 1992 amendments to the FFCA make it easier to bring a citizen suit. Now, the EPA Administrator must bring an enforcement action against an agency if the agency fails to abide by the terms of its IAG.<sup>267</sup> If the EPA Administrator fails to bring such suit, a citizen suit can force the Administrator to perform this non-discretionary act.<sup>268</sup> This provision should make citizen suits more accessible to the average citizen or citizen group. Rather than suing the agency for its environmental violation, the citizen can bring suit against the EPA Administrator. In effect, the suit will force the EPA to sue the agency for its violation.

The fear of such citizen suits has caused many to worry. Citizen suits against the federal government will "undoubtedly expand" as the public learns more about the environmental conditions at facilities near their homes.<sup>269</sup> The amendments allow "every legal yahoo and politician in the country to sue the Defense Department."<sup>270</sup> The financial repercussions can be significant. The federal government faces "enormous liability."<sup>271</sup>

## VI. Environmental Audits

### A. *Encouraging the Corporate Practice*

The EPA has been oft criticized for its haphazard approach to environmental investigations.<sup>272</sup> The EPA's investigations were compartmentalized so that although one office was investigating a corporation for a violation of the Clean Air Act, the investigators were not aware that another office was investigating the same corporation for a violation of the Clean Water Act. This single-media approach was inefficient. Often, this approach allowed companies to focus their efforts at only the single-media being investigated. Thus, although the company was in compliance with that single media, other sources of environmental contamination were ignored.<sup>273</sup> Neither the company nor the EPA checked the other hazards.

The EPA changed to cross-media investigations in 1990.<sup>274</sup> This investigatory strategy permits the EPA to target specific areas. The EPA may target a specific geographical location or perhaps will target a specific industry. This strategy also enables the EPA to conduct a company-wide investigation.<sup>275</sup> As a result, companies risk significant penalties. Several minor violations at a company may establish a "pattern of non-compliance." When such a pattern exists, the EPA may bring an enforcement action against the company. This enforcement action, however, because it is multi-

media action, will combine all violations. Since some environmental statutes provide for penalties of \$25,000 per day, per violation, this action can be quite expensive.<sup>276</sup>

To avoid these significant penalties, many companies are conducting multi-media environmental audits. The EPA defines an environmental audit as "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."<sup>277</sup> These companies hope that by conducting the same audits as the regulators conduct, they can discover problems before they reach non-compliance. Alternatively, if they are already in non-compliance, that they can correct the problem before it results in a fine or penalty.<sup>278</sup>

The EPA encourages companies to conduct environmental audits.<sup>279</sup> To be effective, however, the audits should be conducted by external agencies, wholly independent from the company being audited. The audits should be multi-media in scope and analyze not only if the corporation is in compliance with environmental laws, but address also how to correct the deficiencies discovered.<sup>280</sup> Corporate management must allocate adequate resources to conduct an effective audit and encourage candid cooperation with the auditors.

The EPA encourages voluntary disclosure of the environmental audits. The audit, however, may be used against the company in a subsequent enforcement action.<sup>281</sup> Also, many environmental laws have mandatory reporting requirements. Under the Clean Water Act,<sup>282</sup> a company that discharges waste water must comply with National Pollutant Discharge Elimination System (NPDES) permit.<sup>283</sup> Any discharges in excess of the amount allowed in its permit must be reported. Likewise, under RCRA, companies immediately must report spills of hazardous waste to the EPA.<sup>284</sup> Often companies only learn of these violations after they have conducted an audit. Because discovery of the violation requires its disclosure, companies are reluctant to conduct the audit.<sup>285</sup>

DOJ's guidelines, issued in July, 1991, not only encourage environmental audits, but also encourage voluntary disclosure of violations.<sup>286</sup> These disclosures may result in a criminal prosecution, however. Nonetheless, DOJ does not want the possibility of prosecution to chill the auditing process.

In deciding whether or not to prosecute, DOJ will consider the audit as a mitigating factor. To what extent the audit mitigates the offense, however, is dependent on three primary factors. First, DOJ will evaluate the management's commitment to a comprehensive audit and determine if it established an effective follow-up compliance program.<sup>287</sup> Secondly, DOJ will evaluate the extent and timeliness of the disclosure.<sup>288</sup> The company's

cooperation with DOJ in a subsequent investigation is the third factor DOJ considers in mitigation.<sup>289</sup> These guidelines, however, have not been sufficient to allay many corporate fears.<sup>290</sup>

Faced with the possibility of civil and criminal penalties, many companies have refused to conduct voluntary audits.<sup>291</sup> Companies hope to evade penalties by remaining ignorant of the violations. This attitude may be more dangerous than beneficial. Under the RCO doctrine, management is subject to criminal sanctions even without actual knowledge.<sup>292</sup> At least by conducting an audit, management can discover a violation early and enact measures to control and correct it.

#### *B. The Environmental Compliance Assessment System*

The Army conducts environmental audits utilizing the Environmental Compliance Assessment System (ECAS).<sup>293</sup> The ECAS establishes a procedure to evaluate the environmental condition at all facilities under Army control. Under the ECAS, an audit is conducted at an installation every two years.<sup>294</sup>

The purposes of the ECAS are threefold. First, the Army uses it to increase environmental awareness among employees at an installation. Secondly, the procedure is designed to discover deficiencies in environmental compliance. Thirdly, from the

information discovered in the audit, a plan to correct the deficiencies is established.<sup>295</sup>

The ECAS utilizes a three step process to evaluate each installation. The first step is an initial external audit. The auditing team evaluates the installation practices to ensure compliance with both state and federal environmental laws. Since this is an external audit, the team members are not from the installation being assessed. The team members include an independent contractor, Army personnel, and an Environmental Law Attorney.<sup>296</sup>

The installation is re-evaluated by an external audit every four years. At the mid-point, the installation must conduct an internal audit. Thus, audits are conducted every two years at every installation, either by an external or internal audit.<sup>297</sup>

Each audit is conducted similarly by using a standard Army audit checklist. The results of all audits are immediately documented in an Environmental Compliance Assessment Report (ECAR). This report contains the preliminary findings of the audit team. The report may contain documentation of non-compliance, suggested changes to current installation practices, and a plan to correct any deficiencies.<sup>298</sup>

Like private corporations, the Army is concerned with public disclosure of its environmental audits. The Army considers the ECAR an internal working memorandum. Its premature release to the public may hinder the free exchange of ideas concerning environmental compliance.

The installation staff judge advocate still plays an essential role in the ECAS process. Although not a member of the ECAS team, the attorney remains the principal legal advisor to the installation commander. This role may cause a conflict of interest.

#### *C. The Conflict for the Staff Judge Advocate*

The installation commander is responsible for the overall plan, execution, and monitoring of environmental programs.<sup>299</sup> He is charged with implementing environmental considerations as part of the command's basic mission. He is, in effect, the chief responsible corporate officer on the installation. He is responsible for all actions that result in noncompliance with environmental laws. He is responsible for reporting the noncompliance to the appropriate agencies.<sup>300</sup>

The installation staff judge advocate is the principal legal adviser to the commander on environmental matters. His advise often includes the environmental requirements of state, local, and



federal laws. Upon learning of a condition of noncompliance, the attorney evaluates the report to determine if the noncompliance must be reported to a regulating agencies. In addition, the attorney must be a participant in the command's Environmental Quality Control Committee (EQCC).<sup>301</sup> This committee advises the commander on environmental priorities and strategies. It assesses the environmental consequences of all installation activities.<sup>302</sup>

As part of the commander's staff, the Army attorney frequently attends meetings with other staff officers and the commander. Policies and decisions are made at these meetings. As a member of the EQCC, the attorney may assist in formulating policy. The attorney's conflict will arise if he discovers a proposal or an installation activity that violates an environmental law.

The attorney's obligation is to the client. The attorney has discovered that the client's agent is acting contrary to the Army's best interests. The guidance of rule 1.13 suggests that this is an offense that the attorney may want to report to his immediate supervisor.<sup>303</sup> Discovery of the violation may result in criminal or civil penalties against the Army. Public disclosure of the violation may cast the Army in an unfavorable light. In addition, the public is ill-equipped to protect themselves from the danger of this violation.

The attorney may have other reasons to report the violation. As a member of the EQCC, the attorney may be in a position to formulate policy. Knowledge of the violation, thus, may subject the attorney to criminal penalties. An innovative prosecutor may convince a jury that the attorney was in a position to prevent the violation, but did not. The attorney may be considered a responsible corporate officer and found responsible under the RCO doctrine.

*D. The Conflict During an Environmental Audit*

Corporate and Army attorneys face similar dilemmas when involved in environmental audits. To conduct a comprehensive environmental audit, auditors must interview lower- and mid-level employees. It is only from these employees that auditors may learn of the illegal dumping of contaminated waste or of a discharge in excess of permit requirements. When an attorney conducts the audit, these interviews may fall within the attorney work-product doctrine. Not all audits result in litigation, however. This is particularly true for the Army, which conducts an environmental audit every two years. The audit was not conducted in anticipation of litigation and is not protected by the privilege.<sup>304</sup>

One of the main goals of an environmental audit is to discover areas of noncompliance with environmental laws. Once discovered, these deficiencies can be corrected. A good faith effort on the

part of the Army or the corporation to correct the deficiency may mitigate the offense. Perhaps civil penalties can be avoided.

Likewise, an immediate and honest effort to correct the deficiency may relieve the responsible corporate officer of criminal responsibility. In this age of stiffer criminal penalties and higher fines for environmental violations, an audit is a useful tool mitigate the effects.

The audit may not be as helpful to agency employees. An employee who admits he dumped hazardous waste in an open landfill has incriminated himself. He faces severe criminal penalties. His interests now conflict with the Army's interests. In addition, because of the RCO doctrine, his interests also conflict with the commander's interests. Attorneys conducting the audit have an ethical duty to advise the employee that there is a conflict of interest. The employee should be told that his statements are not privileged and advised to seek legal advice. After receiving this advice, the employee is likely to terminate the interview.

With the interview of this one employee, environmental auditors may have discovered serious threats to the health and welfare of the surrounding community. The employee may have knowledge of widespread dumping of hazardous wastes. The employee, however, may refuse to speak to the auditor for fear of

incriminating himself. The auditor then discovered nothing. An interview with this employee furthers the purpose of environmental statutes--the preservation of the health and safety of the general public.

Nonetheless, DOJ encourages corporations to name the employees responsible for the contamination. The sincerity of a corporation's voluntary disclosure is based, in part, on its cooperation in the subsequent DOJ investigation. DOJ considers the voluntary release of employee names a reflection on the company's overall cooperation.

Environmental audits should not be used as criminal investigatory documents. It serves the public interest better to discover the violation and correct it. The fear of a criminal prosecution may defeat this ultimate goal.

## VII. A Proposal for a Self-Evaluative Privilege

### A. *The Self-Evaluative Privilege*

The self-evaluative privilege was created in *Bredice v. Doctors Hospital, Inc.*<sup>305</sup> In *Bredice*, the court applied a qualified self-evaluative privilege to the minutes of a hospital committee meeting. The committee was comprised of members of the

hospital staff. It was established to review hospital procedures, including specific instances of patient care.

The meeting evaluated the effectiveness of specific medical procedures. The meetings encourage candid comments from doctors about medical procedures they used. In addition, the meetings encourage the doctors to critique the procedures used by their colleagues. The court noted these deliberations cannot occur if doctors fear their critiques will become public.<sup>306</sup>

The purpose of the meeting was to improve the standard of care for all patients. The court noted that with constant improvements to medical technology, doctors need to know of the most up-to-date techniques. These meetings assist in disseminating that information. There is overwhelming public interest in improved medical care. The "free flow" of information at these meetings should "continue unimpeded."<sup>307</sup>

Courts have applied the self-evaluative privilege to other internal reviews.<sup>308</sup> The privilege applies to an internal investigation conducted by a police department,<sup>309</sup> to an accident investigation by a railroad company,<sup>310</sup> and to an internal investigation conducted pursuant to a voluntary disclosure program.<sup>311</sup>

To determine whether information is privileged under the self-evaluative privilege, courts use three criteria to evaluate it.<sup>312</sup> First, was the information obtained from an internal audit?

Second, does the public have an interest in preserving the free flow of this type of information? Third, would the gathering of this information stop if disclosure were allowed?<sup>313</sup> The privilege has applied in cases when these criteria were met; its been denied to information that lacked one of the criteria.<sup>314</sup>

The self-evaluative privilege is a qualified privilege. It can be overcome by a showing of necessity. In addition, the privilege only applies to the subjective evaluations contained in the information. The underlying facts are not privileged.<sup>315</sup>

#### *B. The Need for a Self-Evaluative Privilege*

There is strong public policy reasons to encourage corporate self-policing. This is equally true for agency self-policing. Particularly with public welfare laws like environmental laws, the public benefits from strict compliance with the laws. Compliance with environmental laws, however, is not instinctive. The laws are a "vast and complicated array of regulatory legislation" that affect most aspects of a corporation's daily operation.<sup>316</sup> The need to conduct an environmental audit is apparent to anyone involved in a regulated industry.<sup>317</sup> The EPA and DOJ encourage corporations to conduct environmental audits.

The EPA does not have adequate resources to investigate all possible sources of noncompliance. It learns of ninety percent of all environmental violations from voluntary disclosure. These violations were discovered through the use of an environmental audit. The corporation's fear of disclosure of these audits, however, "threatens to limit the valuable efforts of corporate counsel to ensure their clients' compliance with the law."<sup>318</sup>

Constructive environmental auditing cannot occur when there is fear of premature disclosure of the results. The fear of disclosure creates two distinct chilling effects on the auditing process.<sup>319</sup> The chilling effect on the corporation may cause it not to conduct an audit at all. If the corporation does conduct an audit, the chilling effect may hamper the auditor's access to witnesses.

The chilling effect on the corporation is profound. The fear of criminal liability is often enough to cause a corporation to avoid an environmental audit. The corporation also fears EPA enforcement actions and the risk of significant fines for each day it is in noncompliance. Corporations also fear the public disclosure of their environmental audit. This disclosure exposes the corporation to citizen suits. The disclosure also may result in civil liability for a toxic tort claim.

Corporations also fear disclosure of environmental audits because public knowledge of the corporation's environmental violations may adversely affect the corporations public image. All these fears compounded may cause the corporation to forego an audit.

Perhaps even more important is the chilling effect disclosure may have on the auditor's ability to gather facts.<sup>320</sup> The only possibility an auditor has to discover environmental violations may be from interviewing lower- and mid-level employees. Without an assurance of privilege, these employees may be unwilling to talk to the auditor. The employees may have knowledge of the illegal dumping of hazardous waste. Disclosure of this fact, however, may subject them to criminal liability. They choose instead to remain silent. Discovery of the violation is frustrated and the public remains at risk to the hazard.

### *C. The Conflict With the Citizen's Right to Know*

To justify a self-evaluative privilege for environmental audits, there must be public support of the self-analysis and the belief that this analysis would stop if there was no privilege.<sup>321</sup>

Many commentators believe that analysis of environmental compliance will continue without a privilege.



Citing many statutorily-imposed reporting requirements, commentators believe companies will continue to conduct environmental audits without a self-evaluation privilege.<sup>322</sup> DOJ warns that the criminal risks are too high to avoid conducting such audits.<sup>323</sup> Nonetheless, only fifty percent of the regulated industries conduct the audits.<sup>324</sup> More protection must be afforded to the results of the audits to entice more companies to conduct them.<sup>325</sup>

There is widespread public support of environmental audits. There is also widespread public support in preserving the free flow of this type of information. However, there is also widespread support in the public dissemination of this information.

The legislative history of environmental laws reveals Congress' intent to engage citizens in the enforcement of environmental laws. A self-evaluative privilege for environmental audits will deny citizens of open discovery. This will frustrate a citizen's ability to bring an enforcement action and fulfill a role as a private attorney general.

Yet, affording a privilege to environmental audits places the citizen in no worse position than if the audit had never been conducted at all.<sup>326</sup> The underlying facts are still discoverable, provided the citizen has sufficient resources to discover them.

But the public good is served better if the environmental audits are completed.

Environmental audits are not conducted merely to defend against civil or criminal liability actions. Audits critically analyze corporate practices. Environmental audits often result in discoveries of environmental violations. The audit recommends a plan to correct the corporate practice and a plan to clean-up the environmental hazard it created. Normally the corporation and the EPA enter a voluntary agreement orchestrating the environmental clean-up. The end result of an audit is the clean-up of the environmental hazard. The public is the beneficiary of the audit. It results in both a change in corporate practices and a clean-up of the environmental violation.

The Army's ECAS report also contains such recommendations. Faced with enormous liability, the Army has established a "worst-first" approach to environmental hazards. From reports of the environmental conditions at all of its facilities, the Army's priority is the clean-up of the worst environmental hazards first. Less severe environmental hazards will receive a lesser priority. Eventually, the Army's plan is to clean all environmental contaminations.<sup>327</sup>

Citizen groups often have disputed the Army's order of priority.<sup>328</sup> The Army may decide to clean a severe environmental

hazard in Colorado first, and leave a minor contamination in North Carolina to later. The North Carolina citizen, whose home is located in the same city as the installation, may challenge the Army's order of priority. To that citizen, the contamination in his hometown is the most severe. He, of course, wants the Army to clean that contamination before any others.

I have always been struck by the way a proposal for an incinerator or a landfill mobilizes a lot of people who do not want the offending entity near them. . . . [T]he only thing that matters is protecting their backyard. The famous 'not in my backyard' syndrome, NIMBY, has been much maligned but is often on target and is an undeniably powerful political force.<sup>329</sup>

Citizens may be disgruntled with the schedule agreed to by the EPA for environmental clean-ups. They may be disgruntled with the Army's order of priority. Armed with the results of environmental audits, citizens may become private attorneys general and challenge these decisions in court. This defeats the end goal of an environmental audit. A self-evaluative privilege must protect environmental audits.

#### VIII. Conclusion

There is overwhelming public interest for government agencies and private corporations to conduct environmental audits. These audits reveal dangers to the public health and welfare. Therefore, these audits fulfill the public policy intent of public welfare laws.

Auditors must be assured that these audits will not act to their legal detriment. Likewise, those providing information to the auditor must be assured that their statements will not act against their private interests. Now, there is insufficient protection for the results of an environmental audit.

The attorney-client privilege does not protect audits adequately. Often times, the audit will reveal a conflict of interest between the client and an agent of the client. Attorneys have an obligation to inform the employee of this conflict. Auditors have an obligation to inform the employee that his statement can act to his legal detriment.

The attorney work-product privilege does not protect audits adequately. This privilege protects only documents that were prepared in a reasonable anticipation of litigation. Not every audit will result in litigation. In fact, because environmental laws are public welfare laws, these documents should be prepared to discover and correct environmental hazards. This benefits the public as a whole.

For government agencies, exemption five of FOIA does not protect audits adequately. This exemption protects only pre-decisional internal memoranda. Thus, the environmental audit report only remains protected until it becomes a final decision. The final report, however, includes the Army's order of clean-up priorities. Citizens, spurred on by the NIMBY phenomena, may use this report to challenge the Army's priorities.

A self-evaluative privilege protects these documents when the other privileges fail. Although privileges are not lightly created, a self-evaluative privilege for environmental audits furthers the public policy interests which motivated the enactment of environmental laws. The certainty of the privilege will encourage corporations to conduct candid environmental audits. The public will benefit from an environment devoid of environmental contamination. "[I]n the long run, denying protection will stifle more information than will applying the privilege."<sup>330</sup>

## IX. ENDNOTES

1. Joseph E. Murphy, *The Self-Evaluative Privilege*, 7 J. CORP. L. 489, 495 (1982).
2. See Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 598 (1980).
3. See *infra* notes 21-24 and accompanying text.
4. See *infra* note 28 and accompanying text.
5. Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1084 (1983).
6. See *id.* at 1083-84; Saltzburg, *supra* note 2, at 598.
7. 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).
8. For a discussion of the self-evaluative privilege, see *infra* notes 305-15 and accompanying text. See also notes 86-94 and accompanying text.
9. See *infra* notes 308-11 and accompanying text.

10. Murphy, *supra* note 1, at 495.
11. See *supra* text accompanying note 1.
12. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).
13. *Id.* at 393.
14. See *infra* text accompanying notes 277-91.
15. For a discussion of the attorney-client privilege, see *infra* text accompanying notes 25-41.
16. The attorney work product doctrine is discussed at *infra* text accompanying notes 50-56.
17. See *infra* text accompanying notes 151-59.
18. See *infra* text accompanying notes 160-64.
19. See *infra* text accompanying notes 176-80.
20. See *infra* text accompanying notes 321-29.
21. 8 J. WIGMORE, EVIDENCE, § 2290, at 542 (McNaughton rev. ed. 1961); Developments in the Law, *Privileged Communications*, 98 HARV. L. REV. 1450, 1455 (1985)[hereinafter Developments].

22. Developments, *supra* note 21, at 1457.
23. Note, *supra* note 5, at 1085.
24. Saltzburg, *supra* note 2, at 598 & n.3.
25. *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) (quoting MODEL CODE OF EVIDENCE Rule 210 cmt. (1942)) (emphasis omitted).
26. Wigmore, *supra* note 21, § 2290, at 543; Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 216 n.76 (1989).
27. Wigmore, *supra* note 21, § 2286, at 530-31.
28. *Id.*, § 2291, at 545; Alexander, *supra* note 26, at 216-17.
29. Saltzburg, *supra* note 2, at 604, 609.
30. *See Upjohn Co. v. United States*, 449 U.S. 391, 393 (1981).
31. *Id.*
32. Saltzburg, *supra* note 2, at 603 n.14.



33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Wigmore, *supra* note 21, § 2291, at 554. In an oft-quoted definition, Professor Wigmore proposes the confines of the privilege:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relate to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

*Id.*

38. *Id.*, § 2291, at 545.

39. *Id.*, § 2290, at 544. It is an honorable man who keeps his promises. But the attorney's promise to his client extended only as far as the litigation. The attorney may not invoke the privilege after the litigation ended. Moreover, the client could not claim the privilege, for it was never his to begin with. *Id.*

The point of honor would protect him thus far. . . .

'When the cause is ended, . . . he is then only to be considered, with respect to his former employer, as one man to another; and then the breach of trust does not fall within the jurisdiction of this Court; for the Court can't determine what is honor, but what is law.'

*Id.* (quoting *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1139, 1240 (Ex. 1743)).

40. *Id.*, § 2290, at 545.

41. *Id.*, § 2292, at 554. Professor Wigmore explains the general principals of the modern day application of the attorney-client privilege. This explanation is considered definitive. *See supra* note 37.

42. CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS*, 539 (4th ed. 1983).

43. *Id.* at 540.

44. *Hickman v. Taylor*, 329 U.S. 495, 501 (1947); Diana Lloyd Muse, *Discovery in France and the Hague Convention: The Search for a French Connection*, 64 N.Y.U. L. REV. 1073, n.11 (1989).

45. Wright, *supra* note 42, at 542.

46. *Id.* at 540.

47. *Id.* at 543 (quoting Hickman v. Taylor, 329 U.S. 495, 507 (1947)).

48. *Id.* at 548-49.

49. FED. R. CIV. P. 26(c); Wright, *supra* note 42, at 560.

50. Hickman v. Taylor, 329 U.S. 495 (1946).

51. *Id.* at 510.

52. *Id.*

53. *Id.*

54. FED. R. CIV. P. 26(b)(3).

55. 5 U.S.C. § 552 (1988).

56. See EPA v. Mink, 410 U.S. 73, 86 (1973) (FOIA does not permit inquiry into the needs of the requestor).

57. Ch. 324, § 3, 60 Stat. 238.

58. Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047, 1047 (1973).

59. See, e.g., *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 (D.D.C. 1974).

60. 5 U.S.C. § 552(a)(1)-(2) (1988).

61. *Id.* at § 552(a)(1).

62. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975)(citing Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967); Note, *supra* note 58, at 1047).

63. 5 U.S.C. § 552(a)(2) (1988).

64. DEP'T OF ARMY, REG. 25-55, THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM, para. 1-507(a) (9 Feb. 1990).

65. 5 U.S.C. § 552(a)(4)(B) (1988).

66. 5 U.S.C. § 552(b) (1988). The statute exempts from disclosure all documents that are:

(1) specifically authorized by an Executive order to be secret and are classified secret;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) privileged trade secrets and commercial or financial information obtained from a person;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

*Id.*

67. *Id.* at § 552 (b)(5).

68. *Sears*, 421 U.S. at 149; Ronald I. Keller, Note, *The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government*, 62 B.U. L. REV. 1003, 1015 (1982); Note, *supra* note 58, at 1047-48.

69. 566 F.2d 242 (D.C. Cir. 1977).

70. 617 F.2d 854 (D.C. Cir. 1980).

71. In *Mead Data*, the attorneys were advising the client on contract negotiations.

72. *Id.* at 863.

73. *Id.* The court explained that the communications made by the auditors to the attorneys related to the regulation of private firms. Thus, they are not confidential communications concerning the agency. The court also noted that "[i]t is hard to imagine the 'confidential information' which an auditor might have communicated to the regional counsel." *Id.*

74. S.Rep. No. 813, 89th Cong., 1st Sess. 2 (1965) reprinted in 1966 U.S.C.C.A.N. 2418. See also *Jordan v. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978).

75. See *supra* notes 52-53 and accompanying text. The privilege assimilated by Congress into exception five is the privilege that was recognized in civil discovery. *Sears*, 421 U.S. at 155.

76. *Coastal States*, 617 F.2d at 865.

77. See e.g., *Sears*, 421 U.S. at 151; *EPA v. Mink*, 410 U.S. at 88-89; *Jordan*, 591 F.2d at 772; Current Developments, *supra* note 5, at 1619-23; Note, *supra* note 68, at 1015 n.72.

78. *Sears*, 421 U.S. at 151 (quoting *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss*, 40 F.R.D. 318, 324 (D.D.C. 1966)).

79. S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965).

80. *Sears*, 421 U.S. at 153.

81. *Id.* at 152.

82. 5 U.S.C. § 552(b)(1988).

83. *Id.*; see *EPA v. Mink*, 410 U.S. 73, 88-90 (1973). Congress amended FOIA in 1974 to adopt this holding.

84. *Id.* at 93. See also *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984).

85. *Sears*, 421 U.S. at 162.

86. 465 U.S. 792 (1984).

87. *Id.* at 795-96.

88. *Id.* at 796.

89. *Id.* at 796 (citing *Machin v. Zukert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1973). "Confidential statements made to air crash safety investigators were held to be privileged with respect to pretrial discovery over 20 years ago." This has become known as the Machin privilege. See *id.*

90. *Id.* at 798.

91. *Id.* at 801.

92. *Id.* at 799 (citing *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983)).

93. *Id.* at 803 n.25 (citing FED. R. EVID. 501). See also text accompanying note 5.



94. See *infra* notes 308-14 and accompanying text.

95. U.S. CONST. Art. II, § 1, cl. 1.

96. The phrase "unitary executive" originated from the 1926 Supreme Court case, *Myers v. United States*, 272 U.S. 52 (1926).

Chief Justice Taft wrote:

'Vest [the power to remove an executive officer] in the Senate jointly with the President, and you abolish at once that great principle of *unity and responsibility in the executive* department, which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community.'

*Id.* at 131 (quoting Alexander Hamilton from the annals of the first Congress) (emphasis added). Justice Scalia has called this a lengthy, "carefully researched and reasoned" opinion. *Morrison v. Olson*, 487 U.S. 654, 734 (1987) (Scalia, J., dissenting).

97. *Morrison v. Olson*, 487 U.S. 654, 734 (1987) (Scalia, J., dissenting).

98. *Myers*, 272 U.S. at 135.

99. 3 U.S.C. § 301 (199\_).

100. See generally *Morrison v. Olson*, 487 U.S. at 729 (Scalia, J., dissenting); *Developments, supra* note 21, at 1622.

101. Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B. ASS'N 61, 63 (1978) (footnote omitted) (quoting Federal Bar Ass'n Opinion 73-1)[hereinafter *Government Lawyer*].

102. See Adam Babich, *Circumventing Environmental Laws: Does the Sovereign Have a License to Pollute?*, 6 NAT. RESOURCES & ENV'T, No. 1, 28, 66 (1991)(government lawyers are pledged to serve the public).

103. *Coastal States*, 617 F.2d at 863 (agency is client for purposes of the privilege); *Mead Data*, 566 F.2d at 254 (agency's communications with its attorneys falls under attorney-client privilege); Note, *supra* note 68, at 1010.

104. *Government Lawyer*, *supra* note 101, at 65-66.

105. DEP'T OF ARMY, PAMPHLET 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter R.P.C.].

106. Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1, 1 (1989).

107. R.P.C., *supra* note 105, rule 1.13(a).

108. *Id.*, rule 1.13(g). *See also* DEP'T OF ARMY REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE, para. 9-3(a)(2) (15 Sep. 1989) (communications between legal assistance client and attorney are privileged). *See generally* *Government Lawyer*, *supra* note 101, at 63.

109. MANUAL FOR COURTS-MARTIAL, United States, 1984, MIL. R. EVID. 502 [hereinafter MCM].

110. *Id.*, MIL. R. EVID. 502(b)(1).

111. *Id.*, MIL. R. EVID. 502 (b)(2).

112. R.P.C., *supra* note 105, rule 1.13(b).

113. *Id.*, rule 1.13(a).

114. Government Lawyer, *supra* note 101, at 67.

115. See United States v. AT&T Co., 86 F.R.D. 603, 617-20 (D.D.C. 1979) (government is not a single client; agencies may have opposite positions).

The fact that agency life is often marked by inter-agency rivalries . . . is no argument for maintaining that a lawyer should be responsible to the agency in its role as part-protector of the public interest. Although there are specific jobs to be done, . . . that is no reason to think of a government agency as responsible only to one or another aspect of the public interest. Such thinking allows the internecine warfare to continue instead of fostering a spirit of cooperation among multitudinous groups.

Government Lawyer, *supra* note 101, at 67-68.

116. Executive Order No. 12146, *reprinted at* 28 U.S.C. § 509 (1988). The order provides:

Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for the resolution elsewhere.

*Id.* Since it is possible for one agency to sue another agency, agencies are necessarily separate and distinct. Thus, it is not possible for the federal government to be the attorney's client. The client must be the agency with whom he is employed. See *Colorado v. Dep't of the Army*, 707 F. Supp. 1562, 1570 (D. Colo. 1989) (court suggested that DOJ attorneys had a conflict of interest). For a discussion of this case, see *infra* notes 216-27 and accompanying text. See also *infra* notes 264-66 and accompanying text.

117. 207 F. Supp. 771 (N.D. Ill.), *supplemented*, 209 F. Supp. 321 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963).

118. *Id.* at 773.

119. *Id.*

120. *Id.* at 774.

121. *Id.* at 776.

122. *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir. 1963).

123. *Id.* at 322-23.

124. *Id.* at 323.

125. *Id.* at 324.

126. Alexander, *supra* note 26, at 226; James Heckman, *Recent Developments: Evidence--Upjohn v. United States--Corporate Attorney-Client Privilege*, 7 J. CORP. L. 359, 359 (1982).

127. Alexander, *supra* note 26, at 226.

128. For an excellent discussion of these two tests and their relative merits, see Robert G. Nath, *Upjohn: A New Prescription for the Attorney-Client Privilege and Work Product Defenses in Administrative Investigations*, 30 BUFFALO L. REV. 11, 37-54 (1981).

129. *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa.), petition for mandamus and prohibition denied *sub nom*, *General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 943 (1963).

130. *Id.* at 485.

131. *Id.*

132. *Id.*

133. Heckman, *supra* note 126, at 361.

134. Alexander, *supra* note 26, at 298.

135. Alexander, *supra* note 26, at 298-99. Professor Alexander submits:

[C]orporate managers will continue to employ attorneys to conduct internal investigations because of their business duty to be vigilant and to comply with the law; attorneys will be thorough in interviewing employees because of their professional obligation to do so; and lower-level employees will be no less inhibited in their communications with attorneys than they would under a broader privilege because the corporation's privilege is not theirs to invoke.

*Id.* at 299.

136. 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971).

137. *Id.* at 491.

138. *Id.* at 489-91.

139. *Id.* at 490.

140. *Id.* at 491.

141. *Id.*

142. *Id.* at 491-92.

143. 572 F.2d 596 (8th Cir. 1978) (en banc).

144. *Id.* at 609.

145. *Id.*

146. 449 U.S. 383 (1981).

147. *Id.* at 387.



148. *Id.* at 392.

149. *Id.* at 393.

150. *Id.* at 395.

151. *See supra* note 105 and accompanying text.

152. R.P.C., *supra* note 105, at rule 1.13(e).

153. For a discussion of ethical considerations for corporate attorneys, see Alexander, *supra* note 26, at 286-94. Professor Alexander concludes that Rule 1.13(d) of the Model Rules of Professional Conduct provides little assistance to the corporate attorney.

154. R.P.C., *supra* note 105, rule 1.13(c).

155. *Id.*, rule 1.13(c)(1)-(5).

156. *Id.*, rule 1.13(d).

157. *Id.*, rule 1.6(b).

158. *Id.*, rule 1.6 comment.

159. *Id.*, rule 1.13(a); *see supra* text accompanying notes 113.
160. *Morissette v. United States*, 342 U.S. 246, 254 (1952).
161. 320 U.S. 277 (1943).
162. *Id.* at 280.
163. *Id.* at 279. For a discussion of the Responsible Corporate Officer Doctrine espoused by the *Dotterweich* Court, *see infra* text accompanying notes 165-75.
164. *Id.* at 280-81.
165. 421 U.S. 658 (1975).
166. *Id.* at 661-66.
167. *Id.* at 670-71.
168. *Id.* at 672.
169. 402 U.S. 558 (1971).
170. *Id.* at 563.

171. *Id.* at 565.

172. 471 U.S. 419 (1985).

173. *Id.* at 426.

174. *Id.* at 433.

175. *Id.* at 432-33.

176. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 667 (3d Cir, 1984), *cert. denied*, 469 U.S. 1208 (1985).

177. 42 U.S.C. §§ 9601-9675 (1988).

178. *Id.*

179. 42 U.S.C § 6928(D)(1),(2) (A)-(B) (1988).

180. *Id.*

181. The statute provides for, in part, criminal sanctions against any person who:

(1) knowing transports or causes to be transported any hazardous waste identified or listed under this

subchapter . . . to a facility which does not have a permit . . . ,

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter-

(A) without a permit . . . ;

(B) in knowing violation of any material condition or requirement of such permit;

42 U.S.C § 6928(d)(1), (2)(A)-(B) (1988). For an excellent discussion of CERCLA, see Michele McAninch Miller, *Defense Department Pursuit of Insurers for Superfund Cost Recovery*, 138 MIL. L. REV. 1, 4-8 (1992). For an excellent discussion of RCRA, see Mark J. Connor, *Government Owned-Contractor Operated Munitions Facilities: Are They Appropriate in the Age of Strict Environmental Compliance and Liability?*, 131 MIL. L. REV. 1, 14-18 (1991).

182. See *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991); *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991); *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1991); *United States v. Greer*, 850 F.2d 1447 (11th Cir.

1988); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499 (11th Cir. 1986); *United States v. Johnson & Towers*, 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

183. *Johnson & Towers*, 741 F.2d at 669.

184. *See supra* notes 169-71 and accompanying text.

185. *Johnson & Towers*, 741 F.2d 662.

186. 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

187. *Id.* at 745.

188. For a complete discussion of the knowing requirement in RCRA and a full discussion of *Dee*, see Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of § 6928 (d) of RCRA After United States v. Dee*, 59 GEO. WASH. L. REV. 862 (1991).

189. *Id.* at 884-85. The authors provide an excellent discussion of the application of the RCO doctrine in *Dee*.

190. *See supra* text accompanying notes 167-68.

191. *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 ENVTL. L. REP. (Envtl. L. Inst.) No. 12, at 10, 480, reprinted in Andrew M. Goldberg, Comment, *Corporate Officer Liability for Federal Environmental Statute Violations*, 18 B.C. ENVTL. AFF. L. REV. 357, 358 n.7 (1991).

192. See e.g., Christopher Harris & Patrick O. Cavanaugh, *Environmental Crimes and the Responsible Government Official*, 6 NAT. RESOURCES & ENV'T (A.B.A.) 20, 22-23 (1991).

193. Barrett & Clarke, *supra* note 188, at 882 n.112.

194. Exec. Order No. 12088, 43 Fed. Reg. 47,707 (1978) reprinted in 42 U.S.C. § 4321 app. 976-78 (1988). The order provides, in part:

The head of each Executive agency is responsible for compliance with applicable pollution control standards

. . . .

that would apply to a private person.

195. *Id.* See generally Susan L. Smith, *Government Immunity: Can the King Do No Wrong*, 6 NAT. RESOURCES & ENV'T No. 1, 16, at 57 (1991).

196. Victoria Churchville, *Maryland Officials Probing Aberdeen Chemical Disposal*, WASH. POST, May 8, 1986, at A1.

197. *See generally id.*; Connor, *supra* note 181, at 4-5.

198. Earl Lane, *Deadline Demanded for Feds' Pollution Cleanup*, NEWSDAY, Feb. 8, 1990, at 2.

199. Babich, *supra* note 102, at 28.

200. Marie Cocco & Earl Lane, *Uncle Sam, Polluter: Clout to Clean Up is Lacking*, NEWSDAY, Feb. 7, 1990, at 7.

201. Andrew M. Gaydosh, *The Superfund Federal Facility Program: We Have Met the Enemy and it is U.S.*, 6 NAT. RESOURCES & ENV'T, No. 3, 21, 21 (1992). 201. *See also* Miller, *supra* note 181, at 1.

202. 10 U.S.C. § 2703 (1988).

203. Gaydosh, *supra* note 201, at 21; Miller, *supra* note 181, at 5.

204. *See generally* Stephen Herm, Note, *Criminal Enforcement of Environmental Laws on Federal Facilities*, 59 GEO. WASH. L. REV. 938, nn. 28-36 (1991).

205. See *infra* notes 235-36 and accompanying text.
206. 42 U.S.C. § 9620 (1988).
207. But see *infra* notes 244-45 and accompanying text.
208. See *supra* notes 96-102 and accompanying text.
209. See *supra* note 116 and accompanying text.
210. Exec. Order 12088, 43 Fed. Reg. 47,707 (1978), *reprinted in* 42 U.S.C. § 4321 app. 976-78 (1988).
211. See generally Cocco & Lane, *supra* note 200, at 7 (quoting Robert Roach, a House environment subcommittee staff member).
212. *Id.* (quoting Frank Kelley, Attorney General of Michigan).
213. Smith, *supra* note 195, at 16.
214. *Hancock v. Train*, 426 U.S. 167, 179 (1976).
215. See generally *id.*; Babich, *supra* note 102, at 29; Lane, *supra* note 198, at 2. Lane also reports that continued claims of national security and denying access to facilities and information are thwarting compliance. *Id.*
216. 707 F. Supp. 1562 (D. Colo. 1989).



217. See *infra* note 224.

218. *Colorado v. Dep't of the Army*, 707 F. Supp. at 1570. Other commentators have argued that government attorneys should be more interested in furthering environmental restoration than in formulating precise legal arguments to limit the government's liability. Babich, *supra* note 102, at 66.

219. 707 F. Supp. at 1563.

220. Gaydosh, *supra* note \_\_\_\_, at 24.

221. *Colorado v. United States Dep't of the Army*, 707 F. Supp. at 1570.

222. *Id.* at 1567.

223. *Id.* at 1570.

224. *Id.*

The same Justice Department attorneys have repeatedly claimed to represent both the Army and the E.P.A. in this action, even though the Army is a defendant and the E.P.A. acts for the United States as a plaintiff. These Justice Department lawyers repeatedly have rejected the

court's suggestions that representing these opposing parties constitutes a conflict of interest.

*Id.*

225. *Id.*

226. *Id.*

227. Gaydosh, *supra* note 201, at 24.

228. Cocco & Lane, *supra* note 200, at 7.

229. Babich, *supra* note 102, at 28.

230. *Colorado v. Dep't of the Army*, 707 F. Supp. at 1570.

231. Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights*, PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF THE STATE CONSTITUTION 45, 47 (Barbara Wolfson, ed. 1993)(Papers of the Roscoe Pound Foundation, Report of the 1992 Forum for State Judges)(Co-sponsored by the Roscoe Pound Foundation & Yale Law School).

232. *Id.*

233. Environmental Compliance by Federal Agencies: Hearings on H.R. 1056 Before the Subcomm. on Transportation and Hazardous Materials on the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 7 (1989) (1988 campaign speech by then-Vice-President George Bush) *reprinted in* Herm, *supra* note 204, at 938 n.1.

234. 42 U.S.C. § 6961(a) (1993 Supp.).

235. 42 U.S.C. § 6961(a) (1993 Supp.).

236. *Id.*

237. See National Defense Authorization Act for Fiscal Years 1993 and 1994, Pub. L. No. \_\_\_\_\_, § 322, \_\_\_\_ Stat. \_\_\_\_ (1992).

238. *Id.*

239. *Id.*

240. Herm, *supra* note 204, at 941 (quoting William H. Parker III, Deputy Assistant Secretary of Defense for Environment).

241. *Id.* at 942.

242. Address by Secretary of Defense to a national environmental

conference, Sept. 4, 1990, *quoted in* Miller, *supra* note 181, at 1 n.1.

243. *Id.*

244. 42 U.S.C. § 9609(a)(1)(e) (1988 and supp. 1993).

245. 42 U.S.C. § 6961(b)(1)-(2) (1993 Supp.).

246. *See supra* notes 241-43 and accompanying text.

247. Vice-President AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* 178-79 (Plume ed. 1993).

248. Peter A. Alpert, Comment, *Citizen Suits Under the Clean Air Act: Universal Standing for the Uninjured Private Attorney General?*, 16 B.C. ENVTL. AFF. L. REV. 283, 310 & n.245 (1988).

249. *Id.* at 313.

250. *See e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619 (1982); Clean Air Act, 33 U.S.C. § 1365; RCRA, 42 U.S.C. § 6972; Clean Water Act, 42 U.S.C. § 7604; CERCLA, 42 U.S.C. § 9659.

251. U.S. CONST. art. III, § 2, cl. 1.

252. Wright, *supra* note 42, at 60.

253. *Id.* at 71.

254. A further discussion of the issues surrounding citizen standing is beyond the scope of this article. For an excellent discussion of this issue, see Alpert, *supra* note 248, at 326-27. This commentator concludes that the standing requirement will bar many citizen suits under the environmental laws.

255. Interview with Herbert H. Tate, EPA Assistant Administrator for Enforcement, *Companies' Fear of Environmental Disclosure Has No Basis*, 23 ENV'T REP. (BNA) 24, 25 (May 1, 1992)[hereinafter Tate].

256. Alpert, *supra* note 248, at 311 (quoting James Moorman).

257. This should enable some citizens and citizen groups to acquire the financial resources needed to bring a citizen suit.

258. Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 812 (1991).

259. *Id.* at 813.

260. See *supra* text accompanying notes 248-49.
261. See *supra* text accompanying note 176.
262. The citizen has the right to bring suit against "any person," including the federal government.
263. Connor, *supra* note 181, at 25 (statement of Ohio Attorney General Celebrezze).
264. Babich, *supra* note 102, at 29.
265. See *supra* notes 216-27 and accompanying text for a discussion of *Colorado v. United States*, 707 F. Supp. 1562 (D.C. Colo. 1989).
266. CERCLA, 42 U.S.C. § 9622 (e)(6).
267. 42 U.S.C. § 6961(b)(1).
268. See Alpert, *supra* note 248, at 326.
269. Robert C. Davis, Jr. & R. Timothy McCrum, *Environmental Liability for Federal Lands and Facilities*, 6 NAT. RESOURCES & ENV'T, No. 1, 31, 68 (1991).
270. *A Routine Outrage*, WALL ST. J., July 19, 1989, at A-14, col.

1, reprinted in Connor, *supra* note 181, at 31 (statement of Rep. Ray).

271. Davis & McCrum, *supra* note 269, at 68.

272. Jonathan Z. Cannon, John S. Guttman & Margaret Lattin Bazany, *Addressing Inefficiency: EPA Enforcers Adopt a Coordinated Approach*, NAT'L L.J., Sep. 2, 1991, at 29, 29.

273. *Id.*

274. U.S. Environmental Protection Agency, *Enforcement Four-Year Strategic Plan: Enhanced Environmental Enforcement for the 1990s* (Oct. 17, 1990).

275. Cannon, Guttman & Bazany, *supra* note 272, at 29.

276. *Id.*

277. ENVIRONMENTAL AUDITING POLICY STATEMENT, 51 Fed. Reg. 25004, 25006 (July 1986).

278. Cannon, Guttman & Bazany, *supra* note 272, at 29.

279. Environmental Protection Agency, *Environmental Auditing Policy Statement*, 51 Fed. Reg. 25004 (July 9, 1986).

280. *Id.*

281. David J. Freeman & Carolyn C. Cunningham, *The Environmental Audit: Management Tool or Governmental Weapon?*, N.Y. L.J., Dec. 30, 1991, at 1, col. 1.

282. 33 U.S.C. § 1251 *et seq.* (1988).

283. *Id.* at §§ 1311, 1342.

284. 42 U.S.C. § 6924 (1990).

285. See generally William N. Farren III & Thomas L. Adams, Jr., *Environmental Regulatory Objective: Auditing and Compliance or Crime and Punishment*, 21 [NEWS & ANALYSIS] ENVTL. L. REP. (ELI) 10239, 10239 (1991).

286. U.S. Dep't of Justice, *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator*, July 1, 1991.

287. *Id.* Specifically, DOJ looks to see if management established an effective, independent auditing team. Then, once the results



of the audit were finalized, did management implement changes to ensure compliance?

288. *Id.* Disclosures that are mandated by statute do not qualify as a disclosure in mitigation. The value of the disclosure to the government investigation is the most significant criteria. Thus, did the disclosure aid in the investigation or did it merely disclose what government regulators would have discovered anyway?

289. *Id.* DOJ guidelines specifically mention as a consideration whether the company was willing to disclose to DOJ all the results from its internal investigation, to include the names of all potential witnesses.

290. *See infra* notes 316-18 and accompanying text.

291. Tate, *supra* note 255, at 24.

292. *See supra* notes 186-93 and accompanying text.

293. DEP'T OF ARMY, REG. 200-1, ENVTL. PROTECTION AND AWARENESS, para. 12-8(a) (23 Apr. 1990) [hereinafter AR 200-1].

294. *Id.*

295. DEP'T OF ARMY, REG. 200-1, ENVTL. PROTECTION AND AWARENESS,

para. 12-8(a) (23 Apr. 1990) [hereinafter AR 200-1].

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at para. 1-25(a)(1).

300. *See generally id.* Paragraph 1-25 enumerates many of the commander's responsibilities. Of course, the commander may not personally handle all of these actions. He maintains a staff to whom he delegates many of these responsibilities.

301. *Id.* at 12-13(b).

302. *Id.*

303. *See supra* notes 153-54 and accompanying text.

304. *See supra* notes 52-53 and accompanying text.

305. *Bredice v. Doctor's Hospital, Inc.*, 50 F.R.D. 249, 250-51, (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973) (citation omitted).

306. *Id.* at 250.

307. *Id.*

308. *See generally* Murphy, *supra* note 1, at 490-94.

309. *Elliot v. Webb*, 98 F.R.D. 293 (D. Idaho 1983).

310. *Richards v. Maine Cent. R.R.*, 21 F.R.D. 590 (D. Me. 1957).

311. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977). Though the case was decided on attorney-client privilege grounds, the court applied a self-evaluative privilege rationale.

312. Note, *supra* note 5, at 1086.

313. *Id.*

314. *Id.* at 1091.

315. *Murphy*, *supra* note 1, at 494-95.

316. *See Upjohn Co. v. United States*, 449 U.S. 391, 393 (1981). In *Upjohn*, the statutes governed corporate behavior in the

Securities and Exchange area. It may be as equally difficult to comply with environmental laws.

317. See Murphy, *supra* note 1, at 495.

318. *Id.*

319. Note, *supra* note 5, at 1091.

320. *Id.* at 1092.

321. Murphy, *supra* note 1, at 495.

322. See generally Harris & Cavanaugh, *supra* note 192, at 60.

323. Current Developments, *Companies' Use of Environmental Audits Depends on Confidentiality*, 23 ENV'T REP. (BNA) No. 17 at 1248, 1249 (Aug. 21, 1992)(statement of former DOJ attorney Barry Hartman).

324. Tate, *supra* note 255, at 24.

325. Current Developments, *supra* note 323, at 1249 (statement of Bell Atlantic attorney Joseph Murphy).

326. Murphy, *supra* note 1, at 496. See also *Upjohn*, 449 U.S. at 396.

327. See *supra* notes 296-98 and accompanying text.

328. Current Developments, *Panel Adopts Recommendations to Restore Public's Confidence About Facility Cleanups*, 23 ENV'T REP. (BNA) No. 35, at 2092, 2093 (Dec. 25, 1992).

329. Gore, *supra* note 247, at 355.

330. Note, *supra* note 5, at 1088.