SHOULD CONGRESS ADOPT SELECTIVE WAIVER LEGISLATION?

TABLE OF CONTENTS

I. INTRODUCTION 595
II. OVERVIEW 598
A. *Types of Privileges Corporations Attempt to Selectively Waive* 599
1. Attorney-Client Privilege 600
2. Work-Product Doctrine 601
B. *Case Law on Selective Waiver* 602
C. *Proposed Federal Rule of Evidence 502 and the Recently Dropped Provision on Selective Waiver* 606
1. Recent History of Selective Waiver Provisions 606
2. Public Comment on Proposed Rule 502's Selective Waiver Provision 608
III. DISCUSSION 611
A. *The Common Law Approach* 611
B. *New Government-Investigation Privilege* 614
C. *Should Congress Adopt a Selective Waiver Rule?* 616
1. The Government Agency 616
2. The Investigated Corporation 617
3. The Third-Party Private Litigants 620
4. The Courts 622
D. *Should Congress Adopt the Advisory Committee's Suggested Selective Waiver Provision Language?* 623
IV. CONCLUSION 624

I. INTRODUCTION

Corporate scandals have become as ubiquitous as political scandals. In the wake of the Enron collapse and its progeny, Congress and the U.S. Securities and Exchange Commission ("SEC") took serious steps in an attempt to reinstill public confidence in corporation governance.[1] Not surprisingly, these steps have resulted in the uncovering of several new scandals.[2] Almost every governance

1. For example, Congress passed the Sarbanes-Oxley Act (also known as the Public Company Accounting Reform and Corporate Responsibility Act of 2002), and the SEC has published various memoranda expressing policies on investigation and enforcement. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). See *infra* notes 17 and 26 for examples of relevant government memoranda.

2. For example, in 2006, the fact that numerous companies had backdated options became

scandal eventually results in both governmental investigations and civil litigation.[3] The narrow purpose of this Comment is to examine one doctrine that has an enormous impact on both the governmental investigations of, and civil litigation involving, corporations implicated in these scandals: selective waiver.[4] Selective waiver effectively is the waiver of legally privileged information with respect to a governmental agency while keeping the same information privileged in dealings with subsequent parties.[5] The following example from *In re Qwest Communications International Inc.*[6] demonstrates the multimillion dollar impact that selective waiver can have on a case.

In 2002, the SEC and the U.S. Department of Justice ("DOJ") began investigating Qwest Communications' business practices.[7] Pursuant to negotiated, written confidentiality agreements between Qwest and both agencies, Qwest produced more than 220,000 pages of documents otherwise protected by the attorney-client privilege and the work-product doctrine.[8] These confidentiality agreements essentially "stated that Qwest did not intend to waive the attorney-client privilege or work-product protection."[9]

Concurrent with the governmental investigations, the United States District Court for the District of Colorado consolidated several civil cases involving the same issues into a federal securities action.[10] During the consolidated securities class action, Qwest did not produce the documents released to the SEC and the DOJ, arguing that those documents remained privileged.[11] The plaintiffs moved to compel Qwest to produce the documents, and the magistrate judge concluded that Qwest had waived attorney-client privilege and work-product protection by producing the documents to the agencies.[12] Qwest, therefore, was ordered to produce the documents to the plaintiffs.[13] The "district court refused to overrule the magistrate judge's order compelling production,"[14] and in June of 2006, the

headline news. *See* Frank Ahrens, *Scandal Grows Over Backdating of Options*, WASH. POST, Oct. 12, 2006, at D1 (discussing issue on front page of Business section).

3. *See, e.g.*, *In re* Mut. Fund Market-Timing Litig., 468 F.3d 439, 441 (7th Cir. 2006) (discussing litigation stemming from mutual fund timing scandal); Press Release, Office of N.Y. State Att'y Gen., Spitzer, S.E.C. Reach Largest Mutual Fund Settlement Ever (Mar. 15, 2004), *available at* http://www.oag.state.ny.us/press/2004/mar/mar15c_04.html (noting investigation by state and federal regulatory agencies).

4. See *infra* note 23 and accompanying text for a comprehensive definition of "selective waiver."

5. Anton R. Valukas et al., *Limited Waiver—Controlling Extent of Distribution*, *in* COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES § 5:34 (Jeffrey M. Kaplan et al. eds., 2007), *available at* Westlaw, CPCSG § 5:34.

6. 450 F.3d 1179 (10th Cir. 2006).

7. *Qwest*, 450 F.3d at 1181.

8. *Id.* See *infra* Part II.A for a discussion of attorney-client privilege and work-product doctrine.

9. *Qwest*, 450 F.3d at 1181.

10. *Id.* at 1182.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Qwest*, 450 F.3d at 1182.

Tenth Circuit ultimately upheld the district court's decision.[15]

The fact pattern of *Qwest* is not unusual in the current corporate environment of regulatory requests and civil litigation.[16] The SEC and the DOJ, in particular, have offered corporations under investigation the carrot of possible leniency tied to cooperation.[17] The corporations, however, must balance the potential benefits of cooperation with the possible pitfalls of a court viewing the cooperation as waiver in subsequent civil actions.[18] The SEC and many corporations have looked to selective waiver as the mechanism for filling this gap.[19] The courts, as in *Qwest*, however, have generally determined that selective waiver is not a natural extension of attorney-client privilege and the work-product doctrine.[20]

Is there any relief in sight for corporations stuck between this proverbial rock and hard place? Probably not in the immediate future—the Advisory Committee on Evidence Rules ("Advisory Committee") recently dropped a selective waiver provision from Proposed Federal Rule of Evidence 502 ("Proposed Rule").[21] The centerpiece of this Comment will be the recently dropped provision and its interplay with the case history and policy issues relating to selective waiver. Ultimately, this Comment will attempt to determine whether the Advisory Committee made an error by excluding the selective waiver from Proposed Rule 502 and whether Congress should enact a separate

15. *Id.* at 1201. Thereafter, Qwest settled the consolidated securities class action for $400,000,000, and it paid $250,000,000 in a separate civil suit to the SEC. *In re* Qwest Commc'ns Int'l, Inc. Sec. Litig., No. 01-cv-01451-REB-CBS, 2006 U.S. Dist. LEXIS 71267, at *7-8 (D. Colo. Sept. 29, 2006).

16. *See, e.g.*, *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 291-302 (6th Cir. 2002) (discussing selective waiver argument in civil litigation subsequent to DOJ investigation).

17. *See* Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys 6-8, 14-15 (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf [hereinafter Thompson Memorandum] (stating that companies may receive leniency for cooperation with investigations). Recently, Deputy Attorney General Paul J. McNulty issued a policy memorandum that replaces the Thompson Memorandum. Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys 9 (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf [hereinafter McNulty Memorandum] (requiring prosecutors to obtain prior senior supervisory approval before making waiver demand).

18. *See, e.g.*, *Qwest*, 450 F.3d at 1201 (finding waiver even after confidentiality agreement with government).

19. *See*, *e.g.*, Brief of the SEC, *Amicus Curiae* in Support of McKesson Corp. and Supporting Reversal at 1, United States v. Bergonzi, 403 F.3d 1048 (9th Cir. 2005) (No. 03-10511), *available at* http://www.sec.gov/litigation/briefs/mckesson.htm [hereinafter SEC McKesson Brief] (discussing SEC support for corporations' ability to use selective waiver).

20. See *infra* Part II.B for relevant circuit court case law on incorporating selective waiver into the existing privileges.

21. *See* Memorandum from the Honorable Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to the Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules 4-5 (May 15, 2007), *available at* http://www.uscourts.gov/rules/Reports/2007-05-Committee_Report-Evidence.pdf [hereinafter 2007 Memorandum from Advisory Comm.] (discussing final omission of selective waiver provision).

selective waiver provision.[22]

Part II.A will explain the types of privileges that corporations attempt to selectively waive, specifically the attorney-client privilege and the work-product doctrine. Part II.B examines how the various circuits have ruled on the issue of selective waiver. Part II.C discusses the selective waiver provision that the Advisory Committee recently dropped from Proposed Rule 502 and the related public comments that may have led to this decision. Part III.A explains why none of the current common law approaches to selective waiver can resolve the debate on this issue. Part III.B proposes that selective waiver constitutes an entirely new privilege and discusses why this distinction is important. Finally, Parts III.C-D explain why Congress should adopt a new selective waiver provision and what form the provision should take.

II. OVERVIEW

Selective or limited waiver is "disclosure of confidential information to one party without waiving applicable privileges with respect to other parties."[23] This Comment examines the specific scenario that occurs when a corporation waives attorney-client privilege or work-product protection during a government agency investigation while attempting to retain those privileges for any subsequent civil litigation.[24]

The recent spate of well-publicized corporate scandals has increased the significance of the selective waiver debate.[25] Over the past decade, the DOJ and the SEC have formalized their policies and requirements for corporate cooperation during an investigation.[26] Furthermore, the SEC, in various amicus

22. *Id.* at 5.

23. Valukas et al., *supra* note 5, § 5:34.

24. *See, e.g.*, Memorandum from the Honorable Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to the Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 12 (May 15, 2006), *available at* http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf [hereinafter 2006 Memorandum from Advisory Comm.] (discussing conflicting approaches to scenario in federal courts).

25. Matthew M. Oliver, *Managing Cooperation While Minimizing Exposure: As Courts Tighten the Noose on the Selective Waiver Doctrine, Congress May Extend a Lifeline*, GP SOLO LAW TRENDS & NEWS, July 2006, http://www.abanet.org/genpractice/newsletter/lawtrends/0607/litigation/managecooperation.html. For examples of recent corporate scandals, please see the abundance of articles about topics ranging from Enron to the more recent news about various companies under investigation for backdating employee stock options. *E.g.*, Charles Duhigg, *Poisoned by Scandal, Craving an Antidote*, N.Y. TIMES, Dec. 10, 2006, §3, at 1 (discussing corporate scandals in depth).

26. *See, e.g.*, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, Accounting and Auditing Enforcement Release No. 1470, [2001-2003 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 74,985, at 63,196 (Oct. 23, 2001) [hereinafter Seaboard Report] (discussing factors government should consider for determining whether, and how much, to credit company's "self-policing, self-reporting, remediation and cooperation"); Memorandum from Eric H. Holder, Deputy Att'y Gen., to All Component Heads and United States Attorneys (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud//docs/reports/1999/chargingcorps.html [hereinafter Holder Memorandum] (establishing policy encouraging corporations to waive attorney-client privilege and work-product immunity in exchange for possible

briefs, has advocated the availability of selective waiver as a tool for maximizing the effectiveness and efficiency of government investigations.[27] Corporations, therefore, have a critical interest in this debate because these governmental agencies have policies in place that reward investigatory cooperation with leniency.[28]

The current state of selective waiver is unquestionably unsettled, however, and recent dealings have done little to clarify the lack of uniformity, leading one court to note that "the case law addressing the issue of [selective] waiver [is] in a state of hopeless confusion."[29] The federal circuits are split on the issue of selective waiver,[30] and after receiving extensive public comment, the Advisory Committee on Evidence Rules recently dropped a proposed change to the Federal Rules of Evidence relating to selective waiver.[31] The following subsections will introduce some of the various policy considerations for the existence of privileges along with the approaches taken by courts, administrative agencies, and the legislature.

A. Types of Privileges Corporations Attempt to Selectively Waive

When examining the issue of selective waiver, it is important to understand the various types of privilege that companies attempt to protect, because the courts have often taken fundamentally different approaches to attorney-client privilege and work-product privilege.[32] Furthermore, some courts have taken

favorable treatment by prosecutors); McNulty Memorandum, *supra* note 17, at 9 (modifying Thompson Memorandum by requiring prosecutors to obtain prior senior supervisory approval before making waiver request); Thompson Memorandum, *supra* note 17, at 3 (setting forth nine factors for federal prosecutors to consider in deciding whether to investigate, charge, or negotiate plea with corporation).

27. *E.g.*, SEC McKesson Brief, *supra* note 19, at 1, 23-26 (advocating use of selective waiver doctrine to enable expeditious SEC investigations).

28. *See* Michael H. Dore, *A Matter of Fairness: The Need for a New Look at Selective Waiver in SEC Investigations*, 89 MARQ. L. REV. 761, 767 (2006) (citing Seaboard Report and stating that SEC articulated leniency policy in exchange for cooperation in investigations).

29. *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 294-95 (6th Cir. 2002) (internal quotation marks omitted) (quoting Jobin v. Bank of Boulder (*In re* M&L Bus. Mach. Co.), 161 B.R. 689, 696 (D. Colo. 1993)).

30. *Compare* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (allowing selective waiver of attorney-client privilege, though not directly deciding waiver issue), *with In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1192 (10th Cir. 2006) (rejecting selective waiver and noting that selective waiver in this case would not "further the purposes of the attorney-client privilege or work-product doctrine").

31. *See* 2007 Memorandum from Advisory Comm., *supra* note 21, at 4 (stating selective waiver doctrine dropped from proposed changes to Federal Rules of Evidence after considering public comment). Also, on January 4, 2007, Senator Arlen Specter introduced a bill that would limit requests for selective waiver by the government. *See* Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007) (forbidding government agents and attorneys from conditioning treatment on waiver of privilege). A similar bill has been introduced in the House of Representatives. Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007).

32. See *infra* Part II.B for a discussion of various circuits' approaches to attorney-client privilege and work-product doctrine.

different approaches depending on the type of work product involved.[33]

1. Attorney-Client Privilege

The commonly cited definition of attorney-client privilege is:

> "where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived."[34]

While this privilege is not incorporated in the Federal Rules of Evidence,[35] it is the oldest of the common law privileges for confidential communications.[36] "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[37] The attorney-client privilege serves the dual functions of furthering the attorney's need to receive complete disclosure from the client and the client's need for informed legal advice.[38]

Continued confidentiality is one of the keys for maintaining attorney-client privilege.[39] As one circuit court stated, "'the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant.'"[40] It is these "precautions" that are the crux of the selective waiver issue.[41]

33. *See, e.g.*, *In re* Martin Marietta Corp., 856 F.2d 619, 623-26 (4th Cir. 1988) (applying selective waiver to opinion work product but not to nonopinion work product).

34. *Diversified Indus.*, 572 F.2d at 602 (quoting Wonneman v. Stratford Sec. Co., 23 F.R.D. 281, 285 (S.D.N.Y. 1959)).

35. *See* FED. R. EVID. 501 (stating that privilege "shall be governed by the principles of the common law").

36. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

37. *Id.*; *see also* Trammel v. United States, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.").

38. *In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1185 (10th Cir. 2006) (citing *Upjohn*, 449 U.S. at 390); *see also* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"); MCCORMICK ON EVIDENCE § 87, at 134 (John W. Strong ed., 5th ed., abr. 1999) (describing rationale behind need for attorney-client privilege); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (John T. McNaughton rev. 1961) (defining attorney-client privilege by breaking concept into various components).

39. *See Qwest*, 450 F.3d at 1185 (noting that disclosure to third party usually waives privilege).

40. *Id.* (quoting United States v. Ryans, 903 F.2d 731, 741 n.13 (10th Cir. 1990)).

41. *Id.*

2. Work-Product Doctrine

The work-product doctrine was also originally a product of the common law.[42] Unlike attorney-client privilege, however, the work-product doctrine was subsequently codified in Federal Rule of Civil Procedure 26(b)(3).[43] "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."[44] The work-product doctrine furthers the ideals of the adversary system directly by ensuring that papers prepared by attorneys in anticipation of litigation remain confidential.[45]

There are two types of work product: opinion work product and nonopinion work product.[46] Courts have generally agreed that nonopinion work product, i.e., relevant nonprivileged facts included in an attorney's file, may be discoverable under certain circumstances.[47] Some courts, however, have determined that opinion-based work product is absolutely privileged.[48] "Most courts hold that to waive the protection of the work-product doctrine, the disclosure must enable an adversary to gain access to the information."[49] Meanwhile, courts have not struggled in determining that investigating government agencies are adversaries of the target corporation,[50] but those courts have found more difficult the question of whether waiver to one adversary constitutes waiver against all adversaries.[51]

42. *See* Hickman v. Taylor, 329 U.S. 495, 512-14 (1947) (noting that attorney's work product in case was protected because "[n]o legitimate purpose is served by such production" and requiring production would harm "[t]he standards of the profession").

43. The Rule states:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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

44. United States v. Nobles, 422 U.S. 225, 238 (1975).

45. Westinghouse Elec. Corp. v. Republic of Phil., 951 F.2d 1414, 1428 (3d Cir. 1991).

46. *See Qwest*, 450 F.3d at 1186 (explaining types and court treatment of attorney work product).

47. *Id.*

48. *Id.* (citing Hickman v. Taylor, 329 U.S. 495, 511-12 (1947); Frontier Ref., Inc. v. Gorman-Rupp Co., 136 F.3d 695, 704 n.12 (10th Cir. 1998)).

49. *Westinghouse*, 951 F.2d at 1428.

50. *See, e.g.*, *id.* ("[W]e have no difficulty concluding that the SEC and the DOJ were Westinghouse's adversaries.").

51. *Id.* (noting varied approaches to work-product waiver as against multiple adversaries).

B. Case Law on Selective Waiver

While the Supreme Court has not yet ruled on selective waiver, most of the federal circuit courts have addressed the issue.[52] The ruling circuits have determined that either (1) selective waiver is permissible in some circumstances,[53] or (2) selective waiver is never permissible.[54] As will become clear in the subsequent subsections, the courts have been much more likely to accept selective waiver of the work-product privilege than the attorney-client privilege.[55]

No circuit has held that selective waiver may be permissibly applied to both attorney-client privilege and work-product privilege.[56] Several circuits, however, have determined or implied that selective waiver is permissible when the proper set of facts is present.[57] This case-by-case approach has created a disjointed universe of case law that, when examined closely, reveals that multiple layers of issues actually confuse the matter.[58]

The Eighth Circuit was the first circuit to adopt selective waiver, in *Diversified Industries, Inc. v. Meredith*,[59] and the only one to do so in the context of attorney-client privilege.[60] The facts in *Diversified Industries* are those of a

52. *See, e.g.*, *Qwest*, 450 F.3d at 1196 (denying selective waiver of attorney-client privilege and work-product privilege); *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 302 (6th Cir. 2002) (same); United States v. Mass. Inst. of Tech., 129 F.3d 681, 684-86 (1st Cir. 1997) (same); *Westinghouse*, 951 F.2d at 1425-29 (same); *In re* Martin Marietta Corp., 856 F.2d 619, 623, 625-26 (4th Cir. 1988) (rejecting selective waiver in attorney-client privilege context but allowing it for opinion work product); *In re* John Doe Corp., 675 F.2d 482, 488-89 (2d Cir. 1982) (rejecting selective waiver of attorney-client privilege); Permian Corp. v. United States, 665 F.2d 1214, 1220-22 (D.C. Cir. 1981) (same); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (allowing selective waiver of attorney-client privilege).

53. *See, e.g.*, *Diversified Indus.*, 572 F.2d at 611 (allowing selective waiver of attorney-client privilege).

54. *See, e.g.*, *Westinghouse*, 951 F.2d at 1425-29 (denying selective waiver of attorney-client privilege and work-product privilege); *see also Qwest*, 450 F.3d at 1186-90 (explaining various positions taken by its sister circuits); Dore, *supra* note 28, at 772 (noting categories of positions taken by federal courts).

55. *Compare Martin Marietta Corp.*, 856 F.2d at 624-26 (allowing selective waiver of opinion work product), *with Permian Corp.*, 665 F.2d at 1220-22 (rejecting selective waiver of attorney-client privilege).

56. *Compare Diversified Indus.*, 572 F.2d at 611 (allowing selective waiver for attorney-client privilege but not expressly allowing it for work product), *with In re* Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844, 846-47 (8th Cir. 1988) (stating that work product was waived because Chrysler "voluntarily disclos[ed] [a] computer tape to its adversaries").

57. *See, e.g.*, *In re* Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) (implying that selective waiver might be allowable when confidentiality agreement exists); *Martin Marietta Corp.*, 856 F.2d at 623 (allowing selective waiver of opinion work product); *Diversified Indus.*, 572 F.2d at 611 (allowing selective waiver for attorney-client privilege).

58. *See Qwest*, 450 F.3d at 1186-92 (discussing divergent rationales and analyses of issues created by existing circuit-level case law on selective waiver).

59. 572 F.2d 596, 598 (8th Cir. 1978) (en banc).

60. *Diversified Indus.*, 572 F.2d at 611.

typical selective waiver case: allegations of corporate corruption surfaced,[61] Diversified Industries hired an outside law firm to conduct an internal investigation,[62] and the company disclosed a copy of the final report in response to an SEC subpoena.[63] The court's reasoning for adopting "limited waiver" was that "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."[64] The Eighth Circuit's analysis on selective waiver consisted of only a single brief paragraph,[65] which left the scope of the issue wide open.

Beyond the Eighth Circuit, however, the courts have almost universally rejected selective waiver of attorney-client privilege.[66] The First, Second, Third, Fourth, Sixth, Seventh, Tenth, Federal, and District of Columbia Circuits have all rejected selective waiver.[67] The reasoning used by these circuits has varied in scope and intensity, creating a recognized amount of uncertainty on the topic.[68]

The courts rejecting selective waiver of the attorney-client privilege have noted that a corporation's "[v]oluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship."[69] Some courts, however, have reasoned that there is nothing distinctive about the government when it is acting in an adversarial role, and therefore, "'the attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality.'"[70] These courts found

61. *Id.* at 607-08.

62. *Id.*

63. *Id.* at 611.

64. *Id.*

65. The Eighth Circuit wrote:

> We finally address the issue of whether Diversified waived its attorney-client privilege with respect to the privileged material by voluntarily surrendering it to the SEC pursuant to an agency subpoena. As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred. To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.

Diversified Indus., 572 F.2d at 611 (citations omitted).

66. *See, e.g.*, *In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1187-88, 1192 (10th Cir. 2006) (reviewing circuits rejecting selective waiver and ultimately siding with majority).

67. *See, e.g.*, *id.* (rejecting selective waiver by corporation of attorney-client privilege); *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 302 (6th Cir. 2002) (same); United States v. Mass. Inst. of Tech., 129 F.3d 681, 684-86 (1st Cir. 1997) (same); Westinghouse Elec. Corp. v. Republic of Phil., 951 F.2d 1414, 1425-27 (3d Cir. 1991) (same); *In re* Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988) (same); *In re* John Doe Corp., 675 F.2d 482, 488-89 (2d Cir. 1982) (same); Permian Corp. v. United States, 665 F.2d 1214, 1220 (D.C. Cir. 1981) (same).

68. *See Qwest*, 450 F.3d at 1196 (noting that only common conclusion in case law is that circuits have not expanded attorney-client privilege or nonopinion work-product doctrine by applying selective waiver).

69. *Permian Corp.*, 665 F.2d at 1221.

70. *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (quoting *Permian Corp.*,

little sympathy for the predicament of investigated companies and noted that while it might not be ideal, the company retains a method for retaining privilege: not disclosing any confidential information to the government.[71] As another court so elegantly stated, "selective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage."[72]

The Fourth Circuit, while rejecting selective waiver for attorney-client privilege and nonopinion work product, has applied selective waiver in the limited situation of opinion-based work product.[73] The Fourth Circuit based its finding on the "especial protection for opinion work product" provided under Federal Rule of Civil Procedure 26(b)(3).[74]

The circuits that have allowed some form of selective waiver of work-product privilege are in the distinct minority, as nine of the thirteen federal circuits have all rejected selective waiver.[75] Surprisingly, even the Eighth Circuit, which established limited waiver for attorney-client privilege,[76] has rejected selective waiver in the context of nonopinion work product.[77]

A minority of circuits have also addressed selective waiver when the added element of a negotiated confidentiality agreement between the government and the company exists and have offered another set of incongruous opinions. The circuits are split on whether a confidentiality agreement is truly a relevant factor in examining selective waiver.[78] Proponents of factoring in whether a confidentiality agreement exists rely on the justification that it protects the expectations of the parties involved in the agreement.[79] Conversely, critics of this confidentiality agreement approach note that attorney-client privilege "is not a creature of contract" and "does little to serve the 'public ends' of adequate legal representation that the attorney-client privilege is designed to protect."[80]

665 F.2d at 1222).

71. *See, e.g.*, *id.* at 1375 (stating that company could "insist on a promise of confidentiality before disclosure to the SEC").

72. *In re* Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993).

73. *In re* Martin Marietta Corp., 856 F.2d 619, 626 (4th Cir. 1988).

74. *Id.*

75. *See, e.g.*, *In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1192 (10th Cir. 2006) (rejecting any form of work-product selective waiver); *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 307 (6th Cir. 2002) (same); United States v. Mass. Inst. of Tech., 129 F.3d 681, 687-88 (1st Cir. 1997) (same); Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1430 (3d Cir. 1991) (same); *In re* John Doe Corp., 675 F.2d 482, 488-89 (2d Cir. 1982) (same); Permian Corp. v. United States, 665 F.2d 1214, 1220 (D.C. Cir. 1981) (same).

76. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).

77. *In re* Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844, 845 (8th Cir. 1988).

78. *Compare Qwest*, 450 F.3d at 1194 (rejecting relevance of confidentiality agreement), *with In re* Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) (indicating that confidentiality agreement may justify allowing selective waiver).

79. *See, e.g.*, Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broad. Co., 521 F. Supp. 638, 646 (S.D.N.Y. 1981) (noting that express reservation of future confidentiality protects privilege).

80. *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 303 (6th Cir.

The Tenth Circuit recently discussed almost all of the various factors relating to selective waiver in *In re Qwest Communications International Inc.*[81] After conducting a thorough examination of the topic, which incorporated virtually all of the previous courts' analyses, the court made the determination that "the record in [the case before it did] not justify adoption of selective waiver."[82] This language was typical of that used by most of the circuits in rejecting selective waiver.[83] A court will commonly recognize the benefits of selective waiver theoretically but reject them in the case at hand based on the record before it.[84] The *Qwest* conclusion is noteworthy primarily because it demonstrates that regardless of the depth of analysis undertaken by courts, they are almost summarily disinterested in laying down a per se rule on selective waiver.[85]

The Tenth Circuit's analysis is also of particular interest because it examined the question of whether selective waiver would actually constitute an entirely new "government-investigation privilege"[86] and "not a natural, incremental next step in the common law development of privileges and protections."[87] This characterization is significant because, as the *Qwest* court noted, the Supreme Court rarely recognizes new privileges,[88] and the lower courts are likely to follow that example. Such a distinction is also critical because it signals that the courts are shifting the decision about adopting selective waiver to Congress.[89] Selective waiver, therefore, is on precarious ground in almost every circuit.

2002) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

81. 450 F.3d 1179, 1186-97 (10th Cir. 2006).

82. *Qwest*, 450 F.3d at 1201.

83. *See, e.g.*, *Steinhardt Partners*, 9 F.3d at 236 ("[R]ules relating to privilege in matters of governmental investigations must be done on a case-by-case basis."); *see also Upjohn Co*., 449 U.S. at 396 (noting that questions of privilege must be decided on case-by-case basis so as not to "violate the spirit of Federal Rule of Evidence 501").

84. *See, e.g.*, *Steinhardt Partners*, 9 F.3d at 236 ("[W]e decline to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection.").

85. *See Qwest*, 450 F.3d at 1200-01 (concluding that Congress is better suited to consider adoption of selective waiver rule).

86. *Id.* at 1197-99; *see also* Lauren Rosenblatt, *Will Selective Waiver Become a Reality Under Proposed Rule 502?*, BUS. CRIMES BULL., Aug. 17, 2006, http://www.law.com/jsp/ihc/PubArticleFriendlyIHC.jsp?id=1155732412262 (noting new privilege while examining court treatment in recent Tenth Circuit case).

87. *Qwest*, 450 F.3d at 1192.

88. *Id.* at 1197.

89. "If a change is to be made because it is thought that such voluntary disclosure programs are so important that they deserve special treatment, that is a policy matter for the Congress, or perhaps through the SEC (through a regulation)." *Id.* at 1200-01 (quoting *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1375 (D.C. Cir. 1984)).

C. Proposed Federal Rule of Evidence 502 and the Recently Dropped Provision on Selective Waiver

1. Recent History of Selective Waiver Provisions

In the summer of 2006, the Standing Committee on Rules of Practice and Procedure published for public comment Proposed Rule 502[90] and the accompanying committee notes, as drafted and recommended by the Advisory Committee.[91] Proposed Rule 502, "Attorney-Client Privilege and Work Product; Limitations on Waiver,"[92] was introduced to remedy "a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product."[93] The Advisory Committee stated that the rule would ensure that "disclosure of protected information to a federal government agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to non-governmental persons or entities, whether in federal or state court."[94] The Advisory Committee specified, however, that it had not yet taken a position on the merit of the selective waiver provision.[95] The Committee further noted that it was especially interested in receiving public comment on the selective waiver provision to determine if "limiting the scope of waiver will 1) promote cooperation with government regulators and/or 2) decrease the cost of government investigations and prosecutions."[96]

On May 15, 2007, after receiving more than seventy public comments on the Proposed Rule, the Advisory Committee submitted its follow-up report on Proposed Rule 502 to the Standing Committee on Rules of Practice and

90. The Proposed Rule stated:

> **(c) Selective waiver.** — In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.

2006 Memorandum from Advisory Comm., *supra* note 24, at 5-6.

91. *Id.* at 1, 4; *see also* Rosenblatt, *supra* note 86 (discussing recently proposed change to Federal Rules of Evidence).

92. 2006 Memorandum from Advisory Comm., *supra* note 24, at 4. The deadline for public comment on proposed Rule 502 was February 15, 2007. Memorandum from the Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S. to the Bench, Bar, and Public 1 (Aug. 10, 2006), *available at* http://www.uscourts.gov/rules/Memo_Bench_Bar_and_Public_2006.pdf [hereinafter Memorandum from the Comm. on Rules of Practice & Procedure].

93. 2006 Memorandum from Advisory Comm., *supra* note 24, at 1.

94. *Id.* at 12.

95. *Id.* at 6 n.** ("[T]he Committee has taken no position on [Proposed Rule 502(c)] . . . .").

96. *Id.*

Procedure.[97] This report included an explanation of the nine changes to Proposed Rule 502, the most significant being that the provision on selective waiver was dropped completely.[98] The Advisory Committee noted that it had approved a separate report to Congress on selective waiver, which included the arguments both favoring and opposing the doctrine and an explanation of the Advisory Committee's decision to take no position on the merits of selective waiver.[99] The separate report also included suggested language for a statute on selective waiver to assist Congress if it chose to proceed with a separate selective waiver provision.[100] The Advisory Committee's suggested statutory language closely tracked that included in the Proposed Rule distributed for public comment.[101] The Advisory Committee then approved the revised language of Proposed Rule 502, thereby marking the end of the road for the latest attempt to codify selective waiver.[102]

The provision in Proposed Rule 502 was not the first attempt to codify selective waiver. In 1984, the SEC proposed an amendment to the Securities and Exchange Act of 1934 that would have established selective waiver, but Congress rejected this attempt at codification.[103] More recently, in 2003, the SEC withdrew

97. 2007 Memorandum from Advisory Comm., *supra* note 21, at 4.

98. *Id.* at 4-5.

99. *Id.* at 4. The Committee noted that "selective waiver raised questions that were essentially political in nature" and that would be difficult to answer in the rule-making process. Memorandum from the Honorable Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to the Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure, Draft of Cover Letter to Congress on Selective Waiver 3 (May 15, 2007), *available at* http://www.uscourts.gov/rules/Reports/EV05-2007.pdf [hereinafter 2007 Draft Cover Letter].

100. 2007 Draft Cover Letter, *supra* note 99, at 4-5. The Advisory Committee's suggested selective waiver statutory language was as follows:

> **(a) Selective waiver.** — In a federal [or state] proceeding, the disclosure of a communication or information protected by the attorney client privilege or as work product — when made for any purpose to a federal office or agency in the course of any regulatory, investigative, or enforcement process — does not waive the privilege or work-product protection in favor of any person or entity other than a [the] federal office or agency.
>
> **(b) Rule of construction.** — This rule does not:
>
> 1) limit or expand a government office or agency's authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law; or
>
> 2) limit any protection against waiver provided in any other Act of Congress.
>
> **(c) Definitions.** — In this Act:
>
> 1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
>
> 2) "work-product protection" means the protection that applicable law provides for tangible material or its tangible equivalent, prepared in anticipation of litigation or for trial.

Id. at 4.

101. *Compare id.* (containing 2007 Advisory Committee's suggested selected waiver statutory language), *with* 2006 Memorandum from Advisory Comm., *supra* note 24, at 5-6 (setting out 2006 Advisory Committee's Proposed Rule distributed for public comment).

102. 2007 Memorandum from Advisory Comm., *supra* note 21, at 5.

103. Securities and Exchange Commission Statement in Support of Proposed Section 24(d) of the Securities Exchange Act of 1934, 16 Sec. Reg. & L. Rep. (BNA), at 460, 461 (Mar. 2, 1984) (noting

a proposed provision for selective waiver from the Sarbanes-Oxley Act of 2002[104] due to a determination that Congress alone held the authority to adopt such a rule.[105] Nonetheless, the SEC has made it clear that it views selective waiver as a valuable tool for improving internal corporate governance and maximizing the effectiveness and efficiency of governmental investigations.[106]

2. Public Comment on Proposed Rule 502's Selective Waiver Provision

As the Tenth Circuit aptly noted in *Qwest*, "[l]egislatures and rule-making bodies are endowed with tools to marshal evidence, facts, and experience from numerous and diverse sources that can support more dramatic and immediate creation of new rules or modifications of old rules."[107] The Committee on Rules of Practice and Procedure properly utilized these tools by publishing Proposed Rule 502 for public comment.[108] The published public comments provided a variety of perspectives on the issue.[109] Interestingly, not all corporate counsel or business law groups see the proposed rule as a panacea.[110] As the Advisory Committee noted, "[t]he public comment from the legal community . . . was

that proposed section would remove uncertainty concerning disclosure of privileged information to commission); *see also* Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1425 (3d Cir. 1991) (noting that Congress rejected proposed amendment).

104. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

105. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47,276, Investment Company Release No. 25,829, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003) (noting that many commentators questioned commission's authority to promulgate such rule); *see also* Rosenblatt, *supra* note 86 (noting that under Rules Enabling Act of 1934, 28 U.S.C. §§ 2071-2077, Congress has sole authority to approve rules of court "creating, abolishing, or modifying an evidentiary privilege" (quoting 28 U.S.C. § 2074(b)(2000))).

106. *See* Rosenblatt, *supra* note 86 (noting SEC's long-standing position on selective waiver).

107. *In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1200-01 (10th Cir. 2006).

108. *See* Memorandum from the Comm. on Rules of Practice & Procedure, *supra* note 92, at 1 (requesting circulation of proposed amendments to federal rules to bench, bar, and public for comment).

109. Approximately seventy public comments were published, approximately half of which were transcripts of testimony from several interested parties at Federal Judicial Conference Rules Hearings in New York and Arizona. *See* U.S. Courts, 2006 Evidence Rules Comments Chart, http://www.uscourts.gov/rules/2006_Evidence_Rules_Comments_Chart.htm (last visited Feb. 16, 2008) (listing public comments); *see also, e.g.*, Letter from Susan Hackett, Senior Vice President & Gen. Counsel, Assoc. of Corporate Counsel, to the Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 3-5 (June 20, 2006), *available at* http://www.acc.com/public/attyclientpriv/502acc.pdf (noting association's concerns about government potentially forcing companies to submit to selective waiver); Letter from Matthew R. Gemello & Steven B. Stokdyk, Co-Chairs, Corps. Comm. of the Bus. Law Section of the State Bar of Cal., to Daniel J. Capra, Reporter, Judicial Conference Advisory Comm. on the Fed. Rules of Evidence 2 (Apr. 14, 2006), *available at* http://calbar.ca.gov/calbar/pdfs/sections/buslaw/corporations/2006-04-14_corporations-committee_rule-502-comment-letter.pdf [hereinafter Letter from Cal. Corps. Comm.] (noting position of committee against implementation of selective waiver).

110. *See, e.g.*, Oliver, *supra* note 25, at 2 (discussing concerns of corporate counsel who refuse to waive privilege).

almost uniformly negative."[111]

One issue raised in the public comments was whether the selective waiver provision would have been inconsistent with some state law and thus create even greater confusion.[112] As one group noted, "California Evidence Code Section 912(a) provides that the lawyer-client privilege is 'waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication . . . to *anyone*.'"[113] This group's concern was that selective waiver "may initially provide protection in one jurisdiction but thereafter be lost even in that jurisdiction because of different treatment in another jurisdiction."[114]

Another concern surrounding selective waiver is the creation or exacerbation of the "culture of waiver."[115] Concerned counsel have expressed that requests for waiver "would become item one in the play book of regulators and enforcement agencies, even at the earliest stages of the most generic investigations. . . . and would have pernicious results undermining the attorney-client relationship."[116] Some fear that this "culture of waiver" will discourage employees from seeking counsel, curtail counsels' willingness to take extensive notes at business meetings or conduct internal investigations, and generally exclude lawyers from operating in a preventative manner.[117] Also, some corporate counsel fear that "prosecutors may comfortably choose the target first, confident that they will find a crime (any crime) to charge later."[118] Prosecutors might assume that any internal investigation will disclose some form of criminal conduct, and therefore use waiver as a tool to pressure companies.[119]

There has been no dearth of supporters for the originally stated policy aims of the selective waiver provision, which include the following: (1) resolving "some longstanding disputes in the courts about the effect of certain disclosures of material,"[120] (2) furthering cooperation with government agencies,[121] and (3)

111. 2007 Draft Cover Letter, *supra* note 99, at 1.

112. *See, e.g.*, Letter from Cal. Corps. Comm., *supra* note 109, at 2 (noting state codification of lawyer-client privilege and attorney work-product doctrine may conflict with Proposed Rule 502).

113. *Id.* at 2 (alteration in original) (quoting CAL. EVID. CODE § 912(a) (Deering 2006)).

114. *Id.*

115. *See* David Brodsky, Member, ABA Presidential Task Force on the Attorney-Client Privilege, Statement at the Advisory Committee on Evidence Rules: Hearing on Proposal 502, at 13-16 (Apr. 24, 2006) (transcript available at www.lexisnexis.com/applieddiscovery/lawlibrary/EV_hearing_April_2006.pdf) [hereinafter Brodsky Statement to Advisory Comm.] (presenting statistics relating to policy concerns of selective waiver use proliferation).

116. *Id.* at 15.

117. *Id.* at 15-16; *see also* Paul Rosenzweig, Senior Legal Research Fellow, Ctr. for Legal & Judicial Studies, Testimony Before the American Bar Association Task Force on the Attorney-Client Privilege (Feb. 11, 2005) (transcript available at http://www.heritage.org/research/legalissues/tst021105a.cfm) [hereinafter Rosenzweig Testimony] (discussing history and potential impact of government using selective waiver as tool).

118. Rosenzweig Testimony, *supra* note 117 (discussing potential impact of power grab by government in relation to selective waiver).

119. *Id.*

120. 2006 Memorandum from Advisory Comm., *supra* note 24, at 8, 12-13.

reducing litigation costs.[122] The policies of clarity in the law and maximizing the efficiency of agency investigations mirror those presented above.[123] Corporations recognize that the policies of cooperation adopted by agencies like the SEC have placed them squarely between the proverbial rock and hard place—not wanting to be viewed as uncooperative, but also not wanting to open themselves up to undue civil litigation.[124] The other, often-overlooked policy goal, however, is reduced litigation cost.[125] As the Advisory Committee noted, if selective waiver leads to "'claw-back' and 'quick peek' arrangements,"[126] it could reduce the need for both the corporation and government to review thousands of documents.[127] Thus, selective waiver either would minimize the corporate legal strategy of burying issues in piles of documents, like a needle in a haystack, or would allow corporations to release all documents to the agency with only a cursory review.[128]

It is worth noting that the only subpart of Proposed Rule 502 that the Advisory Committee never took an official position on was the subsection relating to selective waiver.[129] Furthermore, the Advisory Committee solicited feedback on that subsection specifically;[130] therefore, the large proportion of negative comments might be the result of the inherent negative bias in the solicitation process. Nonetheless, in Part III, this Comment will attempt to determine if selective waiver does amount to a new type of privilege and explore some of the practical short- and long-term outcomes of this debate.

---

121. *Id.*

122. *See id.* at 8 (emphasizing policy aims of proposed rule).

123. See *supra* notes 103-06 and accompanying text for a description of the SEC's interest in codifying selective waiver.

124. *Court Rejects Doctrine that Protects Attorney-Client Privilege in Government Investigations*, CLIENT ALERT (Powell Goldstein LLP), Aug. 4, 2006, at 3-4, *available at* http://www.pogolaw.com/articles/1987.pdf (describing conflicts corporations face in complying with regulations of government agencies).

125. *See* 2006 Memorandum from Advisory Comm., *supra* note 24, at 8 (noting goal of reducing costs).

126. *Id.* at 14. "Claw-back" refers to agreements that "allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privileged documents." Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003). "Quick peek" refers to a situation where "the parties can make documents available before formal requests so that the documents can be asked for and, if privileged, an objection can be made to production." John G. Koeltl, Judge, U.S. Dist. Court, S. Dist. N.Y., Statement at the Advisory Committee on Evidence Rules: Hearing on Proposal 502, *supra* note 115, at 4.

127. *See* 2006 Memorandum from Advisory Comm., *supra* note 24, at 14 (discussing how rule provides predictability, which serves to reduce unnecessary costs); *see also, e.g.*, *In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1181 (10th Cir. 2006) (noting that case involved over 600,000 pages of privileged documents).

128. *See* 2007 Memorandum from Advisory Comm., *supra* note 21, at 2 (noting great time and effort spend during document production to ensure preservation of attorney-client and work-product privileges).

129. *See* 2006 Memorandum from Advisory Comm., *supra* note 24, at 6 n.** ("[T]he Committee has taken no position on [Proposed Rule 502(c)] . . . .").

130. See *supra* notes 90-96 and accompanying text for a discussion of the Advisory Committee's process of soliciting public comment on Proposed Rule of Evidence 502.

III. DISCUSSION

The distribution of Proposed Rule 502 for public comment and the subsequent dropping of the selective waiver provision creates a natural segue into analyzing the law of selective waiver. The following analysis will examine some of the issues surrounding selective waiver and will focus on whether Congress should adopt a separate provision on selective waiver. First, a thorough examination of the courts' handling of selective waiver is required. Second, the question of whether Proposed Rule 502(c) would have created an entirely new "government-investigation privilege" must be examined.[131] Finally, the suggested statutory language that the Advisory Committee included in its separate report to Congress must be analyzed to determine if it would serve the expressed policy purposes without creating undue harm.

Ultimately, this analysis displays that the courtroom is not the proper forum for developing a long-term solution to the issue of selective waiver.[132] This analysis also reveals that any selective waiver provision should be viewed as an entirely new privilege, not an extension of the existing attorney-client privilege or work-product doctrine.[133] Furthermore, a well-defined selective waiver provision should serve its policy purposes without having a significant negative impact on any interested parties.[134] Consequently, the examination establishes that Congress should adopt a separate selective waiver provision.[135]

A. The Common Law Approach

As several courts have recognized, "the case law addressing the issue of limited waiver [is] in a state of hopeless confusion."[136] As already noted, when viewed at the most superficial level, courts have taken one of three general positions on this topic:[137] (1) selective waiver is permissible,[138] (2) selective waiver is not permissible under any circumstances,[139] and (3) selective waiver is

131. *See Qwest*, 450 F.3d at 1197-99 (examining whether selective waiver doctrine is tantamount to entirely new privilege).

132. See *infra* Parts III.A and III.C.4 for a discussion of institutionalism issues related to selective waiver.

133. See *infra* Part III.B for a discussion of why Proposed Rule 502(c) constitutes a new privilege.

134. See *infra* Part III.C for an analysis of how Proposed Rule 502(c) would affect various interested parties.

135. See *infra* Part III.D for a discussion of why Congress should adopt Proposed Rule 502(c) in its current form.

136. *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 294-95 (6th Cir. 2002) (alteration in original) (internal quotations omitted) (quoting Jobin v. Bank of Boulder (*In re* M&L Bus. Mach. Co.), 161 B.R. 689, 696 (D. Colo. 1993)).

137. *In re Columbia/HCA Healthcare*, 293 F.3d at 295.

138. *See, e.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (allowing selective waiver of attorney-client privilege).

139. *See, e.g.*, Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1425 (3d Cir. 1991) (rejecting selective waiver because such privileges obstruct truth-finding process and benefits of waiver are outweighed by need for probative evidence).

permissible where the government agrees to a confidentiality order.[140] An examination of these approaches demonstrates that no judicial approach alone could end the hopeless confusion.

Through Federal Rule of Evidence 501, Congress specifically left the issue of privilege for the courts to determine.[141] While the common law surrounding attorney-client privilege has had almost five centuries to be refined,[142] the substantive case law relating to selective waiver is less than three decades old.[143] One could contend that perhaps the common law surrounding selective waiver simply needs more time to reach a judicial consensus.[144] It is also arguable that recent corporate scandals and agency policy shifts have led to the different findings by the various circuits. Furthermore, one could reason that the flexibility of the common law is needed to respond to the dynamic policy shifts by the government.[145] Conversely, one could argue that the fastest and cleanest method of resolving this conflict is to have the legislature provide a definitive rule.[146]

The court in *Diversified Industries, Inc. v. Meredith*[147] granted selective waiver in order to further the "developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."[148] The *Diversified* court's opinion indicates that it was looking squarely at public policy to justify granting a new type of privilege.[149] The court did not express any reasoning that its decision was furthering the traditional goals of attorney-client privilege.[150] This approach is similar to that taken to the Advisory Committee in drafting Proposed Rule

140. *See, e.g.*, *In re M&L Bus. Mach.*, 161 B.R. at 696 (allowing selective waiver when confidentiality agreement existed).

141. Federal Rule of Evidence 501 reads:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof *shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience*. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501 (emphasis added).

142. *See* Rosenzweig Testimony, *supra* note 117 (discussing historic origin of attorney-client privilege in England in 1500s).

143. *See Diversified Indus.*, 572 F.2d at 611 (reflecting first significant judicial change in selective waiver doctrine in 1977).

144. *Cf.* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 540 (1994) (noting "slow creep of case-by-case adjudication" in reaching rules of law).

145. *See* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 584 (2006) (noting long-standing notion that common law is "flexible and susceptible to change").

146. *See In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1200-01 (10th Cir. 2006) (noting legislative ability to gather information and create new rule).

147. 572 F.2d 596 (8th Cir. 1978) (en banc).

148. *Diversified Indus*., 572 F.2d at 611.

149. *Id.*

150. *Id.*

502(c).[151]

The court's approach in *Westinghouse Electric Corp. v. Republic of the Philippines*[152] focused on the traditional policy goals of attorney-client privilege, which led to the conclusion that selective waiver was impermissible.[153] This approach recognizes that attorney-client privilege is meant to encourage full disclosure to one's attorney in order to obtain legal assistance, while selective waiver encourages voluntary disclosure to a government agency.[154] The *Westinghouse* viewpoint was that while the policy goal of cooperation stated in *Diversified* was laudable, it had nothing to do with "the intended purposes of the attorney-client privilege."[155] Therefore, this approach finds no legal justification for extending the attorney-client privilege,[156] which also could be read as a refusal to adopt this new government-investigation privilege.

The final approach takes a compromise stance and focuses on whether the waiving corporation made an effort to retain privilege.[157] Proponents of this approach believe that complete waiver of privilege upon disclosure should be the default, but "the right to assert the privilege in subsequent proceedings [can be retained if] specifically reserved at the time the disclosure is made."[158] The confidentiality agreement displays that the disclosing party is not engaging "in abuse of the privilege by first making a knowing decision to waive the rule's protection and then seeking to retract that decision in connection with subsequent litigation."[159] This approach implies that selective waiver is a new privilege but seeks to ensure the burden is on the waiving party.[160] The primary goals are fairness relating to the expressed expectation of the parties and ensuring that a party does not manipulate the waiver after the disclosure to gain a tactical or strategic advantage.[161]

Thus, the courts that have allowed selective waiver have not done so in the belief that it furthers "the 'public ends' of adequate legal representation that the attorney-client privilege is designed to protect."[162] Conversely, the courts finding

151. *See* 2006 Memorandum from Advisory Comm., *supra* note 24, at 12 (noting that selective waiver furthers policy goals of increased cooperation with governmental investigations and increased investigative efficiency).

152. 951 F.2d 1414 (3d Cir. 1991).

153. *Westinghouse*, 951 F.2d at 1425-26.

154. *Id.*

155. *Id.* (citing Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981)).

156. *Id.*

157. *See, e.g.*, Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1127 (7th Cir. 1997) (rejecting selective waiver because "the possessor of the privileged information should have been more careful, as by obtaining an agreement by the person to whom they [sic] made the disclosure not to spread it further" (citing *In re* Horowitz, 482 F.2d 72, 81-82 (2d Cir. 1973); Eglin Fed. Credit Union v. Cantor, Fitzgerald Sec. Corp., 91 F.R.D. 414, 418-19 (N.D. Ga. 1981))).

158. Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broad. Co., 521 F. Supp. 638, 644-45 (S.D.N.Y. 1981).

159. *Teachers Ins*., 521 F. Supp. at 646.

160. *Id.* at 645.

161. *Id*.

162. *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 303 (6th Cir.

selective waiver impermissible have focused on the goal of the core privilege, whether attorney-client privilege or work-product protection, and concluded that selective waiver is not a natural extension of that privilege.[163] Many courts have indicated that the separate policy goals of cooperation with governmental investigations and internal investigations are "laudable"[164] but have not determined that these goals were grounds enough for creation of a new, common law government-investigation privilege.[165] The majority of circuits have followed the example of the Supreme Court, which "[m]ore often than not" has refused to adopt new privileges.[166] These circuits apparently determined that it was not their place to change the common law, while a minority has been willing to take the unusual step of recognizing a new privilege.[167] Legitimate arguments support each approach, but ultimately the Supreme Court's reticence in adopting a new privilege shifts the question to the legislative branch.[168]

B. New Government-Investigation Privilege

One commentator has contended that selective waiver amounts to merely a half privilege,[169] while many others have argued that it dilutes the existing privileges.[170] At least one court, however, has correctly identified selective waiver as an entirely new privilege specifically relating to materials surrendered in a governmental investigation.[171]

The policy justification for implementation of selective waiver "is suggestive of a new privilege, rather than gloss on an ancient one."[172] The Advisory Committee originally stated that the purpose of the selective waiver provision was not to further the traditional policy goals of attorney-client privilege or the work-product doctrine, but instead the aim was to further the policy goals of increased cooperation with governmental investigations and increased

2002) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

163. *See, e.g.*, *In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1195 (10th Cir. 2006) (noting lack of relationship between selective waiver and traditional justifications for privilege).

164. Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1425 (3d Cir. 1991); *see also* Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (noting importance of investigations).

165. *See, e.g.*, *Qwest*, 450 F.3d at 1197-99 (refusing to recognize selective waiver due to congressional inaction and lack of demand from state legislatures).

166. *Id.* at 1197.

167. *See*, *e.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (allowing selective waiver of attorney-client privilege).

168. *See Qwest*, 450 F.3d at 1199-1201 (discussing institutional limitations of judicial branch and creative, prescriptive capabilities of legislative branch).

169. Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE U. L. REV. 155, 189 (2006).

170. *See, e.g.*, Brodsky Statement to Advisory Comm., *supra* note 115, at 14 (discussing American Bar Association's ("ABA") stance that selective waiver undermines role of privilege in attorney-client relationship).

171. *Qwest*, 450 F.3d at 1197-98.

172. *Id.* at 1197 (citing Westinghouse Elec. Corp. v. Republic of Phil., 951 F.2d 1414, 1425 (3d Cir. 1991)).

investigative efficiency.[173] Traditionally, courts have viewed the attorney-client privilege as a mechanism to facilitate the complete disclosure of details between a client and his or her attorney.[174] Furthermore, the foundation for the work-product doctrine is the notion that an advocate should be able to fully prepare a client's case without concern that the opposing side will get a glimpse of his or her theory of the case.[175]

Many of the policy goals stated by the Advisory Committee are unique to selective waiver.[176] The Advisory Committee noted that a selective waiver provision "furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations."[177] The Advisory Committee made no mention of furthering a client's disclosure to his attorney, nor did it indicate that the attorney's preparation is relevant.[178] In fact, in its separate report to Congress, the Advisory Committee noted that one reason that it was dropping the selective waiver provision from Proposed Rule 502 was because the policy reasons for selective waiver differed from the other provisions of the rule.[179] In reality, selective waiver has only a tenuous connection to the attorney-client relationship; the focus of selective waiver is the adversarial relationship.[180] Accordingly, it is fair to state that on policy grounds, selective waiver would actually constitute an entirely new privilege.[181]

By limiting selective waiver to cases of governmental investigation, Congress would be creating a new legal doctrine. An examination of the Advisory Committee's suggested statutory wording itself reveals that it would effectively change the long-standing default rule that disclosure equals waiver but only in relation to one specific party. Such a selective waiver provision is applicable only to disclosures "made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority."[182] To state it somewhat differently, this wording essentially institutes an enforceable default confidentiality agreement between the government and any investigated corporations. When certain conditions exist, a selective waiver provision would

173. 2006 Memorandum from Advisory Comm., *supra* note 24, at 12.

174. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (noting purpose of attorney-client privilege is to "encourage full and frank communication between attorneys and their clients").

175. Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

176. *See* 2006 Memorandum from Advisory Comm., *supra* note 24, at 8 (stating that new rule resolves uncertainty between inadvertent disclosure and selective waiver and helps reduce litigation costs).

177. *Id.* at 12.

178. *Id.* at 8-15.

179. *See id.* at 4 (noting that selective waiver was driven by goal of reducing costs of governmental investigations while rest of Proposed Rule 502 was driven by goal of reducing litigation costs).

180. *Id.* at 12-13.

181. *See In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1197 (10th Cir. 2006) (noting that selective waiver "does not ground its advocacy on the purposes underlying the attorney-client privilege").

182. 2006 Memorandum from Advisory Comm., *supra* note 24, at 5.

entitle a corporation to confidentiality from the investigating agency.[183] Because the requirement for guarding privilege is so fundamental to the adversarial relationship, a selective waiver provision's new default position seems to create a quasi-adversarial relationship.

Whether selective waiver is a new privilege or a change in the parameters of an existing privilege could affect how courts treat future cases involving this doctrine. If courts view a new rule as only a change in the parameters of the existing privilege, then there is a greater likelihood that they will conform their opinions to old case law.[184] Emphasizing the novelty of nonnegotiated selective waiver should ensure that courts take a fresh look at the doctrine and break away from the brick-by-brick restrictions of the common law process.[185] Furthermore, categorizing selective waiver as a new privilege helps to justify legislative intervention, because as noted, it is a doctrine that would not likely be adopted by the Supreme Court.[186]

C. Should Congress Adopt a Selective Waiver Rule?

Having established that selective waiver constitutes an entirely new government-investigation privilege and not a true extension of attorney-client privilege and work-product doctrine, the next step is to determine if the benefits of such a rule outweigh the possible pitfalls. This piece of the analysis requires an examination of how a selective waiver provision would affect four parties: (1) the government agency (e.g., the SEC), (2) the investigated corporation, (3) the private litigants, and (4) the courts. Further, the underlying policies for selective waiver must be examined to determine their legitimacy. Ultimately, a selective waiver provision would serve the purposes outlined by the Advisory Committee.

1. The Government Agency

The government agency examination, especially as it relates to the SEC, is relatively straightforward. The SEC's goal is to receive increased cooperation from the investigated corporation at the lowest possible cost.[187] The SEC has submitted amicus briefs in several cases, and it is clear that the agency supports

183. *See id.* (stating that waiver applies when communication is made to governmental agency).

184. *See In re* Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984) (stating that privilege "is not 'favored' by federal courts" and "is to be 'strictly confined within the narrowest possible limits consistent with the logic of its principle'" (quoting Herbert v. Lando, 441 U.S. 153, 175 (1979); *In re* Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979))); Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (noting that courts have traditionally construed attorney-client privilege narrowly).

185. *See Qwest*, 450 F.3d at 1200 (discussing natural constraints on common law doctrinal development and effect of legislative intervention).

186. *See id.* at 1197-98 (noting Supreme Court's reluctance to adopt new privileges).

187. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8150, Exchange Act Release No. 46,868, Investment Company Act Release No. 25,829, 67 Fed. Reg. 71,670, 71,693 (proposed Dec. 2, 2002) (discussing SEC support of proposed rule change by Congress because of potential for reduced investigation costs) [hereinafter Implementation of Standards].

the adoption of selective waiver.[188] As the SEC has noted, by obtaining the results of an internal investigation that costs a company millions of dollars to conduct, the SEC staff is able understand a case more quickly and file civil enforcement actions sooner than if it had to start from scratch.[189]

The SEC and the DOJ have reiterated their positions that cooperation, while not strictly mandatory, will be viewed as an important factor in determining leniency.[190] From the agency perspective, this position is a logical long-term strategy, given the limited resources of each agency.[191]

The SEC also analogized selective waiver to confidentiality provisions that Congress enacted relating to investigations by the Public Company Accounting Oversight Board ("the Board") in the Sarbanes-Oxley Act.[192] Section 7215(b)(5)(A) of the Act states that documents and information received by the Board "shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) . . . and shall be exempt from disclosure . . . unless and until presented in connection with a public proceeding."[193] The SEC has expressed its desire to establish a provision for attorneys along with the officers and directors of investigated corporations similar to Section 105(b)'s provision for accountants.[194]

The SEC, therefore, can be placed firmly on the side in favor of a selective waiver provision. Understandably, the agency has much to gain and almost nothing to lose.

2. The Investigated Corporation

As the public comments on Proposed Rule 502 indicated, the impact of a selective waiver provision on corporations is not so straightforward. Some corporations and their counsel have clearly hoped to use selective waiver as a tool to balance cooperation with a government agency with protection in

188. *See*, *e.g.*, SEC McKesson Brief, *supra* note 19, at 15-22 (arguing in favor of level of disclosure roughly equivalent to selective waiver).

189. *See* Implementation of Standards, *supra* note 187, at 71,694 n.78 (discussing example in which internal investigators, after $9 million investigation, expedited enforcement process by explaining complex fraud scheme to commission staff).

190. *See* Seaboard Report, *supra* note 26, at 63,196-97 (discussing consideration of "self-policing, self-reporting, remediation and cooperation" when deciding type and extent of enforcement); Holder Memorandum, *supra* note 26, § XII (establishing policy encouraging corporations to waive attorney-client privilege and work-product immunity in exchange for possible plea agreements); McNulty Memorandum, *supra* note 17, at 9 (requiring prosecutors to obtain senior supervisory approval before making waiver demand); Thompson Memorandum, *supra* note 17, at 3 (establishing criteria for U.S. Attorneys to consider in deciding whether to seek charges against corporate entity).

191. *See* U.S. GEN. ACCOUNTING OFFICE, SEC OPERATIONS: INCREASED WORKLOAD CREATES CHALLENGES 13 (2002), *available at* http://www.gao.gov/new.items/d02302.pdf [hereinafter GAO REPORT] (finding that in recent years "increases in SEC's workload substantially outpaced the increases in SEC's staff").

192. Implementation of Standards, *supra* note 187, at 71,694; *see also* 15 U.S.C. § 7215(b)(1) (Supp. V 2005) (setting forth authority for board investigations of registered public accounting firms).

193. 15 U.S.C. § 7215(b)(5)(A).

194. Implementation of Standards, *supra* note 187, at 71,694.

concurrent or subsequent civil suits.[195] As the published comments have indicated, however, not every corporate group is behind the selective waiver doctrine.[196]

On its face, selective waiver appears to be "another brush on an attorney's palette"[197] and "an additional weapon to use or not at [the corporation's] choice."[198] Essentially, this doctrine allows the corporation to choose between claiming complete privilege and no disclosure, selective waiver and some disclosure, or complete waiver and complete disclosure.[199] Some corporate groups, however, are concerned that selective waiver will no longer be optional.[200] These groups fear that the government agency will reverse the selective waiver advantage and force corporations away from claiming complete privilege.[201]

As some corporate groups have correctly noted, virtually any full investigation into a corporation would uncover some unsavory behavior.[202] Nonetheless, the concern that a government agency will select the target of an investigation without a specific suspected activity lacks strength. Investigatory government agencies already could take the pick-a-corporation-first approach, but have not done so for practical reasons.[203] These agencies do not have the resources to conduct full corporate investigations on a whim.[204] As is widely recognized, agencies conduct the vast majority of investigations only after an outside source brings possible misconduct to their attention.[205] Agencies' actions, therefore, are almost exclusively reactive because the resources are not available to investigate proactively, and selective waiver would not change this dynamic.[206]

195. *See, e.g.*, *In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1181-82 (10th Cir. 2006) (attempting to waive privilege to government agency but retain privilege for related civil litigation).

196. *See, e.g.*, Letter from Cal. Corps. Comm., *supra* note 109, at 2 (noting position of committee against implementation of selective waiver).

197. *In re* Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993).

198. Green v. Crapo, 181 Mass. 55, 62 (1902).

199. The first and third options reflect traditional waiver doctrine, while the second reflects the new option embodied in the proposed changes to Federal Rule of Evidence 502(c). 2006 Memorandum from Advisory Comm., *supra* note 24, at 5-6.

200. *See, e.g.*, Letter from Cal. Corps. Comm., *supra* note 109, at 2 (noting position of committee against implementation of selective waiver due to possible government abuse of power).

201. *Id.* at 2.

202. *See* Rosenzweig Testimony, *supra* note 117 (discussing possible actions by government of picking target first and then searching for misconduct).

203. The SEC does not have the resource capacity to conduct investigations in this manner. *See* GAO REPORT, *supra* note 191, at 13 (noting resource limitations).

204. *Id.*

205. *See* Stephen M. Cutler, Dir., Div. of Enforcement, SEC, Remarks Before the District of Columbia Bar Association (Feb. 11, 2004), *available at* http://www.sec.gov/news/speech/spch021104smc.htm (noting SEC's Enforcement Complaint Center receives tens of thousands of communications per month from investors and whistle-blowers); William R. Baker III et al., *"Wildcatting" for Fraud: A New Investigative Approach by SEC Enforcement?*, MONDAQ.COM, July 12, 2004, http://www.mondaq.com/article.asp?articleid=25829 (discussing traditional reactive approach used by law enforcement agencies).

206. *See* Cutler, *supra* note 205 (discussing fact that securities enforcement has traditionally been

A driving force behind the selective waiver doctrine was that the SEC wanted to encourage internal investigations and the sharing of the results.[207] Selective waiver, however, could have a substantial impact on employee cooperation with corporate internal investigations.[208] As one commentator opined, employees would likely be less forthcoming with information if they feared that the corporation would disclose their privileged statements.[209] Employee cooperation with internal investigations is not isolated to the topic of selective waiver, however, and should be viewed in the context of the corporate attorney-corporate employee relationship.

Corporate attorney-client privilege has some critical differences from the traditional privilege as it applies to individuals. Corporations are simply legal entities authorized to exist by the state, and therefore they do not enjoy many of the constitutional protections afforded to individuals.[210] In the corporate context, attorney-client privilege protects employee statements to the corporation's attorneys only so long as the corporate entity continues to invoke the privilege.[211] Because the corporate attorney represents the corporation and not the individual employees, the individuals have no legal standing to object to a waiver of privilege by the corporation.[212]

The notion that the corporate attorney does not represent the individual employee is not a new revelation.[213] It has become standard that when commencing an investigatory interview with an employee, the corporation's attorney will begin with a boilerplate statement that she represents the corporation and not the employee.[214] This *Miranda*-like warning immediately notifies an employee that revealing details of misconduct during an investigation

reactive); Baker et al., *supra* note 205 (noting constraints requiring reactive approach by agencies).

207. *See* 2006 Memorandum from Advisory Comm., *supra* note 24, at 12 (explaining policy goals of Proposed Rule 502(c)). In recent years, the government has demonstrated its reliance on internal investigations by effectively deputizing the investigating firms. *See generally* George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985 (2005) (discussing oft-cited example of governmental charges of obstruction of justice against executives of Computer Associates for lying to outside counsel performing internal investigation).

208. *See* Rosenzweig Testimony, *supra* note 117 (discussing ways in which selective waiver could impair internal investigations).

209. *Id.*

210. *See* Upjohn Co. v. United States, 449 U.S. 383, 389-90 (1981) ("[C]omplications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law . . . ."); James K. Robinson, Statement at the Advisory Committee on Evidence Rules: Hearing on Proposal 502, *supra* note 115, at 26 (noting different constitutional treatment of corporations and individuals).

211. *See Upjohn Co.*, 449 U.S. at 391-92 (discussing scope of corporate privilege as it relates to individual employees); James K. Robinson, *supra* note 210, at 26 (noting power of corporation to waive privilege).

212. *Upjohn Co.*, 449 U.S. at 391-92.

213. *See* United States v. Aramony, 88 F.3d 1369, 1390 (4th Cir. 1996) (expressing long-standing notion that corporate counsel does not automatically represent employees in all matters).

214. *See* Marks, *supra* note 169, at 183 (noting increased use by attorneys of warning to employees regarding representation).

is not risk free.[215] The attorney practice of providing this boilerplate statement is important in this discussion because it limits the effectiveness of one argument against selective waiver. Some have contended that selective waiver will limit the amount of information that employees offer during corporate attorney interviews.[216] While theoretically viable, the argument lacks strength because the preinterview boilerplate statement has already effectively created the maximum disincentive for employees to confide in the corporation's attorney. Therefore, selective waiver's negative impact on employee discourse with the corporation's attorneys should be marginal.

Corporations are often forced to make difficult decisions when dealing with an investigating government agency. While the courts have traditionally looked at selective waiver as being a powerful tool for corporations,[217] not every corporate association believes that the positives outweigh the negatives.[218]

3. The Third-Party Private Litigants

The impact on private litigants is perhaps the most interesting piece of the selective waiver equation. Courts clearly have been concerned with whether selective waiver is fundamentally unfair to private litigants.[219] But many argue that the new privilege does not harm private litigants and that it might actually help them.[220] This concept is based on the notion that private litigants will still have the ability to use the results of government investigations if they become public through criminal or punitive proceedings.[221]

Some courts have adopted the rationale that "it is inherently unfair for a party to selectively disclose privileged information in one proceeding but not another."[222] Nevertheless, "when a client discloses privileged information to a government agency, the private litigant in subsequent proceedings is no worse

215. *See id.* at 183 (discussing ethical concerns for corporate attorneys when interviewing employees).

216. *See* Rosenzweig Testimony, *supra* note 117 (discussing possible consequences of hindering internal investigations).

217. See *supra* notes 197-99 and accompanying text for a discussion of how some courts view selective waiver as an overwhelming benefit to companies.

218. See *supra* notes 200-02 and accompanying text for an examination of reasons that some corporate groups oppose a selective waiver rule.

219. *See, e.g.*, *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (discussing unfairness of selective waiver use to stymie discovery); *In re* Sealed Case, 676 F.2d 793, 817-24 (D.C. Cir. 1982) (same); Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (same).

220. *See* Implementation of Standards, *supra* note 187, at 71,694 (noting that waiver to government could lead to filing of information in public records, thereby helping private litigants); *cf. In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 312 (6th Cir. 2002) (Boggs, J., dissenting) ("[P]rivate litigants also seek the truth and could benefit from the decreased costs of discovery and the increased accuracy of their positions and arguments.").

221. *See* Implementation of Standards, *supra* note 187, at 71,694 (discussing possible positive effect on private litigants stemming from waiver to government).

222. Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1426 n.13 (3d Cir. 1991) (citing *In re Subpoenas Duces Tecum*, 738 F.2d at 1370; *In re Sealed Case*, 676 F.2d at 817-24; *Permian*, 665 F.2d at 1221).

off than it would have been had the disclosure to the agency not occurred."[223] The notion that private litigants would be in exactly the same position if a government agency had obtained protected materials resonates from a practical standpoint. Disclosure only to the government does not actively hinder the private litigants' ability to discover, it only removes their ability to use the government's investigation as a shortcut in discovery.

The second and more compelling argument for selective waiver as it relates to private litigants is that there could be a trickle-down benefit from an agency's ability to conduct a more thorough and expeditious investigation.[224] As the SEC noted, "many private securities actions follow the successful completion of a Commission investigation and enforcement action."[225] The SEC, therefore, has apparently advocated for private litigants to piggyback off of its investigations but only after the agency makes public the evidence through an enforcement action. The SEC also has argued that allowing the agency access to privileged reports that result from a corporate internal investigation "is appropriate in the public interest and for the protection of investors."[226] This position indicates that the public interest of agency protection outweighs any potential unfairness to private litigants created by selective waiver.

It has also been argued that selective waiver ultimately serves the public interest because government investigations are simply more valuable than private litigation.[227] As Judge Boggs asserted in his dissent in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*,[228] government investigations are more likely to serve the public interest because the public officials are not seeking individual monetary gains.[229] Judge Boggs also noted that the remedies that the government can seek (e.g., imprisonment and punitive fines) reflect the greater importance to the public than would the potential remedies of private litigation (e.g., monetary damages).[230] Although the majority in *In re Columbia/HCA Healthcare* disagreed with Judge Boggs, indicating that this view is not universally accepted, his argument does appear to align with a policy goal originally outlined by the Advisory Committee: ease of governmental investigations.[231] Therefore, perhaps the point is really that the drafters of any selective waiver provision, like Judge Boggs, must be "comfortable . . . providing a clear exception for government investigations, and leaving private litigants out."[232]

223. *Westinghouse*, 951 F.2d at 1426 n.13.

224. *See* Implementation of Standards, *supra* note 187, at 71,694 (noting positive effect on private litigants if commission is able to conduct "more expeditious and thorough" investigations).

225. *Id.*

226. *Id.*

227. *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 312 (6th Cir. 2002) (Boggs, J., dissenting).

228. 293 F.3d 289 (6th Cir. 2002).

229. *In re Columbia/HCA Healthcare*, 293 F.3d at 312 (Boggs, J., dissenting).

230. *Id.*

231. 2006 Memorandum from Advisory Comm., *supra* note 24, at 12.

232. *In re Columbia/HCA Healthcare*, 293 F.3d at 312 (Boggs, J., dissenting).

Once it is accepted that selective waiver reflects an entirely new government-investigation privilege, then much of the concern for the welfare of third party private litigants becomes irrelevant. Since waiver to the government does not actively injure the opportunities for private litigants in their civil actions, these third parties have no basis to argue unfairness. In fact, private litigants might receive trickle-down benefits in the form of decreased cost of discovery and increased accuracy of information.[233]

4. The Courts

The fact that the majority of circuit courts has disallowed selective waiver could lead one to believe that codification of the doctrine would face significant resistance by the courts.[234] Recent decisions, however, indicate that the judiciary would welcome congressional direction on this issue with open arms.[235] Nevertheless, potential conflicts between a codified selective waiver provision and the courts loom on the horizon.

At least one court has explicitly noted that the issue of selective waiver would be better addressed with a definitive legislative rule.[236] Rule 501 has long placed responsibility on the courts to develop the common law of privilege.[237] As the *In re Qwest Communications International Inc.*[238] court noted, the common law approach is limited by the underlying facts of each case, which confines the progression of the doctrine.[239] Furthermore, courts traditionally are reticent to marshal in new evidentiary rules based on policy shifts because legislatures have the power and capacity to gather broader facts and experience on any topic.[240]

Just as Federal Rule of Civil Procedure 26(b)(3) solidified the law dealing with work-product doctrine,[241] a codified rule could do the same for selective waiver. Unlike Rule 26(b)(3), however, which was simply the codification of the common law on work-product doctrine, a provision favoring the selective waiver doctrine would likely be in sharp contrast to the existing common law

233. *Id.* at 311-12.

234. *See In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1201 (10th Cir. 2006) (rejecting selective waiver); *In re Columbia/HCA Healthcare*, 293 F.3d at 302 (same); United States v. Mass. Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997) (same); Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1425 (3d Cir. 1991) (same); *In re* Martin Marietta Corp., 856 F.2d 619, 623-24 (4th Cir. 1988) (same); *In re* John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982) (same); Permian Corp. v. United States, 665 F.2d 1214, 1216-17 (D.C. Cir. 1981) (same).

235. *See, e.g.*, *Qwest*, 450 F.3d at 1200-01 (noting that legislature might better address issue of adopting selective waiver).

236. *Id.*

237. FED. R. EVID. 501 ("[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."); *Qwest*, 450 F.3d at 1200.

238. 450 F.3d 1179 (10th Cir. 2006).

239. *Qwest*, 450 F.3d at 1200.

240. *Id.* at 1200-01.

241. *See id.* at 1186 (noting implementation of Rule 26(b)(3) as codification of doctrine originally founded in common law).

surrounding selective waiver.

Codification of selective waiver will likely have a twofold effect on the courts. First, they would have a clear mandate from Congress that the policy considerations for selective waiver outweigh the traditional notions of privilege and waiver. It would be expected that the courts would then begin accepting confidentiality agreements more readily, which would ultimately provide more stability in the corporate counsel-investigative agency dialogue. The reluctance of the courts to adopt selective waiver in the common law could resurface when the courts determine the scope of the new privilege. This issue is not unique to selective waiver, it is as old as judicial review itself.[242] Therefore, the courts will likely be faced with many new issues relating to selective waiver, but a codified provision should achieve one of its primary goals: to resolve many of the long-standing disputes in the courts.[243]

D. Should Congress Adopt the Advisory Committee's Suggested Selective Waiver Provision Language?

This Comment advocates that Congress adopt a new government-investigation privilege (i.e., selective waiver). The final step in this analysis is to examine the language suggested to Congress by the Advisory Committee to determine if it offers the best chance of achieving the stated goals of cooperation with government agencies and maximized effectiveness and efficiency in government investigations.[244] An examination of the suggested language reveals that it would serve the stated policy goals.

The Advisory Committee stated that it "considered whether the shield of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency" but ultimately determined that such an agreement "has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule."[245] As a result, the Committee has taken the significant step of reversing the default rule, endorsing the position that disclosure no longer constitutes waiver instead of the more moderate position that disclosure still constitutes waiver unless accompanied by a confidentiality agreement.[246]

The issue of confidentiality agreements leads back to the policy interests driving the selective waiver debate. Those courts that have looked for the existence of negotiated-waiver agreements generally have prioritized the expectations of the corporation involved in the investigation and the steps taken to retain rights.[247] The Advisory Committee, however, focused on the efficiency

242. *See* Marbury v. Madison, 5 U.S. 137, 178 (1803) (giving Supreme Court authority to review governmental decisions).

243. 2006 Memorandum from Advisory Comm., *supra* note 24, at 8, 13.

244. *Id.* at 12.

245. *Id.* at 13.

246. *See, e.g.*, *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1375 (D.C. Cir. 1984) (emphasizing company's failure to secure confidentiality agreements as one reason for finding waiver).

247. *See, e.g.*, *id.* (noting company had no expectation that rights were retained).

of the government agency, not the protection of the corporation.[248] This position seeks to reduce attorney involvement in order to create a relatively inexpensive channel for exclusive information sharing between the corporation and the government agency.[249] Ultimately, the Advisory Committee's position indicates that it has no interest in fitting selective waiver within the traditional parameters of attorney-client privilege, thereby demonstrating that both the ends and means involved in this Proposed Rule are new and justified.[250]

Once one accepts that selective waiver is an entirely new privilege, most of the arguments against selective waiver become obsolete. The concern for the roles of corporations or third-party litigants is based primarily on the traditional doctrines of attorney-client privilege and work-product doctrine.[251] If the purpose of a selective waiver provision is simply to improve efficiency of governmental investigations,[252] however, then the most recent proposal is proper and should be implemented. Selective waiver would undoubtedly provide the government with a powerful tool in conducting investigations, which should ultimately serve the public interest.

IV. CONCLUSION

Diversified Industries, Inc. v. Meredith[253] signaled the beginning of a debate over selective waiver. As the debate has played out in the judiciary, particularly at the circuit court level, it has become clear that courts are generally not comfortable stretching the doctrines of attorney-client privilege and work-product protection in order to accommodate selective waiver.[254] The majority approach, when viewed through an institutionalism prism, was wise.[255] Such a drastic development to a fundamental rule is best left to the legislature, with its ability to gather and analyze vast amounts of empirical and anecdotal information.[256] Therefore, the advancement of selective waiver through a rule

248. *See* 2006 Memorandum from Advisory Comm., *supra* note 24, at 12-13 (noting policy goals of increased cooperation with governmental investigations and increased investigative efficiency).

249. *See* Jeremy Burns, *Selective Waiver in the Era of Privilege Uncertainty*, 5 U.C. DAVIS BUS. L.J. 14 (2005), *at* http://blj.ucdavis.edu/article.asp?id=552 (discussing advantages of removing confidentiality agreements from consideration of selective waiver doctrine).

250. Interestingly, Proposed Rule 502(d) discussed the controlling effect of confidentiality agreements upheld by a federal court order. 2006 Memorandum from Advisory Comm., *supra* note 24, at 6. Without any evidence to support this inference, it appears that this subsection of the Proposed Rule would simply allow corporations and government agencies to contract around the new default rule.

251. See *supra* Part III.C.1-2 for a discussion of a selective waiver provision's impact on corporations and third parties.

252. 2006 Memorandum from Advisory Comm., *supra* note 24, at 12.

253. 572 F.2d 596 (8th Cir. 1978) (en banc).

254. See *supra* Part II.B for an examination of the circuit courts' treatment of the selective waiver issue.

255. See *supra* Parts III.A and III.C.4 for an examination of the role of courts in resolving the selective waiver issue.

256. See *supra* Part III.C.4 for a discussion of proper institutional channels for implementing selective waiver.

adopted by Congress would reflect the proper institutional process.

A selective waiver provision should not be viewed as an extension of the long-standing doctrines of attorney-client privilege or work product protection. Selective waiver is an entirely new privilege: a government-investigation privilege.[257] The legislature need not attempt to fit this new privilege into the existing common law, as the judiciary has struggled to do, but need only determine if a selective waiver provision properly addresses a legitimate purpose. The stated goal of improving the efficiency of governmental investigations undoubtedly serves the public's interest, and the method does not have an overt negative impact on any of the interested parties.[258] Selective waiver does not remove the corporation's ability to invoke the traditional protection of attorney-client privilege or work-product protection.[259] Third-party litigants are placed in no worse position than that at which they started; they could even benefit from improved governmental investigation efficiency.[260] Finally, the courts benefit from having a clear legislative policy directive and a clean slate with which to examine future selective waiver issues. Therefore, Congress should implement the statutory language suggested by the Advisory Committee, and the new rule should be considered an entirely new form of privilege.

Alexander F. Smith*

257. See *supra* Part III.B for a discussion of why a government-investigation privilege constitutes a new privilege.

258. See *supra* Part III.C for an analysis of how a government-investigation privilege would affect various interested parties.

259. See *supra* Part III.C.2 for an examination of s government-investigation privilege's probable impact on investigated corporations.

260. See *supra* Part III.C.3 for a discussion of a government-investigation privilege's probable effect on third-party litigants.

* Many thanks to Professor Harwell Wells for his guidance throughout the writing process. I also would like to thank the editors and staff of *Temple Law Review* for their hours of hard work getting this Comment ready for publication. Thanks to my parents, Bob and Heidi, for their unwavering love and support. Finally, thank you to my wife, Lia, and daughters, Ani and Kaia, for inspiring me to try just a little bit harder.