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Upjohn Co. v. United States as Support for Selective Waiver of the Attorney-Client Privilege in Corporate Criminal Investigations

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UPJOHN CO. v. UNITED STATES AS SUPPORT FOR SELECTIVE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE IN CORPORATE CRIMINAL INVESTIGATIONS

Abstract: In 1981, the U.S. Supreme Court in *Upjohn Co. v. United States* clarified the application of the attorney-client privilege to corporations and recognized three concerns in deciding whether such a privilege applies: the predictability as to which communications will be disclosed to third parties, the promotion of the free flow of information between clients and attorneys, and the encouragement of corporate self-policing and cooperation with investigations. Recently, however, a new debate over the attorney-client privilege has arisen in the corporate context—whether to recognize a selective waiver of the attorney-client privilege where communications have been disclosed already to one government agency but not to civil litigants or other government agencies. This debate has engendered conflicting responses from federal circuit courts, the U.S. Department of Justice, the Advisory Committee on Federal Evidence Rules, and Congress. This Note argues that by adhering to the principles laid out in *Upjohn*, courts, lawmakers, and rulemakers should resolve the conflict in favor of recognizing a selective waiver of the attorney-client privilege.

INTRODUCTION

In the 1981 landmark case of *Upjohn Co. v. United States*, the U.S. Supreme Court confirmed and clarified the application of the attorney-client privilege to corporations.[1] In so doing, the Court resolved a significant conflict among the lower courts in favor of a practical and flexible approach to deciding which corporate communications should be disclosed.[2] The Court's rationale in *Upjohn* reflected several concerns that remain relevant for corporate attorneys, including the ability to predict which communications the attorney-client privilege protects, the need for protection of information flowing from clients to attorneys, the balance of competing incentives in the context of internal investigations, and utility.[3]

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[1] *See* 449 U.S. 383, 390 (1981).

[2] *See id.* at 396.

[3] *See id.* at 390–93.

More recently, another conflict regarding how the attorney-client privilege applies to corporations has arisen in the lower courts.[4] Specifically, the debate centers on the effect of waiving the privilege in corporate criminal investigations when the government requests a waiver of privilege from a corporation.[5] In addition to a split involving seven circuit courts, influential organizations including the U.S. Sentencing Commission, the Department of Justice (the "DOJ"), the Advisory Committee on Federal Evidence Rules, and even Congress are all currently playing a role in articulating the best approach to waiver of the attorney-client privilege in the corporate context.[6]

The DOJ, for instance, has consistently upheld the right of federal prosecutors to request that corporations waive the attorney-client privilege in corporate criminal investigations.[7] Although the DOJ has recently cut back on prosecutors' freedom to request privilege waivers, prosecutors are permitted in some cases to consider willingness to waive the privilege in evaluating cooperation and in making charging decisions.[8] Because the U.S. Sentencing Commission's current Organizational Sentencing Guidelines (the "Sentencing Guidelines" or the "Guidelines") reward cooperation with the government in the form of drastically reduced fines for culpable corporations, those corporations that are subject to governmental investigation are often left with little choice but to waive the attorney-client privilege upon the govern-

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[4] *See, e.g.*, *In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1192 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 584 (2006); *In re* Columbia/HCA Healthcare, 293 F.3d 289, 302–03 (6th Cir. 2002); Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1425 (3d Cir. 1991); Diversified Indus. Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (en banc).

[5] *See, e.g.*, *Columbia*, 293 F.3d at 302–03; United States v. Mass. Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997); *Diversified*, 572 F.2d at 611.

[6] *See Qwest*, 450 F.3d at 1186–88 (discussing the current circuit split); Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3 (2007) ; U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt. (2006); Memorandum from Honorable Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure (May 15, 2006, rev. June 30, 2006) [hereinafter Advisory Committee Memorandum], *available at* http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf; Memorandum from Paul J. McNulty to Heads of Dep't Components and U.S. Attorneys (Dec. 12, 2006) [hereinafter McNulty Memorandum], *available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

[7] *See* McNulty Memorandum, *supra* note 6, § VII; Memorandum from Larry D. Thompson to Heads of Dep't Components and U.S. Attorneys (Jan. 20, 2003) [hereinafter Thompson Memorandum], *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm; Memorandum from Eric Holder to Component Heads and U.S. Attorneys (June 16, 1999) [hereinafter Holder Memorandum], *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html.

[8] *See* McNulty Memorandum, *supra* note 6, § VII.

ment's request.[9] This creates serious problems, because waiver of the privilege as to any government agency can result in waiver of the privilege as to other government agencies and all civil litigants.[10]

The federal courts of appeals, on the other hand, are currently divided on the effect of a privilege waiver as to the government.[11] The Eighth Circuit has chosen to recognize a "selective" waiver of the attorney-client privilege, whereby a corporation's waiver of the privilege as to the government does not necessarily result in waiver of the privilege as to nongovernmental parties such as civil litigants.[12] Other circuits that have considered the issue, including the First, Second, Third, Sixth, Tenth, and District of Columbia Circuits, have rejected the doctrine of selective waiver and instead hold that waiver of the privilege as to the government constitutes waiver as to all parties, including civil litigants.[13] Accordingly, attorneys and corporations are faced with serious concerns, including the harsh consequences of waiver of the attorney-client privilege and the importance, even necessity, of cooperation with the government.[14] The concerns of predictability, preservation of the investigatory role of the corporate attorney, and practicality that the Supreme Court recognized in *Upjohn* are also concerns for corporate attorneys dealing with the current circuit conflict.[15]

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[9] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 8; Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469, 538 (2003) (observing that the Organizational Sentencing Guidelines exert "substantial pressure" on corporations to cooperate with the government); John Hasnas, *Overcriminalization: The Politics of Crime: Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 620–21 (2005) (arguing that the Organizational Sentencing Guidelines provide an "almost irresistible incentive" for corporations to cooperate with the government).

[10] *See Qwest*, 450 F.3d at 1192; *Columbia*, 293 F.3d at 302–03; *In re* Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993); *see also Mass. Inst. of Tech.*, 129 F.3d at 686; Permian Corp. v. United States, 665 F.2d 1214, 1220 (D.C. Cir. 1981). In *In re Qwest Communications International, Inc.*, *In re Columbia/HCA Healthcare*, and *In re Steinhardt Partners*, disclosure as to the government resulted in disclosure as to civil litigants. *Qwest*, 450 F.3d at 1192; *Columbia*, 293 F.3d at 302–03; *Steinhardt*, 9 F.3d at 236. *United States v. Massachusetts Institute of Technology* and *Permian Corp. v. United States* presented slightly different factual situations, where disclosure as to one government agency resulted in disclosure as to other government agencies. *Mass. Inst. of Tech.*, 129 F.3d at 686; *Permian*, 665 F.2d at 1220.

[11] *See, e.g.*, *Qwest*, 450 F.3d at 1192; *Columbia*, 293 F.3d at 302–03; *Diversified*, 572 F.2d at 611.

[12] *Diversified*, 572 F.2d at 611.

[13] *Qwest*, 450 F.3d at 1192; *Columbia*, 293 F.3d at 302–03; *Mass. Inst. of Tech.*, 129 F.3d at 686; *Steinhardt*, 9 F.3d at 236; *Westinghouse*, 951 F.2d at 1425; *Permian*, 665 F.2d at 1220.

[14] *See* Cole, *supra* note 9, at 538; Hasnas, *supra* note 9, at 620–21; *see also infra* notes 170–225 and accompanying text (discussing why cooperation can be considered a necessity).

[15] *See infra* notes 226–285 and accompanying text.

Part I of this Note describes the lower court conflict that led to the Supreme Court's decision in *Upjohn* and analyzes the *Upjohn* holding.[16] Part II examines various circuit court approaches to selective waiver and discusses proposed Federal Rule of Evidence 502(c), which would resolve the current circuit court conflict.[17] Part III demonstrates the significance of the current debate over selective waiver of the attorney-client privilege by exploring the Sentencing Guidelines, current DOJ policy, and the proposed Attorney-Client Privilege Protection Act of 2007.[18] Part IV proposes that if courts seek to adhere to the same principles that were validated in the *Upjohn* decision, they should resolve this conflict in favor of the Eighth Circuit and recognize selective waiver of the attorney-client privilege.[19]

I. The Supreme Court's Vision of the Corporate Attorney-Client Privilege in *Upjohn Co. v. United States*

In *Upjohn Co. v. United States*, the Supreme Court resolved a conflict in the lower courts regarding which test should be employed to determine whether the attorney-client privilege protects corporate communications.[20] In examining what types of corporate communications deserve such protection, the Court necessarily made several policy judgments about the attorney-client privilege.[21] Specifically, the Court sought to increase predictability, protect the attorney's fact-gathering role, and eliminate a significant disincentive for corporate self-policing.[22]

A. *Two Approaches to the Corporate Attorney-Client Privilege*

Prior to *Upjohn*, lower federal courts approached the extent of the attorney-client privilege for corporate communications in two different ways.[23] Several circuit courts employed a "control group" test, which privileged only those communications between an attorney and a member of the corporation's "control group" of executives—those who are entitled to participate in decisions regarding the corporation's legal

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[16] *See infra* notes 20–53 and accompanying text.
[17] *See infra* notes 54–169 and accompanying text.
[18] *See infra* notes 170–225 and accompanying text.
[19] *See infra* notes 226–285 and accompanying text.
[20] 449 U.S. 383, 394–95 (1981).
[21] *Id.*
[22] *See id.* at 390–93.
[23] *See infra* notes 24–26 and accompanying text.

matters.[24] Other lower courts used a test called the "subject matter" or "*Harper & Row*" test.[25] Under this test, communication was privileged if: (1) it was between an attorney and an employee of the corporation, (2) the employee's supervisors directed the employee to make the communication, and (3) the subject matter of the communication dealt with the employee's duties in the context of his employment.[26]

B. *Resolution in* Upjohn

The *Upjohn* Court resolved the conflict between these two approaches by applying a version of the *Harper & Row* subject matter test.[27] In *Upjohn*, the Upjohn Company performed an internal investigation into allegations of illegal payments to foreign governments.[28] As part of the investigation, the corporation's employees completed questionnaires prepared by Upjohn's in-house counsel and submitted them to upper management in a highly confidential manner.[29] When the Internal Revenue Service began to investigate the illegal payments, it requested the questionnaires and other documents.[30] The ensuing dispute concerned whether the attorney-client privilege protected the questionnaires and related documents.[31]

The *Upjohn* Court held that the attorney-client privilege protected the communications in question because they were made to corporate counsel (1) by the corporation's employees, (2) concerning matters within the scope of the employee's duties, and (3) with the employees' awareness that they were being questioned so that the corporation could obtain legal advice.[32] The Court declined to lay out a comprehensive test, stressing the importance of case-by-case decisions on privi-

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[24] City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962). The court in *City of Philadelphia* was the first to establish the control group test, reasoning that an employee only sufficiently personifies the corporation such that he can be considered a "client" if he has the authority to make or contribute to making a decision about whether or how to follow an attorney's advice. *Id.*

[25] Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491–92 (7th Cir. 1970), *aff'd per curiam*, 400 U.S. 348 (1971).

[26] *Id.* at 491–92; *see also* Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 484–87 (1987) (discussing pre-*Upjohn* variations of the subject matter test).

[27] *Upjohn*, 449 U.S. at 394–95.

[28] *Id.* at 386.

[29] *Id.* at 387.

[30] *Id.* at 387–88.

[31] *Id.* at 388.

[32] *Upjohn*, 449 U.S. at 394–95.

lege issues.[33] Unlike the more narrowly applicable control group test, this new approach broadened the attorney-client privilege by extending protection of the privilege to communications between attorneys and lower-level corporate employees.[34]

C. *The Resolution's Response to Problems Facing Corporate Attorneys*

The Supreme Court's rationale in *Upjohn* addressed and validated three central problems facing attorneys who counsel corporations: predictability, protection not only of lawyers' advice but also of information given to the lawyer, and the competing incentives of corporations in conducting internal investigations.[35]

First, the Court in *Upjohn* recognized the importance of preserving predictability, a clear concern for both attorneys and clients and a factor that shapes how attorneys and clients choose to communicate with one another.[36] The Court went so far as to state that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[37] More recently, the Court reaffirmed the need for certainty in privilege determinations by quoting *Upjohn* in the 1996 case of *Jaffee v. Redmond*, where the Court first recognized a psychotherapist-patient privilege.[38] By placing such a premium on predictability, the Court demonstrated that certainty, and the efficiency that results from certainty, is an important factor to be considered when determining the scope of the attorney-client privilege.[39]

The Court also acknowledged in *Upjohn* that the attorney-client privilege protects not only the advice that corporate counsel gives to the corporation, but also the information that flows from corporate employees to corporate counsel.[40] This acknowledgment and the eradication of the control group test in general reflect the Court's decision to privilege not only communications between attorneys and execu-

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[33] *Id.* at 396.

[34] *Id.* at 395.

[35] *See id.* at 390–95.

[36] *See id.* at 393.

[37] *Upjohn*, 449 U.S. at 393.

[38] *See* Jaffee v. Redmond, 518 U.S. 1, 18 (1996) (quoting *Upjohn*, 449 U.S. at 393).

[39] *See id. Contra* Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 933 (2006) (noting that although the Court "touted the need for predictability," uncertainty remained after the *Upjohn* decision); Waldman, *supra* note 26, at 497–99 (critiquing the fact that the Court desired certainty in *Upjohn* but declined to create a new comprehensive test).

[40] *Upjohn*, 449 U.S. at 390.

tives, but also communications between attorneys and lower-level employees of a corporation.[41] Thus, the Court in *Upjohn* explicitly attempted to encourage, rather than discourage, communication between employees and lawyers.[42]

Similarly, the *Upjohn* decision reflected the Court's recognition of conflicting incentives for attorneys participating in internal investigations and a willingness to shape application of the attorney-client privilege to encourage corporate self-policing.[43] Before *Upjohn*, attorneys had to choose between interviewing lower-level employees (and risking that the information would be exposed because the communication lacked the protection of the attorney-client privilege), and not conducting interviews with lower-level employees (thus risking that possible wrongdoing would remain uncovered).[44] This created conflicting incentives for attorneys.[45] On the one hand, the attorney has an incentive to promote compliance with the law, and communications with lower-level employees are essential to maintaining compliance.[46] On the other hand, the attorney also seeks to avoid exposing the corporation to liability, so there is an incentive not to interview lower-level employees at all, because the attorney-client privilege may not protect these communications and may expose the corporation to liability if disclosed.[47] By resolving the conflict in favor of encouraging corporate self-policing and internal investigations, the *Upjohn* Court demonstrated a utilitarian approach to the attorney-client privilege.[48] Specifically, the Court recognized that judicial interpretation of the attorney-client privilege can serve to promote incentives favoring frank communication and voluntary compliance with the law.[49]

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[41] *See id.* at 391–92.

[42] *See id.* at 392.

[43] *See id.*

[44] *Id.* at 391–92.

[45] *Upjohn*, 449 U.S. at 391–92.

[46] *Id.*

[47] *Id.*

[48] *See id.*; *see also* Waldman, *supra* note 26, at 482 n.39 (citing the *Upjohn* case as an example of reliance on utilitarian justifications); Jeanne Andrea Di Grazio, Note, *The Calculus of Confidentiality: Ethical and Legal Approaches to the Labyrinth of Corporate Attorney-Client Communications via E-mail and the Internet—From* Upjohn Co. v. United States *and Its Progeny to the Hand Calculus Revisited and Revised*, 23 DEL. J. CORP. L. 553, 570 (1998) (stating that "the *Upjohn* holding can be interpreted as a functionalist approach, because the Court's holding went beyond the rules of case precedent").

[49] *See Upjohn*, 449 U.S. at 392; *see also* Waldman, *supra* note 26, at 492 (discussing the *Upjohn* Court's reliance on a "voluntary compliance" model, in which free flow of communication leads to increased voluntary compliance with the law).

D. *Concerns Still Relevant Today*

The three central concerns of corporate lawyers—maintaining predictability, protection of information flowing to the attorney in internal investigations, and the pressure of competing incentives—that were addressed in *Upjohn* remain relevant in the debate over selective waiver of the attorney-client privilege.[50] Corporate lawyers frequently engage in internal corporate investigations, but, because of the current approach taken by the DOJ and the Sentencing Guidelines, it is often unpredictable whether the attorney-client privilege will protect communications obtained as part of such investigations.[51] The threat of privilege waivers forces lawyers to worry about whether the information they gather from corporate employees will remain confidential as to private litigants.[52] Just like the competing incentives considered in the *Upjohn* case, attorneys are faced with another difficult choice: accept the risk that information may be disclosed and collect the information necessary to uncover corporate wrongdoing, or avoid the risk altogether by not collecting the information.[53]

II. The Current Controversy Regarding Selective Waiver

Thus far, only the Eighth Circuit has recognized the doctrine of selective waiver, which provides that waiver of the attorney-client privilege as to the government in a government investigation does not

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[50] *See Upjohn*, 449 U.S. at 390–93; *see also* Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. Tex. L. Rev. 111, 128 (2004) (examining the risks involved in conducting an internal investigation); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147, 156 (2000) (discussing the uncertainty regarding how information from employee interviews will be treated in internal investigations).

[51] *See, e.g.*, Hasnas, *supra* note 9, at 644; Zornow & Krakaur, *supra* note 50, at 153; *see also* U.S. Sentencing Guidelines Manual ch. 8 (2006); McNulty Memorandum, *supra* note 6, § VII.

[52] *See* Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 Wake Forest L. Rev. 587, 606 (2004) (admitting that there is no easy solution to the "litigation dilemma" that stems from third-party access to information disclosed to the government); Julie R. O'Sullivan, *Some Thoughts on Proposed Revisions to the Organizational Guidelines*, 1 Ohio St. J. Crim. L. 487, 503 (2004) (discussing this "litigation dilemma"); Zornow & Krakaur, *supra* note 50, at 156 (recognizing that after waiver of the privilege as to the government, civil plaintiffs are likely to obtain the disclosed information).

[53] *See, e.g.*, Brown, *supra* note 39, at 940, 944 (describing concerns that the rising prevalence of privilege waivers in corporate investigations will prevent attorneys from either memorializing internal investigations in writing or completing internal investigations at all); Zornow & Krakaur, *supra* note 50, at 156.

automatically establish waiver as to civil litigants or other third parties.[54] For varying reasons, nearly all of the other circuits that have addressed this issue have rejected the doctrine of selective waiver.[55] Recently in April 2006, however, the Advisory Committee on Evidence Rules approved a proposed amendment to the Federal Rules of Evidence that would permit selective waiver.[56] If adopted, Rule 502(c) would resolve, by rule, the current circuit split in favor of the Eighth Circuit.[57]

A. *The Eighth Circuit's Recognition of Selective Waiver*

The Eighth Circuit first recognized the doctrine of selective waiver of the attorney-client privilege in a 1977 en banc holding in *Diversified Industries, Inc. v. Meredith*.[58] Another corporation sued Diversified Industries ("Diversified") for alleged conspiracy, interference with contractual relationships, and violations of the Clayton Antitrust Act.[59] In the course of litigation, the plaintiff sought to obtain several documents that Diversified's lawyers prepared during an internal corporate investigation.[60] The plaintiff corporation argued that the attorney-client privilege did not protect these documents, but that even if it did, the privilege was waived when Diversified turned the documents over to the Securities and Exchange Commission (the "SEC") in response to an

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[54] Diversified Indus. Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (en banc).

[55] *See In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1181 (10th Cir. 2006), *cert denied*, 127 S. Ct. 584 (2006); *In re* Columbia/HCA Healthcare, 293 F.3d 289, 302 (6th Cir. 2002); United States v. Mass. Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997); Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1426 (3d Cir. 1991); Permian Corp. v. United States, 665 F.2d 1214, 1220–21 (D.C. Cir. 1981). Two other circuits have confronted the issue indirectly. *See* Dellwood Farms, Inc. v. Cargill, Inc., 128 F.2d 1122, 1126–27 (7th Cir. 1997) (addressing selective waiver in the law enforcement investigatory privilege context, not the attorney-client privilege context); *In re* Martin Marietta Corp., 856 F.2d 619, 626 (4th Cir. 1988) (not addressing the merits of selective waiver directly, but holding that disclosure of documents to the government did constitute waiver of the attorney-client privilege).

[56] *See* Advisory Committee Memorandum, *supra* note 6, at 12–13.

[57] *Id.* Proposed Rule 502 is unlikely to go into effect until late 2007, at the earliest. *See* James C. Duff, Dir., Admin. Office of the U.S. Courts, The Rulemaking Process: A Summary for the Bench and Bar (Apr. 2006), http://www.uscourts.gov/rules/proceduresum.htm. The Judicial Conference may consider the rule as early as September 2007, and, if approved by the Judicial Committee, it would be submitted to the Supreme Court for approval. *See id.* If the Supreme Court adopts the rule, it will become effective either when Congress adopts the rule, or, as a matter of law, seven months after approval by the Court. *Id.*

[58] 572 F.2d at 611.

[59] *Id.* at 600.

[60] *Id.* at 599.

SEC subpoena in a separate proceeding.[61] Diversified countered that the attorney-client privilege protected the documents, despite the fact that they had been released to the SEC.[62]

A three-judge panel of the Eighth Circuit in *Diversified* applied the "control group" test, evaluating whether the relevant communications were made between the attorneys and members of Diversified's control group of executives having power to make decisions regarding the company's legal relations.[63] Because the Supreme Court had not yet repudiated this test in *Upjohn Co. v. United States*, the circuit court panel held that the attorney-client privilege did not cover such documents because Diversified's lawyers were hired to conduct an investigation and not to provide legal services or advice.[64] Accordingly, the court did not reach the question of selective waiver, but, in a footnote, provided some support for the doctrine:

> We would be reluctant to hold that voluntary surrender of privileged material to a governmental agency in obedience to an agency subpoena constitutes a waiver of the privilege for all purposes, including its use in subsequent private litigation in which the material is sought to be used against the party which yielded it to the agency.[65]

An en banc decision of the Eighth Circuit reversed the panel, rejecting the control group test in favor of the subject-matter-based *Harper & Row* test.[66] Applying this test, the court held that the documents were covered by the attorney-client privilege.[67] The court went on to hold that the disclosure of documents to the SEC in the separate SEC proceeding constituted only a limited waiver of the privilege and did not constitute a waiver of the privilege as to the plaintiff corporation.[68] Reflecting a desire to encourage this self-policing measure, the court reasoned that a contrary decision would deter corporations from conducting internal investigations.[69]

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[61] *Id.*

[62] *Id.* at 606.

[63] *See Diversified*, 572 F.2d at 603.

[64] *See id.* For further discussion of the control group test, see *Upjohn*, 449 U.S. at 390 and *supra* notes 20–34 and accompanying text.

[65] *Diversified*, 572 F.2d at 604 n.1.

[66] *Id.* at 609.

[67] *Id.* at 610–11; *see also supra* notes 25–26 and accompanying text (discussing the *Harper & Row* test).

[68] *Diversified*, 572 F.2d at 611.

[69] *Id.*

The *Diversified* opinion foreshadowed the formal rejection of the control group test by the Supreme Court in *Upjohn*, and, significantly, language from the Eighth Circuit's *Diversified* opinion was directly quoted in *Upjohn*.[70] *Upjohn* attempted to address what the Eighth Circuit in *Diversified* characterized as a "Hobson's choice" for corporate attorneys: the control group test forces attorneys to choose between conducting interviews with employees that may not be privileged and choosing not to interview those employees at all, thus possibly failing to uncover legal compliance issues.[71]

B. *Rejection of the Selective Waiver Doctrine*

1. The District of Columbia Circuit Approach

In 1981, several months after *Upjohn* was decided, the U.S. Court of Appeals for the District of Columbia Circuit in *Permian Corp. v. United States* chose not to follow the Eighth Circuit's *Diversified* decision.[72] The *Permian* case involved a complex factual situation but dealt with several of the same basic principles addressed in *Diversified*.[73] A parent corporation and its subsidiary, the Permian Corporation, disclosed privileged documents to the SEC in order to expedite the approval of the parent corporation's registration statement, but strongly objected when the Department of Energy sought to obtain the documents from the SEC.[74] Although the parent corporation and the SEC had an agreement that the parent would be notified about who would be viewing the privileged documents, the court held that there was no agreement requiring that the documents not be shared with other government agencies.[75]

The D.C. Circuit declined to accept the Eighth Circuit's concept of selective waiver, reasoning that the doctrine does not clearly support the traditional principles of the attorney-client privilege and would allow the attorney to use selective disclosure as a tactical tool in litigation.[76] The court emphasized that the purpose of the attorney-client privilege is to protect and promote communications between an attor-

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[70] *See id.*; *see also Upjohn*, 449 U.S. at 395–96.

[71] *See Upjohn*, 449 U.S. at 392; *Diversified*, 572 F.2d at 608–09.

[72] *Permian*, 665 F.2d at 1220; *see Diversified*, 572 F.2d at 611.

[73] *Permian*, 665 F.2d at 1217.

[74] *Id.*

[75] *Id.* at 1219.

[76] *Id.* at 1220.

ney and a client.[77] According to the D.C. Circuit, the doctrine of selective waiver does nothing to further this objective, because disclosure has already undermined secrecy.[78] The court also held that there was nothing special about the SEC that allowed waiver as to that agency to be different from waiver as to other agencies such as the Department of Energy.[79]

In addition, the D.C. Circuit emphasized that a client should not be permitted to "pick and choose among his opponents" by waiving the privilege or asserting the privilege based solely on a determination of whether the action will benefit the client.[80] Although the language of the *Permian* opinion does not describe this point as an issue of fairness, the rationale that clients should not be able to use their privilege solely for tactical benefit has been characterized as the *Permian* "fairness rationale" in subsequent opinions.[81] Later D.C. Circuit cases developed this point, including *In re Subpoenas Duces Tecum*.[82]

In a brief footnote to the *Permian* opinion, the D.C. Circuit rejected the argument that the corporation's disclosure to the SEC was not truly voluntary.[83] Reasoning that the company's waiver as to the SEC was due to its own desire to have a registration statement approved more quickly, the court found that the corporation voluntarily accepted the risk that the privileged information would be disclosed elsewhere.[84] Thus, unlike the Supreme Court in *Upjohn* or the Eighth Circuit in *Diversified*, the D.C. Circuit recognized the corporation's Hobson's choice but did not find it to be dispositive.[85]

2. The Third Circuit

Echoing much of the D.C. Circuit's rationale for rejecting the doctrine of selective waiver, the Third Circuit similarly rejected the doc-

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[77] *Id.*

[78] *Permian*, 665 F.2d at 1221.

[79] *Id.*

[80] *Id.*

[81] *See, e.g.*, *Mass. Inst. of Tech.*, 129 F.3d at 685; *Westinghouse*, 951 F.2d at 1426 n.13.

[82] *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (holding that voluntary disclosure of documents to the SEC resulted in waiver of the attorney-client privilege); *Permian*, 665 F.2d at 1221.

[83] *Permian*, 665 F.2d at 1221 n.14.

[84] *Id.*

[85] *See id.* at 1221 n.15; *see also Upjohn*, 449 U.S. at 391–92 (recognizing that a corporate attorney conducting an investigation of his corporate client faces a "Hobson's choice"); *Diversified*, 572 F.2d at 611 (stating that allowing disclosure as to other government agencies on the basis that the disclosure was voluntary would thwart internal investigations).

trine in the 1991 case of *Westinghouse Electric Corp. v. Republic of the Philippines*.[86] The SEC was investigating Westinghouse for allegedly bribing government officials in the Philippines, and the corporation hired a law firm to complete an internal investigation into the matter.[87] The law firm produced two letters summarizing the findings of the internal investigation to the SEC, and Westinghouse justified this disclosure by relying on the Eighth Circuit's holding in *Diversified* and on the SEC confidentiality regulations.[88] Westinghouse also produced documents to the DOJ in a subsequent investigation pursuant to a subpoena from the grand jury.[89] These documents, however, were not directly at issue in this Third Circuit proceeding.[90]

Although the Third Circuit joined the D.C. Circuit in rejecting the Eighth Circuit's holding in *Diversified*, the court did not concur completely with the D.C. Circuit's reasoning in *Permian*.[91] The Third Circuit agreed with the *Permian* court that encouraging disclosure to the government does not further the traditional policies supporting the attorney-client privilege.[92] Like the D.C. Circuit, the *Westinghouse* court viewed the main rationale for recognition of the selective waiver doctrine to be facilitating cooperation with the government, which does little to further the true purpose of the attorney-client privilege—promoting disclosures to the attorney for the purpose of receiving legal advice.[93] The Third Circuit, however, broke with the D.C. Circuit on the issue of the *Permian* court's "fairness" rationale.[94] Unlike the D.C. Circuit in *Permian*, the Third Circuit held that it was not necessary to decide whether it would be fair to the opposing party if Westinghouse were permitted to waive the privilege just as to the government, because it is not inherently unfair to permit disclosure to a government agency but not private litigants.[95] In a footnote, the court stated that private litigants would be "no worse off" than if there had been no disclosure to a governmental agency.[96] For the Third Circuit, there was no need to rule on the fairness issue because it

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[86] 951 F.2d at 1426.

[87] *Id.* at 1418.

[88] *Id.*; *see Diversified*, 572 F.2d at 611. The SEC's confidentiality regulations stated that documents obtained by the SEC in the course of an investigation are considered nonpublic and will be kept confidential unless disclosure is authorized. 17 C.F.R. § 240.0-4 (1978).

[89] *Westinghouse*, 951 F.2d at 1419.

[90] *Id.*

[91] *Id.* at 1425–26; *see Permian*, 665 F.2d at 1220–21; *Diversified*, 572 F.2d at 611.

[92] *Westinghouse*, 951 F.2d at 1425.

[93] *Id.*; *see Permian*, 665 F.2d at 1220–21.

[94] *Westinghouse*, 951 F.2d at 1425.

[95] *Id.* at 1426.

[96] *Id.* at 1426 n.13.

was enough to say that the disclosures were not made for the purpose of seeking legal advice.[97]

Like the *Permian* court, the court in *Westinghouse* relegated the dispute about whether the claimed voluntary disclosure was truly voluntary to a footnote.[98] The Third Circuit considered the disclosures to both the SEC and the DOJ to be voluntary, even though the DOJ disclosure was pursuant to a grand jury subpoena, because Westinghouse did not contest the subpoena to the point where a court ordered it to produce the documents.[99] This footnote reveals the Third Circuit's position that affirmative disclosure to the government is always voluntary, and the court declined to take into account external factors including the favorable treatment that corporations receive if they cooperate with the government.[100]

3. The First Circuit

In 1997, the First Circuit similarly declined to recognize selective waiver of the attorney-client privilege in *United States v. Massachusetts Institute of Technology*.[101] In connection with contracts between the federal government and the university, the Massachusetts Institute of Technology ("MIT") had disclosed legal billing statements and corporate minutes to the Defense Contract Audit Agency, the auditing organization within the Department of Defense.[102] When the Internal Revenue Service sought access to the documents, the university claimed attorney-client privilege.[103] The court, however, held that disclosure to the audit agency had forfeited the privilege.[104]

The First Circuit's main rationale in *Massachusetts Institute of Technology* was similar to that of the other circuits in *Permian* and *Westinghouse*—denying selective waiver would not impact the main purpose behind the attorney-client privilege, which is to promote the giving and receiving of legal advice.[105] Unlike the Third Circuit in *Westinghouse*, however, the First Circuit chose to consider the "fairness" of allowing

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[97] *Id.* at 1426.

[98] *See id.* at 1427 n.14; *see also Permian*, 665 F.2d at 1221 n.14 (touching on the voluntariness issue in a footnote).

[99] *Westinghouse*, 951 F.2d at 1427 n.14.

[100] *Id.* at 1427 n.15.

[101] 129 F.3d at 685–86.

[102] *Id.* at 683.

[103] *Id.*

[104] *Id.* at 685.

[105] *Id.*; *see Westinghouse*, 951 F.2d at 1426; *Permian*, 665 F.2d at 1220–21.

disclosure to one party but not the other, as reasoned in the D.C. Circuit's *Permian* decision.[106] The First Circuit also voiced an additional concern about the practical issues of recognizing selective waiver, noting that to take the Eighth Circuit's approach would create problems of efficiency because there would be an overall lack of certainty and a need for line-drawing in every case.[107]

Like the D.C. and Third Circuits, the First Circuit in *Massachusetts Institute of Technology* also rejected the argument that the organization's waiver of the privilege was not truly voluntary.[108] MIT argued that its disclosure was not completely voluntary because, as a government contractor, the university was required to disclose the documents to the audit agency.[109] The First Circuit, however, pointed out that MIT chose to take on the role of government contractor—thus, the choice to disclose was considered voluntary.[110] The court stated more generally that "[a]nyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage."[111] The First Circuit also noted that to accept the argument that the initial disclosure was not truly voluntary could start the courts down a slippery slope with "no logical terminus" in sight.[112]

4. The Sixth Circuit

The Sixth Circuit joined the majority of federal appellate courts in 2002 by declining to recognize selective waiver of the attorney-client privilege in *In re Columbia/HCA Healthcare*.[113] In *Columbia*, a healthcare corporation under DOJ investigation for allegations of Medicare and Medicaid fraud had conducted several internal audits while the investigation was ongoing.[114] After first refusing a DOJ request to view these audit documents, the corporation agreed to produce some of the

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[106] *Compare Mass. Inst. of Tech.*, 129 F.3d at 685 (considering the fairness of disclosure as to one party and not another), *and Permian*, 665 F.2d at 1220–21 (same), *with Westinghouse*, 951 F.2d at 1426 (choosing not to consider the fairness issue).

[107] *Mass. Inst. of Tech.*, 129 F.3d at 685; *see also Diversified*, 572 F.2d at 611.

[108] *Mass. Inst. of Tech.*, 129 F.3d at 686.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 696.

[113] *Columbia*, 293 F.3d at 302; *see Westinghouse*, 951 F.2d at 1426; *Permian*, 665 F.2d at 1220–21.

[114] *Columbia*, 293 F.3d at 291–92.

documents pursuant to a confidentiality agreement.[115] When the corporation was later sued by private litigants alleging that they were overbilled, the corporation sought to protect the audit documents by asserting the attorney-client privilege.[116]

In a detailed opinion summarizing the various circuit views on the subject, the Sixth Circuit rejected the theory of selective waiver for several reasons.[117] Like the D.C., Third, and First Circuits, the Sixth Circuit reasoned that the main policy behind the attorney-client privilege of encouraging disclosures between attorneys and clients is not supported by recognizing selective waiver of the privilege.[118] The court observed that the policy driving the Eighth Circuit's adoption of the selective waiver doctrine was to encourage voluntary cooperation with the government, not to encourage open communication between clients and attorneys.[119]

The Sixth Circuit recognized the benefits provided by a selective waiver policy, including promoting truth-seeking, encouraging settlements, and increasing self-policing, but the court noted several opposing policy concerns as well.[120] Like the First Circuit, the *Columbia* court noted the difficulty of line-drawing in these situations, the concern that encouraging disclosure to the government is not the main purpose of the attorney-client privilege, and the idea that the privilege is not meant to serve as a tactical tool for lawyers.[121] The court also criticized the use of confidentiality agreements, stating that the government has other ways to obtain the information it needs without requiring voluntary disclosure of privileged documents and using confidentiality agreements to unfairly close off that information to private litigants.[122] The court recognized that requiring the government to obtain information without privilege waivers would be more costly, but held that cost did not justify acceptance of selective waiver.[123]

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[115] *Id.* at 292.

[116] *Id.* at 293.

[117] *Id.* at 302.

[118] *Id.*; *see Mass. Inst. of Tech.*, 129 F.3d at 686; *Westinghouse*, 951 F.2d at 1426; *Permian*, 665 F.2d at 1220–21.

[119] *Columbia*, 293 F.3d at 302.

[120] *Id.* at 303.

[121] *Id.* at 302–03.

[122] *Id.* at 303.

[123] *Id.*

5. The Tenth Circuit

Most recently, the Tenth Circuit declined to accept the doctrine of selective waiver in the 2006 case of *In re Qwest Communications International Inc.*[124] Qwest had produced thousands of documents to the DOJ and the SEC pursuant to subpoenas and written confidentiality agreements.[125] Following these disclosures, plaintiffs in a private civil suit sought the disclosed documents in discovery, and Qwest attempted to assert attorney-client and work product privileges as to the documents.[126] The Tenth Circuit, however, ruled that the privilege had been waived and declined to adopt the selective waiver doctrine.[127]

The court reasoned that recognition of selective waiver, at least on the record presented in the case, was not needed to guarantee or encourage cooperation with law enforcement, to further the underlying purposes of the privilege, or to avoid unfairness.[128] The court repeatedly emphasized that Qwest cooperated voluntarily and disclosed the documents despite the fact that only one federal appellate court had accepted selective waiver and there was no favorable Tenth Circuit precedent.[129] The court also focused on the possible negative effects of adopting selective waiver, including the idea that selective waiver could discourage employees from communicating with corporate counsel and motivate corporate counsel to complete internal investigations "with an eye toward pleasing the government."[130]

Qwest, the corporation under investigation, advanced a fairness argument, arguing that selective waiver would avoid unfairness both to Qwest and to the plaintiffs.[131] If selective waiver were recognized, Qwest argued, plaintiffs would be in no worse position than if the company had never waived the privilege at all.[132] The Tenth Circuit reasoned, like the D.C. Circuit in *Permian*, that it would be unfair to permit Qwest to "choose who among its opponents would be privy to

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[124] 450 F.3d at 1181.

[125] *Id.* The court in *Qwest* held that the confidentiality agreements did not support the corporation's selective waiver argument because the agreements did very little to protect the privacy of the documents, for example, permitting the DOJ to use the documents "in any lawful manner in furtherance of its investigation." *Id.* at 1194.

[126] *Id.* at 1182.

[127] *Id.* at 1192.

[128] *Id.*

[129] *Qwest*, 450 F.3d at 1193, 1196.

[130] *Id.* at 1195.

[131] *Id.*

[132] *See id.*

the [documents]."[133] The court held that it would be unfair to confer this benefit on the corporation, especially considering that the corporation made the disclosure in the face of a great deal of negative case law and no Tenth Circuit precedent.[134]

The court discussed amicus briefs filed by the Association of Corporate Counsel and the Chamber of Commerce of the United States of America and addressed the amici's assertions that corporations are currently faced with a "culture of waiver."[135] The court did not deny the assertions made in the amicus briefs, but held that the record before the court did not present evidence of the evils of the "culture of waiver" that would be strong enough to justify acceptance of selective waiver.[136] Significantly, the court noted recent legal developments including legislative and rule-making processes intended to deal with selective waiver and suggested that the selective waiver issue might best be resolved via statute or rule.[137]

C. *The Second Circuit's Incomplete Rejection of Selective Waiver*

The Second Circuit, in the 1993 case of *In re Steinhardt Partners*, declined to follow the Eighth Circuit completely, but also refused to hold that all voluntary disclosures to the government constitute a per se waiver of the work product privilege.[138] Although this case dealt solely with work product privilege and not the attorney-client privilege, the court analyzed the selective waiver issue in the same manner as in the attorney-client privilege context, stating that "much of the reasoning in *Diversified* has equal, if not greater, applicability in the context of the work product doctrine."[139] In this case, the SEC had begun to investigate Steinhardt Partners ("Steinhardt") and was deciding whether or not to bring enforcement proceedings against the organization.[140] After

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[133] *Id.* at 1196; *see also Permian*, 665 F.2d at 1221.

[134] *Qwest*, 450 F.3d at 1196.

[135] *Id.* at 1199.

[136] *Id.*

[137] *Id.* at 1200–01; *see also infra* notes 159–161 (discussing proposed Federal Rule of Evidence 502(c)) and notes 211–222 (discussing the Attorney-Client Privilege Protection Act).

[138] *In re* Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993). The work product privilege differs from the attorney-client privilege in that it protects the attorney's written work product, whereas the attorney-client privilege protects written and verbal communications between attorneys and clients. *See* Hickman v. Taylor, 329 U.S. 495, 511 (1947) (discussing the scope and importance of work product privilege).

[139] *Steinhardt*, 9 F.3d at 235.

[140] *Id.* at 232.

discussions with SEC officials, Steinhardt's attorneys prepared a memorandum summarizing the facts and legal issues of the case and disclosed the report to the SEC.[141] Subsequently, private litigants brought suit against Steinhardt and requested release of the memorandum.[142] Steinhardt refused to produce the document, claiming that the work product privilege protected it from discovery.[143]

The court rejected Steinhardt's selective waiver argument, primarily based on the reasoning that courts should not permit attorneys to utilize the privilege tactically as "another brush on an attorney's palette," echoing the rationale of the D.C. Circuit's opinion in *Permian*.[144] Like the First Circuit, the Second Circuit in *Steinhardt* noted that voluntary disclosures are made pursuant to incentives that organizations can choose to accept or reject.[145]

Steinhardt, just like MIT in *Massachusetts Institute of Technology*, unsuccessfully argued that its initial disclosure was not truly voluntary.[146] Specifically, Steinhardt asserted that to deny selective waiver causes many corporations to face an impossible choice between denying the benefits of cooperation with the government and exposing the corporation to civil litigation.[147] The Second Circuit recognized that corporations are faced with "difficult choices," but the court did not find this fact to be outcome-determinative in this case.[148] Although the Second Circuit did not assert outright that the argument for selective waiver could be persuasive in a different factual situation, it is possible to infer this from subsequent language in the opinion.[149] In the very next sentence, the court stated that decisions in cases such as this should be made on a case-by-case basis rather than with a per se rule that voluntary disclosures to the government always waive the work product privilege.[150]

Although the *Steinhardt* decision addresses the work product privilege, it is significant because, unlike the Eighth Circuit's decision in *Diversified*, it was made in the face of a great deal of negative authority from other circuit courts that had rejected selective waiver

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[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Steinhardt*, 9 F.3d at 235; *see Permian*, 665 F.2d at 1221.
[145] *Steinhardt*, 9 F.3d at 235–36; *see Mass. Inst. of Tech.*, 129 F.3d at 686.
[146] *Steinhardt*, 9 F.3d at 236; *see Mass. Inst. of Tech.*, 129 F.3d at 686.
[147] *Steinhardt*, 9 F.3d at 236.
[148] *Id.*
[149] *See id.*
[150] *Id.*

outright.[151] The Eighth Circuit's decision in *Diversified* was one of the first circuit court decisions to address selective waiver, while the subsequent circuit court decisions in *Permian*, *Westinghouse*, and *Massachusetts Institute of Technology* were able to turn to other courts for guidance on the issue.[152]

Perhaps even more significantly, the Second Circuit in *Steinhardt* cited *Upjohn* for the proposition that the issue of attorney-client privilege in the context of governmental investigations should be analyzed on a case-by-case basis.[153] This highlights the continuing tension, evident in other circuit court decisions, between broad rules having great certainty and careful case-by-case analysis.[154] Although each of the circuits that have addressed the question of selective waiver has examined the issue in the context of the facts of each case, cases such as *Westinghouse* and *Massachusetts Institute of Technology* demonstrate that the courts have taken a broader exclusionary approach in dealing with issues of governmental investigations and the attorney-client privilege.[155] The courts in both *Westinghouse* and *Massachusetts Institute of Technology* declined to address fully the circumstances of the disclosing corporations that prompted their waiver, refusing to credit the fact that the disclosures were not entirely voluntary but were compelled by external circumstances.[156] In *Massachusetts Institute of Technology*, the court declined to weigh the importance of MIT's need to disclose in order to preserve its position as a government contractor, and, in *Westinghouse*, the court deemphasized the corporation's need to disclose in order to comply with a grand jury subpoena.[157] Thus, although *Upjohn* and *Steinhardt* stand for the broader position that privilege issues should be decided on a case-by-case basis, *Westinghouse* and *Massachusetts Institute of Technology* reflect a more categorical approach.[158]

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[151] *See id.* at 236; *see also Westinghouse*, 951 F.2d at 1426; *Permian*, 665 F.2d at 1220–21; *Diversified*, 572 F.2d at 611. Compare this to the Tenth Circuit's decision in *Qwest*, where the court criticized the corporation's reliance on a selective waiver argument because of the "almost unanimous circuit court rejection of selective waiver." 450 F.3d at 1193.

[152] *See Mass. Inst. of Tech.*, 129 F.3d at 685; *Westinghouse*, 951 F.2d at 1423–25; *Permian*, 665 F.2d at 1220–21; *Diversified*, 572 F.2d at 611.

[153] *Steinhardt*, 9 F.3d at 236; *see Upjohn*, 449 U.S. at 396.

[154] *See Upjohn*, 449 U.S. at 396–97; *Mass. Inst. of Tech.*, 129 F.3d at 686; *Steinhardt*, 9 F.3d at 236; *Westinghouse*, 951 F.2d at 1426; *Permian*, 665 F.2d at 1220–21.

[155] *See Mass. Inst. of Tech.*, 129 F.3d at 686; *Westinghouse*, 951 F.2d at 1427 n.15.

[156] *See Mass. Inst. of Tech.*, 129 F.3d at 686; *Westinghouse*, 951 F.2d at 1427 n.15.

[157] *See Mass. Inst. of Tech.*, 129 F.3d at 686; *Westinghouse*, 951 F.2d at 1427 n.15.

[158] *See Upjohn*, 449 U.S. at 396; *Mass. Inst. of Tech.*, 129 F.3d at 686; *Steinhardt*, 9 F.3d at 236; *Westinghouse*, 951 F.2d at 1427 n.15.

D. *Proposed Federal Rule of Evidence 502(c): Acceptance of Selective Waiver via Rule*

In April 2006, the Advisory Committee on Evidence Rules approved an amendment to the Federal Rules of Evidence that would formally approve selective waiver.[159] The proposed rule, Rule 502(c), was published for comment in August 2006 with comments due by February 15, 2007.[160] The rule would provide:

> 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.[161]

Although Rule 502(c) would provide that waiver of the privilege to a government agency would not operate as waiver to a nongovernmental entity, it provides no guidance on whether waiver as to one government agency would constitute waiver as to another government agency.[162] Thus, Rule 502(c) would address most factual situations where selective waiver is at issue, but it would not cover cases such as *Massachusetts Institute of Technology*, where the First Circuit construed waiver as to a Department of Defense agency to constitute waiver as to the Internal Revenue Service, or *Permian*, where waiver as to the SEC amounted to waiver as to the Department of Energy.[163] Nonetheless, if Rule 502(c) had been in effect at the time the cases of *Diversified*, *Westinghouse*, *Columbia*, *Steinhardt*, or *Qwest* had been decided, it would have changed the result in those cases.[164] In all five of those cases, disclosure was made as to government

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[159] Advisory Committee Memorandum, *supra* note 6, at 3. In April 2006, a "Mini-Conference" on waiver of the attorney-client privilege and work product doctrine was held at Fordham University before the Advisory Committee on Evidence Rules. *See* Advisory Committee on Evidence Rules: Hearing on Proposal 502, at Fordham University School of Law (Apr. 24, 2006) [hereinafter Transcript of Mini-Conference], *available at* http://www.lexisnexis.com/applieddiscovery/lawlibrary/EV_Hearing_April_2006.pdf.

[160] Federal Rulemaking: Rules Published for Comment, http://www.uscourts.gov/rules/newrules1.html (last visited Feb. 27, 2007).

[161] Advisory Committee Memorandum, *supra* note 6, at 5–6 (providing the full text of proposed Rule 502(c)).

[162] *See id.*

[163] *See id.*; *see also Mass. Inst. of Tech.*, 129 F.3d at 683; *Permian*, 665 F.2d at 1217.

[164] *See* Advisory Committee Memorandum, *supra* note 6, at 5–6 (providing the full text of proposed Rule 502(c)); *see also Qwest*, 450 F.3d at 1182; *Columbia*, 293 F.3d at 293; *Steinhardt*, 9 F.3d at 232; *Westinghouse*, 951 F.2d at 1420; *Diversified*, 572 F.2d at 606.

entities, and the corporations sought to protect disclosure as to nongovernmental civil litigants.[165]

In its report recommending submission for public comment, the Advisory Committee noted that it has not yet taken a position on the merits of the selective waiver portion of proposed Rule 502, and that public comment will be particularly important in determining whether subsection (c) to Rule 502 will be passed.[166] After the comment period ending in February 2007, the rule will return to the Advisory Committee and will need to obtain approval from the Standing Committee, the Judicial Conference, and the U.S. Supreme Court.[167] After adoption by the Supreme Court, the rule would become effective either when Congress acts to adopt the rule or, as a matter of law, seven months after the Court's approval.[168] If adopted as drafted, the rule would resolve the circuit split in favor of the Eighth Circuit, although the issue of how waiver as to one government agency impacts waiver as to another would remain unaddressed.[169]

III. The Organizational Sentencing Guidelines and the Department of Justice's Approach to Privilege Waivers

There are significant benefits to a corporation that flow from waiver of the attorney-client privilege both under the current federal Sentencing Guidelines and DOJ policy.[170] The current federal Sentencing Guidelines strongly reward cooperation with the government in corporate criminal investigations by reducing fines and penalties.[171] Until December 2006, DOJ policy explicitly stated that requests for waivers of the attorney-client privilege in governmental investigations are a legitimate prosecutorial tool and may be necessary to establish that the organization has cooperated fully for purposes of the Guide-

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[165] *See Qwest*, 450 F.3d at 1182; *Columbia*, 293 F.3d at 293; *Steinhardt*, 9 F.3d at 232; *Westinghouse*, 951 F.2d at 1420; *Diversified*, 572 F.2d at 606.

[166] Advisory Committee Memorandum, *supra* note 6, at 6.

[167] *See generally* Duff, *supra* note 57 (detailing the process and procedures of federal rulemaking).

[168] *See id.*

[169] *See* Advisory Committee Memorandum, *supra* note 6, at 5–6 (providing the full text of proposed Rule 502(c)).

[170] *See* U.S. Sentencing Guidelines Manual ch. 8 (2006); McNulty Memorandum, *supra* note 6, § VII.

[171] *See generally* U.S. Sentencing Guidelines Manual ch. 8.

lines.[172] The DOJ changed its waiver request policy in December 2006 to create more standards and formalities for privilege waiver requests, but the policy still provides that a prosecutor may consider favorably a corporation's willingness to waive the privilege under certain circumstances.[173] This is significant for corporations because, outside of the Eighth Circuit, complying with a prosecutor's request for waiver as to the government also results in waiver of the privilege as to all potential civil litigants.[174]

A. *Punishment of Corporations Under the Organizational Sentencing Guidelines*

The U.S. Sentencing Commission's Sentencing Guidelines provide particularly compelling incentives for organizations to cooperate with government investigations.[175] Because criminally culpable organizations cannot be punished in the same ways that individuals can be punished (in other words, there is no way to incarcerate a corporation), a primary form of deterrence and punishment for corporations is the imposition of fines.[176] The Guidelines establish a method for determining how much a culpable organization should pay.[177] The structure of these Guidelines provides the foundation for much criticism; thus, a brief overview of how the Guidelines are used to calculate fines is necessary.[178]

First, the base fine is set based on the offense level under the Guidelines or, if it can be calculated, the pecuniary gain to the organization because of the offense or the pecuniary loss that was caused by the organization either intentionally, knowingly, or recklessly.[179] The

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[172] *See* Thompson Memorandum, *supra* note 7, § VI; Holder Memorandum, *supra* note 7, § VI.

[173] McNulty Memorandum, *supra* note 6, § VII.

[174] *See, e.g.*, *In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1181 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 584 (2006); *In re* Columbia/HCA Healthcare, 293 F.3d 289, 303 (6th Cir. 2002); United States v. Mass. Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997); *see also supra* notes 54–158 and accompanying text.

[175] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt. Effective in 1991, the Organizational Sentencing Guidelines are contained in Chapter Eight of the Commission's Guidelines Manual. *Id.*

[176] *See generally id.* ch. 8.

[177] *Id.* § 8C1.1.

[178] *See id.* ch. 8. For examples of criticism of the Guidelines, see Hasnas, *supra* note 9, at 619–31, and Zornow & Krakaur, *supra* note 50, at 153–56. For an opposing view supporting the Guidelines, see Buchanan, *supra* note 52, at 587–611.

[179] U.S. SENTENCING GUIDELINES MANUAL § 8C2.4 (2006). Section 8C2.3 directs that the "offense level" that determines the base fine be determined in a special way for certain of-

court then determines the corporation's culpability score based on factors such as high-level employee involvement in or tolerance of criminal activity, the corporation's prior history of illegal activity, violations of orders such as probation or judicial injunctions, obstruction of justice, the existence of an effective compliance and ethics program, and, perhaps the most subjective and significant factor, "self-reporting, cooperation, and acceptance of responsibility."[180]

These factors are given point values, and the method of calculation is provided in the Guidelines at section 8C2.5.[181] The culpability score then corresponds to a minimum multiplier and a maximum multiplier, which are multiplied by the base fine amount to provide the minimum and maximum amounts for the range of fines within which the court will sentence the corporation.[182] After this range is determined, the Guidelines set forth a number of factors to be considered in determining the applicable fine from within the range, including prior misconduct by the organization, extremely high or low culpability scores, and the existence of an effective compliance and ethics program at the time of the offense.[183]

The Guidelines allow subtraction of 5 points from an organization's culpability score if the organization reports an offense to the government, "fully cooperates" with an investigation, and "clearly demonstrates" recognition and acceptance of responsibility.[184] Significantly, these activities must take place before there is an "imminent threat of disclosure or government investigation" and "within a reasonably prompt time" after learning about the offense.[185] The Guidelines allow subtraction of 2 points for full cooperation and acceptance of responsibility, and they permit deduction of 1 point for acceptance of responsibility alone.[186]

These deductions are particularly significant because a difference of 5 points in a culpability score can mean a great deal.[187] For example, a corporation receiving a culpability score of 5 can have the base fine amount multiplied by a minimum of 1.00 (this would not change the

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fenses that are designated in Chapter Two of the Sentencing Guidelines, and directs corporations with multiple offenses to calculate a combined offense level as provided in Chapter Three. *Id.* § 8C2.3.

[180] *Id.* § 8C2.5.

[181] *Id.*

[182] *Id.* §§ 8C2.6–8C2.7.

[183] *Id.* § 8C2.8.

[184] U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(1).

[185] *Id.*

[186] *Id.* § 8C2.5(g)(2)–(3).

[187] *Id.* § 8C2.6.

amount of the base fine), while a culpability score of 1 carries a minimum multiplier of .20, and a culpability score of 10 carries a minimum multiplier of 2.00 (the base fine amount would be doubled).[188] In practice, this means that a corporation receiving a culpability score of 10 could pay double the amount that a corporation with a culpability score of 5 would be required to pay.[189]

Although the Guidelines clearly reward cooperation, the U.S. Sentencing Commission recently amended them to state that they are not intended to encourage waiver of the attorney-client privilege.[190] On November 1, 2006, the following language regarding waiver of the attorney-client privilege was deleted from commentary to section 8C2.5: "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[191] Although the language of the Guidelines no longer affirmatively supports the use of privilege waiver requests as a prerequisite to cooperation, the Guidelines leave open the question of whether waiver of the attorney-client privilege should still be considered a factor in evaluating a corporation's cooperation.[192]

B. *Department of Justice Policy: The Holder, Thompson, and McNulty Memoranda*

The Guidelines leave at least one major issue unresolved: what determines full cooperation?[193] The DOJ's Office of the Deputy Attorney General has published three memoranda that shed light on the meaning of cooperation and some of the general principles that the DOJ follows when prosecuting business organizations.[194]

The first memorandum (the "Holder memo") was sent by Deputy Attorney General Eric Holder to all Department Component Heads and U.S. Attorneys in June 1999.[195] The Holder memo affirmed the DOJ's commitment to prosecuting corporate criminal activity and included a

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[188] *Id.*

[189] *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2006).

[190] *See id.* § 8C2.5 cmt. 12; *see also id.* app. C, pt. 695.

[191] *See id.* § 8C2.5 cmt. 12; *see also id.* app. C, pt. 695.

[192] *See id.* § 8C2.5.

[193] *See id.*

[194] *See* McNulty Memorandum, *supra* note 6, at intro.; Thompson Memorandum, *supra* note 7, at intro.; Holder Memorandum, *supra* note 7, at intro.

[195] Holder Memorandum, *supra* note 7, at intro.

document called "Federal Prosecution of Corporations," outlining factors and considerations to be taken into account when charging corporations.[196] The second memorandum (the "Thompson memo") was sent by Deputy Attorney General Larry Thompson in January 2003 and included much of the same text from the Holder memo.[197] The Thompson memo revised the Holder memo to reflect findings of the Corporate Fraud Task Force.[198]

The Thompson and Holder memoranda stated explicitly that a corporation's willingness to waive the attorney-client and work product privileges should be considered in determining whether a corporation has cooperated adequately with the government.[199] Responding to "concern that our [DOJ] practices may be discouraging full and candid communications between corporate employees and legal counsel," Deputy Attorney General Paul J. McNulty issued a superseding memorandum (the "McNulty memo") on December 12, 2006.[200] The McNulty memo provides standards and procedures to guide federal prosecutors when they request disclosure of privileged information.[201]

Under the McNulty memo, prosecutors may request privileged information only when there is a legitimate law enforcement need for the information and, if waiver is sought, prosecutors must seek the least intrusive waiver necessary and must obtain written authorization for the request from upper-level DOJ supervisors.[202] Information is divided into "Category I" (purely factual information) and "Category II" (attorney-client communications or nonfactual attorney work product).[203] Prosecutors are permitted to consider a corporation's response to a request for waiver as to Category I information in determining whether a corporation has cooperated with the government.[204] Although prosecutors may consider privilege waivers as to Category II information favorably, they must not weigh the refusal to waive as to Category II information negatively against the corporation in any charging decision.[205]

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[196] *Id.* § I–XII.

[197] Thompson Memorandum, *supra* note 7, at intro.

[198] *Id.*

[199] *Id.* § VI; Holder Memorandum, *supra* note 7, § VI.

[200] McNulty Memorandum, *supra* note 6, at intro.

[201] *Id.* § VII.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] McNulty Memorandum, *supra* note 6, § VII.

The recent changes in both the Guidelines and DOJ policy reflect an attempt to downplay the need for privilege waivers.[206] In addition, some commentators have suggested that privilege waivers create fewer problems than one might think because they are rarely utilized.[207] Despite this claim, the issue of privilege waivers has proved significant enough to merit attention from seven circuit courts, the Advisory Committee on Evidence Rules, the U.S. Sentencing Commission, the DOJ, and even Congress.[208] And, despite recent cutbacks that have softened the harshness of DOJ policy with the McNulty memo and the deletion of some commentary from the Guidelines, neither the Sentencing Commission nor the DOJ has fully precluded the use of privilege waivers as a means to cooperate with the government.[209]

C. *Proposed Legislation: The Attorney-Client Privilege Protection Act of 2007*

On January 4, 2007, Senator Arlen Specter reintroduced legislation in the Senate called the Attorney-Client Privilege Protection Act of 2007 (the "ACPPA").[210] The ACPPA would prohibit federal prosecutors from requesting disclosure of privileged information and using assertion of the attorney-client privilege as a factor in determining whether a corporation has cooperated with the government.[211] If enacted, this legislation would alleviate significantly the pressure to waive the attorney-client privilege that DOJ policy and the Sentencing Guidelines have placed on corporations.[212] Support for the ACPPA has come from the ACLU, the Association of Corporate Counsel, and ABA President Karen Mathis.[213]

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[206] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 8 (2006); McNulty Memorandum, *supra* note 6, § VII.

[207] *See* Buchanan, *supra* note 52, at 598 (asserting that waiver requests are the exception, rather than the rule, in prosecution of corporations).

[208] *See Qwest*, 450 F.3d at 1187–88 (discussing the treatment of selective waiver by various circuit courts); Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3 (2007); U.S. SENTENCING GUIDELINES MANUAL ch. 8; Advisory Committee Memorandum, *supra* note 6, at 3; McNulty Memorandum, *supra* note 6, § VII.

[209] *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. 12; McNulty Memorandum, *supra* note 6, § VII.

[210] S. 186.

[211] *Id.* § 3. The legislation was originally introduced on December 7, 2006. *See* Carrie Johnson, *Higher Hurdles Set in Corporate Crime Cases: Business Pressure Spurs Change*, WASH. POST, Dec. 13, 2006, at D1.

[212] *See* S. 186, § 3; *see also* U.S. SENTENCING GUIDELINES MANUAL ch. 8 (2006); McNulty Memorandum, *supra* note 6, § VII.

[213] Am. Bar Assoc., Statement by ABA President Karen J. Mathis Regarding Revisions to the Justice Department's Thompson Memorandum (Dec. 12, 2006), *available at* http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59; Press Release, Am. Civil Liberties Union, ACLU Welcomes Attorney-Client Privilege Protection Act: Bill Would Safe-

The ACPPA provides maximum protection for corporations seeking to assert the attorney-client privilege in a government investigation.[214] It would create a bright-line rule whereby prosecutors could never consider willingness to waive the privilege either in making a charging decision or in determining cooperation.[215] The enactment and codification of the ACPPA would do little to encourage cooperation and voluntary disclosure, however, and thus might not be in the best interests of federal prosecutors.[216] Cooperation and voluntary disclosures are important law enforcement tools that make government investigations more efficient and less costly.[217]

The enactment of the ACPPA would not end the debate regarding selective waiver.[218] Unlike the ACPPA, selective waiver would encourage the free flow of information between government investigators and corporations because corporations would be able to disclose privileged information to the government without risking exposure to civil litigation.[219] The ACPPA encourages assertion of the attorney-client privilege, which could prove costly for the government.[220] To get to the root of corporate wrongdoing, investigators will need to garner information from independent sources, possibly through costly investigations or litigation involving extended discovery proceedings.[221] Selective waiver

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guard Constitutional Right to Counsel (Dec. 7, 2006), *available at* http://www.aclu.org/crimjustice/gen/27637prs20061207.html; Press Release, Assoc. of Corporate Counsel, What Does the DOJ's Issuance of the "McNulty Memorandum" Mean for You and Your Client (Dec. 13, 2006), *available at* http://www.acc.com/public/attyclientpriv/mcnulty-tp.pdf.

[214] Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3 (2007).

[215] *Id.* § 3(b)(2).

[216] *See id.* § 3; *see also* Brown, *supra* note 39, at 902 (emphasizing the importance of cooperation for prosecutors in light of the time and cost involved with investigations).

[217] *See Columbia*, 293 F.3d at 303 (recognizing that waiver of the attorney-client privilege can result in significant savings for prosecutors); Brown, *supra* note 39, at 902 (suggesting that DOJ policy supporting privilege waivers is driven by a desire for "efficiency and cost savings").

[218] *See* S. 186, § 3.

[219] *See, e.g.*, *Qwest*, 450 F.3d at 1193 (recognizing that selective waiver encourages cooperation with government agencies); Claire E. Furry, Note, Permian Corporation v. United States *and the Attorney-Client Privilege for Corporations: Unjustified Severity on the Issue of Waiver*, 77 NW. U. L. REV. 223, 244 (1982) (arguing that courts "stifle any cooperative spirit" between corporations and government agencies when they fail to recognize selective waiver); Brian M. Smith, Note, *Be Careful How You Use It or You May Lose It: A Modern Look at Corporate Attorney-Client Privilege and the Ease of Waiver in Various Circuits*, 75 U. DET. MERCY L. REV. 389, 408 (1998) (noting that selective waiver would improve relations and cooperation between corporations and government agencies).

[220] *See* Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3 (2007).

[221] *See Columbia*, 293 F.3d at 303 (recognizing that when a corporation waives the privilege, "[c]onsiderable savings are realized to the government, and through it to the public, in time and fiscal expenditure related to the investigation of crimes and civil fraud");

would allow a corporation to cooperate with the government with limited risk and exposure, thus raising the incentive for corporations to disclose information voluntarily to the government without having to engage in expensive and protracted litigation.[222]

In summary, the current state of the Sentencing Guidelines, DOJ memoranda, and the significant discretion granted to prosecutors provide strong incentives for corporations to cooperate by waiving the attorney-client privilege when the government requests a privilege waiver.[223] Recognizing selective waiver of the privilege in situations where a government prosecutor requests a waiver from a corporation could serve to diminish the harsh consequences of compliance with a waiver request.[224] If the ACPPA is passed as drafted, it will alleviate pressure to waive from the DOJ and the Guidelines, but recognition of selective waiver is the only surefire way to encourage full cooperation and true dialogue between government investigators and corporations.[225]

IV. Principles from *Upjohn* Applied to the Selective Waiver Debate

The principles that the U.S. Supreme Court valued in *Upjohn Co. v. United States* of predictability, protection of information flowing to the attorney in internal investigations, and respect for the role of the attorney as an investigator should be extended to the debate over selective waiver.[226] These principles are relevant in the selective waiver context because *Upjohn* is the most recent U.S. Supreme Court decision to speak directly on policy issues surrounding the corporate attorney-client privilege.[227] The Court has reaffirmed the validity of *Upjohn*, most recently in the 1996 case of *Jaffee v. Redmond*, where the Court cited *Upjohn* for the principle that an asserted privilege must serve public

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Brown, *supra* note 39, at 902 (suggesting that DOJ policy supporting privilege waivers is driven by a desire for "efficiency and cost savings").

[222] *See, e.g.*, Transcript of Mini-Conference, *supra* note 159, at 28 (testimony of James Robinson, Partner, Cadwalader, Wickersham & Taft LLP) (discussing how selective waiver is "mutually beneficial" to both government and corporations).

[223] *See* U.S. Sentencing Guidelines Manual ch. 8 (2006); McNulty Memorandum, *supra* note 6, § VII.

[224] *See* Finder, *supra* note 50, at 124 (discussing the benefits of selective waiver).

[225] *See* S. 186, § 3.

[226] *See* Upjohn Co. v. United States, 449 U.S. 383, 390–96 (1981).

[227] *See id.* Since *Upjohn*, the Court has addressed the scope of the corporate attorney-client privilege only once. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 354 (1985). In *Commodity Futures Trading Commission v. Weintraub*, the Court held that a trustee of a corporation in bankruptcy could waive the corporation's attorney-client privilege, because the trustee acted as the manager of the corporation. *Id.*

ends.[228] In *Jaffee*, the Court utilized this principle from *Upjohn* to justify recognition of a new privilege between psychotherapists and patients.[229] Similarly, as the debate over selective waiver intensifies in response to the new McNulty memo, proposed Federal Rule of Evidence 502(c), and the Attorney-Client Privilege Protection Act of 2007, courts should return to the principles in *Upjohn* to shape future decisions about the attorney-client privilege, including recognition of the selective waiver doctrine.[230]

A. *Predictability*

In *Upjohn*, the Supreme Court rejected the control group test because it created confusion for attorneys regarding what communications would be protected.[231] As recognized in *Upjohn*, certainty about how the attorney-client privilege applies to communications is an important value for courts to preserve.[232] Selective waiver would increase predictability for corporate attorneys because it informs the attorney conducting an internal investigation that even though a prosecutor's privilege waiver request might require waiver as to the government, outside third parties will not be able to access the otherwise privileged information.[233]

Internal investigations often require attorneys to interview numerous employees and seek sensitive information, and attorneys want to be able to predict whether the information obtained could possibly be exposed to nongovernmental potential civil litigants.[234] Because the government has a great deal of discretion over whether or not a corporation will be prosecuted and how harshly it may be prosecuted for a given offense, corporate attorneys may not be able to predict whether the government will get involved and if the prosecutor will request a

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[228] Jaffee v. Redmond, 518 U.S. 1, 13 (1996).

[229] *Id.*

[230] *See Upjohn*, 449 U.S. at 390–93; Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3 (2007); McNulty Memorandum, *supra* note 6, § VII.

[231] *Upjohn*, 449 U.S. at 393.

[232] *See id.*

[233] *See, e.g.*, Smith, *supra* note 219, at 409 (noting that the limited waiver theory in *Diversified* furthers the same predictability goal encouraged in *Upjohn*); Raymond E. Watts, Jr., Comment, *Reconciling Voluntary Disclosure with the Attorney-Corporate Client Privilege: A Move Toward a Comprehensive Limited Waiver Doctrine*, 39 MERCER L. REV. 1341, 1348 (1988) (same).

[234] *See* Hasnas, *supra* note 9, at 649 (describing the difficulty of dealing with employees when faced with a probable privilege waiver request).

waiver of privilege.[235] If selective waiver of the privilege were recognized, however, corporate attorneys would be able both to cooperate with the government and better predict the level of exposure resulting from disclosure.[236] Currently, as soon as the government requests a privilege waiver, the documents that the corporation is compelled to disclose are available to any number of potential civil plaintiffs.[237] Thus, if corporations are permitted to waive the privilege only as to the government, they may have more of an incentive to cooperate with the government and may be more willing to engage in self-policing via internal investigations, because the consequences of such investigations will be limited to action by the government.[238]

Admittedly, the bright-line approach taken by several circuit courts also serves predictability in that it excludes any communication from protection of the attorney-client privilege if it has been disclosed to the government.[239] This type of categorical exclusion, however, is contrary to the Court's requirement of case-by-case analysis in *Upjohn*.[240] The *Upjohn* decision clearly implicates the need for some line drawing, because the Court requires that issues regarding the application of the attorney-client privilege be considered on a case-by-case basis, as recognized in *In re Steinhardt Partners*.[241] The Supreme Court also recognized that the Federal Rules of Evidence require courts to consider these is-

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[235] *See* McNulty Memorandum, *supra* note 6, § III.B (providing factors for prosecutors to consider in making charging decisions but recognizing that "prosecutors must exercise their judgment in applying and balancing these factors and this process does not mandate a particular result"); *see also* Zornow & Krakaur, *supra* note 50, at 157–58 (discussing the wide discretion given to federal prosecutors).

[236] *See* Finder, *supra* note 50, at 124–25 (exploring the positive benefits of selective waiver whereby corporations can maintain confidentiality while still cooperating with the government); *see also* Transcript of Mini-Conference, *supra* note 159, at 28.

[237] *See In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1192 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 584 (2006) (holding that disclosure of documents to DOJ and the SEC constituted waiver as to private litigants, despite the existence of a confidentiality agreement); *In re* Columbia/HCA Healthcare, 293 F.3d 289, 303 (6th Cir. 2002) (holding that disclosure of audit documents to the DOJ resulted in a release of the documents to private litigants, despite the existence of a confidentiality agreement); *In re* Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) (holding that release of a memorandum to the DOJ resulted in release of the memorandum to private litigants).

[238] *See* Waldman, *supra* note 26, at 492 (explaining the *Upjohn* Court's underlying assumption that free-flowing communication results in increased voluntary legal compliance).

[239] *See, e.g.*, *Columbia*, 293 F.3d at 303–04; United States v. Mass. Inst. of Tech., 129 F.3d 681, 685 (1st Cir. 1997).

[240] *See Upjohn*, 449 U.S. at 396.

[241] *See id.*; *Steinhardt*, 9 F.3d at 236.

sues on a case-by-case basis, even though this practice precludes an easy bright-line approach to attorney-client privilege issues.[242]

In addition, a bright-line approach serves to discourage cooperation with the government, thus failing to promote the public interest in efficient prosecutions of corporations through cooperative efforts.[243] Selective waiver provides a more favorable type of predictability because it encourages governmental cooperation and allows corporations to be more certain about the impact of disclosure in terms of private litigation.[244] With selective waiver, corporate attorneys are permitted to make more informed choices about how to conduct internal investigations.[245]

B. *Protection of Information Flowing from Client to Attorney*

The Supreme Court's decision in *Upjohn* reflects a judgment that information an attorney obtains in furtherance of an internal investigation should be protected by the attorney-client privilege, in addition to the legal advice flowing from the attorney to the corporation.[246] The purpose of the attorney-client privilege, as asserted in *Upjohn*, is to promote compliance with the law by permitting the free flow of communication.[247] For an attorney to convey the advice necessary to ensure that corporations are complying with the law, the attorney must first have all possible information and facts from the client.[248] Because the control group test discouraged communication between attorneys and lower-level employees, the Court held that the test was contrary to the pur-

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[242] *Upjohn*, 449 U.S. at 396–97. Rule 501 of the Federal Rules of Evidence provides that issues of privilege are governed by the common law, not by statute. FED. R. EVID. 501. For further discussion about the rationale behind Rule 501 and the need for a case-by-case evaluation to determine how a privilege applies in a given situation, see S. REP. No. 93-1277 (1974).

[243] *See Upjohn*, 449 U.S. at 389 (holding that the purpose of the attorney-client privilege is to encourage communication and "thereby promote broader public interests in the observance of law and administration of justice"); *see also Qwest*, 450 F.3d at 1193 (recognizing that acceptance of the selective waiver doctrine could increase cooperation with government agencies).

[244] *See Columbia*, 293 F.3d at 303; *Steinhardt*, 9 F.3d at 236. In both *Columbia* and *Steinhardt*, corporations could have avoided disclosure of otherwise privileged documents to private civil litigants if the courts had chosen to recognize selective waiver. *See Columbia*, 293 F.3d at 303; *Steinhardt*, 9 F.3d at 236.

[245] *See* Hasnas, *supra* note 9, at 648–50 (discussing the implications of uncertainty in the context of employees who are interviewed in an internal investigation).

[246] *See Upjohn*, 449 U.S. at 392.

[247] *Id.*

[248] *Id.* at 389 (stating that the attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends, and that such advocacy depends on the lawyer's being fully informed by the client").

pose of the privilege.[249] Therefore, it is clear from the *Upjohn* decision that the attorney-client privilege should be interpreted in a way that promotes and protects communication from clients to attorneys.[250]

Recognizing the selective waiver doctrine would promote and protect the flow of information from employees to corporate counsel in internal investigations because efforts to maintain legal compliance would no longer put the corporation at risk of private third-party litigation.[251] Currently, outside of the Eighth Circuit, all information that corporate attorneys collect for purposes of internal investigations is at risk for disclosure to third parties because any waiver as to the government constitutes a waiver as to all parties, and corporations are often left with little choice but to comply when the government requests a waiver of the privilege.[252] If corporations are permitted to cooperate with governmental investigations by selectively waiving the privilege, they will have a greater incentive to encourage frank communication between employees and attorneys, because the fruits of internal investigations will be less likely to haunt the corporation in subsequent civil litigation.[253]

At least one court, however, has countered this hypothesis by holding that recognition of the selective waiver doctrine may actually inhibit, rather than promote, the flow of information from corporate employees to corporate counsel.[254] In the 2006 case of *In re Qwest Communications International Inc.*, the Tenth Circuit stated that officers and employees might be less forthcoming with information if they knew that the employer could disclose the privileged information to the government

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[249] *Id.* at 392.

[250] *Id.*

[251] *See Columbia*, 293 F.3d at 291–93. The facts of *Columbia* provide an example of how disclosure to the government can result in waiver of the privilege as to civil litigants. *See id.*; *see also supra* notes 117–123 and accompanying text.

[252] *See* Diversified Indus. Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (en banc); *see also Columbia*, 293 F.3d at 303; Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1425 (3d Cir. 1991); Permian Corp. v. United States, 665 F.2d 1214, 1220 (D.C. Cir. 1981). For additional discussion, see *supra* notes 170–225 and accompanying text.

[253] *See* Brown, *supra* note 39, at 903 (noting that "[b]efore the advent of compelled-voluntary waiver, there was arguably a greater probability that counsel would receive all pertinent information, both good and bad, and would accordingly have the opportunity to steer the company in a lawful direction"); Janet L. Hall, *"Limited Waiver" of Protection Afforded by the Attorney-Client Privilege and the Work-Product Doctrine*, 1993 U. ILL. L. REV. 981, 995–96 (suggesting that limited waiver may increase compliance with laws and regulations); Hasnas, *supra* note 9, at 648–50 (discussing the impact of current white collar crime provisions on internal investigations and the trust among employers, employees, and attorneys).

[254] *Qwest*, 450 F.3d at 1195.

without risking a broader waiver of privilege.[255] It is speculative to consider just how often officers and employees will engage in this sort of analysis before cooperating with corporate counsel, and it is perhaps unfortunate that the officers and employees providing information in an investigation have little power over the decision as to whether the privilege should be waived.[256] Even if the Tenth Circuit is correct in pointing out that selective waiver might not encourage officers and employees to be forthcoming with corporate counsel, the selective waiver doctrine does promote internal investigations—it removes the disincentive for corporations to collect information and provides some additional protection against disclosure to private litigants.[257]

C. *Competing Incentives and a Utilitarian Approach to the Attorney-Client Privilege*

The Supreme Court's opinion in *Upjohn* also reflects a strongly utilitarian view of the corporate attorney-client privilege because the Court chose to reject the theoretically sound but impractical control group test in favor of a test that takes incentives and practicality into account.[258] In *Upjohn*, the Court held that the control group theory's limited view of what it means to be a "client" did not fully protect the information flowing to the lawyer in the course of internal investigations, and that such protection is necessary to ensure that clients are actually receiving adequate legal advice.[259] Accordingly, the *Upjohn* test accounts for the reality that attorneys must obtain information from lower-level employees to assist the corporation in maintaining legal compliance.[260] Similarly, although the concept of selective waiver may not appear to advance the theoretical purpose of the attorney-client privilege directly, acceptance of the doctrine of selective waiver may be

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[255] *Id.*

[256] *See* Brown, *supra* note 39, at 903 (noting that there is "room for doubt" as to whether the threat of privilege waivers actually impacts corporate attorney-client relationships); Buchanan, *supra* note 52, at 599 (stating that when corporations have compliance programs, "[e]mployees should not have false expectations concerning the confidentiality of their communications with corporate counsel").

[257] *See Qwest*, 450 F.3d at 1195; *see also* Transcript of Mini-Conference, *supra* note 159, at 58 (discussing whether selective waiver creates a disincentive for cooperation with corporate investigations).

[258] *See Upjohn*, 449 U.S. at 392; Di Grazio, *supra* note 48, at 570 (referring to the approach taken by the Court in *Upjohn* as a "functionalist" approach); *see also* Waldman, *supra* note 26, at 481 n.39 (citing *Upjohn* as an example of judicial reliance on utilitarian reasoning).

[259] *Upjohn*, 449 U.S. at 390.

[260] *Id.* at 394–95; *see also* Waldman, *supra* note 26, at 492.

necessary to achieve utilitarian goals of conserving resources and ensuring that more corporations voluntarily comply with the law.[261]

1. Interpreting the Privilege to Encourage Cooperation and Efficiency

Acceptance of the selective waiver doctrine serves the important utilitarian goal of efficiency because corporations may be more willing to waive the privilege as to the government, thereby making violations easier to prosecute.[262] By obtaining information that the corporation's own internal investigation has already uncovered, the government is not forced to waste its own additional resources to obtain the information on its own.[263] Several courts that have declined to recognize selective waiver of the privilege, however, have not been persuaded by this resource-focused argument.[264] Instead of focusing on the social benefits that flow from acceptance of the selective waiver doctrine—such as increased cooperation with government, ease of prosecution, and incentive for self-policing—these courts instead emphasize the more basic theoretical purpose of the attorney-client privilege, which is to encourage communication between attorneys and clients.[265] This narrower view of the privilege excludes the possibility that one of its uses could be to encourage communication between corporations and the government.[266]

2. Interpreting the Privilege to Recognize and Resolve Practical Problems

The Supreme Court's willingness to shape interpretation of the attorney-client privilege based on a practical recognition of competing incentives also reflects its utilitarian approach.[267] In *Upjohn*, the Court recognized that attorneys were faced with a difficult choice between thoroughly investigating the corporation, thus risking that the privilege would not apply to communications with non-control group employees,

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[261] *See, e.g.*, Hall, *supra* note 253, at 996 (discussing how the limited waiver rule reduces government costs); Waldman, *supra* note 26, at 492 (explaining the *Upjohn* Court's voluntary compliance model reasoning).

[262] *See* Hall, *supra* note 253, at 996 (arguing that a limited waiver rule may reduce investigatory costs). *But see Westinghouse*, 951 F.2d at 1426 n.15 (stating that the privilege might have been recognized if the corporation had fully litigated and contested a subpoena).

[263] *See* Hall, *supra* note 253, at 996.

[264] *See, e.g.*, *Columbia*, 293 F.3d at 303; *Mass. Inst. of Tech.*, 129 F.3d at 685.

[265] *See Columbia*, 293 F.3d at 303; *Mass. Inst. of Tech.*, 129 F.3d at 685; *see also Westinghouse*, 951 F.2d at 1425; *Permian*, 665 F.2d at 1220–21.

[266] *See Columbia*, 293 F.3d at 303; *Mass. Inst. of Tech.*, 129 F.3d at 685; *see also Westinghouse*, 951 F.2d at 1425; *Permian*, 665 F.2d at 1220–21.

[267] *See Upjohn*, 449 U.S. at 391–92.

and not investigating at all.[268] The Court rejected the control group test in part because the test threatened to discourage corporate attorneys not only from communicating with lower-level employees, but also from working to keep the corporation in compliance with applicable laws by conducting internal investigations.[269] *Upjohn* reflects the Court's view that the law should not hinder corporate attorneys in their efforts to gather information and promote legal compliance.[270] The *Upjohn* Court recognized the difficult choices facing attorneys and resolved the conflict by formulating a new test that provides maximum incentives for self-policing and truth-seeking while maintaining protection of the attorney-client privilege over information collected in investigations.[271]

Similarly, acceptance of the doctrine of selective waiver could eliminate a disincentive for self-policing and promote the performance of internal investigations.[272] Corporate attorneys currently face the same difficult choice because, without recognition of selective waiver, conducting an internal investigation can be risky.[273] A mere request for a governmental privilege waiver may result in release of sensitive information to adverse private litigants, thus exposing the corporation to extensive liability.[274] Because the implications of privilege waiver are so great when selective waiver is not recognized, there is less of an incentive for corporations to complete internal investigations at all.[275]

3. Interpreting the Privilege to Reflect Pragmatic Realities

Upjohn reflected a willingness to interpret the privilege in terms of the realistic needs of corporations.[276] Although, in theory, the only in-

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[268] *Id.*

[269] *Id.* at 392.

[270] *See id.*; *see also* Waldman, *supra* note 26, at 492.

[271] *Upjohn*, 449 U.S. at 391–92.

[272] *See supra* notes 251–257 and accompanying text; *see also* Transcript of Mini-Conference, *supra* note 159, at 58 (testimony of Peter B. Pope, Deputy Attorney General of the State of New York).

[273] *See, e.g.*, Beth A. Wilkinson & Steven H. Schulman, *When Talk Is Not Cheap: Communications with the Media, the Government, and Other Parties in High Profile White Collar Criminal Cases*, 39 AM. CRIM. L. REV. 203, 216 (2002) (discussing the risks associated with communication to the government in white collar criminal investigations); Zornow & Krakaur, *supra* note 50, at 156 (pointing out that waiver as to the government leads to waiver as to all parties).

[274] *See, e.g.*, Hasnas, *supra* note 9, at 654 (opining that engaging in self-assessment is "practically inviting litigation"); Wilkinson & Schulman, *supra* note 273, at 216.

[275] *See, e.g.*, Hasnas, *supra* note 9, at 655–56 (highlighting the costs of self-assessment in light of the current Organizational Sentencing Guidelines).

[276] *See Upjohn*, 449 U.S. at 391; Di Grazio, *supra* note 48, at 570 (noting that, after *Upjohn*, "[i]t was no longer necessary to consider the rigid, narrow, and formalistic approach

dividuals within a corporation who could be considered "clients" are those with power to make legal decisions for the corporation—in other words, those in the control group—the Court extended protection of the privilege to communications between lower-level employees and corporate counsel because the reality of the corporate structure required this result.[277]

Because the Court in *Upjohn* reflected a willingness to interpret the privilege realistically, the "fairness" concern that selective waiver permits tactical use of the privilege should not preclude acceptance of the doctrine.[278] Some circuit courts have rejected selective waiver on the theory that it is "unfair" for a corporation to assert the privilege in one proceeding but not in another.[279] This approach ignores two important realities of how the privilege actually works in litigation.[280] First, although the theory of the attorney-client privilege focuses exclusively on the ability of clients to receive accurate legal advice, assertion or waiver of the attorney-client privilege in litigation often reflects a tactical decision.[281] For example, some corporations may waive the privilege to the DOJ as a tactic to avoid being charged, or prosecutors may request privilege waivers as a tactic to force cooperation. Second, as recognized in the *Westinghouse* case, enforcing the privilege against civil litigants after information has previously been disclosed to the government is not necessarily unfair.[282] In reality, the private parties are not harmed by this and are no worse off in their own litigation because of the prior disclosure.[283]

In *Upjohn*, the Supreme Court chose to value the investigatory role of corporate counsel by abolishing the control group test and thus making it less difficult for counsel to conduct internal investigations.[284]

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taken by the court of appeals because it simply did not work in the context of the complex dynamics of a large corporation").

[277] *Upjohn*, 449 U.S. at 391.

[278] *See id.*; *see also Permian*, 665 F.2d at 1221 (providing background rationale for the "fairness" critique of selective waiver); Furry, *supra* note 219, at 237–42 (arguing that recognition of selective waiver provides optimal fairness).

[279] *See, e.g.*, *Qwest*, 450 F.3d at 1196; *Mass. Inst. of Tech.*, 129 F.3d at 685; *Permian*, 665 F.2d at 1221.

[280] *See infra* notes 281–283 and accompanying text.

[281] *See* Smith, *supra* note 219, at 409 (discussing the inapplicability of the argument that the privilege should not be used as both a "sword and shield," in the context of modern corporations). For more in-depth discussion of the inapplicability of the "sword and shield" analogy in the modern context, see Furry, *supra* note 219, at 233–35.

[282] *See Westinghouse*, 951 F.2d at 1426.

[283] *See id.* at 1426 n.13; *see also* Hall, *supra* note 253, at 994–95 (arguing that it follows from the Court's logic in *Upjohn* that whether a party has cooperated with the government is not relevant in the context of claims by a third party).

[284] *Upjohn*, 449 U.S. at 392.

If the Court seeks to uphold the values set forth in *Upjohn*, it should resolve the current circuit conflict by recognizing selective waiver of the attorney-client privilege because selective waiver would still permit the government to investigate wrongdoing in the most efficient way possible, while recognizing the realities of competing incentives and practical application of the privilege in the corporate context.[285]

Conclusion

The Supreme Court's 1981 decision in *Upjohn Co. v. United States* resolved an important conflict in the lower courts regarding the application of the attorney-client privilege to corporate communications and, in particular, the results of internal investigations. Currently, the circuit courts are embroiled in another conflict regarding the application of the attorney-client privilege in the corporate context. The Eighth Circuit has chosen to recognize a selective waiver of the privilege whereby a corporation may waive the attorney-client privilege selectively as to the government alone, whereas the First, Second, Third, Sixth, Tenth, and D.C. Circuits have expressly refused to recognize the concept of selective waiver. This debate is particularly relevant in light of current Sentencing Guidelines that strongly reward cooperation with the government, and the DOJ's continued, albeit qualified, acceptance of compliance with privilege waiver requests as favorable proof of cooperation with the government.

Most recently, concerns about erosion of the attorney-client privilege have sparked both rulemaking and legislative proceedings in the Senate and the Advisory Committee on Evidence Rules. The Supreme Court's decision in *Upjohn* provides a strong foundation for the argument that the debate should be resolved in favor of the Eighth Circuit and selective waiver. The goals of predictability, protection of information gathered by attorneys, and utility guided the *Upjohn* Court's decision. Increased recognition of the doctrine of selective waiver would serve these same goals.

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[285] *See Diversified*, 572 F.2d at 611; Finder, *supra* note 50, at 124.