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# NOTES

## PRESERVING THE PRIVILEGE: CODIFICATION OF SELECTIVE WAIVER AND THE LIMITS OF FEDERAL POWER OVER STATE COURTS

*Nolan Mitchell\**

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### INTRODUCTION

In an attempt to avoid the uncertainties that result from sharing confidential materials with federal agencies, corporations are increasingly entering into “selective waiver” agreements with the government prior to any disclosure. These agreements purport to maintain attorney-client privilege and work

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\* J.D., Boston University, 2006.

product protection over the results of internal corporate investigations as to private third party litigants.<sup>1</sup> They are intended to avoid the harsh consequences of traditional privilege law, under which any disclosure of privileged or protected materials constitutes an absolute waiver of the right to withhold those materials from third parties seeking access, for example, during discovery in later civil proceedings.<sup>2</sup> But corporations often have little practical choice regarding disclosure. Pursuant to federal policy and practices, they face considerable pressure to share the results of internal investigations with federal agencies, both to demonstrate “cooperation” and to mitigate potential civil and criminal penalties.<sup>3</sup> Selective waiver agreements have developed as a means to navigate between the pressures and perils surrounding such cooperation.<sup>4</sup>

Courts, however, have enforced these agreements inconsistently, with the majority of state and federal jurisdictions holding selective waiver agreements invalid.<sup>5</sup> As a result, corporations may be exposed to significant liability in third-party derivative or class action lawsuits prosecuted on the basis of the corporation’s own investigations.<sup>6</sup> Commentators agree that additional certainty and predictability are required with respect to the enforceability of these agreements, and many have advanced sound policy considerations in

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<sup>1</sup> See, e.g., *In re Columbia/HCA Healthcare*, 293 F.3d at 289, 294 n. 5 (6th Cir. 2002)); see also *infra* Parts I, III-IV (describing the development of the selective waiver controversy and its treatment in federal and state courts).

<sup>2</sup> See, e.g., *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1420 (3d Cir. 1991) (“[T]he disclosure of privileged information to any third party, including the government, destroys the privilege.”); see also *infra* Part II (discussing the attorney-client privilege and work product doctrines).

<sup>3</sup> See Bruce Greene & David Clifton, *Feeling a Chill: Changing Government Policies Are Pressing Corporations and Attorneys to Disclose Protected Information*, 91 A.B.A. J. 61, 62 (2005) (characterizing government requests for “privileged or work-product protected information [as] virtually irresistible”); see also *infra* Part I (introducing the controversy surrounding corporate waivers of attorney-client privilege).

<sup>4</sup> See, e.g., Greene & Clifton, *supra* note 3, at 64; Andrew J. McNally, Comment, *Revitalizing Selective Waiver: Encouraging Voluntary Disclosure of Corporate Wrongdoing By Restricting Third Party Access to Disclosed Materials*, 35 SETON HALL L. REV. 823, 826 (2005); see also *infra* Parts I, III-IV.

<sup>5</sup> See *infra* Parts III-V.

<sup>6</sup> See, e.g., McNally, *supra* note 4 (observing that corporate criminal misconduct “may give rise to significant civil liability”); Arnold Rosenfeld, *Attorney Client Privilege: Waiver by Disclosure to the Government*, MASS. LAW. WKLY. (2005), available at [http://www.klng.com/files/tbl\\_s48News/PDFUpload307/11701/Ethics.pdf](http://www.klng.com/files/tbl_s48News/PDFUpload307/11701/Ethics.pdf) (“When governmental investigators express interest in possible corporate wrongdoing, given the potential ramifications of criminal or civil liability, it often is perceived by corporations and their legal advisors that cooperation with the governmental investigators is in the corporate best interest . . .”); see also *infra* text accompanying notes 33-34, 132-136 (observing that if a selective waiver agreement is held invalid, the information will be available to private litigants bringing suits against the corporation).

support of the enforcement of selective waiver clauses.<sup>7</sup> However, because courts confronting these agreements consistently evaluate the issue of waiver in light of the legal rationales supporting the attorney-client privilege and work product doctrine – and not in light of the policy rationales that support selective waiver – it is unlikely that the issue will be resolved by courts in favor of upholding selective waiver agreements.<sup>8</sup> For that reason, a legislative solution presents the most viable and likely course.<sup>9</sup>

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<sup>7</sup> See Nancy Crisman & Arthur Mathews, *Limited Waiver of Attorney-Client Privilege and Work Product Doctrine in Internal Corporate Investigations: An Emerging Corporate ‘Self-Evaluative’ Privilege*, 21 AM. CRIM. L. REV. 123, 123 (1983) (questioning “whether legislation of a federal corporate ‘self-evaluative’ privilege would eliminate the existing confusion respecting limited waiver”); Ashok M. Pinto, *Cooperation and Self Interest Are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege Through Production of Privileged Documents in a Government Investigation*, 106 W. VA. L. REV. 359, 382-88 (2004) (urging Congressional intervention to resolve the circuit split and create certainty for litigants); McNally, *supra* note 4, at 862-70 (2005) (arguing that Congress should adopt qualified “selective waiver” in the form of a new privilege); Note, *The Limited Waiver Rule: Creation of an SEC-Corporation Privilege*, 36 STAN. L. REV. 789, 815-823 (1984) (urging the adoption of an SEC-Corporation privilege independent of that which governs the traditional attorney-client relationship); *infra* text accompanying notes 210-216 (discussing the Delaware Chancery court’s analysis of waiver in *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622 (Del. Ch.)); see also *In re Columbia/HCA Healthcare*, 293 F.3d 289, 312-14 (6th Cir. 2002) (Boggs, J., dissenting) (challenging the majority’s assumption that permitting selective waiver would allow corporations to be less forthcoming with the privileged information, and pointing out important differences between private and public litigants).

<sup>8</sup> See *infra* Parts III, IV (describing the rationales underlying both state and federal court decisions regarding selective waiver). In fact, the Supreme Court could have resolved (or at least clarified) the current controversy – but did not – in *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981) (declining to “lay down a broad rule or series of rules to govern all conceivable future questions” related to the corporate attorney-client privilege and work product protections); see also Crisman, *supra* note 7, at 126-27 (commenting on the “lack of guidance in the *Upjohn* decision on the limited waiver issue”).

<sup>9</sup> In fact, legislation has already been proposed in the House to codify selective waiver to the SEC, although no further action on this resolution has been taken. The Securities Fraud Deterrence and Investor Restitution Act of 2004 provides as follows:

Notwithstanding any other provision of law, whenever the [SEC] and any person agree *in writing* to terms pursuant to which such person will produce or disclose to the Commission any document or information that is subject to any Federal or State law privilege, or to the protection provided by the work product doctrine, *such protection or disclosure shall not constitute a waiver of the privilege or protection as to any person other than the Commission.*

H.R. 2179, 108th Cong., § 4 (2d Sess. 2004) (emphasis added). This proposal has been criticized for not going far enough, since disclosures to non-Commission federal agencies, including the Department of Justice, or to external auditors would not be protected. See David M. Brodsky & Julia Ann Cilia, *Between A Rock And a Hard Place: Deciding whether to cooperate with external auditors and investigating agencies*, GC NEW YORK, Oct. 12,

While one commentator has addressed the question of whether “federalizing privilege” law would pass constitutional scrutiny,<sup>10</sup> and others have proposed alternative solutions to remedy the current controversy,<sup>11</sup> this Note explores the development of the selective waiver controversy at both the state and federal level and addresses a more narrow question: may the federal government enact legislation that alters the scope of *state* privilege law as applied in *state* court proceedings?<sup>12</sup> Resolution of this issue turns on two questions. First, does the federal government have the *power* to enact legislation codifying the enforceability of selective waiver agreements between corporations and federal agencies in state courts?<sup>13</sup> And second, does such legislation intrude on the *sovereignty* of the states?<sup>14</sup> This Note argues that the federal government does have the authority to regulate the scope of the attorney-client privilege, and that such legislation would not offend principles of state sovereignty under the Tenth Amendment.<sup>15</sup>

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2004, at 3, available at [http://www.lw.com/resource/Publications/\\_pdf/pub1102\\_1.pdf](http://www.lw.com/resource/Publications/_pdf/pub1102_1.pdf).

<sup>10</sup> See Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 156-71 (2003) (analyzing Congress’s power to federalize the attorney-client privilege).

<sup>11</sup> See generally Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of the Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33, 59-71 (1997) (offering tactical suggestions to preserve the confidentiality of any privileged documents produced to the government); Crisman, *supra* note 7, at 127 (proposing a new “self-evaluative privilege and work product doctrine” to address the existing confusion surrounding selective waiver agreements); McNally, *supra* note 4, at 828 (arguing that Congress should adopt qualified “selective waiver” in the form of a new corporation-government privilege); Jody E. Okrzesik, Note, *Selective Waiver: Should the Government be Privy to Privileged Information Without Waiving the Attorney-Client Privilege and Work Product Doctrine?*, 34 U. MEM. L. REV. 115, 164-70 (2003) (urging judicial resolution). *But see* Note, *supra* note 7 (criticizing the selective waiver rule and the SEC-corporation privilege it would create independent of that which governs the traditional attorney-client relationship).

<sup>12</sup> For examples of courts and commentators discussing the limits of federal power over state courts, see *Jinks v. Richland County*, 538 U.S. 456, 464 (2003) (acknowledging that it is an open question whether “Congress may . . . , consistent with the Constitution, prescribe procedural rules for state courts’ adjudication of purely state-law claims”) (citing Anthony J. Bellia, *Federal Regulation of State Court Proceedings*, 110 YALE L.J. 947, 993-1001 (2001) (arguing that Congress lacks the power to impose procedural rules on state courts) and Congressional Authority to Require State Courts to Use Certain Procedures in Products Liability Cases, 13 Op. Off. Legal Counsel 372, 373-74 (1989) (stating that “potential constitutional questions” arise when Congress “attempts to prescribe directly the state court procedures to be followed in products liability cases”)); *Southland Corp. v. Keating*, 465 U.S. 1, 24 (1984) (O’Connor, J. & Rehnquist, C.J., dissenting) (questioning the applicability of the Federal Arbitration Act in state court proceedings).

<sup>13</sup> *Cf.*, e.g., *Jinks*, 538 U.S. at 461-63 (invoking the Necessary and Proper Clause to establish the federal power to apply a federal rule in state court proceedings).

<sup>14</sup> See U.S. CONST. amend. X (reserving powers to the states).

<sup>15</sup> See *infra* Part V (reviewing potential constitutional restraints on selective waiver

This Note proceeds in five parts. Part I introduces the concept of selective waiver and the recent government practices that have contributed to the creation of a “culture of waiver” in corporate America. Next, Part II sets out the contours of the attorney-client privilege and the related work product doctrine. This Note then explores the fractured and inconsistent approaches taken by various federal and state courts confronting the enforceability of selective waiver agreements in third-party litigation in Parts III and IV. An analysis of the way in which the majority of courts approach the issue demonstrates that judicial resolution of the issue in favor of the doctrine of selective waiver is unlikely, and that any intended solution must bind federal and state courts equally. Given that legislative intervention would provide the most practical course of action, the final section of this Note analyzes potential limits to the applicability of federal selective waiver legislation in state courts, focusing on issues of both federal power and state sovereignty. This analysis concludes that Congress can bind state courts to enforce selective waiver agreements where a federal actor is a party to that agreement and where Congress expresses the intent to bind state courts.

#### I. THE SELECTIVE WAIVER CONTROVERSY

The pressure to waive the attorney-client privilege with respect to internal corporate investigations originates from several sources. In 1999, Deputy Attorney General Eric Holder issued a memorandum to U.S. Attorneys identifying criteria relevant to the decision to charge a corporation with criminal wrongdoing.<sup>16</sup> This memorandum stated that U.S. Attorneys should consider the corporation’s voluntary disclosure of wrongdoing and willingness to cooperate, and that such “cooperation” should be measured by reference to a corporation’s willingness to disclose the results of internal investigations and to waive attorney-client and work product protections as to those results.<sup>17</sup> In 2003, Deputy Attorney General Larry Thompson revised the Holder Memorandum, placing greater emphasis on waiver as a condition of cooperation.<sup>18</sup> Thompson wrote, “[i]n gauging the extent of a corporation’s

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legislation in state courts).

<sup>16</sup> Memorandum from Deputy Attorney General Eric Holder to All Component Heads and United States Attorneys, *Bringing Charges Against Corporations* (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html> [hereinafter “Holder Memorandum”]; see generally, Carmen Couden, Note, *The Thompson Memorandum: A Revised Solution or Just a Problem?*, 30 J. CORP. LAW 405, 406-415 (2005) (discussing the origins and implications of the Holder Memorandum).

<sup>17</sup> Holder Memorandum, *supra* note 16 (acknowledging that waivers are “often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation”); see also Bruce Greene & David Clifton, *supra* note 3, at 63 (acknowledging that it may be difficult for corporations to resist requests for protected information because corporations depend on “the leniency in sentencing that results from providing assistance satisfactory to the prosecution”).

<sup>18</sup> Memorandum from Deputy Attorney General Larry Thompson to Heads of

cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney client and work product protections."<sup>19</sup> While both memoranda state that waiver is not an "absolute requirement" for a determination of cooperation,<sup>20</sup> in practice the Department of Justice (DOJ) has made clear that waiver is an important (and at times, in fact, required) condition to be fulfilled.<sup>21</sup>

The Securities and Exchange Commission (SEC), likewise, has emphasized the need for waiver as a demonstration of cooperation in government investigations. In what has come to be known as the "Seaboard Release," the SEC prosecuted a corporate official for misconduct but did not take action against the corporation itself, citing cooperation and, in particular, the corporation's willingness to waive attorney-client and work product protections.<sup>22</sup> Other regulatory agencies at both the state and federal level have followed suit, emphasizing that waiver is a critical element in

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Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *reprinted in* United States Attorney's Manual, tit. 9, Crim. Resource Manual, §§ 161-62, *available at* [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) [hereinafter "Thompson Memorandum"] (emphasizing the need for authentic and effective cooperation in light of findings that many corporations take steps to impede criminal investigations); *see generally* Couden, *supra* note 16, at 412-23 (examining the implications of the Thompson Memorandum and criticizing the DOJ approach).

<sup>19</sup> Thompson Memorandum, *supra* note 18 (stressing that "the main focus of the revisions is increased emphasis and scrutiny of the authenticity of a corporation's cooperation").

<sup>20</sup> *Id.*; *see* Holder Memorandum, *supra* note 16.

<sup>21</sup> *See, e.g.*, Greene & Clifton, *supra* note 3, at 63; *see also* Brodsky & Cilia, *supra* note 9 ("Indeed, prompt voluntary waiver can be a factor in convincing an agency not to pursue an enforcement action at all.").

<sup>22</sup> Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969, Accounting and Auditing Enforcement Release No. 1470 (Oct. 23, 2001), *available at* <http://www.sec.gov/litigation/investreport/34-44969.htm> ("The company pledged and gave complete cooperation to our staff . . . [and] it did not invoke the attorney client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation."); *see* Greene & Clifton, *supra* note 3, at 64:

Within the legal community, there is a perception that the SEC regards the production of attorney-client privileged information and attorneys' litigation work product developed in a company's internal investigation as part of the needed disclosure identified in the Seaboard report. This concern is bolstered by public remarks made by SEC officials.

(citing remarks by Steven Cutler, former head of the SEC's enforcement division, *available at* [www.sec.gov/news/speech/spch092004smc.htm](http://www.sec.gov/news/speech/spch092004smc.htm)).

determining whether a corporation has cooperated with a government investigation.<sup>23</sup> In combination, these sources suggest that a corporation's waiver of the attorney-client privilege may be a necessary element of "cooperation" with government investigative agencies in certain circumstances.

Amendments to the Federal Sentencing Guidelines in 2004 also suggested that waiver might be a prerequisite for a sentencing reduction where it was necessary to provide "timely and thorough disclosure of all pertinent information known to the organization."<sup>24</sup> Although the U.S. Sentencing Commission has recently proposed changes that would abandon this policy in November 2006, the Commission's actions will not affect the current policies or practices of the DOJ or other agencies.<sup>25</sup>

The government, however, provides little practical guidance as to what circumstances in fact require waiver. Even where federal investigators fail to deliver formal waiver requests, corporations and their attorneys are well aware that an assertion of attorney-client privilege or work product protection may produce significant liabilities.<sup>26</sup> Given such consequences, corporations frequently choose to waive their attorney-client and work product protections, either on their own initiative or at the suggestion of prosecutors.<sup>27</sup> In doing so, however, corporations have increasingly insisted that federal agencies enter into "selective waiver" agreements which assert that disclosure to the government does not constitute a waiver of relevant protections as to third parties who might later seek to discover the otherwise protected materials in subsequent litigation.<sup>28</sup>

While the government has frequently complied with these requests, there is no uniform and consistent approach to the interpretation of these agreements across federal or state courts.<sup>29</sup> Some courts refuse to recognize them at all, and hold that disclosure – even to a government agency – waives attorney-

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<sup>23</sup> Greene & Clifton, *supra* note 3, at 64 (observing that the "federal prosecutorial approach appears to be catching on elsewhere").

<sup>24</sup> See U.S. SENTENCING GUIDELINES, Commentary to § 8C2.5 (2004) (encouraging the government to require a waiver of attorney-client and work product protections as evidence of "thorough" cooperation and as a prerequisite to qualify for a reduced sentence under the Guidelines).

<sup>25</sup> Terry Carter, *Privilege Waiver Policy Dumped; But Federal Prosecutors May Still Seek Waivers From Corporations*, A.B.A. J. EREPORT, April 14, 2006, <http://www.abanet.org/journal/ereport/a14privil.html>.

<sup>26</sup> See, e.g., Rosenfeld, *supra* note 6, at 2 ("When governmental investigators express interest in possible corporate wrongdoing, given the potential ramifications of criminal or civil liability, it is often perceived by corporations and their legal advisors that cooperation with the governmental investigators is in the corporate best interest . . .")

<sup>27</sup> See generally Brodsky & Cilia, *supra* note 9, at 1.

<sup>28</sup> See, e.g., Okrzesik, *supra* note 11, at 117-118.

<sup>29</sup> See *infra* Parts III-IV (examining the divergent approaches to selective waiver taken by federal and state courts).

client and work product protections completely.<sup>30</sup> One circuit has adopted a per se rule that disclosure to a government agency does not constitute waiver of the attorney-client and work product privileges.<sup>31</sup> Still other courts adopt a more flexible, case-specific approach that will uphold confidentiality agreements in certain circumstances, but these courts offer little guidance as to what those circumstances may be.<sup>32</sup> As a result, corporations are frequently unable, ex ante, to determine whether they may rely on selective waiver agreements to protect materials in the face of subsequent litigation. This uncertainty significantly complicates the decision to disclose confidential materials to the government,<sup>33</sup> because if a court holds a waiver agreement invalid, the materials are discoverable by third parties in private actions brought against the corporation. As one commentator has observed, “You might as well try to put Humpty Dumpty back together again as unwaive a waived privilege.”<sup>34</sup>

The current lack of uniformity with respect to the enforceability of these agreements calls for greater predictability across federal and state courts.<sup>35</sup> As long as the validity of these agreements remains unsettled and dependent on the jurisdiction where a subsequent civil action is brought, corporations may be dissuaded from full cooperation with investigative agencies, and the government’s ability to discover and prosecute corporate wrongdoing may suffer in turn. Before examining the development of the controversy in detail and addressing Congress’s authority to enforce a selective waiver rule in state proceedings, the following Part briefly introduces the policy justifications that underpin the attorney-client privilege and the work product doctrine.

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<sup>30</sup> See *infra* Part III.B.2 (evaluating the rejection of selective waiver by the D.C. Circuit, the Third Circuit, and the Sixth Circuit in favor of a traditional approach to waiver).

<sup>31</sup> See *Diversified Indus. v. Meredith*, 572 F.2d 596, 606-17 (8th Cir. 1978) (en banc); see also *infra* Part III.B.1.

<sup>32</sup> See *infra* Part III.B.3 (suggesting that the approaches of the First and Second Circuits to selective waiver leave open the possibility that selective waiver might be tolerated in certain cases).

<sup>33</sup> See, e.g., Lawrence D. Findler, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 126 (2003) (recognizing that the pressure imposed by a government request for waiver may result in an acceleration of the decision-making process and prevent a full calculation of the risks and benefits of cooperation); Greene & Clifton, *supra* note 3, at 62 (“The legal effect of complying . . . may be that the corporation waives the attorney-client privilege or the work-product doctrine – or both.”); see also Brodsky & Cilia, *supra* note 9, at 1 (cautioning that “corporations . . . should realize the possibility that any ‘voluntary’ disclosure of confidential materials will likely result in a broad waiver of applicable privileges and protections”).

<sup>34</sup> Jerold S. Solovy & Robert L. Bryan, *Unwaiver*, NATIONAL L.J., Apr. 4, 2005, at 11.

<sup>35</sup> See Okrzešik, *supra* note 11, at 119 (stating that “because the attorney-client privilege and work-product doctrine are the most commonly invoked privileges in the federal courts, the need for consistency in upholding or waiving the privileges cannot be underestimated”).



## II. THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

A. *The Attorney-Client Privilege*

The attorney-client privilege exists “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>36</sup> The privilege is founded on a client’s need for “the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”<sup>37</sup> Like other exclusionary evidentiary rules, the privilege obstructs the truth-finding process by limiting the information available to both adversaries and fact-finders. This obstruction has been tolerated on the theory that it is “outweighed by the benefits to justice (not to the client) from a franker disclosure in the lawyer’s office.”<sup>38</sup> However, because the privilege protects against the disclosure of, in most cases, relevant facts, it is construed narrowly.<sup>39</sup> As a result “the privilege ‘protects *only* those disclosures – necessary to obtain informed legal advice – which might not have been made absent the privilege.’”<sup>40</sup> Once otherwise privileged materials are disclosed to a third party, the protections of the privilege have traditionally been considered waived. One commentator explains:

If clients themselves divulge such information to third parties, chances are that they would also have divulged it to their attorneys, even without the protection of the privilege. Thus, once a client has revealed privileged information to a third party, the basic justification for the privilege no longer applies . . . .<sup>41</sup>

Exceptions to the theory of waiver do exist, but those exceptions allow only for disclosure to “allies” in litigation; for example, a party may disclose otherwise privileged materials to agents or co-litigants without waiver.<sup>42</sup> Significantly, however, these narrow exceptions are justified on the ground that they are “consistent with the goal underlying the privilege because each type of disclosure is sometimes necessary for the client to obtain informed

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<sup>36</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

<sup>37</sup> *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

<sup>38</sup> MCCORMICK ON EVIDENCE, § 87, at 204 (Edward W. Cleary ed., West 1972).

<sup>39</sup> See, e.g., *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979) (stating that the privilege “obstructs the search for truth” and thus should be “strictly confined within the narrowest possible limits”).

<sup>40</sup> *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1423-24 (3d Cir. 1991) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

<sup>41</sup> Comment, *Stuffing the Rabbit Back into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Investigation*, 130 U. PA. L. REV. 1198, 1207 (1982), quoted in *Westinghouse Elec. Corp.*, 951 F.2d at 1424.

<sup>42</sup> *Westinghouse Elec. Corp.*, 951 F.2d at 1424.

legal advice.”<sup>43</sup> Therefore, under the reasoning employed by a majority of courts, selective waiver of the attorney-client privilege will be tolerated only insofar as such waiver accords with the rationales that justify the privilege itself. Given that the rationales advanced to justify the enforcement of selective waiver agreements are (largely) independent and unrelated to the rationales that serve the privilege,<sup>44</sup> judicial resolution of the selective waiver controversy in favor of enforcement is unlikely.

B. *The Work Product Doctrine*

A related but independent protection afforded to attorney-client communications is the work product doctrine. Where the attorney-client privilege “promotes the attorney-client relationship and – indirectly – the functioning of our legal system, by protecting the confidentiality of communications between clients and their attorneys,” the work product doctrine “promotes the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation.”<sup>45</sup> The Second Circuit explained:

The logic behind the work product doctrine is that opposing counsel should not enjoy free access to an attorney’s thought processes. An attorney’s protected thought processes include preparing legal theories, planning litigation strategies and trial tactics, and sifting through information. At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case. The doctrine grants counsel an opportunity to think or prepare a client’s case without fear of intrusion by an adversary.<sup>46</sup>

Because this doctrine is focused on protecting the adversarial system, and not the client’s ability to seek informed legal advice, disclosure to a third party does not necessarily waive work product protection.<sup>47</sup> Instead, a majority of

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<sup>43</sup> *Id.*

<sup>44</sup> See *infra* Parts III-IV (discussing the promotion of corporate investigations and cooperation with the federal government as possible rationales for permitting selective waiver agreements).

<sup>45</sup> *Westinghouse Elect. Corp.*, 951 F.2d at 1428; see *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (1981) (comparing the “strict standard of waiver in the attorney-client privilege context with the more liberal standard applicable to the work product privilege”). But see *Westinghouse Elect. Corp.*, 951 F.2d at 1429 (“The standard for waiving the work-product doctrine should be no more stringent than the standard for waiving attorney-client privilege.”).

<sup>46</sup> *In re Natural Gas Commodity Litig.*, 2005 WL 1457666, at \*9-10 (S.D.N.Y. June 21, 2005) (quoting *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234-35 (2d Cir. 1993)) (citations and internal quotation marks omitted).

<sup>47</sup> *Westinghouse Elec. Corp.*, 951 F.2d at 1428 (comparing the work product doctrine to the attorney-client privilege and stating that the former does not assist a client to obtain

courts require that to waive the work product protection, “the disclosure must enable an *adversary* to gain access to the information.”<sup>48</sup> Thus to determine whether a waiver of the work product doctrine has occurred, courts must first “distinguish between disclosures to adversaries and disclosures to non-adversaries.”<sup>49</sup>

Despite the fact that courts agree on the doctrinal foundations for the work product and attorney-client privilege protections, courts confronting the issue of waiver have reached very different conclusions about whether disclosure of otherwise confidential materials to a government agency in fact constitutes such a waiver.<sup>50</sup> As with waiver of the attorney-client privilege, courts have been reluctant to credit arguments not rooted in the traditional rationales that underlie the work product protection itself.

In the following section, this Note examines the state of selective waiver jurisprudence across the federal courts. An analysis of this caselaw demonstrates that selective waiver agreements, though tolerated by certain courts in limited circumstances, are most often rejected because the majority of courts remain unconvinced that policy justifications extrinsic to the privilege or work product doctrine can override the traditional rules governing waiver.

### III. THE DEVELOPMENT OF SELECTIVE WAIVER DOCTRINE(S) IN FEDERAL COURT

#### A. *Approval of Selective Waiver*

In *Diversified Industries, Inc. v. Meredith*, the Eight Circuit first addressed the issue of whether disclosure of privileged attorney-client communications to a government agency, under subpoena, constituted an absolute waiver of the attorney-client privilege and work product doctrine as to all other parties.<sup>51</sup> This case is unique, in comparison to other courts confronting the matter, for its failure to discuss in any great detail the issue of waiver in light of the rationales behind the attorney-client privilege and work product doctrines. Instead, having determined that the privilege applied to the materials at issue,

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informed legal advice).

<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> *Id.*; see *In re Natural Gas Commodity Litig.*, 2005 WL 1457666, at \*9-10 (S.D.N.Y. June 21, 2005):

Common sense and the practicalities of litigation define the limits of the work product doctrine. Once a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears. Courts therefore accept the waiver doctrine as a limitation on work product protection. The waiver doctrine provides that voluntary disclosure of work product to an adversary waives the privilege as to other parties.

<sup>50</sup> See *infra* Parts III-IV.

<sup>51</sup> 572 F.2d 596, 606-17 (8th Cir. 1978) (en banc).

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the court concluded that only a “selective” waiver occurred.<sup>52</sup> “To hold otherwise,” the court remarked, “may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.”<sup>53</sup>

The court did not address the existence (or non-existence) of a confidentiality agreement between the SEC and *Diversified*, though it did place some emphasis on the fact that the privileged materials were disclosed pursuant to an agency (SEC) subpoena.<sup>54</sup> The implication is that, at least in the view of the Eighth Circuit, the existence of such an agreement is not material when the corporation is under a legal obligation to disclose documents. Such disclosure, it seems, fails to satisfy the “voluntary” disclosure language that traditionally attends discussions of waiver.<sup>55</sup> Other courts, less receptive to the concept of selective waiver, frequently emphasize that “deliberate” disclosures will not be tolerated.<sup>56</sup>

The Eighth Circuit’s approach to waiver stands alone among the federal courts. No confidentiality agreement is required to maintain the protections of the attorney-client privilege and work product doctrine. Moreover, the *Diversified* court was willing to maintain the protections of the privilege in the interests of promoting corporate investigations and government cooperation. No other circuits, however, have been willing to accept the Eighth Circuit’s permissive approach to waiver.

## B. *Disapproval of Selective Waiver*

### 1. The D.C. Circuit: Rejection of “Tactical” Waiver

The D.C. Circuit first addressed the issue of selective waiver to government agencies following the *Diversified* decision, and came to a very different

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<sup>52</sup> *Id.* at 611.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *See, e.g., In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235-36 (2d Cir. 1993) (discussing the benefits gained from “voluntary” disclosure as a counterweight to the risks of waiver).

<sup>56</sup> *See, e.g., Permian Corp. v. United States*, 665 F.2d 1214, 1221 (1981) (rejecting the Eighth Circuit’s theory that a failure to find selective waiver would prevent corporations from employing outside counsel to investigate and advise them). Interestingly, the only other comment by the Eighth Circuit relating to waiver was that the litigants seeking access to the privileged materials were “not foreclosed from obtaining the same information from non-privileged sources.” *Diversified*, 572 F.2d at 611. Subsequent courts interpreting the scope of the privilege with respect to SEC/DOJ disclosures have also focused on the availability of relevant information from non-privileged sources. *See, e.g., In re Natural Gas Commodity Litig.*, 2005 WL 1457666, at \*19 (S.D.N.Y. June 21, 2005) (emphasizing the importance of the availability of non-privileged sources for the factual data underlying privileged analyses in determining whether a waiver has occurred).

conclusion. In *The Permian Corporation v. United States*, the court explicitly rejected the selective waiver theory adopted by the Eighth Circuit, hemming instead to the more traditional rule that the confidential status of attorney-client communications was “destroyed” by voluntary disclosure to the SEC.<sup>57</sup> In *Permian*, documents were disclosed to the SEC in the course of an investigation surrounding Occidental Petroleum Corporation’s (“Occidental”) proposed hostile takeover of Mead Corporation.<sup>58</sup> At the request of the SEC, which was unable to process the approximately 1.2 million documents relating to the transaction in a timely way, Occidental disclosed certain privileged materials to expedite the investigation and obtain approval for its bid.<sup>59</sup>

To protect those documents, Occidental and the SEC entered into an arrangement, memorialized in a series of letters, which purported to preserve the privilege as to third parties.<sup>60</sup> Occidental further claimed that there was an “oral understanding” that privileged materials would not be disclosed.<sup>61</sup> The court concluded, however, that the evidence regarding this agreement was “ambiguous.”<sup>62</sup> Nevertheless, the court was willing to accept the district court’s finding that a confidentiality arrangement existed, if only to proceed to its ultimate point – that selective waiver arrangements are invalid (at least where they are clearly motivated by self-interest).<sup>63</sup>

Occidental had, in the district court, sought and been granted an injunction against disclosure of the documents to the U.S. Department of Energy.<sup>64</sup> The D.C. Circuit emphasized that the third party at issue another government agency, and that the confidentiality arrangement itself was ambiguous (particularly as to disclosures to other government agencies), before turning to the theory of selective waiver articulated in *Diversified*.<sup>65</sup> The court unambiguously rejected that theory, stating that it could not “see how the availability of a ‘limited waiver’ would serve the interests underlying the common law privilege for confidential communications between attorney and

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<sup>57</sup> 665 F.2d at 1219.

<sup>58</sup> *Id.* at 1216.

<sup>59</sup> *Id.* (explaining that “the sheer bulk [of the materials provided] impaired its usefulness to the SEC,” prompting the SEC to request permission to obtain information directly from Mead).

<sup>60</sup> *Id.* (indicating that the letters instructed Mead to stamp all documents with a warning against disclosure by the SEC).

<sup>61</sup> *Id.* at 1217.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1221 (“Occidental has been willing to sacrifice confidentiality in order to expedite approval of the exchange offer, and now asserts that the secrecy of the attorney-client relationship precludes disclosure of the same documents in other administrative litigation. The attorney-client privilege is not designed for such tactical employment.”).

<sup>64</sup> *Id.* at 1215.

<sup>65</sup> *Id.* at 1217.

client.”<sup>66</sup> The court reasoned that if the privilege exists only to promote such communications, once that justification is removed through voluntary disclosure, the reasons for the privilege – and thus the protection of that privilege – cease to exist.<sup>67</sup> The court took issue with the Eighth Circuit’s cooperation rationale, commenting that a corporation’s “[v]oluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship.”<sup>68</sup>

Noting that “courts have been vigilant to prevent litigants from converting the privilege into a tool for selective disclosure,”<sup>69</sup> the court continued:

[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. . . . Occidental has been willing to sacrifice confidentiality in order to expedite approval of the exchange offer, and now asserts that the secrecy of the attorney-client relationship precludes disclosure of the same documents *in other administrative litigation*. The attorney-client privilege is not designed for such tactical employment.<sup>70</sup>

The D.C. Circuit’s rejection of selective waiver is thus predicated upon a concern for “tactical” selective waiver and the effect such disclosures would have on the rationales supporting the privilege in the first place. Because Occidental was attempting to prevent the disclosure of materials to another government investigative agency, and not to private litigants, the court was not persuaded by arguments centered on promoting cooperation.<sup>71</sup> In fact, in these

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<sup>66</sup> *Id.* at 1220.

<sup>67</sup> *Id.* (finding that the attorney-client privilege depends on the assumption that the communication will be confidential and stating that if a client wishes to continue to keep such communications confidential, “he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a ‘friendly’ agency”).

<sup>68</sup> *Id.* at 1221; *see id.* at 1221 n.13 (“[W]e cannot see how ‘the developing procedure of corporations to employ independent outside counsel to investigate and advise them’ would be thwarted by telling a corporation that it cannot disclose the resulting reports to the SEC if it wishes to maintain their confidentiality.”). Significantly, the court’s discussion does not focus on the potential liabilities that could result from third party litigants seeking to use the disclosed materials to prepare class action or derivative lawsuits against the corporation. The context of this case, involving disclosures to another government agency, may explain the court’s failure to credit the Eighth Circuit’s analysis.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (emphasis added).

<sup>71</sup> *Id.* (“Important though the SEC’s mission may be, we are aware of no congressional directive or judicially-recognized priority system that places a higher value on cooperation with the SEC than on cooperation with other regulatory agencies, including the Department of Energy.”).

circumstances, Occidental was attempting to *avoid* cooperation with another government agency.<sup>72</sup> The unique circumstances of this case, however, resulted in a rather sweeping rejection of the concept of selective waiver, without comment as to how that rejection would play out in the context of disclosures to private litigants pursuing private interests.<sup>73</sup>

The court concluded by stating, unequivocally, that it

reject[s] the argument that some public policy imperative inherent in the SEC's regulatory program requires that the traditional waiver doctrine be overridden. . . . Important though the SEC's mission may be, we are aware of no congressional directive or judicially-recognized priority system that places a higher value on cooperation with the SEC than on cooperation with other regulatory agencies, including the Department of Energy. . . . It is apparent that [a selective waiver] doctrine would enable litigants to pick and choose *among regulatory agencies* in disclosing and withholding communications of tarnished confidentiality for their own purposes.<sup>74</sup>

The court was particularly concerned that Occidental's cooperation with the SEC was motivated by its own self-interest in expediting SEC approval of its takeover bid, while its attempt to withhold information from the Department of Energy was another self-interested effort to avoid government investigation. Thus the element of cooperation and public interest at play in *Diversified* was utterly lacking, leading the court to reject outright the policy justifications that drove the Eighth Circuit to approve selective waiver.<sup>75</sup> *Permian*, while in many ways distinguishable from *Diversified* and later cases, nonetheless produced language that influenced subsequent courts to reject the selective waiver theory. Moreover, its rejection of cooperation as a policy justification sufficient to overcome tradition waiver rules (though appropriate given the facts of the case) came to exert a marked influence on courts subsequently confronting selective waiver agreements.

In *In re Subpoenas Duces Tecum*, the D.C. Circuit revisited the idea of selective waiver, and rejected the notion that *Permian* was "limited to circumstances in which material that has been disclosed to one federal agency is sought by another federal agency."<sup>76</sup> The case involved the disclosure of privileged materials to the SEC pursuant to that agency's voluntary disclosure

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<sup>72</sup> *Id.* at 1217.

<sup>73</sup> *Id.* at 1220 ("[W]e cannot see how the availability of a 'limited waiver' would serve the interests underlying the common law privilege for confidential communications between attorney and client.").

<sup>74</sup> *Id.* at 1221-22 (emphasis added).

<sup>75</sup> *Id.* at 1220 (rejecting Occidental's request that the court adopt the "limited waiver" theory of *Diversified* and proclaiming "we find the 'limited waiver' theory wholly unpersuasive").

<sup>76</sup> 738 F.2d 1367, 1370 (D.C. Cir. 1984).

program.<sup>77</sup> Though there was no confidentiality arrangement purporting to protect those materials against disclosure to third parties, the corporation argued that such an understanding should be implied in all disclosures made under that program and ought to prevent the release of those materials to private litigants pursuing a class action lawsuit.<sup>78</sup>

The court, reaffirming its disapproval of the “tactical employment” of the attorney-client privilege, stated that “[f]or the purposes of the attorney-client privilege, there is nothing special about another federal agency in the role of potential adversary as compared to other private party litigants acting as adversaries.”<sup>79</sup> The court commented that “[a] client cannot waive [the] privilege in circumstances where disclosure might be beneficial while maintaining it in other circumstances where nondisclosure would be beneficial. . . . [T]he attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality.”<sup>80</sup> The decision implies that selective waiver of the attorney-client privilege will only be approved where the waiver comports fully with the justifications for the privilege, that is, by promoting attorney-client communications.

The court proceeded to admit, however, that the work product doctrine required a different analysis in the context of selective waiver.<sup>81</sup> The court rejected the argument that work product protection had not been waived following disclosure to the SEC because:

(1) the party claiming the privilege [sought] to use it *in a way that [was] not consistent with the purpose of the privilege*; (2) appellants had no reasonable basis for believing that the disclosed materials would be kept confidential by the SEC; and (3) waiver of the privilege in [the] circumstances would not trench on any policy elements now inherent in the privilege.<sup>82</sup>

The court elaborated: “[appellant] was not simply assisting the SEC in doing its job. Rather, [appellant] independently and voluntarily chose to participate in a thorough disclosure program, in return for which it received the *quid pro*

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<sup>77</sup> *Id.* at 1368.

<sup>78</sup> *See id.* at 1369-70.

<sup>79</sup> *Id.* at 1370.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1371 (“[B]ecause the underlying rationale of the work product privilege itself is . . . one of fairness, an analysis of whether that rationale maintains viability in particular circumstances involves of necessity the weighing of more abstract considerations within the context of those particulars.”).

<sup>82</sup> *Id.* at 1372 (internal quotation marks and citations omitted). The court further stated that “[f]airness and consistency require that appellants not be allowed to gain the substantial advantages accruing to voluntary disclosure of work product to one adversary – the SEC – while being able to maintain another advantage inherent in protecting the same work product from other adversaries.” *Id.*



*quo* of lenient punishment for any wrongdoings exposed in the process.”<sup>83</sup> The court reasoned that the decision to disclose materials to the SEC was “obviously motivated by self-interest. Appellants now want work-product protection for those same disclosures against different adversaries *in suits centering on the very same matters disclosed to the SEC.*”<sup>84</sup> The implication is that the term “adversaries” for purposes of the work product doctrine is not limited to adverse parties in the same litigation, but instead include all parties who raise claims arising out of the same general subject matter of the disclosed documents. Given the likelihood that downstream third party suits (i.e., derivative or class action suits based on corporate wrongdoing) will implicate the same general subject matter of the government investigation, such an interpretation significantly undercuts future arguments to uphold selective waiver agreements.

The D.C. Circuit also emphasized the absence of an expectation of confidentiality as to the materials disclosed to the SEC.<sup>85</sup> The court rejected the argument that such an expectation was supplied by an “understanding” between the agency and the appellant, and refused to countenance the notion that, although the materials were disclosed voluntarily, they should receive the same protections as if disclosed under subpoena.<sup>86</sup> Moreover, the court stated that “*no policy factor now inherent in the work product privilege* calls for a special exception for the SEC’s voluntary disclosure plan (or similar government enforcement projects).”<sup>87</sup> The court’s analysis is colored by a distinct reluctance to credit the corporation’s self-interested disclosures to the SEC as a policy goal sufficient to overcome the traditional understandings of the attorney-client privilege or work product doctrine.<sup>88</sup> Absent such self-

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<sup>83</sup> *Id.*

When a corporation elects to participate in a voluntary disclosure program like the SEC’s, it necessarily decides that the benefits of participation outweigh the benefits of confidentiality . . . . It forgoes some of the traditional protections of the adversary process in order to avoid some of the traditional burdens that accompany adversary resolution of disputes . . . .

*Id.* (quoting *In re Sealed Case*, 676 F.2d 793, 822-23 (D.C. Cir. 1982)).

<sup>84</sup> *Id.* (emphasis added).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1373-1375 (“The distinction between voluntary disclosure and disclosure by subpoena is that the latter, being involuntary, lacks the self-interest which motivates the former. As such, there may be less reason to find waiver in circumstances of involuntary disclosure.”).

<sup>87</sup> *Id.* at 1375 (emphasis added).

<sup>88</sup> *Id.* at 1372:

We are convinced that the health of the adversary system – which spawned the need for protection of an attorney’s work product from discovery by an opponent – would not be well served by allowing appellants the advantages of selective disclosure to particular adversaries, a differential disclosure often spurred by considerations of self-interest. . . . [The corporation] foregoes some of the traditional protections of the adversary system in order to avoid some of the traditional burdens that accompany

interest, and with an express confidentiality agreement entered into prior to disclosure, the court may have been more receptive to arguments in favor of selective waiver.<sup>89</sup>

## 2. The Third Circuit: Rejection of Confidentiality Agreements

In *Westinghouse Electric Corp. v. Republic of the Philippines*, the Third Circuit held that the disclosure of attorney-client communications to a government agency waives the attorney-client privilege, even where that disclosure is made pursuant to SEC regulations promising confidentiality and under an explicit confidentiality arrangement with the agency.<sup>90</sup> Building on the D.C. Circuit's reasoning in *Permian* and its progeny, the court stated:

[t]he Eighth Circuit's sole justification for permitting selective waiver was to encourage corporations to undertake internal investigations. Unlike the two widely recognized exceptions to the waiver doctrine<sup>91</sup> . . . *selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance*; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose.<sup>92</sup>

The court agreed with the D.C. Circuit that "however laudable" the goal of promoting government cooperation through selective waiver theory may be, that goal is "beyond the intended purposes of the attorney-client privilege."<sup>93</sup> In the court's view, such policy arguments were "irrelevant" to selective waiver analysis, since "to go beyond the policies underlying the attorney-client privilege on [the cooperation rationale] would be to create an entirely new privilege."<sup>94</sup>

Unlike the D.C. Circuit, however, the court in *Westinghouse* had to confront the existence of an express confidentiality agreement between the DOJ and Westinghouse that claimed to maintain the privilege as to the materials disclosed, thereby preventing their release to third parties.<sup>95</sup> The Third Circuit

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adversary resolution of disputes, especially disputes with such formidable adversaries as the SEC.

<sup>89</sup> See *id.* at 1375 ("[I]f [the corporation] wishes to maintain [the] confidentiality [of materials] . . . the company can insist on a promise of confidentiality before disclosure to the SEC.").

<sup>90</sup> *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1427 (3d Cir. 1991) (explaining that, under traditional waiver doctrine, a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the information).

<sup>91</sup> See *supra* note 9 and accompanying text.

<sup>92</sup> *Westinghouse*, 951 F.2d at 1425 (emphasis added).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1419 (recounting that the DOJ and Westinghouse entered into a confidentiality agreement before Westinghouse disclosed subpoenaed documents to the grand jury).

“reject[ed] Westinghouse’s argument that it did not waive the privilege because it reasonably expected that the SEC and DOJ would maintain the confidentiality of the information that it disclosed to them.”<sup>96</sup> The court explained that “[e]ven though the DOJ apparently agreed not to disclose the information, under traditional waiver doctrine a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else.”<sup>97</sup>

The Third Circuit also rejected arguments that the work product doctrine protected the disclosed documents.<sup>98</sup> The court, after reciting the D.C. Circuit’s three-part analysis articulated in *In re Subpoenas Duces Tecum*,<sup>99</sup> stated that

[w]hen a party discloses protected materials to a government agency investigating allegations against it, it uses those materials to forestall prosecution (if the charges are unfounded) or to obtain lenient treatment (in the case of well-founded allegations). These objectives, however rational, are foreign to the objectives underlying the work-product doctrine.<sup>100</sup>

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<sup>96</sup> *Id.* at 1426-27.

<sup>97</sup> *Id.* at 1427. Significantly, however, the court felt compelled to emphasize that the confidentiality agreement at issue was ambiguous with respect to the extent of protection created by the document. *Id.* Moreover, the court qualified its holding by noting that “even if Westinghouse could preserve the privilege by conditioning its disclosure upon a promise to maintain confidentiality, no such promise was made here regarding the information disclosed to the SEC.” *Id.* Thus while the court’s rather sweeping language can be read as a rejection of all selective waiver agreements, a more careful inspection suggests that the court’s real concern was the specific confidentiality arrangement entered into by Westinghouse. A clear and unambiguous agreement, entered into prior to disclosure, may well have produced a different result.

The facts of this case may also have played a role in the court’s rejection of selective waiver. Westinghouse disclosed its privileged materials in the course of an investigation into allegations that the company had bribed government officials in the Philippines. Westinghouse, in this case, was attempting to prevent disclosure of those materials to the Philippine government, which was also conducting an investigation into those allegations. These circumstances made it particularly difficult for Westinghouse to succeed on arguments rooted in principals of public policy or government cooperation.

<sup>98</sup> *See id.* at 1429 (“The standard for waiving the work-product doctrine should be no more stringent than the standard for waiving attorney-client privilege.”). Unlike the D.C. Circuit, the Third Circuit treats the attorney-client privilege and work product doctrine similarly for purposes of determining whether waiver has occurred. *Id.*

<sup>99</sup> *See supra* text accompanying note 38.

<sup>100</sup> *Westinghouse*, 951 F.2d at 1429. The court also observed that

[c]reating an exception for disclosures to government agencies may actually hinder the operation of the work product doctrine. If internal investigations are undertaken with an eye to later disclosing the results to a government agency, the outside counsel conducting the investigation may hesitate to pursue unfavorable information or legal theories about the corporation. Thus, allowing a party to preserve the doctrine’s

Like the D.C. Circuit, then, the Third Circuit suggests that it will not allow a corporation to receive both the benefits of disclosure and of selective waiver.<sup>101</sup> Because Westinghouse was motivated by its own self-interest in the benefits of cooperation, and not by a desire to cooperate – however principled a distinction that might be – the court refused to accept policy justifications that did not further the goals of the doctrine.<sup>102</sup> Further, the court rejected the argument that Westinghouse did not waive the doctrine’s protections because it reasonably expected the disclosed documents to remain confidential.<sup>103</sup> “Even if we had found that the agencies made such [a confidentiality agreement],” the court remarked, “it would not change our conclusion.”<sup>104</sup> The court, however, continued:

[H]ad the DOJ and the SEC not been Westinghouse’s adversaries, and had we concluded that Westinghouse reasonably expected to keep the material that it disclosed to them confidential, we might reach a different result. But because Westinghouse deliberately disclosed work product to two government agencies investigating allegations against it, [Westinghouse’s expectation of privacy is not relevant].<sup>105</sup>

Because Westinghouse’s disclosure was “deliberate” (read: tactical), even the existence of an explicit confidentiality agreement would not have affected the court’s decision. The Third Circuit’s discussion of work product doctrine is thus less receptive to the theory of selective waiver than most other courts, many of which will consider a corporation’s expectation of privacy in determining whether waiver has occurred.<sup>106</sup>

### 3. The Sixth Circuit: Absolute Waiver

In *In re Columbia/HCA Healthcare*, the Sixth Circuit unequivocally rejected the Eighth Circuit’s approach in *Diversified*, and went even further to dismiss the notion that express confidentiality agreements could preserve the privilege

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protection while disclosing work product to a government agency could actually discourage attorneys from fully preparing their cases.

*Id.*

<sup>101</sup> *Id.* at 1426 (indicating that corporations cannot invoke attorney-client privilege to receive the benefits of the adversary system and waive it to dispense with the burdens of that system).

<sup>102</sup> *Id.* at 1420 (suggesting that it would reject any justification that subverted the adversary system in which the work product doctrine is grounded).

<sup>103</sup> *Id.* at 1430 (criticizing Westinghouse’s reliance on *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984) and *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982), because those cases dealt with partial disclosure and the fairness doctrine).

<sup>104</sup> *Id.* at 1430.

<sup>105</sup> *Id.* at 1431.

<sup>106</sup> *See, e.g., In re Natural Gas Commodity Litig.*, 2005 WL 1457666, at \*8 (S.D.N.Y. June 21, 2005) (characterizing “the presence or absence of a non-waiver/confidentiality agreement” as “significant”).

in the face of disclosure to the government.<sup>107</sup> The court cited three principal reasons for rejecting the concept of selective waiver: (1) “the uninhibited approach adopted out of wholecloth by the *Diversified* court has little, if any, relation to fostering frank communication between a client and his or her attorney;”<sup>108</sup> (2) “any form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into ‘merely another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage;”<sup>109</sup> and (3) the “attorney-client privilege is a matter of common law right, ‘the oldest of the privileges for confidential communications known to the common law’ . . . [It] is not a creature of contract, arranged between parties to suit the whim of the moment.”<sup>110</sup>

While acknowledging that “permitting selective waiver when the initial disclosure is to an investigative arm of the Government” had “considerable appeal,”<sup>111</sup> the court rejected the policy arguments justifying such an approach as “flawed.”<sup>112</sup> The court dismissed the notion that government actors were sufficiently different from private litigants to justify a new exception to privilege doctrine.<sup>113</sup> The court emphasized that private litigants, like the government, pursued a “public interest” in discovering and preventing corporate wrongdoing when prosecuting shareholder derivative or similar actions.<sup>114</sup> Moreover, the court expressed concern that the government, by entering into such agreements, was in fact “obfuscating the ‘truth-finding process.’”<sup>115</sup> The court commented that “[t]he investigatory agencies of the Government should act to bring to light illegal activities, not to assist wrongdoers in concealing information from the public domain.”<sup>116</sup> Finally, recognizing the circuit split on this issue, the court concluded that “[j]ust as the attorney-client privilege itself provides certainty to litigants that information relayed to one’s attorney will not be disclosed, rejection of selective waiver provides further certainty that waiver of the privilege ensures that the

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<sup>107</sup> 293 F.3d 289, 302 (6th Cir. 2002) (reaffirming the common law rule that attorney-client privilege is waived by voluntary disclosure by an individual to a corporation or third party, and rejecting the concept of selective waiver “in any of its various forms”).

<sup>108</sup> *Id.* at 302 (internal citations omitted).

<sup>109</sup> *Id.* (internal citations omitted).

<sup>110</sup> *Id.* at 303 (internal citations omitted).

<sup>111</sup> *Id.* (observing that such disclosure furthers the “truth-finding process” and saves the government considerable time and money).

<sup>112</sup> *Id.* (reasoning that the argument “has no logical terminus” because, in situations where the litigant represents a private attorney general whose action vindicates the public interest – in a shareholder derivative action, for example – the court will have to distinguish one private litigant from the next).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (describing the “attorney general” nature of private litigants who represent shareholders in a derivative shareholder action).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

information will be disclosed.”<sup>117</sup> At least, in the Sixth Circuit.

The court took a similarly restrictive view of the scope of the work product doctrine, holding that “the standard for waiving the work product doctrine should be no more stringent than the standard for waiving the attorney-client privilege – once the privilege is waived, waiver is complete and final.”<sup>118</sup> The court explained

[o]ther than the fact that the initial waiver must be to an “adversary,” there is no compelling reason for differentiating waiver of work product from waiver of attorney-client privilege. Many of the reasons for disallowing selective waiver in the attorney-client privilege context also apply to the work product doctrine. The ability to prepare one’s case in confidence . . . has little to do with talking to the government. Even more than attorney-client privilege waiver, waiver of the protections afforded by the work product doctrine is a tactical litigation decision. Attorney and client both know that the material in question was prepared in anticipation of litigation; the subsequent decision on whether or not to “show your hand” is quintessential litigation strategy. Like attorney-client privilege, there is no reason to transform the work product doctrine into another “brush on the attorney’s palette,” used as a sword rather than a shield.<sup>119</sup>

While the cases discussed previously left some room for the possibility that selective disclosures might be tolerated under different circumstances, the Sixth Circuit’s opinion in *Columbia/HCA Healthcare* suggests that even with an explicit confidentiality agreement, any disclosure of privileged materials to a government agency constitutes an absolute waiver of privilege.<sup>120</sup> The Sixth Circuit’s approach lies at the opposite end of the spectrum from that adopted by the Eighth Circuit in *Diversified*.<sup>121</sup>

### C. *Selective Waiver: A Case-by-Case Approach*

Most circuits have not yet formulated clear rules regarding the enforceability of selective waiver agreements, or the circumstances in which such agreements will be tolerated.<sup>122</sup> However, decisions in the First and

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 307 (citing *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1429 (3d Cir. 1991)) (internal quotation marks omitted).

<sup>119</sup> *Id.* at 306-07 (citing *In re Steinhardt Partners*, 9 F.3d 230, 235 (2d Cir. 1993)).

<sup>120</sup> *Id.* at 302-03 (adopting the Second Circuit’s reasoning in *Steinhardt* that any form of selective waiver, even pursuant to an express confidentiality agreement, unfairly gives the attorney another “brush on his palette”).

<sup>121</sup> *See supra* notes 51-56 and accompanying text.

<sup>122</sup> *See, e.g.*, *United States v. Bergonzi*, 403 F.3d 1048, 1050 (9th Cir. 2005):

Given our finding of mootness, we do not reach [the party’s] argument that we should recognize a form of “selective” or “partial” waiver that would allow a corporation to disclose the results of an internal investigation to an investigating government agency

Second Circuits indicate some willingness to enforce these agreements, albeit in limited circumstances.<sup>123</sup> Other circuits, many of which have yet to directly confront the issue, also suggest that selective waiver agreements should be considered on a case-by-case basis.<sup>124</sup> These circuits, in refusing to adopt the clear positions of the Sixth or Eighth Circuits, contribute to the uncertainty faced by corporations contemplating waiver.

The First Circuit's approach is perhaps the most restrictive of those courts that have yet to formulate clear and definitive selective waiver rules.<sup>125</sup> In *United States v. Massachusetts Institute of Technology*, MIT sought to prevent the Internal Revenue Service (IRS) from obtaining privileged financial records submitted to the Department of Defense (DoD) as part of an ongoing contract.<sup>126</sup> The DoD had agreed not to turn over any of those documents without MIT's consent, but there was no explicit agreement between the parties to keep the materials strictly confidential.<sup>127</sup> Because MIT sought to prevent disclosure to an investigating government agency, and had initially revealed materials to the DoD pursuant to a contractual arrangement, the case raised few of the policy concerns of other selective waiver cases, except for those relating directly to the purpose of the privilege.<sup>128</sup> In such circumstances, the court concluded:

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without waiving attorney-client privilege or work product protection as to the outside world. Whether the sort of selective waiver [the party] seeks is available in this Circuit is an open question.

<sup>123</sup> See *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 684 (1st Cir. 1997); *In re Steinhardt Partners*, 9 F.3d at 236 (“[W]e decline to adopt a *per se* rule that all voluntary disclosures to the government waive work-product protection.”); see also *In re Sealed Case*, 676 F.2d 793, 817 (2d Cir. 1982).

<sup>124</sup> See, e.g., *Dellwood Farms v. Cargill Inc.*, 128 F.3d 1132, 1134 (7th Cir. 1997) (suggesting that the existence of a confidentiality agreement is a factor to be considered in selective waiver cases); *In re John Doe*, 662 F.2d 1073, 1079 (4th Cir. 1981) (finding that the lack of a confidentiality agreement is significant in determining whether a party has waived the work product doctrine).

<sup>125</sup> See *Massachusetts Institute of Technology*, 129 F.3d at 685 (holding that MIT could not rely on a government agency's general practice of nondisclosure to presume that confidential information would not be disclosed indiscriminately).

<sup>126</sup> *Id.* at 683.

<sup>127</sup> *Massachusetts Institute of Technology*, 129 F.3d at 683 (remarking that MIT relied on the DoD's general practice as proof that it would not indiscriminately disclose material).

<sup>128</sup> See *id.* at 685:

MIT, like any client, continues to control both the nature of its communications with counsel and the ultimate decision whether to disclose such communications to third parties. The only constraint imposed by the traditional rule here invoked by the government – that disclosure to a third party waives the privilege – is to limit *selective* disclosure, that is, the provision of otherwise privileged communications to one outsider while withholding them from another. MIT has provided no evidence that respecting this constraint *will prevent it or anyone else from getting adequate legal advice.*

(emphasis added).

[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. It would be perfectly possible to carve out some of those disclosures and say that, although the disclosure itself is not necessary to foster attorney-client communications, neither does it forfeit the privilege. With rare exceptions, courts have been unwilling to start down this path – which has no logical terminus – and we join in this reluctance.<sup>129</sup>

The court's analysis indicates, however, that the existence of an explicit confidentiality agreement, and perhaps more sympathetic circumstances,<sup>130</sup> might have produced a result more favorable to advocates of selective waiver.<sup>131</sup> While the decision in *Massachusetts Institute of Technology* certainly makes arguments in favor of such a position more difficult, it does not preclude them.

In *In re Steinhardt Partners, L.P.*, the Second Circuit also rejected a selective waiver approach to voluntary disclosures to the SEC, but left open the possibility that selective waiver might be tolerated in certain instances.<sup>132</sup> Steinhardt was accused of manipulating the market for Treasury bonds, and had disclosed privileged materials to the SEC in the course of its investigation in order to gain the benefits of cooperation.<sup>133</sup> No confidentiality agreement was entered into between Steinhardt and the SEC.<sup>134</sup> When private litigants pursuing class action claims against Steinhardt sought to obtain those materials, Steinhardt argued, based on *Diversified*, that those materials remained privileged despite disclosure.<sup>135</sup> The court quickly rejected that argument, repeating the D.C. Circuit's admonishment that "selective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage."<sup>136</sup>

However, the court stopped short of declaring a "*per se* rule that all voluntary disclosures to the government waive work product protection."<sup>137</sup> The court explained:

[c]rafting rules relating to privilege in matters relating to government

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<sup>129</sup> *Id.* at 686.

<sup>130</sup> *See id.* at 684-85 (focusing on MIT's expectation of confidentiality but noting that "[a]n intent to maintain confidentiality is ordinarily necessary to continued protection, but it is not sufficient").

<sup>131</sup> *Id.* (acknowledging that, had MIT been able to show that waiver would prevent it or anyone else from getting adequate legal advice, the result might have been different).

<sup>132</sup> 9 F.3d 230, 235 (2d Cir. 1993) (declaring that rules relating to privilege in matters of government investigations must be crafted on a case-by-case basis).

<sup>133</sup> *Id.* at 232.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 235.

<sup>136</sup> *Id.* at 235 (citing *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (1981)).

<sup>137</sup> *Id.* at 236.



investigations must be done on a case-by-case basis. Establishing a rigid rule would fail to anticipate *situations in which the disclosing party and the government may share a common interest* in developing legal theories and analyzing information, or *situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials*.<sup>138</sup>

*Steinhardt* thus suggests that selective waiver to government agencies will be approved of where the parties have, at least, entered into a clear confidentiality agreement. Subsequent lower court decisions interpreting *Steinhardt* support this position.<sup>139</sup>

A more recent decision by a magistrate judge in the Southern District of New York provides an interesting interpretation of the *Steinhardt* decision favorable to disclosures made pursuant to a confidentiality agreement.<sup>140</sup> In *In re Natural Gas*, two corporations facing potential investigations into improper commodity transactions retained outside counsel to perform an internal review of the companies' activities.<sup>141</sup> The results of those reports were later disclosed to the government agencies investigating the allegations, but under explicit confidentiality agreements purporting to preserve the privilege as to all third parties.<sup>142</sup> Plaintiffs in a subsequent private action against the corporations sought to compel production of those materials, and the corporations refused on the ground that the attorney-client privilege applied.<sup>143</sup>

After carefully examining the existing case law and commentary surrounding the issue of selective waiver, the court held that the attorney-client privilege was preserved by operation of the confidentiality agreements.<sup>144</sup> The court stated that “[u]nder *Steinhardt*, [the existence of a confidentiality agreement] goes a long way to a finding of non-waiver.”<sup>145</sup> The court, observing that the Second Circuit was unclear about “how much weight to give a confidentiality agreement with [a] government agency,” concluded, however, that “*Steinhardt* does not create a ‘per se’ rule that if there is a confidentiality/non-waiver agreement with the government, the privilege is not

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<sup>138</sup> *Id.* (emphasis added).

<sup>139</sup> *See, e.g.,* Maruzen Co. v. HSBC USA, Inc., 2002 WL 1628782, at \*2 (S.D.N.Y. July 23, 2002) (approving selective waiver where those claiming the privilege had “explicit confidentiality agreements with the authorities satisfying *Steinhardt*”); *In re Leslie Fay Cos., Inc. Sec. Litig.*, 161 F.R.D. 274, 282-84 (S.D.N.Y. 1995) (disclosures “made pursuant to confidentiality agreements intended to preserve the privilege applicable to the disclosed documents” satisfy *Steinhardt*).

<sup>140</sup> *In re Natural Gas Commodity Litig.*, 2005 WL 1457666, at \*8 (S.D.N.Y. June 21, 2005).

<sup>141</sup> *Id.* at \*1-4.

<sup>142</sup> *Id.* at \*4-6.

<sup>143</sup> *Id.* at \*4-5.

<sup>144</sup> *Id.* at \*10.

<sup>145</sup> *Id.* at \*8-9.

waived.”<sup>146</sup> In addition to those agreements, then, the court relied on the fact that both corporations had produced to the private plaintiffs “the factual documents underlying the work product analyses provided to the government agencies.”<sup>147</sup> Because this information would provide the plaintiffs with all the information on which the privileged materials were based, the court determined that there was no “substantial need” for disclosure of the materials.<sup>148</sup> This reliance on the existence of alternative sources of materials, however, would seem to severely limit the availability of selective waiver enforcement. There would, in most circumstances, be little need to conduct expensive confidential investigations if the conclusions regarding corporate wrongdoing could be drawn from public (or otherwise available) sources.

The case-by-case analysis adopted by the Second Circuit suggests that an explicit confidentiality agreement is a necessary, but not sufficient, prerequisite to an approval of selective waiver.<sup>149</sup> Courts, however, have offered little guidance as to what other factors may be required for such a finding.<sup>150</sup> These factors include, at least, the absence of a substantial need for disclosure and a common interest with the government on the part of the party advocating selective waiver.<sup>151</sup> On the other hand, a corporation that attempts to use waiver in an overtly tactical manner is unlikely to maintain the privileged character of any documents disclosed to government agencies.<sup>152</sup> This ad hoc approach recognizes that in some circumstances selective waiver may be a valid means to promote government cooperation, but the courts’ failure to indicate with any clarity what those circumstances may be only adds to the uncertainty surrounding selective waiver doctrine.<sup>153</sup>

Commentators have characterized federal selective waiver jurisprudence as

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<sup>146</sup> *Id.* at \*9.

<sup>147</sup> *Id.* The court also remarked that “if the analyses had been based on oral information from defendants’ traders, or if the underlying factual trade data was no longer available, plaintiffs would have made a strong showing of substantial need for the analyses defendants produced to the government agencies.” *Id.*

<sup>148</sup> *Id.* at \*9 (contrasting that situation to one in which the information was either based on oral discussions or documents no longer available, in which case there would have been a substantial need).

<sup>149</sup> *Cf. supra* note 91.

<sup>150</sup> *See In re Natural Gas Commodity Litig.*, 2005 WL 1457666, at \*9 (noting that, aside from confidentiality agreements, “*Steinhardt* does not provide any further guidance on the factors this court should consider”).

<sup>151</sup> *Id.* at \*10 (explaining that no such substantial need existed because plaintiffs had been provided with the factual documents underlying the work product analyses provided to the government agencies).

<sup>152</sup> *See id.*

<sup>153</sup> For example, the court acknowledges that *Steinhardt* fails to list what factors are important to the analysis, and then proceeds to list the factors it considers important without explanation. *Id.*

“a state of hopeless confusion.”<sup>154</sup> This confusion significantly complicates a corporation’s decision to cooperate with government investigations. While cooperation may benefit corporations seeking to reduce future liabilities or demonstrate innocence, it also greatly aids government agencies attempting to discover and prosecute corporate wrongdoing.<sup>155</sup> Greater clarity and predictability are required if corporations and the government are going to continue to cooperate in an effort to reduce corporate wrongdoing. Moreover, the privilege itself, long a hallmark of the American legal tradition, may lose a substantial degree of its value if, on the one hand, the government can insist on disclosure and yet, on the other, remain free to disregard confidentiality agreements purporting to protect that privilege.

#### IV. THE PRIVILEGE IN STATE COURTS: THE MCKESSON-HBOC LITIGATION

If the federal courts are in a state of confusion with regard to the enforceability of selective waiver agreements, state courts confronting similar issues have produced no greater clarity. The state courts (California, Delaware, and Georgia) that have confronted the enforceability of selective waiver agreements have done so on the basis of identical facts arising from the merger of McKesson Corporation and HBOC & Co. in 1999.<sup>156</sup> But while the facts may be the same, the divergent rationales and (at times) contradictory conclusions reached by these courts demonstrate the need for greater doctrinal coherence across the states.<sup>157</sup>

##### A. *Background to the McKesson-HBOC Disputes*

In April 1999, four months after the merger of HBOC & Co. (HBOC) and McKesson Corporation into McKesson HBOC, Inc., the company issued a press release reporting the discovery by its auditors of more than \$42 million in

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<sup>154</sup> See, e.g., Edna Selan Epstein, *THE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE* 77 (4th ed. Supp. 2004).

<sup>155</sup> For an argument in favor of allowing selective waiver to government actors, see *In re Columbia/HCA Healthcare*, 293 F.3d 289, 312 (6th Cir. 2002) (Boggs, J., dissenting):

Government officials, with finite litigative resources and no individual monetary stake in the outcome of litigation, generally are more selective regarding the matters they choose to pursue . . . .

[G]overnment investigators and prosecutors start at a tactical disadvantage to private plaintiffs given the procedural protections afforded criminal defendants against the government . . . . I am comfortable, therefore, providing a clear exception for government investigations, and leaving private litigants out.

<sup>156</sup> The privilege and work product claims were also brought in federal district court but were rejected. See *In re McKesson HBOC, Inc. Sec. Litig.*, No. C-99-20743 RMW, 2005 U.S. Dist. LEXIS 7098 (Mar. 31, 2005).

<sup>157</sup> Consider that, particularly with respect to large national corporations, third-party litigants could very easily “shop” for a forum state in which selective waiver agreements are not enforced in order to access corporate materials that would be unavailable in states that recognize some form of selective waiver.

improperly recognized revenue; the companies books would have to be revised.<sup>158</sup> Following this announcement, the company's stock plummeted forty percent, which represented "a \$9 billion drop in market capitalization."<sup>159</sup> More than eighty shareholder lawsuits followed,<sup>160</sup> some filed the very day of the press release, and formal investigations were launched by the DOJ (through the U.S. Attorney's Office (USAO)) and the SEC.<sup>161</sup>

In response, McKesson's Board of Directors authorized its Audit Committee to review its accounting policies and procedures, and the Committee retained the law firm of Skadden, Arps, Slate, Meagher & Flom LLP (Skadden) to defend the company in the shareholder lawsuits and to conduct an internal investigation into the matter.<sup>162</sup> Skadden, in turn, retained PricewaterhouseCoopers LLP (PWC) as accounting consultants.<sup>163</sup> Skadden and PWC performed an investigation which included fifty-five attorney interviews of thirty-seven present and former company employees and extensive document review.<sup>164</sup> The result of these efforts was a comprehensive report (the "Skadden Report").<sup>165</sup> Prior to the completion of that report, however, McKesson had entered into "substantially identical confidentiality agreements" with the USAO and SEC "under which Skadden would provide the government with any report which might result from the internal investigation and the materials upon which such report would be based," as long as the government would agree to keep those materials confidential with respect to any third parties.<sup>166</sup> As one court summarized,

The confidentiality agreements prepared by Skadden reflected McKesson's belief that the documents it was providing were protected by the attorney-client privilege and the work product doctrine. The agreements further stated that McKesson did not intend to waive those protections, and that McKesson believed it had a common interest with the government in obtaining information regarding the improperly recorded revenues.<sup>167</sup>

Based on these facts, civil shareholder suits were filed in several states in which plaintiffs' attorneys sought to compel the release of the Skadden report,

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<sup>158</sup> See *In re McKesson HBOC, Inc. Sec. Litig.*, U.S. Dist. LEXIS 7098, at \*15.

<sup>159</sup> *Id.*

<sup>160</sup> *McKesson HBOC, Inc. v. Adler*, 254 Ga. App. 500, 500 n.1 (Ga. App. 2002).

<sup>161</sup> *McKesson HBOC, Inc. v. Super. Ct. of S.F.*, 9 Cal. Rptr. 3d 812, 815 (Cal. Ct. App. 2004), *aff'g Oregon v. McKesson HBOC, Inc.*, 2003 WL 23315698 (Cal. Super. Ct. 2003).

<sup>162</sup> *Id.*

<sup>163</sup> *In re McKesson HBOC, Inc. Sec. Litig.*, U.S. Dist. LEXIS 7098, at \*16.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at \*16-17.

<sup>167</sup> *McKesson HBOC, Inc.*, 9 Cal. Rptr. 3d at 815. While the agreements did provide for certain exceptions to this confidentiality agreement, none were implicated in any of the litigation that would ultimately surround these agreements. *Id.*

arguing that disclosure to the SEC and USAO had destroyed any attorney-client or work product protection.<sup>168</sup> No court in any of the three states where courts have addressed the issue have upheld the constitutionality of the selective waiver agreements entered into by McKesson with respect to the attorney-client privilege,<sup>169</sup> and only one court was willing to uphold the selective waiver of work product protection.<sup>170</sup>

#### B. *Attorney-Client Privilege*

Trial and appellate courts in California and Georgia have refused to interpret the McKesson disclosure agreements to preserve the privileged status of the Skadden report,<sup>171</sup> while the Delaware Chancery court, resolving the matter on work product grounds, did not reach the issue.<sup>172</sup> In an unpublished opinion, the California trial court determined that, while the attorney-client privilege applied to the Skadden Report and related documents, McKesson had waived the privilege by sharing the report with the government.<sup>173</sup> On appeal, McKesson argued that such disclosure did not waive the privilege, because under California law<sup>174</sup> the disclosures were “‘reasonably necessary for the accomplishment of the purpose’ for which the lawyer was consulted” and because the corporation shared a “common interest” with the government,<sup>175</sup> making them sufficiently allied to justify an exception to the traditional rule of

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<sup>168</sup> See *id.* at 816.

<sup>169</sup> See *id.* at 815 (stating selective waiver defense must come from the legislature), *aff’g* Oregon v. McKesson HBOC, Inc., 2003 WL 23315698 (Cal. Super. Ct. 2003); Saito v. McKesson HBOC, Inc., No. Civ. A. 18553, 2002 WL 31657622, at \*15 (Del. Ch. 2002) (upholding the selective waiver with respect to the work product, but not the privileged information); McKesson HBOC, Inc. v. Adler, 563 S.E.2d 809, 811 (Ga. Ct. App. 2002) (denying the selective waiver defense).

<sup>170</sup> See *Saito*, No. Civ. A. 18553, 2002 WL 31657622, at \*15.

<sup>171</sup> *McKesson HBOC, Inc.*, 9 Cal. Rptr. 3d at 819 (ruling that “McKesson waived its attorney-client privilege with respect to the [Skadden report]”), *aff’g* Oregon v. McKesson HBOC, Inc., 2003 WL 23315698 (Cal. Super. Ct. 2003) (same); *Adler*, 563 S.E.2d at 811 (affirming lower court determination that Skadden report was not privileged despite selective waiver agreement).

<sup>172</sup> *Saito*, No. Civ. A. 18553, 2002 WL 31657622, at \*12 (stating that the court “do[es] not need to address attorney-client privilege in relation to most of the documents [at issue] because they are protected by the work product doctrine”). The court did analyze one document sought by the plaintiffs in terms of the privilege, but because that document had been disclosed prior to the waiver agreement, the court’s analysis does not bear on the issue of selective waiver. See *id.*

<sup>173</sup> See *McKesson HBOC, Inc.*, 9 Cal. Rptr. 3d at 816.

<sup>174</sup> CAL. CODE OF EVID. §§ 950-62. Under California law, the attorney-client privilege is a “legislative creation,” and not rooted in state common law. See *McKesson HBOC, Inc.*, 9 Cal. Rptr. 3d at 817.

<sup>175</sup> *McKesson HBOC, Inc.*, 9 Cal. Rptr. 3d at 817-18 (citing CAL. CODE OF EVID. § 912(d)).

absolute waiver upon disclosure.<sup>176</sup> The Court rejected both contentions.<sup>177</sup>

McKesson's arguments hinged on the court's willingness to accept that McKesson had retained Skadden to provide legal advice and assistance "in civil litigation pending in state and federal court."<sup>178</sup> The Court of Appeals, however, was unwilling to credit the corporation's statement that its retention of Skadden and PWC was unrelated to the imminent federal investigations into its accounting practices.<sup>179</sup> Moreover, the court held that whatever the intention of McKesson in conducting its internal investigation, sharing privileged materials with the government was "unnecessary" to defend itself against those private claims.<sup>180</sup> Further, the court rejected McKesson's claim that it shared with the government a common interest in "investigating and rooting out the source of accounting improprieties at HBOC."<sup>181</sup> Instead, the court stated, "we read the Evidence Code . . . to permit sharing of privileged information when it furthers the attorney-client relationship; not simply when two or more parties might have overlapping interests."<sup>182</sup>

The common interest arguments rejected by the court were, in fact, policy arguments of the kind rejected by the majority of federal courts.<sup>183</sup> Like those courts, the California Court of Appeals would only entertain arguments in favor of selective waiver when those arguments were grounded in the purposes underlying the privilege.<sup>184</sup> This explains the court's failure to discuss in any detail the existence of the confidentiality agreements and their bearing on the issue of waiver. The court implicitly rejected arguments the theory of selective waiver except to the extent that it would "further[] the attorney-client relationship."<sup>185</sup> As a result, the issue of a prior confidentiality agreement did

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<sup>176</sup> See *supra* text accompanying notes 39-41 (explaining exceptions to the waiver rule for disclosure to "allies" in litigation).

<sup>177</sup> *McKesson HBOC, Inc.*, 9 Cal. Rptr. 3d at 817-818.

<sup>178</sup> *Id.* at 817.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 818.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*; see *id.* ("We see no real alignment of interests between the government and persons or entities under investigation for securities law violations.").

<sup>183</sup> That is, the public interest in discovering and rooting out corporate fraud.

<sup>184</sup> *McKesson HBOC, Inc.*, 9 Cal. Rptr. 3d at 818 ("Though McKesson and amici curiae advance policy arguments for allowing sharing of privileged materials with the government, no one suggests that a defendant facing multiple plaintiffs should be able to disclose privileged materials to one plaintiff without waiving the attorney-client privilege as to the other plaintiffs.") (citation omitted). Note that the court's argument fails to consider that in the vast majority of circumstances where government disclosure would occur (i.e., where cooperation would be at issue), there will be a threat of federal action (i.e., the government would be a plaintiff or potential plaintiff). Thus the court's statement on the matter effectively rejects the concept of selective waiver to government agencies.

<sup>185</sup> *Id.*

not weigh on McKesson's assertion of privilege.<sup>186</sup> The California courts have thus rejected the theory of selective waiver of the attorney-client privilege, and instead require that disclosure must strengthen the rationales underlying the privilege in order to avoid waiver as to third-party litigants.

The Georgia courts have also been unreceptive to the theory of selective waiver. In *McKesson HBOC, Inc. v. Adler*, the Georgia Court of Appeals upheld a lower court's determination that the corporation waived the protections of the attorney-client privilege when it disclosed the Skadden Report and related materials to the government.<sup>187</sup> The court, in a brief paragraph, observed that the attorney-client privilege "is far more readily waived by disclosure to a third party" than the work product doctrine, and that the Audit Committee had authorized Skadden and PWC to cooperate with the SEC prior to the investigation.<sup>188</sup> Thus, "since McKesson contemplated that the documents would be provided to a third party almost from the inception of its investigation," the confidentiality agreement was of no moment and "the documents [were] not subject to the attorney-client privilege."<sup>189</sup>

The court reasoned that because the investigation was conducted without any expectation that the materials would remain confidential, a critical element of the privilege (viz., confidentiality) was absent.<sup>190</sup> Therefore, like the majority of courts confronting waiver in this context, the court held that the privilege did not survive.<sup>191</sup> However, the Georgia court's analysis (brief though it was) seems to carry this strain of reasoning even further: if corporations undertake internal investigations with foreknowledge that the results will be disclosed to the government for "cooperation" purposes, those results can hardly be considered privileged in the first place, at least where disclosure does in fact occur. The court's reasoning is thus potentially more damaging to the theory of selective waiver than the reasoning of other courts, since internal investigations undertaken in response to (or anticipation of) a federal investigation will never be able to rely on selective waiver agreements as long as there is some evidence that cooperation was contemplated from the outset. By focusing on the initial expectations of a corporation, and not on subsequent expectations based on a confidentiality agreement, the court was willing to date waiver of the privilege *before* the act of disclosure.<sup>192</sup> In any event, the Georgia courts have demonstrated that selective waiver of the attorney-client privilege will not be tolerated, absent some justification that furthers the attorney-client relationship itself.

Those state courts addressing the issue of waiver of the attorney-client

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<sup>186</sup> *Id.*

<sup>187</sup> *McKesson v. Adler*, 562 S.E.2d 809, 811, 814 (Ga. App. Mar. 27, 2002).

<sup>188</sup> *Id.* at 814.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

privilege have been particularly severe in their refusal to uphold selective waiver agreements. These courts have foregone any meaningful analysis of confidentiality agreements themselves and have, like the majority of federal courts, focused on arguments tied to the justifications for the privilege itself. As a result, any assertion of selective waiver of the privilege in these states is likely to fail.

C. *The Work Product Doctrine*

Courts in California and Georgia have similarly rejected arguments that McKesson preserved its work product protections over the Skadden Report and related materials;<sup>193</sup> but the influential Delaware Chancery court reached the opposite result, ruling that the protection was not destroyed when McKesson shared the Report with government investigators.<sup>194</sup> That the same facts can produce contrary results, and that the validity of selective waiver agreements now depends on the jurisdiction in which third-party claims are brought, demonstrates that variant state selective waiver rules provide corporations with little certainty, and undercut the law in states like Delaware where such agreements may be upheld.

The trial court in California treated McKesson's disclosure to the government as equivalent to disclosure to "third parties who did not have an interest in preserving the confidentiality of the documents."<sup>195</sup> Under state law, waiver occurs when an attorney voluntarily discloses materials to a third party who has no interest in maintaining the confidentiality of those materials.<sup>196</sup> As a result, the trial court ruled that McKesson waived work product protection when it shared the Skadden Report with the USAO and SEC.<sup>197</sup> On appeal, McKesson countered that the confidentiality agreements with those agencies demonstrated that both government agencies in fact had an interest in keeping the Report's contents secret, and (again) that McKesson shared a common interest with the agencies in rooting out corporate wrongdoing.<sup>198</sup> The court disagreed.<sup>199</sup>

The court characterized McKesson's assertion that the confidentiality agreement created a government interest in confidentiality as "bootstrapping."<sup>200</sup> Examining the terms of the agreement, the court observed that the government promised to maintain confidentiality only insofar as "they

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<sup>193</sup> *McKesson HBOC, Inc. v. Super. Ct. of S.F.*, 9 Cal. Rptr. 3d 812, 820 (Cal. Ct. App. 2004); *McKesson Corp. v. Green*, 610 S.E.2d 54 (Ga. 2005).

<sup>194</sup> *Saito v. McKesson HBOC, Inc.*, No. Civ. A. 18553, 2002 WL 31657622 (Del. Ch. 2002).

<sup>195</sup> *McKesson HBOC, Inc.*, 9 Cal. Rptr. 3d at 819.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 820.



did not need to disclose the documents' contents to perform their duties."<sup>201</sup> Thus, because the government promised only "conditional" confidentiality in exchange for the documents (which the court deemed the government's true interest), the court would not read the confidentiality agreement to be, well, a confidentiality agreement.<sup>202</sup> The court contrasted the relationship between McKesson and the government with the situation where "parties are aligned on the same side in the litigation and have a similar stake in the outcome," which would create an interest in confidentiality.<sup>203</sup> The court was unpersuaded by the policy argument that failure to uphold the agreement would "make future targets of government investigations reluctant to cooperate," though the court did comment that this rationale had "some appeal."<sup>204</sup> But the court expressly rejected consideration of such arguments because "selective waiver theory finds no support in the work product policies" of California law.<sup>205</sup> Absent legislative direction, the court would not entertain arguments in favor of selective waiver that did not relate to the policies justifying the protection in the first place.<sup>206</sup>

Similarly, the Georgia Supreme Court rejected McKesson's argument that the confidentiality agreement had preserved work product protection over the Skadden Report.<sup>207</sup> The court described McKesson's common interest argument as "unconvincing," and agreed with the appellate court's characterization of the McKesson-government relationship as adversarial.<sup>208</sup> The court did not engage in detailed analysis of the confidentiality agreements at issue, and instead quoted *Westinghouse* at length to conclude that the objective of government cooperation, though laudable, was "foreign to the objectives underlying the work-product doctrine."<sup>209</sup> Thus courts in Georgia, like those in California, require that the disclosure of materials to the government be justified by exclusive reference to the work product doctrine, and not extrinsic policy considerations.

The Delaware Chancery court, however, confronted the very same circumstances and reached the opposite result, albeit through a different chain of reasoning.<sup>210</sup> Like the California and Georgia courts, the Delaware court

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* (citation omitted).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 821.

<sup>206</sup> *Id.*

<sup>207</sup> *McKesson Corp. v. Green*, 610 S.E.2d 54, 56 (Ga. 2005) ("We agree with the Court of Appeals that the evidence supports the conclusion that McKesson waived work product protection when it provided the audit documents to the SEC.").

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 57 (quoting *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1429-30 (3rd Cir. 1991)).

<sup>210</sup> *Saito v. McKesson HBOC, Inc.*, No. Civ. A. 18553, 2002 WL 31657622, at \*15 (Del.

rejected McKesson's common interest arguments.<sup>211</sup> The court then turned to the issue of whether the corporation had an expectation of privacy with respect to the disclosed materials sufficient to overcome the traditional presumption of waiver.<sup>212</sup> The court first observed that Delaware courts had yet to determine whether selective waiver of the work product doctrine was permitted where such an expectation existed.<sup>213</sup> Starting from scratch, the court observed that the existence of a confidentiality agreement prior to disclosure is evidence of a heightened expectation of privacy with regard to the disclosed materials.<sup>214</sup> Given this expectation, the court stated that the plaintiffs had failed to "provide some . . . reason why the privilege protecting the work product of its opponent should be waived when that work product was confidentially disclosed to a law enforcement agency in its investigation."<sup>215</sup> The court went on to state that "public policy seems to *mandate* that courts continue to protect the confidentially disclosed work product in order to encourage corporations to comply with law enforcement agencies."<sup>216</sup> The Delaware court thus diverged significantly from the majority of courts examining waiver.<sup>217</sup> The court was willing to entertain (and, in fact, actively asserted) policy arguments that had little relevance to the work product doctrine itself.<sup>218</sup>

However, on closer inspection, the court's decision to credit such arguments is not without its basis in work product doctrine, at least understood broadly. Consider the court's approach. First, the court analyzed McKesson's expectation of privacy, and found it to be reasonable.<sup>219</sup> The court dismissed the notion that because other courts had rejected selective waiver theory, McKesson's expectation was unfounded; instead, the court concluded that the precedent on the issue was at best "conflicting," particularly where an express confidentiality agreement was at issue.<sup>220</sup> The remaining issue was formulated as follows: "whether th[e] court should sanction an expectation of privacy when it arose from an attempt to cooperate with a law enforcement agency

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<sup>211</sup> *Id.* at \*7 (characterizing the corporation's interests as "adverse" to those of the government agencies).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at \*7.

<sup>216</sup> *Id.* (emphasis added).

<sup>217</sup> *See, e.g.,* McKesson HBOC, Inc. v. Super. Ct. of S.F., 9 Cal. Rptr. 3d 812, 820 (Cal. Ct. App. 2004); McKesson Corp. v. Green, 610 S.E.2d 54 (Ga. 2005).

<sup>218</sup> *Saito*, No. Civ. A. 18553, 2002 WL 31657622, at \*7.

<sup>219</sup> *Id.* ("When attorneys secure a confidentiality agreement before sharing their work product with the SEC, as McKesson HBOC's attorneys did, those attorneys can reasonably assume that the SEC would not reveal those confidential disclosures to other adversaries.")

<sup>220</sup> *Id.* at \*8.

investigation.”<sup>221</sup> The court found an affirmative answer to be “the more prudent policy,” and rejected plaintiff’s motion to compel those materials protected by the confidentiality agreement.<sup>222</sup>

The court went into some detail as to the policy considerations that informed its decision. It observed that waivers of work product protection “are a penalty reserved for egregious abuses by the privilege holder,” and that voluntary cooperation with law enforcement agencies hardly constitutes an “egregious abuse.”<sup>223</sup> The court took issue with the characterization of cooperation as a purely tactical and self-interested move, noting that corporations frequently must divulge sensitive or incriminating materials:

There is a balance in place already – whether the corporation should air its dirty laundry in exchange for mercy or whether to force the law enforcement agency to do its own legwork (and possibly overlook or fail to discover some of the incriminating evidence) at the cost of more stringent treatment. When courts amplify the risk of disclosure to include future private plaintiffs, the scales begin to tip further in favor of corporate noncompliance with investigative agencies. A rigid rule leading to such an unwholesome result seems unwise. Instead, a practical rule that would reduce the risk of secondary unintended disclosure to private plaintiffs from this initial balance would likely benefit law enforcement agencies and the private plaintiffs they were established to protect.<sup>224</sup>

The court challenged the notion that selective waiver in such circumstances was wholly tactical, and an instance of corporations attempting to “have their cake and eat it too.”<sup>225</sup> In contrast to the formulations of prior courts, the Delaware chancery observed that private litigants seeking disclosure were no less self-interested themselves: “they want disclosing parties to continue disclosing to the SEC so they are better protected [as shareholders], while at the same time they want access to these disclosures for their own tactical advantage.”<sup>226</sup> The court concluded that it was in the best interest of all (the corporation, the government, and shareholders) to enforce McKesson’s confidentiality agreement with the SEC, and so it did.<sup>227</sup> Interestingly, the court’s willingness to look beyond policy justifications strictly tied to the work product doctrine brought the analysis full circle: the doctrine, designed to

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at \*10.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at \*9.

<sup>226</sup> *Id.* (observing also that “[w]hen the benefits of leniency from the SEC are uncertain, yet the burden of exposing a companies Achilles’ heel to a flood of adversaries is certain, corporations will be less likely to disclose work product to the SEC”).

<sup>227</sup> *Id.* at \*11.

promote the adversarial system,<sup>228</sup> had been used by private litigants to achieve exactly the result it was intended to prevent. Private litigants were seeking to benefit from courts' unwillingness to enforce confidentiality agreements. As a result, litigants – just as much as the corporation's own attorneys – were tactically circumventing the adversarial system.

The Delaware court's willingness to look beyond a narrow reading of the work product rules, and to engage the policy rationales for and against selective waiver before formulating its rule, resulted in a holding favorable to selective waiver theory. Moreover, the court's policy discussion amply demonstrates the benefits that flow from recognition of selective waiver theory with respect to disclosures to the government pursuant to a confidentiality agreement. Courts in California and Georgia, unwilling to credit policy considerations extrinsic to a narrow conception of the rule, have reached contrary results. As a consequence, corporations contemplating disclosure now face great uncertainty, since the enforceability of a confidentiality agreement may turn on whether third-party litigants file suit in Delaware (now unlikely) or California (now likely). Thus while the Delaware court's rule is influential given the rate of incorporation in that state, it is nonetheless unlikely to substantially affect corporate behavior in the future. To give full effect to the policy considerations behind the chancery court's opinion, Congress should enact federal legislation codifying selective waiver theory in the context of disclosures to the government under a confidentiality agreement. The next Section, therefore, examines Congress's power in this regard, and concludes that such legislation may effectively bind state and federal courts alike.

#### V. CONGRESSIONAL AUTHORITY TO REGULATE THE SCOPE OF STATE ATTORNEY-CLIENT PRIVILEGE LAW

The limits of Congress's authority to regulate state court proceedings remain largely undefined.<sup>229</sup> James Madison, when confronted with this issue in 1791, could only respond that the "question probably involves several very nice points."<sup>230</sup> More recent commentators have observed that "the points remain 'very nice' today,"<sup>231</sup> and existing caselaw offers little guidance as to the scope of federal power over state courts or the proper analysis governing such inquiries.<sup>232</sup> Nonetheless, certain principles regarding Congress's power can

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<sup>228</sup> See *supra* Part II.B.

<sup>229</sup> Bellia, *supra* note 12, at 949.

<sup>230</sup> Letter from James Madison to Edmund Pendleton (Jan. 2, 1791), in 13 PAPERS OF JAMES MADISON 342-43 (Charles F. Hobson et al. eds., 1981) (responding to a question regarding whether the Paris Peace Treaty of 1789, which removed obstacles to the recovery of debts on either side of the American Revolution, operated to "repeal all acts of limitation, & such as regulate the modes of proving debts"), *quoted in* Bellia, *supra* note 12, at 949.

<sup>231</sup> Bellia, *supra* note 12, at 949; see *supra* note 12.

<sup>232</sup> See, e.g., *In re Transcript Int'l Sec. Litig.*, 57 F. Supp. 2d 836, 841 n.2 (1999) (questioning "whether Congress actually does have the power to regulate state procedural

be discerned from the Supreme Court's jurisprudence. First, the Court has repeatedly affirmed that Congress may require state courts to adjudicate federal claims.<sup>233</sup> Second, several decisions suggest that "Congress may require state courts to prescribe procedural rules that form part of the substance of an asserted federal right."<sup>234</sup> Finally – and significantly – the Court has recognized that state courts are bound to apply federal *policies*, even in the absence of an independent federal cause of action or defense, where those policies create substantive rights.<sup>235</sup> This final category of Congressional authority provides a firm basis for the enforcement of selective waiver legislation in state court proceedings.

In *Southland Corp. v. Keating*, the Court addressed the applicability of the Federal Arbitration Act ("FAA" or "Act") in state court proceedings.<sup>236</sup> California challenged the application of the Act's provisions that required the enforcement of arbitration clauses in written contracts and limited the availability of judicial review over arbitration awards in state court proceedings, since those provisions conflicted with state law.<sup>237</sup> The Court

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law and the state courts' power to govern the progression of cases on their own dockets," but resolving the case on other grounds).

<sup>233</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 928 (1997) ("[S]tate courts cannot refuse to apply federal law – a conclusion mandated by the terms of the Supremacy Clause."); *Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding that state courts are not free to refuse to enforce laws passed by Congress).

<sup>234</sup> *Bellia*, *supra* note 12, at 959; see *Felder v. Casey*, 487 U.S. 131, 138 (1988):

Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law', for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'

(quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)); *Dice v. Akron, Canton, and Youngstown R.R.*, 342 U.S. 359, 361 (1952) (holding that in an action in state court under federal law, the question of the validity of a release granted to a railroad by an injured employee is a federal question to be determined by federal law); *Cent. Vt. Ry. v. White*, 238 U.S. 507, 511-12 (1915) (acknowledging "the general principle that matters respecting the remedy – such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations – depend on the law of the place where the suit is brought," but explaining that "it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure").

<sup>235</sup> See *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983) (stating that the Federal Arbitration Act "is something of an anomaly" in that it "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal question jurisdiction" and "is left in large part to the state courts"); *Glynn*, *supra* note 10, at 165-66 ("Congress has the authority to create substantive rights or defenses that preempt contrary state regulations and which are applicable in state courts even in the absence of a corresponding federal cause of action.").

<sup>236</sup> 465 U.S. 1, 10-16 (1984).

<sup>237</sup> *Id.* at 3-6.

held that through the FAA, “Congress declared a national *policy* favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>238</sup> The Court found that the preemptive effect of the Act “rest[ed] on the authority of Congress to enact substantive rules under the Commerce Clause.”<sup>239</sup> Moreover, the Court found such a preemptive effect even in the absence of any language in the statute indicating the intent to displace contrary state law.<sup>240</sup>

The Court placed great emphasis on the legislative history of the Act, which declared that its provisions should apply to “contracts involving interstate commerce.”<sup>241</sup> The Court reasoned:

[w]e would expect that if Congress . . . was creating what it thought to be a procedural rule applicable only in federal courts, it would not so limit the Act to transactions involving commerce. On the other hand, Congress would need to call on the Commerce Clause if it intended the Act to apply in state courts. . . . We therefore view the involving commerce requirement . . . as a necessary qualification on a statute intended to apply in state and federal courts.<sup>242</sup>

Further, the Court recognized that limiting the application of the federal policy to contract disputes heard in federal court “would frustrate congressional intent,” since “the overwhelming proportion of all civil litigation in this country is in the state courts.”<sup>243</sup> The Court’s reasoning demonstrates that where Congress enacts a federal law to enforce a substantive policy pursuant to its Commerce Clause powers (or any other enumerated power), that policy will bind state courts even in the absence of a corresponding federal claim – provided Congress so intends.<sup>244</sup>

More recent Court decisions support the view that “substantive” federal

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<sup>238</sup> *Id.* at 10 (emphasis added).

<sup>239</sup> *Id.* at 11.

<sup>240</sup> *Id.* at 12 (stating that Commerce Clause powers preempt state laws, even in the absence of explicit intent to do so).

<sup>241</sup> *Id.* at 12-13 (emphasis omitted) (quoting H.R. REP. NO. 96, at 1 (1924)).

<sup>242</sup> *Id.* at 14-15 (emphasis added).

<sup>243</sup> *Id.* at 15-16.

<sup>244</sup> *See id.* at 15 n.9 (“While the [FAA] creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal question jurisdiction.”); Glynn, *supra* note 10, at 166 (“[F]ederal preemptive rights or defenses need not address the substance or merits of the state-law claim to be fully enforceable in state court; in other words, a right or defense asserted in litigation is not ‘procedural’ in nature simply because it does not address the merits of the claim.”); *see* Southland Corp. v. Keating, 465 U.S. 1, 18 (1983) (Stephens, J., concurring in part and dissenting in part) (“The exercise of state authority in a field traditionally occupied by state law will not be deemed pre-empted by a federal statute unless that was the clear and manifest purpose of Congress.” (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978))).

rights must be enforced in state court proceedings, even where such rights do not attend a federal cause of action.<sup>245</sup> In *Jinks v. Richland County*, the Court addressed whether 28 U.S.C. § 1367(d), which provides for the tolling of state statutes of limitations for state claims pending in federal court under supplemental jurisdiction, bound state courts that later heard the state law claims.<sup>246</sup> The Court analyzed the issue in terms of federal power, stating that

[a]lthough the Constitution does not expressly empower Congress to toll limitations periods for state-law claims brought in state court, it does give Congress the authority ‘[t]o make all Laws which shall be necessary and proper for carrying into Execution [Congress’s Article I, § 8,] Powers and all other Powers vested by this Constitution in the Government.’<sup>247</sup>

The Court observed that the “Necessary and Proper Clause [does not] demand[] that an Act of Congress be ‘*absolutely necessary*’ to the exercise of an enumerated power,” provided legislation is “‘conducive to the due administration of justice’ in federal court and is ‘plainly adapted’ to that end.”<sup>248</sup> The Court determined that Congress had power to enact the tolling provision because the provision was “conducive to the administration of justice” and “eliminate[d] a serious impediment to access to the federal courts” for plaintiffs pursuing related state and federal claims.<sup>249</sup>

The Court was willing to read federal power broadly, even in the context of state court proceedings, and to hold that once power was established, Section 1367(d) bound state courts.<sup>250</sup> The Court rejected Respondents’ claims that the law was “not a ‘proper’ exercise of Congress’s Article I powers because it violate[d] principles of state sovereignty.”<sup>251</sup> The Respondents argued that Section “1367(d)’s tolling rule [was] . . . a regulation of state-court ‘procedure,’ and . . . that Congress may not, consistent with the Constitution, prescribe procedural rules for state courts’ adjudication of purely state-law claims.”<sup>252</sup>

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<sup>245</sup> See *Jinks v. Richland County*, 538 U.S. 456, 465 (2002) (holding that statutes of limitations were substantive for *Erie* purposes) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945)).

<sup>246</sup> 538 U.S. 456, 458 (2003).

<sup>247</sup> *Id.* at 461 (quoting U.S. CONST. art. I, § 8, cl. 18).

<sup>248</sup> *Id.* at 462 (citations omitted).

<sup>249</sup> *Id.* at 463-64.

<sup>250</sup> *Id.* at 464-65 (indicating that Section 1367(d) was a proper use of Congressional powers that did not violate state sovereignty principles because the law changed the “substance” of state law).

<sup>251</sup> *Id.* at 464 (citing *Printz v. United States*, 521 U.S. 898, 923-24 (1997)).

<sup>252</sup> *Id.* (citing *Bellia*, *supra* note 12, at 993-1001 (arguing that Congress lacks the power to impose procedural rules on state courts) and Congressional Authority to Require State Courts to Use Certain Procedures in Products Liability Cases, 13 Op. Off. Legal Counsel 372, 373-74 (1989) (stating that “potential constitutional questions” arise when Congress “attempts to prescribe directly the state court procedures to be followed in products liability

Justice Scalia, writing for the Court, replied:

[a]ssuming for the sake of argument that a principled dichotomy can be drawn, for purposes of determining whether an Act of Congress is “proper,” between federal laws that regulate state-court “procedure” and laws that change the “substance” of state-law rights of action, we do not think that state-law limitations periods fall into the category of “procedure” immune from congressional regulation.<sup>253</sup>

The Court disavowed earlier language in *Sun Oil Co. v. Wortman*,<sup>254</sup> which found state statutes of limitations to be “procedural” for purposes of the Full Faith and Credit Clause, and stated that “the meaning of ‘substance’ and ‘procedure’ in a particular context is ‘largely determined by the purposes for which the dichotomy is drawn.’”<sup>255</sup> The Court observed that for *Erie* purposes “state statutes of limitation are treated as substantive.”<sup>256</sup>

While the Court qualified its holding by stating “we need not (and do not) hold that Congress has unlimited power to regulate practice and procedure in state courts,”<sup>257</sup> certain principles relevant to Congressional power over state courts follow from the Court’s opinion. First, the Court is willing to construe Congressional power broadly where Congress roots a regulation of state courts in an enumerated power, like the Commerce Clause (as in *Keating*) or the Necessary and Proper Clause (as in *Jinks*). Second, once power is established, Congress may create federal substantive rights binding on state courts, even in the absence of a corresponding federal right of action. Further, the Supreme Court has been willing to interpret “substantive” expansively to conform to express or implied legislative intent.<sup>258</sup> Third, even if federal power exists, there may be some limitations on Congress’s power to legislate state court procedures under the Tenth Amendment.<sup>259</sup>

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cases”).

<sup>253</sup> *Id.* at 464-65.

<sup>254</sup> 486 U.S. 717, 726 (1988) (“The historical record shows conclusively, we think, that the society which adopted the Constitution did not regard statutes of limitations as substantive provisions . . .”).

<sup>255</sup> *Jinks*, 538 U.S. at 465 (quoting *Sun Oil*, 486 U.S. at 726).

<sup>256</sup> *Id.* (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945)).

<sup>257</sup> *Id.* at 465.

<sup>258</sup> See *Jinks*, 538 U.S. at 462 (reading Congress’s intent in passing § 1367(d) to apply to all inferior tribunals, pursuant to U.S. CONST., art. I, § 8, cl. 9).

<sup>259</sup> The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. The limitations imposed on Congress by that Amendment have been clarified in a series of recent Supreme Court cases discussed *infra* Part V.B.



A. *Congressional Power*

To bind state courts, Congressional authority to enact selective waiver legislation applicable to corporate disclosures to the SEC or DOJ must derive from an enumerated power in the Constitution.<sup>260</sup> By expressly requiring the involvement of a federal actor, and by linking the enforcement of selective waiver agreements to the effectuation of that actor's constitutional prerogatives, courts will likely sustain legislation as a "Necessary and Proper" corollary of that power.<sup>261</sup> Measures enacted under that clause are subject only to rational basis review.<sup>262</sup>

The SEC derives its enforcement powers from the Commerce Clause.<sup>263</sup> If, pursuant to a determination that enforcing selective waiver agreements in both federal and state courts is "necessary" for the effectuation of the SEC's enforcement and investigative mandates, Congress enacts legislation purporting to bind those courts, the Supreme Court will almost certainly sustain the law as a valid exercise of Congressional power.<sup>264</sup> The DOJ likewise is duly empowered under the Constitution to enforce criminal and

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<sup>260</sup> See *Bellia*, *supra* note 12, at 963-64:

Congress' power to prescribe procedural rules for the *federal* courts derives from its power under Articles I and III to constitute inferior federal tribunals, and has been held "necessary and proper" for carrying into execution that power. Congress has no corresponding power in the Constitution to constitute state courts qua state courts. Accordingly, federal authority to regulate state procedural rules must derive from another enumerated power.

(footnotes omitted).

<sup>261</sup> *Cf.* *Sabri v. United States*, 541 U.S. 600, 605 (2004) (stating that the Necessary and Proper Clause confers broad powers on Congress to effectuate other enumerated Constitutional powers because "Congress does not have to sit by and accept the risk of operations thwarted by state or local" action).

<sup>262</sup> See *Hodel v. Va. Mining & Reclamation Assns., Inc.*, 452 U.S. 264, 276 (1981) (granting rational basis review for plenary authorities given to Congress in the Constitution, including the Necessary and Proper Clause).

<sup>263</sup> See *Wright v. SEC*, 112 F.2d 89, 94-95 (2d Cir. 1940) (finding the Securities Exchange Act of 1934 valid as a constitutional attempt to regulate interstate commerce, and as a legitimate delegation of legislative power).

<sup>264</sup> See *Gonzales v. Raich*, 125 S. Ct. 2195, 2216 (2005) (Scalia, J., concurring):

[T]he authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

It is interesting to note that Justice Scalia concurred separately in *Raich* specifically to comment on the expansive reach of the Commerce power when used in combination with the Necessary and Proper Clause. See *id.* at 2215 ("I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.").

civil laws enacted by Congress.<sup>265</sup> If Congress determines that in order to investigate and enforce validly enacted civil or criminal laws, corporations should be able to enter into binding selective waiver agreements with the DOJ, such legislation should constitute a “Necessary and Proper” means to a valid legislative end.<sup>266</sup> Moreover, the effectiveness of any selective waiver legislation would necessarily depend on its applicability in state courts. The Supreme Court has been particularly deferential to Congressional judgments in such circumstances.<sup>267</sup>

Congress thus has power to enact “substantive” selective waiver legislation in cases involving the SEC and DOJ. By operation of the Supremacy Clause, then, that legislation will bind state courts.<sup>268</sup> The Supremacy Clause, after all,

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<sup>265</sup> See generally *Touby v. United States*, 500 U.S. 160, 164-65 (2001) (discussing that Congress has power to legislate broadly under its Article I powers, and that executive agencies may be validly called upon to enforce those laws).

<sup>266</sup> In *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003) (en banc), the Ninth Circuit recognized that the presence of a federal interest was sufficient to bind state courts to enforce a selective waiver of the attorney-client privilege. In that case, a habeas petitioner was required to waive the privilege to proceed on a claim of ineffective assistance of counsel arising from his state court conviction. *Id.* at 716. The federal district court hearing the petition issued “a protective order precluding use of the privileged materials for any purpose other than litigating the federal habeas petition.” *Id.* at 717. The state challenged the order, arguing that the limited waiver order could not bind a state court rehearing the Petitioner’s case, should the petition succeed. *Id.* at 717. Judge Kozinski, writing for the majority, reasoned that the enforcement of selective waiver orders were necessary to fairly adjudicate ineffective assistance of counsel claims, and that Congress had given “state prisoners the right to petition the federal courts for collateral review.” *Id.* at 721-22. Moreover, because the “federal courts . . . induce[d] petitioner to waive his privilege, . . . the federal courts must be able to guarantee the integrity of the bargain.” *Id.* at 726. The court thus held that selective waiver agreements entered into under a federal court order bind state courts. *Id.* A fortiori, if a selective waiver agreement is entered into under the express authority of Congress, state courts will also be bound to honor that agreement. See *id.* at 732 (O’Scannlain, J., concurring) (“The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts *only in obedience to Congressional legislation* in conformity to the Judiciary Article of the Constitution.”) (emphasis added).

<sup>267</sup> See *Jinks v. Richland County*, 538 U.S. 456, 462-63 (200) (holding that the tolling of state statutes of limitations is necessary for effective administration of justice); *Stewart v. Kahn*, 78 U.S. 493, 506 (1870):

The judicial anomaly would be presented of one rule of property in the Federal courts, and another and a different one in the courts of the State, and debts could be recovered in the former which would be barred in the latter. This would be contrary to the uniform spirit of the National jurisprudence from the adoption of the Judiciary Act of 1789 down to the present time.

Cf. *Raich*, 125 S. Ct. at 2209 (discussing the need for comprehensive regulation of medicinal marijuana grown in-state for in-state use as necessary to make national enforcement of drug laws effective).

<sup>268</sup> See, e.g., *Raich*, 125 S. Ct. at 2212 (“The Supremacy Clause unambiguously provides

expressly binds state judges to enforce federal substantive law.<sup>269</sup>

B. *Limits to Congressional Power*

Though the Commerce power is frequently described as “plenary,”<sup>270</sup> certain limitations do apply. Congress may not “regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences.”<sup>271</sup> While the decisions in *United States v. Morrison*<sup>272</sup> and *United States v. Lopez*<sup>273</sup> had left some uncertainty as to the Court’s willingness to sustain legislation grounded in the Commerce power,<sup>274</sup> the 2005 decision in *Raich* essentially limits those cases to their facts.<sup>275</sup> If the Commerce power is broad enough to reach the “intrastate, noncommercial cultivation, possession and use of marijuana” as part of a larger regulatory scheme,<sup>276</sup> it is capable of reaching the regulation of other validly enacted federal laws.

While the restrictions articulated in *Morrison* and *Lopez* result from internal limitations on the Commerce power, Congressional legislation under the Necessary and Proper Clause must also confront the Tenth Amendment.<sup>277</sup>

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that if there is any conflict between federal and state law, federal law shall prevail.”); *see also* *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (“[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress.”); *United States v. Darby*, 312 U.S. 100, 114 (1941) (“[The Commerce] power can neither be enlarged nor diminished by the exercise or non-exercise of state power.”).

<sup>269</sup> *See* *Bellia*, *supra* note 12, at 976 (“[T]he Judges Clause says . . . that state judges must enforce constitutionally enacted federal claims and defenses, even when they conflict with state laws.”).

<sup>270</sup> *See, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1983) (“At least since 1824 Congress’s authority under the Commerce Clause has been held plenary.”).

<sup>271</sup> *Raich*, 125 S. Ct. at 2217 (citing *United States v. Morrison*, 529 U.S. 589, 617-18 (2000) and *United States v. Lopez*, 514 U.S. 598, 564-66 (1995)).

<sup>272</sup> 529 U.S. 598, 617-18 (2000) (striking down the civil remedy provision of the Violence Against Women Act because “Congress may [not] regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.”).

<sup>273</sup> 514 U.S. 549, 561 (1995) (finding that the Commerce Clause did not give Congress power to pass the Gun-Free School Zones Act because the act was “a criminal statute that by its terms ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise”).

<sup>274</sup> *See, Bellia*, *supra* note 12, at 964-70 (“[T]he ‘aggregation’ and ‘economic activity’ problems call the constitutionality of . . . federal regulation [of state court proceedings] into question.”).

<sup>275</sup> *See Raich*, 125 S. Ct. 2195, 2209-12 (discussing and distinguishing *Morrison* and *Lopez*).

<sup>276</sup> *Id.* at 2211 (quoting *Raich v. Ashcroft*, 352 F.3d 1222, 1229 (9th Cir. 2003)).

<sup>277</sup> *See id.* at 2219 (Scalia, J., concurring) (“[A] law is not *proper* for carrying into Execution the Commerce Clause when it violates the constitutional principle of state

Courts have clarified the significance of that Amendment in a series of cases imposing restrictions on the federal power to “commandeer” state executive and legislative bodies.<sup>278</sup> In *New York v. United States*, the Court held that “Congress may not commandeer the States’ legislative processes by directly compelling them to enact and enforce a federal regulatory program.”<sup>279</sup> In *Printz v. United States*, the Court struck down certain provisions of the Brady Act “commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks.”<sup>280</sup> It is essential to note that both cases expressly distinguish federal encroachment on state legislative and executive powers from Congressional interference with state courts.<sup>281</sup> Because *New York* and *Printz* address the question of Congressional power over state legislatures and executive officers, they are not applicable to the issue of selective waiver legislation, which involves Congressional power over courts.<sup>282</sup> These cases do, however, elucidate certain principles relevant to determining the extent to which Congress can interfere with state sovereignty.

In *New York*, the Court set out the contours of state sovereignty under the Constitution, stating that

[t]he Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected

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sovereignty.”) (internal quotation marks omitted).

<sup>278</sup> See *Printz v. United States*, 521 U.S. 898, 924 (1997) (explaining that Congress has the power to regulate interstate commerce directly, but does not have the authority to regulate how state governments regulate interstate commerce); *New York v. United States* 505 U.S. 144, 149 (1992) (“[T]he Constitution does not confer upon Congress the ability simply to compel the States to [act].”).

<sup>279</sup> 505 U.S. 144, 145 (1992).

<sup>280</sup> 521 U.S. 898, 902 (1997).

<sup>281</sup> See *Printz*, 521 U.S. at 907 (stating “the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for judicial power” but rejecting the idea that such obligations “impl[ied] a power of Congress to impress the state executive into its service”); *New York*, 505 U.S. at 178-79 (“Federal statutes enforceable in state courts do . . . direct state judges to enforce them, but this sort of federal ‘direction’ of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate.”).

<sup>282</sup> See Glynn, *supra* note 10, at 168 (“[F]ederal privilege legislation survives scrutiny under *New York*, *Printz*[,] and [its progeny] because it commandeers neither state legislatures nor state executive officials, it also does not offend the values of federalism the Court emphasized in these and other ‘new federalism’ cases.”).

by a limit on Article I power.<sup>283</sup>

*New York* makes clear that when Congress legislates pursuant to an enumerated power, principles of state sovereignty are not offended.<sup>284</sup> While it may still seem a “tautology” to argue that laws enacted pursuant to the Constitution are, well, constitutional, the Court’s point is more refined: once a valid source of federal power is identified, there are no additional limits imposed by considerations of federalism.<sup>285</sup> Moreover, *New York* establishes that what was unconstitutional about the legislation at issue in that case was not the subject matter, but the mode of implementation, which directed state legislatures to enact a federal regulatory scheme in an end-run around political accountability.<sup>286</sup> Thus, under the reasoning of *New York*, because selective waiver legislation is a valid exercise of Congressional power, it does not offend principles of state sovereignty in violation of the Constitution.

In *Printz*, the Court further examined Congressional power in light of the Tenth Amendment and set out a methodology to assess a statute’s validity in the absence of clear textual authority.<sup>287</sup> While Congress’s power to bind state courts is clear from the text of the Judges Clause,<sup>288</sup> application of the *Printz* methodology further substantiates the constitutionality of any potential legislation enforcing selective waiver agreements in state courts.<sup>289</sup> Justice Scalia, writing for the majority, stated that in the absence of clear textual authority, courts may assess the legitimacy of an Act of Congress in light of “historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”<sup>290</sup> While the regulation at issue in *Printz* related to Congress’s authority to “commandeer” state executives, Justice Scalia first recited a series of early Congressional enactments imposing obligations on state courts to arrive at the conclusion that, under the “original” understanding of the Constitution, Congress could “command” state courts to

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<sup>283</sup> 505 U.S. at 156-57.

<sup>284</sup> *See id.* at 156 (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . .”).

<sup>285</sup> *See id.* at 157 (“Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution.”).

<sup>286</sup> *See New York*, 505 U.S. at 160 (“Petitioners do not dispute that under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation. Petitioners contend only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen.”).

<sup>287</sup> *See Printz v. United States*, 521 U.S. 898, 905-06 (1997) (considering statutes enacted by first Congress to determine Congress’s power to force state courts to act).

<sup>288</sup> U.S. CONST. art. VI, cl. 2 (stating that the Constitution “shall be the supreme Law of the Land; and judges in every State shall be bound thereby”).

<sup>289</sup> *See Printz*, 521 U.S. at 905-06.

<sup>290</sup> *Id.* at 905.

enforce federal law.<sup>291</sup>

This “early” understanding is also reflected in more recent Congressional enactments requiring state courts to enforce federal legislation. In particular, several statutes protect the privileged character of confidential communications disclosed to a federal actor.<sup>292</sup> These recent statutes are strong evidence that Congress may validly legislate the scope of the attorney-client privilege in a manner binding on state and federal courts when effectuating an otherwise valid Congressional prerogative.<sup>293</sup>

The “structure of the Constitution” also implies Congressional power to enact selective waiver legislation binding on the states.<sup>294</sup> While the *Printz* opinion stresses the “double security” of separate state and federal executives as a “structural protection[] of liberty” discernable in the constitution,<sup>295</sup> the Judges Clause, in combination with Congressional authority to make all laws “necessary and proper” to the fulfillment of its duties, envisions a flexible and coordinate relationship between the state and federal judiciaries.<sup>296</sup> The Court’s jurisprudence further reflects this relationship, and stresses the “uniform spirit of the National jurisprudence.”<sup>297</sup> Because Congress has the authority to bind state courts to enforce substantive federal rights, nothing in the Tenth Amendment prevents Congress from exercising that power to require the enforcement of selective waiver agreements in those courts.

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<sup>291</sup> See *id.* at 905-07 (citing eight such statutes enacted between 1790 and 1798).

<sup>292</sup> See, e.g., Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1806(a) (2000) (stating that communications otherwise privileged do not lose their privileged character simply because they are subject to electronic surveillance pursuant to or in violation of the restrictions on such surveillance contained in the act); Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2517(4) (2000) (“No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.”); Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7215 (b)(5)(A) (2000 & Supp. 2004) (providing that documents prepared pursuant to an internal corporate investigation “shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any Federal or State court or administrative agency, and shall be exempt from disclosure, in the hands of an agency . . . of the Federal Government”); I.R.C. § 7525(a)(1) (2000) (protecting confidential communications between taxpayers and federally authorized tax practitioners in addition to taxpayers and attorneys).

<sup>293</sup> These statutes have not been challenged on constitutional grounds.

<sup>294</sup> See *Printz*, 521 U.S. at 905 (stating that courts must look to historical understanding, the structure of the Constitution, and the Court’s previous jurisprudence).

<sup>295</sup> 521 U.S. at 921-22 (quoting THE FEDERALIST No. 51, at 323 (James Madison)).

<sup>296</sup> See U.S. CONST. art. I, § 8, cl. 18; *id.* at art. VI, cl. 2.

<sup>297</sup> *Stewart v. Kahn*, 78 U.S. 493, 506 (1870); see *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1983) (Stephens, J., concurring in part and dissenting in part) (“[Federal legislation] builds upon legal relationships established by the states.”).

C. *Substance and Procedure*

While this Note has demonstrated that Congress may enact selective waiver legislation despite the Court's "new federalism" jurisprudence, it is nonetheless instructive to examine prior characterizations of the attorney-client privilege to establish that it truly constitutes a "substantive" right binding on state courts. In any event, regardless of the nature of the privilege itself, legislation requiring the enforcement of selective waiver agreements would likely create a "substantive" right independent of the privilege.

During the debate surrounding the enactment of Article V of the Federal Rules of Evidence (governing privilege law), several commentators "expressed concern that the proposed privilege rules and the governing state and federal standards that they were designed to replace were substantive in nature."<sup>298</sup> The rules were enacted under the Rules Enabling Act (REA), which delegates authority to the Supreme Court to "prescribe general rules of practice and procedure" but withholds the power to "abridge, enlarge or modify any *substantive* right."<sup>299</sup> Therefore, if privilege law is a matter of procedure, it would fall within the scope of the Federal Rules; but if privilege law is, in fact, a matter of substance, then Article V would lie beyond the Rules' power. The debate over the propriety of enacting privilege law under the REA contributed, at least in large part, to the Rules Advisory Committee's ultimate failure to

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<sup>298</sup> Glynn, *supra* note 10, at 88 (citing Kenneth S. Broun, *Giving Codification a Second Chance: Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 772-77 (2002), which discusses criticisms relating to Article V's substantive character, including Former Justice Goldberg's criticism that the privilege rules were making incursions into substantive matters); *see* S. REP. NO. 93-1277, at 6-7 (remarking on the controversy surrounding the codification of privilege as superceding substantive state law and leaving the law to the federal courts to determine); CHRISTOPHER B. MUELLER & LAIRD C. KIRPATRICK, FEDERAL EVIDENCE, § 175, at 263 (2d ed. 1994 & Supp. 2002) (stating that "[p]rivilege law seeks to implement policies which . . . are . . . wholly extrinsic both to the litigating process and the fact-ascertaining policy underlying most evidence law"); Paul Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 299-300 (1994) (stating that at the time Congress considered the proposed rules, there were concerns about the displacement of state privilege rules, which were "too substantive" in nature); Edward Copeland et al. for The Committee on Federal Courts, *Revisiting the Codification of Privileges Under the Federal Rules of Evidence*, 55 THE REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., Jan.-Feb. 2000, at 151-53 (discussing the pervasive effect of privilege rules on the substantive behavior of citizens); Arthur J. Goldberg, *The Supreme Court, Congress, and Rules of Evidence*, 5 SETON HALL L. REV. 667, 681-684 (1974) (arguing against Article V because of its implications on rights in federal court); Jack B. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 370-73 (1969) (discussing the independent substantive impact of privilege rules and arguing that state privilege rules therefore should apply in cases predicated upon state substantive law).

<sup>299</sup> 28 U.S.C. § 2072 (2000) (emphasis added).

enact meaningful privilege codification.<sup>300</sup> Moreover, following passage of the Federal Rules, Congress specifically modified the REA to exempt privileges from the Rules' reach.<sup>301</sup> This modification evidences Congress's understanding that privilege law was not strictly a "procedural" matter. Former Justice Goldberg explains:

[t]he reason rules of privilege are substantive for both the Rules Enabling Act and the *Erie* doctrine is that they are designed to protect independent substantive interests that the state has regarded as more significant than the free flow of information. Thus, their intrinsic objective is to protect communications that the state deems inviolate.

The substantive nature of rules of privilege can be more clearly seen when contrasted with other rules of evidence. Most evidentiary rules, including the admission and exclusion of evidence, examination of witnesses, judicial notice, competency of witnesses and relevance, are designed to facilitate the fact-finding process. Rules of privilege, however, do not help to elicit the truth. Rather, they impede the truth-seeking process in order to serve extrinsic social policies.<sup>302</sup>

While the Court has never explicitly addressed the question of whether the attorney-client privilege is a rule of substance or procedure, the Court offered some guidance to distinguish between the two in *Hanna v. Plummer*.<sup>303</sup> The Court said that "[t]he test must be whether a rule really regulates procedure, the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."<sup>304</sup> Under the *Hanna* rationale, then, the attorney-client privilege is a rule of substance because it creates rights independent of those at issue in the underlying claim.<sup>305</sup>

Justice Harlan's concurrence in *Hanna* further suggests that the attorney-client privilege properly qualifies as a substantive protection. Justice Harlan observed that *Erie*, at issue in that case, "recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs."<sup>306</sup> Substantive rules,

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<sup>300</sup> See MCCORMICK ON EVIDENCE § 76, at 313-314 (John W. Strong et al. eds., 5th ed. 1999) (ascribing the failure to enact specific privilege rules to the "strength and contrariety of views which the subject generates").

<sup>301</sup> See 28 U.S.C. § 2074(b) (2000) ("Any . . . rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.").

<sup>302</sup> Goldberg, *supra* note 298, at 682-84.

<sup>303</sup> 380 U.S. 460 (1965).

<sup>304</sup> *Id.* at 464 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

<sup>305</sup> See *id.* at 464-65.

<sup>306</sup> *Id.* at 474 (Harlan, J., concurring).



therefore, are those that “govern[] primary private activity.”<sup>307</sup>

The scope of the attorney-client privilege will impact a corporation’s decision to disclose confidential communications to a federal actor. More significantly, the enforceability of federal selective waiver legislation in state courts will undoubtedly influence a corporation’s choice to initiate internal investigations or to disclose all information to its attorneys. Therefore, selective waiver legislation would affect corporations’ “primary activity,” which strongly suggests that such legislation would be substantive.<sup>308</sup>

Congressional “power” refers to the ability to legislate substantive federal rights. As long as selective waiver legislation is enacted pursuant to such power, state courts must recognize a “substantive” right to selectively disclose otherwise privileged communications to government actors for a limited purpose, without wholly losing the protection of the privilege. Selective waiver legislation that binds state courts would be a valid exercise of Congressional power provided that it is (1) clearly rooted in an enumerated federal power; (2) clearly evinces an intent to create a substantive right; and (3) clearly expresses an intent to bind state courts. If these criteria are satisfied, neither the internal limitations on the Commerce power expressed in *Morrison* and *Lopez*, nor the Tenth Amendment limitations contained in *New York* and *Printz*, would restrain the ability of Congress to bind state courts.

#### CONCLUSION

The current uncertainty regarding the enforceability of selective waiver agreements, as well as the frequency with which the government demands waiver of attorney-client and work product protections, require resolution. This Note demonstrates that judicial resolution in favor of selective waiver theory is unlikely,<sup>309</sup> and that properly tailored federal legislation codifying the enforceability of such agreements would bind federal and state courts equally.<sup>310</sup> This solution would thus facilitate – and in all likelihood encourage – corporate cooperation with the government. Such legislation, however, would not address more serious concerns that result from the government’s insistence on waiver as a condition for cooperation. Many commentators have decried the “culture of waiver” that has arisen in response to the government’s practices.<sup>311</sup> In 2004 the American Bar Association voted unanimously to

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<sup>307</sup> *Id.* at 475.

<sup>308</sup> See Glynn, *supra* note 10, at 149 (“The attorney-client privilege is concerned with ‘primary conduct and affairs,’ in the words of Justice Harlan, because its purposes are extrajudicial, promoting and protecting communications between attorneys and clients, and thereby producing social benefits.”).

<sup>309</sup> See *supra* Part III.

<sup>310</sup> See *supra* Part V.

<sup>311</sup> See, e.g., Lance Cole, *Revoking Our Privileges: Federal Law Enforcement’s Multi-Front Assault on the Attorney-Client Privilege (And Why It’s Misguided)*, 48 VILL. L. REV. 469, 587 (2003) (“A review of federal law enforcement actions over the past two

approve a statement reaffirming the importance of the privilege in light of increasing concerns about its devaluation in the corporate context.<sup>312</sup> To address these concerns, additional measures are necessary to make it more difficult for corporations to waive their protections and to make the government less insistent upon waiver. Only by striking at the “culture of waiver” itself will attorneys and their corporate clients be able to engage in the sort of full and frank communication that the privilege contemplates. Absent such change, corporations, mindful that confidentiality may later be waived, will have little incentive to cooperate truthfully with internal investigators regarding potential wrongful conduct, and may, in fact, undertake such investigations with less frequency. Given the corporate scandals of recent years, ensuring that corporate wrongdoing is discovered and prosecuted is in the public interest. It is equally important to ensure that the attorney-client privilege and related protections are not cast aside in the process.

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decades . . . demonstrates that the privilege is increasingly under attack and at risk.”). A survey conducted in January and February of 2006 revealed that fifty-two percent of in-house counsel and fifty-nine percent of outside defense lawyers believe that there has been a “significant increase in waiver requests in recent years.” Carter, *supra* note 25 (citing survey results).

<sup>312</sup> Resolution Adopted by the House of Delegates of the American Bar Association, <http://www.abanet.org/poladv/report303.pdf>, at 2-3 (Aug. 2004) (asserting that waiver of the attorney-client privilege should not be a factor in assessing a corporation’s cooperation); *see* Greene & Clifton, *supra* note 3, at 62 (“Recently . . . lawyers representing corporations have expressed concern that the legal protections afforded by the attorney-client privilege and work-product doctrine are eroding.”).