

## ESCAPING THE FISHBOWL: A PROPOSAL TO FORTIFY THE DELIBERATIVE PROCESS PRIVILEGE

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### I. INTRODUCTION

The deliberative process privilege is a shield with which the executive branch deflects public scrutiny into its internal processes. This qualified privilege protects deliberative material, such as advice, recommendations, and opinions, from disclosure in civil litigation, Freedom of Information

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Act (“FOIA”) requests,<sup>1</sup> and from Congress.<sup>2</sup> The privilege and the manner of its application go to the heart of the relationship between citizen and government and raise the difficult question of whether government operates more effectively through greater openness or greater secrecy.

Compared to other governmental privileges, the deliberative process privilege is rather uncontroversial.<sup>3</sup> Federal courts generally accept the instrumental purposes of such a privilege.<sup>4</sup> The privilege is thought to encourage candid discussions of policy options within government agencies,<sup>5</sup> protect against premature disclosure of proposed policies,<sup>6</sup> and avoid public confusion by ensuring that officials are judged only by their final decision.<sup>7</sup>

More generally, the existence of this privilege upholds the principle that, although we are an open, democratic society, enlightened policymaking is often best achieved if “agencies are not ‘forced to operate in a fishbowl.’”<sup>8</sup> While transparency in government is an important democratic value, our society has often recognized that many important governmental functions operate best removed from the public glare. Such functions include the obvious, such as state secrets related to national security,<sup>9</sup> but also include deliberations of the President himself and his closest advisors<sup>10</sup> and probably internal legislative deliberations as well.<sup>11</sup> This Comment offers two additional justifications for the privilege: the deliberative process privilege can create an added incentive for policymakers to explore creative but often risky solutions to problems and can counteract the natural democ-

<sup>1</sup> 5 U.S.C. § 552(b)(5) (2000).

<sup>2</sup> See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (giving Supreme Court sanction to the privilege); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966) (holding that protecting decisionmaking and policymaking processes of government officials was in the public’s best interest). See generally 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5680, at 125–56 (1992).

<sup>3</sup> But see Gerald Wetlauffer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845 (1990) (making a comprehensive attack on the desirability of the deliberative process privilege).

<sup>4</sup> See, e.g., *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001) (stating that the justification for the deliberative process privilege is “obviously” valid).

<sup>5</sup> See, e.g., *Sears*, 421 U.S. at 150.

<sup>6</sup> *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997).

<sup>7</sup> See, e.g., *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 772–73 (D.C. Cir. 1979).

<sup>8</sup> *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (quoting *Wolfe v. Dep’t of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc) (internal quotations omitted)).

<sup>9</sup> See *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953).

<sup>10</sup> See, e.g., *In re Sealed Case*, 121 F.3d 729, 745–46 (D.C. Cir. 1997).

<sup>11</sup> U.S. CONST. art. I, § 6, cl. 1 (the “Speech & Debate Clause”); see also *Gravel v. United States*, 408 U.S. 606, 616 (1972) (holding that deliberations related to the legislative process are covered by the Clause). The extent to which the Speech and Debate Clause creates a generalized deliberative process privilege for Members of Congress and their staff is not entirely clear. See 26A WRIGHT & GRAHAM, *supra* note 2, § 5675, at 75–76.

matic tendency to bend to electoral pressure and thereby promote policies with short-term benefits but long-term costs.

The inevitable conflict between the legitimate secrecy needs of the executive and the value our society places on transparency in government dictates that the deliberative process privilege be qualified and not absolute. Accordingly, the application of the deliberative process privilege is subject to equitable balancing by a court, which, roughly speaking, weighs the plaintiff's need for the evidence to make his or her case against the governmental interest in secrecy and the harm that could result from disclosure.<sup>12</sup>

The uncertainty engendered by this ad hoc balancing test undermines the instrumental goals the privilege is designed to advance. Even though the main purpose of the privilege is to encourage bureaucrats to engage in honest discussion as to policy alternatives without fear of embarrassing or career-damaging future disclosure, the fact that the privilege can be overridden based on a litigant's "need" for the evidence could mean that a substantial chilling effect on deliberations exists despite the privilege. The safe harbor that the privilege provides for government deliberations only exists at the future sufferance of a district judge, who will decide whether to honor the privilege based on several considerations, some of which are outside the government actor's control.

Therefore, the current qualified nature of the privilege may actually yield the worst of both worlds, advancing neither the judicial search for truth nor effective executive leadership. Ultimately, the legal system's attempt to strike a compromise between the values thrown into conflict by the privilege is doomed to failure. Accordingly, if the deliberative privilege cannot be strengthened significantly, it would be better to get rid of it altogether.

This Comment's Proposal provides a more desirable option than annihilation of the privilege. The deliberative process privilege should be merged with the closely related presidential communications privilege.<sup>13</sup> After all, both privileges are properly understood as types of the broader "executive privilege."<sup>14</sup> The distinctions drawn between them by the D.C. Circuit, based on a defensible but unsatisfying interpretation of Supreme

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<sup>12</sup> One common rendering of the balancing test calls for consideration of "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *In re Subpoena Served upon Comptroller of Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992) (citation omitted); see also *Schreiber v. Soc'y for Sav. Bancorp, Inc.*, 11 F.3d 217, 220–21 (D.C. Cir. 1993) (reaffirming use of this test).

<sup>13</sup> See *In re Sealed Case*, 121 F.3d at 745–46 (explaining the differences between the deliberative process privilege and the presidential communications privilege).

<sup>14</sup> The leading executive privilege case is *United States v. Nixon*, 418 U.S. 683 (1974).

Court precedent,<sup>15</sup> are unhelpful in furthering the common instrumental goals of both parts of the executive privilege.

This Proposal will have the effect of raising the standard of “need” (which the party seeking discovery must meet in order to overcome invocation of the privilege), while still providing a viable safety valve for instances when the need for evidence is genuine and compelling. The Proposal will also resolve two problems in deliberative process privilege law—the “fact-opinion” distinction<sup>16</sup> and the difficulty of determining when to apply the per se “government misconduct exception,”<sup>17</sup> which negates the deliberative process privilege when a litigant has made a colorable showing that the integrity of the deliberative process itself is at issue. Finally, the Proposal will make sense of an unnecessarily baroque area of the law, aiding courts, practitioners, and government actors.

Part II lays out the basic parameters of the deliberative process privilege. Part III examines the federal courts’ application of the deliberative process privilege, especially the governmental misconduct cases that best illustrate the difficulty of reconciling the competing policy concerns. Part IV explores the rationales for the privilege in greater depth and discusses academic criticism of the privilege. Part V examines several options for reform, including the Comment’s Proposal to strengthen the deliberative process privilege in order to better capture the instrumental gains promised by the privilege.

## II. SURVEY OF THE DELIBERATIVE PROCESS PRIVILEGE

### A. *Elements and Scope of the Privilege*

To invoke the deliberative process privilege,<sup>18</sup> the government must first meet two prerequisites—the communication it seeks to protect must be “predecisional” and “deliberative.”<sup>19</sup> A “predecisional” communication is “antecedent to the adoption of [an] agency policy.”<sup>20</sup> The agency need not

<sup>15</sup> See *infra* notes 80–99 and accompanying text.

<sup>16</sup> See *infra* notes 37–46 and accompanying text.

<sup>17</sup> See *infra* Part III.C.

<sup>18</sup> At the outset, I note that it is sufficient for purposes of this Comment to discuss the elements of the privilege at a fairly high level of generality. The Department of Justice has provided a quite detailed and well-organized exposition of the deliberative process privilege as incorporated in FOIA’s Exemption 5, which it provides primarily for the benefit of government agencies in deciding whether to invoke the deliberative process privilege in order to withhold information requested under FOIA. See DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE: EXEMPTION 5 (2004), available at <http://www.usdoj.gov/oip/exemption5.htm#deliberative>.

<sup>19</sup> See, e.g., Russell L. Weaver & James T. R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 300 (1989) (noting that the government bears the burden of proof to show prerequisites of deliberative privilege).

<sup>20</sup> *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988) (citation omitted); accord *Jordan v. Dep’t of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978), overruled on other grounds by

point specifically to a final decision, but instead only establish “what deliberative process is involved, and the role played by the documents in issue in the course of that process.”<sup>21</sup> Failure to make such a showing with sufficient particularity could be fatal to the agency’s attempt to protect the requested information.<sup>22</sup> Second, the communication must be deliberative, “reflecting the advisory and consultative process by which decisions and policies are formulated.”<sup>23</sup> A junior staffer’s memorandum to his superior is the paradigmatic case.<sup>24</sup> Deliberative material is distinct from factual material, which is not protected by the privilege and which will be discussed shortly.<sup>25</sup> There are also fairly elaborate procedural requirements to assert the privilege, which principally include the preparation of a detailed privilege log<sup>26</sup> and a requirement that the relevant agency head assert the privilege through affidavit after personal consideration of the materials in question.<sup>27</sup>

The basic goal of the deliberative process privilege, the validity of which has gone virtually unquestioned in the federal case law,<sup>28</sup> is to “prevent injury to the quality of agency decisions.”<sup>29</sup> More specifically, the

Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d 1051 (D.C. Cir.1981).

<sup>21</sup> Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980); *see also* Animal Legal Def. Fund v. Dep’t of the Air Force, 44 F. Supp. 2d 295, 299 (D.D.C. 1999) (citations and internal quotations omitted).

<sup>22</sup> *See Animal Legal Def. Fund*, 44 F. Supp. 2d at 299–301 (finding the government’s assertions that the documents in question were deliberative to be “conclusory”).

<sup>23</sup> Army Times Publ’g Co. v. Dep’t of Air Force, 998 F.2d 1067, 1070 (D.C. Cir. 1993).

<sup>24</sup> *See Weaver & Jones*, *supra* note 19, at 291.

<sup>25</sup> *See infra* notes 37–46 and accompanying text.

<sup>26</sup> This log is known as a “Vaughn index,” after the D.C. Circuit case that established the requirement. Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973); *see also* Weaver & Jones, *supra* note 19, at 300–05 (describing in detail the contents of the Vaughn index).

<sup>27</sup> *See, e.g.,* Landry v. FDIC, 204 F.3d 1125, 1135-36 (D.C. Cir. 2000).

<sup>28</sup> But doubts about the soundness of the privilege’s rationale occasionally appear in lower court opinions:

The ironic premise of the deliberative process privilege appears to be that a democratic government functions more effectively when the electorate remains ignorant of how governmental decisions actually are reached. This irony notwithstanding, the deliberative process privilege is too firmly entrenched in federal law for this Court to question the wisdom of recognizing such a privilege.

*United States v. Irvin*, 127 F.R.D. 169, 172 n.4 (C.D. Cal. 1989). Dissenting in *Herbert v. Lando*, 441 U.S. 153 (1979), Justice Brennan argued in favor of creating an “editorial privilege” that would shield the deliberations of newspaper editors. He compared his proposed privilege to the deliberative process privilege and somewhat reluctantly endorsed the latter privilege’s “paradoxical” rationale: “The same paradox, however, inheres in the concept of an executive privilege: so as to enable the government more effectively to implement the will of the people, the people are kept in ignorance of the workings of their government. The paradox is unfortunately intrinsic to our social condition.” *Id.* at 196 (Brennan, J., dissenting).

<sup>29</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975); *see also* *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (“[F]rank discussion of legal and policy matters is essential to the decisionmaking process of a governmental agency.”); *Town of Norfolk v. U.S. Army Corps of Eng’rs*, 968 F.2d 1438, 1458 (1st Cir. 1992).

three policy objectives of the privilege are to encourage open, frank discussions on matters of policy between subordinates and superiors, to protect against confusing (to the public) premature disclosure of proposed policies before they are finally adopted, and to protect against public confusion that might result from disclosure of reasons and rationale that were not in fact ultimately the grounds for an agency's action.<sup>30</sup> The privilege protects the "decisionmaking processes of government agencies and focus[es] on documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."<sup>31</sup> Thus, the deliberative process privilege ensures that government agencies are not "forced to operate in a fishbowl."<sup>32</sup>

The Supreme Court has not squarely considered the validity of the common law deliberative privilege,<sup>33</sup> but it has construed Exemption 5 of the Freedom of Information Act<sup>34</sup> to encompass a common law privilege for intragovernmental deliberations,<sup>35</sup> and the Court has in several related cases indicated that it considers the basic "candor" rationale to be self-evident.<sup>36</sup>

<sup>30</sup> Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

<sup>31</sup> *Sears*, 421 U.S. at 150 (internal quotations omitted).

<sup>32</sup> EPA v. Mink, 410 U.S. 73, 87 (1973) (citations and internal quotations omitted), *rev'd by statute as stated in* Bennett v. U.S. Dep't of Def., 419 F. Supp. 663, 665-66 (S.D.N.Y. 1976). The "fishbowl" quote from *Mink*, which the Court lifted from a Senate report explaining FOIA Exemption 5, has proven quite popular in federal courts, having been quoted on numerous occasions. *See, e.g.*, Carter v. U.S. Dep't of Commerce, 307 F.3d 1084, 1090 (9th Cir. 2002); Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999); Redland Soccer Club, Inc. v. Dep't of Army of U.S.A., 55 F.3d 827, 854 (3d Cir. 1995); Petroleum Info. Corp. v. Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992).

<sup>33</sup> Although this Comment is primarily concerned with how the deliberative process privilege interacts with the judicial branch in litigation or through FOIA requests, similar issues are raised when the executive is confronted with Congressional requests for information. *See* Norman Dorsen & John H.F. Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 16-22, 24-33 (1974); *cf.* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (articulating the need standard for congressional requests for information protected by executive privilege). When the executive branch properly asserts executive privilege, Congress must establish a "demonstrably critical" need for the information in question to override the privilege. *See* Senate Select Comm. on Presidential Campaign Activities, 498 F.2d at 731; *see also id.* at 733 ("arguable relevance" of information not enough). As the D.C. Circuit recently noted, disputes between the executive and Congress over release of executive branch information, which have been occurring since the founding of the Republic, *see In re Sealed Case*, 121 F.3d 729, 739 n.9 (D.C. Cir. 1997), and sources cited therein, rarely end up in the courts. *Id.* at 739.

<sup>34</sup> 5 U.S.C. § 552(b)(5) (2000); *see also infra* notes 50-54 and accompanying text.

<sup>35</sup> *See, e.g., Sears*, 421 U.S. at 149-55 (holding that the "'generally . . . recognized' privilege for 'confidential intra-agency advisory opinions'" is one of the privileges encompassed by Exemption 5 of the Freedom of Information Act, which exempts documents that would be privileged from discovery in private litigation).

<sup>36</sup> *See id.* at 150; *Mink*, 410 U.S. at 86-87; Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001) (stating that the "deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news"); *cf.* United States v. Nixon, 418 U.S. 683, 705-06 (1974) (asserting that importance of confidentiality in deliberations between "high Governmental officials" and those who advise them is "too plain to require further discussion").

The privilege only encompasses actual opinions, recommendations, and other deliberations,<sup>37</sup> and so it does not extend to purely factual information within an agency's control<sup>38</sup> unless the information is not "severable" from other material that would fall within the protection of the privilege.<sup>39</sup> One asserted reason for this fact-opinion distinction<sup>40</sup> is that the government allegedly lacks a legitimate interest in shielding facts, as opposed to opinions that may shed light on mental processes.<sup>41</sup> One commentator asserts that, since relatively low-level government officials compile such information, and they have plenty of incentive to be thorough, the "candor" rationale is not implicated to the same degree as when truly deliberative material is involved.<sup>42</sup> Finally, factual information may very well be "precisely the documents that a grand jury (or a party to a criminal or civil trial) is likely to find most helpful in making sense of the issues before it,"<sup>43</sup> and therefore the information should not be withheld because it is highly probative.

One commentator has noted that "the deliberative process privilege perpetuates the difficult distinction between 'fact' and 'conclusion' or 'opinion' that has generated so much futile litigation in code pleading and

<sup>37</sup> 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 139; *see also* Wolfe v. Dep't of Health & Human Servs., 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc) (Bork, J.) (stating that opinions are protected but facts are not and that this rule will often, but not always, provide a "quick, clear . . . rule of decision").

<sup>38</sup> *See, e.g., Mink*, 410 U.S. at 87–88; *Redland Soccer Club, Inc. v. Dep't of Army of U.S.A.*, 55 F.3d 827, 854 (3d Cir. 1995); *City of Va. Beach v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993).

<sup>39</sup> *See, e.g., Fed. Trade Comm'n v. Warner Communications, Inc.* 742 F.2d 1156, 1161 (9th Cir. 1984). In situations where factual and deliberative materials are commingled within a single document, the agency is expected to redact deliberative material from a document and then produce the factual material. *Weaver & Jones, supra* note 19, at 298.

<sup>40</sup> Some cases have resisted casting this issue as an on-off distinction between fact and opinion. *See, e.g., Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988) (holding that factual information is exempt from disclosure to the extent that it reveals the deliberative process). While casting the issue in this manner attempts to avoid a pointless "semantic debate" regarding whether a given document is fact or opinion, *see id.*, the problem in determining whether information is deliberative remains.

<sup>41</sup> *See, e.g., Cal. Assembly v. U.S. Dep't of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992) (asserting that the policy behind the distinction is that government has "no legitimate interest in keeping the public ignorant of the facts the agencies worked from, while they [do] have a legitimate interest in shielding their preliminary opinions and explorations").

<sup>42</sup> *See* Kirk D. Jensen, Note, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information Under the Federal Deliberative Process Privilege*, 49 DUKE L.J. 561, 587–88 (1999).

<sup>43</sup> Note, *Constitutional Law—Executive Privilege—D.C. Circuit Defines Scope of Presidential Communications Privilege.—In re Sealed Case*, 116 F.3d 550 (D.C. Cir. 1997), 111 HARV. L. REV. 861, 866 n.42 (1998) [hereinafter *Harvard Case Note*]. This is the same *In re Sealed Case* cited *supra* note 10—the decision discussed in this note was later superseded by a new version that included previously-sealed material. *See In re Sealed Case*, 121 F.3d 729, 734 (D.C. Cir. 1997) (order of August 29, 1997). For present purposes, there is no material difference between the two versions of the opinion.

the rules governing testimony of witnesses.<sup>44</sup> This observation was triggered by the difficulty in application of distinguishing fact and opinion, and in deciding if the factual matter is so interwoven with the protected opinions so as to fall within the privilege.<sup>45</sup>

As will be seen later in this Comment, in contrast to the difficult determinations that are made to separate fact from opinion in the deliberative process privilege context, courts have been completely unwilling to create or police a fact-opinion boundary where the President's deliberative process is involved.<sup>46</sup>

The scope of the deliberative process privilege includes mental processes of government officials, in addition to documents, as long as the mental processes in question are predecisional and deliberative.<sup>47</sup> The privilege can also protect materials related to individualized decisionmaking, not just development of generally applicable policy.<sup>48</sup> The basic policy behind the privilege, to foster candor in deliberations, is still implicated even when an agency is applying existing policies rather than formulating new policies.<sup>49</sup>

<sup>44</sup> 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 139–40.

<sup>45</sup> See, e.g., Jensen, *supra* note 42, at 582; see also Wolfe v. Dep't of Health & Human Servs., 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc) (Bork, J.) (“[T]his court cannot mechanically apply the fact/opinion test. Instead, we must examine the information requested in light of the policies and goals that underlie the deliberative process privilege.”). One illustrative case is *Montrose Chemical Corp. of California v. Train*, 491 F.2d 63 (D.C. Cir. 1974), in which a FOIA requester attempted to obtain summaries of extremely voluminous hearing records. The records were prepared by staffers of the Environmental Protection Agency (“EPA”) for the benefit of the agency administrator who had to render a decision in a complex agency matter. *Id.* at 64–65. The FOIA requester argued that a summary of factual information is still factual information, and therefore such summaries fell outside the deliberative process privilege. *Id.* at 67. The court disagreed, explaining that to disclose the factual summaries would necessarily intrude into the “mental processes” of the EPA officials:

[T]he assistants were making an evaluation of the relative significance of the facts recited in the record; separating the pertinent from the impertinent is a judgmental process, sometimes of the highest order; no one can make a selection of evidence without exercising some kind of judgment, unless he is simply making a random selection.

*Id.* at 68.

<sup>46</sup> See *infra* notes 230–232 and accompanying text.

<sup>47</sup> See *United States v. Morgan*, 313 U.S. 409, 422 (1941); *United States v. AT&T Co.*, 524 F. Supp. 1381, 1386–87 (D.D.C. 1981). Some commentators have pointed out that *Morgan* dealt specifically with quasi-judicial proceedings conducted by administrative agencies and that it should not be read to create a generalized privilege from discovery for mental processes of bureaucrats. Jensen, *supra* note 42, at 591–93; Wetlaufer, *supra* note 3, at 906–08. While these commentators have a point, this alleged misinterpretation of *Morgan* is deeply entrenched, starting with the original deliberative process privilege case, which relied on *Morgan* as a foundation of the privilege. See *Kaiser Aluminum Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (discussed *infra* notes 71–76 and accompanying text). The Supreme Court itself has not subsequently explained whether, or to what extent, the *Morgan* doctrine does extend beyond quasi-judicial proceedings.

<sup>48</sup> *Hinckley v. United States*, 140 F.3d 277, 285 (D.C. Cir. 1998) (holding that deliberations as to whether to release a certain mental patient are covered by privilege); see also *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1535 (D.C. Cir. 1993) (holding that deliberations related to application of existing law governing the exclusion of Nazi war criminals are covered by privilege).

<sup>49</sup> See *Hinckley*, 140 F.3d at 285.

The deliberative process privilege is also applied to thwart FOIA requests.<sup>50</sup> Specifically, Exemption 5 of the Act applies to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than the agency in litigation with the agency.”<sup>51</sup> The Supreme Court has settled that the Exemption prevents disclosure of documents that would fall under the deliberative process privilege if they were requested during civil litigation.<sup>52</sup> But it should be noted that FOIA Exemption 5 will never track entirely with the common law privilege in litigation because a FOIA requester need not show specific need for the materials in question,<sup>53</sup> and because deliberative process privilege cases in the FOIA context rest more heavily on the privilege’s secondary rationale—preventing premature disclosure of agency decisions.<sup>54</sup>

The deliberative process privilege is only a qualified privilege, which can be overcome by a sufficient showing of need by the party seeking discovery.<sup>55</sup> Once the government has asserted the privilege, a court must balance the need for the evidence against the harm that may result from its disclosure.<sup>56</sup> The factors for a court to consider as part of this balancing include: “(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the ‘seriousness’ of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees . . . .”<sup>57</sup>

When the integrity of the deliberative process itself is an issue in the case, the deliberative process privilege cannot be invoked to foreclose inquiry into those deliberations.<sup>58</sup> In such cases, courts do not even apply the balancing test, but simply hold that the deliberative process privilege does not “enter the picture at all.”<sup>59</sup> Similarly, courts have stated that the delib-

<sup>50</sup> See, e.g., *EPA v. Mink*, 410 U.S. 73, 88–90 (1973).

<sup>51</sup> 5 U.S.C. § 552(b)(5) (2000).

<sup>52</sup> *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

<sup>53</sup> See *id.* at 143 n.10.

<sup>54</sup> See 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 130–31.

<sup>55</sup> See, e.g., *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

<sup>56</sup> *Id.* at 737–38 (citations omitted).

<sup>57</sup> *First E. Corp. v. Mainwaring*, 21 F.3d 465, 468 n.5 (D.C. Cir. 1994).

<sup>58</sup> *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (noting that “if the plaintiff’s cause of action is directed at the government’s intent . . . it makes no sense to permit the government to use the privilege as a shield”), *modified on reh’g in part*, 156 F.3d 1279.

<sup>59</sup> *Id.* at 1425; see also *In re Sealed Case*, 121 F.3d at 746 (holding that deliberative process privilege “disappears altogether when there is any reason to believe government misconduct occurred”); *Brown v. City of Detroit*, 259 F. Supp. 2d 611, 623 (E.D. Mich. 2003) (describing the possibility of governmental misconduct as a situation where the privilege is waived); *Williams v. City of Boston*, 213 F.R.D. 99, 102 (D. Mass. 2003) (holding that the deliberative process privilege is not applicable to protect government report investigating plaintiff’s allegations in civil rights action against city police department because, inter alia, “it offends basic notions of openness and public confidence in our system of justice” to shield such a report (quoting *Soto v. City of Concord*, 162 F.R.D. 603, 612 (N.D. Cal.

erative process privilege is negated when the party seeking discovery has provided “reason to believe” that governmental misconduct will be uncovered by the requested material.<sup>60</sup> However, bare allegations of misconduct are not enough.<sup>61</sup> To activate this per se exception, the litigant must meet some undefined minimal evidentiary threshold.<sup>62</sup>

State courts have been more skeptical of the privilege than federal courts.<sup>63</sup> While many states have adopted the reasoning of the federal courts and created a deliberative process privilege for their state agencies,<sup>64</sup> other state courts have either rejected the privilege altogether<sup>65</sup> or held that it is more appropriate to leave creation of such privileges to legislatures, since courts are less competent than legislatures to develop policies promoting larger social goals.<sup>66</sup>

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1995)); *Alexander v. FBI*, 186 F.R.D. 170, 177 (D.D.C. 1999) (holding that it would be pointless to apply normal balancing test when governmental misconduct is at issue because “the public value of protecting identifiable governmental misconduct is negligible”); *Dominion Cogen D.C., Inc. v. District of Columbia*, 878 F. Supp. 258, 268 (D.D.C. 1995) (holding the deliberative process privilege inapplicable since the “deliberative process itself [is] directly in issue”). In two recent cases, the government has disputed the existence of this per se exception to the deliberative process privilege, instead arguing that the possibility of governmental misconduct should merely be one factor to weigh when deciding whether to override the privilege. In support of this argument, the government has asserted that a close reading of the leading D.C. Circuit case on the subject, *In re Sealed Case*, shows that this is the proper approach. But two district judges have now rejected this argument. *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250, 257 n.7 (D.D.C. 2003), *rev'd on other grounds sub. nom.*, *In re England*, 375 F.3d 1169 (D.C. Cir. 2004); *Alexander*, 186 F.R.D. at 177–78.

<sup>60</sup> *In re Sealed Case*, 121 F.3d at 738; *see also Alexander*, 186 F.R.D. at 178–79.

<sup>61</sup> *Chaplaincy of Full Gospel Churches*, 217 F.R.D. at 257–58 (holding that plaintiffs provided adequate factual basis to believe government misconduct occurred, but hastening to add that this determination does not constitute a judgment as to merits of plaintiff’s case); *see also Hinckley v. United States*, 140 F.3d 277, 285–86 (D.C. Cir. 1998) (same); *Judicial Watch of Fla. v. U.S. Dep’t of Justice*, 102 F. Supp. 2d 6, 15–16 (D.D.C. 2000) (holding that bare allegations of government misconduct were insufficient to overcome privilege); *Walker v. City of New York*, No. 98 Civ. 0467(HB), 1998 WL 391935, at \*1 (S.D.N.Y. July 13, 1998) (refusing to apply the government misconduct exception because judge found no indication of such misconduct after *in camera* review of evidence).

<sup>62</sup> *See infra* notes 121–139 and accompanying text.

<sup>63</sup> *See, e.g., People ex rel. Birkett v. City of Chicago*, 686 N.E.2d 66, 70–71 (Ill. App. Ct. 1997) (questioning the empirical justification for the privilege); *Bechtel Infrastructure Corp. v. Mass. Tpk. Auth.*, No. 031601BLS, 2003 WL 21108412, at \*3 (Mass. Dist. Ct. Apr. 10, 2003) (same).

<sup>64</sup> *See, e.g., Capital Info. Group v. Alaska*, 923 P.2d 29, 33–34 (Alaska 1996); *City of Colo. Springs v. White*, 967 P.2d 1042, 1050 (Colo. 1998); *Hamilton v. Verdow*, 414 A.2d 914, 921–24 (Md. 1980); *Ostoin v. Waterford Township Police Dep’t*, 471 N.W.2d 666, 668 (Mich. Ct. App. 1991); *Nero v. Hyland*, 386 A.2d 846, 853 (N.J. 1978); *State ex rel. Attorney Gen. v. First Judicial Dist. Ct.* 629 P.2d 330, 333–34 (N.M. 1981); *Dorchester Master Ltd. P’ship v. Cabot Pipeline Corp.*, 521 N.Y.S.2d 209, 210–11 (N.Y. App. Div. 1987); *Killington, Ltd. v. Lash*, 572 A.2d 1368, 1373–74 (Vt. 1990); *Daily Gazette Co. v. W. Va. Dev. Office*, 482 S.E.2d 180, 191 (W. Va. 1996).

<sup>65</sup> *People v. Sanders*, 457 N.E.2d 1241, 1245 (Ill. 1983).

<sup>66</sup> *See, e.g., Birkett*, 686 N.E.2d at 71; *News & Observer Publ’g Co. v. Poole*, 412 S.E.2d 7, 18 (N.C. 1992).

### B. Historical Origins of the Privilege

The deliberative process privilege has somewhat murky historical roots.<sup>67</sup> Some courts and commentators have held that it derives from the English “crown privilege.”<sup>68</sup> Others contend that the privilege has relatively recent origins, crediting its creation to President Eisenhower’s assertion of “executive privilege” to combat Senator McCarthy’s rise to power in the 1950s.<sup>69</sup> One explanation for the relatively late growth of the privilege could be simply that it was not especially relevant until the twentieth century and the growth of the leviathan state.<sup>70</sup>

The first federal case recognizing what we now call the deliberative process privilege was *Kaiser Aluminum Chemical Corp. v. United States*.<sup>71</sup> Although the case was brought in the Federal Court of Claims, retired U.S. Supreme Court Justice Stanley Reed decided the case while sitting by designation. *Kaiser* could very well be the most influential decision ever rendered by the rather obscure Court of Claims.

In *Kaiser*, the plaintiff sought documents from the General Services Administration (“GSA”) in the context of a breach of contract claim.<sup>72</sup> Spe-

<sup>67</sup> See 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 125–26 (asserting that, contrary to conventional wisdom, federal courts have only developed the privilege in the last two decades, and that the privilege has “only begun to spread to the states”).

<sup>68</sup> The “crown privilege” is roughly analogous to our executive privilege. See Weaver & Jones, *supra* note 19, at 283 n.24 (citation omitted). The justification for the crown privilege is “that national security and the public interest are paramount and must override the private interests of parties or accused persons despite any resultant prejudice which may be caused to them.” *Id.* (citation omitted). The most relevant expression of the principle of “crown privilege” comes from *Duncan v. Cammell, Laird & Co.*, 1942 A.C. 624, 633 (H.L.) (citations and internal quotations omitted):

The law is that the Crown is entitled to full discovery, and that the subject as against the Crown is not. That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it. . . . Now I know that there has always been the utmost care to give to a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded.

This case was cited approvingly in the first U.S. case to recognize a deliberative privilege. See *infra* notes 71–76 and accompanying text.

<sup>69</sup> Wetlaufer, *supra* note 3, at 865–68. Of course, the Second Circuit seems to think that the deliberative privilege is a “sub-species of [the] work product privilege.” *Tigue v. Dep’t of Justice*, 312 F.3d 70, 76 (2d Cir. 2002). It is not clear where the *Tigue* court got this idea—perhaps it was from the fact that the work-product doctrine (which is not technically a privilege) can also be applied to FOIA requests through Exemption 5. See, e.g., *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (*Tigue* cited this case in close proximity to *Tigue*’s [strange] statement about the origins of the deliberative privilege.).

<sup>70</sup> See *infra* notes 265–275 and accompanying text.

<sup>71</sup> 157 F. Supp. 939 (Ct. Cl. 1958). One scholar asserts that Justice Reed’s involvement was significant because it allowed him to achieve his goal of establishing a broad “public interest” privilege from disclosure for the government which he had failed to convince his colleagues to adopt in an earlier case. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (establishing a privilege not to reveal identities of police informers). Wetlaufer, *supra* note 3, at 861–65, 869–74.

<sup>72</sup> *Kaiser*, 157 F. Supp. at 942.

cifically, the plaintiff wanted documents that could shed light on GSA's deliberations involving liquidation sales conducted between the government, the plaintiff, and one of the plaintiff's competitors.<sup>73</sup> The government withheld one document for the following reason:

The document . . . contains opinions that were rendered to the Liquidator of War Assets by a member of his staff concerning a proposed sale of aluminum plants. Those opinions do not necessarily reflect the views of, or represent the position ultimately taken by, the Liquidator of War Assets. A disclosure of the contents of documents of this nature would tend to discourage the staffs of Government agencies preparing such papers from giving complete and candid advice and would thereby impede effective administration of the functions of such agencies.<sup>74</sup>

Justice Reed agreed with the government, and set forth what became the classic justification for the privilege:

Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act.<sup>75</sup>

The court also held, however, that the judicial branch, and not the executive branch, is the final arbiter of whether the privilege applies, rejecting the government's contention that the head of the relevant agency should be allowed to assert the privilege unilaterally.<sup>76</sup>

### C. "Executive Privilege" vs. "Deliberative Process Privilege"

The nomenclature in this area of the law itself causes confusion: while the deliberative process privilege is the most common name for this privilege, it has gone by many other names.<sup>77</sup> But the most consequential source of confusion in this area of law is that the deliberative process privilege is

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 943 n.4.

<sup>75</sup> *Id.* at 945-46.

<sup>76</sup> *Id.* at 947-48. This argument was advanced by President Nixon in the executive privilege context, but was resoundingly rejected by the Court. *United States v. Nixon*, 418 U.S. 683, 703-05 (1974).

<sup>77</sup> Professor Wetlauffer provides a good summary of this phenomenon:

This doctrine has a number of different names. It has sometimes been treated as an undifferentiated part of a larger cluster of privileges, usually either the "executive privilege," or the "official information privilege." It has also been identified as the "pre-decisional privilege," the "deliberative process privilege," the "advice" privilege, the privilege for "intragovernmental communications," the privilege for "intragovernmental documents," the privilege for "intra-agency advisory opinions, recommendations and deliberations," and, most elaborately, the privilege for "intragovernmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions are formulated."

Wetlauffer, *supra* note 3, at 845 n.1 (citations omitted).

often conflated with the overall concept of “executive privilege,”<sup>78</sup> which in reality divides into several distinct branches, including the two we are concerned with here: the deliberative process privilege, and the “presidential communications privilege,” which protects deliberations only of the President and his close advisors.<sup>79</sup>

The Supreme Court is probably as responsible for this confusion as anyone, since it has spoken in general terms about “executive privilege”<sup>80</sup> and the strong presumption against inquiring into the “mental processes” of agency officials<sup>81</sup> without squarely dealing with where the deliberative process privilege fits into the overall scheme.

The D.C. Circuit<sup>82</sup> attempted to untangle the confusion in *In re Sealed Case*,<sup>83</sup> holding that

[w]hile the presidential communications privilege and the deliberative process privilege are closely affiliated, the two privileges are distinct and have differ-

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<sup>78</sup> An extreme example of judicial confusion on this subject comes from *Deuterium Corp. v. United States*, 4 Cl. Ct. 361 (1984). In this case, the plaintiff, pursuing patent infringement and breach of contract claims against the federal government, requested certain documents relating to evaluations of various proposals submitted by plaintiffs and their competitors. The government asserted the deliberative process privilege in accordance with the generally accepted practice (including an affidavit from the relevant agency head). *Id.* at 362–63. The court misconstrued *Kaiser* as supporting a claim of “executive privilege” but not “deliberative process privilege,” which it claimed was not recognized by the Court of Claims. *Id.* at 363. A later decision of the same court made clear that the deliberative process privilege is recognized by the Court of Claims and its parent reviewing court, the Federal Circuit. The later decision attributed the confusion to inconsistent terminology used by the litigants and by the courts in several Court of Claims cases. *Abramson v. United States*, 39 Fed. Cl. 290, 293 (1997) (noting that aliases for the deliberative privilege include “executive privilege” and “governmental privilege”).

<sup>79</sup> See *In re Sealed Case*, 121 F.3d 729, 736–40 (D.C. Cir. 1997). The other major type of executive privilege is the long accepted privilege for secrets of state. See *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953); 26 WRIGHT & GRAHAM, *supra* note 2, §§ 5664–5669, at 613–96 (defining elements of state secret privilege).

<sup>80</sup> See, e.g., *Nixon*, 418 U.S. at 712–13 (asserting existence of executive privilege, at least as a general matter).

<sup>81</sup> *United States v. Morgan*, 313 U.S. 409, 422 (1941).

<sup>82</sup> The D.C. Circuit is preeminent in the governmental privilege area because a large percentage of such questions arises there. Its expertise is recognized by other courts. See, e.g., *City of Colo. Springs v. White*, 967 P.2d 1042, 1048 n.2 (Colo. 1998). The cloud of controversy surrounding the Clinton administration, in particular, gave the D.C. federal courts ample opportunity to develop the law of governmental privilege during the 1990s. See, e.g., *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998) (involving the government attorney-client privilege as applied to Deputy White House Counsel/Clinton confidant); *In re Sealed Case (Secret Service)*, 148 F.3d 1073 (D.C. Cir. 1998) (rejecting Clinton administration’s novel claim of “protective function privilege” to be enjoyed by Secret Service agents); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) (involving assertion of deliberative process and presidential communications privilege during an Independent Counsel’s investigation of Clinton’s Agriculture Secretary); *Judicial Watch of Fla. v. Dep’t of Justice*, 102 F. Supp. 2d 6 (D.D.C. 2002) (involving FOIA requester attempting to obtain notes of Attorney General Reno related to investigations of the Clinton campaign finance scandals); *Alexander v. FBI*, 186 F.R.D. 170 (D.D.C. 1999) (involving the Linda Tripp “Filegate” case).

<sup>83</sup> 121 F.3d at 736–52.

ent scopes. Both are executive privileges designed to protect executive branch decisionmaking, but one applies to decisionmaking of executive officials generally, the other specifically to decisionmaking of the President.<sup>84</sup>

The D.C. Circuit was also confronted with a question deferred in earlier cases,<sup>85</sup> namely, “whether the [presidential communications] privilege . . . extends to communications never directly received by the President but rather channeled in a variety of ways to him or his advisers.”<sup>86</sup> The court concluded that “communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President.”<sup>87</sup> Further, the privilege must extend “to communications authored or received in response to a solicitation by members of a presidential adviser’s staff, since, in many instances, advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President.”<sup>88</sup>

To ensure that the presidential communications privilege would not entirely displace the deliberative process privilege, the court hastened to add that “[n]ot every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege”; rather, the privilege only applies to those communications that involve “members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.”<sup>89</sup> This restriction is in part to ensure that executive branch officials who “exercise substantial independent authority” do not use this stronger privilege to compromise FOIA’s purpose of ensuring governmental openness.<sup>90</sup>

The D.C. Circuit also established that a litigant seeking discovery in the face of the presidential communications privilege must meet a substantially higher standard of “need” than that required in a challenge to an assertion of the deliberative process privilege.<sup>91</sup> Expounding on the basic “demonstrated, specific need for evidence in a pending criminal trial” standard in *United States v. Nixon*,<sup>92</sup> the D.C. Circuit formulated a two-part test for determining need. “A party seeking to overcome a claim of presidential privilege must demonstrate: first, that each discrete group of the subpoe-

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<sup>84</sup> *Id.* at 745.

<sup>85</sup> *Nixon v. Adm’r of Gen. Servs.*, 408 F. Supp. 321 (D.D.C. 1976), *aff’d*, 433 U.S. 425 (1977).

<sup>86</sup> *Id.* at 345 n.29.

<sup>87</sup> *In re Sealed Case*, 121 F.3d at 752.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> 418 U.S. 683, 713 (1974).

naed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere.”<sup>93</sup>

The first component was anticipated even by the D.C. Circuit to have little bite, since subpoenas in criminal cases generally cannot be issued for evidence that is not relevant and admissible.<sup>94</sup> But the second component is a requirement that an effort be made to procure equivalent evidence elsewhere before asking to pry into presidential deliberations—a reflection of the policy that “privileged presidential communications should not be treated as just another source of information.”<sup>95</sup>

Finally, the same credible allegations of governmental misconduct relating to the sought-after discovery, which would cause the deliberative process privilege to “disappear altogether,”<sup>96</sup> would not suffice to override the presidential communications privilege absent a “focused demonstration of need.”<sup>97</sup> This difference between the two privileges expresses most clearly the D.C. Circuit’s judgment that the President and those who deal with him directly are deserving of substantially greater protection than other members of the executive branch.<sup>98</sup> The questions of whether this bifurcation between the presidential communications privilege and the deliberative process privilege is mandated by the Constitution, and whether it is good judicial policy, are taken up later in this Comment.<sup>99</sup>

### III. APPLICATION OF DELIBERATIVE PROCESS PRIVILEGE

Federal courts have considered the deliberative process privilege in many different contexts, covering the entire gamut of government policy-making.<sup>100</sup> As such, how the courts shape the contours of the privilege has

<sup>93</sup> *In re Sealed Case*, 121 F.3d at 754.

<sup>94</sup> *Id.* (citing *Nixon*, 418 U.S. at 700). Although *In re Sealed Case* was concerned with criminal discovery, the first requirement would work similarly in civil cases because of the similar standard governing discovery in civil litigation. See FED. R. CIV. P. 26(b)(1) (restricting discovery to relevant evidence).

<sup>95</sup> *In re Sealed Case*, 121 F.3d at 755 (citations omitted).

<sup>96</sup> *Id.* at 746.

<sup>97</sup> *Id.*

<sup>98</sup> See *id.* at 751 (“[T]he President does not represent simply one level of the executive branch, but rather the ultimate level of decision-making in the executive branch, and intrusion into presidential deliberations is therefore more serious.”).

<sup>99</sup> See *infra* Part IV.

<sup>100</sup> “[The deliberative process privilege] has been invoked in a wide array of discovery disputes involving such diverse matters as the Vietnam War, Agent Orange, police abuse, draft resisters, aircraft accidents, civil service dismissals, anti-competition proceedings, petroleum price controls, EPA lead control regulations, and customs service investigations.” Weaver & Jones, *supra* note 19, at 279–80. In one recent (and particularly novel) example, the privilege was invoked unsuccessfully to protect the deliberations of Navy promotion boards. *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250 (D.D.C. 2003), *rev’d on other grounds sub nom. In re England*, 375 F.3d 1169 (D.C. Cir. 2004). A more prosaic recent example is *Dipace v. Goord*, 218 F.R.D. 399 (S.D.N.Y. 2003), in which the court found that deliberative process privilege shielded a letter written by one prison official to another regarding prisoner mental health. See also *infra* notes 266–270 and accompanying text.

tremendous importance for the operation of the executive branch. Section A of this Part will survey the courts' treatment of the deliberative process privilege in civil litigation, and section B will examine how courts have applied the privilege using Exemption 5 of FOIA.<sup>101</sup> Section C will focus on cases where the party seeking information asserts that the deliberative process privilege should be overridden because the integrity of the relevant deliberative process is at issue.

### A. *Deliberative Process Privilege in Civil Litigation*

In civil litigation, federal judges who find sufficient need for evidence to override the privilege often do so because they determine that the information in question cannot be obtained elsewhere.<sup>102</sup> Mere relevance of the evidence to the proceeding at hand is usually insufficient.<sup>103</sup> As for the government's regulatory interest, district courts generally do not require the government to make a case-specific demonstration that the candor of agency deliberations would be affected by granting the plaintiff the discovery he seeks. Instead, the standard instrumental rationales for the privilege are typically recited and the government's interest is taken as a given.<sup>104</sup>

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<sup>101</sup> Deliberative process privilege issues arise more frequently in the context of FOIA than in litigation. Hilary S. Cairnie & C. Ernest Edgar, *An Imperfect Shield: How Private Parties Can Attack and Defeat the Executive Privilege for Deliberative Process in Government Procurement Litigation*, 28 PUB. CONT. L.J. 127, 134 n.42 (recounting authors' rough search of decisions in certain forms, which determined that Exemption 5 issues arise approximately ten times as often as civil litigation issues).

<sup>102</sup> See *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161–62 (9th Cir. 1984); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 327–28 (D.D.C. 1966); see also *N. Pac., LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1124 (N.D. Cal. 2003) (asserting that availability of comparable evidence from other sources is “perhaps the most important factor in determining whether the deliberative process privilege should be overcome”); *Cobell v. Norton*, 257 F. Supp. 2d 203, 206 (D.D.C. 2003) (upholding deliberative process privilege claim because plaintiffs failed to show that they could not find same information from other sources “without undue hardship”); *Conservation Law Found., Inc. v. Dep’t of Air Force*, No. C-92-156-L, 1994 WL 279747, at \*2 (D.N.H. June 20, 1994) (upholding deliberative process privilege claim because, even assuming evidence sought was relevant, it could be obtained from other sources).

One case where disclosure was denied, despite the court's acknowledgment that the evidence in question was unavailable from any other source, is a case involving the EEOC. See *Scott v. PPG Indus.*, 142 F.R.D. 291, 294 (N.D. W. Va. 1992). Balancing the traditional factors, the court found that if the EEOC's employees “knew that their personal notes and observations, and internal communications . . . would be subject to disclosure in virtually every employment discrimination case, then frank and open communication within the agency would clearly be hindered[,] . . . defeat[ing] the very purpose of an agency such as the EEOC.” *Id.*

<sup>103</sup> *Weaver & Jones*, *supra* note 19, at 318.

<sup>104</sup> One representative case in this regard is *Center for Biological Diversity v. Norton*, No. Civ. 01-409 TUC ACM, 2002 WL 32136200 (D. Ariz. July 24, 2002). Rejecting a request to override the deliberative process privilege, the court merely recited that “compelling disclosure of the disputed documents would hinder the Secretary's future decision making ability and would stifle creative debate and candid consideration of alternatives and undermine the integrity of the decision making process since agency officials are to be judged by what they finally decide.” *Id.* at \*4 (citation omitted). Another recent example is *Judicial Watch, Inc. v. Department of Justice*, 306 F. Supp. 2d. 58 (D.D.C. 2004). Once again,

This seems to indicate that courts consider the government's regulatory interest as too obvious to be even worth debating.<sup>105</sup> Courts do not, and probably cannot, examine whether the deliberative process would actually be harmed by disclosure in a particular situation.<sup>106</sup> Courts also usually do not require the government to detail exactly how the deliberative process would be affected by disclosure.<sup>107</sup> There also seem to be no detailed empirical studies that purport to prove or disprove the premise upon which the deliberative privilege (not to mention executive privilege in general) is based.<sup>108</sup>

*B. Interaction of the Deliberative Process Privilege with Exemption 5 of the Freedom of Information Act*

The public movement in favor of a more transparent federal government,<sup>109</sup> which triumphed in the enactment of the Freedom of Information Act ("FOIA") in 1966,<sup>110</sup> is animated by the rationale stated by the D.C. Circuit in *Soucie v. David*:<sup>111</sup>

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the court accepted the agency's assertions of Exemption 5 without any particularized analysis of whether disclosure really would tend to temper candor in the future. *See id.* at 69–73.

<sup>105</sup> *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001) ("The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." (citations and internal quotations omitted)); *see also Casad v. U.S. Dep't of Health & Human Servs.*, 301 F.3d 1247, 1251 (10th Cir. 2002).

<sup>106</sup> *See, e.g., Weaver & Jones, supra* note 19, at 315–16.

<sup>107</sup> *Id.* But in *Army Times Publishing v. Department of Air Force*, 998 F.2d 1067 (D.C. Cir. 1993), the court refused to accept the government's assertion of interest in secrecy, saying that it needed something more than mere conclusory assertions to find that the government had a legitimate interest supporting imposition of the privilege. *Id.* at 1071–72. The most reasonable reading of *Army Times* is that it merely held that the government failed to meet its burden to show that the material in question (polling data) was deliberative instead of factual. But at least one subsequent decision seems to have construed *Army Times* more broadly to create some sort of affirmative obligation on the government to demonstrate exactly how and why candor would be inhibited, beyond merely reciting the basic candor rationale first enunciated in *Kaiser*. *See Mittleman v. King*, No. Civ.A. 93-1869 SSH, 1997 WL 911801, at \*8 n.17 (D.D.C. Nov. 4, 1997).

<sup>108</sup> An exhaustive examination of privilege law briefly discussed the empirical case for and against evidentiary privileges in general, concluding that the empirical evidence is inconclusive at best. *See Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1474–77 (1985) [hereinafter *Privileged Communications*].

<sup>109</sup> *See Wetlaufer, supra* note 3, at 868 nn.79–80; *see also* DAVID SADOFSKY, KNOWLEDGE AS POWER: POLITICAL AND LEGAL CONTROL OF INFORMATION 99–102 (1990) (discussing political movement that led to FOIA's enactment). *See generally* HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW (1953) (providing an influential manifesto for open government movement).

<sup>110</sup> 5 U.S.C. § 552 (2000). In brief, FOIA provides a mechanism by which private citizens can request and obtain documents and similar information from federal government agencies. The agencies can review requests and withhold information if it falls within one or more of certain exemptions defined by the statute.

<sup>111</sup> 448 F.2d 1067 (D.C. Cir. 1971).

Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives.<sup>112</sup>

Section 552(b)(5) of FOIA, usually referred to simply as Exemption 5, exempts from availability under FOIA “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”<sup>113</sup> Thus, if a party would not be able to discover an agency’s documents because of an evidentiary privilege, the documents cannot be acquired through a FOIA request. Since Exemption 5 merely states that its exemption applies to intragovernmental opinions and recommendations that would otherwise be privileged,<sup>114</sup> cases construing the common law privilege can be used as authority in determining how to apply Exemption 5.<sup>115</sup> Similarly, judges applying the common law privilege in litigation have relied on precedent generated in FOIA cases.<sup>116</sup> The primary difference between FOIA cases and cases arising in civil litigation is that a person seeking disclosure under FOIA need not show that he has a specific need for the evidence.<sup>117</sup> This difference between FOIA requests and civil discovery disputes may actually make the government’s job easier in FOIA cases as opposed to litigation disputes, because “the abstract public interest in open government will never weigh as heavily with courts as the concrete needs of a litigant seeking justice.”<sup>118</sup>

There is also a procedural difference between the two situations that makes it easier for the government to assert the privilege in FOIA cases than in litigation. Any relatively low-level government official reviewing a FOIA request can invoke Exemption 5.<sup>119</sup> But in litigation, if the party

<sup>112</sup> *Id.* at 1080.

<sup>113</sup> 5 U.S.C. § 552(b)(5).

<sup>114</sup> Section 552(b)(5) provides that the disclosure provisions of FOIA “[do] not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”

<sup>115</sup> *See, e.g., In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) (using as authority several FOIA cases in a common law privilege case); *see also* 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 126–27 (documenting possible confusion in the relationship between FOIA and the common law privilege).

<sup>116</sup> *See, e.g.,* *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250, 257 (D.D.C. 2003) (relying on, *inter alia*, the FOIA case *Judicial Watch of Florida v. Department of Justice*, 102 F.Supp.2d 6 (D.D.C. 2002)).

<sup>117</sup> *See* *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975).

<sup>118</sup> 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 130.

<sup>119</sup> *See* DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT REFERENCE GUIDE (2005) (describing DOJ FOIA procedures—relatively low-level officials make initial determinations of what to withhold using a FOIA exemption, and a rank-and-file DOJ attorney provides administrative appeal of determination), available at <http://www.usdoj.gov/04foia/referenceguidemay99.htm#appeals>.

seeking discovery challenges the invocation of the deliberative privilege, the head of the relevant agency must generally be the one to assert the privilege after personal consideration of the material in question.<sup>120</sup> As a practical matter, this makes it harder for government attorneys to invoke the privilege in litigation and discourages them from asserting the privilege in cases where they could plausibly do so.

### C. *The Governmental Misconduct Exception to the Deliberative Process Privilege*

The class of cases applying the per se “government misconduct” exception also captures an important limitation of the deliberative process privilege. It is only relatively recently that a per se misconduct exception has been recognized in the case law.<sup>121</sup> Earlier decisions captured the concerns underlying this exception as part of the overall ad hoc balancing test.<sup>122</sup> While the government has continued to contest the idea that the deliberative process privilege is negated if the integrity of the government’s decisionmaking process has been successfully put at issue,<sup>123</sup> the D.C. Circuit and the circuits following its lead have been clear that “when a plaintiff’s cause of action turns on governmental intent[,] . . . the privilege [becomes] a nonsequitur.”<sup>124</sup> For example, the misconduct exception negates the deliberative privilege when the government is defending a Title VII suit or a suit based on constitutional claims of discrimination.<sup>125</sup>

But in many cases the misconduct exception creates a problem. Several courts have struggled with the question of whether the misconduct exception should be applied on the basis of a plaintiff’s mere allegations of misconduct, or whether the plaintiff must make some evidentiary showing to provide a reason to believe that piercing the deliberative process privilege will uncover evidence of misconduct. The former policy would probably eviscerate the privilege,<sup>126</sup> while the latter standard, if applied too

<sup>120</sup> Landry v. FDIC, 204 F.3d 1125, 1135 (D.C. Cir. 2000); Weaver & Jones, *supra* note 19, at 306.

<sup>121</sup> Although *In re Sealed Case* is now the authoritative case on this point, due partly to the pre-eminent position of the D.C. Circuit in governmental privilege law, the per se governmental misconduct exception appears to have originated in two district court cases. See *In re Franklin Nat’l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979); *Bank of Dearborn v. Saxon*, 244 F. Supp. 394, 401–03 (E.D. Mich. 1965).

<sup>122</sup> See *In re Sealed Case*, 121 F.3d at 738; see also *Texaco P.R., Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995).

<sup>123</sup> See *supra* note 59.

<sup>124</sup> *In re Subpoena Duces Tecum Served on Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998).

<sup>125</sup> *Id.*; see also *Waters v. U.S. Capitol Police Bd.*, 216 F.R.D. 153 (D.D.C. 2003).

<sup>126</sup> *Cf. Hinckley v. United States*, 140 F.3d 277, 285 (D.C. Cir. 1998). Rejecting application of the exception because there was no showing of misconduct, the court stated that “[t]he deliberative process privilege would soon be meaningless, if all someone seeking information otherwise protected under the privilege had to establish is that there was disagreement within the governmental entity at some point in the decision-making process.” *Id.*

rigorously, would render the privilege impregnable. The D.C. courts that have considered this conundrum seem to settle on a “reason to believe”<sup>127</sup> standard, where a litigant must provide something more than mere allegations to enjoy the government misconduct exception. Two district court cases from this circuit illustrate the problems inherent in this standard.

In *Judicial Watch of Florida v. Department of Justice*,<sup>128</sup> a public interest organization made a FOIA request for notes that Attorney General Reno had made during a meeting about the pending campaign finance investigations into the Clinton Administration.<sup>129</sup> The government asserted the deliberative process privilege.<sup>130</sup> The court refused to apply the exception, noting that Judicial Watch had not provided any “basis for belief” or “discrete factual basis” that General Reno’s notes would reveal misconduct.<sup>131</sup>

Three years later, in *Chaplaincy of Full Gospel Churches v. Johnson*,<sup>132</sup> the same judge who decided *Judicial Watch* applied the governmental misconduct exception to override a deliberative process privilege claim. The plaintiffs in *Chaplaincy* were a class of current and former nonliturgical Christian Navy Chaplains who alleged that the Navy had, over a period of decades, systematically discriminated against nonliturgical chaplains such as themselves in hiring, promotions, and selective early retirements.<sup>133</sup> To help prove these allegations, the chaplains sought to depose current and former Navy officers who had served on chaplain promotion boards in order to find out if religious criteria played a role in promotion decisions.<sup>134</sup>

The government resisted allowing these depositions, asserting, *inter alia*, that the deliberative process privilege applied to the recollections of the officers.<sup>135</sup> Attempting to negate the privilege by providing the court with a “reason to believe” governmental misconduct had occurred, the plaintiffs noted that two earlier Navy investigations had turned up troubling signs that

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<sup>127</sup> *In re Sealed Case*, 121 F.3d at 738; *see also Hinckley*, 140 F.3d at 286 (refusing to apply exception because Hinckley made “no colorable showing” that decisionmaker had improper motivations).

<sup>128</sup> 102 F. Supp. 2d 6 (D.D.C. 2000).

<sup>129</sup> *Id.* at 12.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> 217 F.R.D. 250 (D.D.C. 2003).

<sup>133</sup> *Id.* at 253–54. For a more detailed factual background of this litigation, *see Adair v. England*, 183 F. Supp. 2d 31, 36–45 (D.D.C. 2002).

<sup>134</sup> *Chaplaincy of Full Gospel Churches*, 217 F.R.D. at 254.

<sup>135</sup> *Id.* at 257–58. The government also asserted a privilege based on 10 U.S.C. § 618(f) (2004), which provides that proceedings of military promotion boards are to remain secret. The court rejected this alternative basis for nondisclosure, on the ground that, since the statute does not specifically provide for judicial nondisclosure, it cannot be construed as a bar to judicial discovery. *Chaplaincy of Full Gospel Churches*, 217 F.R.D. at 258–62. The D.C. Circuit, however, construed the statute to preclude judicial discovery and accordingly reversed the district court on this ground (without reaching the deliberative process privilege issue). *In re England*, 375 F.3d 1169, 1177–82 (D.C. Cir. 2004).

there was indeed religious discrimination occurring in Navy promotion decisions.<sup>136</sup>

The court agreed with the plaintiffs, and granted their motion to compel because the Navy investigations did indeed provide a “basis for belief” that misconduct had occurred.<sup>137</sup> Interestingly, the same evidence cited by the court as providing such a “basis for belief” had *not* sufficed to win the plaintiffs partial summary judgment at an earlier stage of the case.<sup>138</sup>

The differing outcomes of these cases suggest that there is some undefined minimum evidentiary showing that a plaintiff needs to make in order to receive the benefit of the per se exception. Then again, the general rule seems to suggest that in certain types of cases, the deliberative process privilege is simply unavailable, whether or not the plaintiff can provide any corroborating evidence to create “any reason to believe misconduct has occurred.”<sup>139</sup> In any case, as necessary as it might be to override the privilege in certain situations when the integrity of the government is questioned, this rule is not as simple as it seems, and it makes the deliberative privilege that much harder to administer.

#### IV. THE GOALS OF THE DELIBERATIVE PROCESS PRIVILEGE

As with any privilege, proper application of the deliberative process privilege depends on an understanding of its underlying rationale, because courts strive to interpret such privileges as narrowly as possible so as not to unduly burden the judicial search for truth.<sup>140</sup> This is especially true when considering FOIA cases, since the dominant policy of FOIA is, after all, openness in government.<sup>141</sup> With this in mind, section A of this Part will explore the privilege’s rationale. Section B will examine the justifications for and drawbacks of open government

##### A. Rationales for the Privilege

As noted, courts and commentators enunciate three rationales for the deliberative process privilege. First and foremost, there is the “candor” rationale: the privilege promotes candid and frank discussion in agency de-

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<sup>136</sup> *Chaplaincy of Full Gospel Churches*, 217 F.R.D. at 258.

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

<sup>138</sup> *See Adair v. England*, 217 F. Supp. 2d 7 (D.D.C. 2002). To counter the plaintiffs’ statistics, the government had provided statistics of its own purporting to show that nonliturgical chaplains received promotions in about the right proportion to their representation in the Chaplain Corps and the Navy as a whole. *See id.* at 11.

<sup>139</sup> *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997).

<sup>140</sup> *See United States v. Nixon*, 418 U.S. 683, 710 (1974) (asserting that privileges are not “lightly created or expansively construed”); *see also Redland Soccer Club v. Dep’t of the Army*, 55 F.3d 827, 856 (3d Cir. 1995) (“[D]eliberative process privilege, like other executive privileges, should be narrowly construed.”).

<sup>141</sup> *See, e.g., Army Times Publ’g Co. v. Dep’t of Air Force*, 998 F.2d 1067, 1069 (D.C. Cir. 1993).

liberations, which would be lost if bureaucrats were not granted a partial cloak of secrecy.<sup>142</sup> As some commentators have asserted, this is a rationale that cannot truly be empirically tested.<sup>143</sup>

There are two subsidiary rationales behind the privilege. First, the privilege protects against damaging premature disclosure of agency deliberations.<sup>144</sup> This rationale obviously has more salience in the FOIA Exemption 5 context, as relevant evidence of deliberations in civil litigation will usually pertain to decisions already taken, since litigation by its nature takes place after the deliberative process has run its course.<sup>145</sup> Second, the privilege ensures that agencies are judged only by their final decisions, not by preliminary options that were considered and discarded.<sup>146</sup> These rationales reflect a concern about creating public confusion as to the actual policy position of an agency.<sup>147</sup>

### B. *The Downside of Open Government*

These rationales are based on the fact that, like most benefits, governmental transparency entails costs. Although most reported deliberative process privilege opinions uphold the assertion of the privilege, it does not necessarily follow that the deliberative process privilege is perfectly effective in reducing the costs of transparent government. The possibility of disclosure may lead to negative effects of the type that do not manifest themselves in litigation—meetings not held, opinions and analysis not committed to paper, observations left unexpressed lest they find their way into a FOIA response.<sup>148</sup>

The potential deleterious effects to government operations in the absence of a privilege can sometimes be indirectly discerned, even in situa-

<sup>142</sup> See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

<sup>143</sup> Wetlaufer, *supra* note 3, at 887; see also Weaver & Jones, *supra* note 19, at 316. Most courts have seemed untroubled by the lack of hard empirical evidence supporting the privilege. In fact, federal courts led by the Supreme Court view the rationale as too obvious or self-evident to even merit examination. See *supra* note 36.

<sup>144</sup> See, e.g., *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

<sup>145</sup> See 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 131.

<sup>146</sup> See, e.g., *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 772–73 (D.C. Cir. 1979).

<sup>147</sup> See *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1437 n.10 (D.C. Cir. 1992) (Ginsburg, J.) (asserting that the risk of public confusion is a “subsidiary rationale” for deliberative process privilege).

<sup>148</sup> I am indebted to Professor Victor G. Rosenblum for this insight, which stems in part from his personal experiences. Another scholar has noted an interesting parallel between executive privilege and a strand of First Amendment jurisprudence which recognizes that “speech can sometimes flourish only when the glare of sunlight is not present.” William V. Luneberg, *Civic Republicanism, the First Amendment, and Executive Branch Policymaking*, 43 ADM. L. REV. 367, 383–84 (1991). Luneberg cites as an example of this strand the case *NAACP v. Alabama*, 357 U.S. 449 (1958), which held that compelling a citizen to disclose his membership in an association could have a chilling effect on forming such associations, since such disclosure could expose association members to “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” *Id.* at 462.

tions where the privilege is successfully asserted. For example, in 2001 and again in 2003, President Bush nominated Miguel Estrada to one of the open judgeships on the D.C. Circuit. But after protracted and acrimonious confirmation proceedings in the Senate, the President was forced to accede to Estrada's request to withdraw the nomination in mid-2003.<sup>149</sup> By any objective measure, Mr. Estrada had had a superlative legal career.<sup>150</sup> Although some Senators had reservations about the fact that Mr. Estrada had no judicial experience,<sup>151</sup> nobody denied that he was a talented lawyer manifestly dedicated to public service.

However, Mr. Estrada once worked as a staff attorney in the Office of the Solicitor General.<sup>152</sup> It is probable that Mr. Estrada's work product included his opinions on any number of controversial legal and policy issues, of the type that cause spirited and even emotional discussion in the political arena.<sup>153</sup> The Senate Democrats whose support was necessary for Mr. Estrada's confirmation<sup>154</sup> demanded that the Justice Department produce

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<sup>149</sup> It is not really necessary to delve into the question of whether Mr. Estrada should or should not have been confirmed—a topic which has been discussed extensively in the political arena. For representative statements of the pro- and anti-Estrada positions, see 149 CONG. REC. S11,466–71 (daily ed. Sept. 15, 2003) (statement of Sen. Leahy, an Estrada opponent, after withdrawal of the nomination); 149 CONG. REC. S11,096–99 (daily ed. Sept. 4, 2003) (statement of Sen. Hatch, an Estrada proponent, after withdrawal of the nomination).

<sup>150</sup> Mr. Estrada's resume is on the Department of Justice Website. Office of Legal Policy, U.S. Dep't of Justice, *Estrada Resume*, available at <http://www.usdoj.gov/olp/estradaresume.htm> (last visited Apr. 20, 2005) [hereinafter *Estrada Resume*]. Highlights include: law degree from Harvard Law School, clerkships on the Second Circuit Court of Appeals in New York and for Justice Kennedy on the Supreme Court, two years as an Assistant United States Attorney in the Southern District of New York, and five years in the Solicitor General's Office. *Id.*

<sup>151</sup> See, e.g., 149 CONG. REC. S2773 (daily ed. Feb. 27, 2003) (statement of Sen. Feingold).

<sup>152</sup> *Estrada Resume*, *supra* note 150.

<sup>153</sup> See U.S. Dep't of Justice, *Functions of the Office of Solicitor General* ("The major function of the Solicitor General's Office is to supervise and conduct government litigation in the United States Supreme Court. . . . The Solicitor General determines the cases in which Supreme Court review will be sought by the government and the positions the government will take before the Court. The Office's staff attorneys participate in preparing the petitions, briefs, and other papers filed by the government in its Supreme Court litigation. . . . Another function of the Office is to review all cases decided adversely to the government in the lower courts to determine whether they should be appealed and, if so, what position should be taken."), at <http://www.usdoj.gov/osg/aboutosg/function.html> (last visited Apr. 20, 2005).

<sup>154</sup> During the relevant period of the 107th Congress (2001–2002), the Democrats controlled the Senate and thus controlled the committees, including the Judiciary Committee. The Democrats used their majority on the Judiciary Committee to prevent Mr. Estrada's nomination from reaching the Senate floor during the life of the 107th Congress. In the 108th Congress (2003–2004), the Republicans regained control of the Senate and were able to send Mr. Estrada's renewed nomination to the floor. Helen Dewar, *Senate Panel Approves Estrada Nomination*, WASH. POST., Jan. 31, 2003, at A04. But the Republicans lacked the sixty votes necessary to defeat a filibuster mounted by the Democrats to prevent a confirmation vote. Despite repeated attempts, the Republicans could not force a vote. U.S. Senate Roll Call Votes 108th Congress—1st Session (2003) Nos. 40, 53, 56, 114, 140, 143, 312, at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/vote\\_menu\\_108\\_1.htm](http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_108_1.htm). Eventually, Mr. Estrada decided to end his attempt to join the D.C. Circuit, largely due to the disruption to his law practice

certain memorandums that Mr. Estrada had prepared for his superiors.<sup>155</sup> The justification for request was that the information was necessary for the Senate to gauge Mr. Estrada's legal philosophy and judicial temperament.<sup>156</sup>

The Justice Department invoked the deliberative process privilege for justification and flatly refused to produce the documents.<sup>157</sup> This impasse most likely reduced the willingness of some moderate Democrats to vote for him, and also provided a plausible argument Democrats could use to justify their implacable opposition, since Estrada "did not fill out his job application."<sup>158</sup> The Senate subsequently failed to confirm Mr. Estrada.

The idea that a staff attorney of a government agency can be held personally accountable for opinions that he or she prepared at the request of his or her supervisor is the quintessential danger that the deliberative process privilege is designed to avoid. The intrusion into the deliberative process redounds to the disadvantage of the government for two reasons. First, it is hard enough to entice talented men and women to take government jobs because of the huge disparity in pay between public-sector jobs and their analogues in the private sector.<sup>159</sup> In particular, the Solicitor General's office generally hires only outstanding lawyers.<sup>160</sup> The potential for personal accountability for deliberative opinions would create another barrier standing between the best and brightest attorneys and high-level government service.

Second, it is reasonable to infer that attorneys capable of working for the Solicitor General's office are extremely ambitious, and if they suspect

caused by the impasse. Helen Dewar, *Estrada Abandons Court Bid*, WASH. POST, Sept. 5, 2003, at A01.

<sup>155</sup> See, e.g., Helen Dewar, *Deadlock Over Estrada Deepens; White House Rejects Democrats' Request for Nominee's Memos*, WASH. POST, Feb. 13, 2003, at A04.

<sup>156</sup> See, e.g., 149 CONG. REC. S4667 (daily ed. Apr. 2, 2003) (statement of Sen. Durbin). Of course, having a long "paper trail" is often a handicap for a judicial nominee who wishes to be confirmed, because it gives a nominee's opponents more ammunition. Therefore, the President has an incentive to find an acceptable nominee with no paper trail that could be used against him; but such nominees are then derided as "stealth nominees" who have no record by which they can be rationally judged.

<sup>157</sup> Letter from Daniel Bryant, Assistant Attorney General, to The Honorable Patrick Leahy, Chairman, Committee on the Judiciary 3-5 (October 8, 2002), available at <http://www.usdoj.gov/olp/aagbryant.pdf> [hereinafter Bryant Letter]. This letter also mentioned the attorney-client and work-product privileges as additional grounds for withholding the requested information, *id.* at 3, but the letter mostly discussed the deliberative process privilege.

<sup>158</sup> See, e.g., 149 CONG. REC. S10,196 (daily ed. July 30, 2003) (statement of Sen. Schumer).

<sup>159</sup> For example, Mr. Estrada is currently a partner at Gibson Dunn & Crutcher LLP, a firm whose profits per partner were \$975,000 in 2001, the last year for which figures are available. See *Profits per Partner by Location*, at <http://www.law.com/special/professionals/amlaw/amlaw100/ppp.html> (last visited Apr. 20, 2005). A Court of Appeals judge makes \$164,000. *Judicial Salaries Since 1968*, at <http://www.uscourts.gov/salarychart.pdf> (last visited Apr. 20, 2005). Of course, some would dispute that salaries play much of a role in whether talented lawyers decide to take federal judgeships. See generally Michael J. Frank, *Judge Not, Lest Yee Be Judged Unworthy of a Pay Raise: An Examination of the Federal Judicial Salary "Crisis"*, 87 MARQ. L. REV. 55 (2003) (deprecating the impact of "low" judicial salaries on the ability to attract and retain top legal talent for federal judgeships).

<sup>160</sup> In fact, many former attorneys in the Office of the Solicitor General go on to the federal bench. See generally Bryant Letter, *supra* note 157 (listing many such examples).

that their opinions and recommendations will eventually be made public and damage their future advancement prospects, it will act as a powerful inhibitor on their candor in deliberations. This chilling effect will do incalculable damage to the ability of the Department of Justice to effectively advance the executive branch's interests in the Supreme Court. A staff attorney would constantly be torn between advancing his or her client's interests and trying to avoid writing something that might be looked upon unfavorably by a future Senate Judiciary Committee.<sup>161</sup>

One fairly serious challenge to the privilege arises when it is pointed out that officials who control the privilege often unilaterally reveal otherwise-privileged material for their own ends.<sup>162</sup> But there are two valid responses to this criticism. First, while it is regrettable that some officials leak information about internal deliberations for their own ends, this does not by itself prove that the privilege is worthless, any more than an instance of murder renders laws against murder worthless. Second, often when such disclosures are made, the public discounts the information as manifestly incomplete and thus unreliable accounts of the deliberations in question.<sup>163</sup>

The candor rationale has a subsidiary policy purpose, which is important despite its having not been recognized by the judiciary in so many words. That is, the deliberative process privilege may help to counteract a natural weakness of a democracy: the tendency to sacrifice the long term in favor of the short term.<sup>164</sup> When every decision of an executive is open to

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<sup>161</sup> For example, suppose that the Solicitor General asks a staff attorney to develop a legal strategy for overturning or limiting Supreme Court precedent on abortion (not a far-fetched hypothetical, especially with the Court's current membership in flux following Justice Sandra Day O'Connor's retirement). Without a privilege, in order to do his or her job, that staff attorney would be risking any chance he or she had of being confirmed to the federal bench. A recent Ninth Circuit nominee, who was a Department of Justice attorney during the Reagan Administration, has discovered this to her sorrow. *See, e.g.*, 149 CONG. REC. S14,777-02 (daily ed. Nov. 14, 2003) (statement of Sen. Leahy) (opposing Carolyn Kuhl's nomination because, inter alia, as a Department of Justice lawyer she advocated that the Administration take certain controversial positions on pending abortion and religious discrimination cases).

<sup>162</sup> *See* Wetlaufer, *supra* note 3, at 888; *see also* 26A WRIGHT & GRAHAM, *supra* note 2.

<sup>163</sup> For a recent example of this phenomenon, see generally RON SUSKIND, *THE PRICE OF LOYALTY: GEORGE W. BUSH, THE WHITE HOUSE, AND THE EDUCATION OF PAUL O'NEILL* (2004) (providing a purported "insider" account from fired Treasury Secretary Paul O'Neill). The accuracy, completeness, and interpretation of some of O'Neill's accounts of meetings with President Bush and other high Administration officials are disputed. *See, e.g.*, David Broder, *A Straight Shooter's Failure to Be Heard*, WASH. POST, Jan. 18, 2004, at B07 (quoting Federal Reserve Chairman Greenspan disputing O'Neill's assertion that Greenspan privately called the 2001 Bush tax cut "irresponsible"); Richard Stevenson, *Bush Disputes O'Neill's Charge About War Plan*, INT'L HERALD TRIB., Jan. 14, 2004, at 5 (quoting the President disputing O'Neill's characterization of cabinet meetings concerning Iraq policy).

<sup>164</sup> This point is a staple of public-choice theory, which starts from the premise that politicians are merely rational economic actors whose actions are motivated by a desire to maximize re-election chances. *See, e.g.*, DWIGHT R. LEE & RICHARD MCKENZIE, *REGULATING GOVERNMENT: A PREFACE TO CONSTITUTIONAL ECONOMICS* 127-31 (1987). For background on public choice theory, see generally JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 3-39 (1962); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 *Tex. L. Rev.* 873 (1987). One concrete example of how the politician's short-term bias impedes effective environmental protection appears in

public view, the already-strong tendency towards gearing decisions to the next election becomes that much harder to resist. A robust deliberative process privilege might help to give policymakers the freedom to formulate policies that promise long-term benefits even at short-term cost.<sup>165</sup>

Consider a recent episode involving the Defense Advanced Research Projects Agency (“DARPA”), a subdivision of the Department of Defense.<sup>166</sup> DARPA’s mission is to “assure that the U.S. maintains a lead in applying state-of-the-art technology for military capabilities and to prevent technological surprise from her adversaries.”<sup>167</sup> Not all of these “solutions” are uncontroversial, and some are downright disquieting.<sup>168</sup>

DARPA’s organizational philosophy pursues many traits more typical of a Silicon Valley start-up than a government bureaucracy. “DARPA was designed to be an anathema to the conventional military and R&D structure and, in fact, to be a deliberate counterpoint to traditional thinking and approaches.”<sup>169</sup> DARPA believes that its unique entrepreneurial identity benefits from

[s]ubstantial autonomy and freedom from bureaucratic impediments[.] . . . Program Managers (the heart of DARPA) are selected to be tech-

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Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 900–01 (1999). One author has even argued that monarchy would be preferable to democracy, given the chronic tendency towards political short-termism. See HANS-HERMANN HOPPE, *DEMOCRACY: THE GOD THAT FAILED; THE ECONOMICS AND POLITICS OF MONARCHY, DEMOCRACY, AND NATURAL ORDER* (2001). Similarly, one famous pundit, writing in the aftermath of the World Wars, bemoaned that “[t]he power of the executive has become enfeebled, often to the verge of impotence, by the pressures of the representative assembly and of mass opinions.” WALTER LIPPMAN, *ESSAYS IN THE PUBLIC PHILOSOPHY* 55 (1955).

<sup>165</sup> Some might say that entitlement reform is one area where better policy would result if politicians and bureaucrats could be insulated from the day-to-day pressures of public opinion.

<sup>166</sup> *DARPA over the Years*, at <http://www.darpa.mil/body/overtheyears.html> (last visited Apr. 20, 2005); see also Benjamin Pimentel, *Defense Agency Sharpens Tech Edge; DARPA Funds Pioneering Work for Military Science*, SEATTLE POST INTELLIGENCER, June 13, 2003, at D1.

<sup>167</sup> *DARPA over the Years*, at <http://www.darpa.mil/body/overtheyears.html> (last visited Apr. 20, 2005).

<sup>168</sup> The best recent example is DARPA’s “Total Information Awareness” (“TIA”) program (later renamed Terrorism Information Awareness, presumably to make the program sound less omniscient and to invoke the specter of terrorism in order to convince people of the program’s necessity). This rather ominous-sounding program was described by DARPA at a Senate hearing: “TIA seeks to build analytical tools that first allow analysts across several military and civilian intelligence agencies to collaborate and share data. It further intends to automate the process of spotting signatures of terrorist activity within giant databases of information, both in cyberspace and in intelligence documents.” Stephen Trimble, *DARPA Leaders Defend TIA After Senate Cuts Funding*, AEROSPACE DAILY, July 22, 2003, at 3. The potentially-vast scale and pervasiveness of the data-mining technology gave rise to obvious privacy concerns, which led to the program’s eventual demise. See, e.g., Andrew McClurg, *A Thousand Words Are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U. L. REV. 63, 63–64 (2003) (discussing the uproar created by TIA—see also sources cited therein); Dan Verton, *Senate Votes to Kill Funds for Antiterror Data Mining*, COMPUTERWORLD, July 21, 2003, at 6.

<sup>169</sup> *DARPA over the Years*, at <http://www.darpa.mil/body/overtheyears.html> (last visited Apr. 20, 2005).

nically outstanding and entrepreneurial. The best DARPA Program Managers have always been freewheeling zealots in pursuit of their goals[.] . . . Management is focused on good stewardship of taxpayer funds but imposes little else in terms of rules. Management's job is to enable the Program Managers . . . [and accept] failure if the payoff of success [i]s high enough.<sup>170</sup>

Finally, the role of DARPA's Director has historically been "[to defend] the organization from outside influences that would constrain its freedom and flexibility."<sup>171</sup> In this role, the Director has been supported by superiors at the Department of Defense:

In addition, the Department of Defense's senior management, seeing the value of an agile, forward-looking R&D group unconstrained by conventional thinking and able to investigate ideas and approaches that the traditional R&D community finds too outlandish or risky, has consistently protected the independence of DARPA. Failure to keep the bureaucracy at bay would have doomed the value of DARPA and this has been consistently recognized over the years.<sup>172</sup>

DARPA has been at least partially responsible for many scientific advances of the last fifty years, many of which have had application even beyond the military field. These include the Internet, the Global Positioning System ("GPS"), the M-16 rifle, and unmanned aerial vehicles ("UAVs").<sup>173</sup> More recently, DARPA has funded research and development into robotic exoskeleton legs which could vastly increase the carrying capacity of soldiers, firefighters or disaster relief workers.<sup>174</sup> DARPA also generated press attention by sponsoring a race between privately developed robot cars.<sup>175</sup>

Recently, one DARPA project was prematurely revealed. DARPA was attempting to develop a "terrorist futures market," where people would buy and sell "stocks" representing the likelihood of certain terrorist events. Its basic concept was not particularly innovative; in several other contexts,

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Benjamin Pimentel, *Blazing the Trail for Tech—Defense Agency Has a Long History of Exploring Wild and Risky Ideas*, S.F. CHRON., May 26, 2003, at B1. See generally 3 SIDNEY REED ET. AL., DARPA TECHNICAL ACCOMPLISHMENTS: AN HISTORICAL REVIEW OF SELECTED DARPA PROJECTS (1991).

<sup>174</sup> Michelle Locke, *Robotic Legs Could Produce Super Troopers*, YAHOO NEWS, Mar. 10, 2004, at <http://bleex.me.berkeley.edu/bleexhistPDFs/staugustine.pdf>.

<sup>175</sup> See *Grand Challenge Overview* ("Created in response to a Congressional and DoD mandate, DARPA Grand Challenge is a field test intended to accelerate research and development in autonomous ground vehicles that will help save American lives on the battlefield. The Grand Challenge brings together individuals and organizations from industry, the R&D community, government, the armed services, academia, students, backyard inventors, and automotive enthusiasts in the pursuit of a technological challenge."), at <http://www.darpa.mil/grandchallenge/overview.html> (last visited Apr. 21, 2005).

market mechanisms and the information they collect have been used as predictive devices.<sup>176</sup>

But when DARPA's initiative was exposed to public view, politicians quickly pronounced the idea of a market to predict the possibility of terrorist events "repugnant" or "appalling."<sup>177</sup> Development of the futures market was hastily abandoned and a high DARPA official resigned under pressure, partly as a result of this controversy.<sup>178</sup>

Whether or not this was a good idea, the "terrorism betting pool" is an example of a government agency trying to think outside the box. If DARPA had been allowed to further develop the idea free from public view, perhaps it could have been presented in a form more able to withstand public and political ridicule.<sup>179</sup> As a result of this fiasco, DARPA might now be inhibited from allowing politically risky projects to go forward, with costs to the nation that are perhaps incalculable.<sup>180</sup>

Although the effect of excessive openness is relatively easy to spot where DARPA is concerned, one has to wonder whether open government imposes similar costs across the entire scope of government activity, and whether making it harder to discover the inner deliberations of governmental agencies might make it easier for those agencies to be a little more creative.

<sup>176</sup> See Noah Shachtman, *The Case for Terrorism Futures*, WIRED.COM, July 30, 2003 (giving examples of other markets as "surprisingly reliable indicators" of the future), at <http://www.wired.com/news/politics/0,1283,59818,00.html>. One interesting example from another field is the Hollywood Stock Exchange ([www.hsx.com](http://www.hsx.com)) which correctly predicted thirty-five of the forty Oscar nominees in eight major award categories. See *id.*

<sup>177</sup> See, e.g., 149 CONG. REC. S10,082 (daily ed. July 29, 2003) (statement of Sen. Daschle) (demanding immediate repudiation of project by Administration; futures market constitutes "trading in death"); 149 CONG. REC. S10,033-02 (daily ed. July 28, 2003) (statement of Sen. Dorgan) (claiming that the futures market is "offensive" and will "have no value to anyone").

<sup>178</sup> See generally David Ballingrud, *Wanna Bet?*, ST. PETERSBURG TIMES, Sept. 14, 2003, at 1D; Stephen J. Hedges, *Poindexter to Quit over Terror Futures Plan*, CHI. TRIB., Aug. 1, 2003, at 1; Charles Piller, *Pentagon's Scientific Research Group Produces Breakthroughs, Bungles*, MILWAUKEE J. SENTINEL, Aug. 17, 2003, at 22A. Of course, it also did not help that the DARPA official in question, Ret. Admiral John Poindexter, put in charge of both TIA and the futures market program, was a central figure in the Iran-Contra Scandal during the Reagan Administration—he was the National Security Advisor for much of that period. As a result, he acted as something of a lightning rod for controversy at DARPA, and Congressional overseers cut him very little slack. See, e.g., 149 CONG. REC. S10,082 (daily ed. July 29, 2003) (statement of Sen. Daschle) (noting Admiral Poindexter's "checkered past" while denouncing DARPA's controversial programs).

<sup>179</sup> In fact, in his resignation letter, Admiral Poindexter claimed that an unauthorized decision by an outside contractor for the futures market project, which posted some rather inflammatory sample "futures" (such as the possibility of buying a "future" in the assassination of the late Palestinian leader Yasser Arafat), allowed critics to distort the true nature of the project. See Bradley Graham, *Poindexter Resigns but Defends Programs; Anti-Terrorism, Data Scanning Efforts at Pentagon Called Victims of Ignorance*, WASH. POST., Aug. 13, 2003, at A02.

<sup>180</sup> See A. Barton Hinkle, *Ignorance Triumphs Grandly over DARPA Futures Market*, RICHMOND TIMES-DISPATCH, Aug. 8, 2003, at A15 (expressing concern that this episode has sent the message to DARPA to "get back in the [proverbial] box and don't come out").

The deliberative process privilege seems to have escaped heavy criticism in the academic literature, perhaps because most scholarly fire has been trained on the broader concept of “executive privilege.”<sup>181</sup> This author has found only one law review article, by Professor Gerald Wetlauffer, that conducts a thorough critique of the deliberative process privilege.<sup>182</sup>

Professor Wetlauffer opposes the privilege for several reasons. First, he disputes the validity of the basic “candor rationale,” arguing that the claim that the lack of a privilege would “chill” deliberation is “not well established, . . . easily countered, and . . . inconsistent with the way the executive has chosen to conduct its own affairs.”<sup>183</sup> Specifically, Wetlauffer judges the risk that a given opinion will be disclosed in future litigation as “relatively low” and not sufficient to cause chilling.<sup>184</sup> He also asserts that the risk to a speaker from disclosure is low.<sup>185</sup> As government officials are “committed to the success of the agency for which they work and . . . have a strong incentive to help solve the problems that confront that agency and to get credit for their contributions,” the deliberative privilege is unneeded to encourage bureaucrats to do their best.<sup>186</sup>

Professor Wetlauffer goes on to challenge whether the privilege aids the effectiveness of the executive. First, Wetlauffer asserts that the speech most likely to be chilled is the speech which we as a society would probably want to be chilled: speech that “the speaker believes an outsider would perceive as being against the public interest—including, most particularly, [speech] that is directed towards corrupt or illegal purposes.”<sup>187</sup> Second, he argues that excessive secrecy necessarily constricts the flow of information

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<sup>181</sup> Perhaps the most well-known frontal assault on the concept of executive privilege (albeit concerned primarily with its exertion against Congress as opposed to the judiciary) is Raoul Berger’s *Executive Privilege: A Constitutional Myth* (1974) (disputing the Constitutional underpinnings of executive privilege). See also Arthur S. Miller, *Executive Privilege: A Political Theory Masquerading as Law*, in *THE PRESIDENCY AND INFORMATION POLICY* 48 (Harold C. Relyea ed., 1981); Saikrishna B. Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 *MINN. L. REV.* 1143, 1147–48 (1999) (arguing that executive privilege is not authorized by the Constitution; Congress would have to create it by statute). An excellent recent treatment of the arguments for and against executive privilege (although again primarily dealing with its assertion against Congress) is Mark J. Rozell’s *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* (1994). See also Archibald Cox, *Executive Privilege*, 122 *U. PA. L. REV.* 1383, 1407–17, 1434–35 (1974). To be clear, this author takes the legitimacy of executive privilege as a given and does not attempt to take a position as to who has the better argument; this author’s position is simply that, as long as executive privilege is recognized, as a prudential matter it should apply to the entire executive branch equally. See *infra* Part V.

<sup>182</sup> See generally Wetlauffer, *supra* note 3. Wright and Graham also subject the deliberative privilege to withering criticism. See generally 26A *WRIGHT & GRAHAM, supra* note 2, § 5680. The criticisms in Wright and Graham largely track with the ones laid out by Wetlauffer, which they cite approvingly. See *id.* at n.1.

<sup>183</sup> Wetlauffer, *supra* note 3, at 886.

<sup>184</sup> *Id.* at 887–88.

<sup>185</sup> *Id.* at 888.

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

<sup>187</sup> *Id.* at 889.

available to the ultimate decisionmaker, “depriving the decisionmaker of access to an active, probing, testing, alternative-generating ‘marketplace’ in ideas.”<sup>188</sup> A robust deliberative privilege also allegedly diminishes the credibility and legitimacy of the government in the eyes of the citizenry.<sup>189</sup>

Wetlauffer next contends that, even if one grants the instrumental rationale, the privilege is still not in the public interest due to the adverse effects on the judiciary, litigants, and the citizenry in general.<sup>190</sup> Wetlauffer advocates greater use of devices such as protective orders and other methods to limit public exposure of deliberative materials as an alternative to an evidentiary privilege.<sup>191</sup>

The other set of Wetlauffer’s arguments aims to disprove the assertion that the deliberative process privilege has constitutional underpinnings. He distinguishes the Supreme Court’s opinion in *United States v. Nixon*, which (he claims) clearly distinguished the presidential executive privilege from the general deliberative privilege.<sup>192</sup> Professor Wetlauffer also questions the idea that the *Morgan* doctrine in administrative law<sup>193</sup> gives support to the deliberative privilege, arguing that the *Morgan* doctrine is limited to when agency heads are basically acting as judges, performing “adjudicatory functions.” As such, the *Morgan* cases provide no support for the general deliberative privilege.<sup>194</sup>

Even in light of all these arguments, Wetlauffer concedes that, given the safeguards courts have developed as to the procedures for asserting the privilege,<sup>195</sup> “it is unlikely that systematic injustice is being done in its name[.] . . . [E]ven if the case in favor of this privilege is not particularly strong, neither will be the case against it.”<sup>196</sup>

Some commentators have noted the inherent difficulty in consistently balancing the litigant’s need for information against the government’s interest in protection.<sup>197</sup> One commentator has suggested a reform that would

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

<sup>189</sup> *Id.* at 890.

<sup>190</sup> *Id.* at 890–93.

<sup>191</sup> *Id.* at 893–98.

<sup>192</sup> *Id.* at 899–905.

<sup>193</sup> In *United States v. Morgan*, 313 U.S. 409, 422 (1941), the Supreme Court established that, in quasi-judicial proceedings such as those carried out by administrative agencies, judicial inquiry into the “mental processes” of agency decisionmakers is presumptively impermissible. *Id.*

<sup>194</sup> Wetlauffer, *supra* note 3, at 905–912.

<sup>195</sup> To invoke the privilege in litigation, the head of a department must personally assert the privilege via affidavit. Weaver & Jones, *supra* note 19, at 306. An agency must provide the court with a particularized description of the withheld documents. *Id.* at 301–05. Finally, the agency must provide a clear statement of why there is a need for confidentiality. *Mobil Oil Corp. v. Dep’t of Energy*, 520 F. Supp. 414, 417 (N.D.N.Y. 1981).

<sup>196</sup> Wetlauffer, *supra* note 3, at 856.

<sup>197</sup> See, e.g., Weaver & Jones, *supra* note 19, at 316 (noting that the regulatory interest is often vaguely defined).

solve this problem by abolishing the privilege entirely when the government is a litigant, while making the privilege absolute in cases where the government is not a litigant but is instead a third-party called upon to produce relevant information.<sup>198</sup> Another similar proposal would establish a burden-shifting test based on whether the deliberative process itself is an issue in the litigation. The burden would be on the litigant to show need, unless the deliberative process is at issue, in which case the burden would be on the government to show a compelling need for secrecy in a given case.<sup>199</sup>

## V. PROPOSALS FOR REFORM OF THE PRIVILEGE

Even if one grants that the deliberative process privilege is beneficial, the qualified nature of the privilege cannot help but reduce its effectiveness in creating a climate where government decisionmakers can be free to be creative, controversial, or candid. In fact, a qualified privilege is probably the worst of both worlds: it suppresses relevant evidence in many cases while providing only uncertain protection to policymakers.

This Part will weigh three options to improve this situation. First, section A will briefly discuss the option of abolishing the privilege entirely. Section B will examine the opposite extreme: making the privilege absolute. Finally, section C will explore the author's Proposal, to merge the deliberative process privilege with the better-known "executive privilege" enjoyed by the President himself, which also goes by the name of the "presidential communications privilege."<sup>200</sup> As long as one takes as a given that executive privilege is contemplated by the Constitution,<sup>201</sup> there is no good reason why the entire executive branch should not be protected equally, and therefore, why the bifurcation of the privilege created by the D.C. Circuit should not be abandoned.<sup>202</sup>

### A. Abolish the Privilege

The first option would be to adopt Professor Wetlaufer's proposal and get rid of the privilege. As explained in more detail above,<sup>203</sup> Professor Wetlaufer argues that the privilege cannot accomplish what it claims to ac-

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<sup>198</sup> Arthur Piacenti, *The Deliberative Process Privilege: Preserving Candid Communications or Facilitating Evasion of Justice?*, 12 REV. LITIG. 275, 293–98 (1993).

<sup>199</sup> *Privileged Communications*, *supra* note 108, at 1623.

<sup>200</sup> *See generally In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

<sup>201</sup> *United States v. Nixon*, 418 U.S. 683, 708 (1974) ("The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."). *But see supra* note 181 and sources cited therein (casting doubt on whether executive privilege really is rooted in the Constitution).

<sup>202</sup> *See generally In re Sealed Case*, 121 F.3d at 729. *See also infra* Part V.C.

<sup>203</sup> *See supra* notes 182–196 and accompanying text.

comply, and further that the privilege is not rooted in the Constitution.<sup>204</sup> Therefore, since privileges in general are disfavored, the judicial search for truth should not be impeded for the sake of a privilege without instrumental purpose.<sup>205</sup>

Leaving aside for the moment the proper relationship between the deliberative process privilege and the Constitution,<sup>206</sup> Professor Wetlauffer's attack on the privilege misses its mark because his assumptions about the behavior of government actors are no more verifiable than the assumptions he attacks. Virtually every evidentiary privilege is based on ultimately unverifiable assertions about how people will behave in light of incentives and disincentives created by the legal system.<sup>207</sup> Specifically, the "candor" hypothesis behind the deliberative privilege is no more unreasonable than the very similar premises underlying the attorney-client privilege;<sup>208</sup> the legislative privilege founded on the Speech and Debate Clause of the Constitution;<sup>209</sup> Federal Rules of Evidence 407,<sup>210</sup> 408,<sup>211</sup> or 409;<sup>212</sup> or the privilege enjoyed by judges and their clerks against having to discuss their own deliberations.<sup>213</sup>

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<sup>204</sup> See *supra* notes 192–196 and accompanying text.

<sup>205</sup> Wetlauffer, *supra* note 3, at 921–24.

<sup>206</sup> See *infra* notes 233–239 and accompanying text.

<sup>207</sup> Cf. Eleanor Singer, *Informed Consent: Consequences for Response Rate and Response Quality in Social Surveys*, 43 AM. SOC. REV. 144, 151 (1978) (finding that, when assured of confidentiality, people are more likely to answer embarrassing personal questions); Weaver & Jones, *supra* note 19, at 316 n.186 (noting that the idea that "[m]ost people are more candid in private than they are in public" is recognized by other privileges).

<sup>208</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

<sup>209</sup> See, e.g., *Gravel v. United States*, 408 U.S. 606, 625 (1972) (stating that deliberations are privileged by the Speech and Debate Clause if they are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House").

<sup>210</sup> Rule 407 excludes evidence to prove negligence, product defect, or culpable conduct of subsequent remedial measures taken after an alleged injury or harm. FED. R. EVID. 407. The rule is "based on the policy of encouraging potential defendants to remedy hazardous conditions without fear that their actions will be used as evidence against them." *TLT-Babcock, Inc. v. Emerson Elec. Co.*, 33 F.3d 397, 400 (4th Cir. 1994).

<sup>211</sup> Rule 408 excludes evidence of offers to compromise disputed claims, in order to "promote the out-of-court settlement of claims." *Reeder v. Am. Econ. Ins. Co.*, 88 F.3d 892, 894–95 (10th Cir. 1996); FED. R. EVID. 408.

<sup>212</sup> Rule 409 provides that "[e]vidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." FED. R. EVID. 409.

<sup>213</sup> It is a little unclear, although often assumed, that there is such a privilege. 26A WRIGHT & GRAHAM, *supra* note 2, § 5674, at 60; see also *United States v. Nixon*, 418 U.S. 683, 708 (1974) ("[T]he claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in . . . decisionmaking."). *But see*

To be sure, *Nixon* does not find governmental candor to be irreducibly fragile: “[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.”<sup>214</sup> But “infrequent” is the operative word here. *Nixon* unambiguously recognized that, as a general matter, executive privilege is invaluable to fostering candor in governmental deliberations.<sup>215</sup> Accordingly, the *Nixon* Court set a fairly high standard for when Presidential deliberations are to be disclosed.<sup>216</sup> Given the overall tenor and language of *Nixon*, it is easy to make far too much of the Court’s willingness to countenance “infrequent” disclosures.<sup>217</sup>

As the foregoing discussion demonstrates, the basic assumption that people speak more freely in private than in public is so deeply rooted in our law that it would be odd if such an insight were not recognized in the context of government deliberations as it is in so many other contexts. Therefore, the argument that the deliberative privilege is unnecessary does not satisfy.

### B. Make the Privilege Unqualified

If one accepts that the deliberative process privilege in its current form presents the worst of both worlds, then perhaps the only sensible alternative to jettisoning the privilege entirely is to make it unqualified. This proposal is not as radical as it sounds. The government holds a “state secrets” privilege which is unqualified as long as a judge certifies, after *in camera* review, that the government has met its burden to show that the information in question would harm national security if publicized.<sup>218</sup> Moreover, the immunity and privileges enjoyed by members of Congress have been held to be absolute and not subject to balancing.<sup>219</sup>

This option founders quickly, however, when it runs up against separation of powers concerns. The deliberative process privilege, as noted

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Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 22 GA. L. REV. 89, 114–15 (1987) (noting the “glaring omission” of deliberative privilege for judges and law clerks from lists of recognized, or proposed, governmental privileges). See generally Kevin C. Milne, Note, *The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting a Privilege for the Federal Judiciary*, 44 WASH. & LEE L. REV. 213 (1987).

<sup>214</sup> *Nixon*, 418 U.S. at 712.

<sup>215</sup> *Id.* at 708. In fact, the most contentious issue in *Nixon* was not whether executive privilege should exist at all, but whether the President should be able to unilaterally assert the privilege without judicial review. *Id.* at 703–07; see also *supra* note 76 and accompanying text.

<sup>216</sup> *Nixon*, 418 U.S. at 713. Also note that *Nixon* was dealing with a criminal investigation, where arguably the need for probative evidence is at its highest, as opposed to, say, a FOIA request.

<sup>217</sup> See Jensen, *supra* note 42, at 586–87 (wrongly implying that *Nixon* shows that the Supreme Court is fundamentally skeptical of the basic candor rationale).

<sup>218</sup> *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953); *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

<sup>219</sup> *E.g.*, *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 501–03 (1975).

above,<sup>220</sup> is similar to several other privileges which recognize that it is good policy to give up some probative evidence in exchange for more efficient and complete flows of ideas. What distinguishes the state secrets privilege and the legislative privilege, and what justifies their absolute nature, is a concern about maintaining the fundamental integrity of, respectively, the executive and the legislative branches.<sup>221</sup>

By contrast, with the deliberative process privilege, other branches of government (either the judiciary or Congress) are put into conflict and, therefore, the separation-of-powers argument can cut the other way, as the Supreme Court has recognized in the executive privilege context.<sup>222</sup> Withholding information from Congress necessarily interferes with its constitutional role, and similarly excessive executive secrecy would interfere with

the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions . . . .

. . . .

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of non-military and nondiplomatic discussions would upset the constitutional balance of ‘a workable government’ and gravely impair the role of the courts under Art. III.<sup>223</sup>

Given these considerations, it is not advisable to make a general deliberative privilege absolute. So seemingly, we are back where we started.

### C. *Merge the Deliberative Process and Presidential Communication Privilege into a Unitary “Executive Privilege”*

The extended discussion of the differences between the presidential communications privilege and the deliberative process privilege in *In re*

<sup>220</sup> See *supra* notes 207–213 and accompanying text.

<sup>221</sup> For state secrets privilege, see generally James Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966). The need for an absolute privilege in these instances is generally accepted because of the direct threat that its violation could pose to national security, and the attendant need for the executive branch, which is responsible for national security, to be able to maintain some secrets of state in the national interest. The legislative privilege has ancient roots which extend back to the struggles between Parliament and King in Old England; it is meant to protect the legislature against intimidation from the Executive. See *Gravel v. United States*, 408 U.S. 606, 616 (1972) (“The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.”); see also Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1120–44 (1973) (recounting the historical roots of the privilege).

<sup>222</sup> *United States v. Nixon*, 418 U.S. 683, 707 (1974).

<sup>223</sup> *Id.*

*Sealed Case*<sup>224</sup> points to a simple reform, which would strengthen the deliberative process privilege while still allowing a safety valve of access for when there is genuine need to intrude upon executive branch decision-making. The solution is simply to merge the deliberative privilege with the presidential communications privilege to create a unitary “executive privilege.”

The *In re Sealed Case* decision, as well as the Supreme Court precedent on which it was based (*Nixon*), elicit the following question: what is really so different about deliberations involving the President and deliberations involving other executive branch officials? The D.C. Circuit did address the issue, briefly explaining that the President has more constitutional significance because his office is created by the Constitution, not by Congress as is the case with agency heads and all other officials.<sup>225</sup> Additionally, because the President is the head of the executive branch, his deliberations were held to have more importance to policymaking and hence deserve more protection.<sup>226</sup> But as will be shown below, these answers are not the only, or even the best, interpretation of the Constitution and Supreme Court precedent. The D.C. Circuit’s distinctions also create unfortunate instrumental outcomes.

*In re Sealed Case* expounded at some length about the need to make sure that the privilege for “presidential communications” provided adequate protection for the President’s deliberations, even going so far as to extend the privilege well beyond communications that involve the President himself.<sup>227</sup> At the same time, the court carefully confined the reach of the privilege to those communications that involve members of the staff of an “immediate White House adviser” who have “broad and significant authority for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.”<sup>228</sup> Nowhere in the opinion, or for that matter in the literature examining the opinion,<sup>229</sup> is it explained exactly why deliberations outside the magic circle of presidential advisors and those who assist them are unworthy of the same protection.

The D.C. Circuit even made sure to put factual information inside the ambit of the presidential communications privilege, on the theory that al-

<sup>224</sup> *In re Sealed Case*, 121 F.3d 729, 736–52 (D.C. Cir. 1997).

<sup>225</sup> *See id.* at 748 (citing, *inter alia*, *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982)).

<sup>226</sup> *Id.* at 752 (stating that the privilege is “bottomed on . . . the unique role of the President”); *see also id.* at 751 (asserting that the Presidential deliberations are “the ultimate level of decisionmaking in the executive branch, and intrusion into presidential deliberations is therefore more serious”).

<sup>227</sup> *Id.* at 750–52.

<sup>228</sup> *Id.* at 752.

<sup>229</sup> *See also* Michael C. Boteler, *The D.C. Circuit Review: An Examination of the Presidential Communications Privilege: Who Does It Cover and How Is It Overcome*, 66 GEO. WASH. L. REV. 972, 977–78 (1998); Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon’s Shadow*, 83 MINN. L. REV. 1069, 1120–21 (1999). *See generally Harvard Case Note, supra* note 43 (criticizing the D.C. Circuit for expanding the presidential communications privilege beyond the President).

lowing discovery into factual information used in the presidential deliberative process would unacceptably provide a window into such deliberations and help defeat the purpose of the privilege.<sup>230</sup> As we have seen,<sup>231</sup> factual information is *outside* the scope of the deliberative process privilege, and courts aggressively police the fact-opinion boundary in deliberative process privilege cases. The D.C. Circuit notes the identical rationales for both privileges but sweeps aside the obvious conclusion—extension of the same protection to factual information under the deliberative process privilege—as part of its rather conclusory argument that “intrusion into presidential deliberations is . . . more serious.”<sup>232</sup>

In the end, the distinction between “presidential communications” and “deliberative process” envisioned by *In re Sealed Case* is without merit. The conclusion reached by the D.C. Circuit, that protection for only presidential communications is rooted in separation of powers principles, is a reasonable conclusion to draw from *Nixon*, but not the only conclusion that can be drawn. What *Nixon* actually said was that

[a] President *and those who assist him* must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.<sup>233</sup>

The scope of the presidential communications privilege ultimately hinges on how one defines the phrase “and those who assist him.”<sup>234</sup> The D.C. Circuit chose to define this phrase narrowly, to exclude virtually every member of the executive branch. There is nothing in the *Nixon* opinion or in the Constitution itself to compel this result. As the instrumental rationale is equally important for executive branch officials, public policy suggests

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<sup>230</sup> *In re Sealed Case*, 121 F.3d at 750.

<sup>231</sup> See *supra* notes 37–46 and accompanying text.

<sup>232</sup> *In re Sealed Case*, 121 F.3d at 751.

<sup>233</sup> *United States v. Nixon*, 418 U.S. 683, 708 (1974) (emphasis added). At the end of the quoted sentence appears a footnote that expounds further on the need for freedom of communication as vital to the operation of government. The cases cited for that proposition in the footnote include the very cases generally seen as the originators of the deliberative process privilege. See *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325 (D.D.C. 1966); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F.Supp. 939 (Ct. Cl. 1958) (Reed, J.).

<sup>234</sup> A subsequent *Nixon* case may imply that the Court meant to establish a narrow scope for executive privilege. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (holding that former President Nixon could assert executive privilege against the National Archives for items “with which [the President] was personally familiar”). This case was cited by *In re Sealed Case*, 121 F.3d at 744. But in *Administrator of General Services*, the Court was not squarely presented with the question of which officials really “assist” the President; rather, the Court was trying to decide which documents fell within the Presidential privilege.

an equally defensible but more desirable and workable<sup>235</sup> interpretation—to define “and those who assist him” as the entire executive branch.

One fairly obvious textual counterargument is that the President is “different” from other executive branch officers because his office is established by the Constitution instead of by Congress. This argument is advanced in *In re Sealed Case*<sup>236</sup> and by Professor Wetlauffer.<sup>237</sup> But this argument can be defeated merely by noting that the whole concept of executive privilege is ultimately an extrapolation of the courts and is nowhere mentioned in the Constitution.<sup>238</sup> Besides the obvious inconsistency in applying a textual standard to a privilege that technically has no textual basis, this argument also makes nonsense of the D.C. Circuit’s extension of the presidential communications privilege to advisors whose offices may not always even be subject to Senate confirmation.<sup>239</sup>

Aside from the lack of a constitutional basis for drawing a line between presidential communications and deliberative processes, the dividing line may be much fuzzier in practice than in theory. The D.C. Circuit in *In re Sealed Case* basically held that even the work product of White House externs could conceivably be protected by the presidential communications privilege, as long as that work product was part of a deliberative process related to giving the President advice about executive matters.<sup>240</sup> So a memo written by Monica Lewinsky during her stint as a White House intern could enjoy heightened protection from disclosure (depending on its subject matter and its recipient), while the deliberative process privilege provides little practical protection to the deliberations of military promotion boards, bodies that are essential to the vitality of our military.<sup>241</sup>

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<sup>235</sup> Cf. Boteler, *supra* note 229, at 978 (noting that, if the President orders a cabinet member to “perform research on issues relating to the cabinet member’s . . . policy area,” such deliberations are now outside the presidential communications privilege, even though such official is “closer in operational proximity” than lowlier officials within the privilege).

<sup>236</sup> *In re Sealed Case*, 121 F.3d at 748–49.

<sup>237</sup> Wetlauffer, *supra* note 3, at 901–04 (arguing that the deliberative privilege is not grounded in the separation of powers, but also noting that *Nixon* did not settle the question because it was dealing with the presidential privilege).

<sup>238</sup> Raoul Berger has noted that there is no comparable provision in Article II to the Article I Speech and Debate Clause for Congress. See ROZELL, *supra* note 181, at 161 n.15. The Berger critique of executive privilege as a myth, see BERGER, *supra* note 181, has itself come under attack. See, e.g., ROZELL, *supra* note 181, at 27–32; see also Leonard G. Ratner, *Executive Privilege, Self Incrimination, and the Separation of Powers Illusion*, 22 UCLA L. REV. 92, 94 (1974) (“The presidential claim of executive privilege clearly is grounded in the Constitution. The President’s constitutional functions necessitate consultation with advisers, and the possibility of disclosure may well inhibit the candor of their advice.”).

<sup>239</sup> One case even extended the presidential communications privilege to the First Lady. See *infra* note 243.

<sup>240</sup> See Boteler, *supra* note 229, at 977–78.

<sup>241</sup> *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250 (D.D.C. 2003), *rev’d on other grounds sub nom. In re England*, 375 F.3d 1169 (D.C. Cir. 2004) (deliberative process privilege enjoyed by military promotion boards overridden because plaintiffs, Navy Chaplains, provided a “basis for be-

The line between a Presidential advisor and all other members of the executive branch can also shift depending on the personalities within an administration. For one thing, a position that would carry great influence in one administration could be relatively unimportant in the next one (or vice versa) because the person holding the position could be less assertive or less trusted by the President.<sup>242</sup> This tendency for certain positions in the White House staff to wax or wane in influence may force a court to determine whether an actor is close enough to the throne to qualify as a presidential advisor.<sup>243</sup> For example, a Deputy Counsel to the President during the Clinton Administration, Bruce Lindsey, was widely understood to be one of the

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lief” that religious discrimination was the motive behind their failing to be promoted).

<sup>242</sup> This applies with special force to the office of Vice President. This office was memorably described by one of its occupants, John Nance Garner, as “not worth a bucket of old spit.” Brian Lamb, *Vice Presidential Haunts: A Tour Across America of Political Graves, from Adams to Rockefeller*, CHI. TRIB., Sept. 22, 2002, § 8, at 1. President Eisenhower, when asked by a reporter during the 1960 election to list policymaking contributions made by his Vice President, Richard Nixon, replied, “If you give me a week, I might think of one. I don’t remember.” STEPHEN E. AMBROSE, *NIXON: THE EDUCATION OF A POLITICIAN* 559 (1987). By contrast, the last two occupants of this office, Vice Presidents Al Gore and Dick Cheney, have by all accounts been among the most influential Vice Presidents in American history. See, e.g., Marc Sandalow, *Golden Age of the Second Banana: U.S. Vice Presidency Rises from Anonymity to Become One of World’s Most Powerful Jobs*, S.F. CHRON., July 4, 2004, at A1 (discussing the greater influence gained by Gore and Cheney as compared to earlier Vice Presidents), available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/07/04/VEEP.tmp>. A high-level energy policy working group run by Vice President Cheney was recently the subject of a lawsuit between the Executive Branch and the General Accounting Office (an arm of Congress) over access to the group’s deliberations and the identity of certain private citizens who were included in the working group’s meetings. The lawsuit was eventually dismissed for lack of standing. *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002). The question of whether the Vice President is “close enough” to the Oval Office to fall under the presidential communications privilege as outlined in *In re Sealed Case* is briefly explored in Jeffrey P. Carlin, *Walker v. Cheney: Politics, Posturing, and Executive Privilege*, 76 S. CAL. L. REV. 235, 268–69 (2002). The Supreme Court recently ducked an opportunity to fully explore the Vice President’s status in this regard, remanding an executive privilege dispute to a lower court on essentially procedural grounds. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367 (2004). In any case, given the variance in the practical importance of the office over the years, a characterization of influence that may be accurate for Vice President Cheney could be unwarranted for a successor. One not-so-far-fetched scenario is a Vice President who was a political rival of the President, but originally was added to the ticket to help “balance” the ticket for electoral purposes. A Vice President who gained office on this basis would be somewhat less likely to be privy to high-level Oval Office discussions and, thus, the justification for including him within the ambit of the presidential communication privilege, at least on the terms set by the D.C. Circuit, would be weak.

<sup>243</sup> Even a First Lady can qualify as a close advisor for this purpose. Hillary Clinton’s unprecedented influence over policy as First Lady was recognized by the D.C. District Court in a presidential communications privilege case. The court held that conversations she had with White House operatives Bruce Lindsey and Sidney Blumenthal fell within the scope of the privilege, partly because “Mrs. Clinton is widely seen as an advisor to the President.” *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 27–28 (D.D.C.), *rev’d in part on other grounds sub nom. In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998). Although Mrs. Clinton’s status as a presidential advisor was apparently uncontroversial, *see id.* (noting that the party seeking discovery did not dispute that Mrs. Clinton is covered by “executive privilege”), one can easily imagine future litigation in this area turning on subjective disputes as to whether a given advisor is “widely seen” as an advisor to the President.

President's closest confidants,<sup>244</sup> while in other administrations the person holding that position would probably have much less access to the President,<sup>245</sup> raising a litigable question of whether he in fact participated in presidential deliberations.

The Supreme Court rejected a strikingly similar test in the analogous context of corporate attorney-client privilege.<sup>246</sup> A lower court had restricted the applicability of a corporation's attorney-client privilege to "those officers who play a 'substantial role' in deciding and directing a corporation's legal response."<sup>247</sup> The Court recognized that the term "substantial role" would be interpreted unpredictably,<sup>248</sup> and instead established a test that looks at whether the communication was made by a corporate employee to corporate legal counsel for the purpose of securing legal advice, regardless of the rank of the corporate employee.<sup>249</sup>

On the other hand, the most recent case to apply *In re Sealed Case*<sup>250</sup> expressly rejected a lower court's analysis that the dividing line between the presidential communications and deliberative process privilege rests largely on the subject matter of the communication. Instead, the D.C. Circuit placed great weight on whether the documents or advice in question were actually "'solicited and received' by the President or the Office of the President."<sup>251</sup>

The district court had extended the presidential communications privilege to documents generated by the Department of Justice's Office of the Pardon Attorney on the grounds that the attorneys were "advising the President in the exercise of a quintessential and nondelegable Presidential

<sup>244</sup> See, e.g., Glen Johnson & Joanna Weiss, *Clark and Dean in Spotlight as Candidates Spar*, BOSTON GLOBE, Sept. 26, 2003, at A1.

<sup>245</sup> At least if public notoriety is any guide, neither man who has held Lindsey's position in the current Bush administration has remotely the level of influence or access that Lindsey reputedly had. A Westlaw search of the ALLNEWS database ("Bruce" /2 "Lindsey" & "White House" & "Counsel" & "Deputy" & DA(AFT 1/1/1997) & DA(BEF 1/1/2001)) turned up over 1900 hits (search performed May 23, 2005). By contrast, a similar search performed for Tim Flanigan, who held the position of Deputy Counsel to the President from 2001 to 2003, produced only 79 hits in the same database (search for "Timothy Flanigan" produces 33 hits, search for "Tim Flanigan" adds 21; same search as for Lindsey except substituting names and changing dates to 1/1/2001 to 5/1/2003). Flanigan's successor, David G. Leitch, had 29 hits (same search as above, substitute name and search period 1/1/03 to present). Even with this rough search, and accounting for the fact that the Lindsey search was performed over a somewhat wider date range, the substantial difference in influence seems fairly inferred, and the policy basis for including Leitch within the ambit of the presidential communications privilege is somewhat weakened, at least if the determination is based on the identity of the advisor as opposed to the subject matter of the communication.

<sup>246</sup> *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

<sup>247</sup> *Id.* at 393.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 394-95.

<sup>250</sup> *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004) (*Judicial Watch II*).

<sup>251</sup> *Id.* at 1121.

power.”<sup>252</sup> According to this court, when “quintessential” presidential powers are involved, the policy justification for *In re Sealed Case*’s extension of the privilege beyond just the President still applies.<sup>253</sup>

The district court relied on language from *In re Sealed Case* which stated that the presidential privilege should be limited to White House officials because only such communications were “close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers.”<sup>254</sup> In this instance, the pardon attorneys were “close enough” because they were directly assisting the President in the exercise of one of his powers.<sup>255</sup> Such an interpretation hints at a “subject matter” delineation of the presidential communications privilege.<sup>256</sup> Of course, at one time or another, pretty much every employee of the executive branch is in some sense assisting the President in the exercise of one of his powers; after all, this is why we have federal employees.<sup>257</sup>

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<sup>252</sup> *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 259 F. Supp. 2d 86, 91 (D.D.C. 2003) (*Judicial Watch I*) (denying FOIA request on account of presidential communications privilege).

<sup>253</sup> *Id.* Perhaps strangely, it appears that *Judicial Watch I* did not try to raise the possibility that government misconduct would be uncovered by its FOIA request. It could probably have raised that issue in order to meet the *Nixon* need standard, given that the documents sought related to several controversial pardons granted by President Clinton in his last days in office. *Id.* at 87.

<sup>254</sup> *Id.* (quoting *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997)).

<sup>255</sup> *Id.*

<sup>256</sup> The district court was relying on language in *In re Sealed Case*, 121 F.3d at 729, that drew a distinction between powers that the President must personally exercise (such as the power of appointment), and more general powers—“for example the duty to take care that the laws are faithfully executed, can be exercised or performed without the President’s direct involvement, pursuant to a presidential delegation of power or statutory framework.” *Id.* at 753. In the latter case, according to the D.C. Circuit, the presidential communication privilege should not apply because, *inter alia*, there is “assurance” that the materials in question were directly related to Presidential deliberations, as opposed to mere executive branch deliberations. *Id.* Although neither *In re Sealed Case* nor the recent *Judicial Watch* decisions referred to it, the Supreme Court has hinted at a distinction between powers expressly granted to the President by the Constitution (such as the pardon power, *see* U.S. CONST. art. II, § 2) and other powers “not explicitly assigned by the text of the Constitution to be within the sole province of the President, but rather . . . encompassed within the general grant to the President of the ‘executive Power’ [in U.S. CONST. art II, § 1, cl. 1].” *Pub. Citizen v. Dep’t of Justice*, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring in the judgment). According to Justice Kennedy, the Court does not tolerate any encroachment by other branches when the constitutional grant of executive power is explicit. *See id.* at 485. Where, however, the power is merely “inferred,” encroachment by another branch on the Executive’s power can be tolerated if the “potential for disruption of the President’s constitutional functions were present and if that impact [were not] justified by an overriding need to promote objectives within the constitutional authority of Congress.” *Id.* at 484–85 (citation and internal quotation omitted).

<sup>257</sup> This is not an entirely uncontroversial point, but properly understood, federal employees are merely instruments of the President’s constitutionally-granted power to execute the laws. *See generally* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (arguing that the essential meaning of executive power is the power to execute the laws). Put another way, the President alone is “vested” with the executive power, U.S. CONST. art. II, § 1, cl. 1, and therefore has the theoretical power to personally carry out any executive branch function—we merely have federal employees because the President cannot be in a million places at once. *Cf.* Stephen G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451

The D.C. Circuit rejected this analysis, instead basing application of the stronger presidential communications privilege on whether the documents passed within the sphere of the Office of the President.<sup>258</sup> The court also took solace in the fact that the deliberative process privilege would still potentially protect the documents in question. In fact, the court remanded the case so the district court could make the determination.<sup>259</sup>

In dissent, Judge Randolph adopted the lower court's "subject-matter" test; he would hold that the fact that the Department of Justice's attorneys were assisting the President in executing a "nondelegable" power of his office brought the information within the presidential communications privilege.<sup>260</sup> Judge Randolph makes two points that are relevant here. First, he takes issue with the majority's "slippery-slope" argument that FOIA would be eviscerated if the presidential communications privilege were not strictly limited, and a "large swath of the executive branch" were brought within the stronger privilege.<sup>261</sup> Judge Randolph maintains that there is a "clear" dividing line between officials who advise about a "quintessential and non-delegable Presidential power" and those who generate advice about governmental operations that "do not call ultimately for direct decision-making by the President."<sup>262</sup> For the reasons discussed above, it is not clear that this dividing line is really tenable.<sup>263</sup>

Judge Randolph also deprecates the value of the deliberative process privilege to adequately protect the integrity of executive deliberations, responding to the majority's point that denying the applicability of the presidential communications privilege is no big deal, since the deliberative privilege may still be available.<sup>264</sup> True enough, but Judge Randolph does not address the underlying problem with a narrow conception of executive privilege, given that it would be impossible for the President to personally consider more than a small fraction of the policy choices that are made in his name.<sup>265</sup> (Or, if he does consider more of them, it is only in the most

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(1997) (detailing extent of direct presidential control over the execution of the law between 1787 and 1837); Stephen G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667 (2003) (same, from 1837 to 1889).

<sup>258</sup> *Judicial Watch II*, 365 F.3d 1108, 1121. (D.C. Cir. 2004).

<sup>259</sup> *See id.*

<sup>260</sup> *Id.* at 1136–37 (Randolph, J., dissenting).

<sup>261</sup> *Id.* at 1116, 1139.

<sup>262</sup> *Id.* at 1139 (Randolph, J., dissenting) (quoting *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997)).

<sup>263</sup> *See supra* notes 255–257 and accompanying text.

<sup>264</sup> *Judicial Watch II*, 365 F.3d at 1139 (Randolph, J., dissenting).

<sup>265</sup> This Comment takes no position on the proper procedural requirements for this unitary executive privilege. As discussed above, at least in litigation as opposed to FOIA, the head of the agency in question must assert the deliberative process privilege after personal consideration, and the agency must create a privilege log for the court. *See supra* notes 26–27 and accompanying text. Some might argue that, under the unitary executive privilege that this author proposes here, the President should be forced to personally assert the privilege in all cases, as he now must do for the presidential communications privi-

perfunctory fashion—for example, ratifying decisions presented to him by his underlings).

Many of these policy choices, made at a lower level than the Oval Office, profoundly affect the lives of Americans, even if they are not “quintessential” presidential powers.<sup>266</sup> A small sampling of such deliberations that qualify only for the deliberative privilege include: setting environmental standards (EPA),<sup>267</sup> setting educational quality standards for the nation’s schools (Department of Education),<sup>268</sup> administering Social Security and Medicare (Social Security Administration, Center for Medicare and Medicaid Services),<sup>269</sup> and handling military operations and administration (Department of Defense).<sup>270</sup> By contrast, President Carter’s “deliberations” regarding the use of the White House tennis courts, where he personally determined schedules for staff access,<sup>271</sup> would presumably receive protection under the stronger presidential communications privilege.

Similarly, it is also unsatisfying to argue that the strength of the “candor” rationale dissipates as one descends further into the executive branch.<sup>272</sup> This argument does not account for the reality that even “low-level” officials who do not make “decisions” or “policy” nevertheless produce documents that are revelatory of such decisions—something the D.C.

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lege. See, e.g., *Blumenthal v. Drudge*, 186 F.R.D. 236, 242 (D.D.C. 1999) (holding that the “President alone possesses . . . authority [to invoke presidential communications privilege]”). But it is hard to see the necessity of such a safeguard, especially set against the formidable administrative headache for the President that would be created. To give the reader some idea of the scope of the executive branch that the President heads: there are fifteen cabinet departments and dozens of additional “independent agencies” within the executive branch, all of which combined employ 1,849,000 employees, excluding military personnel (as of December 2004). *FedScope Employment Data Cubes*, at <http://www.fedscope.opm.gov/employment.asp> (last visited May 23, 2005). In 2002 alone, these agencies promulgated 4167 final rules and caused an all-time record 75,606 pages to be printed in the *Federal Register*. CLYDE WAYNE CREWS, TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE I (Cato Inst., Working Paper, June 8, 2003), available at [http://www.cato.org/tech/pubs/10kc\\_2003.pdf](http://www.cato.org/tech/pubs/10kc_2003.pdf).

<sup>266</sup> *In re Sealed Case*, 121 F.3d at 752–53.

<sup>267</sup> E.g., *Ctr. for Auto Safety v. EPA*, 731 F.2d 16 (D.C. Cir. 1984) (involving an attempt by Naderite public-interest organization to discover deliberations related to EPA’s auto emissions policy).

<sup>268</sup> E.g., *Md. Coalition for Integrated Educ. v. Dep’t of Educ.*, No. CIV. A. 89-2851, 1992 WL 1311694 (D.D.C. July 20, 1992) (involving whether FOIA requester could obtain internal documents related to the federal Department of Education’s monitoring of a state Department of Education’s compliance with a federal statute intended to aid handicapped students).

<sup>269</sup> *Dixon v. Bowen*, 126 F.R.D. 483 (S.D.N.Y. 1989) (involving an attempt by class-action plaintiffs to take depositions to learn more about Social Security Administration general adjudicative policies).

<sup>270</sup> E.g., *Murphy v. Dep’t of Army*, 613 F.2d 1151 (D.C. Cir. 1979) (involving a FOIA requester seeking internal deliberations regarding a large Army Corps of Engineers public works project).

<sup>271</sup> See James Fallows, *The Passionless Presidency*, THE ATLANTIC MONTHLY, May 1979, at 33.

<sup>272</sup> See Cairnie & Edgar, *supra* note 101, at 143–45 (relying heavily on Wetlauffer to demonstrate that only senior officials engage in “policy deliberations” worthy of privilege protection).

Circuit recognized in the presidential privilege context but failed to apply to the deliberative process privilege.<sup>273</sup>

Consideration of the history of executive privilege in the United States lends added support to the idea that there should only be one type of executive privilege. As *In re Sealed Case* recognizes, the concept of executive secrecy has roots going back to the founding of the Republic.<sup>274</sup> Back then, due to the small size of the federal government, the President really could consider a significant percentage of executive branch decisions. It was not until the twentieth century that the executive branch mushroomed to its current size.<sup>275</sup> Recognizing this fact leads to the conclusion that executive privilege makes sense only when applied in a uniform fashion to the entire executive branch. The D.C. Circuit Court of Appeals indirectly acknowledged this in *Association of American Physicians and Surgeons v. Clinton*,<sup>276</sup> where it held that the First Lady is a full-time government employee for the purposes of a statute that exempts from its provisions committees composed entirely of full-time government employees.<sup>277</sup> In so doing, the D.C. Circuit had occasion to note that

[t]he ability to discuss matters confidentially is surely an important condition to the exercise of executive power. Without it, the President's performance of any of his duties—textually explicit or implicit in Article II's grant of executive power—would be made more difficult. In designing the Constitution, the Framers vested the executive power in one man for the very reason that he might maintain secrecy in executive operations. As Alexander Hamilton wrote

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<sup>273</sup> *In re Sealed Case*, 121 F.3d 729, 745–46 (D.C. Cir. 1997).

<sup>274</sup> *Id.* at 736, 739–40; see also ROZELL, *supra* note 181, at 13–14, 32–42. For that matter, the Constitutional Convention itself demonstrates that most of the Founders (Jefferson being the notable dissident) understood the value of secrecy in fostering candid discussion; the Convention's proceedings were strictly confidential both while they were going on and for some time after. See DANIEL N. HOFFMAN, *GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS* 20–24 (1981); see also CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 134–39 (1928). As Alexander Hamilton asserted, “[h]ad the deliberations been open while going on, the clamours of faction would have prevented any satisfactory result. Had they been afterwards disclosed, much food would have been afforded to inflammatory declamation.” HOFFMAN, *supra*, at 21 (quoting 3 *RECORDS OF THE FEDERAL CONVENTION OF 1787* 368 (Max Farrand ed., 1911)). Similarly, George Washington admonished participants “to be more careful, lest our transactions get into the News Papers, and disturb the public repose by premature speculations.” *Id.* (quoting 3 *RECORDS OF THE FEDERAL CONVENTION*, *supra*, at 86). The Supreme Court has taken note of this historical record: “Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written.” *United States v. Nixon*, 418 U.S. 683, 705 n.15 (citation omitted).

<sup>275</sup> For the tremendous growth of the White House staff in particular, see, for example, PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 896 (1997) (discussing growth of the White House staff from the Lincoln administration to Nixon's). For the growth of the federal government in the twentieth century, and the impetus for such growth, see generally ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* (1987).

<sup>276</sup> 997 F.2d 898 (D.C. Cir. 1993).

<sup>277</sup> Federal Advisory Committee Act, 5 U.S.C.A. app. 2. (1996); see also *Ass'n of Am. Physicians*, 997 F.2d at 902–03.

in the Federalist Papers: “Decision, activity, secrecy, and dispatch will generally characterise [sic] the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.” The Framers thus understood that secrecy was related to the executive's ability to decide and to act quickly—a quality lacking in the government established by the Articles of Confederation. If a President cannot deliberate in confidence, it is hard to imagine how he can decide and act quickly.<sup>278</sup>

If this is true, then the growing complexity and size of the executive branch militates in favor of extending this secrecy to all those that act in the President's name.<sup>279</sup> For this reason, the Founders would find the current division of the executive branch into two “castes,” with differing levels of protection for their deliberations, odd. Therefore, the basic “candor” or “quality of decisionmaking” rationale should logically apply with at least equal force to many of these important decisions made every day by faceless bureaucrats. If one is to have a two-tiered executive privilege, it makes little sense in our modern leviathan state to draw the line based on who is making the final decisions as opposed to the gravity of the decisions made.

Even if neat line-drawing were possible between the two branches of executive privilege, it is arguable that a court should not engage in it, for separation of powers reasons. Leaving aside whether one views the deliberative process privilege as rooted in the common law or in the Constitution, to fail to provide the executive branch as a whole with a robust and comprehensive privilege against disclosure of deliberations puts the executive at a material disadvantage to the other two branches.<sup>280</sup> Senators and Congressmen enjoy immunity from prosecution related to their official acts.<sup>281</sup> This immunity extends to their legislative staff, when such staff is performing legislative functions.<sup>282</sup> More to the point, this immunity has

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<sup>278</sup> *Ass'n of Am. Physicians*, 997 F.2d at 909 (internal citation omitted).

<sup>279</sup> The Court has accepted an analogous argument when construing the Speech and Debate Clause, which provides Members of Congress with some degree of protection over their deliberations related to legislative acts:

[I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary . . . will inevitably be diminished and frustrated.

*Gravel v. United States*, 408 U.S. 606, 616–617 (1974).

<sup>280</sup> Rozell makes a similar argument to the one this author proposes next, but in the context of the President's executive privilege as applied against Congress, not the deliberative process privilege. That said, the considerations here are similar. ROZELL, *supra* note 181, at 59–61.

<sup>281</sup> U.S. CONST. art. I, § 6, cl. 1 (the Speech and Debate Clause).

<sup>282</sup> *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975); *Gravel*, 408 U.S. at 616–17. Admittedly, the sparse jurisprudence construing the Speech and Debate Clause (from which legislative

also been held to create an absolute privilege forbidding courts from compelling testimony into the mental processes of legislators and their staff.<sup>283</sup> Even when a court is probing misconduct by a legislator, the privilege cannot be overridden.<sup>284</sup>

More tellingly, federal judges and their law clerks seem to enjoy protection from having to explain the deliberative process by which they decide cases.<sup>285</sup> In particular, the Supreme Court is known as one of the most secretive organs of the federal government,<sup>286</sup> while at the same time being perhaps the most powerful. On a yearly basis, the Court takes up issues of the highest national importance and renders sweeping decisions that often change the landscape of American politics and culture.<sup>287</sup> But we know almost nothing about the Court's deliberations. One wonders why the open government movement has spent so much time and effort attempting to

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immunity derives) often involves line-drawing regarding what is and is not an immunized "legislative act." Such acts have been defined as "things generally done in a session of the House by one of its members in relation to the business before it." *Hutchinson v. Proxmire*, 443 U.S. 111, 126 (1979) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)).

<sup>283</sup> *Gravel*, 408 U.S. at 616.

<sup>284</sup> See *United States v. Johnson*, 383 U.S. 169, 173–74 (1966) (holding that inquiry into legislative motivations was prohibited, even though success of bribery prosecution of Congressman depended on such inquiry).

<sup>285</sup> See *supra* note 213. The D.C. Circuit has noted that judges' experiences with their own deliberative process can help inform their judgments in deliberative process privilege cases. See *Wolfe v. Dep't of Health and Human Servs.*, 839 F.2d 768, 775 n.8 (D.C. Cir. 1988) (en banc) (Bork, J.); see also *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1538 (D.C. Cir. 1993) (citing *Wolfe* for this proposition).

<sup>286</sup> The most notorious popular work regarding the internal deliberations of the Supreme Court (gleaned mostly from interviews with current and former law clerks) is probably Bob Woodward and Scott Armstrong's *The Brethren: Inside the Supreme Court* (1979). A recent example of this genre that has generated controversy is Edward Lazarus's *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* (1998). Perhaps proving the high value that judges place on the secrecy of their deliberations, a court of appeals judge has vigorously attacked Lazarus for revealing the Court's deliberations in his book. See generally Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835 (1999) (reviewing Lazarus work cited *supra*). Among other points, Judge Kozinski notes that piercing the veil of secrecy that had previously shrouded the Court's deliberations will have the effect of making the Court's future deliberations "more guarded and less productive"—defeating one of Lazarus' ostensible objectives for writing the book. *Id.* at 875. "After all, you never know whether the next Edward Lazarus is lurking within the chambers down the hall—or within your own. *Closed Chambers* is likely to become a self-fulfilling prophecy." *Id.*

<sup>287</sup> In the last few years, for example, the Court has declared private sexual relations to be outside the bounds of governmental regulation, *Lawrence v. Texas*, 539 U.S. 558 (2003); established a constitutional framework for affirmative action in law school admissions, *Grutter v. Bollinger*, 539 U.S. 306 (2003); restrained punitive damage awards in state courts, *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003); resolved long-standing constitutional questions regarding school choice programs, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); and overturned or called into question dozens of state laws regulating partial-birth abortion, *Stenberg v. Carhart*, 530 U.S. 914 (2000). One Justice has even suggested (sarcastically) that, given its vast power, perhaps the American people should have more direct influence over the Court's membership. See *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 1000–01 (1992) (Scalia, J., dissenting).

open up the executive branch's deliberations while largely ignoring a branch with vast power and no direct accountability to the public.<sup>288</sup>

The merger envisioned by this Comment would bring four immediate benefits. Most importantly, the presidential communications privilege, provides a better balance between the need for evidence and the legitimate government interest in secrecy than the deliberative process privilege. Despite the dismissive comments of some commentators,<sup>289</sup> the policies underlying the deliberative process privilege are important to the government's effectiveness, encouraging both the free flow of information within government and creativity and risk taking by government agencies.

Second, it would eliminate the problem created by the per se governmental misconduct exception, which exists only in the deliberative process privilege. The presidential communications privilege, considered more "important" by the courts, is only defeated by a "focused" showing of need by the party seeking discovery, even when governmental misconduct is at issue and even in a criminal case.<sup>290</sup> By contrast, the deliberative process privilege "disappears altogether" when there is "any reason to believe" governmental misconduct has occurred.<sup>291</sup> This Comment has already noted the difficulty in fairly applying this exception,<sup>292</sup> which (somewhat counter-intuitively) would be ameliorated by reverting to an ad hoc need/interest test like that provided by the presidential communications privilege. The inquiry would be turned away from a difficult preliminary determination of the merits of a litigant's case and toward the policies behind the privilege—specifically whether the litigant really needs to override the deliberative privilege because of the unavailability of other evidence.

Third, merging the privileges would immediately end the pointless exercise engaged in by courts attempting to separate "deliberative" material, worthy of protection, from merely "factual" or "post-decisional" material, which falls outside the deliberative privilege.<sup>293</sup> Unlike the deliberative privilege, the presidential communications privilege applies equally to factual materials used in presidential deliberations, as well as post-decisional materials, which are often "revelatory of the President's deliberations—as, for example, when the President decides to pursue a particular course of action, but asks his advisers to submit follow-up reports so that he can moni-

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<sup>288</sup> But see Arthur Selwyn Miller & D.S. Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 BUFF. L. REV. 799 (1973) (advocating public disclosure of Supreme Court deliberations).

<sup>289</sup> See, e.g., 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 131 (arguing that the privilege should be overridden when there is any need for the evidence, because the instrumental rationale is so flimsy).

<sup>290</sup> See *United States v. Nixon*, 418 U.S. 683, 706 (1974); see also *In re Sealed Case*, 121 F.3d 729, 751 (D.C. Cir 1997).

<sup>291</sup> *In re Sealed Case*, 121 F.3d at 746.

<sup>292</sup> See *supra* Part III.C.

<sup>293</sup> See *supra* notes 37–46 and accompanying text.

tor whether this course of action is likely to be successful.”<sup>294</sup> Releasing factual material used in executive branch deliberations not involving the President is equally “revelatory” of those deliberations. Therefore, importing this concept to the deliberative process privilege would better fulfill that privilege’s purpose while side-stepping useless collateral disputes.<sup>295</sup>

Finally, merging the two privileges would rationalize this area of law, in order to dispel some of the confusion that has arisen in courts.<sup>296</sup> Consolidating these two privileges will contribute to predictability in the law and make this doctrine somewhat easier to apply and understand.

## VI. CONCLUSION

The qualified nature of the deliberative process privilege leads one to wonder whether it really delivers the instrumental gains that it promises. While the deliberative process privilege exerts a vast influence over civil litigation involving the government, as well as Freedom of Information Act requests, the relative ease with which it can be overridden means that perhaps it would be better if we either did not have the privilege at all, or made it absolute.

The first step towards reform of the privilege is to recognize that it really does embody important principles of sound governance, promoting long-term thinking within the framework of democratic politics, as well as keeping the executive branch in parity with the other two branches. The second step to reform is to recognize that the policies behind the presidential communications privilege and the deliberative process privilege are identical, and thus it would make sense, both on substantive grounds and for the sake of judicial economy, to merge the two privileges into a unitary executive privilege.

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<sup>294</sup> *In re Sealed Case*, 121 F.3d at 745–46. *But see Harvard Case Note*, *supra* note 43, at 866 n.42 (criticizing this aspect of the opinion).

<sup>295</sup> *See* 26A WRIGHT & GRAHAM, *supra* note 2, § 5680, at 139–44 (griping about the fruitless disputes engendered by the amorphous fact-opinion distinction).

<sup>296</sup> *See id.* § 5662, at 484–92 (detailing how this area of law is “a mess”—due partly to confusion in nomenclature).

