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THE DELIBERATIVE PROCESS PRIVILEGE

Russell L. Weaver*
James T. R. Jones**

During the last thirty years, the deliberative process privilege, which protects the internal deliberations of governmental officials,¹ has emerged as one of the important governmental privileges. It is a branch of the executive privilege. But, unlike the presidential version of executive privilege, which the President has invoked in several well-publicized confrontations with Congress and the judiciary,² including the Watergate controversy,³ the deliberative process privilege has a less glamorous past. Its major impact has been on the day-to-day functioning of the federal government. It has been invoked in a wide array of discovery disputes involving such diverse

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1. *Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987) (deliberative process privilege "protects the deliberative and decisionmaking processes of the executive branch, [and] rests most fundamentally on the belief that were agencies forced to operate in a fishbowl, . . . the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer"); *Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484, 1497 (D.C. Cir. 1984) ("[T]he purpose . . . to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decisionmakers without fear of publicity [that might] . . . inhibit frank discussion of policy matters and likely impair the quality of decision."). See also *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982); *Bristol-Meyers Co. v. FTC*, 598 F.2d 18, 23 (D.C. Cir. 1978); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978).

2. See *The Power of the President to Withhold Information from the Congress: Hearing on S. 921 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. 78-82, 108-12 (1958) [hereinafter *Hearing*] (Department of Justice study); R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 167-82, 187-94 (1974). See also *infra* text accompanying notes 31-33.

3. *United States v. Nixon*, 418 U.S. 683, 714 (1974).

matters as the Vietnam War,⁴ Agent Orange,⁵ police abuse,⁶ draft resisters,⁷ aircraft accidents,⁸ civil service dismissals,⁹ anti-competition proceedings,¹⁰ petroleum price controls,¹¹ EPA lead control regulations,¹² and customs service investigations.¹³

Litigants seek access to deliberative process materials for a variety of reasons. Some seek a better understanding of agency action, and believe that deliberative statements will be insightful.¹⁴ Some seek to overturn agency action, using the device of contemporaneous construction discovery,¹⁵ and believe that statements made during the deliberative process will be helpful.¹⁶ Others may want factual data, contained in predecisional materials,

4. *Westmoreland v. CBS*, 584 F. Supp. 1206 (D.D.C. 1984), *aff'd in part, rev'd in part*, 770 F.2d 1168 (D.C. Cir. 1985).

5. *Russell v. Department of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982).

6. *United States v. O'Neill*, 619 F.2d 222 (3d Cir. 1980).

7. *Wayte v. United States*, 470 U.S. 598, 614 (1985).

8. *Lacy v. United States Dep't of the Navy*, 593 F. Supp. 71 (D. Md. 1984).

9. *McClelland v. Andrus*, 606 F.2d 1278 (D.C. Cir. 1979).

10. *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971).

11. *Conoco Inc. v. United States Dep't of Justice*, 687 F.2d 724 (3d Cir. 1982).

12. *Ethyl Corp. v. EPA*, 478 F.2d 47 (4th Cir. 1973).

13. *Timken Co. v. United States Customs Serv.*, 531 F. Supp. 194 (D.D.C. 1981).

14. *See Amoco Prod. Co. v. United States Dep't of Energy*, 29 Fed. R. Serv. 2d (Callaghan) 402, 403-04 (D. Del. 1979). Motions to compel discovery were before the court. The judge concluded that discovery was appropriate to help in understanding the agency's action. "The threshold and perhaps crucial issue in these cases, however, deals not with whether agency action is infirm but rather with determining what action the agency took." *Id.* at 403-04. *See also Tenneco Oil Co. v. Department of Energy*, 475 F. Supp. 299 (D. Del. 1979).

15. The label "contemporaneous construction discovery" is a misnomer. The label implies that discovery is sought for the purpose of determining whether an interpretation was contemporaneously issued and therefore entitled to deference under the contemporaneous construction principle. For a discussion of that principle, see *Great N. Ry. v. United States*, 315 U.S. 262, 275 (1942); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933). In fact, under this label, discovery is sought for a wide variety of purposes. Litigants actually use contemporaneous construction discovery for more general attacks on agency interpretations. In some cases, the information sought relates to how an interpretation has been applied: whether it was contemporaneously issued and has been consistently applied.

16. If discovery reveals that the agency's present interpretation differs from its contemporaneous one, or that the present interpretation has been inconsistently applied, it is argued that the present interpretation is entitled to little or no deference. *See, e.g., United States v. Exxon Corp.*, 87 F.R.D. 624, 630-33 (D.D.C. 1980); *see also Quincy Oil, Inc. v. Federal Energy Admin.*, 468 F. Supp. 383, 388 (D. Mass. 1979). In some cases, information is sought relating to a regulation's promulgation. In these instances, litigants hope to demonstrate that the agency's present interpretation conflicts with its original intent. *See Gulf Oil Corp. v. Schlesinger*, 465 F. Supp. 913 (E.D. Pa. 1979). Litigants do not specifically request discovery

that the government has compiled and that would be difficult or impossible to obtain outside the government.¹⁷ Agencies resist the discovery, fearing that the release of deliberative materials will chill the deliberative process and will have an adverse effect on the quality of agency decisionmaking.¹⁸

Litigation about the privilege has presented the courts with many difficult issues. May agency attorneys assert the privilege, or must other officials?¹⁹ Courts that require assertion by non-attorneys disagree about

regarding legislative history. Instead, they request discovery of "agency officials responsible for formulating and interpreting the regulations at issue." *Id.* at 916. In doing so, they try to reconstruct the legislative history by means of discovery. See *McCulloch Gas Processing Corp. v. Department of Energy*, 650 F.2d 1216, 1229 (Temp. Emer. Ct. App. 1981) (discovery of rule-making officials allowed); *Amoco Prod. Co. v. United States Dep't of Energy*, 29 Fed. R. Serv. 2d (Callaghan) 402, 404-05 (D. Del. 1979) (court extended discovery to pre-promulgation documents in attempt to find out what "the law was"). This type of discovery is unusual. It is, however, discussed in *United States v. Exxon Corp.*, 87 F.R.D. 624 (D.D.C. 1980) (Exxon allowed to discover lower level, unofficial agency statement that interpreted agency regulation); *Tenneco Oil Co. v. Department of Energy*, 475 F. Supp. 299 (D. Del. 1979) (oil company granted request for production of information concerning construction of regulation); *Gulf Oil Corp. v. Schlesinger*, 465 F. Supp. 913 (E.D. Pa. 1979) (contemporaneous construction used to interpret Federal Energy Administration ruling). The validity of this type of "legislative history" is open to question. See Weaver, *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. CIN. L. REV. 681 (1984).

17. For example, in the early 1980s, the City of Long Beach and the State of California brought an antitrust action against several major oil companies. Market data, both as to the pricing and allocation of crude oil and petroleum products, had been compiled by the U.S. Department of Energy and its predecessor agencies. The defendants sought access to this information.

18. See *infra* text accompanying notes 40-42.

19. Compare *Pierson v. United States*, 428 F. Supp. 384, 393 (D. Del. 1977) (when defendant argued that the privilege could be asserted without a formal affidavit from the Commissioner, the court rejected the argument; "this Court can find no persuasive authority to support the defendant's position that executive privilege, constitutional or not, can be asserted by someone other than the responsible agency head, in this case, the Commissioner") and *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981) ("only the agency head may assert the privilege after that officer's personal consideration of the matter. . . . The affirmations of staff attorneys, especially those participating in pending litigation are legally insufficient.") and *Amchem Prods., Inc. v. GAF Corp.*, 64 F.R.D. 550, 553-54 (N.D. Ga. 1974) (court noted that "defendant has never filed with the court a formal claim of executive privilege. . . , executive privilege has been asserted in this case only by counsel to the defendant" and that "[o]rdinarily there must be a formal claim of privilege by the head of the department") with *United States Dep't of Energy v. Brett*, 659 F.2d 154, 155 (Temp. Emer. Ct. App. 1981), *cert. denied*, 456 U.S. 936 (1982) (court rejected the notion that the privilege must be asserted by the head of the agency; "We conclude that the court erred in ruling that this privilege may be asserted only by the head of an agency."). See *infra* text accompanying notes 122-57. See also *United States v. Board of Educ.*, 610 F. Supp. 695, 698 (N.D. Ill. 1985); *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 519 (D. Del. 1980); *Smith v. FTC*, 403 F. Supp. 1000, 1016 (D. Del. 1975).

which official must make the assertion, and how it must be asserted.²⁰ Litigation is further complicated by the fact that the privilege is qualified, and can be overridden by a sufficient demonstration of need.²¹ The evaluation of need must be made on a document-by-document basis as to each document involved in a search request.²² This evaluation can be time-consuming, and can impose a great burden on judicial resources.²³

20. Some courts require assertion by the head of the agency after personal consideration. See *Mobil Oil Co. v. Department of Energy*, 102 F.R.D. 1, 5 (N.D.N.Y. 1983); *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *Smith v. FTC*, 403 F. Supp. 1000, 1017 (D. Del. 1975). Other courts permit assertion by lower-level officials. See *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 5-6 (N.D.N.Y. 1983) (“[T]his power to claim the privilege may be delegated by the head of the agency, but only to a subordinate with high authority.”); *United States v. Exxon Corp.*, 87 F.R.D. 624, 637 (D.D.C. 1980) (court wrote opinion, not to rule on the validity of privilege assertions, but to guide parties during the conduct of discovery and concluded that “[W]e do not believe that the affidavit need be sworn to by the head of the agency. Instead, it may be sworn to by an official, with delegated authority from the Secretary, to assert such representations.”).

21. *United States v. Board of Educ.*, 610 F. Supp. 695, 698 (N.D. Ill. 1985); *United States v. Capitol Serv., Inc.*, 89 F.R.D. 578, 583 (E.D. Wis. 1981); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 327 (D.D.C. 1966), *aff’d sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

22. In *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981), the court pointed out that applicability of the deliberative process privilege depends on whether “the material is ‘so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency.’ . . . [T]he outcome is dependent upon the individual document considered and the role it plays in the administrative process. . . .” *Id.* (quoting *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 866 (1980)). See also *Freeman v. Seligson*, 405 F.2d 1326, 1338-39 (D.C. Cir. 1968).

23. See *Senate of Puerto Rico v. United States Dep’t of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987) (“[W]e appreciate the difficult task confronting district court judges facing inherently fact-dependent exemption(s) claims [exemption(s) of FOIA which include the deliberative process].”). Courts have commented on the immense burdens imposed on courts in contemporaneous construction cases. The deliberative process privilege is heavily involved in many of these cases. In *United States Dep’t of Energy v. Crocker*, 629 F.2d 1341 (Temp. Emer. Ct. App. 1980), the court remarked that:

We are aware of the burden imposed upon the district judges by the broad discovery, covering hundreds or even thousands of documents, undertaken by parties in litigation with DOE, given the assertion of privileges, as here, with respect to such a relatively large proposition of the documents sought. The pattern of seeking mammoth discovery of DOE files is emerging along well-defined lines. . . .

Id. at 1345. The court then quoted the district court judge in *Coastal Corp. v. Duncan*, 86 F.R.D. 514 (D. Del. 1980), who remarked in referring to “the enormous burden of resolving questions of privilege in document discovery” that “[t]his type of litigation just cannot be controlled under present circumstances.” *Crocker*, 629 F.2d at 1345. In *Freeman v. Seligson*, 405 F.2d 1326 (D.C. Cir. 1968), the court

This Article examines the privilege. Part I traces its origins and early development. Parts II-IV examine substantive and procedural requirements for invocation of the privilege, and the process by which those claims are evaluated.

I. ORIGINS AND DEVELOPMENT

The deliberative process privilege originated in the principles underlying the English "crown privilege."²⁴ In the eighteenth and nineteenth centuries that privilege did not expressly delineate a deliberative process privilege, but it did protect a wide range of governmental communications. Among those were the identity of an informer,²⁵ correspondence of or between government officials,²⁶ and military reports.²⁷ At least some of these were of a deliberative nature.²⁸

referred to the "almost certain, laborious page-by-page examination" of documents which would be required. *Id.* at 1338-39.

24. "Crown privilege" makes secret such things as parliamentary deliberations, state secrets and papers, confidential proceedings of the Privy Council, and communications by or to public officials in the discharge of their public duties. J. BUZZARD, R. MAY & M. HOWARD, *PHIPSON ON EVIDENCE* § 14-04 (13th ed. 1982). While the term "crown privilege" is no longer employed, the change in nomenclature is recent. *Id.* § 14-08; H. WADE, *ADMINISTRATIVE LAW* 721, 726-28 (5th ed. 1982). The rationale of 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." *Crown or State Privilege*, 3 REV. OF INT'L COMMISSION OF JURISTS 29, 29 (1969).

25. *E.g.*, *Rex v. Hardy*, 24 How. St. Tr. 199, 819-20 (1794); *Rex v. Akers*, 170 Eng. Rep. 850 (1790); *cf.* *Rex v. Watson*, 171 Eng. Rep. 591, 600 (K.B. 1817) (taker of shorthand note could not be asked to whom in government he delivered it).

26. *E.g.*, *Wadeer v. East India Co.*, 44 Eng. Rep. 360, 362-63 (Ch. App. 1856) (East India Company documents governmental and privileged for public policy reasons); *Smith v. East India Co.*, 41 Eng. Rep. 550, 552 (Ch. 1841) (East India Company correspondence "within that class of official communications which are privileged, inasmuch as they cannot be subject to be communicated . . . without injury to the public interests"); *Cooke v. Maxwell*, 171 Eng. Rep. 614, 615 (K.B. 1817) (instructions from colonial governor to military officer held privileged); *Wyatt v. Gore*, 171 Eng. Rep. 250 (C.P. 1816) (letter between colonial attorney general and lieutenant governor held privileged); *Home v. Bentinck*, 129 Eng. Rep. 907 n.(b) (Ex. Ch. 1820) (official correspondence of Secretary of State observed to be privileged).

27. *E.g.*, *Home v. Bentinck*, 129 Eng. Rep. 907 (Ex. Ch. 1820) (report of military inquiry into officer's conduct held privileged); *Beatson v. Skene*, 157 Eng. Rep. 1415, 1421-22 (Ex. 1860) (military report held by Secretary of State for War held privileged; court stated "it cannot be laid down that . . . all communications to the heads of departments, are to be produced and made public whenever a suitor in a Court of Justice thinks his case requires such production"). Other state secrets were also privileged. *E.g.*, *Bishop Atterbury's Trial*, 16 How. St. Tr. 323, 494, 495-96, 543, 587, 629-30, 672 (H.L. 1723) (in treason trial code by which

Early American cases recognized an executive privilege derived, to some degree, from the English crown privilege precedents.²⁹ These cases protected the deliberations of the President and other high-level officials, but did not address the routine concerns of the lower echelons of government.³⁰ They involved, for example, President Washington's assertion of privilege against congressional inquiries into the St. Clair military expedition and the Jay Treaty³¹ and President Jackson's assertions against various con-

supposedly ciphered letters deciphered, warrant to intercept mail held privileged).

In his celebrated compilation of English evidence law, Sir James Fitzjames Stephen observed in article 112 that "No one can be compelled to give evidence relating to affairs of State, or as to official communications between public officers upon public affairs, except with the permission of the officer at the head of the department concerned . . ." J. STEPHEN, *A DIGEST OF THE LAW OF EVIDENCE* art. 112 (3d ed. 1877). See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1460-61 (1985).

28. Most of the cases cited *supra* notes 26 and 27 involved deliberative materials. While some might involve the executive issues discussed *infra* notes 31-33, the majority feature the routine internal activities protected by the American deliberative process privilege.

29. American cases and other authorities have used crown privilege precedents. *E.g.*, *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 945 & nn. 10 & 12, 946 n.13 (Ct. Cl. 1958); *Wertheim v. Continental Ry. & Trust Co.*, 15 F. 716, 724 (C.C.S.D.N.Y. 1883); *Appeal of Hartranft*, 85 Pa. 433, 447 (1877); *In re Marks*, 121 Pa. Super. 181, 185-86, 183 A. 432, 434 (1936); 1 S. GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* § 251 (J. Wigmore 16th ed. 1899); J. HAGEMAN, *PRIVILEGED COMMUNICATIONS* §§ 306-1/2, 316, 317 (1889); H. UNDERHILL, *A TREATISE ON THE LAW OF EVIDENCE* § 175 (1894); 1 F. WHARTON, *A COMMENTARY ON THE LAW OF EVIDENCE IN CIVIL ISSUES* §§ 604-05 (2d ed. 1879); Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131, 145 & n.49 (1910). See *Bank Line v. United States*, 163 F.2d 133, 139 (2d Cir. 1947); *Worthington v. Scribner*, 109 Mass. 487, 489 (1872); 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2378, at 805 n.21 (McNaughton rev. 1961); Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73, 78 (1949). Their impact on the development of the deliberative process privilege is clear.

30. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 143-45 (1803), the right of Attorney General Lincoln not to disclose confidential matters that arose while he was Secretary of State arguably was based in the executive. See *id.* at 169-70. The dispute over the presidential letters at issue in *United States v. Burr*, 25 F. Cas. 30, 36-38 (C.C.D. Va. 1807) (No. 14,692d) and *United States v. Burr*, 25 F. Cas. 187, 191-93 (C.C.D. Va. 1807) (No. 14,694) involved executive considerations not featured in most deliberative process privilege disputes. Similar issues involving gubernatorial privilege arose in various states. *E.g.*, *Thompson v. German Valley R.R.*, 22 N.J. Eq. 111 (1871); *Appeal of Hartranft*, 85 Pa. 433 (1877); *Yoter v. Sanno*, 6 Watts 164 (Pa. 1837); *Gray v. Pentland*, 2 Serg. & Rawle 23 (Pa. 1815); cf. *Morris v. Creel*, 4 Va. (2 Va. Cas.) 49 (1816). Related issues included the confidentiality of state secrets, *Totten v. United States*, 92 U.S. 105 (1875), and the identity of informers. *E.g.*, *United States v. Moses*, 27 F. Cas. 5 (C.C.E.D. Pa. 1827) (No. 15,825); *Worthington v. Scribner*, 109 Mass. 487 (1872).

31. *Hearing*, *supra* note 2, at 78-79.

gressional inquiries.³² President Jefferson invoked the same privilege at various times during the Burr trials.³³ Over time the presidential privilege evolved into an array of privileges. All were governmental in nature, but they extended below the highest levels. Included were the state secrets³⁴ and informers³⁵ privileges. Cases did not recognize the deliberative process privilege by name, but did protect materials of the sort which the deliberative process privilege now encompasses.³⁶

32. *Id.* at 80-82.

33. *Id.* at 108-12. For an interesting challenge to the prevailing versions of the Washington, Jefferson, and Jackson incidents, see R. BERGER, *supra* note 2, at 167-82, 187-94.

34. The ancient state secrets privilege protects against disclosure of sensitive diplomatic, military, and public security information, both factual and opinion in nature. American precedents extend back to *Totten v. United States*, 92 U.S. 105 (1875), if not to *United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d). The Supreme Court fully developed the privilege in *United States v. Reynolds*, 345 U.S. 1 (1953), where it referred to "a privilege which is well established in the law of evidence." *Id.* at 6-7 & n.11. See, e.g., *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984); *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983); *Halkin v. Helms*, 690 F.2d 977, 990 & n.53 (D.C. Cir. 1982); M. LARKIN, *FEDERAL TESTIMONIAL PRIVILEGES* § 5.02[1], at 5-9 to -13 (1986); 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2378, at 794-96 (McNaughton rev. 1961 & Supp. 1987). See generally Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966); Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570 (1982).

35. The equally ancient informers privilege protects the identity of informers. E.g., *United States v. Moses*, 27 F. Cas. 5 (C.C.E.D. Pa. 1827) (No. 15,825); *Worthington v. Scribner*, 109 Mass. 487 (1872). *Roviaro v. United States*, 353 U.S. 53 (1957) was the modern elucidation of the informer's privilege. See generally M. LARKIN, *supra* note 34, § 7.01; 8 J. WIGMORE, *supra* note 29, § 2374(f), at 761.

36. *United States v. Cooper*, 25 F. Cas. 631, 637 (C.C.D. Pa. 1800) (No. 14,865) refused disclosure of unspecified official documents, but the basis for doing so is unclear. In dicta in *Howard v. Thompson*, 21 Wend. 319, 335-36 (N.Y. Sup. Ct. 1839), the court indicated that a letter from a postmaster to the United States Secretary of the Treasury about a customs employee would be privileged as "for aught that appears, these letters have performed no other office than furnishing a sort of information, vital, above all things, to the safe operation of the fiscal department of the government." *Id.* Similarly, in *United States v. Six Lots of Ground*, 27 F. Cas. 1097 (C.C.D. La. 1872) (No. 16,299), *aff'd sub nom.* *Semmes v. United States*, 91 U.S. 21 (1875), correspondence between a district attorney and the Attorney General was held privileged. "The district attorney represents the United States, and the correspondence between him and the attorney general is confidential in its nature and cannot be cited by third persons." *Id.* at 1097. Correspondence was again the issue in *Gardner v. Anderson*, 9 F. Cas. 1158 (C.C.D. Md. 1876) (No. 5,200). The court held an official letter from an appraiser of merchandise to the Secretary of the Treasury was privileged as "[c]ommunications in writing passing between officers of the government, in the course of official duty, relating to the business of their offices, are privileged from disclosure, on the ground of public policy, and the production will not be compelled by courts of law or equity." *Id.* at 1158. See also *In re Weeks*, 82 F. 729, 731 (D. Vt. 1897). In *Wertheim v. Continental Ry. & Trust Co.*, 15 F. 716 (C.C.S.D.N.Y.

The deliberative process privilege itself can be directly traced to two relatively recent decisions. In 1938 the Supreme Court protected the mental processes of government decisionmakers in *Morgan v. United States*.³⁷ Then,

1883), the court apparently acknowledged that "it is a good objection to producing the papers asked for that they are of a public nature and cannot be exhibited without injury to the public." *Id.* at 724 (footnote omitted). A number of Attorney Generals viewed disclosure of government information as inappropriate. *E.g.*, Civil Service Commission—Production of Records, 20 Op. Att'y Gen. 557, 558 (1893) (civil service records privileged when required by "general public interest"); Internal Revenue Suits, 16 Op. Att'y Gen. 24, 25-26 (1878) (tax records privileged as, in part "[t]hey are in the nature of confidential communications, intended by subordinate officers to enable a superior to perform the duty required of him by law"); Privileged Communications, 15 Op. Att'y Gen. 378 (1877) (official correspondence between Commissioner of Internal Revenue and a district attorney privileged); Records of Courts-Martial, 11 Op. Att'y Gen. 137, 142 (1865) ("The official transactions between the heads of departments of the Government and their subordinate officers are, in general, treated as 'privileged communications.'").

The Field Code, a noted product of the nineteenth century codification movement, included the provision that "[a] public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure." NEW YORK STATE COMMISSIONERS ON PRACTICE AND PLEADING, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK § 1710(5) (1850). While the scope of this privilege probably exceeded the deliberative process, it would seem to be included. For a brief history of the Field Code, see 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5005 (1977).

In the first half of the twentieth century more deliberative process materials were held protected. Among these were naval accident trial records, *e.g.*, Pacific-Atlantic S.S. Co. v. United States, 175 F.2d 632, 636-37 (4th Cir.), *cert. denied*, 338 U.S. 868 (1949); *State ex rel. Kent v. United States*, 1947 A.M.C. 1336, 1338-39 (D. Md. 1947); *see also, e.g.*, *The Wright*, 2 F. Supp. 43, 44 (E.D.N.Y. 1932) ("The subject of inquiry by the court may be broad and general in scope and may involve matters of public welfare and of the universal good of the service."); *cf.* *Moorman, Executive Privilege and the Freedom of Information Act: Sufficient Protection for Aircraft Mishap Reports?*, 21 A.F. L. Rev. 581 (1979) (government correspondence); *Zacher v. United States*, 227 F.2d 219, 226 (8th Cir. 1955), *cert. denied*, 350 U.S. 993 (1956) (letter from United States Attorney to Attorney General); Executive Department—Official Records—Testimony, 25 Op. Att'y Gen. 326 (1905) (Commerce Department records exempt under both privilege and housekeeping statute); *North Am. Airlines v. CAB*, 240 F.2d 867, 874 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 941 (1957) (staff studies and interoffice memoranda); *Continental Distilling Corp. v. Humphrey*, 17 F.R.D. 237, 241 (D.D.C. 1955). Other cases generally acknowledged the existence of a deliberative process-type privilege. *Reynolds v. United States*, 192 F.2d 987, 994 & n.9, 996 (3d Cir. 1951), *rev'd on other grounds*, 345 U.S. 1 (1953); *see also Walling v. Richmond Screw Anchor Co.*, 4 F.R.D. 265, 269 (E.D.N.Y. 1943) (also discusses housekeeping privilege); *United States v. General Motors Corp.*, 2 F.R.D. 528, 530 (N.D. Ill. 1942) ("It might be a valid objection to a particular interrogatory that it would require disclosure of matters which it would be against public policy to disclose."); *Fleming v. Bernardi*, 1 F.R.D. 624, 625 (N.D. Ohio 1941) (also mentions housekeeping privilege). Several states also protected deliberative process materials. *E.g.*, *Shallow v. Markert Mfg. Co.*, 175 Misc. 613, 24 N.Y.S.2d 823 (Sup. Ct. 1941) (federal

in 1958 Justice Reed built on *Morgan* when, sitting on the Court of Claims by designation, he decided *Kaiser Aluminum & Chemical Corp. v. United States*.³⁸ Justice Reed considered in *Kaiser* whether internal government documents must be disclosed.³⁹ He recognized the need for open, frank

wage and hour records privileged, possibly also under housekeeping privilege); *In re Marks*, 121 Pa. Super. 181, 183 A. 432 (1936) (health department records privileged); *Liquor Law Violation Informers*, 15 Pa. D. & C.2d 742, 743-46 (Att'y Gen. 1958).

For many years a federal statute protected deliberative process and other information from disclosure. The so-called "housekeeping" statute is now codified at 5 U.S.C. § 301 (1982). It provides:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

The last sentence was added in 1958. *See* Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547 (1958). Prior to the amendment, courts upheld regulations promulgated by the heads of executive departments forbidding subordinate officials from disclosing deliberative process-type materials, and thus blocked disclosure. *See, e.g.*, *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); *Boske v. Comingore*, 177 U.S. 459 (1900); *Walling v. Richmond Screw Anchor Co.*, 4 F.R.D. 265 (E.D.N.Y. 1943); *Fleming v. Bernardi*, 1 F.R.D. 624 (N.D. Ohio 1941); *Executive Department—Official Records—Testimony*, 25 Op. Att'y Gen. 326 (1905). The 1958 amendment rendered the statute essentially worthless as a protection for deliberative process material. *See generally* Note, *Discovery from the United States in Suits Between Private Litigants—The 1958 Amendment of the Federal Housekeeping Statute*, 69 YALE L.J. 452 (1960).

37. 304 U.S. 1, 18 (1938) (in challenge to method Secretary of Agriculture used to set stockyard rates, Court held "it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusion if he gave the hearing which the law required"); *accord* *United States v. Morgan*, 313 U.S. 409, 422 (1941). The *Morgan* rule protecting the mental processes of government decisionmakers was incorporated into the privilege in *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958), and *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325-26 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967). For more on the mental process rule, *see, e.g.*, B. SCHWARTZ, *ADMINISTRATIVE LAW* § 7.21 (2d ed. 1984).

38. 157 F. Supp. 939 (Ct. Cl. 1958). *Kaiser* is widely regarded as critical to the development of the deliberative process privilege. *See, e.g.*, *United States v. Procter & Gamble Co.*, 25 F.R.D. 485, 490 (D.N.J. 1960); *Hamilton v. Verdow*, 287 Md. 544, 559, 414 A.2d 914, 923 (1980); R. BERGER, *supra* note 2, at 232; Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 79-80 n.81 (1973); Note, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 156 (1976).

39. While so doing, Justice Reed discussed the state secrets and informers privileges and touched on various English precedents. *Kaiser*, 157 F. Supp. at 944-45, 946 & nn.8, 10, 12 & 13.

discussions among government officials about proposed or contemplated action.⁴⁰ He believed disclosure of official deliberations would inhibit those discussions, invade the mental processes of government officials, and adversely affect the quality of administrative decisionmaking.⁴¹ Accordingly, he held that a document containing deliberative process information was privileged and need not be disclosed.⁴²

Neither *Morgan* nor *Kaiser* clearly articulated the bases of the privilege. Later courts have debated whether the deliberative process privilege has constitutional, as well as common law, roots.⁴³ The privilege is based in the executive privilege, which in *United States v. Nixon*⁴⁴ the Supreme Court recognized as a constitutional privilege based upon the separation of powers and the need for confidential communication “[b]etween high Government officials and those who advise and assist them in the performance of their manifold duties.”⁴⁵ Whether this holding was soundly

40. *Id.* at 945-46. Justice Reed noted that the privilege preserved “the policy of open, frank discussion between subordinate and chief concerning administrative action.” *Id.* at 946.

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.

Id. at 945-46.

41. Justice Reed cited the *Morgan* decisions discussed *supra* note 37 as authority for the mental process point. *Kaiser*, 157 F. Supp. at 946. Some sources ascribe constitutional separation of powers underpinnings to the mental process branch of the deliberative process privilege. *See infra* note 47.

42. *Id.* at 947.

43. *See infra* note 48.

44. 418 U.S. 683, 703 (1974).

45. *Id.* at 705-06. *Accord, e.g., In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1519 (11th Cir.), *cert. denied*, 477 U.S. 904 (1986); *Sierra Club v. Costle*, 657 F.2d 298, 405 & n.522 (D.C. Cir. 1981); *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 541 (D.C. Cir. 1977); *Dellums v. Powell*, 561 F.2d 242, 246 (D.C. Cir.), *cert. denied*, 434 U.S. 880 (1977); *United States v. Capitol Serv., Inc.*, 89 F.R.D. 578, 582-83 (E.D. Wis. 1981); *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 581 (E.D.N.Y. 1979); *Hamilton v. Verdow*, 287 Md. 544, 562, 414 A.2d 914, 924 (1980); M. LARKIN, *supra* note 34, § 5.01, at 5-1 & n.4; 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* § 509[11] (1986); Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 389 (1976); Perritt & Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years*, 63 GEO. L. REV. 725, 738 & n.96 (1975); Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 U.C.L.A. L. REV. 116, 118 (1974); Note, *supra* note 38, at 142 n.2. Prior to the decision in *United States v. Nixon*, the constitutional status of executive privilege in cases like *Marbury v. Madison* and *United States v. Burr*, *supra* note 30, was much debated. The United States asserted a constitutional status for the deliberative process privilege in *United States v. Reynolds*, 345 U.S. 1, 6 & n.9 (1953) and *United States v. Procter & Gamble Co.*, 25 F.R.D. 485, 489-90 (D.N.J. 1960).

based is still debated.⁴⁶ Regardless, lower courts treat at least the mental process branch of the privilege as constitutionally based.⁴⁷

Recent decisions seem to treat the privilege as common law based,⁴⁸ emphasizing policy justifications for protecting deliberative information. They recite the need to foster frank and candid internal government communications, to protect the public from the confusion that premature exposure to policies before they are adopted would cause, and to protect the decisionmaking process by insuring that officials are judged by what they actually do, not by what they considered before deciding.⁴⁹ As one

46. Some scholars, of whom Raoul Berger has been the most prolific, deny that any branch of executive privilege, including the deliberative process privilege, is truly based in the Constitution. *E.g.*, R. BERGER, *supra* note 2, at 1; Berger, *Executive Privilege: A Presidential Pillar Without Constitutional Support*, 26 VILL. L. REV. 405 (1981); Berger, *Constitutional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865 (1975); Berger, *The Incarnation of Executive Privilege*, 22 U.C.L.A. L. REV. 4 (1974); Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. 1044 (1965); Gard, *Executive Privilege: A Rhyme Without a Reason*, 8 GA. L. REV. 809 (1974); Owens, *The Establishment of a Doctrine: Executive Privilege After United States v. Nixon*, 4 TEX S.L. REV. 22 (1976); see *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.17 (1975); *United States v. O'Neill*, 619 F.2d 222, 228 n.2 (3d Cir. 1980); Halperin v. Kissinger, 606 F.2d 1192, 1211 & n.131 (D.C. Cir. 1979), *aff'd in part by an equally divided court, cert. dismissed in part*, 452 U.S. 713 (1981). *Contra* Clark, *Executive Privilege: A Review of Berger*, 8 AKRON L. REV. 324 (1975); Winter, *The Seedlings for the Forest* (Book Review), 83 YALE L.J. 1730 (1974). Many focus on the use of executive privilege by the President against Congress rather than in the judicial process.

47. See, *e.g.*, *In re Franklin Nat'l Sec. Litig.*, 478 F. Supp. 577, 581 (E.D.N.Y. 1979); 2 J. WEINSTEIN & M. BERGER, *supra* note 45, § 509[05], at 509-37 & n.5 (1986).

48. Many authorities agree that regardless of the constitutional issues discussed *supra* at 4 and notes 43-47, the privilege has common law roots. "Historically, and apart from the Constitution, the privilege against public disclosure or disclosure to other coequal branches of the Government arises from the common sense-common law principle that not all public business can be transacted completely in the open." *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971) (Wilkey, J., concurring). *Accord, e.g.*, *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1519 (11th Cir.), *cert. denied*, 477 U.S. 904 (1986); *Vaughn v. Rosen*, 523 F.2d 1136, 1146 & n.37 (D.C. Cir. 1975); *Nixon v. Sirica*, 487 F.2d 700, 763 (D.C. Cir. 1973) (Wilkey, J., dissenting); *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 580 (E.D.N.Y. 1979); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 944-45 (Ct. Cl. 1958); *Hamilton v. Verdow*, 287 Md. 544, 562, 414 A.2d 914, 924 (1980); M. LARKIN, *supra* note 34, § 5.01, at 5-1; Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1416 (1974); Engel, *Introduction: Information Disclosure Policies and Practices of Federal Administrative Agencies*, 68 NW. U.L. REV. 184, 186 (1973); see Berger, *How the Privilege for Governmental Information Met Its Watergate*, 25 CASE W. RES. L. REV. 747, 761 (1975); Levi, *Confidentiality and Democratic Government*, 30 REC. ASS'N BAR CITY N.Y. 323, 323 (1975).

49. *E.g.*, *Russell v. Department of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978); *Marzen v. United States Dep't of Health & Human Servs.*, 632 F. Supp. 785, 813 (N.D. Ill. 1986), *aff'd*, 825 F.2d 1148 (7th Cir. 1987).

court observed, the privilege "rests most fundamentally on the belief that were agencies forced to 'operate in a fishbowl,' the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer."⁵⁰

II. SUBSTANTIVE REQUIREMENTS

A. *Predecisional*

In order for the deliberative process privilege to apply, several requirements must be satisfied. First, the communication must have been predecisional.⁵¹ In other words, it must have been made before the deliberative process was completed. There are several reasons for this requirement. The privilege is applied for fear that disclosure of predecisional communications will stifle robust discussion between agency officials, and will adversely affect the quality of agency decisionmaking. These concerns are not present with postdecisional communications.⁵² The agency's decision

50. *Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987) (citation omitted). *Accord, e.g.*, *Thurner Heat Treating Corp. v. NLRB*, 839 F.2d 1256, 1259 (7th Cir. 1988); *Wolfe v. Department of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988).

51. *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987); *Afshar v. Department of State*, 702 F.2d 1125, 1139 (D.C. Cir. 1983); *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982); *Tabcor Sales Clearing, Inc. v. Department of the Treasury*, 471 F. Supp. 436, 438 (N.D. Ill. 1979). In *Ginsburg, Feldman & Bress v. FEA*, 591 F.2d 717, 733 (D.C. Cir. 1978), *reh'g en banc*, 591 F.2d 752 (1978), *cert. denied*, 441 U.S. 906 (1979), the court held:

The Court has stated that the quality of a decision is not impaired by disclosure made after the decision which are designed to explain it; however, the Court has indicated that the disclosure of predecisional communications can impair the deliberative process by inhibiting discussion by policymakers and their advisors.

Id. (citations omitted).

52. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975). "The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, *if adopted*, will become public is slight." *Id.* (emphasis in original). The court in *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980) stated:

DOE asserts that its attorneys will be less "candid" in the future if these [postdecisional] memoranda are disclosed, but we are unable to find in any of the fourteen documents any statement which could be described as "candid." We can see no possibility whatsoever that an attorney performing this job would be less "frank" or "honest" if he or she knew that the document might be made known to the public; there is little to be frank or honest about when explaining on what date a transaction occurs under 10 C.F.R. § 212.31 or whether 10 C.F.R. § 212.10 permits

has already been made, and there are no deliberations to be stifled.

There is another, perhaps more important, reason why post-decisional statements are unprotected. Agencies are not free to develop "secret" law that they shield from the public and apply at their whim or caprice.⁵³ Many postdecisional communications contain the decision that has been made, and therefore reflect the agency's regulatory policy. Such policy should be made public.⁵⁴ Those subject to regulatory requirements are entitled to fair notice of the agency's position. Accordingly, in *Jordan v. United States Department of Justice*,⁵⁵ the court ordered the agency to turn over instruction manuals and guidelines. They were not deliberative. They had already been adopted.

Certain types of communications are more likely to be predecisional than others. Included are upstream inquiries (from subordinates to superiors).⁵⁶ Suppose, for example, that agency personnel are uncertain about how to interpret a regulatory requirement. They send a memo to their supervisors requesting clarification. In their memo, they explain the options

a buyer and seller to agree to a price higher than that set by the agency. . . .
See also Federal Open Market Comm. v. Merrill, 443 U.S. 340, 354 (1979); Afshar v. Department of State, 702 F.2d 1125, 1142 (D.C. Cir. 1983); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971); Brinton v. Department of State, 636 F.2d 600, 606 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); United States v. Board of Educ., 610 F. Supp. 695, 698 (N.D. Ill. 1985); Brinton v. Department of State, 636 F.2d 600, 606 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); United States v. AT&T, 86 F.R.D. 603, 636 (D.D.C. 1979).

53. *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983) (Maritime Administration's Chief Counsel Opinions (CCOs) not protected by the deliberative process privilege; court concluded that "CCOs and their summaries are 'statements of policy and interpretations which have been adopted by the agency'"); *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982) ("The Agency must thus carry the burden of establishing that documents contain 'the ideas and theories which go into the making of the law' and not 'the law itself'"; documents must not be part of the "'working law' of the agency"); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) ("A strong theme of our opinions has been that an agency will not be permitted to develop a body of secret law, . . . hidden behind a veil of privilege because it is not designated as formal, binding, or final."); *see also* Afshar v. Department of State, 702 F.2d 1125 (D.C. Cir. 1983); Brinton v. Department of State, 636 F.2d 600, 606 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Badran v. United States Dep't of Justice*, 652 F. Supp. 1437, 1439 (N.D. Ill. 1987); *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 5 (N.D.N.Y. 1983).

54. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971).

55. 591 F.2d 753, 774 (D.C. Cir. 1978).

56. *See* *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 586 (D.C. Cir. 1987); *Schlefer v. United States*, 702 F.2d 233, 238 (D.C. Cir. 1983).

and make suggestions about which option is preferable. Then, higher-level officials resolve the issue and send instructions to lower-level personnel about how to resolve the issue. The memo to the supervisors might be predecisional, but the memo from the supervisors would not be.⁵⁷ The latter contains the decision and explains its justifications. But downstream communications are not always postdecisional. If they do in fact precede the decision, as when they involve a discussion between superior and subordinate about what the appropriate policy ought to be, a downstream communication may be predecisional.

Each case must be decided on its own merits, and the source of a communication is not necessarily determinative of its privileged status. Agency counsel's communications might be predecisional in some cases, but postdecisional in others. In *Murphy v. Department of the Army*,⁵⁸ a general counsel's memorandum was deemed predecisional. It was an upstream memorandum that gave recommendations to the Secretary of the Army. In *Schlefer v. United States*,⁵⁹ on the other hand, the Maritime Administration's Chief Counsel's Opinions (CCOs) were deemed postdecisional. Although primary decisionmaking authority rested with subordinates, who had the right to accept or reject the counsel's opinions, those subordinates routinely followed such opinions.⁶⁰ Moreover, the Chief Counsel reviewed lower-level decisions and routinely refused to clear decisions that did not comply with its earlier opinions.⁶¹ Such opinions were written on the assumption that they would be followed. Later CCOs referred to their "holdings" and "rulings."⁶² The court concluded that such opinions were "authoritative" rather than deliberative, and that they embodied the "law."⁶³

Documents which are predecisional in nature retain their protection even after the decision is made.⁶⁴ This protection is essential. The privilege

57. See *Arthur Andersen & Co. v. IRS*, 679 F.2d 254 (D.C. Cir. 1982) (drafts of proposed revenue rulings and court held that documents, which flowed from subordinate to superior, were predecisional).

58. 613 F.2d 1151, 1154 (D.C. Cir. 1979).

59. 702 F.2d 233, 237-44 (D.C. Cir. 1983).

60. *Id.* at 241. The court pointed out that:

Finally, the Chief Counsel's ultimate decisionmaking authority on matters of statutory construction is confirmed by the practices and expressions of requesting officials and Chief Counsels. Neither the current nor any prior Chief Counsel whose testimony appears in the record could point to any instance in which a requesting official declined to follow the advice contained in a CCO that construed any of the three Acts of interest to *Schlefer*.

Id.

61. *Id.* at 239-40.

62. *Id.* at 240-41.

63. *Id.* at 244.

64. *May v. Department of the Air Force*, 777 F.2d 1012, 1014-15 (5th Cir.

assumes that discovery of predecisional communications may be harmful. But the harm, if it occurs, will generally impact future deliberations. The release of predecisional communications after a decision has been made may cause an agency damage, and may inhibit future communications. Those subject to the decision might be able to use predecisional statements to challenge the agency's final action.⁶⁵

The passage of time can have an important impact on the need to protect communications from disclosure. It might be quite inhibiting if, immediately after a decision is made, all deliberations related to that decision are publicly revealed. But, as time passes, the impact of disclosure on the willingness of these and other officials to give frank, candid advice may diminish.⁶⁶ As a result, disclosure might be more appropriate.⁶⁷

Predecisional communications can lose their predecisional status if the decisionmaker incorporates a predecisional communication by reference, or expressly adopts it in the final decision.⁶⁸ If so, the communication becomes part of the agency's decision. Since the final decision is not protected under this privilege, adoption of the predecisional communication in the decision deprives the communication of its privileged status. Of course, if only part of a communication is adopted or incorporated, only that portion of the privilege loses its protection.⁶⁹

1985) (court rejected argument that the documents in question were predecisional and deliberative when they were prepared, but that they lost that status when the decision was made); *United States v. Capitol Serv., Inc.*, 89 F.R.D. 578, 583 (E.D. Wis. 1981) ("[I]t follows that documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports, and expression of opinion within the agency.").

65. In *Brinton v. Department of State*, 636 F.2d 600, 605 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), the court concluded that certain documents were predecisional. However, at oral argument, appellant referred "to the age of these legal opinions—a period of several years—as an indication of their 'finality'." *Id.* at 605. The court rejected the argument. "[T]he age of the opinion has nothing to do with whether it has been adopted as effective agency working law." *Id.*

66. *Jabara v. Kelley*, 75 F.R.D. 475, 488 (E.D. Mich. 1977) dealt with the military/state secrets branch of the executive privilege. The court pointed out that: The passage of time has a profound effect upon such matters, and that which is of utmost sensitivity one day may fade into nothing more than interesting history within weeks or months. Any considerations of national security interests therefore must be viewed in the light of circumstances as they exist at the time the request for disclosure is made - not when the affidavit was prepared or the material filed with the court.

Id. (quoting *United States v. Ahmad*, 499 F.2d 851, 855 (3d Cir. 1974)).

67. *Id.*

68. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975); *Bristol-Meyers Co. v. FTC*, 598 F.2d 18, 23 (D.C. Cir. 1978).

69. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975); *Bristol-Meyers Co. v. FTC*, 598 F.2d 1125, 1138-43 (D.C. Cir. 1983). Two memoranda

Incorporation or adoption of a predecisional document involves more than a mere reference to the document. In *Swisher v. Department of the Air Force*,⁷⁰ a final report mentioned a predecisional Report of Inquiry. Plaintiff argued that the final report's "allusion" to the Report of Inquiry was enough to trigger the latter document's disclosure. The court disagreed. Express adoption or incorporation requires a more substantial use of the document than an allusion to it.

Incorporation or adoption also involves more than mere "use" or "consideration" of a predecisional communication. In *Sterling Drug, Inc. v. FTC*,⁷¹ appellant sought disclosure of memoranda prepared by agency staff and its commissioners during the decision of a case. Appellant argued that these documents reflected the reasons for the agency's final decision. The court disagreed, emphasizing that all of the documents sought were preliminary. Individual commissioners may or may not have based their decision on the documents. This was true even for documents prepared by the commissioners. An individual commissioner might have prepared a document, setting forth his position, then changed his mind. And, even if the commissioner did rely on a document, there was no assurance that other commissioners adopted his reasoning. Thus, the documents did not necessarily reflect the rationale for the Commission's decision. Only documents issued by the Commission itself, which reflected its decision, had to be disclosed.⁷²

Those seeking disclosure will often have difficulty demonstrating that a document has been incorporated or adopted in the final decision, and

contained identical information. Plaintiff argued that "[t]he FBI should have been required to indicate, before its claim under [FOIA] exemption 5 was upheld, whether advice contained in the withheld portions of two memoranda was in fact adopted as the basis for agency action." *Id.* at 1138-39. The court reversed the district court judgment in favor of defendant, holding the document exempt. The case was remanded to allow defendant to demonstrate that the document was not "expressly adopted by the agency . . . in nonexempt memorandum explaining a final decision to take action" *Id.* at 1143. *See also* Arthur Andersen & Co. v. IRS, 679 F.2d 254, 257 (D.C. Cir. 1982); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

70. 495 F. Supp. 337, 339-40 (W.D. Mo. 1980), *aff'd*, 660 F.2d 369 (8th Cir. 1981).

71. 450 F.2d 698 (D.C. Cir. 1971).

72. *Id.* at 708. *See also* Kent Corp. v. NLRB, 530 F.2d 612 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976); SEC v. National Student Marketing Corp., 538 F.2d 404, 406-07 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977). In *National Student Marketing*, the appellants sought various documents which included memos prepared by individual commissioners and agency staff members. The lower court held that all but the Commission's final report were privileged. "The great bulk of the documents requested . . . are not 'Commission-authored' but rather . . . consist, with few exceptions, of memoranda among individual Commissioners, their legal assistants and Commission staff." *Id.* at 407. The court concluded that such documents were privileged. "Consequently, the court concluded that such documents could not be relied upon as indicators of agency intent." *Id.*

thereby has become postdecisional. In a few cases, the agency will state that it adopts or incorporates a predecisional document. But, in most cases, it will not. The agency relies, *sub silentio*, on a predecisional document. In *Orion Research Inc. v. EPA*,⁷³ Orion admitted that documents were predecisional when prepared in that they involved evaluations of technical proposals and recommendations regarding which one should be adopted. But Orion argued that the documents became postdecisional because higher-level officials had simply rubber-stamped the memos' conclusions. Because Orion could not prove that the conclusions were rubber-stamped, the court dismissed the argument as mere speculation.⁷⁴

Afshar v. Department of State took a preferable approach.⁷⁵ Two documents were involved. One was predecisional, the other postdecisional. Plaintiff tried to force the Department to state whether the predecisional document had been adopted, in toto, in the decision. The Department refused, and the district court refused to force the Department to do so. Then, the district court rendered summary judgment in favor of the Department. The D.C. Circuit reversed and remanded. Plaintiff was entitled to know whether predecisional documents had been adopted, and therefore become discoverable, before summary judgment was rendered against him.⁷⁶

73. 615 F.2d 551, 554-55 (1st Cir.), *cert. denied*, 449 U.S. 833 (1980).

74. *Id.* at 555. A similar conclusion was reached in *Ahearn v. United States Army Materials & Mechanics Research Center*, 580 F. Supp. 1405, 1407 (D. Mass. 1984). The facts were essentially the same. The court concluded that:

Contrary to plaintiff's view, the Court finds that the memorandum attached to the ROI [Report of Inquiry] gives no indication that the reasoning of the report has been adopted. The record merely shows that General Vessey approved the ROI and that he reached the same result as that of the investigating officers. This Court cannot conclude, then, that the General agreed with the opinions, conclusions and recommendations contained in the ROI. Accordingly, the Court rules that the opinions, conclusions and recommendations contained in the ROI are pre-decisional, and thus properly excludable under [FOIA] Exemption 5.

Id. (citation omitted). See *May v. Department of the Air Force*, 777 F.2d 1012, 1014-15 (5th Cir. 1985). The *May* court held that a document did not lose its predecisional status merely because a final decision had been rendered. In order to lose that status, the document had to be incorporated into the final opinion.

Id. See also *Bristol-Meyers Co. v. FTC*, 598 F.2d 18, 24 (D.C. Cir. 1978).

75. 702 F.2d 1125, 1138-43 (D.C. Cir. 1983).

76. The court stated that:

Since this record raises a genuine issue of fact as to whether the portions of the memoranda withheld under a claim of [FOIA] exemption 5 were expressly adopted by the agency in nonexempt memorandum explaining a final decision to take action, the government was not entitled to summary judgment as to these. We remand in order to allow the government an opportunity to show that they were not so adopted.

Id. at 1143.

B. Deliberative

The second requirement that must be met for the privilege to apply is that the communication must be deliberative in character.⁷⁷ It is not enough that a statement was made during the deliberative process. Rather, the statement itself must be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."⁷⁸ A wide variety of communications might satisfy this requirement. Included might be a communication that explains and discusses positions an agency might take on a particular issue,⁷⁹ drafts of a document, order or regulation,⁸⁰ comments on a draft document,⁸¹ or an agency's budget request submitted to the Office of Management and Budget.⁸² A draft

77. *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987); *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Badran v. United States Dep't of Justice*, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987); *Marzen v. United States Dep't of Health & Human Servs.*, 632 F. Supp. 785, 813-14 (N.D. Ill. 1986), *aff'd*, 825 F.2d 1148 (7th Cir. 1987).

78. *Paisley v. CIA*, 712 F.2d 686, 698-99 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984); *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). In *Amchem Prods., Inc. v. GAF Corp.*, 64 F.R.D. 550, 553 (N.D. Ga. 1974), the court noted that:

The defendant is apparently claiming some sort of executive privilege. Certainly defendant's counsel makes such a claim. However, no reason has been advanced by the defendant which would justify a finding of the privilege. The mere fact that the documents requested were prepared by staff personnel of the EPA for consideration by other staff cannot, without more, justify precluding the plaintiff from discovery of those documents

....

79. *King v. IRS*, 684 F.2d 517, 519-21 (7th Cir. 1982); *Murphy v. TVA*, 571 F. Supp. 502, 505-06 (D.D.C. 1983); *see Cliff v. IRS*, 496 F. Supp. 568, 575 (S.D.N.Y. 1980) (recommendation about whether to proceed with a proposed revenue procedure); *Tabcor Sales Clearing, Inc. v. Department of the Treasury*, 471 F. Supp. 436, 438 (N.D. Ill. 1979) (document "written in contemplation of amendments to the Internal Revenue Code and contains the author's opinion regarding the desirability and feasibility of the proposed amendments. The document is a communication written in the process of the Treasury Department's determination of what position the Department should take regarding the amendments. . . .").

80. *Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565 (D.C. Cir. 1987); *see Arthur Andersen & Co. v. IRS*, 679 F.2d 254 (D.C. Cir. 1982) (proposed revenue ruling); *Pies v. IRS*, 668 F.2d 1350 (D.C. Cir. 1981) (draft proposed regulations held privileged); *Westmoreland v. CBS*, 584 F. Supp. 1206 (D.D.C. 1984), *aff'd in part, rev'd in part*, 770 F.2d 1168 (D.C. Cir. 1985) (draft history of the Vietnam War). *See also Marzen v. United States Dep't of Health & Human Servs.*, 632 F. Supp. 785 (N.D. Ill. 1986), *aff'd*, 825 F.2d 1148 (7th Cir. 1987).

81. *Cliff v. IRS*, 529 F. Supp. 11 (S.D.N.Y. 1981).

82. *See Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484 (D.C. Cir. 1984). The agency's budget request was final, but final budget authority rested with the President. The agency's request was treated as a recommendation to the President. For a discussion of the case, *see Note, Developments Under the Freedom of Information Act*, 154 *Miss. L.J.* 742, 766-67.

might be deliberative in that it constitutes a proposal about how the final order or regulation should be formulated.

Information that is purely factual, even though it may have been used by decisionmakers in their deliberations, is usually not protected.⁸³ The justification for this distinction is not clear. Perhaps courts assume that the deliberative process is only supposed to protect the decisionmakers' expressions of opinions, and that there is no need to shield factual data. Disclosure of facts would not adversely affect the quality of agency decisionmaking. The more likely justification for the distinction, however, is that the FOIA distinguishes between factual and deliberative materials, and requires production of factual materials.⁸⁴ FOIA's distinction may, quite simply, have been extended to the privilege in its common law form.

Whether the fact-policy distinction is a sound one is debatable. There are instances when disclosure of factual data will harm the deliberative process. Disclosure might, for example, make it more difficult to get certain information in the future. In *Brockway v. Department of the Air Force*,⁸⁵ the Air Force sought to prevent disclosure of a safety report on an airplane crash. At issue was whether facts, obtained from witnesses whose testimony investigators gained through promises of confidentiality, must be segregated and disclosed. The court refused to order disclosure, noting that disclosure might curtail the availability of such information in the future and might

83. *EPA v. Mink*, 410 U.S. 73, 87-88 (1973) (“[I]n the absence of a claim that disclosure would jeopardize state secrets, memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.”); see *Deering Milliken, Inc. v. Irving*, 548 F.2d 1131, 1137-38 (4th Cir. 1977); *Ethyl Corp. v. EPA*, 478 F.2d 47, 49 (4th Cir. 1973); *Committee on Masonic Homes v. NLRB*, 414 F. Supp. 426, 431 (E.D. Pa. 1976), *vacated on other grounds*, 556 F.2d 214 (3d Cir. 1977). See also *Paisley v. CIA*, 712 F.2d 686, 699-700 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984) (court reversed district court decision and remanded; court was ordered to release factual material that would not reveal the deliberative process); *Pacific Molasses Co. v. NLRB Regional Office # 15*, 577 F.2d 1172, 1183 (5th Cir. 1978) (NLRB employee prepared a statistical report disclosing the number of employees in a prospective bargaining unit, the number of signed authorization cards, and the percentage of employees supporting the union; court held that the report was “little more than a mechanically compiled statistical report which contains no subjective conclusions” and concluded that the report was factual and not protected by the deliberative process privilege); *Vaughn v. Rosen*, 523 F.2d 1136, 1143 (D.C. Cir. 1975) (“[I]t is not enough to assert, in the context of [FOIA] Exemption 5, that a document is used by a decisionmaker in the determination of policy. Unevaluated factual reports or summaries of past administrative determinations are frequently used by decisionmakers in coming to a determination, and yet it is beyond dispute that such documents would not be exempt from disclosure.”).

84. *Pacific Molasses Co. v. NLRB Regional Office # 15*, 577 F.2d 1172, 1183 (5th Cir. 1978); *Kent Corp. v. NLRB*, 530 F.2d 612, 622 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976).

85. 518 F.2d 1184 (8th Cir. 1975).

thereby hamper the effectiveness of the safety program.⁸⁶ Witnesses might not be willing to testify if their testimony could be used to discipline or impose liability on friends or associates. Thus, the promise of confidentiality was essential if investigators were to have access to necessary information.⁸⁷ But it is unclear that the deliberative process privilege need extend to such information. Other privileges can protect it.⁸⁸

Sometimes deliberative process material and unprotected factual material are commingled in a single document. If so, the agency must still produce the factual material.⁸⁹ It does so by redacting the privileged material so as to produce a document containing only the factual material.⁹⁰ But such redaction is not required when factual material is so intertwined with deliberative material that the two cannot be segregated without rendering the remaining facts useless.⁹¹ The agency need not leave enough deliberative material so that the factual material makes sense.⁹²

86. *Id.* at 1191. See also *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); *Badhwar v. Dep't of the Air Force*, 829 F.2d 182 (D.C. Cir. 1987); *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963).

87. 518 F.2d at 1191.

88. It might, for example, be protected by the investigative privilege. See *Machin v. Zuckert*, 316 F.2d 336, 339 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963).

89. *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 753-54 (E.D. Pa. 1983) (court concluded that agency's summaries of allegedly privileged documents were inadequate and that authors of the summaries made no "attempt to separate factual material from protected deliberative material"); *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 8-9 & n.6 (N.D.N.Y. 1983) (court concluded that agency failed to properly invoke the deliberative process privilege and noted, *inter alia*, that "[m]any of the documents contain charts, graphs, and other material which may include segregable factual data"); see also *United States v. AT&T Co.*, 86 F.R.D. 603, 610 (D.D.C. 1979); *Smith v. FTC*, 403 F. Supp. 1000, 1015 (D. Del. 1975).

90. *Paisley v. CIA*, 712 F.2d 686, 699-700 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984). In *Paisley*, the district court "declined to make findings as to the nature or segregability of the information contained in . . . documents." *Id.* at 699. The court of appeals remanded with orders "to determine precisely which documents or portions thereof should be released as severable factual material whose disclosure would not reveal the deliberative process." *Id.* at 699-700. In *Professional Review Org., Inc. v. United States Dep't of Health & Human Servs.*, 607 F. Supp. 423, 426-27 (D.D.C. 1985), the plaintiff sought records relating to the evaluation of competitive procurement proposals. The court refused to compel production of internal evaluations consisting of point scores, evaluations, opinions and recommendations. It did order the release of a blank copy of computer generated evaluation sheets which reflected the rating categories and the facts considered in the evaluative process. *Id.* See also *United States v. Exxon Corp.*, 87 F.R.D. 624, 636-37 (D.D.C. 1980) (court ordered Department of Energy to excise deliberative material, and provide Exxon with remaining factual material).

91. *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) ("[T]he factual material in the memoranda is so interwoven with the delib-

C. *Level of Applications*

Courts have given little consideration to whether the privilege applies only to the deliberations of high-level administrative officials, or whether it also applies to those at lower-levels. Language in *Kaiser* suggests that the privilege might be restricted to the deliberations of high-level administrative officials such as agency or department heads. *Kaiser* itself involved a memorandum by a special assistant to the War Assets Liquidator that was addressed to the Liquidator himself.⁹³ Justice Reed protected the document because of his concern about the need for "open, frank discussion between subordinate and chief concerning administrative action."⁹⁴ But the case did not resolve the question of whether the privilege would shield low-level officials' deliberations regarding their own decisions. The court could not have resolved the issue since it was not presented. Later decisions have not resolved the issue.

erative material that it is not severable."); *Paisley v. CIA*, 712 F.2d 686, 699 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984) ("[E]ven factual material may come within [FOIA] Exemption 5 if the manner of selecting or presenting those facts would reveal the deliberative process, or if the facts are inexplicably intertwined with the policymaking process."); *Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971) (court held that "factual information may be protected only if it is inextricably intertwined with policy-making processes" and concluded that agency had failed to indicate that factual information in a report was so intertwined; on remand, the district court was to determine whether the entire report was protected or whether portions of it should be released). *See also Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 753-54 (E.D. Pa. 1983); *Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971).

92. *Murphy v. TVA*, 571 F. Supp. 502, 505 (D.D.C. 1983). In *Professional Review Org., Inc. v. United States Dep't of Health & Human Servs.*, 607 F. Supp. 423, 426-27 (D.D.C. 1985), plaintiffs sought access to records relating to the agency's evaluation of bids submitted in a competitive procurement process. Among the documents sought were statistical information considered by the agency in evaluating the bids, "pure" facts considered and relied on by the panel members, the facts considered dispositive by the agency staff in evaluating the proposals of the bidders as well as the agency's use of such facts in its decision to award the contract to the defendant, and "the computer-generated score sheets, with the rating categories completed and containing the panel member's scores and the rationale behind the rating for each of the quality objectives of the proposal." *Id.* at 426. The court denied the request. Although factual material is generally not protected under the deliberative process privilege, as incorporated into FOIA, it is protected when the facts would reveal the agency's deliberative processes. Release of the information sought in this case would reveal how the agency evaluated the proposals. The court did order the agency to turn over its computer generated scoring sheets, with scores and marks deleted, so that plaintiff could determine what objective factors were considered in evaluating proposals.

93. *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 943 (Ct. Cl. 1958).

94. *Id.* at 946.

The privilege should be applied to the deliberations of lower-level officials. In many large agencies, lower officials make the vast majority of decisions. Just as agency heads need to engage in free and frank discussions when they make decisions, lower-level officials do too. Disclosure of their discussions may inhibit future discussions, and may damage the quality of their decisions.

Those courts that have considered the issue have also extended the privilege to a non-agency consultant's communications to agency officials.⁹⁵ For example, an agency hires a firm to conduct a study or to advise the agency on the feasibility of a proposed action. The privilege protects the firm's recommendations and advice. This extension of the privilege is appropriate. Consultants can be part of the deliberative process, and they need to speak freely. The privilege would not extend to non-agency personnel who gratuitously submit information to an agency. For example, a regulated industry writing to the agency trying to influence agency actions would not be protected.

III. PROCEDURAL REQUIREMENTS

A. *Burden of Proof*

The burden of proof falls, initially, on the agency asserting the privilege.⁹⁶ It must demonstrate that there was a deliberative process,⁹⁷ and that any communications it seeks to protect from disclosure were both predecisional and part of the deliberative process.⁹⁸

B. *Vaughn Index*

Requirements for assertion of the deliberative process privilege have grown highly technical. Agencies cannot make conclusory or general as-

95. *Westmoreland v. CBS*, 584 F. Supp. 1206, 1210-11 (D.D.C. 1984), *aff'd in part, rev'd in part*, 770 F.2d 1168 (D.C. Cir. 1985) (draft document prepared by former CIA agent who was under contract to the agency); *see also* *Brush Wellman, Inc. v. Department of Labor*, 500 F. Supp. 519, 522-24 (N.D. Ohio 1980).

96. *Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484, 1497 (D.C. Cir. 1984); *Schlefer v. United States*, 702 F.2d 233, 237 (D.C. Cir. 1983); *United States v. Capitol Serv., Inc.*, 89 F.R.D. 578, 583 (E.D. Wis. 1981), *cert. denied*, 474 U.S. 945 (1985).

97. *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987); *King v. IRS*, 684 F.2d 517, 519 (7th Cir. 1982); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

98. *Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484, 1497 (D.C. Cir. 1984); *Professional Review Org., Inc. v. United States Dep't of Health & Human Servs.*, 607 F. Supp. 423, 426 (D.D.C. 1985); *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981).

sertions of privilege.⁹⁹ Instead, they must specifically assert the privilege for each document or communication they seek to protect.¹⁰⁰ Most courts require that these assertions be made in a “*Vaughn* index.”¹⁰¹ This index, named for *Vaughn v. Rosen*,¹⁰² which first imposed the requirement, requires a specific and detailed assertion of the privilege. But the index need not be so detailed that it compromises the privilege.¹⁰³

A *Vaughn* index should contain several different types of information. First, there should be a specific description of all documents asserted to be privileged.¹⁰⁴ The description should set forth the document’s author(s),

99. *Senate of Puerto Rico v. United States Dep’t of Justice*, 823 F.2d 574, 584-87 (D.C. Cir. 1987); *Bureau of Nat’l Affairs, Inc. v. United States Dep’t of Justice*, 742 F.2d 1484, 1497-98 (D.C. Cir. 1984); *United States v. Board of Educ.*, 610 F. Supp. 695, 698-99 (N.D. Ill. 1985); *see also Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 753 (E.D. Pa. 1983) (documents described in brief and conclusory fashion and description held inadequate); *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43-44 (N.D. Tex. 1981) (“[T]he agency has not designated with particularity those materials alleged to be privileged. . . . Until such time as the privilege properly has been invoked, the Court will not address the merits of the agency’s privilege claims.”); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 519 (D. Del. 1980) (“DOE has provided little information in . . . [its] document indices”; deliberative process privilege held improperly invoked).

100. *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 6, 8-9 (N.D.N.Y. 1983) (“DOE also fails to satisfy the third procedural requirement that the agency provide ‘precise and certain’ reasons for preserving the confidentiality of the information”; court concluded that the DOE had “failed to properly invoke” the privilege); *see also Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *United States v. Capitol Serv., Inc.*, 89 F.R.D. 578, 583 (E.D. Wis. 1981); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 519 (D. Del. 1980).

101. *Bureau of Nat’l Affairs, Inc. v. United States Dep’t of Justice*, 742 F.2d 1484, 1497-98 (D.C. Cir. 1984); *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982); *United States v. Exxon Corp.*, 87 F.R.D. 624, 637 (D.D.C. 1980). *See also White v. IRS*, 528 F. Supp. 119, 120-21 (N.D. Ohio 1981), *aff’d*, 707 F.2d 897 (6th Cir. 1983).

102. 523 F.2d 1136, 1146 (D.C. Cir. 1975).

103. *See Church of Scientology v. United States Dep’t of the Army*, 611 F.2d 738, 742 (9th Cir. 1979); *United States v. Board of Educ.*, 610 F. Supp. 695, 699 (N.D. Ill. 1985).

104. *Black v. Sheraton Corp. of Am.*, 371 F. Supp. 97 (D.D.C. 1974). In this case, the court refused to recognize the privilege claim because it was asserted deficiently. The court could not make “a just and reasonable determination as to its applicability.” *Id.* at 101. The court pointed out that a “formal and proper claim of executive privilege requires a specific designation and description of the documents within its scope.” *Id.* *See also Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 6 (N.D.N.Y. 1983); *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 753 (E.D. Pa. 1983); *United States v. Capitol Serv., Inc.*, 89 F.R.D. 578, 583 (E.D. Wis. 1981), *cert. denied sub nom. United Artists Communications, Inc. v. United States*, 474 U.S. 945 (1985); *Amoco Prod. Co. v. United States Dep’t of Energy*, 29 Fed. R. Serv. 2d (Callaghan) 402, 408 (D. Del. 1979).

recipient(s), and subject matter.¹⁰⁵ In addition, it should explain why each document is privileged.¹⁰⁶ This explanation should contain a statement that agency deliberations were involved,¹⁰⁷ and the "role played by the documents" in the deliberative process.¹⁰⁸ The index should also include the status of the preparer,¹⁰⁹ as well as a demonstration of why disclosure would be harmful.¹¹⁰ To the extent that the document contains segregable

105. *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982) ("[T]he agency must present to the court . . . the nature of the decisionmaking authority vested in the office or person issuing the disputed document[s], . . . and the positions in the chain of command of the parties to the documents."); *see also Smith v. FTC*, 403 F. Supp. 1000, 1016-18 (D. Del. 1975).

106. *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 250-51 (D.C. Cir. 1977) ("[T]he burden which the FOIA specifically places on the Government to show that the information withheld is exempt from disclosure cannot be satisfied by the sweeping and conclusory citation of an exemption plus submission of disputed material for *in camera* inspection . . ."); *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 8-9 (N.D.N.Y. 1983) (agency asserted that disclosure of documents would hamper the free exchange of ideas within the agency but failed to offer any explanation or justification for why such harm would result; court held agency's assertions inadequate); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 519 (D. Del. 1980) (court concluded that deliberative process privilege had been improperly invoked because agency had asserted only "conclusory" justifications in support of its assertions and there was "[n]o effort . . . to indicate why particular documents must be kept confidential"). *See also Smith v. FTC*, 403 F. Supp. 1000, 1016 (D. Del. 1975). "Finally, there must be a demonstration of 'precise and certain reasons for preserving' the confidentiality of the governmental communications." *Id.* (quoting *Black v. Sheraton Corp. of Am.*, 371 F. Supp. 97, 101 (D.D.C. 1974)).

107. *Paisley v. CIA*, 712 F.2d 686, 698-99 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984); *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

108. *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982); *see also Taxation with Representation Fund v. IRS*, 646 F.2d 666, 678 (D.C. Cir. 1981); *Vaughn v. Rosen*, 523 F.2d 1136, 1144-45 (D.C. Cir. 1975).

109. *United States v. Board of Educ.*, 610 F. Supp. 695, 698 (N.D. Ill. 1985); *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 6 (N.D.N.Y. 1983); *United States v. Capitol Serv., Inc.*, 89 F.R.D. 578, 583 (E.D. Wis. 1981), *cert. denied*, 474 U.S. 945 (1985); *Amoco Prod. Co. v. United States Dep't of Energy*, 20 Fed. R. Serv. 2d (Callaghan) 402, 405 (D. Del. 1979); *Smith v. FTC*, 403 F. Supp. 1000, 1016 (D. Del. 1975).

110. *See Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43-44 (N.D. Tex. 1981) which stated:

And, no affidavit or other statement has been submitted by the Secretary of the Department of Energy demonstrating that he has reviewed the question of privilege and believes that disclosure of the materials sought would genuinely threaten the public interest or efficient agency operations. Until such time as the privilege properly has been invoked, the Court will not address the merits of the agency's privilege claims.

Id. at 44. *See also United States v. Board of Educ.*, 610 F. Supp. 695, 698-99 (N.D. Ill. 1985). In *Smith v. FTC*, 403 F. Supp. 1000 (D. Del. 1975), the court

factual data, that information should be released. If the document contains non-segregable factual data, the index should state the existence of that material and explain why it is not segregable.¹¹¹

The *Vaughn* index serves several important objectives. First, it is important to the adversary process. Disputes over the privilege are weighted in the government's favor. It has the documents, opposing parties do not. Thus, the government has ample opportunity to demonstrate that the documents are privileged, and that they should be protected. Opposing parties can find it difficult to rebut the government's claims. The *Vaughn* index provides litigants with basic information about the privilege claims and gives them a meaningful chance to challenge the government's claims.¹¹²

The index is also important to the court. It must evaluate the government's claims and decide whether to sustain them. In order to discharge its obligation, a reviewing court must familiarize itself with the contents of the documents, and the justifications asserted for nondisclosure. A court can examine the documents *in camera*. However, when large numbers of documents are involved, *in camera* review is difficult and burdensome. The *Vaughn* index gives the court a summary of the documents and relieves the judicial burden considerably.¹¹³

complained that the FTC failed to "proffer 'precise and certain' reasons for preserving the confidentiality of the requested documents." *Id.* at 1017. The court noted that "[w]ithout such information, a court cannot employ the balancing process appropriate to resolution of this controversy." *Id.* at 1017 (citations omitted). In *Black v. Sheraton Corp. of Am.*, 371 F. Supp. 97 (D.D.C. 1974), the court stated that it "can not recognize the claim in the instant case because it is legally insufficient to allow the Court to make a just and reasonable determination as to its applicability." *Id.* at 101. The court complained, *inter alia*, that "[d]efendant has given no precise or compelling reasons to shield these documents from outside scrutiny" and concluded that to "recognize such a broad claim . . . would make a farce of the whole procedure." *Id.* at 101.

111. *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 753-54 (E.D. Pa. 1983). In *Nishnic v. United States Dep't of Justice*, 671 F. Supp. 776, 783-85 (D.D.C. 1987), the Justice Department supplemented its *Vaughn* index with a more detailed analysis of certain documents, and a statement of why they were privileged. The Justice Department represented that these sample documents were taken from the various categories of documents at issue. This "sampling" procedure was upheld. *Id.* at 796.

112. *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982) (quoting *Vaughn v. Rosen*, 484 F.2d 820, 825-26 (D.C. Cir. 1973)) (court noted that, without a detailed *Vaughn* index, "the opposing party is comparatively helpless to controvert" the privilege claims); see also *Schwartz v. IRS*, 511 F.2d 1303 (D.C. Cir. 1975); *Nishnic v. United States Dep't of Justice*, 671 F. Supp. 776, 782 (D.D.C. 1987).

113. In *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982), the court stated that:

The procedures by which an agency must ordinarily make such a showing were defined in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S. Ct. 1564, 39 L.Ed.2d 873 (1974). "[T]o allow

For these reasons, most courts demand strict compliance with the *Vaughn* requirements¹¹⁴ and reject indices that are too general or conclusory.¹¹⁵ In *Mobil Oil Co. v. Department of Energy*,¹¹⁶ the agency asserted

the courts to determine the validity of the government's claims without physically examining each document," *Coastal States, supra*, 617 F.2d at 861, *Vaughn* required that claims of exemption be supported with specific explanations. The concern in *Vaughn* was that unassisted court examination might be prohibitively burdensome. "In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a government characterization." *Vaughn, supra*, 484 F.2d at 825. But particularly where many documents are involved, "it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case." *Id.* Because the party seeking disclosure is ignorant of the contents of withheld documents and a court may be unable to undertake an exhaustive *in camera* review, *Vaughn* required that an agency justify withholding of documents through itemized and indexed explanation. Otherwise, the burden of justification would be imposed on the court. As *Vaughn* explained, "[t]he burden has been placed specifically by statute on the Government. Yet under existing procedures, the Government claims all it need do to fulfill its burden is to aver that the factual nature of the information is such that it falls under one of the exemptions. At this point the opposing party is comparatively helpless to controvert this characterization. If justice is to be done and the Government's characterization adequately tested, the burden now falls on the court system to make its own investigation. This is clearly not what Congress had in mind."

Id. at 825-26. See *Schwartz v. IRS*, 511 F.2d 1303 (D.C. Cir. 1975); *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 7-8 (N.D.N.Y. 1983); *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 753 (E.D. Pa. 1983); see also *Black v. Sheraton Corp. of Am.*, 371 F. Supp. 97, 101 (D.D.C. 1974). "[A] formal and proper claim of executive privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality. Without this specificity, it is impossible for a court to analyze the court short of disclosure of the very thing sought to be protected." *Id.* (citations omitted).

114. *Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484, 1497-98 (D.C. Cir. 1984); *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 8-9 (N.D.N.Y. 1983).

115. See also *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 8-9 (N.D.N.Y. 1983) (Department of Energy's privilege assertions inadequate and court concluded that the agency had "failed to properly invoke" the privilege); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 522 (D. Del. 1980) (agency made only conclusory assertions of deliberative process privilege and court held the privilege was improperly invoked). In *Black v. Sheraton Corp. of Am.*, 371 F. Supp. 97 (D.D.C. 1974), the Attorney General subdivided the file, containing 6,000 pages, into eight general categories. His affidavit also discussed "in very general terms the reasons for preserving the confidentiality of each category of document as a whole." *Id.* at 101. The court rejected the agency's privilege assertions. "[A]n improperly asserted claim of privilege is no claim of privilege." *Id.* at 101. And "[a]s the affidavit now stands, the Court has little more than its *sua sponte* speculation with which to weigh the applicability of the claim." *Id.* at 101.

116. 102 F.R.D. 1, 8-9 (N.D.N.Y. 1983).

only that disclosure of portions of a report would hamper the inter-agency "exchange of information and ideas."¹¹⁷ It did not explain why or how. The court rejected the agency's claims.¹¹⁸

Most courts that reject inadequate indices give the agency the opportunity to cure the defect.¹¹⁹ This is a sound approach. *Vaughn* imposes fairly technical and burdensome requirements. Agencies faced with large numbers of documents and short time frames may have difficulty preparing flawless indices. Moreover, if the deliberative process privilege serves an important and useful purpose, courts should be reluctant to overrule assertions of privilege merely for a good faith error.¹²⁰

Courts have discretion to accept conclusory indices. But they must take steps to insure that disputed documents are, in fact, privileged. In *Mead Data Central, Inc. v. United States Department of the Air Force*,¹²¹ the district court accepted conclusory indices, and then made its own *in camera* inspection of the documents. The D.C. Circuit upheld the court's action. *In camera* inspection sufficed in place of the index. While this procedure might technically be permissible, it should be avoided. It makes it difficult or impossible for those seeking production to participate in the evaluation process. Moreover, it places extra burdens on the reviewing court.

117. *Id.* at 8.

118. *Id.* at 8-9.

119. *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987); *Smith v. FTC*, 403 F. Supp. 1000, 1018 (D. Del. 1975); *Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484, 1497-98 (D.C. Cir. 1984) (OMB affidavits were inadequate and court ordered the agency to submit a revised *Vaughn* index justifying its assertions; revised index was found to be valid and was upheld); *see also Coastal States Gas Corp. v. Department of Energy*, 644 F.2d 969, 984-85 (3d Cir. 1981) (court held that district court abused its discretion in rejecting the revised index and in ordering immediate disclosure of the documents). *But see Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 858 (D.C. Cir. 1980); *Gulf Oil Corp. v. Schlesinger*, 465 F. Supp. 913, 918 (E.D. Pa. 1979).

120. In *Smith v. FTC*, 403 F. Supp. 1000 (D. Del. 1975), the court noted that the privilege had not been properly asserted, and held that "an improperly raised claim of privilege is no privilege at all." *Id.* at 1017-18. Nevertheless, the court refused to order immediate production:

However, because the public interest is a factor to be considered in determining the proper scope of discovery, 4 *Moore's Federal Practice* § 26.60[3] (1972 ed.), it is concluded the public interest would not be served at this point by a finding that no privilege attaches to these documents as a result of the Commission's inability to properly raise its claims. Therefore, the Commission will be allowed a final "third bite at the apple" on its executive privilege claim.

Id. at 1017-18. But the court held that the Commission "will be required to mend all the multitudinous flaws that currently beset its claims of executive privilege." *Id.* at 1018 (emphasis in original) (footnote omitted).

121. 575 F.2d 932, 935 (D.C. Cir. 1978).

B. Affidavit Requirement

In addition to the *Vaughn* index requirement, many courts impose an affidavit requirement. They will not accept assertions of counsel, by themselves, as adequate to invoke the privilege.¹²² They require, instead, that the head of the department or agency make the assertion¹²³ after personal consideration.¹²⁴ Such assertions are made by affidavit, accompanied by the *Vaughn* index,¹²⁵ which demonstrates why disclosure would be harmful.¹²⁶

Courts offer numerous justifications for requiring the affidavit. Most express concern that the privilege allows the government to shield its actions from private citizens or organizations,¹²⁷ and conclude that it should not be lightly invoked.¹²⁸ They believe that requiring the agency head personally

122. *United States v. O'Neill*, 619 F.2d 222, 225-27 (3d Cir. 1980) (assertions of deliberative process privilege improper; the privilege was "alluded" to in a legal memorandum submitted to the district court, and then raised orally before the Third Circuit); *Mobil Corp. v. Department of Energy*, 102 F.R.D. 1, 6 (N.D.N.Y. 1983) (assertion of privilege by HUD attorneys and by some officials at the behest of HUD attorneys; court held assertion of privilege inadequate); *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981) ("The affirmations of staff attorneys, especially those participating in pending litigation are legally insufficient."); *Amchem Prods., Inc. v. GAF Corp.*, 64 F.R.D. 550, 553-54 (N.D. Ga. 1974) (privilege asserted only by counsel and found defective in other respects as well; court overruled privilege and ordered document production).

123. *United States v. Board of Educ.*, 610 F. Supp. 695, 698 (N.D. Ill. 1985); *Smith v. FTC*, 403 F. Supp. 1000, 1016 (D. Del. 1975); *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 5 (N.D.N.Y. 1983); *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 752 (E.D. Pa. 1983); *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981). *See also* *Pierson v. United States*, 428 F. Supp. 384, 393 (D. Del. 1977) (there is abundant authority to support the proposition that this privilege must be formally claimed by the Commissioner).

124. *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 5 (N.D.N.Y. 1983); *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 752 (E.D. Pa. 1983); *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *United States v. Capitol Serv., Inc.*, 89 F.R.D. 578, 583 (E.D. Wis. 1981); *Pierson v. United States*, 428 F. Supp. 384, 395 (D. Del. 1977); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 326 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

125. *Smith v. FTC*, 403 F. Supp. 1000, 1016 (D. Del. 1975). *See also* *Pierson v. United States*, 428 F. Supp. 384, 393-95 (D. Del. 1977); *United States v. Capitol Serv., Inc.*, 89 F.R.D. 578, 583 (E.D. Wis. 1981); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 326 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

126. *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 753 (E.D. Pa. 1983).

127. *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *Pierson v. United States*, 428 F. Supp. 384, 395 (D. Del. 1977).

128. *United States v. O'Neill*, 619 F.2d 222, 227 (3d Cir. 1980); *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 518 (D. Del. 1980); *United States v. AT&T Co.*, 86 F.R.D. 603, 604-05 (D.D.C. 1979); *Pierson v. United States*, 428 F. Supp. 384, 395 (D. Del. 1977).

to consider all assertions of the privilege, and to make those assertions himself, assures careful consideration.¹²⁹ Moreover, the agency head is more likely to be politically responsive,¹³⁰ and more likely to assert the privilege in an evenhanded and consistent manner.¹³¹ Counsel, concerned about the outcome of litigation, might assert the privilege lightly.¹³²

In recent years, however, the requirement of agency-head assertion has come under increasing criticism and scrutiny.¹³³ Some courts have abandoned it altogether.¹³⁴ Others have qualified it. While they continue to require the agency head to assert the privilege, they permit him to rely on subordinates' advice or summaries,¹³⁵ or they allow the agency head to delegate

129. *United States v. O'Neill*, 619 F.2d 222, 227 (3d Cir. 1980); *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 752 (E.D. Pa. 1983); *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 518 (D. Del. 1980); *Pierson v. United States*, 428 F. Supp. 384, 395 (D. Del. 1977).

130. *United States v. Reynolds*, 345 U.S. 1 (1953), from which the requirement of personal consideration originated, emphasized that the decision to withhold should be made "by the minister who is the political head of the department." *Id.* at 7-8. In *Coastal Corp. v. Duncan*, 86 F.R.D. 514 (D. Del. 1980), the court rejected the deliberative process privilege as asserted by a lower-level official. The Secretary delegated his authority to assert the privilege to a subordinate who further delegated the authority to his subordinate. The court, in rejecting the privilege assertions, emphasized that the asserter was "not a politically responsible authority." *Id.* at 518.

131. *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 752 (E.D. Pa. 1983); *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 518 (D. Del. 1980); *Pierson v. United States*, 428 F. Supp. 384, 395 (D. Del. 1977).

132. *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 752 (E.D. Pa. 1983); *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *Pierson v. United States*, 428 F. Supp. 384, 395 (D. Del. 1977).

133. *United States Dep't of Energy v. Brett*, 659 F.2d 154, 155 (Temp. Emer. Ct. App. 1981), *cert. denied*, 456 U.S. 936 (1982); *Founding Church of Scientology, Inc. v. Director of FBI*, 104 F.R.D. 459, 464-66 (D.D.C. 1985); *In re Agent Orange Prod. Liab. Litig.*, 97 F.R.D. 427, 435 (E.D.N.Y. 1983); *United States v. Exxon Corp.*, 87 F.R.D. 624, 637 (D.D.C. 1980). *See also* *Association for Women in Science v. Califano*, 566 F.2d 339 (D.C. Cir. 1977). *Women in Science* involved the confidential reports privilege which normally must be asserted by the affidavit of the department or agency head. The court allowed the U.S. Attorney to assert the privilege. "[L]ittle, if anything, could be gained by having the Secretary of HEW review each Form 474 before claiming the privilege." *Id.* at 348. The reports were all in a standard format. *Id.*

134. *See* *United States Dep't of Energy v. Brett*, 659 F.2d 154 (Temp. Emer. Ct. App. 1981), *cert. denied*, 456 U.S. 936 (1982); *Association for Women in Science v. Califano*, 566 F.2d 339, 347-48 (D.C. Cir. 1977); *Founding Church of Scientology, Inc. v. Director of FBI*, 104 F.R.D. 459, 465-66 (D.D.C. 1985).

135. *See* *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 44 (N.D. Tex. 1981); *Peck v. United States*, 88 F.R.D. 65, 73-74 (S.D.N.Y. 1980). In *Peck*, the U.S. Attorney General asserted the deliberative process privilege but had not read or personally considered the documents for which he asserted the privilege.

his review authority to subordinates.¹³⁶ These latter courts impose differing conditions. Some only permit delegation to high-level officials.¹³⁷ Others require that the delegation be accompanied by case-specific content guidelines which will insure appropriate and consistent application of the privilege by the agency.¹³⁸

The most important decision challenging the agency head assertion requirement is *United States Department of Energy v. Brett*,¹³⁹ which abandoned the affidavit requirement. In that case, the Temporary Emergency

Rather, he relied on discussions with subordinates who were responsible for preparation of the disputed document. The court did "not think that the failure of the Attorney General to personally review the material was fatally defective to the assertion of the privilege." *Id.* at 74. The court upheld the privilege. In *United States v. AT&T Co.*, 86 F.R.D. 603 (D.D.C. 1979), the court issued an order establishing discovery guidelines. If the agency asserted governmental privilege, it was required to provide a statement from the head of the department. However, the official need not certify that he had personally reviewed the documents in question. He could rely on "a detailed review" prepared by subordinates provided he stated that he "personally approve[d] the assertion of the privilege." *Id.* at 605. Some courts dispense with the requirement of personal consideration only if the agency head has established "case-specific content guidelines which will insure appropriate and consistent invocation of the privilege by the agency." *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 44 (N.D. Tex. 1981). *See also Coastal Corp. v. Duncan*, 86 F.R.D. 514 (D. Del. 1980).

136. *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 5-6 (N.D.N.Y. 1983); *United States v. Exxon Corp.*, 87 F.R.D. 624, 637 (D.D.C. 1980). In *Exxon*, the court rejected the contention that privilege must be asserted by the head of the agency. "[W]e do not believe that the affidavit need be sworn by the head of the agency. Instead, it may be sworn by an official, with delegated authority from the Secretary, to assert such representations." *Id.* at 637. *See also Association for Women in Science v. Califano*, 566 F.2d 339, 347-48 (D.C. Cir. 1977); *Brush Wellman, Inc. v. Department of Labor*, 500 F. Supp. 519, 522 (N.D. Ohio 1980).

In *In re Agent Orange Prod. Liab. Litig.*, 97 F.R.D. 427 (E.D.N.Y. 1983), the court did not expressly require the agency head to delegate the authority to a subordinate. Rather, it simply required that some agency official make the privilege assertion. *Id.* at 436.

In *Coastal Corp. v. Duncan*, 86 F.R.D. 514 (D. Del. 1980), the court rejected the Secretary of Energy's attempt to delegate the authority to a subordinate. The delegation was to the Administrator of the Department of Energy's Economic Regulatory Administration (ERA) who delegated the authority, in turn, to the ERA's Assistant Administrator of Regulations and Energy Planning. But the delegation did not contain any guidelines as to how the privilege was to be asserted. The court suggested that delegations that contained appropriate guidelines might be valid. *Id.* at 517-19.

137. *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 5 (N.D.N.Y. 1983).

138. *Id.* at 5-6; *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 44 (N.D. Tex. 1981); *United States v. Exxon Corp.*, 87 F.R.D. 624, 637 (D.D.C. 1980); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 518 (D. Del. 1980).

139. 659 F.2d 154 (Temp. Emer. Ct. App. 1981), *cert. denied*, 456 U.S. 936 (1982).

Court of Appeals (TECA) overturned a district court decision overruling the agency's privilege claims for failure to comply with the affidavit requirement. TECA held, for several reasons, that an affidavit was no longer required. First, the court was concerned that the affidavit requirement might have an adverse effect on the deliberative process by making the privilege too difficult to assert.¹⁴⁰ Second, the court concluded that the requirement was unnecessary. Under *Vaughn v. Rosen*, agencies were required to submit detailed indices justifying their assertions of privilege.¹⁴¹ These indices, coupled with the availability of *in camera* review, eliminated the need for the affidavit.¹⁴² The agency need only submit an affidavit if it wished to avoid *in camera* review.¹⁴³

Brett's analysis seems sound. It is questionable whether agency heads should be required to personally review large numbers of documents and make privilege assertions. If the requirement is complied with literally, the agency head must review each document as to which a claim of privilege is asserted. In cases involving large numbers of documents, this burden can be crushing. Moreover, the agency head may have no personal knowledge regarding many of the documents. Many of the largest agencies have tens of thousands of employees in numerous sections. Many decisions are made by lower-level officials with little or no consideration by the agency head. These lower-level officials may be in the best position to assess the interest in non-disclosure.

In addition, historical justifications for requiring assertion by the agency head are no longer valid. The requirement originated in *United States v. Reynolds*.¹⁴⁴ That case involved the military and state secrets branch of executive privilege rather than the deliberative process branch of the privilege.¹⁴⁵ Under that branch, *in camera* review of documents should be avoided: "[T]he court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone in chambers."¹⁴⁶ Rather, if at all possible, the judge should determine the matter on the agency's allegations and affidavits. But the preclusion of *in camera* review posed a dilemma. If judges could not review the documents, how could they be sure that the privilege was being properly asserted? They could not. Courts sought and gained some protection in state secrets cases by requiring the agency head

140. *Id.* at 156.

141. *Id.* at 155.

142. *Id.*

143. *Id.*

144. 345 U.S. 1, 7-8 (1953).

145. *See supra* note 34.

146. *United States v. Reynolds*, 345 U.S. at 10. *See also* *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984); *United States v. Capitol Serv., Inc.*, 89 F.R.D. 578, 583 (E.D. Wis. 1981), *cert. denied sub nom. United Artists Communications, Inc. v. United States*, 474 U.S. 945 (1983).

to review disputed documents and to make the privilege assertions himself.¹⁴⁷

Originally, courts treated the deliberative process privilege much like the state secrets privilege. *In camera* review was to be avoided,¹⁴⁸ and therefore the requirement of personal consideration was rigorously imposed. But *in camera* review has become relatively common in deliberative process cases,¹⁴⁹ especially under FOIA.¹⁵⁰ Moreover, there is little reason to withhold such review. Deliberative process materials rarely contain sensitive material like military and state secrets. If such material were involved, the agency could assert that privilege. When only deliberative process materials are involved, *in camera* review is quite appropriate.¹⁵¹ Thus, the need for the affidavit has diminished.¹⁵²

Mobil Oil Corp. v. Department of Energy criticized *Brett*.¹⁵³ The court raised a number of concerns. First, it emphasized that the thrust of *Vaughn*

147. See *Stephenson v. IRS*, 629 F.2d 1140, 1145 (5th Cir. 1980) ("In the area of FOIA disclosure of national security or classified information there appears to be a stronger presumption in favor of reliance upon agency affidavits.").

148. *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. at 947. In *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 330-33 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967), decided eight years after *Kaiser*, a similar reluctance was expressed. Plaintiffs sought *in camera* inspection to test and verify the government's assertions of privilege. The court refused. "The court may be able to satisfy itself, without conducting an examination, that the privilege is sufficiently well founded, and if it does, divulgence even *in camera* is both unnecessary and improper." *Id.* at 332. The *Zeiss* court concluded that *in camera* inspection would be appropriate if plaintiffs had demonstrated a right to disclosure and were disputing the extent of that disclosure. *Id.* at 331-32.

149. In *United States v. Nixon*, 418 U.S. 683 (1974), Nixon challenged the district court's order requiring an *in camera* inspection of the disputed materials. The United States Supreme Court affirmed. *Id.* at 713-14. The requirement has also been imposed in deliberative process cases. *United States v. Board of Educ.*, 610 F. Supp. 695 (N.D. Ill. 1985). The court, after the government's assertion of the deliberative process privilege, was forced to determine whether the Board of Education's need for the disputed documents outweighed the government's interest in protecting them from disclosure. The court held that the government would be forced to submit the documents *in camera*. "We will balance the interests after reviewing the documents *in camera*, so that we can make an informed analysis." *Id.* at 699.

150. See *EPA v. Mink*, 410 U.S. 73, 91-94 (1973).

151. In *United States v. AT&T Co.*, 86 F.R.D. 603 (D.D.C. 1979), the court stipulated that all documents would be submitted for *in camera* inspection. If the agency wanted to avoid such inspection for documents, disclosure of which might jeopardize national security, it must submit an affidavit from the agency head "describing the nature of the information sought and the reasons why disclosure would jeopardize national security." *Id.* at 608.

152. See *Founding Church of Scientology, Inc. v. Director of FBI*, 104 F.R.D. 459, 465-66 (D.D.C. 1985), *cert. denied*, 108 S. Ct. 199 (1987); *In re Agent Orange Prod. Liab. Litig.*, 97 F.R.D. 427, 435 (E.D.N.Y. 1983).

153. 102 F.R.D. 1, 6-7 (N.D.N.Y. 1983).

was to impose more stringent requirements for privilege assertion, and that the decision in *Brett* was inconsistent with that intent.¹⁵⁴ *Brett* liberalized the requirements. This criticism is puzzling. *Vaughn* did impose more stringent requirements. But, so what? If *Vaughn*'s new requirements rendered other requirements unnecessary, then those other requirements should be abandoned. The point is not to make it difficult to assert privileges. Each requirement should stand or fall on its own merits. If the privilege is valid, courts should not impose unnecessary formalities merely to force agencies to abandon the privilege.

The *Mobil* court believed that the affidavit requirement did serve a useful function. It noted that some cases involve "arcane areas of the law" and affidavits help courts understand those areas. "Without such assistance, the chances of erroneous determinations increase."¹⁵⁵ And, of course, the court was partially right. Some areas may be arcane and may require additional agency explanation. But such explanation need not come from the agency head in the form of an affidavit. It can be provided in the agency's *Vaughn* index, and the agency would still be required to provide such information. *Brett* does not eliminate the agency's obligation to support its claim of privilege. All it indicates is that the agency head need not supply the documentation.

The *Mobil* court also complained that *in camera* review would increase the judicial burden. The court argued that courts were already overburdened, and should not be forced to accept this additional obligation.¹⁵⁶ That concern is valid. But the court misperceived *Brett*'s holding. Courts would not be forced, even under *Brett*, to conduct an *in camera* review of all documents for which a privilege was asserted. Presumably, the initial determination would still be made based on the agency's claims and accompanying indices. If those indices are detailed enough, *in camera* review might not be necessary, or may involve only a sampling. If the indices are inadequate, the court should either force the agency to prepare proper indices or reject its privilege claims. This sampling would probably be necessary even if an affidavit were submitted.

The *Mobil* court's other objections are more valid. The court expressed concern that, if agency attorneys were free to assert the privilege, agencies might assert the privilege carelessly or inconsistently.¹⁵⁷ Given *Brett*'s relaxed requirements, attorneys would have no incentive to curtail their assertions. This is a legitimate concern, but the solution is not to require assertion by agency or department heads. High level officials do not have the time

154. *Id.* at 6.

155. *Id.*

156. *Id.* at 7.

157. See *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 752-53 (E.D. Pa. 1983); *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *Amchem Prods., Inc. v. GAF Corp.*, 64 F.R.D. 550, 553-54 (N.D. Ga. 1974).

to perform this task. Moreover it is doubtful that they do, in fact, perform it even when the affidavit is required. The review is probably done by subordinates who also prepare the affidavit. As noted above, some courts expressly permit this procedure. Thus, there is no assurance that privilege claims are asserted in a consistent manner even today. Some consistency is likely because documents will be screened on the way to the agency head, and higher-ups may filter out less worthy documents. But consistency, if that is the goal, could be obtained by forcing agencies to develop criteria for the assertion of the privilege. If higher-level officials establish such guidelines and agency attorneys were forced to conform to them, consistency of assertion might be assured.

IV. REVIEW PROCESS

A. Judicial Role

Once the privilege is properly asserted, the judiciary is charged with deciding whether the privilege applies, and whether it should be overridden. In *United States v. Nixon*,¹⁵⁸ which involved the executive rather than the deliberative process privilege, President Nixon argued that the separation of powers doctrine precluded judicial review of his privilege claims.¹⁵⁹ The United States Supreme Court disagreed. Relying on *Marbury v. Madison*,¹⁶⁰ the Court emphasized that the courts are charged with the obligation "to say what the law is."¹⁶¹ The Court held that its duty extended to claims of privilege including the executive privilege.¹⁶² Lower federal courts have extended *Nixon's* holding to the deliberative process privilege.¹⁶³

B. In Camera Inspections

As already noted, *in camera* inspections have become much more commonplace in recent years.¹⁶⁴ But early courts were reluctant to engage

158. 418 U.S. 683, 703-05 (1974).

159. *Id.* at 703.

160. 5 U.S. (1 Cranch) 137 (1803).

161. 418 U.S. at 705.

162. *Id.*

163. *Westmoreland v. CBS*, 584 F. Supp. 1206, 1209 (D.D.C. 1984), *aff'd in part, rev'd in part*, 770 F.2d 1168 (D.C. Cir. 1985); *Amchem Prods., Inc. v. GAF Corp.*, 64 F.R.D. 550, 553 (N.D. Ga. 1974); *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57, 63 (N.D. Ohio 1964). *See also United States v. Reynolds*, 345 U.S. 1, 8 (1953).

164. *McClelland v. Andrus*, 606 F.2d 1278, 1287 n.55 (D.C. Cir. 1979); *United States v. Board of Educ.*, 610 F. Supp. 695, 699 (N.D. Ill. 1985); *In re Agent Orange Prod. Liab. Litig.*, 97 F.R.D. 427, 434 (E.D.N.Y. 1983). *See also United States v. AT&T Co.*, 86 F.R.D. 603 (D.D.C. 1979).

in such review. These courts were no doubt influenced by Justice Reed's statements in *Kaiser* discouraging it. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*,¹⁶⁵ decided shortly after *Kaiser*, reinforced Justice Reed's point of view. Plaintiffs tried to force *in camera* inspections to verify the government's privilege claims. The court denied the request, holding that *in camera* inspections were generally to be avoided. If it were possible to test the government's claims without such inspection, then "divulgence even *in camera* is both unnecessary and improper."¹⁶⁶

Most courts will grant *in camera* review today. Several factors prompted this change in attitude. One was the holding in *United States v. Nixon*.¹⁶⁷ The Court approved the use of *in camera* review despite claims of executive privilege. Courts are required to rule on the validity of privilege claims. Absent *in camera* review, it may be difficult for courts to perform their role. Another factor is the Freedom of Information Act (FOIA). Courts routinely conduct *in camera* inspection under its provisions.¹⁶⁸ Regardless, modern courts are quite willing to impose *in camera* review.¹⁶⁹ Only a few courts still believe that *in camera* inspection should be avoided when less intrusive review alternatives are available.¹⁷⁰

At present, the availability and scope of *in camera* review is within the discretion of the trial court.¹⁷¹ But many courts regard it as important and indispensable. Such review offers a check on the accuracy and honesty of governmental privilege assertions,¹⁷² and some courts are beginning to

165. 40 F.R.D. 318 (D.D.C. 1966), *aff'd sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

166. *Id.* at 332.

167. 418 U.S. 683, 714 (1974).

168. 5 U.S.C. § 552(a)(4)(B) (1982). See *Stephenson v. IRS*, 629 F.2d 1140, 1144-46 (5th Cir. 1980); *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 742-43 (9th Cir. 1979).

169. See *United States v. Board of Educ.*, 610 F. Supp. 695, 699 (N.D. Ill. 1985); *United States v. AT&T Co.*, 86 F.R.D. 603, 605 (D.D.C. 1979). See also *ACLU v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980); *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 662 (D.C. Cir. 1960).

170. *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982); *United States v. Capitol Serv., Inc.*, 89 F.R.D. 578, 583 (E.D. Wis. 1981); *Brush Wellman, Inc. v. Department of Labor*, 500 F. Supp. 519, 522 (N.D. Ohio 1980).

171. *Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484, 1497-98 (D.C. Cir. 1984) (district court held that documents were "predecisional deliberative material" without *in camera* inspection after concluding that such review was unnecessary and the Office of Management and Budget's conclusions were adequate to support the claim of privilege; D.C. Circuit agreed); *United States v. Board of Educ.*, 610 F. Supp. 695, 699 (N.D. Ill. 1985) (court concluded that it had discretion to order government to submit documents for *in camera* inspection); *Brush Wellman, Inc. v. Department of Labor*, 500 F. Supp. 519, 522 (N.D. Ohio 1980) (court concluded *in camera* inspection unnecessary).

172. See *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 743 (9th Cir. 1979) ("[I]n camera inspection may supplement an otherwise

view this checking function as mandatory rather than discretionary. In *Stephenson v. IRS*,¹⁷³ the court recognized that the district court had discretion about whether to require *in camera* review. But the appellate court reversed the district court's decision not to engage in such review. "[O]nce it is established that records and documents are in the possession of the governmental agency" and are responsive to the document request, more is required than a perusal of the agency's affidavit and *Vaughn* index.¹⁷⁴ The court suggested that the district court must verify the validity of the government's claims through *in camera* review, or some other adequate procedure.¹⁷⁵

In camera review is conducted incident to, rather than as a substitute for, the *Vaughn* index.¹⁷⁶ FOIA expressly takes this position.¹⁷⁷ The index provides the court with a convenient summary, and explains the applicability of asserted privileges. Courts need this information even if they conduct *in camera* review.

Courts might be able to substitute *in camera* review for the *Vaughn* index, but they have little incentive to do so. *In camera* review is burdensome and time-consuming.¹⁷⁸ The most effective use of judicial resources is probably obtained by primary reliance on the *Vaughn* index. In cases involving only a small number of documents, the judge may want to review all documents *in camera*. In other cases, the judge may want to spot-check documents to insure that the index description is adequate.

In several cases, litigants have argued that they have a right to be present at *in camera* inspections.¹⁷⁹ They want to review the documents, and to have a chance to respond to the agency's privilege assertions in light of that review. Most agencies oppose such requests. They argue that the presence of opposing attorneys compromises the privilege - even if the

sketchy set of affidavits. By first-hand inspection, the court may determine whether the weakness of the affidavits is a result of poor draftsmanship or a flimsy exemption claim."); see also *Mervin v. FTC*, 591 F.2d 821, 826 (D.C. Cir. 1978).

173. 629 F.2d 1140, 1144-46 (5th Cir. 1980).

174. *Id.* at 1145.

175. The court suggested several possible alternatives the district court might use: "sanitized indexing, random or representative sampling *in camera* with the record sealed for review, oral testimony or combinations thereof." *Id.* at 1145-46.

176. See *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 544-45 (D.C. Cir. 1977).

177. 5 U.S.C. § 552(a)(4)(B) (1982). See *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 743 (9th Cir. 1979).

178. See *Black v. Sheraton Corp. of Am.*, 564 F.2d 531 (D.C. Cir. 1977). The court noted that "an *in camera* examination places a heavy burden of inspection and analysis on the trial judge." *Id.* at 544. For this reason, *Vaughn* required "a relatively detailed analysis in manageable segments and an index correlating statements made in that analysis to portions of individual documents." *Id.*

179. See *Arief v. United States Dep't of the Navy*, 712 F.2d 1462, 1469-71 (D.C. Cir. 1983).

court enters a protective order prohibiting parties from divulging the contents of the documents. Most courts are unwilling to permit adversary representation. They agree that disclosure, even under a protective order, will be damaging.¹⁸⁰

C. Balancing

Once the court determines that a document is privileged, it must still determine whether the document should be withheld. Unlike some other branches of the executive privilege, the deliberative process privilege is a qualified privilege.¹⁸¹ Once the agency demonstrates that documents fit within it, the burden shifts to the party seeking disclosure.¹⁸² It must demonstrate that its need for the information outweighs the regulatory interest in preventing disclosure.¹⁸³

1. Regulatory Interest

The regulatory interest is only vaguely defined. Most courts engage in only the most perfunctory analysis.¹⁸⁴ They parrot the harms suggested by

180. *Id.*

181. *United States v. Board of Educ.*, 610 F. Supp. 695, 698 (N.D. Ill. 1985); *United States v. Capitol Serv., Inc.*, 89 F.R.D. 578, 583 (E.D. Wis. 1981); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 327 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

Not all branches of the executive privilege are qualified. The state secrets branch is an absolute privilege. As the court stated in *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984), "a party's need for the information is not a factor in considering whether the privilege will apply Once the court is satisfied that the information poses a reasonable danger to secrets of state, 'even the most compelling necessity cannot overcome the claim of privilege.'" *Id.* at 399 (quoting *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982)). *See also* *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57, 63 (N.D. Ohio 1964). The presidential branch of the privilege is, however, qualified. *United States v. Nixon*, 418 U.S. 683, 707-13 (1974) ("[W]e conclude that the legitimate needs of the judicial process may outweigh Presidential privilege . . .").

182. *United States v. AT&T Co.*, 86 F.R.D. 603, 609-10 (D.D.C. 1979).

183. *See McClelland v. Andrus*, 606 F.2d 1278, 1290 (D.C. Cir. 1979); *United States v. Board of Educ.*, 610 F. Supp. 695, 698 (N.D. Ill. 1985); *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 5 (N.D.N.Y. 1983); *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *Amoco Prods. Co. v. United States Dep't of Energy*, 29 Fed. R. Serv. 2d (Callaghan) 402, 405 (D. Del. 1979); *Union Oil Co. v. Morton*, 56 F.R.D. 643, 644 (C.D. Cal. 1972).

184. *See, e.g., Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 191-92 (D.C. Cir. 1983); *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258-59 (D.C. Cir. 1982); *Westmoreland v. CBS*, 584 F. Supp. 1206, 1210-12 (D.D.C. 1984), *aff'd in part, rev'd in part*, 770 F.2d 1168 (D.C. Cir. 1985); *Tabcor Sales Clearing, Inc. v. Department of Treasury*, 471 F. Supp. 436, 438 (N.D. Ill. 1979). *Brush Wellman, Inc. v. Department of Labor*, 500 F. Supp. 519, 522-23 (N.D. Ohio 1980) contains a good example of an affidavit that details the regulatory interest.

Justice Reed in *Kaiser*. Thus, they express concern that officials will not engage in full and robust deliberative discussions if they fear that their statements will be discoverable. In the final analysis, the quality of administrative decisionmaking will be impaired. Administrators will not have the benefit of a full discussion of ideas.

Courts rarely examine whether these harms really occur.¹⁸⁵ In fact, it would be difficult or impossible for them to do so. The privilege is not premised on detailed empirical studies which show that, if deliberative statements are revealed, particular consequences will ensue. And little or no attempt has been made to determine the impact of disclosure in those cases when the privilege has been rejected or overruled. Rather, judges base their decisions on hunches and intuition.

The dynamics of the situations in which the privilege is claimed further hampers judicial analysis. If the anticipated harm occurs at all, it will occur in the future. When deliberative statements are sought, the statements being sought have already been made. The concern then is that if deliberative statements are revealed, administrators will be reluctant to engage in robust discussion in future deliberations. But how does the judge know what will happen in the future? And who is the judge worried about inhibiting? Should he worry about future deliberations within this agency, or should he worry within the particular section of the agency that is involved in the case? Should the judge be concerned about the impact on administrators in other agencies? Once the judge determines who to focus on, how does the judge determine what the impact will be? Will current or future administrators find out that prior deliberative statements were released? And, even if they do find out, will they care? Will their future actions be affected?

This is not to suggest that the privilege's benefits are non-existent. One can surmise that the privilege does perform an important function. If the privilege did not exist at all, and deliberative statements were routinely discoverable, one would expect administrators to be aware of that fact, especially if their prior statements had been discovered. One would also expect some administrators to be more cautious in their future deliberations. Most people are more candid in private than they are in public, a fact recognized by many other privileges.¹⁸⁶ But how much reticence would exist

185. See *United States v. Board of Educ.*, 610 F. Supp. 695, 698 (N.D. Ill. 1985). "[T]he benefits are at best indirect and speculative", [the privilege] must be strictly confined "within the narrowest possible limits consistent with the logic of [its] principles" *Id.* (quoting *In re Grand Jury Proceedings*, 599 F.2d 1224, 1235 (3d Cir. 1979)).

186. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (attorney-client privilege); *United States v. Nixon*, 418 U.S. 683, 703, 705-06 (1974) (presidential privilege); *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1519-20 (11th Cir.), *cert. denied*, 477 U.S. 904 (1986) (judicial privilege); *Allen & Hazelwood, Preserving the Confidentiality of Internal Corporate Investigations*, 12 J. CORP. L. 355 (1987) (self-evaluation privilege).

is difficult to determine. Would officials temper their discussion, or would they be more concerned about doing a good job and therefore feel compelled to discuss all policy alternatives? Would officials speak freely because they believe they have nothing to hide?

Given all these uncertainties, it is difficult for judges to make informed judgments about the regulatory interest in individual cases.

In one of the few pronouncements on the subject, the Supreme Court has suggested that the occasional release of recommendations and advice will not, by itself, have a devastating effect on advisors' willingness to speak freely. In *United States v. Nixon*,¹⁸⁷ the Court struggled with the possible impact of releasing advice given to the President on the willingness of presidential aides to advise the President in the future. The Court concluded that advisors would not be affected by occasional disclosures.¹⁸⁸ Presumably, the same thing is true of disclosures of the deliberations of lower officials.

Several suggestions might be made about the regulatory interest. First, the interest in non-disclosure will probably vary depending on the degree of confidentiality and sensitivity involved in the communication. One might surmise that administrators are more likely to be concerned about the release of sensitive policy statements than they are to be about the release of other deliberative communications.¹⁸⁹ Of course, it can be difficult for a reviewing court to determine how sensitive a statement is without conducting an *in camera* review. Agencies can try to explain the importance of a communication in their affidavits and indices. But agencies can only be so thorough. They have to maintain the confidentiality of the communications.

Courts might also consider how much time has elapsed since the deliberations were concluded and since the deliberative statements were made.¹⁹⁰ As time passes, one might expect the impact of disclosure to diminish. Few officials are likely to be deterred from engaging in robust discussion about a pending policy merely because their communications might become public at some point in the distant future. Officials are more likely to be concerned about the immediate impact.

187. *United States v. Nixon*, 418 U.S. 683, 712 (1974).

188. *Id.* The Court stated that "we 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." *Id.* (footnote omitted).

189. *See Amchem Prods., Inc. v. GAF Corp.*, 64 F.R.D. 550, 553 (N.D. Ga. 1974) ("The defendant has failed to convince the court that the information sought is in any sense 'sensitive' or that some policy of the EPA would be jeopardized by disclosure.").

190. *See United States v. Ahmad*, 499 F.2d 851, 855 (3d Cir. 1974); *Jabara v. Kelley*, 75 F.R.D. 475, 488 (E.D. Mich. 1977).

Correspondingly, courts should be more protective of documents sought during the pendency of a deliberative process. Illustrative is *Chemical Manufacturers Association v. Consumer Product Safety Commission*.¹⁹¹ In that case, the manufacturers' association sought access to a study prepared for the Consumer Product Safety Commission (CPSC) by the Inhalation Toxicology Research Institute of the Department of Energy. After receiving the first study, the CPSC created a panel to evaluate the studies and to advise whether regulatory action should be taken. The manufacturers' association sought the document while the panel was deliberating, and before the second study had arrived. The court refused to order disclosure, citing concerns about interfering with pending deliberations.¹⁹²

2. Need

The other side of the balancing test, the litigant's need for the information, can be defined more objectively. But few courts do so. Even when the regulatory interest is somewhat amorphous, courts require strong demonstrations of need from litigants. The mere fact that the information would be relevant or material to some legitimate objective is insufficient.¹⁹³

Courts are more inclined to order disclosure when the information sought is important to a pending civil or criminal proceeding. In *United States v. Nixon*,¹⁹⁴ which involved the presidential executive privilege and

191. 600 F. Supp. 114 (D.D.C. 1984).

192. *Id.* at 117-18. The court stated that:

Where a government regulatory body is moving rapidly to reach a decision about whether products used by children cause cancer, agency scientists may, for example, discuss hypotheses which had not matured, and can be effectively shared only with peers in regular and confidential communication. For example, disclosure of an internal hypothesis or the data related to its formation followed by a demeaning attack on that hypothesis before the author has finally formed a conclusion would have an obvious chilling effect on the persons still in the process of forming the opinion, and those who follow in the same process. The scientist whose work was assailed would not be able to make a defense by pointing to a finished product, but would be forced to endure the embarrassment of premature criticism. Just as factual information contained in witness' statements may be withheld when disclosure would hamper the government's deliberative processes "by making it difficult for the government to obtain essential information," *Deering Milliken, Inc. v. Irving*, 548 F.2d 1131, 1138 n.9 (4th Cir. 1977), so scientists should be able to withhold nascent thoughts where disclosure would discourage the intellectual risktaking so essential to technical progress. Moreover, the plaintiff in this case need delay its parallel process for only a few weeks more, after which, the Commission indicates, the documents sought will be forthcoming.

Id. at 118 (footnote omitted).

193. *See Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 5 (N.D.N.Y. 1983).

194. 418 U.S. 683, 709 (1974).

its balancing test, the Supreme Court emphasized that the need to develop all facts was critical to the effective functioning of the adversary system. "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."¹⁹⁵ Therefore, the Court concluded that "it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."¹⁹⁶ Lower courts, applying the same balancing test in the context of the deliberative process privilege, agree.¹⁹⁷

Even if the information has great importance, disclosure is not automatic. Courts will examine whether similar information is available from other sources and can be obtained without compromising the agencies' deliberative processes.¹⁹⁸ They will also examine whether comparable information has already been obtained so that the information sought is duplicative.¹⁹⁹

Very few decisions have found sufficient need to override an assertion of privilege. One that did was *United States v. Board of Education*.²⁰⁰ In that case, the United States Department of Education was under a consent decree which required it to provide funds to remedy school segregation.²⁰¹ On remand, the district court was ordered to determine whether the Board of Education was receiving the "maximum level of funding that is available," and to analyze "how the Secretary exercised his discretion in allocating funds already appropriated by Congress for school desegregation."²⁰² The

195. *Id.*

196. *Id.*

197. See *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 752 (E.D. Pa. 1983); see also *Jabara v. Kelley*, 75 F.R.D. 475, 480 (E.D. Mich. 1977) ("There is, on the other hand, the unquestionable interest of the litigant in seeking certain information necessary for a just resolution of the legal dispute The need to develop all relevant facts in the adversary system is both fundamental and comprehensive.").

198. See *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161-62 (9th Cir. 1984); *Kinoy v. Mitchell*, 67 F.R.D. 1, 12 (S.D.N.Y. 1975); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 327-28 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967). In *Stiftung*, the privilege applied. "[T]he size and diversification of the production already made raises great doubt as to what additional informational tendencies [the documents sought] could have." *Id.* at 327.

199. See *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 328 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967). In *Stiftung*, the court noted, *inter alia*, that "[t]he claimants' presentation is also devoid of a showing that the papers already furnished have not supplied the great bulk of the information for which the claimants earlier professed a need." *Id.* at 328.

200. 610 F. Supp. 695, 699-700 (N.D. Ill. 1985).

201. *Id.*

202. *Id.* at 697.

dispute focused on twenty-seven documents that the Secretary of Education had refused to produce asserting, *inter alia*, the deliberative process privilege as to each document.

The district court indicated that it would not rule on the privilege claims until it saw the documents, but strongly suggested that it would hold that the Board of Education's need for the documents outweighed the Department's interest in protecting them.²⁰³ The Secretary had already produced documents and information concerning those programs he had funded.²⁰⁴ Thus, the remaining documents dealt only with "recommendations, advice, and opinions that were not adopted by the Secretary."²⁰⁵ These documents, the court held, were crucial to the Board's case. "The recommendations rejected and options considered are exactly what the Court needs to consider in deciding whether the Secretary actually gave the Board 'top of the list priority.'"²⁰⁶

III. CONCLUSION

Although the deliberative process privilege is of relatively recent origin, it has rapidly developed into one of the major governmental privileges, and is routinely asserted in a wide array of governmental litigation. Moreover, assuming that the privilege's assumptions are valid - that deliberative discussions must be protected in order to insure "full and frank" communication between agency decisionmakers - the privilege has a major impact on the day-to-day functioning of the federal government. Courts have been very protective of such communications.

The privilege's development has not, however, been without difficulty. Courts have struggled to define procedural requirements for the privilege's assertion. And, in some respects, these efforts have been successful. Courts now require, almost routinely, a *Vaughn* index for assertion of the privilege. This index provides the court and opposing litigants with essential information about the documents. But, in other respects, judicial efforts have

203. The court stated that:

The Board has made this preliminary showing of necessity warranting *in camera* review. Indeed, although we of course express no firm opinion without first seeing the documents, we venture to say that the Board will probably be able to make a very powerful showing of necessity. It is hard to imagine a case in which the government's deliberative process is more relevant or crucial. At dispute is whether the Secretary has violated "a unique funding provision in a consent decree that constitutes an unprecedented settlement of a school desegregation claim by the United States."

Id. at 699-700 (footnote omitted) (quoting *United States v. Board of Educ.*, 744 F.2d 1300, 1304 (7th Cir. 1984)).

204. *Id.* at 700.

205. *Id.*

206. *Id.*

been less successful. Courts have not agreed on whether the *Vaughn* index must be accompanied by an affidavit from the agency head specifically asserting the privilege. Some courts continue to require the affidavit while other courts have modified or dispensed with it. As noted above, courts should dispense with the requirement. Historical justifications for requiring it are no longer valid.

Courts have done a better job in their attempts to define substantive requirements for invocation of the privilege. With minor exceptions, courts have articulated the basic requirements: communications must be both predecisional and deliberative. One area that the courts have given little attention, however, involves the balancing test used to determine whether this qualified privilege should be sustained or overridden. Courts have made little attempt to articulate standards for defining or measuring the regulatory interest in non-disclosure, or for determining when the need for disclosure outweighs that interest. These issues will have to be addressed in the years ahead.

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