

**THE GOVERNMENT’S INCREASING
RELIANCE ON–AND ABUSE OF–THE
DELIBERATIVE PROCESS EVIDENTIARY
PRIVILEGE: “[T]HE LAST WILL BE FIRST”¹**

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INTRODUCTION

In the past two years, the public has turned intense scrutiny to the controversies relating to enhanced methods of interrogating alleged terrorist detainees,² the enforcement priorities of the United States Immigration and Customs Enforcement (ICE),³ the proposed Keystone oil pipeline from Canada,⁴ the Federal Reserve Board's role in financial bailouts,⁵ the genetic engineering of food crops,⁶ body scanner technology employed by the Department of Homeland Security,⁷ the awarding of Energy Policy Act loan guarantees,⁸ and the Drug Enforcement Agency's Fast and Furious gun program.⁹ These controversies all revolve around government policies of vital concern to the American public; the policies concern the future of the American economy and national security. The Supreme Court has recognized that as a general proposition, government activities should be transparent; in the Court's words, citizens are entitled "to know 'what their Government is up to.'"¹⁰ The Freedom of Information Act¹¹ is a

² ACLU v. CIA, 892 F. Supp. 2d 234, 238 (D.D.C. 2012).

³ Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec., 841 F. Supp. 2d 142, 149 (D.D.C. 2012); Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, 827 F. Supp. 2d 242, 246 (S.D.N.Y. 2011).

⁴ Judicial Watch, Inc. v. U.S. Dep't of State, 875 F. Supp. 2d 37, 41 (D.D.C. 2012).

⁵ McKinley v. Bd. of Governors of the Fed. Reserve Sys., 849 F. Supp. 2d 47, 52-55 (D.D.C. 2012); Judicial Watch, Inc. v. U.S. Dep't of Treasury, 796 F. Supp. 2d 13, 18 (D.D.C. 2011) (the Troubled Asset Relief Program (TARP)).

⁶ Pub. Emps. for Envtl. Responsibility v. Office of Sci. & Tech. Policy, 825 F. Supp. 2d 104, 105-06 (D.D.C. 2011).

⁷ Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 892 F. Supp. 2d 28, 35 (D.D.C. 2012).

⁸ S. Alliance for Clean Energy v. U.S. Dep't of Energy, 853 F. Supp. 2d 60, 64 (D.D.C. 2012).

⁹ Louis Fisher, *An Overbroad Executive Privilege Claim*, NAT'L L.J., July 30, 2012, at 34.

¹⁰ Toensing v. U.S. Dep't of Justice, 890 F. Supp. 2d 121, 130 (D.D.C. 2012) (quoting Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171-72 (2004)).

¹¹ 5 U.S.C. § 552 (2012).

direct reflection of the importance of such transparency “in a real democracy.”¹² Yet in each controversy, the federal government was largely successful in blocking citizens’ access to information about the development of these policies.¹³

Although these controversies concerned important governmental policies, the federal government did not rely primarily on the military or state secret privilege¹⁴ to deny the citizenry access to this information. Rather, the government invoked the deliberative process privilege.¹⁵ Other governmental privileges, such as the military or state secret doctrine¹⁶ and the doctrine protecting an informant’s identity,¹⁷ have long been fixtures in American law. In contrast, the federal courts did not adopt the deliberative process privilege until 1958.¹⁸ Even at that late date, the court recognizing the privilege was not the Supreme Court, a court of appeals, or even a district court; the seminal decision was rendered by the federal Court of Claims.¹⁹ The court

¹² *Toensing*, 890 F. Supp. 2d at 130 (quoting *Favish*, 541 U.S. at 172). See also *Freedom Watch, Inc. v. CIA*, 895 F. Supp. 2d 221, 225 (D.D.C. 2012); Gerald Wetlauffer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 877-78 (1990) (“Enactment of FOIA was based on the general premise that governments, especially democracies, function most effectively when they function openly and are, by virtue of that openness, held accountable for their actions.”).

¹³ See *ACLU v. CIA*, 892 F. Supp. 2d 234, 238 (D.D.C. 2012); *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 892 F. Supp. 2d 28 (D.D.C. 2012); *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 841 F. Supp. 2d 142, 143 (D.D.C. 2012); *Judicial Watch, Inc. v. U.S. Dep’t of State*, 875 F. Supp. 2d 37 (D.D.C. 2012); *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 849 F. Supp. 2d 47 (D.D.C. 2012); *S. Alliance for Clean Energy v. U.S. Dep’t of Energy*, 853 F. Supp. 2d 60 (D.D.C. 2012); *Judicial Watch, Inc. v. U.S. Dep’t of Treasury*, 796 F. Supp. 2d 13 (D.D.C. 2011); *Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 827 F. Supp. 2d 242 (S.D.N.Y. 2011); *Pub. Emps. for Envtl. Responsibility v. Office of Sci. & Tech. Policy*, 825 F. Supp. 2d 104 (D.D.C. 2011).

¹⁴ See 2 EDWARD J. IMWINKELRIED, *THE NEW WIGMORE A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 8.3 (2d ed. 2010).

¹⁵ *ACLU v. CIA*, 892 F. Supp. 2d 234; *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 841 F. Supp. 2d 142; *Nat’l Day Laborer Org. Network*, 827 F. Supp. 2d 242; *Judicial Watch, Inc. v. U.S. Dep’t of State*, 875 F. Supp. 2d 37; *McKinley*, 849 F. Supp. 2d 47; *Judicial Watch, Inc. v. U.S. Dep’t of Treasury*, 796 F. Supp. 2d 13; *Pub. Emps. for Envtl. Responsibility*, 825 F. Supp. 2d 104; *Elec. Privacy Info. Ctr.*, 892 F. Supp. 2d 28; *S. Alliance for Clean Energy*, 853 F. Supp. 2d 60.

¹⁶ IMWINKELRIED, *supra* note 14.

¹⁷ IMWINKELRIED, *supra* note 14, at § 7.3.2.

¹⁸ Wetlauffer, *supra* note 12, at 848 (citing *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958)).

¹⁹ *Id.*

reasoned that cloaking officials' deliberations over proposed policies would encourage more vigorous, candid deliberations and thereby improve the quality of government decision-making.²⁰ The doctrine is an "infant privilege"²¹—the last and most recent major government privilege to be fashioned by the federal courts. The doctrine itself has received relatively little scrutiny; indeed, some of the leading evidence course books make no mention of the doctrine.²² However, as the last two years of decisions illustrate, the deliberative process privilege is now the first doctrine that the federal government typically resorts to in order to block citizen access to information about the formulation of a government policy. In the short period of its existence,²³ the deliberative process doctrine has become the most frequently invoked governmental privilege.²⁴

The first part of this Article describes the original rationale for and scope of the privilege. As that part notes, from the very outset thoughtful commentators have sharply challenged the assumptions underpinning the case for recognizing the privilege. Given those challenges, initially the courts gave the privilege a rather modest scope. However, the second part of this Article points out that despite doubts about the soundness of the privilege, since 1958, the judicial trend has been to expand its scope. The courts have broadened the reach of the privilege and in the vast majority of cases, upheld government invocations of the privilege against both litigants and citizens filing Freedom of Information Act suits. The third part of this Article focuses on the government's most recent attempt to broaden the privilege. In a number of recent cases, the government has sought to further widen the privilege to shield information about officials'

²⁰ *Id.* at 850-52. *See also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 152 (1975); Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720, 729 (S.D.N.Y. 2012).

²¹ 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5680, at 125 n.1 (1992).

²² *See* GEORGE FISHER, EVIDENCE (3d ed. 2013); STEVEN I. FRIEDLAND ET AL., EVIDENCE LAW AND PRACTICE (5th ed. 2012); OLIN GUY WELLBORN III, CASES AND MATERIALS ON THE RULES OF EVIDENCE (6th ed. 2012).

²³ Kirk D. Jensen, Note, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information Under the Federal Deliberative Process Privilege*, 49 DUKE L.J. 561, 564-66 (1999).

²⁴ *Id.* at 562 (citing *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)).

deliberations over the manner in which they should respond to press inquiries regarding existing government policies. The general thesis of this Article is that the courts should refuse to sustain privilege claims in this context. This Article argues that the government's invocation of the doctrine in this setting represents an illegitimate attempt to convert a policy tool into a political tool.

I. THE ORIGINAL RATIONALE FOR AND SCOPE OF THE DELIBERATIVE PROCESS PRIVILEGE

A. *The Historical Origin of the Privilege*

It has sometimes been claimed that the deliberative process privilege has been long recognized²⁵ or at least that it rests on a longstanding tradition.²⁶ However, at least as far as American law is concerned, those claims are overstatements.²⁷ Indeed, several commentators have characterized those claims as a distortion of the historical record.²⁸

The privilege is traceable to two English decisions, *Smith v. East India Co.*²⁹ and *Duncan v. Cammell Laird Co.*³⁰ *Smith*, decided in 1841, and *Duncan*, handed down in 1942, both used broad language to describe the English "Crown privilege."³¹ The first notable invocation of the privilege in the United States was by a President rather than an American court. In 1954, Senator Joseph McCarthy was chairing hearings to investigate the extent to which communists had infiltrated the United States Army.³²

²⁵ *In re Liquidation of Integrity Ins. Co.*, 754 A.2d 1177, 1182 (N.J. 2000); *City of Colo. Springs v. White*, 967 P.2d 1042, 1047 (Colo. 1998) ("widely recognized").

²⁶ 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 5:57, at 885 (3d ed. 2007).

²⁷ Russell L. Weaver & James T. R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 320 (1989) ("of relatively recent origin"); Wetlaufer, *supra* note 12, at 845, 882 ("new to the federal courts"); Jensen, *supra* note 23, at 561-62 ("[a] relatively recent addition to the collection of privileges available to the federal executive branch . . .").

²⁸ 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 125; Jensen, *supra* note 23, at 564.

²⁹ (1841) 41 Eng. Rep. 550 (Ch.) 551-52.

³⁰ [1942] A.C. 624 (H.L.) 626, 641.

³¹ Jensen, *supra* note 23, at 564-65; Weaver & Jones, *supra* note 27, at 283.

³² Wetlaufer, *supra* note 12, at 865; Jensen, *supra* note 23, at 566.

McCarthy's committee subpoenaed several Defense Department officials to testify.³³ President Eisenhower barred them from appearing.³⁴ After consulting Attorney General Brownell,³⁵ President Eisenhower sent the Secretary of Defense a letter explaining the basis for his decision.³⁶ In his letter, the President wrote that "it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters."³⁷ The letter reflected not only the Attorney General's advice but also Eisenhower's former experience as a general working with military staff.³⁸ Dwight Eisenhower believed that just as a military general needs candid advice from his or her subordinates to develop a sound battle plan, a civilian government official must have frank counsel from his or her staff to formulate effective civilian policy.

President Eisenhower's 1954 invocation of the privilege set the stage for judicial recognition of the privilege in 1958. The seminal decision was *Kaiser Aluminum & Chemical Corp. v. United States*.³⁹ Although the court in question was the Court of Claims, the author of the opinion was Justice Stanley Reed, then retired from the Supreme Court and sitting by designation.⁴⁰ Prior to his elevation to the Supreme Court, Reed had served as solicitor general for President Franklin Roosevelt.⁴¹ As solicitor general, he had been "an extraordinarily consistent supporter of the prerogatives of the federal executive."⁴² In 1951, after his appointment to the Supreme Court, Justice Reed wrote the majority opinion in *United States ex rel. Touhy v. Ragen*,⁴³

³³ Wetlaufer, *supra* note 12, at 865.

³⁴ *Id.*

³⁵ *Id.* at 866 n.73.

³⁶ *Id.* at 866 n.74 (citing Letter to the Secretary of Defense, 1954 PUB. PAPERS 483 (May 17, 1954) (directing him to withhold certain information from the Senate Committee on Government Operations)).

³⁷ *Id.* at 866 (quoting Letter to the Secretary of Defense, 1954 PUB. PAPERS 483 (May 17, 1954)).

³⁸ *Id.* at 867.

³⁹ 157 F. Supp. 939 (Ct. Cl. 1958).

⁴⁰ Jensen, *supra* note 23, at 566.

⁴¹ Wetlaufer, *supra* note 12, at 861.

⁴² *Id.* at 861.

⁴³ 340 U.S. 462 (1951).

upholding the attorney general's power to instruct his subordinates to refuse to produce documents. In *Touhy*, a district court judge ordered an FBI agent to divulge documents that might have endangered the safety of an informer.⁴⁴ When the attorney general instructed the agent to disobey the order, the district court judge cited the agent for contempt. Justice Reed held that the Federal Housekeeping Act, adopted in 1789,⁴⁵ empowered the attorney general to forbid the agent from obeying the order. The Justice construed the Act as “centraliz[ing]” decisions relating to the disclosure of documents; as a senior official, the attorney general had the authority to issue the instruction to the agent.⁴⁶ Given the difficulty of suing the attorney general to challenge his or her decision, *Touhy* temporarily created a privilege-in-effect⁴⁷—until 1958 when Congress amended the Housekeeping Act to make it crystal clear that the Act was not intended to create a privilege.⁴⁸

Ironically, in the very same year that Congress amended the Housekeeping Act to overrule Reed's interpretation granting the executive department a broad privilege, Reed in his *Kaiser Aluminum & Chemical Corp.*⁴⁹ decision, recognized a privilege essentially replacing the one Congress had abolished. In retrospect, it was hardly surprising that the Court of Claims adopted a position protecting the secrecy of government deliberations. The court had historically been opposed to liberal discovery. Its own discovery rules lagged “about forty years behind [those applicable in] the district courts.”⁵⁰ The court not only accorded litigants narrow discovery, but the court had also adopted asymmetric rules thereby allowing government litigants

⁴⁴ Wetlaufer, *supra* note 12, at 861.

⁴⁵ 5 U.S.C. § 301 (2012).

⁴⁶ Wetlaufer, *supra* note 12, at 860.

⁴⁷ *Id.* at 863, 869.

⁴⁸ *Id.* The 1958 amendment provided that “[t]his section does not authorize withholding information from the public or limiting the availability of records to the public.” *Id.* at 869 (quoting Pub. L. No. 85-619, 72 Stat. 347 (1958) (codified as amended at 5 U.S.C. § 301 (1982))).

⁴⁹ *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

⁵⁰ Wetlaufer, *supra* note 12, at 869.

to refuse to make disclosures that private litigants were sometimes required to make.⁵¹

It was against this backdrop that Justice Reed authored his opinion in *Kaiser*. In *Kaiser*, the plaintiff had purchased three aluminum plants from a government agency, the Liquidator of War Assets. The plaintiff alleged that the government agency had breached a provision of the purchase agreement.⁵² The plaintiff sought production of relevant government documents, including a memorandum authored by the liquidator's special assistant.⁵³ The government opposed discovery on privilege grounds that disclosure was contrary to "the public interest."⁵⁴ On the one hand, Justice Reed rejected the government's claim that it was the sole judge of the validity of the privilege claim.⁵⁵ On the other hand, citing the English *Duncan* decision on Crown privilege,⁵⁶ he recognized a qualified⁵⁷ deliberative process privilege "that had never been approved previously by a federal court."⁵⁸ In his mind, the essential thrust of the argument for recognizing the privilege was that the lack of a privilege would chill internal government policy deliberations and thereby impair effective government decision-making.⁵⁹ While he conceded that the argument did not

⁵¹ *Id.* at 870-71.

⁵² *Kaiser*, 157 F. Supp. at 941-42. Kaiser's contract with the government included a "most favored purchaser" provision. *Id.* at 942. The provision required the government to sell the plants to Kaiser on terms that were at least as favorable as any sales of similar plants that the government made to Reynolds Metals. *Id.* Kaiser contended that the government had sold plants to Reynolds on more advantageous terms. *Id.*

⁵³ *Id.* at 943.

⁵⁴ *Id.*

⁵⁵ *Id.* at 947; Wetlaufer, *supra* note 12, at 872-73.

⁵⁶ *Kaiser*, 157 F. Supp. at 945.

⁵⁷ *Id.* at 946 ("[D]ocuments that are privileged from inspection as against public interest but not absolutely").

⁵⁸ Wetlaufer, *supra* note 12, at 873.

⁵⁹ *Id.* Justice Reed advanced this argument in several passages in a relatively short, nine-page opinion. *See Kaiser*, 157 F. Supp. 939. In the first relevant passage, he wrote, "[f]ree 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." *Id.* at 945-46. In a subsequent passage, he asserted "[t]here is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action." *Id.* at 946. Still later in the opinion he stated that there should be a privilege "to protect free discussion of prospective [government] operations and policy." *Id.* at 947. Finally,

justify shielding “objective facts,”⁶⁰ he strongly believed that the argument warranted privileging intra-office⁶¹ advisory opinions⁶² on policy.⁶³

B. The Original Rationale for the Privilege—and the Early Criticisms of the Rationale

The argument favoring the recognition of the privilege is instrumental.⁶⁴ The privilege is viewed as a means to the end of improving the quality of government policies.⁶⁵ The essential assumptions are that: (1) the quality of government policies will be higher if government officials engage in candid,⁶⁶ frank,⁶⁷ open,⁶⁸ robust,⁶⁹ and uninhibited,⁷⁰ deliberations; and (2) absent the privilege, such deliberations would not occur. The proponents of the privilege assert that without the privilege, government officials would live in a fishbowl⁷¹ in constant fear that their casual comments will end up as front-page news.⁷² In their internal debates,⁷³ policymakers must feel free to think outside

near the end of the opinion, he declared that “the very purpose of the privilege, [is] the encouragement of open expression of opinion as to governmental policy.” *Id.*

⁶⁰ *Kaiser*, 157 F. Supp. at 946.

⁶¹ *Id.* at 945.

⁶² *Id.* at 943-44, 947.

⁶³ *Id.* at 945.

⁶⁴ Wetlaufer, *supra* note 12, at 849, 884.

⁶⁵ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975); *Nat’l Immigration Project of the Nat’l Lawyers Guild v. Dep’t of Homeland Sec.*, 842 F. Supp. 2d 720, 729 (S.D.N.Y. 2012).

⁶⁶ *United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir. 2000); *Cal. First Amendment Coal. v. Superior Court*, 78 Cal. Rptr. 2d 847, 851 (Cal. Ct. App. 1998).

⁶⁷ *EPA v. Mink*, 410 U.S. 73, 88 (1973); *Fernandez*, 231 F.3d at 1246; *Soucie v. David*, 448 F.2d 1067, 1080-81 (D.C. Cir. 1971); *Green v. Internal Revenue Serv.*, 556 F. Supp. 79, 84 (N.D. Ind. 1982), *aff’d*, 734 F.2d 18 (7th Cir. 1984).

⁶⁸ *Mink*, 410 U.S. at 88.

⁶⁹ *Weaver & Jones*, *supra* note 27, at 290.

⁷⁰ *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 191 (1975); 3 JACK B. WEINSTEIN, WEINSTEIN’S FEDERAL EVIDENCE § 509.21, at 5191 (2d ed. 1997).

⁷¹ WEINSTEIN, *supra* note 70; *Mink*, 410 U.S. at 87; *Assembly of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992), *modified*, No. 92-15217, 1992 U.S. App. LEXIS 22208 (9th Cir. Sept. 17, 1992).

⁷² *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 841 F. Supp. 2d 142, 160 (D.D.C. 2012).

⁷³ *Jensen*, *supra* note 23, at 569.

the box and play devil's advocate,⁷⁴ and the lack of a privilege will supposedly chill their willingness to do so.⁷⁵ Some courts now declare that it is an "obvious realization" that without the benefit of the privilege government officials will not communicate candidly.⁷⁶ In its filings in the original *Kaiser* case, the government asserted that, absent a deliberative process privilege, "[g]overnment as we know it would all but stop functioning."⁷⁷

From the outset, many commentators and courts have been skeptical of these hyperbolic claims, which have little empirical evidence to support them.⁷⁸ As one leading critic has observed:

[T]he proponents of this privilege have never offered any kind of formal empirical evidence in support Nor do the cases or the literature contain so much as a single specific and verifiable anecdote. Rather, the proponents have confined themselves to boilerplate recitations of the barest form of the deliberative rationale.⁷⁹

In addition to the lack of empirical support, there are common sense doubts about the need for the privilege. Although the absence of a privilege would undoubtedly make some government officials more cautious,⁸⁰ the proponents' sweeping generalization is suspect. For most of the legal history of the United States there was no deliberative process privilege. Nevertheless, American government agencies were able to formulate policies effective enough to survive a Civil War, several international wars, the Great Depression, a number of recessions, and countless disasters—all without the benefit of this privilege. Moreover, government officials have several powerful incentives to engage in the communications necessary to produce effective policies.⁸¹ A committed civil servant⁸² presumably feels a moral

⁷⁴ Wetlaufer, *supra* note 12, at 885; Moye, O'Brien, O'Rourke, Hogan, & Pickert v. Nat'l R.R. Passenger Corp., 376 F.3d 1270, 1277 (11th Cir. 2004).

⁷⁵ Jensen, *supra* note 23, at 586.

⁷⁶ ACLU v. CIA, 892 F. Supp. 2d 234, 248 (D.D.C. 2012); Hooker v. U.S. Dep't of Health and Human Servs., 887 F. Supp. 2d 40, 56 (D.D.C. 2012).

⁷⁷ Wetlaufer, *supra* note 12, at 873 n.110.

⁷⁸ Jensen, *supra* note 23, at 587.

⁷⁹ Wetlaufer, *supra* note 12, at 887.

⁸⁰ Weaver & Jones, *supra* note 27, at 316.

⁸¹ Wetlaufer, *supra* note 12, at 888, 921.

obligation to develop such policies⁸³ and has the considerable protection of civil service status.⁸⁴ In the case of hired government consultants, they have the practical incentive of a contractual duty to furnish candid advice.⁸⁵ For that matter, if the official is worried about subsequent disclosure of his or her statements, the official has greater concerns than the lack of a formal evidentiary privilege. An individual official is not the holder of the privilege; the agency head⁸⁶ can decide to waive the privilege over the official's objection and sometimes does so to scapegoat a subordinate official.⁸⁷ Even if the agency head does not formally waive the privilege, they frequently include revelations embarrassing to subordinate officials in later memoirs.⁸⁸ Summing up, two leading commentators characterize the rationale for the privilege as both "feeble"⁸⁹ and "puny."⁹⁰

The initial legal reaction to the privilege was understandably lukewarm. On the other side of the Atlantic, the English courts reconsidered the broad language that they used in their earlier Crown privilege decisions. In a 1968 decision, *Conway v. Rimmer*,⁹¹ the House of Lords passed on a government's assertion of privilege to oppose a police officer's request for a routine personnel report that led to his termination. Lord Morris posed this rhetorical question: "Would the knowledge that there was a remote chance of possible enforced production really affect candour?"⁹² For his part, Lord Upjohn stated: "I cannot believe

⁸² Lower-level government employees arguably have an especially strong incentive to frankly and clearly convey their views to their superiors:

[T]heir job is to prepare such materials. Their employment may depend on preparing these materials as thoroughly and completely as possible. [L]ower-level officials will want to impress their superiors at the agency The credit they receive for performing their jobs well may be reflected in future salary increases or promotions

Jensen, *supra* note 23, at 588.

⁸³ Wetlaufer, *supra* note 12, at 888, 921.

⁸⁴ 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 140.

⁸⁵ *Id.* at 135.

⁸⁶ Jensen, *supra* note 23, at 589.

⁸⁷ 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 131-32, 146.

⁸⁸ Wetlaufer, *supra* note 12, at 888.

⁸⁹ 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 147.

⁹⁰ *Id.* at 131.

⁹¹ [1968] A.C. 910 (H.L.).

⁹² *Id.* at 957.

that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject . . . by the thought that his observations might one day see the light of day.”⁹³ In its 1971 and 1972 drafts of the Federal Rules of Evidence, the advisory committee decided against including a deliberative process privilege in the rules.⁹⁴ Some states concurred and decided to reject the proposed privilege.⁹⁵ In 1974, the Supreme Court handed down its decision in *United States v. Nixon*.⁹⁶ Although *Nixon* acknowledged the need to confer a measure of protection on communications involving the President,⁹⁷ the opinion contained language that seemed to forcefully reject any call for a broader deliberative privilege: “[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.”⁹⁸

C. *The Original Scope of the Privilege*

The weakness of the instrumental case for recognizing the privilege⁹⁹ made it predictable that, at least initially, the courts would proceed cautiously. The courts recognized a qualified privilege of modest scope: The privilege protected only material¹⁰⁰

⁹³ *Id.* at 994. See also Wetlaufer, *supra* note 12, at 860 n.45; Jensen, *supra* note 23, at 565 n.23, 587 (“The British House of Lords . . . reversed its earlier decisions recognizing the privilege, concluding that the chilling rationale was implausible.”).

⁹⁴ Wetlaufer, *supra* note 12, at 879. When the Committee “had all but completed its work . . . a powerful ally of the White House,” Senator John McClelland, announced that if the committee did not endorse the Justice Department’s proposal for a deliberative process privilege, “he would press forward with . . . legislation that would eliminate the rule-making powers of the Supreme Court . . .” *Id.* at 880. At that point, the committee relented and included the privilege in proposed Rule 509. *Id.* However, Congress ultimately rejected Rule 509. IMWINKELRIED, *supra* note 14, at § 4.2.2.

⁹⁵ Jensen, *supra* note 23, at 587 (citing *Dist. Attorney v. Flatley*, 646 N.E.2d 127, 129 (Mass. 1995)).

⁹⁶ *United States v. Nixon*, 418 U.S. 683 (1974).

⁹⁷ Wetlaufer, *supra* note 12, at 882.

⁹⁸ *Nixon*, 418 U.S. at 712. See also Weaver & Jones, *supra* note 27, at 317; Jensen, *supra* note 23, at 586-87.

⁹⁹ Wetlaufer, *supra* note 12, at 897.

¹⁰⁰ Although the common-law version of the doctrine applies to both oral and written communications, in Freedom of Information Act litigation the doctrine applies

that was “pre-decisional” as well as “deliberative”; and even when the material in question satisfied both prongs of that test, a litigant could obtain discovery by demonstrating a substantial, overriding need for the information.

In a series of Freedom of Information Act cases, the Supreme Court recognized the privilege and outlined its contours. The Court explicitly endorsed Justice Reed’s *Kaiser* opinion.¹⁰¹ In two 1975 decisions, *National Labor Relations Board v. Sears, Roebuck & Co.*¹⁰² and *Renegotiation Board v. Grumman Aircraft Engineering Corp.*,¹⁰³ the Court stressed that to be protected, the material must be “pre-decisional” in character.¹⁰⁴ The public is entitled to learn the content of the final governmental decision; when an agency has finally¹⁰⁵ adopted a decision as “effective”¹⁰⁶ or “working”¹⁰⁷ law, fairness demands that the agency disclose the substance of the decision. However, the Court believed that there is a legitimate public interest in protecting the consultative process preceding and culminating in the decision.¹⁰⁸ The Court generalized that while conferring protection on pre-decisional material promotes that public interest, “post-decisional” material does not warrant such protection.¹⁰⁹ Thus, the temporal sequence

only to written material. 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 145. The Act itself applies only to documentary material.

¹⁰¹ NLRB v. Sears, Roebuck, & Co., 421 U.S. 132, 150 (1975); EPA v. Mink, 410 U.S. 73, 87-93 (1973).

¹⁰² *Sears, Roebuck, & Co.*, 421 U.S. at 152.

¹⁰³ *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 185 (1975).

¹⁰⁴ *Id.* at 184; *Sears, Roebuck, & Co.*, 421 U.S. at 151; *Banner Health v. Sebelius*, 945 F. Supp. 2d 1, 22 (D.D.C. 2013).

¹⁰⁵ *Grumman Aircraft Eng’g Corp.*, 421 U.S. at 182-86; *Sears, Roebuck, & Co.*, 421 U.S. at 152 (“already adopted”).

¹⁰⁶ *Sears, Roebuck, & Co.*, 421 U.S. at 153.

¹⁰⁷ *Id.* at 153.

¹⁰⁸ *Renegotiation Bd.*, 421 U.S. at 192.

¹⁰⁹ *Sears, Roebuck, & Co.*, 421 U.S. at 153 n.19; *Renegotiation Bd.*, 421 U.S. at 184; *Am. Immigration Council v. U.S. Dep’t of Homeland Sec.*, 905 F. Supp. 2d 206, 219 (D.D.C. 2012) (“[T]he document . . . conveys existing policies instead of searching out new policies.”); *Greene v. Thalhimer’s Dep’t Store*, 93 F.R.D. 657, 659 (E.D. Va. 1982) (“[T]he privilege does not protect communications . . . made after the completion of the deliberative process.”).

is critical;¹¹⁰ privileged material must be generated “antecedent to the adoption of an agency policy.”¹¹¹

The same reasoning led the Court in all three cases to impose the further restriction that the material be “deliberative,” reflecting advisory opinions, conclusions, recommendations, and analyses.¹¹² The Court’s 1973 decision, *Environmental Protection Agency v. Mink*,¹¹³ is particularly emphatic on this point. Just as the 1975 decisions distinguished between protected pre-decisional material and unprivileged post-decisional material, the *Mink* case distinguished between deliberative and factual material.¹¹⁴ The former are at the heart of the policymaking process;¹¹⁵ they represent the give-and-take¹¹⁶ inherent in a government agency’s group thought process working out its policy.¹¹⁷ However, there is generally no reason to shield “purely factual material” from

¹¹⁰ *Sensor Sys. Support, Inc. v. Fed. Aviation Admin.*, 851 F. Supp. 2d 321, 328 (D.N.H. 2012).

¹¹¹ *Soghoian v. U.S. Dep’t of Justice*, 885 F. Supp. 2d 62, 73 (D.D.C. 2012) (quoting *Jordan v. DOJ*, 591 F.2d 753, 774 (D.C. Cir. 1978), *overruled on other grounds by Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981)).

¹¹² *Renegotiation Bd.*, 421 U.S. at 180-81; *Sears, Roebuck, & Co.*, 421 U.S. at 150; *EPA v. Mink*, 410 U.S. 73, 88-93 (1973). *See also* *Ameren Mo. v. EPA*, 897 F. Supp. 2d 802, 809 n.9 (E.D. Mo. 2012) (“both pre-decisional and deliberative”); *Angumate v. U.S. Dep’t of Homeland Sec.*, 918 F. Supp. 2d 13, 18 (D.D.C. 2013); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Educ.*, 905 F. Supp. 2d 161, 173 (D.C.C. 2012); *N.Y. Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508, 542 (S.D.N.Y. 2013); *Charles v. Off. of the Armed Forces Med. Exam’r*, 935 F. Supp. 2d 86, 94 (D.D.C. 2013) (both “predecisional” and “deliberative”); *Ludlam v. U.S. Peace Corps*, 934 F. Supp. 2d 174, 188 (D.D.C. 2013) (“both ‘predecisional’ and ‘deliberative’”); *Lazaridis v. U.S. Dep’t of State*, 934 F. Supp. 2d 21, 32 (D.D.C. 2013); *Soghoian v. Office of Mgmt. and Budget*, 932 F. Supp. 2d 167, 177-78 (D.D.C. 2013); *Elec. Privacy Info. v. U.S. Dep’t of Homeland Sec.*, 928 F. Supp. 2d 139, 149 (D.D.C. 2013) (“both predecisional and deliberative”); *Muttitt v. Dep’t of State*, 926 F. Supp. 2d 284, 305 (D.D.C. 2013); *Dent v. Exec. Office for U.S. Attorneys*, 926 F. Supp. 2d 257 (D.D.C. 2013); *Judicial Watch v. U.S. Dep’t of Homeland Sec.*, 926 F. Supp. 2d 121 (D.D.C. 2013) (both predecisional and deliberative); *Senior Citizens League v. U.S. Dep’t of State*, 923 F. Supp. 2d 55, 66 (D.D.C. 2013) (“both predecisional and a part of the deliberative process”).

¹¹³ *Mink*, 410 U.S. at 73.

¹¹⁴ *Id.* at 88, 93.

¹¹⁵ *Id.* at 92.

¹¹⁶ *U.S. ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 527 (6th Cir. 2012); *Comptel v. FCC*, 910 F. Supp. 2d 100, 121 (D.D.C. 2012).

¹¹⁷ *Soghoian v. U.S. Dep’t of Justice*, 885 F. Supp. 2d 62, 74 (D.D.C. 2012).

discovery.¹¹⁸ The Court elaborated that factual material ought to be protected only when it is “inextricably intertwined” with privileged deliberative material.¹¹⁹

Even when the material is both pre-decisional and deliberative, in litigation the privilege is qualified.¹²⁰ The court uses a balancing test to determine whether to uphold the privilege claim and suppress the requested information.¹²¹ Even as an avid proponent of the privilege, Justice Reed did not purport to create an absolute privilege in *Kaiser*. Quite to the contrary, he stated that protected material is privileged “but not absolutely.”

II. A DESCRIPTION OF THE CONSTANT, GRADUAL EXPANSION OF THE SCOPE OF THE PRIVILEGE

The great sociologist Max Weber once observed that bureaucracies have an inherent tendency to expand their power by keeping their activities secret.¹²² The evolution of the deliberative process privilege bears out Weber’s observation. As Part I pointed out, perhaps in part due to doubts about the validity of the instrumental rationale for the privilege, initially the courts accorded the privilege only a modest scope. However, the privilege “caught on . . . quickly” as government agencies immediately began to take advantage of the newly minted privilege.¹²³ According to one commentator, from its humble beginnings in the

¹¹⁸ *Mink*, 410 U.S. at 88-89; *Ameren Mo. v. EPA*, 897 F. Supp. 2d 802, 813 (E.D. Mo. 2012).

¹¹⁹ *Mink*, 410 U.S. at 93 (quoting *Mink v. EPA*, 464 F.2d 742, 746 (D.C. Cir. 1971)).

¹²⁰ *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57, 64 (N.D. Ohio 1964) (“qualified”); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (“but not absolutely”); WEINSTEIN *supra* note 70, at 509-17.

¹²¹ *Denver Policemen’s Protective Ass’n v. Lichtenstein*, 660 F.2d 432, 437 (10th Cir. 1981); *McClelland v. Andrus*, 606 F.2d 1278, 1287 n.54 (D.C. Cir. 1979); *Thompson v. Lynbrook Police Dep’t*, 172 F.R.D. 23, 26-27 (E.D.N.Y. 1997); *Mobil Oil Corp. v. Dep’t of Energy*, 520 F. Supp. 414, 417 (N.D.N.Y. 1981), *rev’d on other grounds*, 659 F.2d 150 (Temp. Emer. Ct. App.); *Peck v. United States*, 88 F.R.D. 65, 74 (S.D.N.Y. 1980); *Socialist Workers Party v. Attorney Gen. of U.S.*, 458 F. Supp. 895, 901 (S.D.N.Y. 1978), *rev’d in part on other grounds*, 596 F.2d 58 (2d Cir. 1979); *United States v. Beatrice Foods Co.*, 52 F.R.D. 14, 20 (D. Minn. 1971).

¹²² MAX WEBER, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 223 (H.H. Gerth & C. Wright Mills, eds., 1946). See also Wetlauffer, *supra* note 12, at 885-86; Joan M. Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261, 1272 (1970); Wetlauffer, *supra* note 12, at 885-86

¹²³ Jensen, *supra* note 23, at 566.

Court of Claims, the privilege “spread through the federal courts like wildfire.”¹²⁴ The privilege took hold and was “applied in an ever-increasing number of cases.”¹²⁵ The privilege has not only been invoked in a considerable¹²⁶ number of published and unpublished¹²⁷ opinions, the courts have also applied the doctrine in a wide variety of types of cases.¹²⁸ Moreover, although the privilege is formally qualified, in the typical case the court upholds the privilege claim and permits the government to withhold the information from the opposing litigant or the public.¹²⁹ Even more significantly, as this part will demonstrate, doctrinal creep¹³⁰ has set in: For the most part, the courts have construed the privilege broadly¹³¹ and enlarged¹³² it far beyond its modest original scope.

A. The Limitation to Communications Between Federal Government Employees

In the cases decided immediately after the seminal *Kaiser* decision, the privilege was ordinarily applied in a narrow setting: A federal court would apply the deliberative process privilege to writings documenting communications between, or at least to, relatively high-ranking federal executive employees. Today the

¹²⁴ *Id.* at 567.

¹²⁵ *Id.*

¹²⁶ Wetlaufer, *supra* note 12, at 920.

¹²⁷ *Id.* at 848 n.10 (“The great bulk of such [pre-trial discovery] decisions are never reported. Accordingly, it would seem appropriate to assume that, whatever the total number of reported decisions, the number of unreported decisions is significantly larger.”).

¹²⁸ Weaver & Jones, *supra* note 27, at 279-80, 320 (“[A] wide array of discovery disputes involving such diverse matters as the Vietnam War, Agent Orange, police abuse, draft resisters, aircraft accidents, civil service dismissals, anti-competition proceedings, petroleum price controls, EPA lead control regulations, and customs service investigations.”); Jensen, *supra* note 23, at 562.

¹²⁹ Wetlaufer, *supra* note 12, at 845-46; Arthur Piacenti, Note, *The Deliberative Process Privilege: Preserving Candid Communications or Facilitating Evasion of Justice?*, 12 REV. LITIG. 275, 290 (1992) (“[S]ubsequent cases have overwhelmingly favored government claims to the deliberative process privilege.”).

¹³⁰ 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 137.

¹³¹ 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5680 44 (Supp. 2012).

¹³² Jensen, *supra* note 23, at 563.

privilege has been broadened to apply in a myriad of other settings.

- To begin with, a large number of state courts currently recognize the privilege.¹³³
- Next, federal courts now apply the privilege to protect communications between state government officials.¹³⁴
- Further, the privilege's scope has been widened to apply to lower level employees within the executive branch.¹³⁵
- In addition, the courts have expanded the privilege beyond executive branch employees to apply to officials of all three branches.¹³⁶
- And finally, while in *Kaiser* Justice Reed mentioned only "intra-office"¹³⁷ memoranda, there is now substantial authority that the privilege applies to communications between government employees and private parties. The employment status of the person communicating with the government official is no longer dispositive of the question of whether the privilege attaches to the communication.¹³⁸ For instance, there are numerous precedents holding that the privilege applies to communications between

¹³³ *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 898 F. Supp. 2d 603, 606-07 (S.D.N.Y. 2012) (discussing the New Jersey privilege); *In re Methyl Tertiary Butyl Prods. Liab. Litig.*, 898 F. Supp. 2d 584, 588-89 (S.D.N.Y. 2012) (discussing the New Jersey privilege); *Fuller v. Homer*, 113 P.3d 659, 660 n.3 (Alaska 2005); *San Joaquin Local Agency Formation Comm'n v. Superior Court*, 76 Cal Rptr. 3d 93, 102-03 (Cal. Ct. App. 2008); *City of Colo. Springs v. White*, 967 P.2d 1042, 1049 (Colo. 1998); *Baker v. Jones*, 199 S.W.3d 749, 752 (Ky. Ct. App. 2006); *Herald Co. v. E. Mich. Univ. Bd. of Regents*, 693 N.W.2d 850, 858 n.17 (Mich. Ct. App. 2005); *Educ. Law Ctr. v. N.J. Dep't of Educ.*, 966 A.2d 1054, 1061 (N.J. 2009); *Ario v. Deloitte & Touche LLP*, 934 A.2d 1290, 1293 (Pa. Commw. Ct. 2007); *West v. Port of Olympia*, 192 P.3d 926, 931 (Wash. Ct. App. 2008).

¹³⁴ *United States v. Irvin*, 127 F.R.D. 169, 172 (C.D. Cal. 1989); Piacenti, *supra* note 129, at 276-77.

¹³⁵ Piacenti, *supra* note 129, at 276.

¹³⁶ *Citizens for Open Gov't v. City of Lodi*, 140 Cal. Rptr. 3d 459, 468 (Cal. Ct. App. 2012).

¹³⁷ *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 945-47 (Ct. Cl. 1958).

¹³⁸ *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 849 F. Supp. 2d 47, 63-64 n.14 (D.D.C. 2012).

government officials and private consultants.¹³⁹ Some courts have even gone to the length of applying the privilege to private parties' responses to questionnaires distributed by a government agency gathering data to formulate policy.¹⁴⁰

The upshot is that the privilege applied today protects material created by a much larger class of persons than the government officials involved in *Kaiser*. The above development makes it all the more imperative that the courts clearly define the nature of the privileged communications. As we saw in Part I, the judicial definitions of "pre-decisional" and "deliberative" specify that nature.

B. The Limitation to "Pre-decisional" Material Rather Than "Post-decisional" Material

As Part I pointed out, when the courts first recognized the privilege they limited its scope to pre-decisional material and emphasized the chronology,¹⁴¹ that is, whether the material came into existence before the agency's final decision. The courts purported to exclude post-decisional material from the ambit of the privilege. Thus, the cases deny privilege protection to documents that explain the terms¹⁴² or application¹⁴³ of a prior final decision.

¹³⁹ *Stewart v. U.S. Dep't of Interior*, 554 F.3d 1236, 1241 (10th Cir. 2009); *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 892 F. Supp. 2d 28, 47-48 (D.D.C. 2012); *Citizens for Pa. Future v. U.S. Dep't of Interior*, 218 F.R.D. 441, 446 (M.D. Pa. 2003), *vacated*, No. 1:CV-01-2403, 2004 U.S. Dist. LEXIS 30626 (M.D. Pa. Aug. 23, 2004); *Gwich'in Steering Comm. v. Office of the Governor*, 10 P.3d 572, 581 (Alaska 2000); *Prince George's Cnty. v. Wash. Post Co.*, 815 A.2d 859, 877 (Md. Ct. Spec. App. 2003); *Daily Gazette Co., v. W. Va. Dev. Office*, 482 S.E.2d 180, 192 (W. Va. 1996); *Weaver & Jones*, *supra* note 27, at 300; *see also Poet, LLC v. Cal. Air Res. Bd.*, 160 Cal. Rptr. 3d 69, 121 (App. 2013).

¹⁴⁰ *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 574-75 (D.C. Cir. 1990); 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 137.

¹⁴¹ *Sensor Sys. Support, Inc. v. Fed. Aviation Admin.*, 851 F. Supp. 2d 321, 328 (D.N.H. 2011).

¹⁴² *Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs.*, 849 F. Supp. 2d 13, 42 (D.D.C. 2012).

¹⁴³ *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 827 F. Supp. 2d 242, 244 (S.D.N.Y. 2011).

In one respect, it was inevitable that the general exclusion would break down. For example, suppose that after a final decision, an agency employee prepares a document describing the deliberative process that culminated in a decision. The disclosure of that document has as much potential to discourage future candid internal policy deliberations as the divulgence of a pre-decisional document with identical contents. Accordingly, the courts eventually carved out an exception to the general exclusion of post-decisional documents and thereby extended the privilege to such material.¹⁴⁴

More broadly, though, the courts began to blur the distinction between pre- and post-decisional documents. In *National Labor Relations Board v. Sears, Roebuck & Co.*,¹⁴⁵ the Supreme Court weakened the distinction by remarking in footnote nineteen that “the line between pre-decisional and post-decisional documents may not always be a bright one.”¹⁴⁶ In another footnote, the Court explained that “[a]gencies are, and properly should be, engaged in a continuing process of examining their policies.”¹⁴⁷ The Court hypothesized that a document could be both post- and pre-decisional—“explaining . . . a decision already reached” while simultaneously helping to develop “guides for decisions of similar or analogous cases arising in the future.”¹⁴⁸ Thus, a single document can be Janus-faced.¹⁴⁹ The Court’s comments give rise to the possibility that a clever government official will be able to manipulate the privilege to suppress what is essentially post-decisional material.¹⁵⁰

¹⁴⁴ *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 841 F. Supp. 2d 142, 148 (D.D.C. 2012); *Judicial Watch, Inc. v. U.S. Dep’t of Treasury*, 796 F. Supp. 2d 13, 31 (D.D.C. 2011).

¹⁴⁵ 421 U.S. 132 (1975).

¹⁴⁶ *Id.* at 153 n.19.

¹⁴⁷ *Id.* at 152 n.18. *See also* *Cal. Native Plant Soc’y v. U.S. Env’tl. Prot. Agency*, 251 F.R.D. 408, 412 (N.D. Cal. 2008).

¹⁴⁸ *Sears, Roebuck & Co.*, 421 U.S. at 153 n.19.

¹⁴⁹ 26A WRIGHT & GRAHAM, JR., *supra* note 131, § 5680, at 65.

¹⁵⁰ 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 148.

C. The Limitation to Deliberative Material Rather Than Factual Information

Like the “pre-decisional” concept, the deliberative notion helps to define the nature of the privileged information. However, just as the courts have loosened the “pre-decisional” limitation, they have also eroded the distinction between protected deliberative material and unprivileged factual matter.

Although courts vary in their approach to defining the term “deliberative,”¹⁵¹ the core concept is encouraging spirited internal debates¹⁵² over the merits of proposed policies¹⁵³ by protecting recommendatory¹⁵⁴ documents. Recommendatory materials are subjective documents¹⁵⁵ that reflect the writer’s personal views¹⁵⁶ rather than the final position of the agency. By way of example, the concept includes documents in which a subordinate¹⁵⁷ government official submits an opinion,¹⁵⁸ analysis,¹⁵⁹ or advice¹⁶⁰ to a superior to assist the superior in reaching a policy decision.

Given this definition of “deliberative,” at first the courts insisted that the privilege did not extend to documents or segregable passages of documents that reflect only objective¹⁶¹ factual information. The courts repeatedly declared that the privilege does not shield raw¹⁶² or purely¹⁶³ factual data.¹⁶⁴ Hence,

¹⁵¹ Jensen, *supra* note 23, at 573-74.

¹⁵² *McCann v. U.S. Dep’t of Health & Human Servs.*, 828 F. Supp. 2d 317, 3212 (D.D.C. 2011).

¹⁵³ *Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t of Homeland Sec.*, 868 F. Supp. 2d 284, 291-92 (S.D.N.Y. 2012).

¹⁵⁴ *ACLU v. CIA*, 892 F. Supp. 2d 234, 249 (D.D.C. 2012).

¹⁵⁵ *Pub. Emps. for Env’tl. Responsibility v. U.S. Int’l Boundary & Water Comm’n*, 839 F. Supp. 2d 304, 321 (D.D.C. 2012).

¹⁵⁶ *Mo. Coal. for Env’t Found. v. U.S. Army Corps of Eng’rs*, 542 F.3d 1204, 1211 (8th Cir. 2008); *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007); *Nat’l Sec. Archive v. CIA*, 859 F. Supp. 2d 65, 70 (D.D.C. 2012); *In re Pharm. Indus. Average Wholesale Price Litig.*, 254 F.R.D. 35, 39 (D. Mass. 2008).

¹⁵⁷ 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 146 (explaining uphill as opposed to downhill flow).

¹⁵⁸ *Env’tl. Prot. Agency v. Mink*, 410 U.S. 73, 89 n.14 (1973).

¹⁵⁹ *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 179-81 (1975).

¹⁶⁰ *Performance Coal Co. v. U.S. Dep’t of Labor*, 847 F. Supp. 2d 6, 15 (D.D.C. 2012).

¹⁶¹ 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 139.

¹⁶² *West v. Port of Olympia*, 192 P.3d 926, 931 (Wash. Ct. App. 2008).

¹⁶³ *Enviro Tech Int’l, Inc. v. U.S. Env’tl. Prot. Agency*, 371 F.3d 370, 374 (7th Cir. 2004).

the courts balk at extending the privilege to arrest statistics,¹⁶⁵ financial data,¹⁶⁶ information about the location of owls,¹⁶⁷ raw scores,¹⁶⁸ and scientific information.¹⁶⁹

However, any student of either the procedural law governing pleading¹⁷⁰ or the evidence law controlling the admissibility of expert testimony¹⁷¹ appreciates that it can be difficult to distinguish “fact” from “opinion.”¹⁷² Predictably, the courts have often found it “frustrating and perplexing”¹⁷³ to draw the line.

In particular, two lines of lower court authority have tended to blur the distinction.¹⁷⁴ According to one precedential line, the privilege attaches to factual information when the government officials’ manner of presenting and selecting the factual data¹⁷⁵ would provide important circumstantial¹⁷⁶ insight into the policy thought process of the government officials who included the data in the document. In some cases, reviewing an official’s choice of the data assembled in the report¹⁷⁷ would enable the reviewer to

¹⁶⁴ *Peer v. U.S.E.P.A.*, 926 F. Supp. 2d 48 (D.D.C. 2013); *United W. Bank v. Office of Thrift Supervision*, 853 F. Supp. 2d 12, 16-17 (D.D.C. 2012); *Equal Emp’t Opportunity Comm’n v. Tex. Hydraulics, Inc.*, 246 F.R.D. 548, 551 (E.D. Tenn. 2007); *see generally* Jensen, *supra* note 23.

¹⁶⁵ *Nat’l Cong. for Puerto Rican Rights v. N.Y.C.*, 194 F.R.D. 88, 92 (S.D.N.Y. 2000).

¹⁶⁶ *United W. Bank*, 853 F. Supp. 2d at 17.

¹⁶⁷ *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002).

¹⁶⁸ *Consumers Union of U.S., Inc. v. Veterans Admin.*, 301 F. Supp. 796, 806-07 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

¹⁶⁹ 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 139.

¹⁷⁰ FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, *CIVIL PROCEDURE* §§ 3.7-.8, at 149-53 (4th ed. 1992).

¹⁷¹ KENNETH S. BROUN ET AL., *MCCORMICK ON EVIDENCE* § 11, at 23-26 (6th ed. 2006).

¹⁷² 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 139-40; *In re Franklin Nat’l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979) (“[T]he line between ‘fact’ and ‘opinion,’ here as elsewhere in the law, is neither distinct nor fixed.”).

¹⁷³ *Fla. House of Representatives v. U.S. Dep’t of Commerce*, 961 F.2d 941, 947 (11th Cir. 1992), *cert. dismissed*, 506 U.S. 969 (1992).

¹⁷⁴ Jensen, *supra* note 23, at 563, 582.

¹⁷⁵ *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); *Dowd v. Calabrese*, 101 F.R.D. 427, 430 (D.D.C. 1984).

¹⁷⁶ *United States v. Exxon Corp.*, 87 F.R.D. 624, 637 n.8 (D.D.C. 1980); 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 143.

¹⁷⁷ *Viropharma Inc. v. Dep’t of Health & Human Servs.*, 839 F. Supp. 2d 184, 193-94 (D.D.C. 2012).

infer the official's policy view.¹⁷⁸ The review would effectively reveal the writer's thought process.¹⁷⁹ The official's exercise of judgment in selecting information from a vast amount of data could easily reveal the policy factors that the writer considered most important.¹⁸⁰ Given the right facts, even the revelation of the name of a person attending a particular meeting could furnish an important clue as to policy leanings and priorities of the officials convening the meeting.¹⁸¹

An alternative line of authority holds that the privilege attaches to factual information when the factual information and the deliberative portions of the document are so "inextricably intertwined"¹⁸² that it is impractical to sever them. If the privileged and unprotected portions are so "interwoven"¹⁸³ or intermingled¹⁸⁴ that the "deletion of the [privileged] evaluative component of the document would make the remaining factual portions incomprehensible,"¹⁸⁵ the court will deny discovery of even the factual portions. In deciding whether the portions are realistically severable, the courts consider such factors as the proportions of privileged and unprotected material in the document and the manner in which the unprotected material is

¹⁷⁸ *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1227 (10th Cir. 2007).

¹⁷⁹ *Horowitz v. Peace Corps*, 428 F.3d 271, 276 (D.C. Cir 2005).

¹⁸⁰ *Elec. Frontier Found. v. U.S. Dep't of Justice*, 890 F. Supp. 2d 35, 52-53 (D.D.C. 2012).

¹⁸¹ *Judicial Watch, Inc. v. U.S. Dep't of State*, 875 F. Supp. 2d 37, 44-45 (D.D.C. 2012) (withholding a list of the names of potential invitees to a meeting between the United States and Canada to discuss the proposed oil pipeline from Canada to the United States).

¹⁸² *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008), *aff'd*, 395 F. App'x 438 (9th Cir. 2010); *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 82 (2d Cir. 2002); *ACLU v. CIA*, 892 F. Supp. 2d 234, 250-51 (D.D.C. 2012); *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 841 F. Supp. 2d 142, 161 (D.D.C. 2012); *In re Pharm. Indus. Average Wholesale Price Litig.*, 254 F.R.D. 35, 40 (D. Mass. 2008); *Peck v. United States*, 88 F.R.D. 65, 69 (S.D.N.Y. 1980); *Gwich'in Steering Comm. v. Office of the Governor*, 10 P.3d 572, 579 (Alaska 2000); *Educ. Law Ctr. v. N.J. Dep't of Educ.*, 966 A.2d 1054, 1063 (N.J. 2009); *Paff v. Office of Attorney Ethics*, 945 A.2d 149, 157 (N.J. Super. Ct. Law Div. 2007); *Anguimate v. U.S. Dep't of Homeland Sec.*, 918 F. Supp. 2d 13, 21 (D.D.C. 2013); 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 142-43.

¹⁸³ *Fed. Trade Comm'n v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

¹⁸⁴ *In re Apollo Grp., Inc. Sec. Litig.*, 251 F.R.D. 12, 28 (D.D.C. 2008).

¹⁸⁵ 26A WRIGHT & GRAHAM, *supra* note 21, § 5680, at 143.

dispersed in the document.¹⁸⁶ The burden of convincing the judge that the material cannot be severed lies with the government claimant.¹⁸⁷ When the court relies on this theory to deny access to factual material in the document, the court must make specific findings as to segregability;¹⁸⁸ and, if need be, the court can examine the document in camera before ruling.¹⁸⁹

D. The Characterization of the Privilege as Qualified or Conditional

As noted, when Justice Reed announced the creation of the deliberative process privilege in *Kaiser*, he explicitly stated that the privilege was conditional or qualified.¹⁹⁰ That is, even if the requested information falls within the scope of the privilege, the party seeking the information can defeat the privilege by showing a compelling need for the information. To decide whether to uphold the privilege claim, the trial judge balances the magnitude of the government confidentiality interest against the extent of the requesting party's need for the information.¹⁹¹ At least some

¹⁸⁶ Elec. Frontier Found. v. U.S. Dep't of Justice, 826 F. Supp. 2d 157, 174 (D.D.C. 2011).

¹⁸⁷ Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs., 903 F. Supp. 2d 59, 70 (D.D.C. 2012); Hajro v. U.S. Citizenship & Immigration Servs., 832 F. Supp. 2d 1095, 1111-14 (N.D. Cal. 2011). If possible, the trial judge should segregate purely factual material from deliberative matter. ITT World Commc'ns, Inc. v. FCC, 699 F.2d 1219, 1236 (D.C. Cir. 1983), *rev'd on other grounds*, 466 U.S. 463 (1984); Life Extension Found., Inc. v. Internal Revenue Serv., 915 F. Supp. 2d 174, 184-85 (D.D.C. 2013).

¹⁸⁸ ACLU v. CIA, 892 F. Supp. 2d 234, 250-51 (D.D.C. 2012); Anguimate v. U.S. Dep't of Homeland Sec., 918 F. Supp. 2d 13, 21-22 (D.D.C. 2013).

¹⁸⁹ *Hajro*, 832 F. Supp. 2d at 1111-12 (N.D. Cal. 2011); Jensen, *supra* note 23, at 569 n.54; Weaver & Jones, *supra* note 27, at 303, 312-13; Jensen, *supra* note 23, at 569. In *Kaiser Aluminum & Chemical Corp. v. United States*, Justice Reed recognized the possibility that before making a final ruling on the privilege claim, the judge might examine the allegedly privileged documents in camera. 157 F. Supp. 939, 947 (Ct. Cl. 1958). However, he rejected Kaiser's argument that the party opposing the privilege claim has "an absolute right for judicial examination." *Id.* On the facts, the justice found that "a judicial examination of the sought-for evidence itself should not be required without a much more definite showing of necessity than" Kaiser had made. *Id.*

¹⁹⁰ *Kaiser Aluminum & Chem. Corp.*, 157 F. Supp. at 946 ("but not absolutely").

¹⁹¹ Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F.2d 432, 437 (10th Cir. 1981); McClelland v. Andrus, 606 F.2d 1278, 1287 n.54 (D.C. Cir. 1979); Hall v. CIA, 881 F. Supp. 2d 38, 68 (D.D.C. 2012) (noting the age of the document is a relevant consideration); Thompson v. Lynbrook Police Dep't, 172 F.R.D. 23, 26-27 (E.D.N.Y. 1997); Mobil Oil Corp. v. Dep't of Energy, 520 F. Supp. 414, 417 (N.D.N.Y. 1981), *rev'd on other grounds*, 659 F.2d 150 (Temp. Emer. Ct. App. 1981); Peck v. United States, 88

courts assign the government the burden of convincing the judge that its confidentiality interest outweighs the requesting party's need.¹⁹² Nevertheless, "[v]ery few" decisions find that the requesting party has made a sufficiently strong showing of need to trump the privilege.¹⁹³ In cases in which a requesting party has argued that its need for the privileged information surmounted the government interest, the rulings have "overwhelmingly favored" the government.¹⁹⁴ One commentator has suggested that the judicial tendency to sustain litigated privilege claims is so pronounced that the formally qualified privilege "has in practice operated almost as an absolute privilege."¹⁹⁵

In Freedom of Information Act (FOIA) cases, the courts have gone even farther. In that context, as a formal matter the privilege is absolute. In its 1973 FOIA decision, *Environmental Protection Agency v. Mink*,¹⁹⁶ the Supreme Court ruled that under the FOIA, a trial judge should not consider the "particularized needs of the individual seeking the information."¹⁹⁷ In the pertinent exemption,¹⁹⁸ the Act provides that the government need not disclose "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."¹⁹⁹ The Court construed that language as meaning that in order to justify non-disclosure, the government need show only that the information fall within the scope of asserted privilege.²⁰⁰ In short, if the document in question

F.R.D. 65, 74 (S.D.N.Y. 1980); *United States v. Beatrice Foods Co.*, 52 F.R.D. 14, 20 (D. Minn. 1971).

¹⁹² *Herald Co. v. E. Mich. Univ. Bd. of Regents*, 693 N.W.2d 850, 858 (Mich. Ct. App. 2005).

¹⁹³ *Weaver & Jones*, *supra* note 27, at 319. *See, e.g.*, *United W. Bank v. Office of Thrift Supervision*, 853 F. Supp. 2d 12, 18 (D.D.C. 2012) ("[T]he Court concludes that the document is protected by the deliberative process privilege and that the privilege has not been overcome by a showing of good cause.").

¹⁹⁴ *Piacenti*, *supra* note 129, at 289-90 ("[I]n reality the government is decisively winning this discovery battle.").

¹⁹⁵ *Id.* at 290.

¹⁹⁶ 410 U.S. 73 (1973).

¹⁹⁷ *Id.* at 87.

¹⁹⁸ While the Act lists several exemptions from the general mandate that the government disclose information upon request, the pertinent provision is exemption 5. 5 U.S.C. § 552(b)(5) (2012).

¹⁹⁹ *Id.*

²⁰⁰ *Mink*, 410 U.S. at 86-91.

is both pre-decisional and deliberative in character, that is the end of the analysis; the court denies discovery. In a FOIA case, the Act does not “permit” the trial judge to “inquir[e]” about the requesting party’s allegedly countervailing need for the information.²⁰¹ In FOIA cases, the party seeking the information cannot even raise the “issue” of his or her need for the information.²⁰² In short, the privilege is unqualified or absolute in the FOIA setting.²⁰³

III. A CRITICAL EVALUATION OF NEW CUTTING EDGE ISSUE UNDER THE DELIBERATIVE PROCESS PRIVILEGE: IS A GOVERNMENT AGENCY ENGAGED IN PROTECTED “DELIBERATION” WHEN IT DELIBERATES OVER HOW TO RESPOND TO MEDIA COMMENTARY ABOUT EXISTING POLICIES?

Part II demonstrated that government agencies have been almost spectacularly successful in persuading courts to both uphold assertions of the deliberative process privilege and to expand the scope of the privilege. Perhaps emboldened by that success, very recently government agencies have attempted to push the edge of the envelope even farther. Beginning late in the Bush administration and continuing now during the Obama administration, government agencies are arguing that the privilege applies to documents reflecting officials’ deliberations over how to respond to press commentary on government policies. Although the courts have divided over the validity of this argument, most have endorsed the government position. After surveying the split of authority, this section evaluates the merits of the question of whether the courts should sustain this type of government privilege claim.

²⁰¹ *Id.* at 87;

²⁰² *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 841 F. Supp. 2d 142, 162 (D.D.C. 2012).

²⁰³ *Judicial Watch, Inc. v. U.S. Dep’t of Treasury*, 796 F. Supp. 2d 13, 26 (D.D.C. 2011). *See also* *Jensen, supra* note 23, at 581 (“[O]nce the government makes a prima facie showing for invoking the privilege, analysis under FOIA Exemption 5 stops and does not proceed to the balancing of interests.”).

A. The Split of Authority

In 2007 in *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Labor*,²⁰⁴ an FOIA case, a private entity, Citizens for Responsibility and Ethics in Washington (CREW), sought to compel the government to disclose a certain Labor Department record.²⁰⁵ The document reflected the Labor Department's internal discussions over how the Secretary should respond to press articles about some Labor Department projects.²⁰⁶ The government refused to produce and asserted the deliberative process privilege to justify withholding the documents.²⁰⁷ CREW contended that the government's refusal was based on "politics and not policy."²⁰⁸ Nevertheless, the court sustained the privilege claim.²⁰⁹ The court concluded that the internal conversation reflected in the document "was pre-decisional and deliberative—DOL staff were deciding what action, if any, DOL should take in response to a media article that commented on DOL policies."²¹⁰ The court dismissed as "speculative"²¹¹ CREW's claim that the motivation for the conversation was political rather than policy-oriented; the court stated that the government was "entitled to a presumption of good faith."²¹²

Although the court's analysis in *Citizens for Responsibility and Ethics in Washington* was conclusory, in 2010 another federal court approvingly cited the *Citizens for Responsibility and Ethics in Washington* decision.²¹³ In the 2010 decision, the court attempted to furnish a rationale for the result in *Citizens for Responsibility and Ethics in Washington*. The court reasoned that the requested documents were pre-decisional because the agency was engaged in "a continuous process of agency decision making,

²⁰⁴ 478 F. Supp. 2d 77 (D.D.C. 2007).

²⁰⁵ *Id.* at 79.

²⁰⁶ *Id.* at 82-83.

²⁰⁷ *Id.* at 81.

²⁰⁸ *Id.* at 83.

²⁰⁹ *Id.* at 85.

²¹⁰ *Id.* at 83.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 736 F. Supp. 2d 202, 208 (D.D.C. 2010).

viz., how to respond to on-going inquiries.”²¹⁴ In a third decision reached in 2012,²¹⁵ a government agency again had to decide how to respond to press inquiries and coverage, including a television news program about the agency’s policies.²¹⁶ The agency officials discussed “how to present its policy in the press.”²¹⁷ As in the prior cases, the court upheld the government’s claim of deliberative process privilege.²¹⁸ The court both collected the authorities sustaining such claims²¹⁹ and reiterated the argument that there is “a continuous process of agency decision making.”²²⁰ These cases illustrate the prevailing view that an agency’s internal discussions about responses to press inquiries and coverage constitute deliberations warranting the protection of the privilege.

In the most recent decision in this line of authority, *Fox News Network, LLC v. U.S. Department of Treasury*,²²¹ ABC News had sent the Treasury Department a list of questions about the government’s oversight of AIG.²²² The questions related to such topics as AIG’s use of federal funds.²²³ The Treasury Department and the New York Federal Reserve Board exchanged emails about the preparation of responses to the questions.²²⁴ Fox News subsequently filed a Freedom of Information of Act suit to obtain the emails.²²⁵ The court ruled that the Treasury Department had to disclose some of the requested material that “consist[ed] almost entirely of factual information, such as where the data can be found and what the agency previously had said publicly about the topic.”²²⁶ However, as in the prior decisions, the court held that the deliberative process privilege shielded a Federal Reserve Board Senior Vice President’s “personal opinions and

²¹⁴ *Id.*

²¹⁵ *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 880 F. Supp. 2d 105, 112 (D.D.C. 2012).

²¹⁶ *Id.* at 111-12.

²¹⁷ *Id.*

²¹⁸ *Id.* at 113.

²¹⁹ *Id.* at 111-12.

²²⁰ *Id.* at 112.

²²¹ 911 F. Supp. 2d 261 (S.D.N.Y. 2012).

²²² *Id.* at 279.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 268.

²²⁶ *Id.* at 279 (alteration in original).

recommendations regarding formulation of the agency's substantive response."²²⁷

Although that position is the majority view, there is a contrary view. The leading case for the minority view is *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*.²²⁸ Judge Shira A. Scheindlin authored that decision in 2011. Her Honor rejected the government's attempt to characterize the agency's conduct as policy deliberations:

[M]any of the documents that defendants seek to withhold under the deliberative process privilege do not contain agency deliberations about what [the agency's] policies should be, but rather about what message should be delivered to the public about what . . . [the] policies are. Such 'messaging' is no more than an explanation of an existing policy, which is not protected by the deliberative process privilege. Deliberations about how to present an already decided policy to the public, or documents designed to explain that policy to—or obscure it from—the public . . . are at the heart of what should be released under FOIA.²²⁹

In her mind, the agency's internal discussions did not reveal a discussion of any proposed "shift in policy."²³⁰ Instead, the agency was merely attempting to "portray those policies to the public" in an attractive manner.²³¹

B. The Proper Resolution of the Split of Authority

None of the opinions rendered to date on this issue is wholly satisfactory. More specifically, none of the opinions considers all the relevant factors. Those factors include both the nature of the press inquiry and the character of the agency's internal deliberations.

²²⁷ *Id.*; *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 949 F. Supp. 2d 225, 234-35 (D.D.C. 2013).

²²⁸ 811 F. Supp. 2d 713 (S.D.N.Y. 2011).

²²⁹ *Id.* at 741 (footnote omitted).

²³⁰ *Id.* at 742.

²³¹ *Id.* at 743.

1. The Nature of the Press Inquiry

There is one instance in which the nature of the press inquiry or coverage should indisputably trigger the deliberative process privilege. Suppose that a newspaper reporter requests that an agency disclose the internal steps leading to an agency's ultimate adoption of a policy. Or a television program might question whether the agency ascribed appropriate weight to a particular consideration in the intra-agency discussions leading to the adoption of a policy. If the agency responds to the request or program, the agency will necessarily be disclosing pre-decisional deliberations.²³² Strictly speaking, the adoption of the policy would antedate the generation of any document reflecting the agency's possible response to the media request or program. Thus, technically, that document would be post-decisional. Yet, as previously stated,²³³ the disclosure of that document would violate the confidentiality of pre-decisional deliberations just as surely as the disclosure of documents prepared contemporaneously with the deliberations. In this situation, it serves the purpose of the privilege to extend the privilege.

However, it is quite another matter when the press inquiry or coverage relates to the proper interpretation and application of a previously adopted policy. Here the government agency can respond without breaching the confidentiality of the earlier policy discussions. In this situation, the applicability of the privilege ought to turn on another factor, namely, the character of the agency's internal discussions.

2. The Character of the Agency Deliberations

A press inquiry or article could conceivably prompt an agency to rethink an earlier decision. Suppose, for example, that the inquiry or article highlights a policy consideration that the agency either ignored or undervalued in the prior deliberations culminating in the adoption of the policy. Once an agency receives such an inquiry or learns of such an article, the agency could

²³² *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 841 F. Supp. 2d 142, 162-63 (D.D.C. 2012).

²³³ *See supra* note 144 and accompanying text.

respond in several different ways. There are three primary scenarios.

Scenario #1. The threshold decision facing the agency is whether, in light of the press inquiry or coverage, the agency should in fact rethink its earlier policy decision. The agency could do so; as the courts applying the privilege to agency deliberations over responses to press inquiries have pointed out, an agency can continuously review and revise its policy on its own initiative.

However, assume *arguendo* that the agency summarily rejects that option. The agency gives little or perhaps no thought to the revision of its earlier decision. Rather, the internal agency discussions quickly focus on the question of how to respond to the press in order to make the existing policy more understandable or popular.

In this scenario, the courts should refuse to apply the privilege to documents reflecting the internal discussions. The documents are post-decisional. They reflect discussions intended to help the agency support its earlier decision.²³⁴ In Judge Scheindlin's words, the intent may be to merely "portray those [existing] policies" in a favorable light in the public eye.²³⁵ There is no justification for invoking the deliberative process privilege in this scenario.

Scenario #2. This variation of the fact pattern is the polar extreme from scenario number one. In this variation, during the initial step after the press inquiry or coverage, the agency decides to give serious consideration to modifying its policy. After considering the inquiry or coverage, the agency concludes that it was remiss in neglecting or depreciating an important policy consideration in the initial deliberations leading to the adoption of the existing policy.

Having resolved the threshold question differently than in scenario number one, in a second step the agency proceeds to reconsider the existing policy. Whether or not the reconsideration leads to an alteration of the policy, the internal discussions

²³⁴ *Island Film, S.A. v. Dep't of the Treasury*, 869 F. Supp. 2d 123, 135 (D.D.C. 2012) ("This executive deliberative process privilege applies only if the document is 'predecisional'—prepared to aid a decision-maker in arriving at his decision, not to support a past decision.").

²³⁵ *Nat'l Day Laborer Org. Network*, 811 F. Supp. 2d at 743.

reflecting the reconsideration ought to be characterized as pre-decisional. The government has the same confidentiality interest in the discussions reconsidering the earlier policy that it has in the discussions originally leading to the adoption of the earlier policy. If the judge's in camera review²³⁶ of the requested records convinces the judge the records reflect this two-step process of reconsideration, the judge should sustain the privilege claim. In both steps of the reconsideration process, the agency must be able to candidly discuss the relative importance of both the policies it stressed in making its original decisions and the policies it arguably ignored or undervalued. In these circumstances, upholding the privilege claim serves to protect the government's continuing capacity to make policy decisions, rather than the official's ability to play politics.

Scenario #3. The third scenario falls in the middle of the spectrum and presents the court with the most difficult decision.

In the first scenario, the agency spends little or no time wrestling with the threshold question of whether to reconsider the agency policy in light of the press inquiry or coverage; the agency decides almost immediately against doing so. The agency then throws itself into the task of making the existing policy clearer to or more popular with the public. In contrast, in the third scenario the agency gives the threshold question extensive consideration. However, unlike as in the second scenario, here after its internal discussion of the threshold question, the agency decides against reconsideration. Then, as in the first scenario, the agency turns its attention to the task of developing a response to the press inquiry or coverage that will make its existing policy more understandable or popular. As in the two prior scenarios, the government asserts the deliberative process privilege. How should the trial judge rule?

In principle, the judge should distinguish between documents reflecting the agency's serious consideration of the threshold reconsideration question and those evidencing discussions intended to help the agency make its existing policy clearer or more attractive.

²³⁶ Weaver & Jones, *supra* note 27, at 312 (“[I]n camera inspections have become much more commonplace in recent years.”).

The former documents are both deliberative and pre-decisional. The documents are deliberative because they concern the agency's policy priorities. Did the agency overvalue the policies that seemed to rationalize the earlier decision, or did the agency slight or depreciate countervailing policies? Moreover, the documents are pre-decisional. The agency has the power to reconsider its earlier action and after serious internal discussion the agency made a final decision not to exercise that power. The documents reflecting that discussion antedate the final decision.

However, the latter documents do not deserve the protection of the privilege. As in the first scenario, they are post-decisional; they reflect discussions intended to enable the agency to support its earlier action.²³⁷ Further, especially when the officials' intent is to cast the agency's decision in a more favorable public light, the documents primarily "regard[] politics and not policy."²³⁸

In sum, the outcome in scenario number three is that while the former documents are privileged, the latter documents are unprotected. This is an ideal situation for the trial judge to conduct an in camera hearing to inspect all the documents. Such hearings are now commonplace in disputes over the applicability of the deliberative process privilege.²³⁹ In the past, judges usually conducted such hearings primarily to segregate privileged policy deliberations from unprotected factual information.²⁴⁰ In the current context, judges can use such hearings for a different purpose. Once again they will be drawing a line. However, now the line is between privileged deliberations over whether to exercise the agency's power to reconsider an earlier decision and unprotected subsequent discussions intended to enable the agency to better explain or defend the earlier decision.

CONCLUSION

As the Introduction noted, the deliberative process doctrine was the last major government privilege to be recognized by the American courts. Yet, it is now the most frequently invoked

²³⁷ *Island Film, S.A.*, 869 F. Supp. 2d at 135.

²³⁸ *Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Labor*, 478 F. Supp. 2d 77, 83 (D.D.C. 2007) (alteration in original) (rejecting the characterization).

²³⁹ *Weaver & Jones*, *supra* note 27, at 312.

²⁴⁰ *Piacenti*, *supra* note 129, at 278-80.

government privilege; it is the first privilege that the government resorts to when it attempts to justify non-disclosure to an opposing litigant or a citizen making a Freedom of Information Act request. It is no wonder that the last has become first. As Part II explained, since the genesis of the privilege in the Court of Claims in 1958, federal and state courts have dramatically expanded its scope: Today the privilege attaches to communications with some private persons and entities, the courts have blurred the distinction between pre- and post-decisional documents, the privilege now sometimes protects factual information, and in one setting the doctrine has evolved into an absolute privilege. The government has enjoyed great success in persuading the courts to expand the parameters of the privilege. We have reached a point at which, unless limited, the privilege will become a shield for “embarrassing or incriminating”²⁴¹ information rather than for documents in which the government has a legitimate confidentiality interest.

The most “hot button” issue in current deliberative process jurisprudence is the question of the extent to which the privilege should protect documents reflecting internal government discussions of potential responses to media inquiries and coverage. As Part III noted, the lower courts are currently divided over this question. Unfortunately, the available precedents do not satisfactorily resolve the question. As we have seen, in resolving the question in a given case, the courts ought to consider both the nature of the media inquiry and the character of the agency’s internal discussions of the media coverage. If the courts do so, in many cases they will come to the same conclusion that Judge Scheindlin reached in *National Day Laborer Organizing Network*: The privilege does not protect efforts to fine-tune the political “messaging” for government policies.²⁴² In the past half-century, the courts have significantly increased the reach of the deliberative process privilege. As Judge Scheindlin perhaps

²⁴¹ Fisher, *supra* note 9, at 34 (discussing President Obama’s invocation of the privilege to block Congress’ access to documents relating to the Drug Enforcement Agency’s Fast and Furious gun program).

²⁴² *Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement*, 811 F. Supp. 2d 713, 741-43 (S.D.N.Y. 2011).

sensed in *National Day Laborer Organizing Network*, it is now time for the courts to say: “[T]his far – but no farther.”²⁴³

²⁴³ *Job* 38:11.