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Cover Page Footnote

J.D. Candidate, 2009, Fordham University School of Law. I thank Professor Andrew Kent for his generous advice in the writing process. Thanks also to my parents and brother for their love, support, and encouragement.

PROPER ASSERTION OF THE DELIBERATIVE PROCESS PRIVILEGE: THE AGENCY HEAD REQUIREMENT

*Shilpa Narayan**

Can any employee of an executive agency assert the deliberative process privilege in order to withhold information in response to a valid request? This Note examines the agency head requirement for assertion of the deliberative process privilege and concludes that only executive officials possessing policy-making authority may invoke the privilege. Such privilege determinations must come from a policy-making official in order to curb abuse and maintain the integrity of executive decisions. Recognition of such a policy-making distinction with regard to the agency head requirement will serve both the Executive's and the public's interest in ensuring effective governance.

INTRODUCTION

In the early part of President George W. Bush's first term, Vice President Richard Cheney convened secret meetings of an energy task force comprised of Enron Corporation executives in order to formulate energy policy.¹ Congress's Government Accountability Office (GAO) subsequently sued the Vice President, seeking the release of documents in connection with the GAO's investigation into the extent of the influence that Enron had on the Bush administration's energy policy.² The Vice President claimed that constitutional doctrine entitled him to keep his communications secret in order to protect his ability to obtain "unvarnished" advice from his policy advisors.³ The GAO claimed that the investigation stemmed from doubts as to the Vice President's capacity to lead a national energy policy development committee due to his dealings with Enron.⁴ Vice President Cheney envisioned a potentially dangerous precedent resulting from the release of his deliberative communications with the Enron executives. In speaking with reporters regarding the

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1. See Elisabeth Bumiller, *Cheney Is Set to Battle Congress to Keep His Enron Talks Secret*, N.Y. TIMES, Jan. 27, 2002, at A1.

2. See *id.*

3. See *id.* (internal quotation marks omitted).

4. See *id.*

investigation, he stressed that such a precedent may render it impossible for future vice presidents “to ever have a conversation in confidence with anybody without having, ultimately, to tell a member of Congress what . . . was said.”⁵ However, the GAO believed that the Vice President asserted executive privilege in order to avoid oversight into key policy making.⁶

The deliberative process privilege is the most frequently invoked executive privilege in the federal courts.⁷ The purpose of the privilege is to protect the decision-making processes and policy discussions that occur within government agencies and executive departments prior to policy adoption.⁸ Thus, the privilege requires that the protected material be both “predecisional”—limited to communications occurring before policy adoption—and “deliberative”—reflecting the processes by which policy alternatives are assessed.⁹ A major concern that prompted recognition of the privilege was that disclosure of such deliberative discussions to the public would impose a chilling effect on candid policy debates.¹⁰

There are three procedural requirements associated with the common-law privilege: (1) there must be a formal claim of the privilege invoked by a “head of the department” who has control over the requested information; (2) the official asserting the privilege must have personally considered the information requested; and (3) there must be a detailed specification of the privilege claimed, as well as an explanation as to why the requested information falls within the scope of the privilege.¹¹ The first procedural provision—requiring agency head invocation—has been the subject of some debate.¹² One view is that non-policy-making officials should be able

5. See *id.* (internal quotation marks omitted).

6. See *id.* (“[The Government Accountability Office (GAO) head official] said that it was his view that the White House had put Mr. Cheney in charge of energy policy for that very reason—to claim executive privilege and avoid oversight of the group by Congress. ‘But that’s a loophole big enough to drive a truck through,’ [he] said.”).

7. *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

8. See *Kaiser Aluminum & Chem. Corp.*, 157 F. Supp. 939, 945–46 (Ct. Cl. 1958) (“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.”); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff’d sub nom.* *V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967) (indicating an interest in protecting “intra-governmental advisory and deliberative communications”); see also Michael N. Kennedy, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 *Nw. U. L. Rev.* 1769, 1770 (2005) (“The privilege is thought to encourage candid discussions of policy options within government agencies, protect against premature disclosure of proposed policies, and avoid public confusion by ensuring that officials are judged only by their final decisions.”).

9. See *In re Sealed Case*, 121 F.3d at 737.

10. *Kaiser*, 157 F. Supp. at 945–46.

11. See *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988).

12. This Note uses the terms “agency” and “department” interchangeably. The term “agency head requirement,” as it appears in this Note, refers to the first procedural requirement for invocation of the deliberative process privilege as it applies to both agencies and departments.

to assert the privilege for the sake of convenience to the agency.¹³ An opposing view advocates a stricter interpretation, namely, that only substantive policy-making officials within the agency may invoke the privilege for the sake of government accountability and transparency.¹⁴

The procedural provisions that guide assertion of the deliberative process privilege are derived from those provisions applicable to all types of executive privilege, first set forth in *United States v. Reynolds*.¹⁵ In that case, the U.S. Supreme Court expressed the standard as involving a formal claim of privilege, “lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.”¹⁶ *Reynolds*, decided before courts recognized the deliberative process privilege, involved the military and state secrets privilege—another type of executive privilege that had, by then, taken firm root in the law of evidence.¹⁷ The case involved a claim of privilege by the U.S. Air Force in response to the plaintiffs’ request for an accident investigation report of the crash of a military aircraft carrying civilians.¹⁸ The Secretary of the Air Force asserted the military and state secrets privilege.¹⁹ Satisfied that the disclosure of military secrets was at stake, the Court did not compel production of the accident investigation report and thus did not base its decision on whether the Secretary of the Air Force’s assertion of privilege sufficed as a formal claim of privilege “lodged by the head of the department which has control over the matter.”²⁰ Because the deliberative process privilege not only covers more than security-related secrets but also involves communications of government employees of all ranks, and not just those concerning the President alone,²¹ judges and scholars alike have debated, well after *Reynolds*, how crucial the requirement for agency head invocation is to the proper assertion of the privilege.²²

The dispute concerning the deliberative process privilege has enormous ramifications for communications that are vital both to the claims of the private litigant and to the integrity and functioning of the government. Because invocation of the privilege inevitably results in the withholding of governmental information from a litigant with a demonstrated need, the conflict surrounding the agency head requirement implicates the classic

13. See *infra* Part II.A.

14. See *infra* Part II.B.

15. 345 U.S. 1, 7–8 (1953); see Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 858 (1990).

16. *Reynolds*, 345 U.S. at 7–8 (footnote omitted).

17. *Id.* at 6–7.

18. *Id.* at 3.

19. *Id.* at 4–5.

20. *Id.* at 8, 11.

21. See *In re Sealed Case*, 121 F.3d 729, 745–46 (D.C. Cir. 1997) (stating the differences between the deliberative process privilege and the presidential communications privilege, which covers communications involving the President alone).

22. See *infra* Part I.C.4.

struggle between government secrecy and democratic accountability.²³ The disagreement surrounding the agency head requirement contributes to the confusion concerning legitimate exercise of the deliberative process privilege.

Assertions of executive privilege increased dramatically under both the administrations of Bill Clinton and George W. Bush, as compared with previous administrations.²⁴ Moreover, recent assertions of executive privilege have expanded into areas of executive functioning that lie beyond the traditional confines of matters relating to national security.²⁵ On October 12, 2001, Attorney General John Ashcroft issued a memorandum to all federal departments and agencies that supplanted a 1993 memorandum issued by Clinton-era Attorney General Janet Reno, expanding the scope of Freedom of Information Act (FOIA) exemption protections, including Exemption 5, which incorporates the common-law deliberative process privilege.²⁶ As a result of both this recent directive and court decisions conferring privilege invocation authority on low-ranking government officials who lack policy-making distinction, the legal landscape concerning the legitimate invocation of the deliberative process privilege has become increasingly uncertain.

This Note seeks to address the judicial ambivalence concerning the proper invocation of the deliberative process privilege and proposes to resolve the dispute over the agency head requirement by arguing for a strict interpretation of "agency head." This rule would require courts to read the term "head of the department" or "agency head" as "policy-making official." Such a construction of the requirement will legitimize assertions of this privilege at a time when serious questions about the proper use of executive privilege have been raised by courts, Congress, the media, and scholars.²⁷ This Note further proposes new legislation to clarify that the term "head of the department" means "policy-making official." Such an enactment will not only serve the interest of clarity, but also allow for greater government accountability.

Part I of this Note provides a general background of the history and development of the deliberative process privilege, describing past and

23. See generally MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY (2d ed. 2002) (providing historical episodes of executive invocations of privilege and their political repercussions).

24. See *id.* at 122–55 (providing examples of Clinton and Bush invocations of executive privilege and illustrating instances where both Presidents exercised the privilege in circumstances that went beyond the "traditional boundaries" established by precedent).

25. See *id.* at 122 ("In [the Clinton administration], the president tried to use executive privilege to protect himself, his aides, and his administration from embarrassing and incriminating information. In [the Bush administration], the president tried to use executive privilege to vastly expand the scope of presidential power at the expense of Congress and open information.").

26. See Memorandum from John Ashcroft, U.S. Attorney Gen., to Heads of All Federal Departments and Agencies (Oct. 12, 2001), available at <http://www.doi.gov/foia/foia.pdf>.

27. See ROZELL, *supra* note 23, at 122–23 (indicating that recent presidential assertions of executive privilege have "reignited" the debate over the privilege's proper use).

present usage of the privilege, as well as the tensions leading up to the current debate surrounding the agency head requirement of deliberative process privilege invocation. Part II probes both sides of the legal conflict surrounding the agency head requirement, exploring policy rationales supporting the argument that “agency head” should translate to any government official as well as those espousing a construction of “agency head” as “policy-making official.” Part III assesses each side of the debate and ultimately advocates the stricter reading of the agency head requirement.

I. HISTORICAL DEVELOPMENT AND USE OF THE DELIBERATIVE PROCESS PRIVILEGE

This part examines the foundations of the deliberative process privilege and its application in the contexts of both civil litigation and FOIA requests. Part I.A explores the sources of authority that gave rise to the recognition of the deliberative process privilege in American courts. Part I.B provides a survey of the application of the deliberative process privilege in both the common-law context and the FOIA arena. Part I.C offers insight into emerging issues surrounding the invocation of the deliberative process privilege.

A. *Origins of the Deliberative Process Privilege*

The deliberative process privilege first took hold in the federal courts in 1958, specifically in the U.S. Court of Claims, in *Kaiser Aluminum & Chemical Corp. v. United States*.²⁸ This case involved a breach of contract between the plaintiff and the Liquidator of War Assets, a government services agency, for the sale of plants manufacturing fabricated aluminum products.²⁹ The defendant Agency Administrator refused to provide an advisory opinion relating to an intraoffice policy involving the contract of sale.³⁰ Justice Stanley Reed, retired from the Supreme Court, and sitting by designation on the Court of Claims, opined that this refusal was justified because it involved an important public interest of protecting “frank discussion between subordinate and chief concerning administrative action.”³¹ Other than the deliberative process privilege’s first appearance in federal court, the precise historical origins of the privilege are unclear.³² This section explores the various sources for the deliberative process privilege and briefly discusses the doubts concerning the need for such a privilege in light of its foundations.

28. 157 F. Supp. 939 (Ct. Cl. 1958).

29. *Id.* at 941.

30. *Id.* at 943.

31. *Id.* at 946 (indicating that the documents sought were “privileged from inspection as against public interest”).

32. See Kennedy, *supra* note 8, at 1779.

1. The English Crown Privilege

Many commentators and courts recognize the deliberative process privilege's roots in the English crown privilege.³³ In *Kaiser*, Justice Reed formulated the deliberative process privilege from several sources, among them, the "crown" privilege from the House of Lord's decision in *Duncan v. Cammell, Laird & Co.*³⁴ Although the English crown privilege never explicitly announced a deliberative process privilege, it protected governmental communications that were deliberative in nature, such as military reports and correspondence among government employees.³⁵ The English crown privilege translated into an executive privilege in the United States shortly after independence, protecting the deliberations of high officials, including the President; but it did not afford similar protection to the lower ranks of government employees.³⁶ Early examples of the application of this privilege on American soil include President George Washington's invocation of executive privilege in the face of a congressional inquiry into the St. Clair military expedition and the Jay Treaty.³⁷ President Andrew Jackson similarly asserted the privilege against several congressional inquiries, and President Thomas Jefferson invoked the privilege several times over the course of the Aaron Burr trials.³⁸ The executive privilege developed over time to include several different types of executive privilege, including the military and state secrets privilege and the informer's privilege.³⁹ Recognition of the deliberative process privilege as being distinct from other governmental privileges did not occur until the late 1950s with the *Kaiser* decision.⁴⁰

33. See Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 283 (1989); Wetlaufer, *supra* note 15, at 858; see also *Kaiser*, 157 F. Supp. at 945 ("[T]he Crown is entitled to full discovery, and . . . the subject as against the Crown is not.").

34. [1942] A.C. 624, 633 (H.L.) (appeal taken from Eng.) (U.K.); see *Kaiser*, 157 F. Supp. at 945; see also Wetlaufer, *supra* note 15, at 873.

35. Weaver & Jones, *supra* note 33, at 283.

36. *Id.* at 284.

37. See *id.* (citing *Freedom of Information and Secrecy in Government: Hearing on S. 921 and the Power of the President to Withhold Information from the Congress Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 85th Cong. 78-79 (1958) [hereinafter *Information Hearing*] (Department of Justice study)). But see RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 168-69 (1974) (noting that the precedential force of President Washington's assertion lay in the presidential cabinet's conclusion "that the President had discretion to refuse papers, 'the disclosure of which would injure the public,'" but that this conclusion was not unearthed until almost two centuries later during congressional hearings on executive privilege (citation omitted)).

38. See Weaver & Jones, *supra* note 33, at 284-85 (citing *Information Hearing*, *supra* note 37, at 80-82, 108-12 (Department of Justice study)). But see BERGER, *supra* note 37, at 179-82 (expressing doubt that the Jefferson and Jackson assertions carried any precedential value).

39. Weaver & Jones, *supra* note 33, at 285.

40. *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958); see Weaver & Jones, *supra* note 33, at 287; Wetlaufer, *supra* note 15, at 848.

2. The Doctrine of Sovereign Immunity

In addition to the crown privilege, Professor Gerald Wetlauffer recognizes the doctrine of sovereign immunity for its formative influence on the deliberative process privilege.⁴¹ Justice Reed saw the position of the executive as enjoying a “certain freedom from control beyond that given the citizen.”⁴² However, in *United States v. Procter & Gamble Co.*, decided nearly six months after *Kaiser*, the Supreme Court rejected the doctrine of sovereign immunity as a source for limiting the scope of discovery in holding that the government must play by the same rules that govern citizens.⁴³ While Professor Wetlauffer considers the influential value that the doctrine may have had in Justice Reed’s opinion in *Kaiser*, he posits that the doctrine of sovereign immunity does not give rise to the deliberative process privilege because, at a fundamental level, the American conception of the sovereign focuses on “the people” rather than on the executive, and, on a practical level, the principle of sovereign immunity is applicable only in the context of relief and not in the context of discovery and privilege.⁴⁴

3. The *Morgan* Doctrine

The *Kaiser* decision also relied on the *Morgan* doctrine, drawn from the Supreme Court’s decision in *Morgan v. United States*,⁴⁵ which states that courts cannot take leave to probe the inner processes of an administrator’s mental state in reaching an administrative conclusion.⁴⁶ Other cases have cited to the *Morgan* doctrine as a source of authority for the deliberative process privilege.⁴⁷ Some commentators have argued that the *Morgan* doctrine was not a proper source of authority for the deliberative process privilege in *Kaiser*.⁴⁸ In *Morgan*, the Court dealt with deliberations of the Secretary of Agriculture, who functioned as a “quasi-judicial” official,

41. See Wetlauffer, *supra* note 15, at 873.

42. *Kaiser*, 157 F. Supp. at 946.

43. See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958) (“The Government as a litigant is, of course, subject to the rules of discovery.”).

44. Wetlauffer, *supra* note 15, at 916–18, 917 n.258.

45. 304 U.S. 1, 18 (1938).

46. *Kaiser*, 157 F. Supp. at 946.

47. See, e.g., *Int’l Paper Co. v. Fed. Power Comm’n*, 438 F.2d 1349, 1359 (2d Cir. 1971); *Davis v. Braswell Motor Freight Lines, Inc.*, 363 F.2d 600, 604 (5th Cir. 1966) (indicating that deliberations of a “quasi-adversary” are more deserving of protection than those of a judge or a jury); *NLRB v. Botany Worsted Mills*, 106 F.2d 263, 266–67 (3d Cir. 1939) (applying the *Morgan* doctrine to deliberations of “quasi-adversary” NLRB); *Green v. IRS*, 556 F. Supp. 79, 84 (N.D. Ind. 1982), *aff’d*, 734 F.2d 18 (7th Cir. 1984); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325 (D.D.C. 1966), *aff’d sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967) (noting that the “judiciary . . . is not authorized ‘to probe the mental processes’ of an executive or administrative officer” (quoting *Morgan*, 304 U.S. at 18)).

48. See Wetlauffer, *supra* note 15, at 873, 906–08; 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, 567, 591–93 (1999).

performing an adjudicatory role over proceedings resembling judicial hearings in order to determine the rate to be charged by market agencies at stockyards.⁴⁹ Justice Reed analogized the role of the Secretary of Agriculture in *Morgan* to the role of the Administrator in *Kaiser*, finding that there were “somewhat similar circumstances” present.⁵⁰ Professor Wetlauffer argues that the *Morgan* doctrine is inapplicable to the deliberative process privilege, since the type of agency deliberation that occurs in a quasi-judicial setting is both “analytically and functionally distinct from those that fall within the realm of the [deliberative process privilege].”⁵¹ Professor Michael N. Kennedy notes that the Supreme Court has not ruled on the applicability of the *Morgan* doctrine to proceedings outside the context of quasi-judicial deliberations.⁵² Thus, the mix of opinion regarding the doctrine’s relation to the deliberative process privilege offers no clarity on the precise origins of the privilege.

4. The Separation of Powers Doctrine

Courts and commentators note that assertions of the deliberative process privilege are often founded on the separation of powers doctrine.⁵³ Many cite to the Supreme Court’s decision in *United States v. Nixon*, where the Court recognized the deliberative process privilege as stemming from the executive privilege—a privilege deriving from both the separation of powers doctrine and protection of confidential communications between high government officials and those who advise them in the course of administrative decision making.⁵⁴ In this case, the Court found that there was a qualified privilege protecting presidential deliberations.⁵⁵ The Court observed that high-ranking officials were especially in want of protection due to their concerns with public attention and approval.⁵⁶ Professor Wetlauffer notes that the Court was careful to emphasize the Chief Executive as deserving of the privilege’s protection, distinguishing the President from the remaining members of the executive branch.⁵⁷ He argues that protection of presidential deliberations should be distinct from

49. *Morgan*, 304 U.S. at 13.

50. *Kaiser*, 157 F. Supp. at 946.

51. Wetlauffer, *supra* note 15, at 906.

52. Kennedy, *supra* note 8, at 1776 n.47.

53. See, e.g., *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 323 (D.D.C. 1966), *aff’d sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967) (discussing the validity of the separation of powers doctrine as a source of the deliberative process privilege); Wetlauffer, *supra* note 15, at 899.

54. See *Weaver & Jones*, *supra* note 33, at 288 (citing *United States v. Nixon*, 418 U.S. 683, 703 (1974)); see also Wetlauffer, *supra* note 15, at 899 (“The argument is that the occasional disclosure of general deliberative materials in the course of a judicial proceeding would be an unconstitutional interference with or intrusion upon the executive branch.”).

55. *Nixon*, 418 U.S. at 703–07.

56. *Id.* at 705 (“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”).

57. Wetlauffer, *supra* note 15, at 901.

the deliberative process privilege in that, first, it singles out the presidency as a position deserving of deference not properly reserved for lower-ranking offices; second, the President and Vice President are the only executive officers recognized in the U.S. Constitution whereas all other executive officials are mere creations of the legislature; and finally, questions of executive privilege affect the functioning of the President, who is functionally distinct from other executive officials.⁵⁸ The U.S. Court of Appeals for the District of Columbia Circuit in *In re Sealed Case* distinguished the protection of presidential deliberations from that of other intra-agency communications, labeling the former the “presidential communications privilege.”⁵⁹ Professor Kennedy questions this distinction and proposes that the deliberative process privilege merge with the presidential communications privilege.⁶⁰ Unlike Wetlaufer, Kennedy argues that the Court did not intend to make a distinction between the President and those who assist him.⁶¹ He remarks that *Nixon* cited decisions like *Kaiser* as authority for the argument that the privilege must protect the “President and those who assist him.”⁶² It is not settled whether the Supreme Court decision in *Nixon* remains sound authority for the deliberative process privilege.⁶³

5. The McCarthy Hearings

Other commentators recognize the invocation of the privilege by President Dwight D. Eisenhower during the McCarthy hearings as the debut of the deliberative process privilege on American soil.⁶⁴ President Eisenhower adapted the concept from his military organizational experience to his civilian chief executive office, arguing that he had a duty to protect his subordinates from attack during the McCarthy hearings.⁶⁵ The charges

58. *Id.* at 901–02.

59. *In re Sealed Case*, 121 F.3d 729, 736–40 (D.C. Cir. 1997).

60. Kennedy, *supra* note 8, at 1803–15 (arguing that the distinction between the two forms of privilege is “without merit”).

61. *Id.* at 1804.

62. *Id.* (emphasis omitted) (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)) (citing *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325 (D.D.C. 1966), *aff’d sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958)).

63. *See Weaver & Jones, supra* note 33, at 288–89 (“Whether this holding was soundly based is still debated.”); Wetlaufer, *supra* note 15, at 901 (“[T]he separation of powers question is . . . not settled by *United States v. Nixon*.”).

64. *See HERBERT BROWNELL WITH JOHN P. BURKE, ADVISING IKE: THE MEMOIRS OF HERBERT BROWNELL* 256–59 (1993) (“To the cabinet, he emphasized the need to protect individuals within our departments from the kinds of attacks McCarthy was now making.”); ROZELL, *supra* note 23, at 40 (noting the “criticism of the president for defining executive privilege too broadly—possibly allowing every executive branch officer to assert that prerogative”); *see also* Wetlaufer, *supra* note 15, at 867 (describing how President Eisenhower adopted the principle from his military experience).

65. *See BROWNELL WITH BURKE, supra* note 64, at 256–57, 259; Wetlaufer, *supra* note 15, at 865–66 (detailing Eisenhower’s efforts to prevent his subordinates from testifying during the McCarthy hearings).

against the Eisenhower administration came to a head when, in May 1954, testimony revealed that there was a high-level meeting within the administration to devise a strategy to frustrate the McCarthy probe.⁶⁶ Eisenhower, in the meantime, consulted with Attorney General Herbert Brownell in order to develop legal arguments to protect subordinates within the administration from the Senate investigation.⁶⁷ His legal counsel offered only traditional arguments pertaining to the separation of powers doctrine.⁶⁸ Upon receiving the advice, Eisenhower ordered the cessation of further information disclosures to the Senate, invoking not a separation of powers argument, but rather a rationale based on the deliberative process privilege.⁶⁹ Eisenhower remarked in a letter to Secretary of Defense Charles E. Wilson, "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."⁷⁰ Furthermore, he added, "it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed."⁷¹ Since then, the privilege has gained wide acceptance among federal executives and has caught on quickly in the courts.⁷²

6. Skepticism Surrounding the Deliberative Process Privilege

Despite both the recognized and putative sources for its existence, the deliberative process privilege has incurred much criticism from commentators who are skeptical of the need for such a protective measure in civil litigation. Several critics express not only doubt over the validity of the sources cited as doctrinal authority for the deliberative process privilege but also concern over the lack of empirical evidence to support its value in administrative governance (there are no veritable findings that demonstrate that assertion of the privilege has directly resulted in the protection of

66. See BROWNELL WITH BURKE, *supra* note 64, at 258–59; Wetlaufer, *supra* note 15, at 865 n.72.

67. See BROWNELL WITH BURKE, *supra* note 64, at 257; Wetlaufer, *supra* note 15, at 866 & n.73.

68. See BROWNELL WITH BURKE, *supra* note 64, at 257 (indicating that "the issue of a subpoena involved a matter of the separation of powers and the question of protecting the confidentiality of the army's proceedings"); Wetlaufer, *supra* note 15, at 866 & n.73.

69. Wetlaufer, *supra* note 15, at 866.

70. See ROZELL, *supra* note 23, at 39 (quoting Letter to the Secretary of Defense Directing Him to Withhold Certain Information from the Senate Committee on Government Operations, PUB. PAPERS 483 (May 17, 1954) [hereinafter Eisenhower Letter]) (internal quotation marks omitted); Wetlaufer, *supra* note 15, at 866 (citing Eisenhower Letter, *supra*, at 483).

71. See ROZELL, *supra* note 23, at 39 (quoting Eisenhower Letter, *supra* note 70, at 484) (internal quotation marks omitted); Wetlaufer, *supra* note 15, at 866–67 (citing Eisenhower Letter, *supra* note 70, at 483–84).

72. See Wetlaufer, *supra* note 15, at 867 & n.77 (describing the rapid spread of the deliberative process rationale for executive privilege).

candor in policy-making discussions).⁷³ Many critics are concerned about the mounting drive toward secrecy on the part of government officials, and they suggest that the deliberative process privilege is in derogation of the democratic values of this country.⁷⁴ Others express doubt about the efficacy of the privilege and argue either for its abolishment or for its reinforcement.⁷⁵ Professor Wetlaufer laments that courts have neither examined the doctrinal weaknesses that are cited as the foundation for the deliberative process privilege nor questioned the tenuous strands of the instrumental rationale underlying its application.⁷⁶ Nonetheless, the deliberative process privilege remains relatively prevalent as a source for withholding executive information.⁷⁷

B. *Current Scope of the Deliberative Process Privilege*

The deliberative process privilege is both a common-law privilege and a statutory provision found in the FOIA.⁷⁸ The principles underlying both manifestations derive from the recognized instrumental value of the privilege; however, there are noteworthy distinctions between the two with regard to practical implications. This section outlines the parameters of both the common-law privilege and the FOIA provision, highlighting the distinctions between the two.

1. The Common-Law Privilege

As a common-law judicial privilege, the deliberative process privilege prevents the judiciary from ordering an executive official to disclose information to a litigant in civil litigation, but does not defend against congressional inquiries.⁷⁹ The privilege contains two substantive

73. See BERGER, *supra* note 37, at 234 (“It need hardly be said that [the deliberative process privilege] is altogether without historical foundation.”); Wetlaufer, *supra* note 15, at 887 (“So far as I have been able to determine, the proponents of this privilege have never offered any kind of formal empirical evidence in support of its assertion.”). *But see infra* note 91 and accompanying text (indicating that there is general recognition of the privilege’s objectives).

74. See BERGER, *supra* note 37, at 249 (“In truth, ‘candid interchange’ is but another of a string of shallow rationalizations to justify withholding of information”); Wetlaufer, *supra* note 15, at 889 (arguing that proponents of the deliberative process privilege have abused the concept of privilege in the name of “executive secrecy and diminished opportunities for public participation and debate”).

75. See Kennedy, *supra* note 8, at 1799–814; *see also supra* notes 60–62 and accompanying text. *But see* Weaver & Jones, *supra* note 33, at 320 (“[A]ssuming 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.”).

76. Wetlaufer, *supra* note 15, at 875.

77. *See supra* note 7 and accompanying text.

78. *See* Wolfe v. Dep’t of Health & Human Servs., 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc); Jordan v. U.S. Dep’t of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978) (en banc), *overruled on other grounds* by Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981).

79. *See* Wetlaufer, *supra* note 15, at 845 & n.3.

requirements: the material must be both predecisional and deliberative.⁸⁰ Predecisional material comprises communications that occur before the government agency adopts a policy or other type of decision.⁸¹ Deliberative communications include those communications that “reflect[] the advisory and consultative process by which decisions and policies are formulated.”⁸² Documents that contain purely factual material or information relating to a decision or policy that the government has already adopted do not fall within the scope of the privilege.⁸³ However, factual material, when inextricably linked with the deliberations contained in a document, may be protected from disclosure under the privilege.⁸⁴ The primary rationale behind the inapplicability of the deliberative process privilege to factual information is that the government does not have a legitimate interest in shielding non-security-related facts from the public eye, whereas it does have a legitimate interest in protecting opinions, recommendations, and other decision-making processes from public scrutiny.⁸⁵

The substantive requirements of the deliberative process privilege ensure that candor in discussions relating to policy making is protected from the chilling effect brought on by the fear of disclosure of such discussions and deliberations.⁸⁶ A related rationale concerns the protection against premature disclosure of proposed policies that have not reached full development, let alone adoption by the agency.⁸⁷ Ancillary to this policy concern is the worry that the public may conflate deliberative statements with adopted policy.⁸⁸ Finally, constitutional issues surrounding the separation of powers channel the privilege toward the prevention of judicial meddling in executive affairs, so that judges do not abuse their fact-finding authority by examining deliberative communications within an agency at the expense of that agency’s ability to carry out its regulatory and executive functions.⁸⁹ The overarching objective behind the deliberative process privilege concerns the prevention of “injury to the quality of agency

80. See *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); Kennedy, *supra* note 8, at 1772.

81. See Kennedy, *supra* note 8, at 1772–73.

82. *Army Times Publ’g Co. v. Dep’t of Air Force*, 998 F.2d 1067, 1070 (D.C. Cir. 1993).

83. *In re Sealed Case*, 121 F.3d at 737.

84. *Id.*

85. See Kennedy, *supra* note 8, at 1775.

86. *In re Sealed Case*, 121 F.3d at 737.

87. Jensen, *supra* note 48, at 569 (citing CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *MODERN EVIDENCE: DOCTRINE AND PRACTICE* 660–61 (1995); 2 SCOTT N. STONE & ROBERT K. TAYLOR, *TESTIMONIAL PRIVILEGES* § 9.09, at 9–22 (2d ed. 1993)).

88. *Id.* (citing MUELLER & LAIRD, *supra* note 87, at 661; 2 STONE & TAYLOR, *supra* note 87, §9.09, at 9–22).

89. *Id.* (citing *Morgan v. United States*, 298 U.S. 468 (1936)).

decisions.”⁹⁰ Federal courts have upheld the legitimacy of this goal throughout the deliberative process privilege’s tenure in case law.⁹¹

Both commentators and courts alike acknowledge that the deliberative process privilege is not as powerful as its presidential communications counterpart.⁹² The common-law deliberative process privilege is a “qualified” privilege because it may give way to a showing of sufficient need for the requested information.⁹³ For this reason, it is subject to a balancing inquiry that considers factors such as “the relevance of the evidence, the availability of other evidence, the seriousness of the litigation, the role of the government, and the possibility of future timidity by government employees.”⁹⁴ Because the objectives of the privilege are balanced against both the interests of government transparency and the interests of the requesting litigant, the determination of sufficient need occurs on a case-by-case basis.⁹⁵ Moreover, when the litigation concerns a claim of governmental misconduct, the deliberative process privilege will not apply.⁹⁶ This qualification reflects that the purpose of the deliberative process privilege is to serve the interest of “honest, effective government.”⁹⁷

2. FOIA Exemption 5

While the deliberative process privilege originated in the common law, it applies more frequently in the context of FOIA requests.⁹⁸ Exemption 5 of the FOIA, which applies to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than the agency in litigation with the agency,”⁹⁹ incorporates several privileges, including both the deliberative process privilege and the attorney-client privilege.¹⁰⁰ Here the requester is not in litigation with the government agency.¹⁰¹

90. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

91. *See Kennedy*, *supra* note 8, at 1773 (stating that “the validity of [this goal] has gone virtually unquestioned in the federal case law”).

92. *See id.* at 1799 (arguing that the instrumental value of the deliberative process privilege is weak in light of its qualified nature); *see also In re Sealed Case*, 121 F.3d 729, 738, 746 (D.C. Cir. 1997) (noting that the deliberative process privilege is “routinely denied” in cases of government misconduct and that it does not afford as much protection against disclosure as its presidential communications counterpart).

93. *See In re Sealed Case*, 121 F.3d at 737.

94. *Id.* at 737–38 (internal quotation marks omitted).

95. *Id.* at 737.

96. *Id.* at 738.

97. *Texaco P.R., Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995).

98. *See In re Sealed Case*, 121 F.3d at 737.

99. 5 U.S.C. § 552(b)(5) (2006).

100. *See U.S. DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE 468* (2007), available at http://www.usdoj.gov/oip/foia_guide07.htm; *see also Wetlaufer*, *supra* note 15, at 878, 913 & n.248.

101. *See EPA v. Mink*, 410 U.S. 73, 89–91 (1973) (detailing the provisions of the FOIA as well as the intent behind Exemption 5).

The purpose behind the FOIA is to provide the public with a "broad spectrum of information."¹⁰² Notably, a demonstrated need for requested material is necessary only when a litigant seeks to overcome the common-law deliberative process privilege and not Exemption 5 of the FOIA.¹⁰³ Courts construe the FOIA broadly since the intent behind its enactment was to provide access to documents long shielded from the public eye.¹⁰⁴ The exemptions in subsection (b) grant the government specific provisions for the determination of those documents that may remain confidential.¹⁰⁵ Like the common-law deliberative process privilege, Exemption 5 of the FOIA necessitates a balancing inquiry of government interests of confidentiality against public interests of transparency; however, the balance favors the "fullest responsible disclosure."¹⁰⁶ Thus, unlike the deliberative process privilege in common law, the deliberative process privilege in the FOIA context focuses more on the disclosure of government actions than on the satisfaction of the particular needs of the requester.¹⁰⁷

C. *The Changing Landscape of the Deliberative Process Privilege Invocation Requirements*

While the substantive requirements of the deliberative process privilege are not under dispute, the procedural requirements have endured their fair share of controversy.¹⁰⁸ The procedural framework of the privilege provides that (1) there must be a formal claim of the privilege invoked by a "head of the department" who has control over the requested information, (2) the official asserting the privilege must have personally considered the information requested, and (3) there must be a detailed specification of the privilege claimed, as well as an explanation as to why the information falls within the scope of the privilege.¹⁰⁹ This section provides an overview of the discrepancies concerning the procedural requirements of the privilege that arise from various concerns, ranging from the proper role of courts in acknowledging the needs of the executive branch to the practical implications of instituting rigid limitations on assertion of the privilege when other procedural mechanisms for checking executive privilege exist.

102. *Id.* at 74.

103. *See In re Sealed Case*, 121 F.3d at 738 (distinguishing the common-law privilege from the FOIA exemption).

104. *See Mink*, 410 U.S. at 80 ("Without question, the Act is broadly conceived.")

105. *Id.*

106. *Id.* (quoting S. REP. NO. 89-813, at 3 (1965)).

107. *See In re Sealed Case*, 121 F.3d at 737 n.5 (providing Exemption 7(c) as an example of the notion that the focus of the privilege determination is on the government operation rather than on the "identity or purpose of [the] requester").

108. *See infra* Part II.

109. *See United States v. O'Neill*, 619 F.2d 222, 226 (3d Cir. 1980); *see also In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988) (stating the requirements for invoking the law enforcement privilege).

1. The *Vaughn* Index

One such procedural mechanism is the *Vaughn* index. A government agency, when asserting privilege, may not do so without listing the specific documents withheld.¹¹⁰ Courts require agencies to submit a table of the documents withheld, known as the “*Vaughn* index.”¹¹¹ The purpose of the *Vaughn* index, named for *Vaughn v. Rosen*,¹¹² is to allow the government the opportunity to demonstrate its need for privilege and to provide the requesting litigant a meaningful chance to contest the government’s privilege assertions.¹¹³ The *Vaughn* index must contain a description of all documents under the claim of privilege.¹¹⁴ Without revealing so much so as to compromise the purpose of the privilege, the description must include the author(s), recipient(s), and subject matter of the document, as well as an explanation as to why the document is privileged.¹¹⁵ For invocation of the deliberative process privilege, the explanation must include both a statement that the document contains deliberative material and an account of how the document functioned in the deliberations.¹¹⁶ Additionally, the index must indicate the status of the preparer as well as a demonstration of the harm associated with disclosure of the document.¹¹⁷ The court will assess the validity of the government’s claims after reviewing the contents of the documents and the government’s justifications for asserting privilege.¹¹⁸ The court may also examine the privileged documents in camera.¹¹⁹ When in camera review is burdensome due to the large quantity of documents under assertion of privilege, the *Vaughn* index provides a summary of the basic contents of the documents and alleviates the burden on judicial resources.¹²⁰

2. The Agency Head Requirement

In addition to the *Vaughn* index, courts require that government agencies submit an affidavit demonstrating why disclosure would be harmful.¹²¹ One provision that haunts legitimate exercise of the privilege is the requirement that the affidavit be lodged by the head of the agency.¹²² The requirement first appeared in *Reynolds*.¹²³ That case involved the deaths of three civilians aboard a B-29 aircraft that was testing secret electronic

110. Weaver & Jones, *supra* note 33, at 301.

111. *Id.*

112. 523 F.2d 1136, 1146 (D.C. Cir. 1975).

113. Weaver & Jones, *supra* note 33, at 303.

114. *Id.* at 301.

115. *Id.* at 301–02.

116. *Id.* at 302.

117. *Id.*

118. *Id.* at 303.

119. *Id.*

120. *Id.*

121. *Id.* at 306.

122. See *infra* Part II.

123. *United States v. Reynolds*, 345 U.S. 1, 8 (1953).

equipment and subsequently crashed.¹²⁴ In suits brought against the United States, the surviving spouses of the three deceased civilians moved for the production of the Air Force's official accident investigation report and the statements of the three surviving crew members.¹²⁵ After both the district court and the court of appeals compelled production of these documents, the Air Force refused, arguing that it was not in the public interest to furnish the requested documents.¹²⁶ Furthermore, in addition to invoking privilege under Air Force Regulation section 161,¹²⁷ the Air Force claimed that the demanded documentation could not be produced "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."¹²⁸

On appeal, the Supreme Court held that the executive privilege must be invoked by way of a formal claim, "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."¹²⁹ In *Reynolds*, the Secretary of the Air Force invoked the privilege, thus satisfying the Court's notion of valid assertion.¹³⁰ The Court reversed the decision below on alternative grounds, due to its satisfaction that "military secrets [were] at stake."¹³¹

Most scholars and judges recognize that the deliberative process privilege emerged amidst significant political transition associated with the uncertainty of the cold war, the bureaucracy arising from the New Deal, and the aftermath of World War II.¹³² These episodes of political upheaval fostered a sense of "secrecy and executive prerogative" that marked the early development of the deliberative process privilege and perhaps led to the agency head requirement.¹³³ During this time, the courts imposed the *Reynolds* requirements on those government entities seeking to assert executive privilege in order to protect government secrecy.¹³⁴ In *Reynolds*, the Court emphasized the danger that may result from an insistence on inspection of documents sensitive in nature, even when conducted by a judge in chambers.¹³⁵ Without in camera review, however, judges lacked a basic knowledge of the documents' contents and thus faced uncertainty

124. *Id.* at 2-3.

125. *Id.*

126. *Id.* at 4.

127. *Id.*

128. *Id.* at 5 (internal quotation marks omitted).

129. *Id.* at 8.

130. *Id.* at 10.

131. *Id.* at 11.

132. Professor Gerald Wetlauffer notes that it was "a period marked by the administrative aspirations of Roosevelt's presidency, the military contingencies of World War II, and the early period of the Cold War, the era of the Rosenbergs, of Hiss and of Joseph McCarthy." Wetlauffer, *supra* note 15, at 857-58.

133. *Id.*

134. See Weaver & Jones, *supra* note 33, at 309; Wetlauffer, *supra* note 15, at 876.

135. *Reynolds*, 345 U.S. at 10.

when making privilege determinations.¹³⁶ Courts felt that the documents under claim of privilege warranted a standard of review higher than that provided by subordinates and thus required consideration by the agency head.¹³⁷

3. The Lack of the Agency Head Requirement in the FOIA Context and a New Executive Focus on FOIA Exemption 5

The agency head requirement exists only in the context of the common law and not in the arena of FOIA requests.¹³⁸ Low-ranking employees may invoke FOIA exemptions in order to withhold information from FOIA requesters.¹³⁹ This procedural difference may be due not only to the ability of Congress to override a common-law privilege by statute, but also to the low priority given to the public interest needs of FOIA requesters as contrasted with the greater weight accorded with the specific discovery needs of a litigant.¹⁴⁰ Thus, because it is outside the context of litigation, the government generally has little difficulty invoking privilege in order to withhold information requested by means of the FOIA.¹⁴¹

136. See Weaver & Jones, *supra* note 33, at 309 (“If judges could not review the documents, how could they be sure that the privilege was being properly asserted?”).

137. See *id.* at 309–10 (“Courts sought and gained some protection in [*Reynolds* privilege determinations] by requiring the agency head to review disputed documents and to make the privilege assertions himself.”); see also *United States v. AT&T Co.*, 86 F.R.D. 603, 608 (D.D.C. 1979) (ordering that if the agency wished to avoid in camera disclosure of documents, then it must submit an affidavit from the “agency head, particularly describing the nature of the information sought and the reasons why disclosure would jeopardize national security interests”).

138. See Kennedy, *supra* note 8, at 1786–87 (describing the procedural difference in that “low-level government official[s]” may invoke FOIA exemptions whereas, generally, “the head of the relevant agency” must make litigation assertions of deliberative process privilege).

139. See U.S. DEP’T OF JUSTICE, *supra* note 100, at 38–130 (indicating that the “agency” has the capacity to make request determinations). While the agency must designate a “senior official” to be the “Chief FOIA officer,” that officer’s charge is “agency-wide responsibility for efficient and appropriate compliance with the FOIA.” *Id.* at 40–42 (quoting Exec. Order No. 13,392, 3 C.F.R. 216 (2006), *reprinted in* 5 U.S.C. § 552 (2006)). The *Freedom of Information Act Guide*, however, points to differentiation between policy-making authorities within an agency and subordinates with regard to ascertaining the “predecisional” nature of documents. See *id.* at 488–90 (“[O]ne must consider the nature of the decisionmaking authority vested in the office or person issuing the document. If the author lacks ‘legal decision authority,’ the document is far more likely to be predecisional.” (citations omitted)).

140. See Kennedy, *supra* note 8, at 1786 (“[T]he abstract public interest in open government will never weigh as heavily with courts as the concrete needs of a litigant seeking justice.” (quoting 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5680, at 130 (1992))).

141. Some commentators find that this difficulty in the litigation context discourages the government from invoking the privilege in cases where they have a legitimate basis for withholding. See Kennedy, *supra* note 8, at 1787 (“As a practical matter, this makes it harder for government attorneys to invoke the privilege in litigation and discourages them from asserting the privilege in cases where they could plausibly do so.”).

In a practical sense, the absence of the agency head requirement in the FOIA context contributes to the broad protection now aggressively sought by the executive branch when invoking the deliberative process privilege. In recent years, two different views emerged from the White House regarding protections afforded by the FOIA exemptions. In the wake of September 11, 2001, Attorney General John Ashcroft issued new FOIA guidelines, directing agencies to protect information much more aggressively.¹⁴² Ashcroft's October 2001 memorandum to all federal departments and agencies, expanding the scope of FOIA exemption protections, supplanted a 1993 memorandum issued by former Attorney General Reno.¹⁴³ Reno's memorandum had called for a "presumption of disclosure" and an end to the withholding of information "merely because there is a 'substantial legal basis' for doing so."¹⁴⁴ While Reno's memorandum to federal agencies made no mention of any particular FOIA exemption,¹⁴⁵ the Ashcroft memorandum of October 2001 highlighted Exemption 5 of the FOIA:

Congress and the courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), incorporates these privileges and the sound policies underlying them. I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA.¹⁴⁶

Additionally, whereas the Reno memorandum emphasized transparency as the cornerstone of a well-run democracy,¹⁴⁷ the Ashcroft memorandum focused on effectiveness and information security.¹⁴⁸ Thus, in the Bush

142. See Memorandum from John Ashcroft to Heads of All Federal Departments and Agencies, *supra* note 26, at 1 ("Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.").

143. *Id.* For reference to the 1993 memorandum, see Memorandum from Janet Reno, U.S. Attorney Gen., to Heads of Departments and Agencies (Oct. 4, 1993), available at <http://www.gwu.edu/~nsarchiv/nsa/foia/reno93.pdf>.

144. See Memorandum from Janet Reno to Heads of Departments and Agencies, *supra* note 143, at 1.

145. See *id.*

146. See Memorandum from John Ashcroft to Heads of All Departments and Agencies, *supra* note 26, at 1.

147. See Memorandum from Janet Reno to Heads of Departments and Agencies, *supra* note 143, at 3 ("The American public's understanding of the workings of its government is a cornerstone of our democracy.").

148. See Memorandum from John Ashcroft to Heads of All Departments and Agencies, *supra* note 26, at 1 ("The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy.").

administration, government agencies were directed to pay closer attention to the protections afforded by the deliberative process privilege, while aggressively adhering to a sense of confidentiality.

4. A Shift in Debate over the Interpretation of “Agency Head”

The dispute over the interpretation of the agency head requirement in the litigation context arose in large part because the Supreme Court decided *Reynolds* before the deliberative process privilege ever appeared in the federal court system. The early debate was whether *Reynolds* applied to certain types of executive privilege other than the military and state secrets privilege.¹⁴⁹ The Temporary Emergency Court of Appeals, in *U.S. Department of Energy v. Brett*, established a line of precedent that interpreted *Reynolds* as being inapplicable to the deliberative process privilege.¹⁵⁰ The petitioners in *Brett* sought a writ of mandamus requiring the district court to approve the Department of Energy’s claim of the deliberative process privilege that arose during a discovery dispute.¹⁵¹ The court held that the district court erred in rejecting the Department of Energy’s claim of deliberative process privilege simply because the privilege was asserted by counsel rather than by the agency head.¹⁵²

Opposed to this stance was the view, championed by the U.S. Court of Appeals for the Third Circuit in *United States v. O’Neill*, that *Reynolds* applies to all types of executive privilege, including the deliberative process privilege.¹⁵³ In *O’Neill*, the Commissioner of the Philadelphia Police Department refused to comply with discovery requests calling for production of material relating to the police department’s response to allegations of excessive force and brutality on the part of police officers.¹⁵⁴ Although the Commissioner did not assert deliberative process privilege specifically, he claimed privilege relating to work product, attempting to exclude communications such as opinions and mental impressions.¹⁵⁵ The

149. The court in *Kaiser Aluminum & Chemical Corp. v. United States* did not specify the formal requirements for invocation of the deliberative process privilege, though it made reference to the requirements enumerated in *United States v. Reynolds*, decided five years earlier. 157 F. Supp. 939, 942, 947 (Ct. Cl. 1958) (explaining that “[the p]laintiff objected that while the document was covered by the court’s order, the claim of privilege had not been made by the head of the department after actual personal consideration” (citing *United States v. Reynolds*, 345 U.S. 1, 7 (1953))). *Kaiser* focused more on the necessity of judicial review of requested documents where the head of an agency declared such documents protected by executive privilege. *Id.* at 947 (“When the head of an agency claims privilege from discovery on the ground of public interest, which is recognized as a basis for the claim, it seems to us a judicial examination of the sought-for evidence itself should not be required without a much more definite showing of necessity than appears here.”).

150. U.S. Dep’t of Energy v. Brett, 659 F.2d 154, 155 (Temp. Emer. Ct. App. 1981) (“*United States v. Reynolds*, . . . relied on by the district court, is inapposite. *Reynolds* dealt with an absolute privilege for state secrets, not the deliberative process privilege.”).

151. *Id.*

152. *Id.*

153. *United States v. O’Neill*, 619 F.2d 222, 226 (3d Cir. 1980).

154. *Id.* at 224.

155. *Id.* at 226–27.

court held that the claim of privilege failed because, among other reasons, the City Solicitor made the assertion instead of the Police Commissioner or the Chief Inspector.¹⁵⁶ In its reasoning, the court applied the *Reynolds* standard to the City's claim, stating, "Although the Court in that case was dealing with the claim of privilege for state and military secrets, 'its prerequisites for formal invocation of the privilege have been uniformly applied irrespective of the particular kind of executive claim advanced.'"¹⁵⁷

The D.C. Circuit addressed the dispute over whether *Reynolds* applies to nonmilitary secrets privileges in the more recent case of *Landry v. FDIC* by applying the *Reynolds* standard to all types of executive privilege.¹⁵⁸ *Landry* involved actions on the part of the Federal Deposit Insurance Corporation (FDIC) in removing Michael Landry, a senior vice president, chief financial officer, and cashier of a local bank, due to conduct attributed to him that allegedly compromised the integrity of the banking institution.¹⁵⁹ Landry argued that assertion of the deliberative process privilege by the Memphis Regional Director of the FDIC's division of supervision, rather than by the head of the FDIC, was insufficient to refuse compliance with certain discovery requests.¹⁶⁰ The court devised a compromise in that it both observed the agency head requirement—thus applying *Reynolds* to the deliberative process privilege—and announced that the requirement should not mean that the "very pinnacle of agency" must be the official who invokes the privilege.¹⁶¹ The *Landry* court went on to state that the asserting individual ideally should be a "responsible" officer of "sufficient rank."¹⁶² This decision is indicative of a new phase in the agency head controversy that focuses the debate on the interpretation of what constitutes a responsible officer of sufficient rank for the purposes of deliberative process privilege assertion.¹⁶³

156. *Id.* at 225.

157. *Id.* at 226 (quoting *Carter v. Carlson*, 56 F.R.D. 9, 10 (D.D.C. 1972)).

158. See *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (citing *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984)) (applying the procedural requirements articulated in *Reynolds* to the deliberative process privilege).

159. *Id.* at 1128.

160. *Id.* at 1135.

161. *Id.*

162. *Id.* at 1135–36 (quoting *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1342 (D.C. Cir. 1984)).

163. See, e.g., *id.* (espousing one way to "read 'head of the department'"); see also *Marriott Int'l Resorts, L.P. v. United States*, 437 F.3d 1302, 1306 (Fed. Cir. 2006); *Mobil Oil Corp. v. U.S. Dep't of Energy*, 102 F.R.D. 1, 5 (N.D.N.Y. 1983) ("This power to claim the privilege may be delegated by the head of the agency, but only to a subordinate with high authority.").

II. THE CURRENT STATE OF THE DEBATE SURROUNDING THE AGENCY HEAD REQUIREMENT

The proper invocation of the deliberative process privilege with respect to the agency head requirement has never stood on certain ground.¹⁶⁴ Sufficient ambiguity pertaining to the Supreme Court's qualifying phrase, "which has control over the matter,"¹⁶⁵ exists such that courts have come down on two distinct sides regarding the meaning of "head of the department." This part analyzes the dispute. Part II.A examines a line of case law that suggests that the agency head requirement should be construed to permit the delegation of deliberative process privilege invocation to any subordinate that the agency head deems worthy, including counsel. Part II.B explores a line of case law that suggests that the requirement should be construed in such a way that delegation, if allowed at all, must be directed to an official involved in the substantive policy decisions of the agency.

A. *The Nondifferentiation Position*

A number of courts have construed the agency head requirement as permitting the government to delegate the authority of privilege invocation to a subordinate who may not necessarily possess policy-making authority.¹⁶⁶ The first case to adopt such a construction of the agency head requirement was *Brett*, which held that delegation of the privilege by an agency head to a subordinate is acceptable.¹⁶⁷ As noted in Part I.C, *Brett* held that *Reynolds* did not apply to cases involving the deliberative process privilege.¹⁶⁸ Few courts wholly follow the *Brett* court in holding both that *Reynolds* is inapplicable to cases involving the deliberative process privilege and that delegation to counsel is appropriate.¹⁶⁹ A greater number of courts following *Brett* have adopted the three procedural requirements of *Reynolds*, including the provision that the claim of privilege be lodged by the "head of the department," but nonetheless construe the provision to allow the agency head to delegate privilege assertion to any subordinate.¹⁷⁰ These courts generally do not differentiate between subordinates who

164. See *Weaver & Jones*, *supra* note 33, at 307–08 (listing several different approaches courts have adopted with regard to the agency head requirement); see also *Marriott Int'l Resorts, L.P.*, 437 F.3d at 1306–07 (describing the circuit split regarding the agency head requirement).

165. *United States v. Reynolds*, 345 U.S. 1, 8 (1953).

166. See *Marriott Int'l Resorts, L.P.*, 437 F.3d at 1306–07 (listing circuits that reject a narrow construction of the agency head requirement).

167. *U.S. Dep't of Energy v. Brett*, 659 F.2d 154, 155–56 (Temp. Emer. Ct. App. 1981).

168. See *id.* at 155.

169. See *Yankee Atomic Elec. Co. v. United States*, 54 Fed. Cl. 306, 310 n.4 (2002) (noting that *Reynolds* involved a state secrets privilege and not a deliberative process privilege); *Founding Church of Scientology of Wash., D.C., Inc. v. Dir., FBI*, 104 F.R.D. 459, 465 (D.D.C. 1985).

170. See, e.g., *Marriott Int'l Resorts, L.P.*, 437 F.3d at 1308 (holding that the delegation by the IRS Commissioner to counsel was in line with the majority rule).

possess policy-making authority and those who lack such powers.¹⁷¹ This Note terms this interpretation of the agency head requirement as the “nondifferentiation position.” This section examines the arguments in favor of the nondifferentiation position.

1. A Distraction from Other Official Duties

One of the rationales behind the nondifferentiation position is that agency heads cannot be bothered with petty litigation demands relating to deliberative communications when they have other duties of higher priority.¹⁷² The U.S. Court of Appeals for the Federal Circuit, in *Marriott International Resorts, L.P. v. United States*, offered this rationale to suggest that such a stringent demand on the head official may result in either a superficial review of the material requested that would detract from the goals of the privilege or a prolonged examination of the documents that may delay other official obligations.¹⁷³ In *Marriott*, a dispute arose amidst tax litigation between Marriott International Resorts and the Internal Revenue Service (IRS) over the definition of “liability” in regulations issued under section 752 of the Internal Revenue Code.¹⁷⁴ At some point during the course of discovery, Marriott requested all documents pertaining to the IRS’s formulation of its definition of “liability” under the Treasury Regulations.¹⁷⁵ The IRS both withheld and redacted portions of documents under an assertion of “executive privilege,” and Marriott moved to compel production.¹⁷⁶ The assertion of privilege came not from the IRS Commissioner but from the Assistant Chief Counsel to the Agency.¹⁷⁷ The document review involved more than 4000 pages of material, of which 339 documents were claimed privileged.¹⁷⁸ The attorney assigned to the material spent more than thirty-one hours in document review.¹⁷⁹ The case came before the Federal Circuit as an inquiry into the “limits of the ‘deliberative process privilege.’”¹⁸⁰ In arriving at its decision approving delegation of the deliberative process privilege, the court noted that review conducted by a subordinate would be more prompt, thorough, and consistent than that done by an agency head.¹⁸¹

Professors Russell L. Weaver and James T.R. Jones share the view expressed in *Marriott*, calling the burden of document review on agency

171. *See id.*

172. *See Weaver & Jones, supra* note 33, at 309 (“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.”).

173. *Marriott Int’l Resorts, L.P.*, 437 F.3d at 1307.

174. *Id.* at 1303.

175. *Id.*

176. *Id.* at 1303–04.

177. *Id.* at 1304.

178. *Id.* at 1307.

179. *Id.*

180. *Id.* at 1303.

181. *Id.* at 1307.

heads “crushing.”¹⁸² Critics of this argument point to the intent set out in *Reynolds* that the privilege should rarely be invoked, and thus it should entail a stringent procedural requirement that would curtail abuse.¹⁸³ Weaver and Jones counter this position, expressing a concern set forth by the *Brett* court that requiring the head of the agency to invoke the privilege would in fact make assertion of the privilege too difficult.¹⁸⁴ They contest the notion that the agency head requirement targets abuse of the deliberative process privilege.¹⁸⁵ This argument comes as a response to a criticism of *Brett*, present in *Mobil Oil Corp. v. U.S. Department of Energy*, that the *Vaughn* index reflects an intent to uphold a rigorous standard for invocation of the deliberative process privilege.¹⁸⁶ The *Mobil Oil* court remarked that, although *Brett* observed the *Vaughn* index requirement, it disregarded the agency head requirement and thus contravened the intent of *Vaughn*.¹⁸⁷ Professors Weaver and Jones view the agency head requirement as a hindrance to the protection afforded by the privilege, stating that courts’ recognition of the deliberative process privilege demands that they “not impose unnecessary formalities merely to force agencies to abandon the privilege.”¹⁸⁸ Moreover, they interpret the *Vaughn* index requirements not as imposing stricter standards on proponents of the deliberative process privilege, but rather as both obliterating the need for agency head invocation and easing the difficulty with which the privilege may be asserted.¹⁸⁹ A more general response to the position that the agency head requirement comports with the goal of restraining invocation of the deliberative process privilege is the reiteration of one of the cornerstones of *Brett*: *Reynolds* involved the military and state secrets privilege—which warrants greater scrutiny—not the deliberative process privilege.¹⁹⁰ Critics of the application of *Reynolds* to the deliberative process privilege thus view the *Vaughn* index as a suitable substitute for document review by the agency head—one that eases the burden on the agency head.

182. Weaver & Jones, *supra* note 33, at 309.

183. See *Jade Trading, LLC v. United States*, 65 Fed. Cl. 487, 495 (2005), *abrogated on other grounds*, Alpha I, L.P. *ex rel. Sands v. United States*, 83 Fed. Cl. 279 (2008) (citing *Reynolds* for the proposition that the privilege should be invoked only after careful consideration); see also Wetlaufer, *supra* note 15, at 876 (noting that the deliberative process privilege purports to “restrain the frequency with which the privilege has been asserted”).

184. Weaver & Jones, *supra* note 33, at 309 (citing *U.S. Dep’t of Energy v. Brett*, 659 F.2d 154, 156 (Temp. Emer. Ct. App. 1981)).

185. *Id.* at 311 (“The point is not to make it difficult to assert privileges.”).

186. *Id.* (citing *Mobil Oil Corp. v. U.S. Dep’t of Energy*, 102 F.R.D. 1, 6 (N.D.N.Y. 1983)).

187. *Mobil Oil Corp.*, 102 F.R.D. at 6–7.

188. Weaver & Jones, *supra* note 33, at 311.

189. *Id.* (“If *Vaughn*’s new requirements rendered other requirements unnecessary, then those other requirements should be abandoned.”).

190. See *U.S. Dep’t of Energy v. Brett*, 659 F.2d 154, 155 (Temp. Emer. Ct. App. 1981).

2. Locus of Relevant Knowledge

Another rationale contained in the nondifferentiation position is that agency heads will not be sufficiently familiar with the context of the policy discussions or the deliberative communications under claim of privilege.¹⁹¹ Weaver and Jones agree that heads of agencies often lack the personal knowledge required to make privilege assertions.¹⁹² They point out that many agencies employ tens of thousands of personnel spanning numerous divisions and departments.¹⁹³ These lower-level officials are often the individuals involved in the deliberations and discussions at issue in the litigation and they frequently carry out such deliberations without consulting the agency head.¹⁹⁴ Weaver and Jones argue that these lower-level employees may be the best candidates for determinations of nondisclosure.¹⁹⁵ The court in *Marriott* adopted this line of reasoning in holding that delegation by the IRS Commissioner to the Service's counsel was appropriate.¹⁹⁶

Moreover, some argue that heads of agencies in fact depend on the knowledge of their subordinates when invoking the privilege. In *Yankee Atomic Electric Co. v. United States*, a suit brought by electric utilities companies against the United States for breach of contract regarding nuclear waste disposal, the U.S. Court of Federal Claims relied on this reasoning not only to posit that agency heads would be inefficient at document review due to their unfamiliarity with the facts of the dispute, but also to suggest that in the process of review, the head officials would derive their knowledge from the "very officials given the delegations."¹⁹⁷ Thus, as Weaver and Jones note, even if the affidavit asserting privilege is submitted by an agency head, it is most probably prepared by subordinates who conducted the document review without any personal review by their superior.¹⁹⁸

3. In Camera Review Safeguards

The court in *Brett* offered an additional rationale that spared the Department of Energy from agency head invocation. The government asserted that, since it was willing to allow an in camera inspection of the requested documents, there was no reason for the court to impose upon the agency the additional burden of submitting an affidavit by the agency

191. See *id.* (noting that the privilege need only be invoked by "individuals with specific and detailed knowledge of the documents in which the privilege is asserted").

192. Weaver & Jones, *supra* note 33, at 309.

193. *Id.*

194. *Id.*

195. *Id.*

196. See *Marriott Int'l Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (positing that a subordinate is "undoubtedly [more] familiar with the nature of the documents at issue and [more] practiced at large-scale document review").

197. *Yankee Atomic Elec. Co. v. United States*, 54 Fed. Cl. 306, 311 (2002).

198. See Weaver & Jones, *supra* note 33, at 312.

head.¹⁹⁹ The court held that an affidavit lodged by the head of an agency is needed only if the agency seeks to be excused from in camera inspection of the documents.²⁰⁰ The court in *Mobil Oil* rejected this reasoning, stating that in camera examination of documents under claim of privilege would increase the burden on judicial resources.²⁰¹ Weaver and Jones take issue with this rejection of *Brett*, arguing that *Mobil Oil* “misperceived *Brett*’s holding.”²⁰² They observe that courts, even under *Brett*, would not have to undergo in camera examination of all documents under assertion of privilege.²⁰³ Weaver and Jones once again point to the *Vaughn* index as a source of alleviation of judicial burden, suggesting that if the indices are sufficiently detailed, then in camera inspection will not be necessary.²⁰⁴ Moreover, Weaver and Jones propose that the agency head requirement be eliminated altogether, and that if the *Vaughn* index is inadequate, the court may either demand a more detailed index or reject the agency’s assertion of privilege.²⁰⁵

The nondifferentiation position, however, acknowledges that most courts facing assertions of deliberative process privilege conduct in camera inspections.²⁰⁶ Weaver and Jones cite to this fact to counter the concern that the *Mobil Oil* court raised with regard to in camera inspection and judicial burden.²⁰⁷ They argue that the affidavit from the agency head is meaningless in the deliberative process privilege context since courts will make the privilege determination upon their own review during the in camera examination.²⁰⁸ Thus, according to the nondifferentiation position, invocation by a policy-making head of the department is unnecessary given the rigorous application of in camera inspection.

4. Diminished Historical Significance of the Agency Head Requirement in the Deliberative Process Privilege Context

Observers of the nondifferentiation position note that in camera review has become more common in deliberative process privilege cases as compared with those concerning the military and state secrets privilege due to the nature of the documents involved. Consequently, they argue, there is a decreased need for the agency head requirement in deliberative process privilege assertion.²⁰⁹ Professors Weaver and Jones note that, because the

199. U.S. Dep’t of Energy v. *Brett*, 659 F.2d 154, 155 (Temp. Emer. Ct. App. 1981).

200. *Id.* (“In most cases, [the agency head requirement] reflects *Vaughn*’s substantive requirement that the privilege be raised by individuals with specific and detailed knowledge of the documents in which the privilege is asserted.”).

201. *Mobil Oil Corp. v. U.S. Dep’t of Energy*, 102 F.R.D. 1, 7 (N.D.N.Y. 1983).

202. Weaver & Jones, *supra* note 33, at 311.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 310.

207. *Id.* at 310–11.

208. *Id.*

209. *Id.* at 310.

documents under claim of deliberative process privilege contain material that is much less sensitive than those under military and state secrets privilege, there is little reason to withhold in camera inspection.²¹⁰ Although critics on both sides of the agency head debate acknowledge that there is a diminished need for secrecy when invoking the deliberative process privilege, the nondifferentiation position translates this diminished concern for secrecy into a stronger justification for in camera inspection and less need for agency head assertion, whereas those advocating a stricter construction of the agency head requirement interpret the lack of secrecy as requiring greater disclosure and more stringent provisions to curb the frequency of deliberative process privilege assertion.

Commentators on both sides of the conflict generally acknowledge that courts originally treated both the military and state secrets privilege and the deliberative process privilege similarly in that they sought to avoid in camera inspection in both circumstances.²¹¹ Those following the nondifferentiation position, however, argue that the two types of executive privilege have evolved differently over time, such that the deliberative process privilege no longer warrants the same strict procedural requirements that control the military and state secrets privilege.²¹² They note that the deliberative process privilege emerged amidst political turmoil and uncertainty over national security.²¹³ This era of political unrest ushered in a drive toward secrecy and governmental prerogative that shaped the evolution of the deliberative process privilege.²¹⁴ The *Reynolds* requirements attached to assertions of executive privilege intended to protect secret governmental affairs.²¹⁵ The Supreme Court warned against judicial insistence on the inspection of documents relating to matters of national security, even when conducted in camera.²¹⁶ Absent in camera inspection, however, judicial determinations of privilege warranted some other type of safeguard in order to uphold and protect the worthiness of privilege invocations, thus prompting the Court to set forth the agency head requirement.²¹⁷ However, commentators following *Brett* are quick to note that *Reynolds* involved the military and state secrets privilege, whereas cases concerning the deliberative process privilege do not involve such sensitive matters.²¹⁸ Thus, as Weaver and Jones argue, in camera inspection of documents should not raise concerns similar to those faced by

210. *Id.*

211. *See* *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 947 (Ct. Cl. 1958); Weaver & Jones, *supra* note 33, at 310; Wetlaufer, *supra* note 15, at 854 & n.33.

212. *See* Weaver & Jones, *supra* note 33, at 309 (“[The] historical justifications for requiring assertion by the agency head are no longer valid.”).

213. *See supra* note 132 and accompanying text.

214. *See supra* note 133 and accompanying text.

215. *See supra* note 134 and accompanying text.

216. *See supra* note 135 and accompanying text.

217. *See supra* note 137 and accompanying text.

218. *See* *U.S. Dep’t of Energy v. Brett*, 659 F.2d 154, 155 (Temp. Emer. Ct. App. 1981); Weaver & Jones, *supra* note 33, at 309–10.

the *Reynolds* court.²¹⁹ Adherents to the *Brett* interpretation of *Reynolds* therefore find the agency head requirement wholly inapplicable to the assertion of the deliberative process privilege.

B. *The Policy-Making Distinction Position*

Courts that reject the nondifferentiation position require that the government either invoke the deliberative process privilege through its department head or delegate this authority to another agency official who possesses policy-making authority.²²⁰ This Note terms this interpretation of the agency head requirement the “policy-making distinction” view. Notably, these courts proscribe government invocation of the deliberative process privilege through government counsel.²²¹ The policy objectives that drive this position include discouraging abuse of the privilege, adhering to precedent, improving government transparency, efficacy and accountability, and promoting consistency in the privilege’s application.²²² This section explores these justifications for the policy-making distinction.

1. Curbing Abuse of the Privilege

Those espousing the policy-making distinction view assert that the agency head requirement purports to stem frivolous invocation of the privilege. In *Jade Trading, LLC v. United States*, the Court of Claims held that the invocation requirements of the deliberative process privilege were intended to be restrictive due to the “extraordinary assertion of power” that is at the heart of its invocation.²²³ *Jade Trading*, like *Marriott*, involved a motion to compel discovery in litigation concerning the IRS’s interpretations of the term “liability” in Treasury Regulations.²²⁴ Plaintiffs claimed that the IRS improperly asserted the deliberative process privilege by submitting an affidavit of privilege by the Assistant Chief Counsel to the Agency, rather than by the agency head.²²⁵ The court agreed, reasoning that the procedural requirements were intended to be restrictive in order to ensure that the privilege be asserted only where necessary.²²⁶

219. See *Weaver & Jones, supra* note 33, at 310; see also *Brett*, 659 F.2d at 155.

220. See *Yang v. Reno*, 157 F.R.D. 625, 632 (M.D. Pa. 1994) (advocating for privilege invocation by the “political head of the department” (quoting *United States v. Reynolds*, 345 U.S. 1, 8 n.20 (1953))).

221. See, e.g., *Jade Trading, LLC v. United States*, 65 Fed. Cl. 487, 495 (2005), *abrogated on other grounds*, Alpha I, L.P. *ex rel. Sands v. United States*, 83 Fed. Cl. 279 (2008); *Thill Sec. Corp. v. N.Y. Stock Exch.*, 57 F.R.D. 133, 138 (E.D. Wis. 1972); *Carter v. Carlson*, 56 F.R.D. 9, 11 (D.D.C. 1972).

222. See *infra* Part II.B.1–4.

223. *Jade Trading*, 65 Fed. Cl. at 495 (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 389 (2004)).

224. *Id.* at 488.

225. *Id.*

226. *Id.* at 495.

Commentators observe that such requirements have constrained the potential for serious harm to effective judicial proceedings.²²⁷

Critics of the nondifferentiation construction of the agency head requirement often cite to the potential for the privilege to be “lightly invoked” as a concern.²²⁸ Professor Raoul Berger notes that the privilege is often asserted over petty matters.²²⁹ Moreover, as Berger notes, the deliberative process privilege may be asserted in order to cover up misconduct that had not appeared in the opposing litigant’s claims.²³⁰ Berger further makes the point that the deliberative process privilege may have virtually boundless application, since practically every document of an agency potentially contains either an opinion or predecisional commentary.²³¹

An additional fear associated with the nondifferentiation approach is that government attorneys will assume the power to assert the privilege and will do so in an abusive way. This concern focuses on the ability of attorneys to invoke the deliberative process privilege in pursuit of a “desirable litigation strategy” rather than as a result of “an executive decision about the exigencies of executive management.”²³² Early courts that were confronted with a government invocation of the privilege were careful to protect litigants from the indiscriminate use of the privilege and thus denied government agencies the grant of privilege invoked by an attorney.²³³

Professor Melanie B. Leslie notes several motives other than a concern for optimal policy making that compel government lawyers to assert the deliberative process privilege in litigation involving discovery requests for information from government agencies. Leslie begins with the presumption that the primary duty of government lawyers is to serve the public.²³⁴ However, as Leslie notes, the government lawyer’s zealous advocacy on

227. See Wetlaufer, *supra* note 15, at 877 (“[T]he procedural requirements and the balancing process appear to have created a situation that minimizes the likelihood that egregious injury will be done by the application of the privilege.”).

228. See *Jade Trading*, 65 Fed. Cl. at 495 (quoting *Cheney*, 542 U.S. at 389; *United States v. Reynolds*, 345 U.S. 1, 7 (1953)).

229. See BERGER, *supra* note 37, at 235–36 (noting that the privilege is “often invoked for sheer trivialities”).

230. See *id.* (observing that officials assert the privilege “to block exposure of administrative neglect or corruption”). Raoul Berger’s remark suggests that even though the deliberative process privilege is not applicable when government misconduct is alleged, there is a possibility that such misconduct may be shielded from discovery when the litigant has not posited a claim of misconduct.

231. See, e.g., *id.* at 236 (noting that the acting director of the International Cooperation Administration (ICA) stated, “if ICA wanted to apply the ‘executive privilege’ [the GAO] would not see one thing because practically every document in our agency has an opinion or a piece of advice” (emphasis omitted)).

232. *Deseret Mgmt. Corp. v. United States*, 76 Fed. Cl. 88, 97 (2007).

233. See *United States v. O’Neill*, 619 F.2d 222, 226–27 (3d Cir. 1980); *Thill Sec. Corp. v. N.Y. Stock Exch.*, 57 F.R.D. 133, 138 (E.D. Wis. 1972).

234. Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469, 515 (2002).

behalf of the client agency often gets in the way of this larger duty.²³⁵ Leslie enumerates several motivating factors underlying this variance on the part of government lawyers. First, government lawyers frequently conduct their work in a manner that promotes their careers.²³⁶ Second, rules of professional conduct do not mandate that government lawyers advocate on behalf of their clients in a manner different from the way in which private attorneys advocate on behalf of their clients.²³⁷ Leslie notes finally that government lawyers do not have a clear and unified notion of what the “public interest” is in relation to their roles as representatives of the government.²³⁸ Government attorneys would not be wrong to reason that zealous advocacy on behalf of their government clients would be in pursuit of a robust adversarial system and thus would further the interests of representative democracy and efficient government operations.²³⁹ Leslie makes the general observation that government attorneys are not in the best position to be the declarants of such an executive privilege. Professor Wetlaufer agrees with this notion, reasoning that the trial lawyers who assert the privilege do so by mere recitations of the deliberative rationale in order to win each “episode in the course of hard-fought litigation” on behalf of their demanding clients.²⁴⁰ Wetlaufer further notes that each discovery dispute is a strategic opening for the lawyer.²⁴¹

2. Upholding the Spirit of Both *Reynolds* and *Landry*

Those favoring the policy-making distinction position argue that this interpretation is in accord with the rationale behind both *Reynolds* and *Landry*. In *Yang v. Reno*, the U.S. District Court for the Middle District of Pennsylvania sought to reject the nondifferentiation position on a number of grounds, one of which was to show that such a construction of the agency head rule would be in derogation of the standard set forth in *Reynolds*.²⁴² *Yang* involved an action arising out of the “detention and attempted exclusion by the Immigration and Naturalization Service (INS) of certain citizens of the People’s Republic of China.”²⁴³ The aliens were detained after their vessel, the *Golden Venture*, arrived at New York Harbor.²⁴⁴ Immigration judges rejected the aliens’ claims for asylum, and the aliens appealed to the Board of Immigration Appeals (BIA).²⁴⁵ *Yang* was a habeas action filed after the BIA dismissed the aliens’ claims.²⁴⁶ The court

235. *Id.*

236. *Id.*

237. *Id.* at 515–16.

238. *Id.* at 516.

239. *Id.*

240. Wetlaufer, *supra* note 15, at 887.

241. *Id.*

242. *See Yang v. Reno*, 157 F.R.D. 625, 632 (M.D. Pa. 1994).

243. *Id.* at 629.

244. *Id.* at 629–30.

245. *Id.* at 630.

246. *Id.*

issued an order allowing the petitioning aliens leave to take limited discovery of documents and information concerning potential bias and “political interference” on the part of the Clinton administration with regard to the aliens’ proceedings.²⁴⁷ The Executive Secretary of the National Security Council asserted deliberative process privilege in refusing to grant certain discovery requests relating to the discovery order.²⁴⁸ The court held that such invocation was improper due to the Executive Secretary’s lack of membership in the Council.²⁴⁹ The court recognized that each member of the Council was a policy-making official and thus was qualified to assert the privilege; however, because the Executive Secretary was not a member of the Council, he possessed no policy-making distinction within the Agency and thus was not qualified to invoke the deliberative process privilege.²⁵⁰

The court considered the *Reynolds* Court’s regard for the qualifier “political” before the term “head of department” in its opinion to be significant cause for construing “agency head” strictly as a policy-making official.²⁵¹ Other courts have noted that adherence to the construction of agency head as “political head of the department” furthers the intent behind the deliberative process privilege, because it ensures that the privilege receives consideration by one who is knowledgeable about the future policies and directions of the agency and therefore can invoke the privilege in a more informed manner than a subordinate can.²⁵² The court in *Landry* emphasized responsibility within the agency as an important factor when determining a government employee’s qualification for deliberative process privilege assertion.²⁵³ Thus, those courts construing “agency head” as “policy-making official,” such as the *Yang* court, assert that this interpretation of the agency head requirement comports with the reasoning of both *Reynolds* and *Landry*.

247. *Id.*

248. *Id.* at 632.

249. *Id.* at 633.

250. *Id.* at 633–34.

251. *See id.* at 632–33 (“The *essential* matter is that the decision to object should be taken by the minister who is the *political head of the department*’ The court does not believe that [the authority to appoint and fix the compensation of personnel] amounts to the kind of political and policy making authority contemplated by the *Reynolds* Court.” (quoting *United States v. Reynolds*, 345 U.S. 1, 8 n.20 (1953))); *see also* *Jade Trading, LLC v. United States*, 65 Fed. Cl. 487, 494–95 (2005), *abrogated on other grounds*, *Alpha I, L.P. ex rel. Sands v. United States*, 83 Fed. Cl. 279 (2008).

252. *See* *Marriott Int’l Resorts, L.P. v. United States*, 437 F.3d 1302, 1308 (Fed. Cir. 2006) (advocating that the privilege be invoked by a “high ranking Agency official with expertise in the nature of the privilege claim and documents at issue”).

253. *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (“[W]e implied that officials other than the head of the department could assert the privilege, stating: ‘the files had not been examined for this purpose by *responsible members or officers* of CFTC.’” (quoting *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1342 (D.C. Cir. 1984))).

3. Effectiveness of Executive Decision Making

The policy-making distinction position draws attention to the efficacy of executive decision making as an additional supporting rationale. Commentators note that the objective of secrecy at play in the assertion of deliberative process privilege operates to stem the flow of information to the executive decision maker, thus diminishing the effectiveness of executive decision making.²⁵⁴ Professor Berger notes that the deficiencies of a department or agency are not readily noticeable by agency heads since many agencies and departments contain vast and sprawling components within.²⁵⁵ Adherents of the policy-making distinction position argue that the nondifferentiation position allows certain predecisional discussions that are likely to be problematic or indicative of misconduct²⁵⁶ to go unnoticed by the head of the pertinent department.²⁵⁷ Thus, observers of the policy-making distinction contend that increasing the information flow from low levels of management to policy-making officials via the policy-making distinction would help to alleviate administrative inefficiencies and allow policy making to transpire more effectively.

Additionally, several scholars note that the great ease with which executive employees invoke the deliberative process privilege may undermine not only the flow of information directed toward the agency head, but also the credibility and integrity of the Executive, as well as the apparent legitimacy of other types of executive privilege. Diminished credibility levels, in turn, may inhibit effective governance. Professors Eric A. Posner and Adrian Vermeule note that discretion conferred upon the Executive carries with it a significant burden of distrust.²⁵⁸ They observe that while public cynicism over the motives of the Executive is well-founded, such doubt can have a deleterious effect on the efficacy of a well-intentioned Executive as much as that of an ill-intentioned Executive.²⁵⁹ Professor Wetlaufer argues that diminished “legitimacy and credibility of the government in the eyes of its own citizens” can have a corresponding diminishing impact on the effectiveness of the Executive’s ability to

254. See, e.g., BERGER, *supra* note 37, at 239 (“Can it be maintained that protection for such candid interchange is of greater public benefit than plenary . . . investigation [exposing] maladministration over persistent executive heel-dragging and deception?” (internal quotation marks omitted)); Wetlaufer, *supra* note 15, at 889.

255. BERGER, *supra* note 37, at 244 (noting that the head of the agency is often “totally unaware” of inefficiencies within the agency).

256. See Wetlaufer, *supra* note 15, at 886 (“[T]here is a strong association between secrecy and bad acts.”).

257. See, e.g., BERGER, *supra* note 37, at 239 (“Throughout [the McCarthy proceedings], Eisenhower exhibited a lamentable unawareness of the scandal his subordinates sought to sweep under the rug.”).

258. Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 866 (2007).

259. See *id.* at 867 (“The problem is that voters who would want to give discretion (only) to the well-motivated executive may choose not to do so, because they are not sure what type he actually is. The risk that the public and legislators will fail to trust a well-motivated president is just as serious as the risk that they will trust an ill-motivated president . . .”).

implement decisions.²⁶⁰ Wetlauffer argues that the potential for flimsy invocation of the privilege is contrary to this nation's values of openness and self-government.²⁶¹ Citing Chief Justice Warren Burger's opinion in *Nixon*, he suggests that the American people give greater weight to this democratic ideal than they confer upon judicial efficiency.²⁶² In that opinion, Burger warned of the gravity of privilege invocation, stating that "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts"²⁶³ and thus are not to be "lightly created nor expansively construed."²⁶⁴ Professor Berger expresses a similar concern, arguing that it may be damaging to the Executive's credibility if the privilege were invoked too hastily when later the investigation into the documents at issue may be revealed as justified.²⁶⁵

Observers of the policy-making distinction view cite credibility concerns, noting that the invocation of the deliberative process privilege by low-ranking agency employees may have an adverse effect on public esteem of the executive branch. This want of credibility may have dire consequences for the efficacy or, at least, the perceived efficacy of the Executive.²⁶⁶ Posner and Vermeule cite information asymmetries on the part of those monitoring executive activities as a source of doubt concerning the motives of an executive official.²⁶⁷ They contend that if representatives of the public lack the knowledge sufficient to assess executive activity due to executive secrecy, then a credibility dilemma arises whereby the Executive must choose between the potentially dangerous disclosure of secrets or the increase in doubt over the motives underlying official decisions.²⁶⁸ Posner and Vermeule suggest that increased transparency by way of exposure of the Executive's decision-making processes to public observation may be

260. Wetlauffer, *supra* note 15, at 890.

261. *Id.* at 886.

262. *Id.* at 883, 886 ("The net effect seems to be a general, if sometimes contested, preference for openness in government, a preference that exists without regard for the efficiency costs that may be entailed.")

263. *United States v. Nixon*, 418 U.S. 683, 709 (1974).

264. *Id.* at 710.

265. BERGER, *supra* note 37, at 237 (citing one incident involving a Foreign Operations Administration (FOA) decision to bid low on a contract for a grain storage elevator in Pakistan, where, after the administrative hearings concerning charges of mismanagement ended, the director reversed his decision concerning the bid, thus illustrating the embarrassing and injurious effect misapplied assertion of privilege has on the concept of executive privilege).

266. See Posner & Vermeule, *supra* note 258, at 893-94 (indicating that alongside first-order goals in effecting policy, executive officials must fulfill "second-order" needs to address credibility concerns that the public may harbor with regard to the motivations and competency of the executive branch); Wetlauffer, *supra* note 15, at 893. ("That diminished sense of accountability may increase the likelihood that the official will act in a way that is sloppy or incompetent, that he will confuse his own self-interest . . . with the interests of the public, or that he will engage in various kinds of bad acts with which he would not want to be publicly associated.")

267. Posner & Vermeule, *supra* note 258, at 885.

268. *Id.*

one mechanism toward solving the credibility dilemma.²⁶⁹ Posner and Vermeule note the importance of “executive signaling”—formal or informal mechanisms by which the executive branch, at least in appearance, addresses public concerns surrounding executive dealings—to a feasible solution to the credibility problem.²⁷⁰ Posner and Vermeule suggest one possible device of intrabranched checks on executive power as relevant to the goal of executive signaling.²⁷¹ This concept of intrabranched checks as a method of executive signaling derives from the policy-making distinction. The policy-making distinction adherents point out that, when invocation of the deliberative process privilege passes “far down the chain of command,”²⁷² denial of requested documents on the part of a low-ranking employee assures the requesting litigant merely a reduced form of justice²⁷³ and little means of recourse by way of the political process.²⁷⁴ Hence, they contend that, by adhering to a policy-making distinction when asserting the deliberative process privilege, executive officials achieve signaling and thus address the credibility dilemma.

4. A Need for Clarity and Consistency

Advocates of the policy-making distinction position allude to a need for consistency and clarity as further support for their side of the dispute. The court in *Jade Trading* noted that *Reynolds* emphasized the importance of consistency in the assertion of executive privilege.²⁷⁵ The consistency standard is one basis for the *Jade Trading* court’s decision to reject the nondifferentiation construction of the term “agency head.”²⁷⁶ The court observed, “To permit any government attorney to assert the privilege would derogate [this interest].”²⁷⁷ Others posit that consistency as to the reasons for invoking the deliberative process privilege will promote clarity and credibility as to its assertion. For example, Professor Wetlauffer argues that judicial efficiency is a better reason for the procedural requirements than is a concern for keeping certain deliberations secret from both judges

269. *Id.* at 903.

270. *Id.* at 894 (“In the general case, well-motivated executives send credible signals by taking actions that are more costly for ill-motivated actors than for well-motivated ones, thus distinguishing themselves from their ill motivated mimics. . . . Commitments themselves have value as signals of benign motivations.”).

271. *Id.* at 897 (citing Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316 (2006)).

272. *L.H. v. Schwarzenegger*, No. CIV. S-06-2042, 2007 WL 2009807, at *3 n.4 (E.D. Cal. July 6, 2007).

273. See Wetlauffer, *supra* note 15, at 892 (suggesting that a losing litigant would feel “a diminished sense that she has been treated fairly by the system”).

274. See *id.* at 886 (“In the public sphere, such alienation between the governed and the governors tends toward hierarchy and away from democracy and citizen sovereignty.”).

275. *Jade Trading, LLC v. United States*, 65 Fed. Cl. 487, 495 (2005), *abrogated on other grounds*, Alpha I, L.P. *ex rel. Sands v. United States*, 83 Fed. Cl. 279 (2008).

276. *Id.* at 495–96.

277. *Id.* at 495 (quoting *Pierson v. United States*, 428 F. Supp. 384, 395 (D. Del. 1977)).

and the ultimate executive decision maker.²⁷⁸ Courts observing the policy-making distinction position suggest that such a construction is conducive toward assuring consistently prudent outcomes.²⁷⁹

III. A PROPOSAL TO ADOPT THE POLICY-MAKING DISTINCTION

The policy-making distinction view merits mandatory adherence. Although there is broad consensus over the soundness of the decision in *Landry*,²⁸⁰ the debate over the agency head requirement has not disappeared. Rather, it has merely shifted to a conflict over the construction of "agency head." *Reynolds*'s procedural requirements do warrant concern, but only to a limited degree. The Supreme Court decided *Reynolds* over fifty years before publication of this Note and did not expressly contemplate the impact of its requirements on the functioning of agencies. Little empirical evidence is available to shed light on either the effectiveness of, or the burden on, agencies wrought by the agency head requirement. Commentators on both sides of the debate point to the balancing of the litigation interests of government and litigant, the interests of transparency and efficiency, and the interests of accountability and the efficacy of government functioning.²⁸¹ This part evaluates both sides of the debate and concludes that the policy-making distinction position is the better reading of the agency head requirement, as it upholds the values of legitimate privilege assertion, government efficacy and accountability, and consistency and clarity in the application of the privilege. It concludes that Congress is the most appropriate branch to address the dispute and enact legislation that clarifies the term "agency head" as "policy-making official."

A. *The Need to Stem Abuse*

Permitting invocation of the deliberative process privilege far down the chain of command in a government agency poses a high risk for abuse of the privilege in litigation. That the agency head requirement is present in the common-law privilege and not in FOIA Exemption 5²⁸² highlights not only the great weight granted to private litigants' needs, but also the potential for abuse in the litigation context, as those invoking the privilege in the litigation context may do so merely to win discovery skirmishes.²⁸³ While the notion that permitting only senior officials to invoke the deliberative process privilege will translate to fewer assertions of the

278. Wetlaufer, *supra* note 15, at 876 ("If, in the realm of the [deliberative process privilege], the courts have fashioned a decisional process that relies heavily on the representations of the party seeking to avoid disclosure, the justification for such a process must rest on judicial efficiency and not the need to keep these deliberations secret even from the judge.").

279. *Jade Trading*, 65 Fed. Cl. at 495 (citing *Pierson*, 428 F. Supp. at 395).

280. See *supra* notes 162–63 and accompanying text.

281. See *supra* Part II.

282. See *supra* note 138 and accompanying text.

283. See *supra* notes 240–41 and accompanying text.

privilege²⁸⁴ is somewhat speculative, the incentive for agency counsel to abuse the privilege in order to make gains in discovery warrants restricting invocation of the privilege to those who are more closely in tune with the direction of the agency's policies and the interests of the public, rather than with litigation strategy.²⁸⁵ Moreover, government attorneys may indeed benefit from the clarification as to their proper role in both representing their government agency clients and serving the public.²⁸⁶

Additionally, there is a risk of abuse associated with allowing lower-ranking officials who have no policy-making distinction the ability to assert the privilege. This risk is evident in light of the conflict of interest that arises when those whose communications are the subject of the litigation are in a position to see that such communications are left concealed.²⁸⁷ The nature of a dispute involving internal processes within an agency warrants a level of internal review that is detached from any personal involvement with the communications at issue.²⁸⁸

The notion that observance of the policy-making distinction position will overly burden the officials who must review the documents²⁸⁹ should not excuse those officials from protecting not only the policy-making decisions of the agency subordinates, but also the public interest associated with the agency's decisions. Allowing any policy-making official the authority to invoke the privilege also may ease the burden on the "very pinnacle" of the agency, such that document review associated with every claim of the deliberative process privilege is not placed upon one individual. Furthermore, even if such a high-ranking official relies on subordinates to conduct the actual document review, it is the assertion of the deliberative process privilege that requires a discretionary balancing of both the agency's interests and the interest of the private litigant who relied on the agency's decision making.²⁹⁰ The *Reynolds* court opined that the privilege is not to be "lightly invoked" and that it be reserved solely for matters involving executive exigencies in decision making.²⁹¹ Interpretation of the agency head requirement along the lines of the policy-making distinction position comports with the goal of *Reynolds*.

284. See *supra* notes 223–26 and accompanying text.

285. See *supra* notes 232–35 and accompanying text.

286. See *supra* notes 238–39 and accompanying text.

287. See *supra* notes 256–57 and accompanying text.

288. See *supra* note 271 and accompanying text; see also *In re Entergy Nuclear Vt. Yankee, LLC*, 62 N.R.C. 828, 847 (2005) (the determination must come from "a person who is above the fray of the immediate dispute or litigation").

289. See *supra* Part II.A.1.

290. See *Entergy Nuclear Vt. Yankee*, 62 N.R.C. at 847.

291. *United States v. Reynolds*, 345 U.S. 1, 7 (1953); see *Deseret Mgmt. Corp. v. United States*, 76 Fed. Cl. 88, 97 (2007) (indicating that the purpose of the procedural requirements is "to ensure that the privilege is invoked as a result of an executive decision about the exigencies of executive management").

B. *The Government's Interest in Informed Decision-Making Meets the Public's Interest in Political Accountability*

By observing the policy-making distinction position, the government will better protect its own interests of efficiency and efficacy. If lower-ranking, non-policy-making officials can invoke the deliberative process privilege without review at the policy-making level, policy-making figures in the agency may never learn about deliberative communications that relate to or result in injuries to private litigants.²⁹² As a consequence, some subsequent policy decisions issued by the agency will lack the quality of guidance stemming from a sense of potential lawsuits that resulted from the adoption of similar policies in the past. Moreover, while lower-ranking officials may be more knowledgeable of the facts pertaining to a specific deliberative communication,²⁹³ higher-ranked officials are presumably more knowledgeable of the overarching policies and future directions of the agency, making them better positioned than their subordinates to make well-informed determinations as to whether disclosure of a particular deliberative communication will harm the agency or its future policies.²⁹⁴ Thus, it is in the interest of policy-making agencies to restrict invocation of the deliberative process privilege to policy-making officials alone.

In addition to the government interests at stake, political accountability suffers when invocation authority passes down to a non-policy-making subordinate, particularly an attorney, as there is greater risk of a misguided invocation that fails to take into account the knowledge of future policy and overarching goals of the agency that both reside with higher-ranked officials and serve the public interest.²⁹⁵ Furthermore, delegating privilege invocation authority far down the chain of command alienates the private litigant from those officials whom the public citizenry holds responsible for policy making.²⁹⁶ Separation from the policy makers who oversee the agency's decision-making processes diminishes the quality of justice afforded to those seeking relief arising from allegedly poor decision making.²⁹⁷ A lower-ranking official will not suffer the same criticism from the public as a more senior, policy-making official if it comes to light that the agency abused its discretion when invoking the privilege.²⁹⁸ Policy-making officials have a stronger connection with the public as a result of political appointments or public election, or simply because they receive more attention than their subordinates due to their greater responsibilities.²⁹⁹ By contrast, lower-ranking officials who possess no policy-making distinction gain their employment largely through

292. See *supra* notes 254–55 and accompanying text.

293. See *supra* Part II.A.2.

294. See *supra* Part II.B.2.

295. See *supra* notes 254–57, 266 and accompanying text.

296. See *supra* notes 272–73 and accompanying text.

297. See *supra* notes 272–73 and accompanying text.

298. See *supra* note 56 and accompanying text.

299. See *supra* note 56 and accompanying text.

nonpolitical means. Therefore, adherence to the policy-making distinction position furthers the interests of political accountability and raises the stakes associated with abuse of the privilege.

C. *The Benefits of Clarity and Credibility*

The jurisprudence surrounding the invocation requirements of the deliberative process privilege is woefully confusing; clarity by way of statutory adoption of the policy-making distinction position will bring about much needed credibility to the privilege. As the court in *Jade Trading* stated, restricting the interpretation of “agency head” to mean a policy-making figure will provide clear guidance to practitioners and government officials alike.³⁰⁰ Such clarity will further judicial efficiency in that courts will no longer waste time and resources exploring the vast and confused jurisprudence surrounding the agency head requirement.

Any confusion associated with the agency head requirement may not only impede judicial efficiency, but also have detrimental effects on the needs of litigants. To illustrate, the trend toward more aggressive withholdings on the part of government agencies in the FOIA context as a result of the Ashcroft memorandum³⁰¹ has the makings to impact deliberative process privilege invocation in litigation. This recent Department of Justice directive encouraging aggressive assertion of FOIA Exemption 5 can potentially have a spillover effect on agency officials’ sense of authority when invoking the common-law privilege. The lack of the agency head requirement in the FOIA context allows for greater flexibility on the part of agencies to invoke the privilege.³⁰² A lack of clarity as to the agency head requirement in the litigation realm may likewise serve to allow government officials to invoke the privilege without due constraints and will have the concomitant effect of impeding the discovery objectives of litigants. Because litigants have specific lawsuit-related claims for which they need the requested documents, there must be procedural requirements that are more stringent in the context of litigation than in the FOIA framework so as to filter out flimsy assertions of the deliberative process privilege.

Any ambiguity and doubt associated with this procedural provision will disappear if Congress passes legislation specifying the level of policy-making authority required to invoke the privilege. In turn, agencies can identify the level of officials who possess policy-making authority sufficient for purposes of asserting the deliberative process privilege on their organizational charts. It is clear that the Department of Justice is aware of the ability of agencies to differentiate among their employees, distinguishing those who possess policy-making authority from those who

300. *Jade Trading, LLC v. United States*, 65 Fed. Cl. 487, 495 (2005), *abrogated on other grounds*, *Alpha I, L.P. ex rel. Sands v. United States*, 83 Fed. Cl. 279 (2008).

301. See *supra* notes 142–48 and accompanying text.

302. See *supra* notes 138–40 and accompanying text.

do not.³⁰³ While clarity may result from legislation that allows lower-ranking employees to invoke the privilege, measures by Congress and agencies to restrict the invocation to policy-making officials not only will serve the interests of clarity and consistency but also will boost the public's confidence in invocations of this type of executive privilege. The goals of both *Reynolds* and *Landry* will prevail with the policy-making distinction position.³⁰⁴

CONCLUSION

Effective policy making is both the beginning and the end of the deliberative process privilege. Thus, the public interest must always guide assertions of the deliberative process privilege. In light of both the interests of government efficacy and the interests of transparency and political accountability, it behooves Congress to reject the nondifferentiation position and to pass legislation restricting assertion of the deliberative process privilege to policy-making officials alone. The agency head requirement of the privilege, now over fifty years old, is long overdue for legislative treatment.

This Note has evaluated the development of the deliberative process privilege along with the benefits and the costs of the agency head requirement and recognizes the policy-making distinction view as the prevailing position in the debate concerning the proper interpretation of "agency head." Legislation that incorporates the policy-making distinction view of deliberative process privilege assertion will bring much needed clarity to both courts and executive officials alike. Along with newfound clarity, credibility to the executive branch will follow, thus bringing confidence to executive decision making. Hence, effective governance will most likely result from adherence to the policy-making distinction view. The policy-making distinction position addresses the concerns of the nondifferentiation position, but more importantly, brings the public interest, the goal of effective policy making, into focus.

303. See *supra* note 139.

304. See *supra* Part II.B.2.