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**STANDING IN THE WAY OF JUDICIAL REVIEW: ASSERTION OF
THE DELIBERATIVE PROCESS PRIVILEGE IN APA CASES**

MICHAEL RAY HARRIS*

INTRODUCTION

As a basic principle, secrecy in government is contrary to the notion of democracy held by most Americans. As James Madison wrote in the earliest years of our republic, “[a] popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”¹ This sentiment has been oft rekindled by other American

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1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910). Madison portrays the clear understanding of our forefathers and mothers that the people must have the means of obtaining information related to the operation of government in order to fully realize the success of a democracy. This was clearly not the case under the British Crown, as evidenced by statements of our nation’s pre-Revolutionary War leaders. For example, Patrick Henry declared at the Constitutional Convention of 1787 that “[t]he liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them.” See Bruce R. James, Public Printer of the United States, Transforming the Government Printing Office: Revitalizing Public Access to Government Information in the Electronic Age, Address at the University Forum at Brigham Young University – Idaho (Feb. 17, 2005), available at http://www.access.gpo.gov/news/speeches/PP_IdahoSpeech.pdf. Similarly, in 1765, John Adams stated that “liberty cannot be preserved without a general knowledge among the people, who have a right[,] . . . an indisputable, unalienable, divine right to the most dreaded and envied kind of knowledge, I mean the characters and conduct of their rulers.” See, e.g., Hon. John Cornyn, *Enduring the Consent of the Governed: America’s Commitment to Freedom of Information and Openness in Government*, 17 LBJ J. PUB. AFFAIRS 7, 8 (2004). For this reason, it should not be a surprise that the drafters of the Declaration of Independence included in their preamble the simple statement that “[g]overnments are instituted among Men, deriving their just powers from the *consent of the governed*” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added). Without a doubt, as later evidenced by the freedoms protected for the people in the Bill of Rights, including the right to free association, to petition the government, and the freedom of the press, the drafters of the

leaders, from Abraham Lincoln² to John F. Kennedy.³ And today there remains extremely broad support among the public for the proposition that open government is good government.⁴

Historically, the notion of secrecy has been equally repugnant in the operation of the American judicial system. As Justice Byron White once observed in response to a question regarding whether the Supreme Court operated too secretively, “We’re the only branch of [g]overnment that explains itself in writing every time it makes a decision.”⁵ While lawyers know that this may not actually always be the case, undoubtedly courts judiciously guard the free flow of information in the judicial forum. It continues to be, for instance, that courts, in determining whether to extend common law evidentiary

Declaration had in mind a specific type of “consent,” that being, of course, informed consent. *See, e.g.,* Cornyn, *supra* at 10.

2. As one author has noted, perhaps no one has expressed this sentiment “better or more succinctly” than when “our beloved 16th President said ‘Let the people know the facts, and the country will be safe.’” Cornyn, *supra* note 1, at 10. Similarly, President Lincoln’s vision, set out in his famous Gettysburg Address on November 19, 1863, of a “government of the people, by the people, and for the people” again echoes the need for access by the people to the inner workings of the government through open government. *See* Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *available at* <http://www.ourdocuments.gov/doc.php?doc=36&page=transcript>.

3. “The very word ‘secrecy’ is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths, and to secret proceedings.” President John F. Kennedy, The President and the Press: Address Before the American Newspaper Publishers Association (Apr. 27, 1961) (transcript available in the John F. Kennedy Presidential Library & Museum).

4. Public opinion polls taken annually between 2006 and 2008 in connection with National Sunshine Week demonstrate that a significant (and growing) majority of Americans believe that open government is an important cornerstone of a democratic government. In 2006, sixty-two percent of respondents to a Scripps Survey Research Center poll, conducted at the request of the American Society of Newspaper Editors, agreed that “public access to government records is critical to the functioning of good government.” Press Release, Open Government Is Good Government, Public Tells Pollsters (Mar. 12, 2006), *available at* <http://www.sunshineweek.org/sunshineweek/polls06>. In 2007, the same poll found that Americans were “increasingly suspect [that] the federal government has become cloaked in secrecy.” Press Release, Federal Government Seen as Increasingly Secretive; National Opinion Poll Finds Privacy Concerns Rising (Mar. 7, 2007), *available at* <http://www.sunshineweek.org/sunshineweek/scrippspoll07>. Finally, the 2008 poll found that a full three-quarters of American adults “view the federal government as secretive, and nearly nine in 10 say it’s important to know presidential and congressional candidates’ positions on open government when deciding who to vote for” Press Release, More People See Federal Government as Secretive; Nearly All Want to Know Where Candidates Stand on Transparency (Mar. 16, 2008), *available at* <http://www.sunshineweek.org/sunshineweek/secrecypoll08> (hereinafter “2008 Poll”). By way of background, National Sunshine Week was established in 2005 and has broad, bipartisan support. Sunshine Week 2008 Participant List (June 3, 2008), *available at* <http://www.sunshineweek.org/sunshineweek/participants08>; About Sunshine Week (Nov. 5, 2007), *available at* <http://www.sunshineweek.org/sunshineweek/about>.

5. James A. Meyers, *A Letter from the Publisher*, TIME, October 8, 1984, at 4.

privileges, seek to carefully balance the need of preserving a litigant's desire to keep evidence "private" with the longstanding rule that the public "has a right to every man's evidence."⁶

Given our want of an open and free government, the rather expansive use in recent years of the so-called deliberative process privilege to preclude disclosure of numerous government documents is quite surprising, if not downright shocking. The deliberative process privilege is intended to protect the most sensitive of internal deliberations of high-ranking, policymaking officials in the government.⁷ Distilled to its essence, the rationale of the privilege is that the confidentiality of certain material connected with the government decisionmaking process ensures frank and open discussion among government officials, which in turn enhances the quality of government decisionmaking.⁸ In practice, the privilege is routinely invoked by the government to excuse itself from the obligation to disclose information in civil litigation, in response to Freedom of Information Act requests, and to Congress.⁹

It is not surprising that the rationale behind deliberative process privilege is rooted in the need to protect sensitive military information.¹⁰ Yet since its adoption as an evidentiary privilege by the American judiciary in 1958, its use has exploded and today is used as a filter by federal agencies, and increasingly state agencies, to hold back from the public information that bears directly on government policymaking.¹¹ In its relatively short life, the deliberative process privilege has become one of the most predominate privileges exercised by the government and is now routinely asserted in a wide array of litigation challenging government decisionmaking.¹²

Debate over the value of the deliberative process privilege to governmental function is nothing new, and scholars have argued both for the abolishment of the privilege,¹³ as well as for its expansion.¹⁴ The purpose of this article is not

6. *United States v. Bryan*, 339 U.S. 323, 331 (1950); *see also* *United States v. Nixon*, 418 U.S. 683, 710, (1974) (noting that evidentiary privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth").

7. *See infra* Part I.A.

8. *See, e.g.*, *EPA v. Mink*, 410 U.S. 73, 87 (1973).

9. *See infra* Part I.C.

10. *See* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 *IND. L.J.* 845, 859 (1990) (noting that two of the three earliest known applications of the privilege—*Duncan v. Cammell Laird & Co.*, [1942] *App. Cas.* 624, and *United States v. Reynolds*, 345 U.S. 1 (1953)—involved military secrets).

11. *See infra* Part I.C.

12. *See* Kirk D. Jensen, Note, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information Under the Federal Deliberative Process Privilege*, 49 *DUKE L.J.* 561, 567 (1999) (noting that the privilege has "spread through the federal courts like wildfire" and "is being applied in an ever-increasing number of cases"); *infra* Part I.C.

13. *See* Wetlaufer, *supra* note 10.

to wade too deep into this larger debate, although this is somewhat unavoidable. Instead, I seek mainly to examine the use of the privilege as it narrowly applies to judicial review of informal government rulemaking under the federal Administrative Procedure Act, or APA.

To understand the need for this inquiry, it is important to see the APA as the modern embodiment of the quintessential American system of checks and balances among the three branches of government.¹⁵ With the advent of the administrative state in the New Deal period, Congress relinquished control over substantial areas of legislative authority in the belief that modern social problems required lawmaking institutions that have greater flexibility and expertise.¹⁶ Courts, legal scholars, and the American business community, however, were rightfully wary in the 1930s and 1940s that such additional power in the Executive Branch could result in unchecked law making, with little or no oversight by the other branches of government.¹⁷ In fact, early attempts to delegate legislative authority to agencies within the Executive Branch, particularly those related to the New Deal economic reforms, were soundly quashed by a Supreme Court protective of the constitutional *status quo*.¹⁸

14. See Michael N. Kennedy, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 NW. U. L. REV. 1769 (2005).

15. See *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”).

16. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2072 (1990) [hereinafter Sunstein, *Law and Administration*] (stating that the New Deal reformers sought new institutions better capable of handling modern problems); Alexander Dill, *Scope of Review of Rulemaking After Chadha: A Case for the Delegation Doctrine?*, 33 EMORY L.J. 953, 953 (1984) (“[S]ince their widespread introduction during the New Deal, federal administrative agencies have played an increasingly important role in developing and implementing congressional policies in various areas of national concern. Congress has routinely granted broad discretionary authority to agencies in order to accord them the flexibility necessary in highly technical areas of regulation such as nuclear energy and environmental health, as well as in areas of economic regulation such as banking and corporate securities . . .”). But Professor Sunstein also warned that “[i]t would be a mistake to overstate the association between the New Deal and the belief in neutral expertise [in that] [i]ndependent regulatory agencies, including the Interstate Commerce Commission, the Federal Trade Commission, and the Federal Radio Commission, were created well before the New Deal.” Cass R. Sunstein, *Constitutionalism After The New Deal*, 101 HARV. L. REV. 421, 441 (1987). Still, there can be little doubt that the New Deal period opened the door for ultimate acceptance by the public and the courts of the modern administrative state. See *infra* Part II.A.

17. See *infra* Part II.B.

18. See *infra* notes 147–52 and accompanying text.

It was this steadfast view in the early 1940s—that a system of checks and balances is an indispensable constraint on administrative power—that helped give rise to the APA¹⁹ in 1946. The APA limits the Executive’s power in numerous ways: establishing hearing rights, separating certain administrative functions, devising procedural safeguards, ensuring the right of public participation, and, most importantly for the purpose of this article, independent judicial review of agency rulemaking.²⁰ Indeed, it is fair to say that the oversight of the Executive Branch’s law making function established by Congress in the APA parallels the openness and public participation in government desired by our forefathers and mothers.²¹

Thus, regardless of whether the privilege has any legitimate purpose related to executive policymaking,²² this paper proposes that the privilege is not proper when asserted by an agency to shield documents from a court properly tasked with reviewing the lawfulness or reasonableness of government rulemaking. Such use of the deliberative process privilege undermines the APA and is inconsistent with the modern role of judicial review. As implicitly recognized through the Supreme Court’s adoption of the so-called “hard look” doctrine in *Citizens to Preserve Overton Park, Inc. v. Volpe*,²³ transparency in the rulemaking process is essential to ensure that an agency has acted in a rational and lawful manner.²⁴ The use of the deliberative process privilege, however, can shield an agency’s reliance on evidence outside the scope of its statutory authority, as well as wholly biased, one-sided decisions. This is not the intent of APA, which clearly called for the courts to review the “whole record” to ensure that an agency decision is not arbitrary or capricious, or otherwise not in accordance with the law.²⁵

19. Pub. L. No. 79–404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

20. 5 U.S.C. §§ 553–54 (2006).

21. It has been argued that the APA, along with the Federal Advisory Committee Act (5 U.S.C. App. 2), the Freedom of Information Act (5 U.S.C. § 552) and the Sunshine Act (5 U.S.C. § 552b), make up the “four pillars of open government law,” which fortifies the constitutional commitment to open government. Brief of American Association of Law Libraries et al. as Amici Curiae at 8, *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004) (No. 03-475) (quoting from Hearings on the FACA and the President’s AIDS Comm’n before the Senate Comm. on Global Affairs, 100th Cong., 1st Sess. 67 (1987) (statement of Sen. Glenn)), *reprinted in* 329 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 2003 TERM SUPPLEMENT (Gerhard Casper & Kathleen M. Sullivan eds., 2004).

22. As of the date this article was written, both the public and lawmakers are expressing serious doubt as to the use of the deliberative process privilege by the Executive Branch in a growing number of policy decisions. *See, e.g., infra* Part III.B.4.

23. 401 U.S. 402 (1971).

24. *See infra* Parts III.A.1 and III.B.3.

25. 5 U.S.C. § 706 (2006); *see infra* Part III.A.3.

Part I of this Article examines the nature of the deliberative process privilege. Emphasis is placed on the history of the privilege, from its origin in a now defunct opinion by the British House of Lords, to its explosive use in the American judicial system. Part II focuses on the Administrative Procedure Act, looking primarily at the growth of the modern administrative state since the start of the New Deal and passage of the APA in 1946 as a means to provide a constitutional-like check on bureaucratic authority. Part III presents the focal point of this article, examining whether the growing tendency of the government to assert the deliberative process privilege, as a means to limit access to relevant information in the administrative record, has undermined judicial review. The focus in this Part will be on review of informal administrative rulemakings, which today make up the bulk of government policymaking with respect to domestic social and economic issues. Finally, Part IV of this Article acknowledges the need to protect the nature of some government activities in order, for instance, to keep certain national security information “secret” and only in the hands of governmental officials. However, in lieu of the broad, unchecked use of deliberative process privilege by the Executive Branch in APA cases, this Article proposes more surgical methods, such as in camera review or the use of protective orders, if necessary, to limit access to sensitive information.²⁶

I. THE DELIBERATIVE PROCESS PRIVILEGE

A. *Scope of the Privilege*

The deliberative process privilege protects certain advice, recommendations, and opinions that are part of the deliberative, consultative, decision-making processes of government.²⁷ According to the Supreme Court, the purpose of the privilege is “to prevent injury to the quality of agency decisions.”²⁸ This is presumably accomplished by the privilege in two ways because the privilege: “(1) protects the integrity of the decisionmaking process by encouraging frank debate and discussion within an agency on predecisional matters, and (2) avoids the possibility that the public will be unnecessarily misled by “premature disclosure of agency opinions and recommendations that may not be incorporated into a final decision.”²⁹

26. Moreover, there are long-recognized privileges in American and English law designed to protect true state and military secrets, which are not as resoundly criticized by scholars, lawmakers, and the public. *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953).

27. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *EPA v. Mink*, 410 U.S. 73 (1973).

28. *Sears*, 421 U.S. at 151.

29. Kristi A. Miles, *The Freedom of Information Act: Shielding Agency Deliberations from Disclosure*, 57 GEO. WASH. L. REV. 1326, 1329 (1989); see also *Dep’t of Interior v. Klamath*

From a legal practice standpoint, making the initial claim of the deliberative process privilege is no different than claiming other judicially recognized privileges, such as the attorney-client and attorney work product privileges.³⁰ Thus, the initial claim of privilege may be made by counsel in response to a request for documents, in defending the deposition of an agency employee, or in open court.³¹ However, unlike other privileges, which are both claimed and defended solely by the agency's counsel, for the government to prevail in the use of the deliberative process privilege, the head of the agency department with control over the decision-making process must ultimately make a formal assertion of the privilege to the court. This generally requires that the agency head personally inspect and consider the material before invoking the privilege.³² Once the agency head reviews the material, the privilege is generally asserted through an affidavit by the official describing the material and setting forth why the legal requirements for protection as deliberative material are met.³³ This requirement of personal involvement by

Water Users Protective Ass'n, 532 U.S. 1, 8–9 (2001) (“The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance ‘the quality of agency decisions’ by protecting open and frank discussion among those who make them within the Government.” (citations omitted)). As one court has put it, the deliberative process privilege allows “agencies freely to explore possibilities, engage in internal debates, or play devil’s advocate without fear of public scrutiny.” *Assembly of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992).

30. See, e.g., *Procedures for Asserting and Defending the Deliberative Process Privilege*, in THE U.S. EEOC REGIONAL ATTORNEYS’ MANUAL (2005), available at http://www.eeoc.gov/litigation/manual/3-2-a_deliberative_process.html.

31. *Id.* The privilege is not limited to deliberations memorialized in writing. *In re “Agent Orange” Prod. Liab. Litig.*, 97 F.R.D. 427, 434 (E.D.N.Y. 1983). “Thus, the privilege would also bar inquiry by [a plaintiff] by means of any discovery tool, whether by interrogatory or deposition or otherwise, into the evaluations, expressions of opinions and recommendations on policy matters or matters essential to” agency deliberations. *DCP Farms v. Espy*, Civ. No. 294CV85BA, 1995 WL 1945518, at *4 (N.D. Miss. Feb. 10, 1995).

32. *DCP Farms*, 1995 WL 1945518, at *2. Recently, some courts have taken the position that the privilege permits delegation from the agency head to high-ranking subordinates. See *Marriott Int’l Resorts, L.P. v. United States*, 437 F.3d 1302 (Fed. Cir. 2006).

33. Jensen, *supra* note 12, at 570–71. In reviewing assertions of the privilege by an agency, courts have required a “‘detailed analysis’ of the requested documents.” *Johnson v. U.S. Dep’t of Justice*, 739 F.2d 1514, 1516 (10th Cir. 1984). In meeting its burden, the agency must do more than make conclusory statements that the privilege is applicable. *Senate of P.R. v. U.S. Dep’t of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987); see also *Animal Legal Def. Fund, Inc. v. Dep’t of the Air Force*, 44 F. Supp. 2d 295, 300 (D.D.C. 1999) (rejecting an agency’s claim of the privilege where it parroted the case law and holding that the agency must demonstrate that disclosure “would actually inhibit candor in the decision-making process” (citations omitted)). Much of the case law on the issue of adequately asserting the privilege comes in the area of FOIA litigation. See generally *infra* note 82. In FOIA cases, a specific type of affidavit, known as a *Vaughn* Index, is required and must “itemize *each* document and explain the connection between the

the agency head seeks to promote “‘consistency and prudence,’ since the agency head will supposedly ensure that the privilege is invoked in the best interest of the public and not merely in the agency’s litigation interests.”³⁴

Courts have adopted a two-prong test when examining an agency’s assertion of the deliberative process privilege to withhold information: to be privileged the information must be both predecisional and deliberative.³⁵ To establish that a document is predecisional, the government must prove that the document is “(1) ‘antecedent to the adoption of an agency policy,’ and (2) ‘a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.’”³⁶ Thus, while this requirement in large part requires that the materials “predate” the decision, “chronology alone is insufficient.”³⁷ Even if the materials were created before any agency decision, to satisfy the predecisional prong of the privilege, the agency head must demonstrate that the materials actually assisted in the decision-making process and did not simply support a decision already made.³⁸ Moreover, a mere claim by an agency that the material was part of some unarticulated decision-making process is simply not enough to justify withholding under the deliberative process privilege. Instead, a court must be able to pinpoint an agency decision or policy to which the document contributed.³⁹

To establish that information is deliberative, a court must examine the agency’s administrative process and the role of the information in that

information withheld and the exemption claimed. . . .” *Oglesby v. U.S. Dep’t of the Army*, 79 F.3d 1172, 1180 (D.C. Cir. 1996). An adequate index must provide much more than the basic elements of who, what and when. *See Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (finding a *Vaughn* Index “patently inadequate” where it merely “identifies who wrote the memorandum, to whom it was addressed, its date, and a brief description of the memorandum”). Instead the agency must show “by specific and detailed proof” that the privilege applies. *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977).

34. Jensen, *supra* note 12, at 570–71.

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

36. *Evans v. U.S. Office of Personnel Mgmt.*, 276 F. Supp. 2d 34, 38 (D.D.C. 2003) (citations omitted); *see also ITT World Commc’ns, Inc. v. FCC*, 699 F.2d 1219, 1239 (D.C. Cir. 1983), *rev’d on other grounds*, 466 U.S. 463 (1984).

37. Jensen, *supra* note 12, at 572.

38. *Id.*; *see also Petrol. Info. Corp. v. U.S. Dep’t of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992).

39. *See Senate of P.R. v. U.S. Dep’t of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987). While not all courts require that material relate to a specific, final agency decision, at minimum the agency must identify a specific decision-making process. *Access Reports v. Dep’t of Justice*, 926 F.2d 1192, 1195–96 (D.C. Cir. 1991); *see also, Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997) (noting that a document is not “predecisional” if it is merely part of a “continuing process of agency self-examination”).

process.⁴⁰ If material in the document “could not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.”⁴¹ While many different judicial tests have been formulated to determine if information is “deliberative,” in essence, what the courts want to see is that the material is part of the “give-and-take process by which decisions are made and policy formulated.”⁴² This determination must be made on a case-by-case basis.⁴³

However, courts have made it clear that certain material, even if used as part of a decision-making process, will simply not be considered “deliberative” in any case. For instance, the privilege has been held not to protect information that is “merely peripheral to actual policy formation,”⁴⁴ “summaries or commentaries on past agency determinations or investigations,”⁴⁵ or matters generated by private organizations.⁴⁶ Finally, in determining whether material is deliberative, courts have generally made an “opinion/fact distinction,” where “factual information generally must be disclosed.”⁴⁷ In particular, information that is not associated with a “significant *policy* decision,” but instead is “essentially technical and

40. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975) (“Crucial to the decision of this case is an understanding of the function of the documents in issue in the context of the administrative process which generated them.”); see also, *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 172–79 (1975); *Schlefer v. United States*, 702 F.2d 233, 237–43 (D.C. Cir. 1983); *Playboy Enters., Inc. v. Dep’t of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982); *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866–67 (D.C. Cir. 1980).

41. *Petrol. Info. Corp.*, 976 F.2d at 1435.

42. See *Jensen*, *supra* note 12, at 573–74.

43. See *Klein v. Jefferson Parish Sch. Bd.*, No. Civ.A. 00–3401, 2003 WL 1873909, at *4 (E.D. La. Apr. 10, 2003).

44. See *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994).

45. See *J.R. Norton Co. v. Arizmendi*, 108 F.R.D. 647, 649 (S.D. Cal. 1985).

46. See *Ryan v. Dep’t of Justice*, 617 F.2d 781, 788 (D.C. Cir. 1980); *Wu v. Nat’l Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972). However, some courts have adopted a “functional” equivalent test under which some documents prepared outside government may nevertheless qualify as “intra-agency” memoranda. See, e.g., *Hoover v. U.S. Dep’t of Interior*, 611 F.2d 1132, 1137–38 (5th Cir. 1980); *Lead Indus. Ass’n v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979); *Soucie v. David*, 448 F.2d 1067, 1078 n.80 (D.C. Cir. 1971). These cases recognize that the communications between a government agency and its hired outside consultant are protected by the privilege. See, e.g., *Hoover*, 611 F.2d at 1138. However, the Supreme Court has made it clear that such a consultant must be providing its objective opinion, and may not be communicating with the agency with its own self-interests in mind. *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 10–11 (2001).

47. See *Petrol. Info. Corp. v. U.S. Dep’t of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992). A good discussion of the treatment of factual information under the deliberative process privilege, and particularly how the line between fact and opinion is often blurred, is provided in *Miles*, *supra* note 29, at 1330–31.

facilitative,” is characterized by the courts as factual information that should be disclosed.⁴⁸

While the process of asserting the privilege established by the courts is, at least facially, rigorous, in practice the deliberative process privilege has proven to protect a large array of government documents and information. According to the U.S. Department of the Interior’s Office of Solicitor, the privilege has been, and can be used, to protect from disclosure “briefing statements, recommendations, drafts of decisions or policy statements, comments to . . . other agencies on proposed legislation or testimony, and notes of inter- or intra-agency meetings.”⁴⁹ But simply looking at how the privilege is applied and what type of materials it may cover begs the larger question of whether the privilege should be construed to cover *all* executive branch decisionmaking—

48. *Petrol. Info. Corp.*, 976 F.2d at 1437–38. Two additional circumstances that would bar assertion of the privilege also merit mention. First, “[e]ven if a document satisfies the criteria for protection under the deliberative process privilege, nondisclosure is not automatic.” *Texaco P.R. Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995). “The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). Thus, “[e]ach time [the deliberative process privilege] is asserted the district court must undertake a fresh balancing of the competing interests,” taking into account 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.’” *Id.* at 737–38 (citations omitted). As one court put it, “[a]t bottom, then, the deliberative process privilege is ‘a discretionary one.’” *Texaco P.R.*, 60 F.3d at 885 (citations omitted). Second, courts have recognized a “waiver by incorporation” exception to the deliberative process privilege. *See Tigue v. U.S. Dep’t of Justice*, 312 F.3d 70, 81 n.6 (2d Cir. 2002). Under this doctrine, “[a]n agency may be required to disclose a document otherwise entitled to protection under the deliberative process privilege if the agency has chosen ‘expressly to adopt or incorporate by reference . . . [a] memorandum previously covered by [the deliberative process privilege] in what would otherwise be a final opinion.’” *Nat’l Council of La Raza v. Dep’t of Justice*, 411 F.3d 350, 356 (2d Cir. 2005) (citations omitted). “In such a circumstance, the document loses its predecisional and deliberative character, and accordingly, the . . . privilege no longer applies.” *Id.*; *see also Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997); *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 678 (D.C. Cir. 1981) (privilege does not protect an agency’s body of “working law”). And as the Supreme Court has recognized, when a document is adopted as policy by an agency, “[t]he probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice *if adopted* will become public is slight[,] . . . [to the contrary] agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted . . .” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975) (emphasis added). It should be noted however, that it remains unsettled as to whether “waiver” generally, as may be applied to the attorney-client privilege, is applicable in deliberative process privilege cases. *See Texaco P.R.*, 60 F.3d at 885 n.8.

49. Memo from Solicitor, Office of the Solicitor, DOI, to Chief of Staff, Assistant Secretaries and Heads of Bureaus and Office (October 22, 1998) (on file with author). “The privilege also protects other communications derived from these predecisional communications.” *Id.*

whether that be executive policymaking or agency rulemaking made subject to judicial review by Congress. To examine this larger question, we first need to understand the historical basis of the privilege, a topic to which we now turn.

B. Historical Development of the Privilege

A relative newcomer to the list of recognized federal common law evidentiary privileges,⁵⁰ the deliberative process privilege has a mysterious and unconventional history.⁵¹ Its roots lie in a now discredited 1841 decision of the British House of Lords⁵² and a procedural regime designed to protect sensitive military information.⁵³ Once adopted, however, the privilege moved seamlessly, with little or no careful consideration by the judiciary, to protect internal communication involving nearly all aspects of executive branch decisionmaking.⁵⁴

The rationale behind the privilege appears to have been first articulated in a decision of the British House of Lords.⁵⁵ The case of *Smith v. East India Company*⁵⁶ involved a demand for documents reflecting communications between a government appointed oversight body, the “Board of Control,” and the East India Company.⁵⁷ The Lords, after first concluding that the parties could properly invoke the so-called “Crown privilege,”⁵⁸ proceeded to fashion a privilege to protect certain communications between government officials.⁵⁹ In the words of the Lords, if such communications were “subject to be produced in a Court of justice, the effect . . . would be to restrain the freedom of the communications, and to render them more cautious, guarded, and

50. See Wetlaufer, *supra* note 10, at 845; Jensen, *supra* note 12, at 563.

51. See Kennedy, *supra* note 14, at 1779.

52. See *infra* notes 55–61 and accompanying text.

53. See *infra* notes 62–75 and accompanying text.

54. See Wetlaufer, *supra* note 10, at 875. Professor Wetlaufer provides a well-researched, detailed discussion of the history of the privilege, from its roots in English law and American Military culture to rapid growth of the privilege in the American judiciary system. See *id.* at 856–82. He frames the development of the privilege as a debate between advocates of “[s]ecrecy” and defenders of “[d]emocracy and [a]ccountability.” *Id.* at 857 (noting that the music in this drama is provided by two competing choruses, one singing “The Urge to Secrecy” and the other “The Ode to Democracy and Accountability”).

55. See Wetlaufer, *supra* note 10, at 858 (citing *Smith v. East India Co.*, (1841) 41 Eng. Rep. 550 (Ch.)); Jensen, *supra* note 12, at 564; Kennedy, *supra* note 14, at 1779.

56. (1841) 41 Eng. Rep. 550 (Ch.).

57. See Wetlaufer, *supra* note 10, at 858.

58. See *id.* In England, the Crown privilege is normally asserted by the executive department concerned but may be raised by the parties. The privilege is applicable where disclosure would be harmful to national defense or good diplomatic relations. See *Conway v. Rimmer* [1968] A.C. 910 (H.L.). For a review of the history of the privilege, see *Burmah Oil Co. v. Bank of England*, (1979) 1 W.L.R. 473, 489–93 (A.C.).

59. Wetlaufer, *supra* note 10, at 858.

reserved.”⁶⁰ The Lords continued by concluding that the communications at issue “therefore . . . come within the class of official communications which are privileged, inasmuch as they cannot be subject to be communicated . . . without injury to the public interests.”⁶¹ Thus, the House of Lords invoked a rationale very similar to what would be that of the United States Supreme Court some 133 years later—that disclosure of predecisional, deliberative material from the Executive Branch would inhibit frank and candid debate among officials, which would injure the quality of government decisions.⁶²

This British predecessor to the deliberative process privilege would not make a second appearance for over a century. When it did reemerge, it would do so both in Britain and the United States in the context of protecting military secrets. In 1942, the House of Lords took up the case of *Duncan v. Cammell Laird & Co.*,⁶³ in which the survivors of a crew of a new military submarine that was sunk during a test dive sought government documents pertaining to the design and construction of the vessel.⁶⁴ After the First Lord of the Admiralty refused to provide the documents, the survivors brought the matter to the House of Lords.⁶⁵ The Lords sided with the military, holding that “the rule that the interest of the state must not be put in jeopardy by producing documents which would injure it is a principle to be observed in administering justice [that is] quite unconnected with the interests or claims of the particular parties in litigation.”⁶⁶ While the Lords did not directly rely on the *Smith* decision, it appears that the rationale for allowing the government to withhold the documents—injury to state interests—was of similar importance to the Lords in both cases.⁶⁷

In the United States, the deliberative process privilege would make its first appearance around 1954, but not in the judicial arena. Instead, the rationale behind the privilege was invoked in a political dispute between President

60. *Smith*, 41 Eng. Rep. at 552. This case is cited in Wetlaufer, *supra* note 10, at 858 n.41.

61. *Smith*, 41 Eng. Rep. at 552.

62. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–51 (1975).

63. [1942] A.C. 624 (H.L.).

64. Wetlaufer, *supra* note 10, at 859.

65. *Id.*

66. *Duncan*, [1942] A.C. at 642, quoted in Wetlaufer, *supra* note 10, at 859.

67. “[T]he public interest requires a particular class of communications with, or within, a public department to be protected from production on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation rather than on the contents of the particular document itself.” *Duncan*, [1942] A.C. at 635 (quoted in Wetlaufer, *supra* note 10, at 859 n.43). Professor Wetlaufer suggests that while there is no direct citation to *Smith* in the *Duncan* decision, the “*Duncan* decision has subsequently been read to incorporate the deliberative rationale first articulated in *Smith*.” Wetlaufer, *supra* note 10, at 859. However, as discussed *infra* notes 98–110 and accompanying text, an alternative view is that *Duncan* is more appropriately considered a British version of the “state secrets privilege.”

Dwight Eisenhower and Senator Joseph McCarthy during the course of the Army-McCarthy proceedings.⁶⁸ In ordering that the Army refuse to provide the Senate Committee on Government Oversight any further oral or documentary testimony during the course of the hearings, the President invoked not a traditional separation of powers argument, but instead the deliberative process rationale.⁶⁹ President Eisenhower argued, “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 He continued by ordering the Secretary of Defense to withhold certain information from the McCarthy Committee on the grounds that 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

68. Wetlaufer, *supra* note 10, at 865–868. The Army-McCarthy hearings stemmed from Senator McCarthy’s attempts in 1953 to gain access to the Army’s confidential files on loyalty and security. See ROBERT GRIFFITH, *THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE* 244–49 (1970). “The army-McCarthy hearings sprawled out through nearly two months of confusion and turmoil” and are probably best defined by the series of skirmishes they ultimately covered. See *id.* at 254–63. The first skirmish involved the investigation of communist infiltrators among civilians employed by the Army, including nearly seven year-old discredited charges of espionage at Fort Monmouth. See ROBERTA STRAUSS FEUERLICHT, *JOE MCCARTHY AND MCCARTHYISM: THE HATE THAT HAUNTS AMERICA* 114–17 (Marie Shaw ed., 1972). The second involved the Army’s failure to take action against a dentist who had been drafted into service, and ultimately promoted to Major, despite his refusing to answer several questions on his routine loyalty form on the constitutional grounds of self-incrimination. *Id.* at 117–22. And finally, there was the accusation by the Army that the hearings were actually in retaliation for the Army’s failure to give special treatment to the career of G. David Schine, and McCarthy’s counterattack in which he claimed the Army was seeking to blackmail his committee. *Id.* at 124–27. Ultimately the hearings ended any presidential possibilities for McCarthy, *id.* at 114, as reflected in his public opinion ratings throughout 1954. GRIFFITH, *supra* at 263 & n.57.

69. See Wetlaufer, *supra* note 10, at 865–68; Jensen, *supra* note 12, at 566.

70. President Dwight D. Eisenhower, *Letter to the Secretary of Defense Directing Him to Withhold Certain Information from the Senate Committee on Government Operations* (May 17, 1954), in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER 1954*, ¶ 113, at 483 (1960).

71. *Id.* at 483–84. That the deliberative process privilege was first articulated in the United States in response to the Army-McCarthy hearings adds irony to the privilege’s history, and to Professor Wetlaufer’s battle between “secrecy” and “democracy and accountability.” Thus, on one hand Senator McCarthy can be viewed as a defender of accountability, seeking to ensure that the Executive Branch not withhold evidence of Army misconduct. As one historian noted, these hearings “were unique in the annals of Congress and the nation. Never before had the polite facade [sic] of parliamentary decorum been lifted to expose such a bewildering tangle of personal, political, and constitutional issues. Never before had an audience of eighty million been made privy to the inner secrets of government.” GRIFFITH, *supra* note 68, at 243. On the other hand, the President’s response also seems rather appropriate to an investigation by a man who is now villainized for his overzealous investigations of communists. Indeed, it is quite clear that

Shortly after President Eisenhower asserted the deliberative process rational against his political foe, the privilege was first recognized by the courts in the case of *Kaiser Aluminum & Chemical Corp. v. United States*.⁷² In that case, the plaintiff alleged a breach by the United States of its contract to sell war plants to Kaiser Aluminum and Reynolds Metal Company.⁷³ During the litigation, Kaiser sought documents from the General Services Administration (GSA) relating to the Kaiser and Reynolds sales. In particular, Kaiser requested:

all internal GSA reports, memoranda, or other documents concerning these sales to Kaiser and Reynolds prepared by all employees or agents of the [GSA] for intra-agency use, particularly prior drafts of the Kaiser contract with [GSA] interpretation and justification thereof and similar papers in connection with the claims. There was also sought the like intra-agency reports and comparisons concerning the Reynolds contract.⁷⁴

In response, the GSA produced all but one document on “the ground that it was ‘contrary to the national interest.’”⁷⁵ That one document was an advisory opinion written by a Special Assistant to the War Assets Liquidator.⁷⁶

In an opinion authored by retired Supreme Court Justice Stanley Reed, sitting on the Court of Claims by designation, the court agreed with the GSA’s decision to withhold the sole document in dispute by fashioning what is now known as the deliberative process privilege.⁷⁷ Relying on *Duncan* for support, Justice Reed wrote that “[t]here is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.”⁷⁸ In the opinion, the court crafted the parameters of the privilege, which essentially survive to this day, from requiring assertion of the privilege by the agency

McCarthy was not providing the public with the “truth,” in that his usual tactics included the use of fabricated evidence and violent personal attacks. *See id.* at 256.

72. 157 F. Supp. 939 (1958). According to one court, “*Kaiser Aluminum* occasionally receives credit as the first federal case to recognize a deliberate process privilege.” *Marriott Int’l Resorts, L.P. v. United States*, 437 F.3d 1302, 1304 (Fed. Cir. 2006) (emphasis added). Most scholars would give it unconditional credit as the first such case. *See Jensen, supra* note 12, at 566; Kennedy, *supra* note 14, at 1779; Wetlaufer, *supra* note 10, at 869.

73. *Kaiser Aluminum*, 157 F. Supp. at 941–42.

74. *Id.* at 942.

75. *Id.*

76. *Id.* at 943.

77. *Id.* at 940, 946–48. Great weight has been given to the fact that the privilege was fashioned by a former Supreme Court Justice. *See Marriott Int’l*, 437 F.3d at 1304 n.1. However, it is unclear whether this alone should justify rationale and extensive use of the privilege since 1958. *See infra* notes 93–97 and accompanying text.

78. *Kaiser Aluminum*, 157 F. Supp. at 946.

head to allowing the privilege to be overcome by necessity, to recognizing that the privilege protects advice, but not facts.⁷⁹

C. *The Unbridled Growth of the Privilege*

Once articulated in *Kaiser Aluminum*, the use of the deliberative process privilege by the Executive Branch, and its acceptance by the courts, spread like “wildfire.”⁸⁰ The privilege is now routinely invoked by the Executive Branch as an evidentiary privilege in litigation,⁸¹ in response to public requests under the Freedom of Information Act (FOIA),⁸² to prevent information from getting into the hands of Congress,⁸³ and most recently, as justification for withholding information from the administrative record in APA cases.⁸⁴ The privilege is also widely accepted by the state courts as a legitimate means to withhold government documents from the public.⁸⁵ In fact, the privilege has been

79. Compare *id.* with *Judicial Watch, Inc. v. United States Postal Serv.*, 297 F. Supp. 2d 252, 258–60 (D.D.C. 2004) (discussing the rationale for the privilege and the notion that mere facts are not protected by the privilege), and *DCP Farms v. Espy*, Civ. No. 2:94cv85-B-A, 1995 WL 1945518, at *1 (N.D. Miss. Feb. 10, 1995) (discussing the privilege and the policy underlying it).

80. Jensen, *supra* note 12, at 567.

81. See *Wetlaufer*, *supra* note 10, at 848.

82. *Id.* at 878–79 (“[T]here has been occasion for a great [number of] FOIA [cases] to apply, if not necessarily to assess, the general deliberative privilege.”); see also Kennedy, *supra* note 14, at 1777 (“The deliberative process privilege is also [used] to thwart FOIA requests.”). Congress enacted FOIA “in order to create a public right [to acquire] governmental information ‘from possibly unwilling official hands.’” Dianna G. Goldenson, Comment, *FOIA Exemption Five: Will It Protect Government Scientists from Unfair Intrusion?*, 29 B.C. ENVTL. AFF. L. REV. 311, 314 (2002) (citing *EPA v. Mink*, 410 U.S. 73, 80 (1973)). FOIA provides the public a legal right to request, following specified procedures, copies of public records maintained by federal agencies. See 5 U.S.C. § 552 (2006). The Supreme Court has repeatedly stressed that disclosure is the overriding purpose of FOIA, calling it a statute designed to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). However, while FOIA favors public disclosure of governmental records, the statute does contain nine exemptions under which an agency may withhold a particular record. See 5 U.S.C. § 552(b) (2006). Exemption 5 allows an agency to withhold “inter-agency or intra-agency memorandums [sic] or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5) (2006). “The Supreme Court has interpreted Exemption 5 as encompassing recognized statutory and common law privileges, including the attorney work-product privilege, the attorney-client privilege, and the deliberative process privilege.” Miles, *supra* note 29, at 1329.

83. See MORTON ROSENBERG, CRS REPORT FOR CONGRESS, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 9 (2008).

84. See *infra* Part III.B.

85. See Erin Hoffman, *The Deliberative Process Privilege in Kentucky*, 25 J. NAT’L ASS’N ADMIN. L. JUDGES 485, 494–504 (2005). Hoffman analyzes the use of the privilege in context of state open record statutes. *Id.* Some state courts have also embraced the privilege as a general evidentiary privilege that can be used by a state government in the course of civil or criminal litigation. See, e.g., *Thomas v. Guyette*, No. CV030081427S, 2004 WL 2669197, at *1 (Conn.

asserted so successfully by the government that it took very little time before it was simply assumed that the privilege is so “deeply rooted in [American jurisprudence]”⁸⁶ that its existence must be “uncontroversial.”⁸⁷

Uncontroversial or not, several observations regarding the history of the privilege can be made that suggest unbridled expansion of the privilege deserves more than the “most perfunctory and stylized attention” its use has received by the courts to date.⁸⁸ First, there is the peculiar forum from which the privilege first sprang—the Federal Court of Claims. It has been said that this court, until its demise in 1982, had a historical bias toward extending procedural protections to the Executive Branch⁸⁹: “[T]he entire business of the Court of Claims [was] the adjudication of suits against the United States for money judgments.”⁹⁰ According to the official history of the court, the Court of Claims was a place where one could expect that “the Government, always the defendant in the court, [had] an obvious lopsided advantage in

Super. Ct., Oct. 29, 2004); *Ostoin v. Waterford Twp. Police Dep’t*, 471 N.W.2d 666, 668 (Mich. Ct. App. 1991); *In re Integrity Ins. Co.*, 754 A.2d 1177, 1184 (N.J. 2000). Others, however, have explicitly declined to endorse the deliberative process rationale as a blanket privilege on par with the attorney-client and attorney work product privileges, and they instead have chosen to limit circumstances of its use—like access to public records—addressed by their state legislatures. *See, e.g.*, *People ex rel. Birkett v. City of Chicago*, 705 N.E.2d 48, 50–51 (Ill. 1998) (declining to extend the privilege and stating that it is “strongly disfavored because [it] operate[s] to ‘exclude relevant evidence and thus work against the truthseeking function of legal proceedings.’”) (citations omitted); *Marylander v. Superior Court*, 97 Cal. Rptr. 2d 439, 443 (Cal. Ct. App. 2000) (refusing to extend the privilege beyond that allowed by statute and noting that unlike a public records act case, a “party to pending litigation has a stronger and different type of interest in disclosure”).

86. Kennedy, *supra* note 14, at 1801; *see Sprague Elec. Co. v. United States*, 81 Cust. Ct. 168, 173–74 (Cust. Ct. 1978); Joseph W. Bishop, Jr., *The Executive’s Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L. J. 477, 477 (1957) (noting that even in 1957 it seemed strange that the question of the privilege had not been resolved).

87. Kennedy, *supra* note 14, at 1770.

88. Wetlaufer, *supra* note 10, at 875. Professor Wetlaufer argues that instead, most of the energies of the courts have “gone into the development of rules related to the application of the privilege.” *Id.*; *see also* Kennedy, *supra* note 14, at 1773 (noting that the validity of the privilege has gone “virtually unquestioned in the federal case law”). Notably, outside of acknowledging (and accepting) the deliberative process rationale as incorporated by Congress in exemption five of FOIA, the Supreme Court has never given the privilege any careful, analytical consideration or endorsed its broader use outside of FOIA. *See* Jensen, *supra* note 12, at 567. This is in stark contrast to the Court’s historical treatment of other common law privileges, such as the attorney-client privilege and attorney work product privilege, where the court has stressed the need to weigh the public interest in disclosure of evidence with the need for confidentiality. *See infra* notes 289–96 and accompanying text (discussing Federal Rule of Evidence 501 and the U.S. Supreme Court’s discussion in *Upjohn Co. v. United States*, 449 U.S. 383, 396–97 (1981), and *Hickman v. Taylor*, 329 U.S. 495, 510–12 (1947)).

89. *See* Wetlaufer, *supra* note 10, at 869–70.

90. Note, *Constitutional Status of the Court of Claims*, 68 Harv. L. Rev. 527, 527 (1955).

discovery.”⁹¹ In other words, it can be of no great surprise that the court would grasp on to the far-reaching deliberative process privilege seemingly articulated in the *Duncan* case as a new tool to protect the federal government in litigation.⁹²

Similarly, although great weight has been given to the privilege because *Kaiser Aluminum* was penned by a former Supreme Court Justice,⁹³ by the time Justice Reed sat on the Court of Claims he, too, had already demonstrated himself as an ardent defender of executive branch prerogative. In *Touhy v. Ragen*,⁹⁴ for example, Justice Reed and his Supreme Court colleagues were faced with the question of whether a subordinate official in the Department of Justice could rightfully refuse to obey a subpoena *duces tecum* on the grounds that he was ordered not to respond by his superior, the United States Attorney General.⁹⁵ Writing for a majority of the Court, Justice Reed upheld the subordinate’s refusal to comply with the subpoena, finding that “[w]hen one considers the variety of information contained in the files of any government department and the [possibility] of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious.”⁹⁶ Looking at this opinion and others, historians have concluded that Justice Reed was “neither inconsistent nor even unpredictable” in that “[f]rom the beginning, he has been a strong federal-government man, upholding its laws and the orders of its administrative agencies, whether directed against wealth or against personal freedoms of citizens”⁹⁷ Thus, given that the

91. 2 WILSON COWEN ET AL., *THE UNITED STATES COURT OF CLAIMS: A HISTORY* 106 (1978).

92. See Wetlaufer, *supra* note 10, at 859.

93. *Marriott Int’l Resorts v. United States*, 437 F.3d 1302, 1304 & n.1 (Fed. Cir. 2006).

94. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

95. *Id.* at 463, 467. The order at issue stated:

All official files, documents, records and information in the offices of the Department of Justice . . . are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Department of Justice, Office of the Attorney General, Order No. 3229, *Disclosure or Use of Confidential Records and Information*, 11 Fed. Reg. 4920, 4920 (May 4, 1946). In the case, the plaintiff, an inmate of the Illinois state penitentiary, instituted a habeas corpus proceeding in U.S. District Court and sought documents in the possession of the Federal Bureau of Investigation in Chicago that he claimed contained evidence showing that his conviction was based on fraud. *Touhy*, 340 U.S. at 464–65.

96. *Touhy*, 340 U.S. at 468.

97. FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955*, at 268 (1955). Justice Reed was given a seat on the Court as a reward for his work as the Solicitor General, during which time he argued most of the big New Deal cases before the Court with “patient passion that had caused him once to faint in the course of argument.” *Id.* at

deliberative process rationale was first articulated by a court in which the arguments of the federal government were likely to be given great deference, the *Kaiser Aluminum* decision seems like a tenuous foundation for what has become such a widely asserted government privilege.

Second, Justice Reed's reliance on *Duncan* as justification for the privilege was misplaced. *Duncan* involved the question of whether the government could claim a privilege where documents sought by a party in the course of litigation contained sensitive military information, the disclosure of which could undermine national security.⁹⁸ The House of Lords found that such a privilege was available to the Crown.⁹⁹ In the United States, this privilege is known as the "state-secrets privilege"¹⁰⁰ and can be "traced as far back as 1807."¹⁰¹ The seminal case establishing the modern day reach of the state-secrets privilege is *United States v. Reynolds*, decided in 1953.¹⁰² Faced with facts eerily similar to those in *Duncan*, the Supreme Court in *Reynolds*¹⁰³ relied heavily on the English precedent to lay out the basic procedural safeguards the government must follow to invoke the privilege.¹⁰⁴ The Court recognized that too much judicial inquiry into whether the claim of privilege was valid could force disclosure of the very information the privilege was meant to protect.¹⁰⁵ Likewise, if the Court was to completely abandon judicial control over the privilege, it would lead to intolerable abuses by the government.¹⁰⁶ Thus, the Court was concerned with fashioning a process that would balance the government's need to maintain secrecy—even from the court—with the need for the court to maintain control over the circumstances appropriate for the

252. Once on the Court, Reed was alone among the Roosevelt-era Justices in his ardent belief that "Uncle Sam could almost do no wrong." *Id.* at 307.

98. D. C. M. Yardley, *The Primacy of the Executive in England*, 21 *PARLIAM. AFF.* 155, 159–60 (1967).

99. *Id.*

100. See Erin M. Stilp, *The Military and State-Secrets Privilege: The Quietly Expanding Power*, 55 *CATHOLIC U. L. REV.* 831, 831 (2006) ("The privilege permits the government to refuse discovery requests where 'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.'" (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953))).

101. *Id.* at 833.

102. *Id.* at 834.

103. *United States v. Reynolds*, 345 U.S. 1 (1953). The case involved the crash of a military aircraft on a flight to test secret electronic equipment. The widows of the civilian observers on board the flight sued the United States for damages, and they sought through discovery the Air Force's accident investigation report and statements made by surviving crew members. The Air Force objected on the grounds that the aircraft and its personnel were "engaged in a highly secret mission . . ." *Id.* at 2–5; see *supra* notes 63–65 and accompanying text (discussing the remarkably similar facts in *Duncan*).

104. *Reynolds*, 345 U.S. at 7–8 & n.15.

105. *Id.* at 8.

106. *Id.*

claim of privilege. It did so by requiring that the privilege be lodged by only the highest, and presumably most accountable, government officials.¹⁰⁷

In *Kaiser Aluminum*, Justice Reed imported the procedural regime established to protect military secrets in *Duncan* into a rule to protect the general deliberative process involved in executive branch decisionmaking. In doing so, however, Justice Reed appears to have given no consideration to the fact that the rationale for protecting government information under the state-secrets privilege is sharply distinct from his desire to generally protect agency communications in an effort to enhance the quality of decisionmaking. The state-secrets privilege seeks to protect factual information, regardless of whether communications are involved, because the release of such highly secret military or diplomatic information might endanger the public or harm the nation.¹⁰⁸ With such high stakes riding on protecting the secrecy of this information, it is arguably justified for the court to relinquish some control over evidence in a case, even at the risk that the government will wrongly withhold evidence.¹⁰⁹ It is far less clear, however, that relinquishing judicial safeguards is equally as warranted to merely protect “candid” and “frank” internal agency discussions.¹¹⁰ This is of particular concern given the significant number of government communications that may fall under the deliberative umbrella, and, therefore, the relatively high possibility for abuse.

Finally, although the validity of the deliberative process privilege has gone “virtually unquestioned in the federal case law” since *Kaiser Aluminum*,¹¹¹ the House of Lords has long since reversed itself and abandoned the privilege

107. See *id.* at 11. This privilege remains available to the Executive Branch today, separate and distinct from the deliberative process privilege. See Bryan S. Gowdy, *Should the Federal Government Have An Attorney-Client Privilege?*, 51 FLA. L. REV. 695, 717–18 (1999) (identifying the specific privileges available to the Executive Branch). It should be noted that these two privileges are often grouped, along with the law enforcement secrets privilege, under the general title of Executive Privilege. See Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559, 1571 & n.63 (2002); see also *In re Sealed Case*, 121 F.3d 729, 736–37 (D.C. Cir. 1997). In any event, according to one study, the use of the state-secrets privilege, like the deliberative process privilege, is very much on the rise. Patrice McDermott & Emily Feldman, *Secrecy Report Card 2006: Indicators of Secrecy in the Federal Government 7* (2006), <http://www.openthegovernment.org/otg/SRC2006.pdf> [hereinafter *Secrecy Report Card 2006*]. “Between 1953 and 1976, the federal government invoked [the privilege] only six (6) times. Between 1977 and 2000, administrations invoked the privilege 59 reported times. Since 2001, [the privilege] has been invoked at least 22 times.” *Id.*

108. Note, *Developments in the Law—Privileged Communications: Institutional Privileges*, 98 HARV. L. REV. 1592, 1592 n.1 (1985) [hereinafter *Developments*].

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

110. See *Developments*, *supra* note 108, at 1612 (noting that with regard to the problem of “empirical validity: it is simply not clear that disclosures would actually chill communications within many institutions”).

111. Kennedy, *supra* note 14, at 1773.

articulated in *Smith* to the extent that it would protect internal government communications solely to protect candor.¹¹² As one Lord put it:

I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject . . . by the thought that his observations might one day see the light of day.¹¹³

Thus, the only real judicial precedent for the deliberative process privilege in this country has long been overturned.

In short, there appears to be little historical or legal justification for a broad privilege, which can only be invoked by the government, to generally withhold from courts, litigants, Congress, and the public deliberative documents that can shed light on the inner workings of the Executive Branch. But, moreover, when we consider that the Congress has made an express declaration that the courts, in order to perform their constitutional and statutory mandate to review certain executive branch decisions (such as agency rulemakings), must have sufficient access to the information in the agency's decision-making record, then, at minimum, one must seriously question the privilege's use in judicial review cases. With this in mind, let us now turn to the APA.

II. THE ADMINISTRATIVE PROCEDURE ACT

A. *Background of the Act*

Congress enacted the APA in 1946,¹¹⁴ "largely in response to the tremendous and unprecedented [growth] of the administrative state during the New Deal period and the concomitant backlash to this expansion [from] the

112. See *Conway v. Rimmer*, 1 All E.R. 874, 891 (H.L. 1968).

113. *Id.* at 915; see also *Burmah Oil Co. Ltd. v. Bank of England*, 3 All E.R. 700, 724 (H.L. 1979) ("[T]he reasons, possibly oblique, . . . [given] for refusing production of communications between the directors of the East India Company and the Board of Control in *Smith v. East India Co.* . . . must now be treated as having little weight, if any.").

114. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). Initial work on the federal APA actually "began in 1939 with the appointment of the U.S. Attorney General's Committee on Administrative Procedure." Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 297-98 (1986). That committee was tasked with determining the need for reform in federal agency procedure and practice. "Before [the] committee completed its work, however, Congress passed the Walter-Logan bill, an administrative . . . reform effort that was endorsed by the American Bar Association (ABA). In 1940 President Roosevelt vetoed [the Walter-Logan Bill], stating that he wished to await the outcome of . . . work of the Attorney General's Committee" before approving any comprehensive administrative procedure legislation. *Id.* "That committee filed its final report in 1941," but the Second World War delayed any serious consideration of administrative reform efforts. *Id.* "In 1946, with the war concluded, both houses of Congress unanimously approved and President Truman signed the federal APA." *Id.* Since

legal and business communities.”¹¹⁵ The statute is often seen as a political “compromise between New Dealers enthusiastic about the use of administrative power” to address the country’s social needs and “conservative critics who saw [such] power as a veil for [executive] tyranny.”¹¹⁶ Indeed, the dramatic rise of the administrative state in the 1930s can be seen as a direct challenge to the traditional system of checks and balances embodied in the Constitution. In turn, the APA was the ultimate response to this challenge—an attempt to restore the rule of law, and a system of checks and balances, on the Executive Branch’s expanding authority. In this section, we explore both of these events in order to more fully understand why the Executive Branch’s use of the deliberative process privilege to withhold documents from a court charged with reviewing agency rulemaking is a departure from the balance struck in the APA that may have constitutional implications.

1. Rise of the Administrative State

The presence and role of administrative agencies have grown so common in American society that one commentator compared their impact on our daily lives to that of “VCRs, suburbs, and advertising.”¹¹⁷ Even so, the political legitimacy of administrative agencies remains unsettled even today in many Americans’ minds.¹¹⁸ Thus, the question “Why is there an administrative state?” is not merely an academic question, but has been observed to “reflect[] the deepest of anxieties of our political culture.”¹¹⁹ Indeed, the existence of administrative agencies defies our traditional expectations of a constitutional form of government by undermining notions of separation of powers, due

that time, the APA has proven very durable, being amended only three times and warding off many other attempts to change its structure. See William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 237–41 (1986).

115. Marshall J. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 338 (1986).

116. Sunstein, *Law and Administration*, *supra* note 16, at 2080. As Justice Jackson noted, the APA “represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.” *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950).

117. PETER H. SCHUCK, *FOUNDATIONS OF ADMINISTRATIVE LAW* 7 (2d ed. 2004). Of course, in today’s world the comparison is probably better made to DVDs or digital video recorders, such as TiVo®.

118. Even in our time, the Supreme Court has seemed willing to question the constitutionality of independent administrative agencies. See *Freytag v. Comm’r*, 501 U.S. 868, 920–22 (1991) (Scalia, J., concurring). Maybe for this reason, commentators are willing to suggest that administrative law remains (possibly forever) in search of its “intellectual bearings.” SCHUCK, *supra* note 117, at 2; see also RONALD A. CASS & COLIN S. DIVER, *ADMINISTRATIVE LAW: CASES AND MATERIALS*, at xxi (1987) (“Administrative law is a field that seems forever in search of itself.”).

119. SCHUCK, *supra* note 117, at 7.

process, and political accountability.¹²⁰ So why do they exist? The answer, at least initially, is rooted largely in the changing needs of the country as a result of the Great Depression.

a. The Great Depression and a Changing America

In the years leading up to October 19, 1929,¹²¹ the American economy was a dichotomy. On one hand, the corporate world was booming in the 1920s.¹²² On the other hand, neither the working class nor farmers appeared to improve their economic conditions to “any substantial degree in the ten years preceding 1929.”¹²³ This led the influential economist John K. Galbraith to conclude in 1955 that the economy was “fundamentally unsound” in the years leading up to the Depression, not merely due to the income disparity in American society,¹²⁴ but because this “highly unequal distribution meant that the economy was dependent on a high level of investment or a high level of luxury consumer spending or both [which] are subject, inevitably, to more erratic influences and to wider fluctuations than the [daily] outlays of a \$25-a-week workman.”¹²⁵

120. See Sunstein, *Law and Administration*, *supra* note 16, at 2072 (discussing the incompatibility of law and administration and noting that “[t]he view that legal checks, in their traditional form, are an indispensable constraint on regulatory administration [and] played a large role in the constitutional assault on the administrative state . . .”). “Implicit in the United States Constitution is the notion of limited government,” and the mechanism chosen by the Framers to limit the expansion of governmental power is “the system of internal checks and balances.” E. P. Krauss, *Unchecked Powers: The Supreme Court and Administrative Law*, 75 MARQ. L. REV. 797, 798 (1992). The Constitution distributes authority among the three branches of government—Legislative, Executive, and Judicial. The Constitution seeks to coordinate, and protect, each of the three branches. Most importantly, the separation of powers doctrine preserves this structure by “calling into question the usurpation or subversion of the constitutional role of one branch . . . by the actions of another.” *Id.*; see also LOUIS L. JAFFE & NATHANIEL L. NATHANSON, *ADMINISTRATIVE LAW* 33 (4th ed. 1976) (summarizing the separation of powers principle as “a fundamental and valid dogma” whose “object is the preservation of political safeguards against the capricious exercise of power”).

121. The start of the Great Depression is usually tied to the stock market crash on October 19, 1929, known as Black Tuesday. One scholar has stated that the moment “belongs to the mythology of American Life . . . [because] [i]t possesses all the elements of drama, of personal crisis, of concentrated symbolic value needed for the creation of the folklore and legends which decorate the life of nations.” MARIO EINAUDI, *THE ROOSEVELT REVOLUTION* 49 (1959).

122. *Id.* at 26 (also noting that the net income of corporations filing federal tax returns increased fifty percent between 1920 and 1929 and that there was a significant rise in actual dividends paid to shareholders during this period as well).

123. *Id.* at 25–26.

124. JOHN KENNETH GALBRAITH, *THE GREAT CRASH: 1929*, at 182 (1955). Professor Galbraith notes that in 1929, “the rich were indubitably rich.” The figures indicate that “the 5 per cent [sic] of the population with the highest incomes in that year received approximately one third of all personal income.” *Id.*

125. *Id.* at 182–83.

At the same time, the Executive Branch, leading up to and during the early part of the Great Depression, took a clearly *laissez faire* approach to the economy.¹²⁶ The presidential administrations during this period,¹²⁷ while not repealing many of the existing Wilsonian era social legislation, did not take a position that it was appropriate for the federal government to use legislation (or for that matter administrative rulemaking), particularly legislation that would interfere with the free market, to address the economic woes of the country.¹²⁸ These administrations sought to appeal to a certain type of American tradition, namely to the values of individual freedom and ruggedness.¹²⁹ In short, the prevailing view of these administrations seemed to be that any bump in the economic road, even one like the Great Depression, “could be overcome without undue influence of government power with free enterprise.”¹³⁰

A similar approach to government involvement in the economy was embraced by American courts, particularly the United States Supreme Court, during this era.¹³¹ As one scholar of the politics behind the Great Depression states:

It seems certain that, during this long and critical period, roughly from 1890 to 1936, a period including both a phase of [economic] ascendancy and one of deep crisis, the Supreme Court—moving away sharply from earlier nineteenth-century positions built upon the strong foundations of Chief Justice John Marshall¹³²—reinterpreted the meaning of the Constitution in a way to weaken the power of government.¹³³

126. For a general discussion of the role of government during this period and the general “hands off” approach by the Executive Branch, see EINAUDI, *supra* note 121, at 33–38.

127. This period consists essentially of the administrations of Presidents Harding, Coolidge, and Hoover.

128. See EINAUDI, *supra* note 121, at 33–38. Even worse, apparently, than the government interfering with the free market in the 1930s was the notion that the government would compete with it. See *id.* at 35–38. This was the opinion voiced by President Hoover when he vetoed legislation to establish a quasi-governmental entity, the Tennessee Valley Authority (“TVA”), to develop and sell power in Tennessee. *Id.* at 35. At the time of this veto in 1931, the country was already in the midst of a deepening economic crisis, with unemployment reaching seven million. *Id.* at 37. Although the bill would have resulted in the construction of significant energy infrastructure, which would be a source of steady employment in the region, the President stuck by his principles that such social legislation was to “break down the initiative and enterprise of the American People.” *Id.* at 36–37. Interestingly, it is exactly this type of legislation that President Roosevelt would rely upon (including the TVA bill, which he later signed), that makes up a good portion of the New Deal reforms. See *infra* note 142 and accompanying text.

129. See EINAUDI, *supra* note 121, at 34.

130. *Id.*

131. For a general discussion of the role of courts during this period, see *id.* at 38–48.

132. Chief Justice John Marshall, the longest serving Chief Justice in Supreme Court history (1801–1835), is credited with shaping the influence of the Judicial Branch, the right of the courts to utilize judicial review to strike down unconstitutional legislation, and the roles of the federal and state governments under the constitutional doctrines of supremacy and federalism. See Chief

During this time, the views of the Supreme Court hemmed in both the federal and state governments' ability to enact social legislation. The federal government's efforts to exercise its authority to address economic issues were repeatedly struck down as unconstitutional on the basis of the Court's narrow interpretation of federal powers under the "general welfare" and "interstate commerce" clauses and on a broad assumption of surviving state power under the Tenth Amendment.¹³⁴ At the same time, state social legislation was similarly thwarted on the grounds that it curtailed private property rights and freedom of contract protected under the Due Process Clause.¹³⁵ In essence, what the Supreme Court did during this fifty year period before the New Deal was to set "embarrassing limits" on legislative reform efforts by telling the federal government on one hand that it was essentially limited in its delegated jurisdiction, and, on the other hand, by telling the states that their exercise of police power was rigorously limited by the Fourteenth Amendment.¹³⁶

Needless to say, by October 29, 1929, America was strapped with a government that was either reluctant (in the case of the President and Supreme Court) or paralyzed (in the case of Congress and the States) from acting to address the rapidly deteriorating economic condition of the country. The reluctance of the Executive Branch came to a quick end in 1932 with the election of President Franklin D. Roosevelt and the emergence of his New Deal principles,¹³⁷ the hallmark of which was an extensive slate of social

Justice Earl Warren, *Foreword* to CHIEF JUSTICE JOHN MARSHALL: A REAPPRAISAL, at xiv–xv (W. Melville Jones ed., 1956); Donald G. Morgan, *Marshall, the Marshall Court, and the Constitution*, in CHIEF JUSTICE JOHN MARSHALL: A REAPPRAISAL, *supra* at 171.

133. EINAUDI, *supra* note 121, at 204.

134. *Id.* at 205. For a partial list of the cases that struck down federal social legislation seeking to address the American economy during this period, see *id.* at 207 n.2.

135. *Id.* at 40. According to Professor Einaudi, the Supreme Court struck down some 228 state statutes on the basis of the due process clause between 1890 and 1937. *Id.* at 205. As another scholar put it:

[W]ell over a thousand of the Supreme Court's full-dress decisions have revolved around the little due process clause. [These cases most often deal] with corporations . . . who claim[] through their lawyers that some duly enacted and fairly administered state law, taxing them or regulating their business activities, "deprived" them of property "without due process of law." [As such], the Fourteenth Amendment[] . . . has become the last, and quite often successful, resort of men or companies who stand to lose money through the normal working of some state law, properly passed by a properly elected legislature, properly signed by a properly elected governor, and properly put into effect by properly chosen state officials, including judges—some law that perhaps clamps down on sweatshops, or taxes big fortunes handed on at death, or orders a monopoly like an electric company not to charge so much.

RODELL, *supra* note 97, at 148.

136. EINAUDI, *supra* note 121, at 40–41, 205–06.

137. For a discussion of how President Roosevelt changed the nature of the presidency by reasserting executive power, see *id.* at 119–38.

legislation aimed toward curing the economic depression and establishing sufficient safeguards to ensure that future economic downturns would take a lesser toll on the nation.¹³⁸ The reluctance of the Court, however, would persist a little longer, a spark that can only be called a constitutional crisis—actually the first of two closely related constitutional crises in the span of a decade between 1935 and 1945.

b. The New Deal (Constitutional Crisis I)

Given the failure of the government to prevent the Great Depression (or address it between 1929 and 1932), it is unremarkable that, at first, Roosevelt and the New Dealers found the traditional separation of powers and system of checks and balances were an obstacle to the enactment and implementation of reforms at the national level.¹³⁹ As a result, they believed that new governmental bodies, largely combining powers once exercised only by individual branches of government, were necessary to carry out this new national agenda.¹⁴⁰ More importantly, “[t]he New Deal reformers believed that modern problems required institutions having flexibility, expertise, managerial capacity, political accountability, and powers of initiative” well beyond that of any one branch of government, particularly the courts.¹⁴¹

138. See A.A. Berle, Jr., *The Social Economics of the New Deal*, N.Y. TIMES MAG., Oct. 29, 1933, reprinted in THE NEW DEAL: A DOCUMENTARY HISTORY 38 (William E. Leuchtenburg ed., 1968) (discussing the whirlwind of legislation and its impact on America during the New Deal and noting that the aim of these folks was to introduce “a power of organization into the economic system which can be used to . . . make sure that the burdens of readjustment are equitably distributed, and that no group of individuals will be ground to powder in order to satisfy the needs of an economic balance”); J. Frederick Essary, *The New Deal for Nearly Four Months*, LITERARY DIGEST, July 1, 1933, reprinted in THE NEW DEAL: A DOCUMENTARY HISTORY, *supra* at 25–26. Indeed, the main theme of Roosevelt’s presidential campaign in the summer and fall of 1932 was that the country would now implement through co-operative action (i.e., enactment of social legislation) what individuals and groups had failed to do for themselves, namely adequately address the social and economic needs of the people. EINAUDI, *supra* note 121, at 78–79.

139. Sunstein, *Law and Administration*, *supra* note 16, at 2080.

140. *Id.*

141. *Id.* at 2072, 2079; see also JAMES LANDIS, THE ADMINISTRATIVE PROCESS (1938), reprinted in PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 11 (2d ed. 2004) (“[A]dministrative agencies . . . were called into being when the political power of our democratic institutions found it necessary to exercise some control over the varying phases of our economic life.”). In this regard, the courts are particularly poorly suited to address economic crises. By their very nature, courts decide individual cases based upon individual facts. This gives the courts the “inability to maintain a longtime, uninterrupted interest in a relatively narrow and carefully defined area of economic and social activity.” *Id.* at 12. Moreover, as courts of general jurisdiction, courts have a broad knowledge of “things human and divine,” but not necessarily the expertise to fully address “an extended police function of a particular nature,” such as the economy. *Id.* Thus, it has been argued that in large measure, the twentieth century rise of a

As the New Deal progressed under the leadership of Roosevelt, a large number of administrative agencies came into being with the blessing of Congress.¹⁴² These agencies were given enormous legal power to interpret and execute often intricate new laws.¹⁴³ Before the New Deal, regulatory activities were largely discrete and limited in nature, primarily aimed at particularized fields of economic activity.¹⁴⁴ By the middle of the 1930s, however, the Executive Branch, as well as Congress, had developed a regulatory system that sought to correct the failing tendencies of the free market, and, exemplified by agencies such as the Tennessee Valley Authority (TVA), often embraced comprehensive governmental planning as a tool for developing a social infrastructure.¹⁴⁵ Moreover, to an unprecedented extent, these governmental bodies now exercised quasi-legislative (through rulemaking), quasi-judicial (through interpreting the law and deciding issues brought by aggrieved parties), and quasi-executive authority (through enforcing the law).¹⁴⁶

Within a few years of the New Deal, however, Roosevelt and his supporters would realize that the courts remained an obstacle to grand social reforms on the principles of private autonomy and free markets.¹⁴⁷ In addition to maintaining its disapproving stance toward state and federal legislative attempts to govern the economy,¹⁴⁸ in the mid-1930s the Supreme Court turned its constitutional guns specifically toward these emerging administrative powers. In 1935, invoking the previously never exercised “non-delegation” doctrine,¹⁴⁹ the Court struck down two congressional attempts to transfer broad

massive administrative apparatus was a self-conscious repudiation of regulation through the courts. See Sunstein, *Law and Administration*, *supra* note 16, at 2078.

142. EINAUDI, *supra* note 121, at 137. In addition to the TVA, Congress adopted legislation creating, among others, the Housing and Home Finance Agency, the Securities and Exchange Commission, the National Labor Relations Board, the Federal Deposit Insurance Corporation, the Export-Import Bank, the Foreign Operations Administration, and the Federal Security Agency. *Id.* Many others would, of course, follow.

143. *Id.*

144. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1252 (1986).

145. See *id.* at 1253.

146. See *id.* at 1264. As discussed above, before the New Deal a series of Supreme Court decisions had set constitutional limits on Congress’s assignment of legislative duties to the Executive Branch. See *supra* notes 131–36 and accompanying text. Similarly, before the rise of the regulatory state, the allocation of authority between the Executive Branch and the judiciary was also rather clear in that “it was for the courts, not the Executive, to ‘say what the law is,’ at least in litigated cases.” Sunstein, *Law and Administration*, *supra* note 16, at 2078 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

147. See Sunstein, *Law and Administration*, *supra* note 16, at 2080.

148. See EINAUDI, *supra* note 121, at 208.

149. Article I of the U.S. Constitution states: “All legislative Powers herein granted, shall be vested in a Congress of the United States . . .” U.S. CONST. art. 1, §1. The purpose of this Article is to ensure that the legislature is not provided with an opportunity to divest its

administrative authority to the Executive Branch under the National Industrial Recovery Act.¹⁵⁰ In doing so, the Court complained bitterly that these

constitutionally mandated authorities to the executive branch or any outside agency. Daniel J. White, *The Nondelegation Doctrine Revisited: Whitman v. American Trucking Associations*, 71 U. CIN. L. REV. 359, 362 (2002). Before 1935, the non-delegation doctrine itself consisted of a series of decisions, dating back to the early 1800s, that spoke of the “non-delegable” legislative power in Congress. *See, e.g.*, *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932); *Wichita R.R. & Light Co. v. Pub. Util. Comm’n*, 260 U.S. 48, 58–59 (1922); *Field v. Clark*, 143 U.S. 649, 692 (1892); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825); *Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813). Notably, in none of these cases leading up to 1935 had the Court disapproved the delegation in question. Instead, the Court generally took one of two approaches. First, the Court determined that where the delegation was one of discretion as to the facts, not the law, it was not an unconstitutional delegation of power. *See Clark*, 143 U.S. at 692–93. Second, and more importantly, the Court chose to distinguish “those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.” *Wayman*, 23 U.S. (10 Wheat.) at 43. *See also Shreveport Grain & Elevator Co.*, 287 U.S. at 85 (“That the legislative power of Congress cannot be delegated is . . . clear. But Congress may declare its will, and, after fixing a primary standard, devolve upon administrative officers the ‘power to fill in the details.’”). It is this later approach that laid the foundation for the Court’s articulation of the “intelligible principle” test which is now used as the basis for testing the constitutionality of a congressional delegation. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989) (discussed *infra* note 162).

150. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *Panama Refining* involved the grant of discretionary power to the President under Section 9(c) of the Act to prohibit the transportation of certain petroleum products among the states over certain permitted amounts. *Panama Refining*, 293 U.S. at 405–06. While the facts of the case focused primarily on the President’s authority under the Act, the Court took special pain to point out that if the Congress could authorize such discretion by the President, there would be nothing preventing similar delegations of authorities to other officials and agencies. *Id.* at 420–21. Indeed, even under Section 9(c), it was the Department of Interior that acted as Administrator in recommending to the President what limits should be placed on petroleum transportations among the states. *Id.* at 409. *Schechter Poultry*, however, clearly involved the grant of authority to an administrative agency (through the President) to develop “codes of fair competition.” *Schechter Poultry*, 295 U.S. at 521–22, 524. In that case, the Court struck down the Live Poultry Code developed by the Administrator for Industrial Recovery on the grounds that it unconstitutionally delegated legislative power reserved only to Congress. *Id.* at 522, 541–42. Finally, it should be noted that these two cases can be distinguished in at least one significant way from past decisions of the Court upholding delegation of the “details” of a program to the Executive Branch. *See supra* note 149. The past cases all considered delegations in matters such as presidential authority in foreign affairs or agency management of public property. *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 17 (2d ed. 2001). The delegations at issue in *Panama Refining* and *Schechter Poultry* were not so limited in subject matter, but instead involved delegations pertaining to the type of broad-scale agency regulation of private economic conduct that troubled the Court so much leading up to 1935. *See id.* This led Professor Ernst Freund in 1928 to comment that “the appropriate sphere of delegable authority is where there are no controverted issues of policy or of opinion . . .” (citing ERNST FRUEND, *ADMINISTRATIVE POWER OVER PERSONS AND PROPERTY* 218 (1928)). *Id.*

delegations lacked procedural safeguards to the extent that the actions of the Executive Branch would be wholly outside the constitutional system of checks and balances.¹⁵¹

Needless to say, the Court's view of administrative authority was a serious blow to Roosevelt's reform efforts.¹⁵² To the New Dealers, the Court simply missed the broader, and more pressing issues facing the country.¹⁵³ Yes, public regulation might very well inflict some loss of profits and freedom of economic movement in the short term, but in the long run it would broaden the security of the nation, and ultimately expand private gains.¹⁵⁴ In any event, Roosevelt was not to be entirely deterred. Shortly after his landslide reelection in 1936, Roosevelt announced his well-known "court-packing" plan of February 1937 with the intent of increasing the number of Supreme Court Justices from nine to fifteen.¹⁵⁵ With these new justices selected by him, Roosevelt was certain that the Court would no longer pose a problem to the implementation of the New Deal.

Although by July 1937 the court-packing plan had failed to gain passage in the Senate, events at the Court itself transpired to make the plan superfluous.¹⁵⁶ Most notably, Chief Justice Hughes and Justice Roberts executed their famous "switch in time that saved nine"¹⁵⁷ by reversing first their position on state economic legislation in *West Coast Hotel Co. v. Parrish*¹⁵⁸ and then on the New Deal legislation in *NLRB v. Jones & Laughlin Steel Corp.*¹⁵⁹ In fact, after

151. See, e.g., *Panama Refining*, 293 U.S. at 431–33. Similarly, in *Schechter Poultry*, the Court noted that unlike previous delegations in which Congress set up special procedures for the agency to develop rules—requiring notice and hearing, findings of fact supported by adequate evidence, and judicial review—in the National Industrial Recovery Act, Congress inappropriately "dispenses with this administrative procedure and with any administrative procedure of an analogous character." *Schechter Poultry*, 295 U.S. at 533.

152. EINAUDI, *supra* note 121, at 115.

153. See *id.*

154. *Id.* at 206. As Professor Einaudi states:

The issue can be summed up in this way: Was it proper for the Supreme Court to identify itself to such a large extent with one view of economic freedom and of economic policy, and to nullify, therefore, so many of the intermittent, tentative, and scattered efforts that legislative bodies were making to keep economic life within changing and better defined boundaries of public policy?

Id. at 205.

155. Michael Comiskey, *Can A President Pack—Or Draft—The Supreme Court? FDR and The Court in The Great Depression and World War II*, 57 ALB. L. REV. 1043, 1046 (1994). The actual name of the plan was the Judiciary Reorganization Bill of 1937. SENATE COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711, at 31 (1937).

156. Comiskey, *supra* note 155, at 1046.

157. *Id.*

158. 300 U.S. 379 (1937).

159. 301 U.S. 1 (1937). There is little reason to believe that Roosevelt's court-packing plan was the sole impetus for the dramatic change of opinions by Chief Justice Hughes and Justice

repeatedly striking down New Deal legislation,¹⁶⁰ the Court would uphold social and economic measures in each of the eighteen cases before it between December 1936 and May 1937.¹⁶¹ Moreover, the Court would not again invoke the non-delegation doctrine to strike down New Deal era delegations of administrative power to the Executive Branch.¹⁶²

In short, the tensions between the President and the Court brought about by the Great Depression undoubtedly created a political crisis that resulted in what has been called a “Constitutional Revolution.”¹⁶³ The New Deal reforms, and their eventual acceptance by the Court, opened the door for the burgeoning, modern-day administrative state.¹⁶⁴ The enormous power that would be

Roberts. Since both had changed their minds several months before the announcement of the court-packing plan, it is most likely that Roosevelt’s “overwhelming electoral triumph” in 1936 “induced their change of heart.” Comiskey, *supra* note 155, at 1047. See also EINAUDI, *supra* note 121, at 219 (noting that Roosevelt believed that the “change had been due to political pressure exercised on the Supreme Court, culminating with his plan for judicial reform.”). In any event, as a subsequent member of the Court, Justice Robert H. Jackson, would observe, “the spectacle of the Court that day frankly and completely reversing itself and striking down its opinion but a few months old was a moment never to be forgotten.” *Id.* at 212 (footnote omitted).

160. In three terms between 1933–34 and 1935–36, the Court struck down or limited New Deal measures in eleven of thirteen cases. Comiskey, *supra* note 155, at 1046.

161. *Id.*

162. White, *supra* note 149, at 364; see also Krauss, *supra* note 120, at 799 & n.6. The Supreme Court itself provided a concise history of its nondelegation doctrine jurisprudence between 1928 and 1989, stating that since 1935, the year it invalidated two statutes as excessive delegations, the Court has “upheld . . . without deviation, Congress’ ability to delegate power under broad standards.” *Mistretta v. United States*, 488 U.S. 361, 373 (1989). In *Mistretta*, the Court recognized that its past precedent established that “[s]o long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’” *Id.* at 372 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)). The Court continued by stating that:

Applying this ‘intelligible principle’ test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. . . . Accordingly, this Court has deemed it ‘constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.’

Id. at 372–73 (citations omitted). In 1998, however, the Court finally found a delegation that was just too broad to ignore, finding that that the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), which authorized the President to selectively void portions of appropriation bills, was an unconstitutional delegation of the legislative vestment of Congress. *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998).

163. EINAUDI, *supra* note 121, at 212.

164. Rabin, *supra* note 144, at 1262–63. As the Supreme Court would later observe, the rise of the administrative state “has been the most significant legal trend” in the twentieth century. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952). However, the Court’s acceptance remained a

quickly vested in numerous administrative agencies would soon result in a second constitutional crisis—the need to reestablish checks and balances over this “fourth branch” of the government.¹⁶⁵

B. Rise of the Administrative Procedure Act

1. The Growing View of Administrative Agencies as “Unruly Administrators” (Constitutional Crisis II)¹⁶⁶

By the late 1930s, the presence of specialized administrative agencies was quickly becoming an accepted fact of life in America.¹⁶⁷ To this end, the New Deal programs, which took an active role in economic and social policy, were quite welcomed by the American public.¹⁶⁸ Even so, the new administrative state would continue to be scrutinized, particularly by the legal and business communities, into the late 1930s and early 1940s.¹⁶⁹ Of course, with very little legal and political success in challenging the necessity for a federal bureaucracy,¹⁷⁰ there was a major shift in terms of the debate over the country’s new regulatory system by 1938.¹⁷¹ Gone was the wholesale disagreement over the appropriate realm of administrative action;¹⁷² in its place was a growing apprehension over the largely unchecked agency decision-making process.¹⁷³

reluctant one for some time. *Id.* (observing further that the rise of administrative bodies has “deranged our three-branch legal theories as much as the concept of a fourth dimension unsettles our three dimensional thinking”).

165. See Krauss, *supra* note 120, at 837; see also THE PRESIDENT’S COMM. ON ADMIN. MANAGEMENT, REPORT OF THE COMM. WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT (1937), reprinted in SUBCOMM. ON SEPARATION OF POWERS, COMM. ON THE JUDICIARY, U.S. SENATE, SEPARATION OF POWERS AND THE INDEPENDENT AGENCIES: CASES AND SELECTED READINGS, S. DOC. NO. 91–49, at 346 (1st Sess. 1970) (“They constitute a headless ‘fourth branch’ of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three branches . . . and only three.”).

166. I must attribute the term “unruly administrators” growing out of the New Deal regulatory reforms to Professor Rabin, *supra* note 144, at 1265.

167. *Id.* at 1263. See also 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 280–81 (1998) (noting the solid acceptance of the New Deal by the American people and the repudiation of Republican constitutional values in the 1930s).

168. See Rabin, *supra* note 144, at 1252 (“The public came to look upon [the] government as its guarantor against acute economic deprivation.”).

169. For a discussion of this turbulent period for administrative agencies, see generally Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986) and Rabin, *supra* note 144, at 1262–64.

170. See *supra* notes 142–64 and accompanying text.

171. Rabin, *supra* note 144, at 1263.

172. *Id.*

173. *Id.*

Led in large part by leaders of the American Bar Association, the young regulatory system would suffer a “barrage of criticism” over the perceived inadequacies of agency procedure and the limitations of judicial review.¹⁷⁴ There was a growing notion that decision-making processes of these agencies suffered as a result of their “unwholesome combination of judicial, executive, and legislative powers,” and that their presence was “rapidly and seriously” undermining the position of the Judicial Branch of the federal government.¹⁷⁵ These beliefs were captured in the so-called “tendencies” of administrative agencies cataloged in a 1938 report by the ABA Special Committee on Administrative Law.¹⁷⁶ Among them were the tendencies:

(1) to decide without a hearing; (2) to decide on the basis of matters not before the tribunal; (3) to decide on the basis of preformed opinions; (4) to disregard jurisdictional limits; (5) to do what will get by; (6) to mix up rulemaking, investigation, and prosecution, as well as the functions of advocate, judge and enforcement authority.¹⁷⁷

This debate was turned up a notch when opponents, led by the ABA Special Committee’s new chairman, Roscoe Pound, sought to move the argument over control of administrative law into one between “the good guys against the bad guys,” or maybe more properly put, between American and Marxist values.¹⁷⁸ It was argued by Pound and others that the regulatory system, which lacked an adequate body of authoritative grounds and guides to decisionmaking, would result in “administrative absolutism,” and the end of rule of law—“a Marxian idea very much in vogue [at the time] among a type of American writers.”¹⁷⁹ As the President-elect of the ABA would state the argument in 1938, “[t]he forces of Absolutism and those of Democracy are at grips throughout the world,” and therefore fellow lawyers must “join the ‘titanic struggle’ against those ‘progressives,’ ‘liberals,’ or ‘radicals’ who desire to invest the national Government with totalitarian powers in the teeth of Constitutional democracy.”¹⁸⁰

While in hindsight it is likely that this “Marxist” view of administrative agencies was overly alarmist, it is rather clear from a constitutional perspective that the criticism of the regulatory process was not wholly unjustified. As administrative power expanded in this country, the decisions of these agencies would come to impact nearly every aspect of the American system of values,

174. *Id.* Chief behind this criticism was the leadership of the ABA’s Special Committee on Administrative Law. *See generally* Gellhorn, *supra* note 169.

175. *See* Gellhorn, *supra* note 169, at 220.

176. Rabin, *supra* note 144, at 1264.

177. *Id.*

178. *See* Gellhorn, *supra* note 169, at 221–22.

179. *Id.*

180. *Id.* (footnote omitted).

with important consequences on personal rights and freedoms.¹⁸¹ Moreover, the lack of sufficient oversight by either Congress or the courts after the New Deal would mean that the discretion of these agencies to act was essentially unbound.¹⁸² Thus, it became undeniable that our constitutional system of legal checks and balances was at risk unless constraints were instituted on regulatory administration.¹⁸³

By 1939, under tremendous pressure from the ABA, Congress was compelled to explore legislation to rein in the power of these agencies.¹⁸⁴ And not being deaf himself to the rising tide of procedural criticism, President Roosevelt instructed the Attorney General to appoint a committee to report on the “need for procedural reform” in the field of administrative law and “to make a ‘thorough and comprehensive study’ of then ‘existing practices and procedures, with an eye toward detecting any existing deficiencies and pointing the way to improvements.’”¹⁸⁵ While much of this constitutional upheaval over the administrative state was momentarily forgotten as a result of World War II,¹⁸⁶ in the end it was the passage of the APA in 1946, and its establishment of procedural safeguards and independent judicial interpretation

181. See Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 97 (1996). Professor Shapiro notes that the expansion of government during the New Deal “was extraordinary both in the degree of intrusion on private autonomy and its premise that the capitalistic market system was fundamentally flawed.” *Id.* He goes on to say, “New Deal agencies violated such cherished constitutional concepts as separation of powers (because of the combination of functions), due process (because administrative adjudication was more informal than its judicial counterpart), and political accountability (because of the many ‘independent’ agencies).” *Id.* These concerns also would not escape the Supreme Court, even after passage of the APA. See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952).

182. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1676–81 (1975).

183. See Shapiro, *supra* note 181, at 97 (noting that although it is hard to understand from the perspective of today’s highly regulated society, there was a “social and constitutional threat posed by the New Deal”).

184. In 1940, Congress passed the Walter-Logan Bill seeking to curtail administrative power. See 86 CONG. REC. 13, 815–16 (1940) (noting the House of Representatives’ passage of the Senate’s amendments to the Bill). The bill enhanced judicial review and established internal checks on agency decisionmaking. See James M. Landis, *Critical Issues in Administrative Law: The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1085–86 (1940). The bill was vetoed by President Roosevelt. Shapiro, *supra* note 181, at 98. For a thorough examination of the Walter-Logan Bill, see Landis, *supra*.

185. Gellhorn, *supra* note 169, at 224–25 (footnote omitted).

186. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1641 (1996) (“Congress and the nation fought foreign enemies rather than native administrative bureaucracy.”).

of the law, which were the necessary “quid pro quos” for the creation of the administrative state.¹⁸⁷

2. A New System of Checks and Balances

The APA applies to all administrative bodies of the federal government except those expressly exempted.¹⁸⁸ It establishes procedural requirements concerning public access to agency law, agency rulemaking procedure, agency adjudication procedure, and, in many aspects most importantly, judicial review of agency action.¹⁸⁹ The Act generally divides the universe of agency action into two classes—rulemaking and adjudications—and subjects each class to separate procedural schemes.¹⁹⁰ Rulemaking involves, as the name implies, the issuance of agency rules and regulations, which are generally defined as “statements of general applicability prescribing law or policy.”¹⁹¹ Adjudication, on the other hand, involves the issuance of agency orders, which can be defined as statements of particular applicability that determine the rights of specified parties that then may be relied upon by agencies as precedent.¹⁹²

187. Sunstein, *Law and Administration*, *supra* note 16, at 2072–73 (emphasis added); *see also* Shapiro, *supra* note 181, at 98 (“The ultimate adoption of the APA stilled the crisis over the legitimacy of the administrative state.”).

188. 5 U.S.C. § 551(1) (2006).

189. Bonfield, *supra* note 114, at 303 (“The first broad concept embodied in the federal APA and emulated by the states concerns the desirability of a *general* and *comprehensive* APA.” (emphasis in original)). The Supreme Court has expressly stated in particular that the rulemaking provisions in the APA are maximum requirements, and that while courts may not generally impose additional safeguards, “[a]gencies are free to grant additional procedural rights in the exercise of their discretion.” *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

190. Bonfield, *supra* note 114, at 308; *see also* U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947) [hereinafter AG MANUAL] (“[T]he entire [APA] is based upon a dichotomy between rule making and adjudication.”).

191. Bonfield, *supra* note 114, at 325; AG MANUAL, *supra* note 190, at 14 (“Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations.”).

192. Bonfield, *supra* note 114, at 325; AG MANUAL, *supra* note 190, at 14–15 (“[A]djudication is concerned with the determination of past and present rights and liabilities. . . . [I]t may involve the determination of a person’s right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits.”). There has been often conflicting criticism of the rulemaking and adjudication dichotomy established by the APA. One view, for instance, is that the adoption of some agency rules might benefit from a more fact-intensive process, such as taking of oral evidence. Bonfield, *supra* note 114, at 309. Indeed, some states do engage in an adjudication type approach to certain rulemakings. *See, e.g.*, N.M. STAT. ANN. §§ 70-2-6 to 70-2-7 (2007); N.M. CODE R. § 19.15.14.1205 (Weil 2007) (regulations of the New Mexico Oil and Gas Commission), *available at* <http://www.nmcpr.state.nm.us/NMAC>; CAL. PUB. UTIL. CODE § 728 (1970) (utility rate setting

The APA further breaks down both rulemaking and adjudication into two procedural varieties—formal and informal. In taking formal action, an agency must act “on the record after opportunity for an agency hearing.”¹⁹³ Sections 556 and 557 of the APA contain a fairly elaborate set of trial-type procedural requirements for formal agency actions that parallel closely a judicial proceeding.¹⁹⁴ The Act provides for the right to an agency hearing and for the right of all interested parties to make argument and offer evidence.¹⁹⁵ In this way, the Act seemingly calls for agencies to provide for an assured minimum level of due process when persons are hauled before administrative agencies.¹⁹⁶

in California). Others, however, argue that greater use of rulemaking, and consequently less adjudication, is more preferable for several reasons. Bonfield, *supra* note 114, at 309. First, adjudications lack broad public participation, which will constrain the information available to the decision maker. *Id.* at 326–28. Second, the subject of the adjudication may be unwilling or unable to make certain arguments that may bear on sounder policymaking. *Id.* at 327. Finally, it is argued that rules are fairer in that they are normally prospective in nature (adjudications are retrospective) and likely to apply more uniformly to a broad and defined class of persons. *Id.* at 330–31.

193. 5 U.S.C. §§ 553(c), 554(a) (2006). Determining when a formal agency hearing is required has turned out to be a difficult undertaking, even for the most seasoned administrative law expert. With regards to formal rulemaking, the Supreme Court has stated that “the actual words ‘on the record’ and ‘after . . . hearing’ used in § 553 [are] not words of art, and that other statutory language having the same meaning could trigger the [formal hearing] provisions of §§ 556 and 557 in rulemaking proceedings.” *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 238 (1973). According to Professor Lawson, despite the Court’s admonishment, “in the more than thirty years since [*Florida East Coast Railway*] was decided, no statute that does not contain the magic words ‘on the record’ has been found [by a court] to require formal rulemaking.” GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 219 (4th ed. 2007). Thus, “[a]part from the few rulemaking statutes that contain an express ‘on the record’ requirement, formal rulemaking has virtually disappeared as a procedural category.” *Id.* at 219–20. With regards to formal adjudication, the Supreme Court “has never decided a case involving the language that organic statutes must contain in order to trigger formal adjudication.” *Id.* at 221. Instead, the courts of appeals have offered us several “dueling presumptions.” *Id.* at 233. While some courts have appeared willing to presume, subject of course to rebuttal, that “any language in an organic statute calling for a ‘hearing’ triggers formal adjudication,” other courts presume, again subject to rebuttal, “that the restrictive rule of [*Florida East Coast Railway*] applies to adjudications as well as to rulemakings.” *Id.* In 1989, the District of Columbia Circuit Court of Appeals announced a third approach, essentially deferring to an agency’s determination of whether a hearing is required where the organic statute is ambiguous. *Id.*; *Chem. Waste Mgmt., Inc. v. U.S. Env’tl. Prot. Agency*, 873 F.2d 1477 (D.C. Cir. 1989).

194. See Rabin, *supra* note 144, at 1265; Bonfield, *supra* note 114, at 320. This arguably is a direct result of the intense concern that agencies were undermining the federal judiciary and leading to the eroding of personal rights. See *supra* notes 173–83 and accompanying text. See also Rabin, *supra* note 144, at 1263–65.

195. 5 U.S.C. § 554(b)–(c) (2006).

196. See Alexander Dill, Comment, *Scope of Review of Rulemaking After Chadha: A Case For The Delegation Doctrine?*, 33 EMORY L.J. 953, 969 (1984).

The procedural requirements in the APA for informal rulemakings are dramatically different than those called for in sections 556 and 557 of the APA. The APA requires that an agency engaged in informal rulemaking provide notice to the public of the proposed rule, an opportunity for public comment, and the public issuance of a statement of basis and purpose of the final rule adopted.¹⁹⁷ These requirements, which are commonly referred to as “notice-and-comment rulemaking,”¹⁹⁸ impose a significant duty on an agency and serve to promote agency accountability and reasoned decisionmaking.¹⁹⁹ As the Court of Appeals for the District of Columbia has recently stated, the notice and comment requirements in informal rulemakings

are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.²⁰⁰

With regards to informal adjudications, the APA is simply silent. Unlike the minimal “notice and comment” procedures in section 553 applicable to informal rulemaking,²⁰¹ the APA establishes “no procedural constraints on informal agency adjudication[s]. . . .”²⁰² In such cases, a party aggrieved by an agency’s informal adjudication likely only has two possible remedies. The first would be to allege a violation of his or her constitutional right to due process, which does apply to informal agency adjudications.²⁰³ The second is to seek judicial review of the agency’s substantive decision in the courts. Thus, the APA also calls for judicial review of *all* final administrative actions—rulemakings and adjudications, both the formal and informal varieties.²⁰⁴ It is the judicial review provisions of the Act in which the courts are reestablished as an essential check on the power of the Executive Branch.²⁰⁵

Indeed, the Act gives the courts two important roles in the administrative process. First, Congress restored the courts’ role as the branch of government

197. 5 U.S.C. § 553(b)–(c); *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995).

198. JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 6 (4th ed. 2006).

199. *Reno*, 57 F.3d at 1132.

200. *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (citation omitted).

201. LAWSON, *supra* note 193, at 323.

202. LUBBERS, *supra* note 198, at 6.

203. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 256 (2d ed. 2001).

204. *See* 5 U.S.C. §§ 702, 704 (2006); Rabin, *supra* note 144, at 1265–66.

205. *See* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 433 n.149 (1982); *see also* Stewart, *supra* note 182, at 1676–79.

primarily responsible for interpretation of statutes.²⁰⁶ Section 706 of the APA expressly states that, to the extent necessary, “the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions. . . .”²⁰⁷ Through this provision, the APA reflects back on that most hallow of our Framers’ belief about the Executive Branch—that “those who are limited by law ought not to be entrusted with the power to define the limitation.”²⁰⁸

Second, the APA establishes the courts as the decider over whether an agency acted within its authority, and within reason, in making its decision. Section 706 provides the courts authority to “hold unlawful and set aside agency action” found to be: (1) in regards to rulemaking, “arbitrary, capricious,

206. Sunstein, *Law and Administration*, *supra* note 16, at 2080–81.

207. 5 U.S.C. § 706 (2006). However, in modern administrative law, courts often give substantial deference to agency interpretation of the law where the text of a statute is ambiguous or where the text of the statute does not clearly address a specific issue (known as legislative “gaps”). *See, e.g.*, Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron* U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1275, 1281–82. This principle flows from the Supreme Court’s decision in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). At issue in that case was the Environmental Protection Agency’s decision under the Clean Air Act to allow “bubble” definitions of pollution sources subject to regulation. *Id.* at 840. The bubble rule allows polluters to treat entire plants as a single source, even though the plant may consist of several individual pieces of equipment that emit air pollutants. *Id.* Environmental groups vehemently objected to this enlarged definition of a stationary source. *See id.* at 859, 864 (discussing how respondents, a collection of environmental groups, opposed the EPA’s bubble rule and were waging a “policy battle” in a “judicial forum”). In upholding the “bubble” definition (which is not within the four corners of the Clean Air Act (*see id.* at 838; 42 U.S.C. §§ 9601–9628 (2000))), the Court set forth a two part test for reviewing agency interpretations of the law:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Chevron, 467 U.S. 842–43. The *Chevron* doctrine has been much analyzed, criticized, and glorified. *See, e.g.*, Callahan, *supra* (analyzing how *Chevron* has been applied and suggesting how it ought to be applied in the future); Krauss, *supra* note 120, at 817–20; Sunstein, *Law and Administration*, *supra* note 16; Frank LaSalle, Note, *City of Chicago v. Environmental Defense Fund, Inc.: Making the Case for Broader Application of Chevron*, U.S.A. v. Natural Res. Def. Council, 28 AKRON L. REV. 349 (1995); Stephen M. Lynch, Note, *A Framework for Judicial Review of an Agency’s Statutory Interpretation: Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 1985 DUKE L.J. 469.

208. Sunstein, *Law and Administration*, *supra* note 16, at 2077.

an abuse of discretion, or otherwise not in accordance with the law;²⁰⁹ (2) in excess of constitutional or statutory authority;²¹⁰ (3) in violation of established procedures;²¹¹ and (4) with regards to adjudications under sections 556 and 557 of the Act, “unsupported by substantial evidence.”²¹² Under this scope of review, the courts are also an essential check on the power of the Executive Branch by protecting the citizenry from decisions made only in the self-interest of administrators or on the behalf of powerful, private interest groups.²¹³

In conclusion, through procedural safeguards, and to a greater extent through the availability of judicial review, the APA provides at least “a measure of assurance that the overall [administrative] process has been conducted with regularity and due deliberation” and within the bounds of the law.²¹⁴ Indeed, it is through this single statute that “countless thousands of federal adjudicatory and rulemaking proceedings are conducted each year.”²¹⁵ Given its role in rebalancing power between the Executive and Judicial Branches, it has been said that “the APA has achieved quasi-constitutional status.”²¹⁶ More importantly, however, for over sixty years it has stood alone as a bulwark—whether in word or deed—against administrative absolutism in this country.²¹⁷

III. IS JUDICIAL REVIEW OF “OFF THE RECORD” RULEMAKINGS SOUND POLICY?

The question to be examined in Part III is whether the Executive Branch, through the deliberative process privilege, has made a renewed bid to increase

209. 5 U.S.C. § 706(2)(A) (2006).

210. *Id.* § 706(2)(B)–(C).

211. *Id.* § 706(2)(D).

212. *Id.* § 706(2)(E).

213. See Cass Sunstein, *Fractions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271 (1986), reprinted in FOUNDATIONS IN ADMINISTRATIVE LAW 55 (Peter H. Schuck ed., 1994).

214. Krauss, *supra* note 120, at 825–26. Thus, since passage of the APA in 1946:

The exercise of governmental power by administrative agencies is held in check by four principal mechanisms: (1) [the remaining] structural constraints imposed under the constitutional doctrine of separation of powers; (2) statutory constraints set forth generally in the [APA] and specifically in each agency’s organic legislation; (3) the requirement [as evidenced in section 554 of the APA] that individuals be treated fairly in conformity with the standards of procedural due process; and (4) the institutional role of judicial review to assure agency adherence to applicable legal standards.

Id. at 797.

215. Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California’s New Administrative Procedure Act*, 32 TULSA L.J. 297, 297 (1986).

216. *Id.*

217. See Mathew Diller, *The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1188 (2000).

its power vis-à-vis the judiciary (as well as the American people), which is contrary to both the express legal mandates of the APA, as defined by the Supreme Court, and to sound public policy. The focus in addressing this question will lie solely on the assertion of the privilege by the government during judicial review of informal agency action in which the primary standard of review is the “arbitrary and capricious” test. Of particular concern is the privilege’s impact on review of notice and comment rulemakings,²¹⁸ which are subject to the procedural requirements of section 553 of the APA.²¹⁹

In general, in the modern era of administrative law it is through informal rulemaking that agencies within the Executive Branch have tended to make wholesale changes to public policy in areas affecting the environment, education, public health and safety, communications, and other social and economic aspects of American life.²²⁰ Unfortunately, there is mounting evidence that the Executive Branch is using the deliberative process privilege to frustrate judicial review by redacting information from administrative records that provide the agency’s underlying rationale for rulemaking decisions, and arguably as a subterfuge to cover up decisions that are being made largely on political grounds without regard to whether such decisions are legally or scientifically sound.²²¹ Equally alarming is that no court has given

218. See LUBBERS, *supra* note 198, at 6–7.

219. Specifically, section 553 of the APA establishes the minimum procedures applicable to agency informal rulemaking, including: (1) publishing, in the Federal Register, notice to affected persons of the agency’s intent to promulgate a rule; (2) solicitation of comments on the proposed rule by interested parties; and (3) promulgation of the final rule coupled with the issuance of “a concise general statement of [the agency’s] basis and purpose” of the final rule. 5 U.S.C. § 553(b)–(c) (2006).

220. See William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 38 (1975). Informal rulemaking has become the primary procedural tool used by agencies to make future changes in governmental policy that will impact large segments of the population or the economy. See *id.* As one author has put it:

Through the rulemaking process pass the sum and substance of the hopes and fears of this democratic nation. We will understand it, our government, and ourselves better when we treat rulemaking as the most important source of law and policy for the conduct of our daily lives. It will occupy that status unless the improbable occurs and we find some very different way to govern ourselves.

CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 279 (2d ed. 1999). It should also be noted that while both formal and informal rulemaking are available to an agency under section 553 of the APA, formal rulemaking procedure is rarely, if ever, utilized by modern administrative agencies. See Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 106–07 (2003) (noting that formal rulemaking “has turned out to be a null set” in that given the “impracticalities of formal rulemaking are well known, Congress rarely requires this technique, and courts avoid interpreting statutes to require it, even in the rare cases where the statute seems to do so”).

221. See *infra* Part III.B.1.

any serious consideration to whether the privilege should have ever been extended to cases involving judicial review of rulemakings under the APA.²²² If the courts were to take a close look at this question, it seems likely that the only possible conclusion is that the use of the privilege is not legally justified given the APA mandate that the courts review “the whole record,” and its use is also inconsistent with the Supreme Court’s so-called “hard-look” doctrine of judicial review.²²³ Use of the privilege in these cases, at best, will only further erode public confidence in the federal government, and, at worst, will undermine or destroy the safeguards put in place by the APA to protect against administrative absolutism in this country.²²⁴

A. *Judicial Review of Agency Informal Rulemakings Under Section 706 of the APA*

1. The APA’s (Two) Standard(s) of Review

As any administrative law scholar or student can attest, the existing legal precedent that addresses the appropriate standards applicable to judicial review of agency action is, at best, a quagmire.²²⁵ Over the decades since the adoption of the APA, and particularly after 1970, courts have struggled to understand both the applicability and scope of the various standards of review articulated by the Supreme Court.²²⁶ Even so, the actual text of the APA provides two possible standards a court may use in reviewing an agency’s *substantive*

222. See *infra* Part III.B.2.

223. See *infra* Part III.B.3.

224. See *infra* Part III.B.4.

225. See Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 221 (1996) (“Judicial review doctrine . . . has undergone several transformations, ricocheting between extreme deference and intense scrutiny with intermittent, not always successful, attempts to merge the two.”). Judge Wald provides an excellent history of the debate regarding the appropriate standard of review since 1946, and concludes that the primary concerns have remained unchanged, and that there remains deep-rooted controversy over the role of the courts in reviewing administrative action. *Id.* at 221–30.

226. See Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1051–52 (1995) (noting that landmark decisions by the Supreme Court pertaining to judicial review have broken down and/or been ignored by lower courts). The scope of confusion regarding the applicability of particular standards of review is eloquently revealed (and some would argue resolved) in then-Judge Scalia’s opinion in *Ass’n of Data Processing Service Organizations v. Board of Governors of the Fed. Reserve Sys.*, 745 F.2d 677 (D.C. Cir. 1984), which is discussed in more detail below. See *infra* notes 248–51 and accompanying text. Similarly, Judge Wald also provides a luminous examination of the struggle courts have engaged in to establish the scope of review to apply, with a seemingly illogical attempt to accommodate both judicial deference to, and scrutiny of, the agency within the same judicial doctrine. Wald, *supra* note 225, at 229–30.

determinations,²²⁷ and the Supreme Court has provided sufficient guidance on both standards so as to establish at least the general parameters of judicial review applicable today to informal rulemaking.

The first is the substantial evidence test, which is alleged to be the more rigorous of the two.²²⁸ Under this test, an agency's *factual determinations* must be upheld by the reviewing court if supported by "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise."²²⁹ The Supreme Court, in cases that predate the APA, has stated that "[s]ubstantial evidence is more than a mere scintilla" of evidence, and "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²³⁰ This standard of review is an evidentiary standard,²³¹ akin to that which a court of appeals might apply to the factual determinations made by a trial court or jury.²³²

227. 5 U.S.C. § 706(2) (2006); Mathew J. McGrath, Note, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 GEO. WASH. L. REV. 541, 544 (1986). It could be argued that the APA actually establishes three possible standards of review. See Pedersen, *supra* note 220, at 46–47. However, as the Supreme Court has pointed out, the third standard, "unwarranted by the facts," is authorized by section 706(2)(F) in only two circumstances: (1) when the action is adjudicatory in nature and (2) in a proceeding to enforce non-adjudicatory agency action. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). Neither situation can arise in an agency's informal rulemaking. Of course, courts are often tasked with more than just reviewing the substance of an agency rule. For instance, a court may be tasked with reviewing the agency process used to promulgate a rule to determine if it complied with the law. Such review is clearly authorized by the APA. See § 706(2)(D); see also *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994). Similarly, the courts have devised additional standards of review not expressly called for in the APA. For instance, under the *Chevron* doctrine, courts apply the "now-familiar two-step" formulation enunciated by the Supreme Court to review agency interpretations of statutes the agency is entrusted by Congress to implement. See Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 313 (1996). For purposes of this paper, we are concerned with judicial review of the substantive decision under section 706 of the APA, for which the court is required to review "the whole [administrative] record." § 706.

228. See McGrath, *supra* note 227, at 541.

229. Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 43 (1994).

230. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); see also *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) ("[The evidence] must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."). For a more in-depth discussion of the substantial evidence test, see Louis L. Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233 (1951); Kunsch, *supra* note 229, at 42–45.

231. William H. Kuehnle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829, 835, 850 (2005).

232. Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of*

The second test has been dubbed the “arbitrary and capricious” test²³³ or “hard look” review.²³⁴ This test is clearly the squishier of the two, and comes into play when an agency is called upon by Congress to make the type of policy-related determinations that often occur in rulemaking proceedings.²³⁵ In one of the first Supreme Court cases to directly consider the applicable scope of review of an agency informal rulemaking,²³⁶ the Court held that *all* agency actions “must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law’ or if the action failed to meet statutory, procedural, or constitutional requirements.”²³⁷ The Court went on to state that under these “generally applicable standards” of the APA, a reviewing court must engage in a “substantial inquiry” in the agency’s determination.²³⁸ To uphold the agency’s decision under the arbitrary or capricious test, a court must be able to determine that the decision was based on a “consideration of the relevant factors” and that there was no “clear error of judgment” on the part of the agency.²³⁹ While commentators generally agree that ultimately the scope of review “is narrow and a court is not to substitute its judgment for that of the agency,”²⁴⁰ it is equally clear that the agency is not shielded from “a thorough, probing, in-depth review” of its decision by the court,²⁴¹ and that the rationality of the decision is the central focus of the reviewing court.²⁴²

Judicial Review “On the Record,” 10 ADMIN. L.J. AM. U. 179, 195 (1996); *see also* Kunsch, *supra* note 229, at 42 (noting that the substantial evidence test is also used in Washington state courts “to decide whether or not to uphold a trial court’s findings of fact” and in federal court for “reviewing factual determinations [made] by a jury”).

233. *See, e.g.,* Kunsch, *supra* note 229, at 40 (also noting that the term should properly be phrased “arbitrary or capricious”)(emphasis added).

234. *See* Lawson, *supra* note 227, at 324; Wald, *supra* note 225, at 227.

235. *See* Indus. Union Dep’t, AFL-CIO v. Hodgson, 499 F.2d 467, 473 (D.C. Cir. 1974) (agreeing with the government that the substantial evidence rule applies to factual determinations while inferences of policy are weighed in terms of “arbitrariness or irrationality”); Lawson, *supra* note 227, at 322–25 (noting that while there are potentially four ways to treat legislative-like policy determinations made by agencies, modern courts have embraced hard look review with “vigor”).

236. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (stating that the action at issue in the case was “nonjudicatory, quasi-legislative in nature” (emphasis added)).

237. *Id.* at 413–14 (emphasis added) (citations omitted).

238. *Id.* at 415.

239. *Id.* at 416.

240. Justin Winkvist, Comment, *Arbitrary and F^@#*\$! Capricious: An Analysis of the Second Circuit’s Rejection of the FCC’s Fleeting Expletive Regulation in Fox Television Stations, Inc. v. FCC* (2007), 57 AM. U. L. REV. 723, 734–35 (2008).

241. *See* Young, *supra* note 232, at 190 (footnote omitted).

242. Breger, *supra* note 115, at 354; *see also* Wald, *supra* note 225, at 233–34 (“‘Arbitrary and capricious’ has turned out to be the catch-all label for attacks on the agency’s rationale, its completeness or logic, . . . or lack of evidence in the record to support key findings.”).

2. Which Standard Applies?

Post-*Overton Park*, the question that naturally arose with regard to these two standards of review in APA cases was: “Which test should a court apply in a particular case?” At first, scholars and courts applied what was considered the “simple model” set forth in section 706 of the APA and seemingly endorsed by the Supreme Court: the “arbitrary or capricious” standard was to be used for judicial review of informal agency actions, while the “substantial evidence” standard was to be used for review of formal, record-producing agency actions.²⁴³ It was particularly believed that application of the substantial evidence standard to informal rulemaking was not possible because notice and comment rulemaking lacks the necessary adversarial process needed to produce formal record evidence (and thus, an administrative record).²⁴⁴ Instead, informal rulemaking, again viewed more as an agency policymaking exercise, was considered best reviewed by a court to simply determine if the agency acted within the bounds of rationality.²⁴⁵

In truth, however, it is clear that in many rulemakings today the decision-making process includes both fact-finding and policymaking by the agency.²⁴⁶ Accordingly, the perceived difference between the two standards, which were inherent in application of the simple model of section 706, has “not withstood the test of time.”²⁴⁷ Instead, as articulated by then-Judge Scalia in 1984, courts have come to see the scope of review provisions of the APA as cumulative, not separate.²⁴⁸ In other words:

243. McGrath, *supra* note 227, at 541 & n.2.

244. *Id.* at 542–43 (noting that it was originally considered that “rulemaking did not lend itself to a weighing of the evidence” because “[r]ulemaking lacks the adversarial procedures that transform inconsistent data into reliable evidence that is more susceptible to substantial evidence review”); *see also* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (stating that “the basic requirement for substantial-evidence review” is that the agency action be “designed to produce a record that is to be the basis of agency action”).

245. *See* McGrath, *supra* note 227, at 547–48.

246. Probably the best explanation of the “hybrid” nature of many agency rulemakings can be found in Judge McGowan’s 1973 opinion review of the Occupational Safety and Health Administration’s industrial exposure asbestos rule. *Indus. Union Dep’t, AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974). In that case, OSHA was statutorily mandated to establish protective standards for worker safety. *Id.* at 470–71. On one hand, OSHA did hold evidentiary hearings to determine if substantial evidence existed to determine the risk of asbestos to worker health. *Id.* at 472–73. On the other hand, where the evidence indicated that “reliable data is not currently available with respect to the precisely predictable health effects” of asbestos, OSHA remained obligated to establish some regulatory limit. *Id.* at 475. While such policy determinations are “not susceptible to the same type of verification or refutation by reference to the record as are some factual questions,” they are nonetheless subject to review by the court. *Id.*

247. McGrath, *supra* note 227, at 548.

248. *Ass’n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984).

an agency action which is supported by the required substantial evidence may in another regard be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” . . . [Similarly,] [w]hen the arbitrary or capricious standard is performing that function of assuring factual support, there is no *substantive* difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a “nonarbitrary” factual judgment supported only by evidence that is not substantial in the APA sense—*i.e.*, not “enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn . . . is one of fact for the jury. . . .”²⁴⁹

Thus, in what has been labeled the “convergence theory,”²⁵⁰ when reviewing informal rulemakings under the “arbitrary or capricious” standard, courts today will require not only that the agency supply a “reasoned basis for its action, but also that substantial evidence in the record support any factual determinations made by the agency in the course of the rulemaking.”²⁵¹

3. The Role of the Administrative Record

Today it is rather black letter law that judicial review of informal rulemaking is to be based upon the whole of the administrative record.²⁵² But this was not always the case. Before *Overton Park*, the notion that a court must utilize the administrative record during judicial review was reserved almost exclusively for cases in which the agency had engaged in a formal, adjudicatory-type process.²⁵³ In reviewing informal agency action before 1970, courts applying the arbitrary or capricious test would merely assume the existence of facts as stated by the agency in its justification of the rule to the court.²⁵⁴ As one scholar has put it, “[t]he notion of reviewing a rule adopted in informal proceedings based on the administrative ‘record[,]’” which is now seen as “the yardstick by which the arbitrariness or rationality of the agency’s action is measured[,]” was at one time “looked upon as something of a contradiction in terms.”²⁵⁵

249. *Id.* at 683–84 (citations omitted).

250. McGrath, *supra* note 227, at 552–53.

251. *Data Processing*, 745 F.2d at 683–84. Judge Scalia would go so far as to say that the distinction between the substantial evidence test and the arbitrary or capricious test is now “largely semantic.” *Id.* at 684.

252. *See, e.g.*, Breger, *supra* note 115, at 354.

253. *See* Pedersen, *supra* note 220, at 62–64 (discussing the change spawned by *Overton Park* from a judicial rule based upon a “procedural” record consisting of material properly placed into evidence during the administrative process to a “historical” record consisting of an ad hoc effort by the agency to reconstruct for the court the basis of a particular action).

254. Breger, *supra* note 115, at 354.

255. *Id.*

This too changed with *Overton Park*. In that case, the Supreme Court declared that, in the context of informal agency action, judicial review by a court must be made “on the full administrative record” before the agency at the time it made the decision.²⁵⁶ It has often been pointed out that this requirement is at odds with the Supreme Court’s acknowledgement just a few pages earlier in the *Overton Park* opinion that in informal agency proceedings there is no mechanism for generating a formal record.²⁵⁷ Indeed, in choosing to require on-the-record review of informal agency actions, the Court clearly glossed over the fact that, in contrast to the procedural record-compiling of trial courts and administrative proceedings, the APA does not require an agency to develop a “focused and defined” record as part of the notice and comment rulemaking process.²⁵⁸

Be that as it may, it is one of *Overton Park*’s “formalizing innovations” to make it clear that while informal proceedings “are not on the record in the technical sense of the APA, there is, nevertheless, a record in another sense.”²⁵⁹ Thus, *Overton Park* has come to stand for the proposition that the agency make available to the court all the actual documents and information that were before the agency at the time that it made its decision.²⁶⁰ This loose, non-procedural definition of the record, however, has led to intense confusion and criticism over what actually should or should not go into the administrative record²⁶¹—confusion which, no doubt, has contributed to the rise of the deliberative process privilege as a means of excluding information that contributed to rulemaking from the administrative record.

256. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).

257. Young, *supra* note 232, at 190 (noting that the portions of *Overton Park* which bear on the review of the record by a court “brim with contradictions” and setting forth the inconsistent language from the opinion); *see also* Pedersen, *supra* note 220, at 62–63 (elaborating on the possible intent behind the Court’s self-contradiction).

258. Compare 5 U.S.C. § 553 (2006) (notice and comment rulemaking), with §§ 554–557 (formal adjudications). Section 557(c) of the APA expressly states that:

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of –

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record

§ 557(c). It has been said that the central loss occurring after the adjudicatory model was discarded in favor of notice and comment rulemaking was not the loss of cross-examination or oral testimony in particular, but rather the loss of a “focused and defined record which all the procedures used in adjudication were intended to produce.” Pedersen, *supra* note 220, at 61.

259. Young, *supra* note 232, at 208.

260. *Id.*; *see also* Pedersen, *supra* note 220, at 62–63.

261. LAWSON, *supra* note 193, at 597; *see also* Pedersen, *supra* note 220, at 64; Young, *supra* note 232, at 208.

B. *The Deliberative Process Privilege Frustrates Judicial Review*

1. The Rise of the Deliberative Process Privilege in Section 706 Cases

The past decade has witnessed a marked rise in the use of the deliberative process privilege in APA cases under section 706. Of course, no empirical study exists regarding the exact number of APA cases in which the Executive Branch has invoked the privilege. Nor is such a study likely possible, given that, as with many of the procedural issues that come before the courts, disputes over completeness of the rulemaking record are not always resolved by published court cases.²⁶² But even a cursory search of available cases on Lexis[®] or Westlaw[®] shows that the privilege, while scarcely seen in reported APA cases before 1990, has been invoked in well over three dozen reported decisions since 2000.²⁶³

One area of law in which it is possible to chart the growth of the deliberative process privilege in recent years is in cases arising under the federal Endangered Species Act of 1973 (ESA).²⁶⁴ Since 2000, the privilege has been invoked in numerous cases brought under the ESA²⁶⁵ to challenge the Department of the Interior's decision to either not list (or delist) species whose existences are threatened or to reduce habitat protection for species already on

262. See Stephen L. Wasby, *Publication (Or Not) of Appellate Rulings: An Evaluation of Guidelines*, 2 SETON HALL CIR. REV. 41, 100–01 (2005) (explaining that technical and procedural matter are reason for a court not to publish); see also C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 122–23 (1996) (observing that pre-trial rulings are “rarely published” and that they are “largely immune from appellate court contradiction”).

263. A Lexis search of the federal court database using the terms “administrative record,” “deliberative process privilege,” and “administrative procedure act,” resulted in a total of 52 cases. Of these, 2 cases were dated prior to 1990, 10 cases between 1990 and 2000, and 40 cases were dated after January 1, 2000. A Westlaw search of the same terms resulted in 61 total cases. Of these, 11 cases were dated prior to 1990, 15 cases between 1990 and 2000, and 35 cases were dated after January 1, 2000.

264. 16 U.S.C. §§ 1531–1544 (2006).

265. See, e.g., *Ctr. for Biological Diversity v. Norton*, 336 F. Supp. 2d 1155, 1157 (D.N.M. 2004); *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 11 (D.D.C. 2002); *Maine v. Norton*, 208 F. Supp. 2d 63, 65 (D. Me. 2002); *Trout Unlimited v. Lohn*, No. C05-11128C, 2006 WL 1207901, at *1 (W.D. Wash. May 4, 2006); *Ctr. for Biological Diversity v. Norton*, No. Civ. 01-409, 2002 WL 1207901, at *1 (D. Ariz. July 24, 2002). There is also an unquantifiable, but very likely extensive, number of unpublished ESA challenges invoking the privilege as well. See, e.g., *Plaintiffs' Motion to Compel Completion of the Administrative Record* at 3, *Wash. Toxics Coal. v. U.S. Dep't of the Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2005) (Civ. No. C04-1998C); *Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment*, *N.M. Wilderness Alliance v. U.S. Fish and Wildlife Serv.*, Civ. No. 04-530 (D.N.M. Oct. 25, 2004) [hereinafter *ESA SJ Motion*] (on file with author).

the endangered species list.²⁶⁶ These cases starkly demonstrate the trouble with allowing the privilege to be asserted in section 706 APA cases. Under the ESA, the government must make scientific evaluations regarding the status of a species, relying solely on the use of “the best scientific and commercial data available.”²⁶⁷ The U.S. Fish and Wildlife Service has further recognized an obligation “to document their evaluation of information that supports or does not support a position [on a species] being proposed as an official agency position” and that these evaluations must “rely on the best available comprehensive, technical information regarding the status and habitat requirements for a species.”²⁶⁸

A written evaluation of this type, regarding the decision made about a species under the ESA, along with the supporting data, undoubtedly constitutes part of the “record as a whole” before the agency. Moreover, this (supposedly) objective evaluation of existing data relevant to the species would not appear to implicate any discretionary policy decision for which the deliberative process privilege would appear applicable. To the contrary, it relies on technical, objective, and factual information that is not covered, in any case, by the deliberative process privilege.²⁶⁹ Indeed, in preparing this evaluation,

266. The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The ESA imposes certain duties on the Secretary of the Interior to protect species (and their habitats) that have been formally listed as either “endangered” or “threatened.” 16 U.S.C. § 1533 (2006). A species is defined as “endangered” when it is in “danger of extinction throughout all or a significant portion of its range . . .” *Id.* § 1532(6). A species is defined as “threatened” when it is “likely to become an endangered species within the foreseeable future . . .” *Id.* § 1532(20). The Secretary of the Interior has generally delegated responsibility for carrying out the ESA to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. 50 C.F.R. § 402.01(b) (2007).

267. 16 U.S.C. § 1536(a)(2) (2006). As stated in the government’s own policy on standards for information under the ESA, FWS biologists must review “all scientific and other information that will be used” in order “to ensure that any information used by the [Fish and Wildlife and National Marine Fisheries] Services to implement the [ESA] is reliable, credible, and represents the best scientific and commercial data available.” *Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on Information Standards Under the Endangered Species Act*, 59 Fed. Reg. 34,271, 34,271 (July 1, 1994) [hereinafter *Endangered and Threatened Wildlife*].

268. 16 U.S.C. § 1536(a)(2).

269. *See* *Petroleum Info. Corp. v. U.S. Dep’t of the Interior*, 976 F.2d 1429, 1438 (D.C. Cir. 1992); *see also* *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 6 (6th Cir. 1980) (stating that opinions of “scientifically trained persons” are only exempt if they reflect “the deliberative process of decision or policy making”); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970) (“Purely factual reports and scientific studies cannot be cloaked in secrecy . . .”); *Sw. Ctr. for Biological Diversity v. U.S. Dep’t of Agric.*, 170 F. Supp. 2d 931, 940 (D. Ariz. 2000) (noting that the disclosure of factual information about birds would not have an adverse effect on agency decision-making processes).

Congress has expressly declared that the government may *not* consider any political or economic factors when carrying out its legal obligations under the ESA.²⁷⁰

Even so, the government has repeatedly and regularly asserted the privilege to withhold from the record information bearing on species subject to ESA.²⁷¹ For many years there was justifiable speculation that the redacted information related to wrongful (and arguably illegal) consideration of political, economic, and special interest concerns of the Executive Branch regarding the protection of endangered species.²⁷² We now know with absolute certainty that such politically-motivated considerations were in fact being withheld from the record with regard to ESA rulemakings.²⁷³ This is arguably the most publicly-known use of the deliberative process privilege by the Executive Branch to interfere with a court's ability to review an

270. *See* Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv., 268 F. Supp. 2d 1197, 1225–26 (E.D. Cal. 2003); *see also* H.R. REP. NO. 95-1625, at 13 (1978) (“[I]ndividuals charged with the administration of the act do not have the legal authority to weigh the political importance of an endangered species.”).

271. *See supra* note 265 and accompanying text.

272. *See, e.g.,* ESA SJ Motion, *supra* note 265, at 7–9; UNION OF CONCERNED SCIENTISTS, SCIENTIFIC INTEGRITY IN POLICYMAKING: AN INVESTIGATION INTO THE BUSH ADMINISTRATION'S MISUSE OF SCIENCE 15 (2004) (discussing the political misuse of science under the ESA); WILLIAM SNAPE III ET AL., DEFENDERS OF WILDLIFE, SABOTAGING THE ENDANGERED SPECIES ACT: HOW THE BUSH ADMINISTRATION USES THE JUDICIAL SYSTEM TO UNDERMINE WILDLIFE PROTECTION 16 (2003) (addressing “ESA cases in which the Bush administration unlawfully abandoned sound science in favor of rewarding its corporate supporters”); Noah Greenwald, Editorial, *Speakout: Species Act Interference Clearly Documented*, ROCKY MOUNTAIN NEWS, Dec. 3, 2006, available at <http://www.rockymountainnews.com/news/2006/dec/03/bspeakoutb-species-act-interference-clearly/> (addressing illegal political reversals of recommendations by Fish and Wildlife Service scientists on species under the ESA); Letter from Alden Meyer, Union of Concerned Scientists Director of Strategy and Policy, and Jeff Ruch, Public Employees for Environmental Responsibility Executive Director, to Congressmen Henry A. Waxman and Nick Rahall (Feb. 9, 2005) (addressing a recent poll of government scientists regarding political pressure to change results or recommendations within federal agencies).

273. OFFICE OF INSPECTOR GENERAL, DEP'T OF THE INTERIOR, REPORT OF INVESTIGATION: JULIE MACDONALD, DEPUTY ASSISTANT SECRETARY, FISH, WILDLIFE AND PARKS (2007), available at http://www.biologicaldiversity.org/swcbd/PROGRAMS/esa/pdfs/doi-ig-report_jm.pdf [hereinafter REPORT OF INVESTIGATION]. In the end, all blame was placed on a single Department of Interior employee—Deputy Assistant Secretary Julie MacDonald—who resigned just after release of the Inspector General's report and days before a House Congressional Oversight Committee announced it would hold a public hearing on her violations of the Endangered Species Act, censorship of science, and brutalization of U.S. Fish and Wildlife Service staff. E-Wire Press Release, Embattled Interior Official Julie MacDonald Resigns In Wake of Inspector General Report (May 8, 2007), available at http://www.ewire.com/display.cfm/Wire_ID/3894.

administrative rulemaking.²⁷⁴ Unfortunately, a review of these ESA cases, as well as other cases invoking the deliberative process privilege to withhold information from the administrative record, shows that the Executive Branch has gotten away with such tactics largely because the courts have nearly universally failed to give any serious consideration to the propriety of the assertion of the privilege in these types of APA rulemaking challenges.²⁷⁵

2. Courts Have Not Seriously Scrutinized the Escalating Use of the Deliberative Process Privilege in APA Cases

In one of the earliest APA deliberative process privilege cases, the District Court for the District of Columbia sought to recognize the tension between the “general rule that judicial review of administrative action is to take place upon the ‘whole record’” and the proposition that it is “generally true” that the government is entitled to the deliberative process privilege “to promote freedom of expression among civil servants.”²⁷⁶ That court went on to observe that the “indiscriminate use of the ‘deliberative process’ privilege to justify expurgation of administrative records may frustrate the process of judicial review of agency action under the APA.”²⁷⁷ The *Seabulk* court, however,

274. Ironically, after concluding that wrongdoing occurred within the Fish and Wildlife Service, the Department Inspector General found, not that the Deputy Assistant Secretary’s manipulation of scientific findings for political and economic purposes was illegal or that withholding such information from the courts was necessarily wrong, but that the chief problem was the sharing of “nonpublic information to private sector sources, including the California Farm Bureau Federation and the Pacific Legal Foundation.” REPORT OF INVESTIGATION, *supra* note 273, at 2.

275. Such perfunctory treatment by the courts of invocation of the deliberative process privilege in APA cases is, of course, consistent with the historical development of the privilege in general. *See supra* Part I.C.

276. *Seabulk Transmarine I, Inc. v. Dole*, 645 F. Supp. 196, 201 (D.D.C. 1986). The *Seabulk* case involved an informal agency adjudication in which the plaintiffs, operators of marine vessels used to transport corrosive liquid chemicals in foreign commerce, sought a subsidy from the Federal Maritime Subsidy Board, a subdivision of the Maritime Administration of the Department of Transportation. *Id.* at 197. Under federal law, subsidies of this kind are discretionary and thus decided on a case-by-case basis. *Id.* As discussed below, to the extent the plaintiffs sought review to determine if there was substantial evidence supporting the factual determinations of the Subsidy Board in denying the subsidy, the government’s withholding of deliberative materials may have been appropriate under the so-called *Morgan* doctrine. *See infra* Part III.B.2.b. However, the court proceeded to review the government’s decision under the “arbitrary or capricious” standard. *Seabulk*, 645 F. Supp. at 197. Accordingly, the court’s observation of the tension between the privilege and the court’s obligation to review the whole of the record is certainly relevant to any discussion of the privileges used in review of informal rulemaking. *See supra* Part III.A.1.

277. *Seabulk*, 645 F. Supp. at 202; *accord* *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 21 n.10 (D.D.C. 2002). The *Norton* court noted in dicta that the government’s “failure to provide these [deliberative process] documents that should have been included in the original

avoided this tension (but did not resolve it) by using Rule 37 of the Federal Rules of Civil Procedure to devise a rather novel approach to the problem. The court held that should the defendant agency fail to include the disputed documents “*in full*” in the administrative record, the court would simply deem, for purposes of the case, that the documents fully supported the plaintiffs’ position, whether “they do, in fact, or not.”²⁷⁸

In contrast to *Seabulk*, other courts have seemingly just assumed that the privilege must apply in APA cases.²⁷⁹ These courts rationalize their decision to sustain the privilege either through general citation to precedent acknowledging the privilege’s “common law” roots²⁸⁰ or its purported inclusion in the so-called *Morgan* doctrine.²⁸¹ These rationalizations, however, are insufficiently supported by the courts to allow the continued withholding of

Administrative Record raises further doubts that it has provided the complete Administrative Record” and that “[g]iven the deficiency in the Administrative Record, it is questionable whether the Court would be in a position to adequately address the Service’s conclusions under the APA.” *Norton*, 239 F. Supp. 2d at 21 n.10 (citations omitted).

278. *Seabulk*, 645 F. Supp. at 202. Federal Rule of Civil Procedure 37(b)(2) reads in relevant part:

Sanctions in the District Where the Action Is Pending. (A) For Not Obeying a Discovery Order . . .

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims[.]

FED. R. CIV. P. 37(b)(2).

279. *See generally* Conservation Law Found. v. Dep’t of the Air Force, 864 F. Supp. 265, 273 (D.N.H. 1994) (applying the privilege without analysis); *Maine v. Norton*, 208 F. Supp. 2d 63, 67 (D. Me. 2002) (same); *Ctr. for Biological Diversity v. Norton*, No. Civ. 01-409, 2002 WL 32136200, at *2-4 (D. Ariz. July 24, 2002) (same); *Safari Club Int’l v. Babbitt*, No. 91-2523, 1994 U.S. Dist. LEXIS 18183, at *27-30 (D.D.C. Dec. 15, 1994) (same).

280. *See Ariz. Rehab. Hosp., Inc. v. Shalala*, 185 F.R.D. 263, 269 (D. Ariz. 1998); *Modesto Irrigation Dist. v. Gutierrez*, No. 1:06-cv-00453, 2007 WL 763370, at *10 (E.D. Cal. Mar. 9, 2007). It is generally accepted that the APA’s “whole record” requirement is nonetheless subject to legitimate claims of privilege by the government. *See Ariz. Rehab.*, 185 F.R.D. at 267. Interestingly, there is also little analysis by the courts as to the basis for the general exception that information subject to common law privileges, such as the attorney-client or attorney work product privileges, may be withheld from an administrative record. *See generally* Nat’l Courier Ass’n v. Bd. of Governors of the Fed. Reserve Sys., 516 F.2d 1229, 1241 (D.C. Cir. 1975) (“Authority is sparse on the question of what internal agency memoranda are properly part of the record. . . . The proper approach . . . would appear to be to consider any document that might have influenced the agency’s decision . . . subject to any privilege that the agency properly claims as protecting its interest in non-disclosure.”); *Int’l Longshoremen’s Ass’n v. Nat’l Mediation Bd.*, No. Civ.A. 04-824, 2006 WL 197461, at *4 (D.D.C. Jan. 25, 2006) (“[T]his Court has found no case detailing the method by which an agency can establish that certain documents should not be contained in the administrative record because they are deemed privileged . . .”).

281. *See In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998) (citing *United States v. Morgan*, 313 U.S. 409 (1941), for the assertion that “[a]gency deliberations not part of the record are deemed immaterial”); *supra* Part III.B.2.b.

deliberative materials from the administrative record in the context of judicial review under the arbitrary or capricious standard.

a. The Privilege's "Common Law" Roots

A good example of a court blindly accepting the government's assertion of the deliberative process privilege as an established common law privilege can be found in *Arizona Rehabilitation Hospital, Inc. v. Shalala*.²⁸² In that case, a group of health care institutions that provide patient rehabilitation care challenged the repeal of certain rules by the Department of Health and Human Services that allowed them to recover from Medicare the lower of their actual costs or charges for services.²⁸³ After agreeing that review of the repeal of the rule was subject to judicial review under the arbitrary or capricious standard of the APA,²⁸⁴ the government moved for a protective order on the grounds that certain documents to the rulemaking record "are protected from release and inclusion in the administrative record by the 'deliberative process' privilege."²⁸⁵ In response, the court simply cited, without any analysis of the privilege's application to APA cases, existing precedent from the Court of Appeals for the District of Columbia that "[o]ne of the traditional evidentiary privileges available to the Government in the *civil discovery context* is the common-sense, common-law deliberative process privilege."²⁸⁶

There are considerable factual and legal problems with the court's conclusion in *Arizona Rehabilitation* that the deliberative process privilege is a "traditional . . . common sense, common law" privilege that should be applied in APA cases. As an initial matter, the deliberative process privilege lacks the pedigree necessary to consider it established in American law.²⁸⁷ To do so would certainly ignore its dubious history in both this country and in England.²⁸⁸ More importantly, even if the privilege had roots as a traditional evidentiary privilege, existing law does not condone applying the privilege to cases seeking judicial review under the APA absent a rigorous examination by the court of the consequences to the judicial system and the public interest.

Federal Rule of Evidence 501 governs the development of privileges in federal court.²⁸⁹ Traditionally, the development of a new privilege under Rule

282. *Ariz. Rehab.*, 185 F.R.D. 263 (D. Ariz. 1998).

283. *Id.* at 265.

284. *Id.*

285. *Id.* at 267.

286. *Id.* (alteration in original) (emphasis added); *see also*, *Modesto Irrigation Dist. v. Gutierrez*, No. 1:06-cv-00453, 2007 WL 763370, at *5 (E.D. Cal. Mar. 9, 2007).

287. *See supra* Part I.C.

288. *See id.*

289. Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1084 (1983). Federal Rule of Evidence 501 states:

501, or the expansion of an existing one to cover new forms of evidence, has encountered strong scrutiny by the courts.²⁹⁰ Courts have been careful to recognize that the application of evidentiary privileges can impact both “the interest of the public and the resisting party in preserving privacy in the matter sought to be discovered.”²⁹¹ In the seminal case, *Hickman v. Taylor*,²⁹² for instance, the Supreme Court was tasked with determining whether information obtained by an attorney, such as oral and written witness statements in the course of litigation, was privileged from discovery by the opposing party.²⁹³ In considering whether to adopt what is now commonly known as the attorney work-product privilege, the Court was faced with two competing interests: (1) the need to protect “a person’s files or records, including those resulting from the professional activities of an attorney” and (2) “public policy [that] supports reasonable and necessary inquires” as part of the litigation.²⁹⁴ The Court found that it was necessary to carefully balance these two competing interests, which in the Court’s words “is a delicate and difficult task.”²⁹⁵ Since *Hickman*, the Court has continued to demand that there be a careful balancing of the need for the free flow of information in the judicial forum against the necessity of private communications in each new area in which a privilege has been encouraged by a party.²⁹⁶

Similarly, with regards to APA cases, both the challenging party and the reviewing court “have a strong interest in fully knowing the basis and circumstances of an agency’s decision.”²⁹⁷ Accordingly, courts have found that

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. EVID. 501.

290. *United States v. Nixon*, 418 U.S. 683, 710 & n.18 (1974) (“[Privileges] are not lightly created nor expansively construed, for they are in derogation of the search for truth.”).

291. FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* § 5.9, at 249 (3d ed. 1985).

292. 329 U.S. 495 (1947).

293. *Id.* at 497.

294. *Id.*

295. *Id.*; JAMES & HAZARD, *supra* note 291, § 5.9, at 248.

296. *See, e.g.*, *Upjohn v. United States*, 449 U.S. 383, 396–97 (1981) (scrutinizing the expansion of the attorney-client privilege to cover certain communications within the corporate structure); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189–90 (1990) (scrutinizing (and rejecting) expansion of the self-evaluative privilege to cover internal investigations by organizations subject to employment discrimination claims under Title VII of the Civil Rights Act of 1964); *United States v. Reynolds*, 345 U.S. 1, 7–11 (1953) (scrutinizing the development of a state secrets privilege).

297. *Nat’l Courier Ass’n v. Bd. of Governors of the Fed. Reserve Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975).

“the ‘whole’ administrative record . . . consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency’s position.”²⁹⁸ If this is a correct description of the record in APA cases, which it certainly is,²⁹⁹ it then defies imagination (as well as Supreme Court precedent) that a court would so casually authorize removal of documents from the record on the mere utterance by an agency of terms like “deliberative,” “pre-decisional,” or an assertion of the need for “candor.” This is particularly true given that there is not a jot of evidence that any government employee would hide his or her honest views in the course of rulemaking absent the availability of the privilege.³⁰⁰ Regardless, it is the failure of the courts to undertake this balancing of the need for disclosure during judicial review against the need to protect bureaucratic candor that undermines courts’ acceptance of the privilege in APA cases to date.³⁰¹

298. *Ariz. Rehab. Hosp., Inc. v. Shalala*, 185 F.R.D. 263, 266 (D. Ariz. 1998) (alteration in original) (citations omitted).

299. *See supra* Part III.A.3 for a discussion on the administrative record in arbitrary or capricious review cases under the APA.

300. *See* Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 312–13 (1989); *supra* notes 111–13 and accompanying text. On the other hand, it appears that some government employees have actually taken measures to avoid assertion of the privilege by their superiors in hopes of actually getting their opinions and views in the rulemaking before the public. This has been done, for instance, where federal employees purposefully leave their names off of an internal document. Where a document fails to identify, at minimum, the author, recipient, or list of reviewers, an agency cannot plausibly—or legally—suggest that candor will be impinged. *See Ethyl Corp. v. EPA*, 25 F.3d 1241, 1250 (4th Cir. 1994) (“But, most importantly, where the list fails to identify either the author or its recipient, those persons’ relationships to the decisionmaking process cannot be identified and it becomes difficult, if not impossible, to perceive how the disclosure of such documents would result in a chilling effect upon the open and frank exchange of opinions . . .”).

301. Similarly, courts have also justified assertion of the deliberative process privilege by the government in APA decisions by glomming onto the seemingly overwhelming acceptance of the privilege in the 1970s and 80s by the federal judiciary, including the Supreme Court, in cases arising under the Freedom of Information Act. *See Maine v. Norton*, 208 F. Supp. 2d 63, 65–67 (D. Me. 2002) (sustaining the withholding of seventy-two documents from the administrative record on the basis of FOIA’s Exemption 5); *Int’l Longshoremen’s Ass’n. v. Nat’l Mediation Bd.*, No. Civ.A. 04-824, 2006 WL 197461, at *4 (D.D.C. Jan. 25, 2006) (“[I]t is clear that privileges under the APA are considered to be ‘co-extensive with Exemption 5 of the Freedom of Information Act.’” (citation omitted)). As an initial matter, the recognition of the deliberative process privilege in FOIA cases composes a significant portion of the privilege’s dubious history in this country. *See supra* note 33 and accompanying text. But even more importantly, Exemption 5 of FOIA, which allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]” 5 U.S.C. § 552(b)(5) (2006), has long been understood to do nothing more than incorporate the common law privileges into FOIA. *See* Dianna G. Goldenson, *FOIA Exemption Five: Will It Protect Government Scientists from Unfair Intrusion?*, 29 B.C. ENVTL. AFF. L. REV. 311, 319 (2002). Thus, reliance on FOIA cases does not change the underlying

b. The *Morgan* Doctrine Justification

In the *Morgan* line of cases,³⁰² the Supreme Court found that it was improper to subject the Secretary of Agriculture—who had previously conducted an *adjudicatory* proceeding closely resembling that of a trial court judge—to deposition and subpoena.³⁰³ The court held that “it was not the function of the court to probe the mental processes of the Secretary. . . . [J]ust as a judge cannot be subjected to such scrutiny [on appeal], . . . so the integrity of the administrative process must be equally respected.”³⁰⁴ Accordingly, in such circumstances the Court found that the agency should be accorded “the same deference, respect and immunity . . . given to another court.”³⁰⁵ In plain terms, the so-called *Morgan* doctrine “stands for the proposition that an administrative decisionmaker who presides over a quasi-judicial hearing may not be questioned unless it would also be proper to interrogate a judge in similar circumstances.”³⁰⁶

It has been said that there is an “interconnectedness” between the *Morgan* doctrine and the deliberative process privilege articulated in *Kaiser Aluminum*,³⁰⁷ and that courts and parties should also not be able to personally examine material provided to an agency head by his staff because it is akin to

failure of these courts to balance the public interest in sustaining the privilege in APA cases. Indeed, the balance of interests is significantly different in FOIA cases than in cases involving judicial review of agency rulemakings. As one state court has recognized, exemptions in laws intended to provide the general public access to government records must be considered in context because “unless [subject to exemption], all public records may be examined by any member of the public, often the press, but conceivably any person with no greater interest than idle curiosity.” *Marylander v. Superior Court*, 97 Cal. Rptr. 2d 439, 442–43 (Cal. Ct. App. 2000) (discussing application of privileges to California’s Public Records Act, Cal. Gov’t. Code § 6254). Presumably a party challenging the government in an APA case would have “a stronger and different type of interest in disclosure,” *id.*, which under *Hickman v. Taylor* must be carefully balanced with the government’s need to sustain “candor” in the rulemaking process. See *Hickman v. Taylor*, 329 U.S. 495, 497 (1947). Once again, the courts have utterly failed to undertake this required task.

302. There were four in total—*Morgan v. United States (Morgan I)*, 298 U.S. 468 (1936); *Morgan v. United States (Morgan II)*, 304 U.S. 1 (1938); *United States v. Morgan (Morgan III)*, 307 U.S. 183 (1939); and *United States v. Morgan (Morgan IV)*, 313 U.S. 409 (1941).

303. *Morgan IV*, 313 U.S. at 421–22.

304. See Wetlaufer, *supra* note 10, at 906 (citing *Morgan IV*, 313 U.S. at 422).

305. *Id.*

306. Judge Christopher Maska, *Discovery and Administrative Decisionmakers: The Morgan Doctrine Under Federal and Texas Law*, 3 TEX. TECH. J. TEX. ADMIN. L. 61, 64 (2002). Some courts have labeled the *Morgan* doctrine the “mental process privilege.” See, e.g., *RLI Ins. Co. Group v. Superior Court*, 59 Cal. Rptr. 2d 111, 124 (Cal. Ct. App. 1996).

307. Robert O’Callahan, *Administrative Law—Judicial Review—“Mental Process” Privilege Prevents Discovery of Existence of Agency Head’s Statutorily-Required Personal Decision—National Nutritional Foods Association v. Food & Drug Administration*, 491 F.2d 1141 (2d Cir. 1974), 50 WASH. L. REV. 739, 745–46 (1975).

examining his judgment and/or personal knowledge.³⁰⁸ Courts to date have willingly accepted this claimed “interconnectedness” of the privileges as grounds to sustain the assertion of the deliberative process privilege by the government in seemingly all aspects of administrative decisionmaking, including in rulemakings.³⁰⁹ The problem, however, as articulated by Professor Wetlaufer, is that courts have disregarded the unambiguous language in *Morgan* regarding the quasi-judicial nature of the Secretary of Agriculture’s activities as though it was “not a part of the Court’s opinion.”³¹⁰ When such language is taken into consideration, it becomes clear that *Morgan* and its progeny “represent a category of cases that are analytically and functionally distinct from those that fall within the realm of the general deliberative [process] privilege.”³¹¹

Indeed, many scholars readily agree that the *Morgan* doctrine extends no further than those cases in which a “federal court sits in an [essentially] appellate capacity and reviews” the formal adjudicatory decisions of an agency.³¹² To take this a step further, the *Morgan* bar prohibiting inquiry into the mental processes of administrative decisionmakers is limited to those cases in which the agency actually makes formal findings of facts, the basis of which are being reviewed by the trial court.³¹³ In such cases, the focus of the court should be solely on the record before the administrative tribunal, as the sole question for the court to decide is whether the tribunal’s decision is supported by substantial evidence.³¹⁴ As in the appellate-trial court context, “[i]f the findings of the [agency] are supported by some reliable, probative, and substantial evidence (albeit disputed evidence), the courts are not free to set them aside even though the courts could have drawn different inferences.”³¹⁵

308. *Id.* at 752.

309. *See In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279 (D.C. Cir. 1998); *Nat’l Courier Ass’n v. Bd. of Governors of the Fed. Reserve Sys.*, 516 F.2d 1229, 1241–42 (D.C. Cir. 1975); *Modesto Irrigation Dist. v. Gutierrez*, No. 1:06-cv-00453, at *10–11 (E.D. Cal. Mar. 9, 2007).

310. Wetlaufer, *supra* note 10, at 906–07.

311. *Id.* at 906.

312. *See id.* at 910–11; Maska, *supra* note 306, at 62–64; Jensen, *supra* note 12, at 591–92.

313. Maska, *supra* note 306, at 65 (discussing the Supreme Court’s holding as to this point in *Overton Park*). Indeed, such a limited application of the *Morgan* doctrine was clearly evidenced by the Supreme Court in *Overton Park*. While the Court generally affirmed the rule in *Morgan* that “inquiry into the mental processes of administrative decisionmakers is usually to be avoided,” the Court went on to explain that where, as in the case before it, “there are no such formal findings[,] . . . it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

314. 5 U.S.C. § 706 (2006); *see supra* notes 225–32 and accompanying text; Part III.A.2.

315. *T. Marzetti Co. v. Doyle*, 523 N.E.2d 347, 352 (Ohio Ct. App. 1987) (citing 4 DAVIS, ADMINISTRATIVE LAW § 29.05, at 137–38 (1958)).

Thus, what lies behind the *Morgan* doctrine, and for that matter behind the substantial evidence test as well, is that an agency decisionmaker sitting in a quasi-judicial role and making factual determinations should, like a trial judge, have the freedom to weigh the evidence and credibility of the witnesses before him.³¹⁶

When looked at this way, a plausible argument can be made that the *Morgan* doctrine does have a viable, but limited, role to play in reviewing the informal rulemakings issued by administrative agencies. As previously discussed, modern judicial review of rulemakings has come to use a hybrid judicial review standard, incorporating both the substantial evidence test (factual findings) and the arbitrary or capricious test (policy judgments).³¹⁷ It seems plainly obvious that the *Morgan* doctrine can preclude probing the mind of the decisionmaker with regards to how he or she judged the evidence before the agency in making formal factual findings. The problem, however, occurs when *Morgan*-like protection is extended (under the guise of the deliberative process privilege) to utterly eliminate judicial inquiry into “if—not how—the decisionmakers had exercised their statutory authority. . . .”³¹⁸ While there is no argument that a court should not probe the inner workings of an administrator’s mind with respect to how he reached factual conclusions, nothing in *Morgan* or any other Supreme Court precedent, however, can be said to sanction an agency’s attempts to withhold from the court information bearing on what actually constituted the basis of its legislative-like policy decisions.³¹⁹ Use of any privilege in such a manner undoubtedly works to the agency’s advantage, just as if *Overton Park* and its progeny would have been overturned altogether.

316. See *TBC Westlake, Inc. v. Hamilton County Bd. of Revision*, 689 N.E.2d 32, 37 (Ohio 1998).

317. See *supra* Part III.A.2.

318. O’Callahan, *supra* note 307, at 747–48 (“[A] close reading of both *Morgan I* and [*United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954),] reveals the petitioners were entitled to examine if—not how—the decisionmakers had exercised their statutory authority, and thus indicates the Court’s willingness to allow inquiry into allegations of procedural irregularity.”).

319. See *D.C. Fed’n of Civic Ass’ns v. Volpe*, 316 F. Supp. 754, 760–61 n.12 (D.D.C. 1970) (“[I]t was only by allowing the questioning of the Secretary himself that the Court could ascertain whether the decisions were in fact made and what constituted the basis for the decisions[,]” and while “[t]he Court is aware that the Supreme Court in *United States v. Morgan* prohibited the probing of the mental process of an administrative decision maker to determine his reasoning in reaching a decision[,] . . . [t]he interrogation of Secretary Volpe here was limited to the actions which he took, and the materials which he considered as the basis for his determination, rather than his mental process in considering these materials.” (citation omitted)).

3. The Privilege Undermines Judicial Review as Envisioned in *Overton Park*

By the time Justice Marshall wrote his opinion in *Overton Park* on behalf of the Supreme Court majority in 1971, another major change (or two) had occurred within American administrative law that called for reconsideration of the role of judicial review. Most prominently, there was a clear shift away from formal adjudication toward the informal rulemaking model of agency action that is dominant today.³²⁰ This switch in agency process to a less formal procedure grew out of necessity, as Congress increasingly mandated that agencies take action to address social ills brought to light by the new environmental and consumer protection movements of the 1960s and 1970s.³²¹ Obviously, with such an increase in mandated regulatory activity, conducting more informal notice and comment rulemaking is, at least theoretically, more efficient than holding trial-like hearings for each proposed regulation.³²²

At the same time, this increase in agency rulemaking activity was coupled with a marked shift in the attitude of the judiciary toward the amount of deference that should be given to an agency.³²³ Many of the new social statutes adopted during this period increasingly called upon these bureaucratic institutions to make important policy decisions,³²⁴ and there was a familiar

320. See Pedersen, *supra* note 220, at 38–39.

321. Wald, *supra* note 225, at 225. Judge Wald notes that “[b]etween 1966 and 1981, ‘Congress enacted 182 regulatory statutes and created 24 new regulatory agencies . . . compared with 58 statutes and 8 new agencies between 1946 and 1965.’” *Id.* (footnote omitted).

322. See generally Pedersen, *supra* note 220, at 38 (“[A]gencies could not possibly discharge their sweeping mandates to regulate pollution, energy, occupational health and safety, coal mine safety, and consumer product safety (to give only a few examples) through case-by-case adjudication in formal hearings.”). I say “theoretically” because in reality judicial, congressional, and executive impositions “have impeded . . . the efficiency of the rulemaking process.” Tyler R.T. Wolf, *Existing in a Legal Limbo: The Precarious Legal Position of Standards-Development Organizations*, 65 WASH. & LEE L. REV. 807, 836 (2008). For a discussion of the “countervailing trends” that developed after the surge of social rulemakings in the 1970s that have generally made the development of new rules “more cumbersome, time consuming, and difficult,” see Robert W. Hamilton, *Prospects for the NonGovernmental Development of Regulatory Standards*, 32 AM. U. L. REV. 455, 457–58 (1983).

323. Wald, *supra* note 225, at 224–25.

324. For example, as the Court of Appeals District of Columbia explained with regard to the emerging environmental regulatory movement in the 1970s:

It is only recently that we have begun to appreciate the danger posed by unregulated modification of the world around us, and have created watchdog agencies whose task it is to warn us, and protect us, when technological “advances” present dangers unappreciated—or unrevealed—by their supporters. Such agencies, unequipped with crystal balls and unable to read the future, are nonetheless charged with evaluating the effects of unprecedented environmental modifications, often made on a massive scale. Necessarily, they must deal with predictions and uncertainty, with developing evidence, with conflicting evidence, and, sometimes, with little or no evidence at all.

uneasiness that such decisions should be left wholly unchecked to the administrators.³²⁵ Accordingly, it was no longer considered prudent to simply rely upon an agency's litigation affidavits, in lieu of some type of record, to explain the basis of its rulemaking.³²⁶ As such, courts in the late 1960s and early 1970s were really left searching for a new approach to judicial review.³²⁷

In his article *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, Professor Gary Lawson provides us with a list of four possible "options," or standards of review, that a court sitting in 1970 could utilize when reviewing the substance (as opposed to process) of an agency's rulemaking.³²⁸ First, a court could simply conclude that where an agency's decision cannot be supported by justifiable facts (presumably under the substantial evidence test), then the decision "is essentially a *legislative* act, and the [organic] statute is therefore an unconstitutional delegation of legislative power."³²⁹ While one could argue that this solution may be a correct constitutional result, such an argument ignores the history of the American administrative state, which has clearly come to accept the fiction of the constitutionality of this fourth branch of government.³³⁰ It also ignores that under this fiction, agencies will be routinely required to "make important policy decisions that cannot be reduced to traditional questions of fact or law."³³¹

Second, Professor Lawson argues that a court could provide "only cursory review" of the agency's "legislative-like policy judgments," upholding any decision "that is not completely ridiculous on its face."³³² Arguably, given the roots of the administrative state, the APA may in fact have envisioned that

Ethyl Corp. v. EPA, 541 F.2d 1, 6 (D.C. Cir. 1976).

325. Young, *supra* note 232, at 205 (stating that this period was "characterized by a general reappraisal of the desirability of allowing an agency to be the sole champion of the public interest in nonconstitutional cases"). Compare this with the concerns of the legal and business communities post-New Deal (but pre-APA). See *supra* notes 165–85 and accompanying text.

326. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (rejecting the lower court's use of litigation affidavits as "merely '*post hoc*' rationalizations which have traditionally been found as an inadequate basis for review" and "clearly do not constitute the 'whole record' compiled by the agency") (citations omitted).

327. Professor Lawson, in his textbook on federal administrative law, provides a good description of the struggle in the D.C. Circuit Court of Appeals in the 1970s over establishing parameters of judicial review that would be better situated for reviewing agency policymaking, which often lacks a sufficient factual record for the court to review. LAWSON, *supra* note 193, at 559–64.

328. Lawson, *supra* note 227, at 322.

329. *Id.*

330. See *supra* Part II.

331. Lawson, *supra* note 227, at 323.

332. *Id.*

courts would give “an extraordinary level of deference to agencies.”³³³ Adoption of this “highly deferential”³³⁴ choice today, however, would be to wholly reject the uneasiness that was present in the federal judiciary in the *Overton Park* era,³³⁵ which since has become a staple of the “modern conception of the judicial role in administrative review.”³³⁶

Third, a court “could simply determine the appropriate policy choices [itself].”³³⁷ In other words, a court could undertake *de novo* review of the decision, effectively allowing for a full-blown evidentiary trial as a basis to scrutinize the agency decision.³³⁸ Obviously, such a review process would consume tremendous judicial resources. More importantly, this approach also does not correspond with our modern view of the administrative state in that such significant judicial involvement in agency decisions would, at least in some cases, tend to usurp *all* agency discretion so hard-fought for during the New Deal.³³⁹

Finally, the fourth option, and the one adopted in *Overton Park*, is “‘hard look’ review, under which the court ensures that the agency has taken a ‘hard look’ at—has thought carefully about—the relevant problem.”³⁴⁰ Given the possible choices outlined by Lawson (and assuming a court would not plausibly accept the first option³⁴¹), it can be fairly said that the hard look doctrine adopted by the Court in 1971 is something of a compromise between the substantial deference originally afforded agencies after adoption of the

333. *Id.*

334. *Id.*

335. Wald, *supra* note 225, at 225–26. Judge Wald identifies three reasons for the diminished judicial deference to agencies in the 1970s. First is the previously mentioned increase in the number and scope of regulatory activities during this time, coupled with the increasingly detailed directives to the agency by Congress for which judicial review was authorized. *See id.* Second was a “growing skepticism toward established bureaucracies based on the theory of ‘agency capture.’” *Id.* at 226. This theory postulates that over time agencies tend to “pursue the interest of the industries they regulate[] and not the general public interest.” *Id.* Finally, Judge Wald points to the overall emergency of “judicial activism . . . in recognizing fundamental individual rights . . . and in protecting members of disadvantaged and discriminated against groups . . .” *Id.*

336. Lawson, *supra* note 227, at 323–24.

337. *Id.* at 324

338. *But see* Edward C. Fritz, *Broadening Judicial Review Under the National Forest Management Act*, 3 WIS. ENVTL. L.J. 27, 29 (1996) (“[*De novo* review] broadens both the scope and standard of review. . . . [T]rue *de novo* review of an agency action allows a court to engage in fact-finding beyond the administrative record (scope) and to independently evaluate the wisdom of the an administrative agency’s decision without deference to that agency (standard).” (citations omitted)).

339. *See supra* Part II; *see also* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971) (pointing out the APA itself forbids *de novo* review in all but a few cases); Fritz, *supra* note 338, at 31–34 (explaining that the *Overton Park* court overly forbade *de novo* review).

340. Lawson, *supra* note 227, at 324.

341. *Id.* at 322–23.

APA in 1946 on informal decisionmaking and the adoption of a *de novo* approach to judicial review. As Professor Lawson explains the test:

The agency must demonstrate *awareness* and *candor*. It must indicate that it knows that it is dealing with factual and statutory uncertainty and that an answer is therefore not dictated by any evidentiary or interpretive considerations. *It must then identify the nonfactual and nonstatutory considerations upon which it chooses to rely and the reasons why it selected those considerations rather than others.* The agency should prevail, on this model, so long as those considerations and the reasons that led to them bear some plausible relation to the agency's mission.³⁴²

Of course, this intermediate approach to judicial review "is not so easy to encapsulate in a single list of rubrics because it embraces a myriad of possible faults and depends heavily upon the circumstances of the case."³⁴³ However, it can safely be said that under the hard look doctrine, courts will, at minimum, demand that an agency "make plain its course of inquiry, its analysis and its reasoning."³⁴⁴ And here arises the tension between the deliberative process privilege and the hard look doctrine: it is exactly the material that is likely to

342. *Id.* at 324–25 (emphasis added). Indeed, as the Supreme Court offered in its now famous and often cited explanation of the so-called "hard look" inquiry formulated in *Overton Park*:

The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of an agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' *Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.*

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted) (emphasis added).

343. *Lodge Tower Condo. Ass'n v. Lodge Props., Inc.*, 880 F. Supp. 1370, 1376 (D. Colo. 1995).

344. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994); *see also* Wald, *supra* note 225, at 234 (noting that in a surprising number of cases under the arbitrary and capricious test, the "court is most frustrated about the agency's failure to communicate any reason for taking certain actions"). This requirement is no secret to the agencies of course. As one federal agency (the National Marine Fisheries Service) states in its internal administrative record guidelines:

The [administrative record] must . . . explain and rationally support the agency's decisions. . . . Particularly, the [record] should document consideration of opposing points of view, and provide a thorough explanation as to why the preferred course of action was adopted.

Trout Unlimited v. Lohn, No. C05-1128C, 2006 WL 1207901, at *2 (W.D. Wash. May 4, 2006) (citing NMFS Policy Directive 30-123, Administrative Records Guidelines (March 2005)).

constitute an agency's "reasoning"—i.e., its consideration of the various factual and policy issues associated with a given rulemaking—that is also likely to be defined by the government as "deliberative" for purposes of redacting material from the rulemaking record.

For two separate, but very much interrelated reasons, this tension cannot be resolved. First, use of the deliberative process privilege to remove material bearing on the reasons behind an agency's rulemaking decisions simply conflicts with the requirement in Section 706 that a court review the "whole of the record" before the agency. As courts have acknowledged in other contexts, it would be unwise to "straightjacket" a reviewing court with the administrative record offered by the government, in that the court could not "adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters."³⁴⁵ No doubt, if given the choice an agency would seek to proffer a record that "may be 'adequate' because it fully articulates the agency's reasoning," while simultaneously being "inadequate" in that it fails to provide contrary "documents, memoranda, and other evidence which were considered directly or indirectly by the agency."³⁴⁶

Second, and by far the more grave concern, is that application of the privilege will lessen—if not wholly abolish—the rigor of the hard look doctrine. As evidenced, for example, in recent cases challenging government rulemakings under the Endangered Species Act,³⁴⁷ by applying the deliberative process privilege to redact information from the record associated with those portions of the rulemaking decision to which the arbitrary or capricious standard applies, it has become virtually impossible to check upon whether an agency has—intentionally or not—overstepped the legal authority given to it by Congress, or whether the agency has decided to act in a biased or wholly unreasonable manner. Again, it is helpful to illuminate the difference between an agency decision based upon verifiable facts and one involving more subjective policy decisions. While a court may review the former under the substantial evidence test without regard to "the 'how' and 'why' of the agency's factual conclusions,"³⁴⁸ the "how and why" is *the entirety* of judicial

345. *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) (justifying when extra-record evidence should be allowed before a reviewing court).

346. *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981); *see also Tenneco Oil Co. v. Dep't of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979) ("It strains the Court's imagination to assume that the administrative decision-makers reached their conclusions without reference to a variety of internal memoranda, guidelines, directives, and manuals, and without considering how arguments similar to [the Plaintiff's] were evaluated in prior decisions by the agency . . . [The Department] may not unilaterally determine what shall constitute the administrative record and thereby limit the scope of this Court's inquiry.").

347. *See supra* notes 264–75 and accompanying text.

348. *Lawson, supra* note 227, at 317.

review of a policy decision under the hard look doctrine. Unfortunately, it is the subjective “how and why” that is exactly the target of redaction from the record when the government asserts the deliberative process privilege.³⁴⁹

4. The Privilege Undermines the Protections Against Administrative Absolutism Envisioned in the APA

The modern role of judicial review represents a hard fought compromise to a fundamental debate over the American administrative state: the desire to utilize the courts to limit agency absolutism, arrogance, and/or non-compliance with the law against the strong belief that under our Constitutional system, courts should play a limited role, if any, in the making of public laws and policy.³⁵⁰ Unfortunately, the deliberative process privilege, under the guise of protecting bureaucratic candor, is effectively upsetting this compromise. Assertion of the privilege has substantially reduced the ability of the public, Congress, and the courts to place a legitimate check on administrative abuse of the rulemaking process. As it did in the post-New Deal America, as well as in the early 1970s, this lack of administrative oversight likely plays a role in the diminishing trust of many Americans in their government.

In fact, recent history suggests a growing penchant for secrecy in the Executive Branch, coupled with growing tendency of the President to exert control over nearly all facets of executive agency interaction with the other branches of government. It has been said repeatedly that the Administration of George W. Bush was the most secretive administration in our history.³⁵¹ Observers critical of the Bush White House can point to a litany of attempts to keep policy matters of the administration behind closed doors:³⁵² the

349. As Professor Lawson again so wonderfully illustrates, take the example of an agency that, when tasked with a policy judgment, turns to an astrological chart as part of its deliberations to make the final decision. *Id.* at 318–19. Undoubtedly under the hard look test (or for that matter even a highly deferential test), use of an astrological chart in such a manner is irrational, illegal, or both. *Id.* But with the deliberative process privilege in its arsenal, one must now seriously wonder if the use of such an absurd means of lawmaking will ever be known to the reviewing court.

350. Wald, *supra* note 225, at 229–330.

351. See JOHN W. DEAN, WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH, at ix (2004); Renee Loth, Editorial, *Bush's Passion for Secrecy*, BOSTON GLOBE, Sept. 21, 2004, at A15; Dorothy Samuels, Editorial, *Psst. President Bush Is Hard at Work Expanding Government Secrecy*, N.Y. TIMES, Nov. 1, 2004, at A24; Ted Widmer, *Making War*, N.Y. TIMES, May 9, 2004, at A7 (reviewing BOB WOODWARD, PLAN OF ATTACK (2004)).

352. For a more thorough examination on the secrecy of the Bush administration, see generally MINORITY STAFF OF H. COMM. ON GOV'T. REFORM, SECRECY IN THE BUSH ADMINISTRATION (2004) [hereinafter WAXMAN REPORT], available at <http://oversight.house.gov/documents/20050317180908-35215.pdf>; Gary D. Bass & Sean Moulton, *The Bush Administration's Secrecy Policy: A Call to Action to Protect Democratic Values* (OMB Watch

President's order restricting the public's access to the papers of former presidents;³⁵³ his order in the aftermath of September 11th expanding the range of documents that may be kept secret from the public for up to twenty-five years³⁵⁴ (and expanding the number of agencies that could classify documents as secret³⁵⁵); the seminal fight between the White House and environmentalists all the way to the Supreme Court to keep secret closed-door meetings between the Vice President and industry representatives that comprised the so-called Cheney Energy Task Force;³⁵⁶ the highly surreptitious handling of the firing of nine U.S. Attorneys in late 2006,³⁵⁷ and the President's general desire to control all executive agency interaction with Congress.³⁵⁸

Working Paper, 2002), available at <http://www.OMBWatch.Org/RTK/Secrecy.pdf>; *Secrecy Report Card 2006*, *supra* note 107.

353. Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 1, 2001).

354. Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (March 25, 2003).

355. See Loth, *supra* note 351 ("Bush has expanded the number of agencies with authority to classify documents as secret, including Health and Human Services, the Environmental Protection Agency, and the Department of Agriculture."); see also WAXMAN REPORT, *supra* note 352, at 12–16, 25 ("While these agencies have presumably used this authority to classify some information better kept out of the hands of our enemies, it has also been used to prevent access by the public on information such as reports of known chemical releases, auto and tire safety information, environmental and public health data, and even telephone service outages.").

356. See Eric Dannenmaier, *Executive Exclusion and the Cloistering of the Cheney Energy Task Force*, 16 N.Y.U. ENVTL. L.J. 329, 330–33 (2008). Outside of the ESA cases discussed earlier, probably the most celebrated deliberative process privilege case in recent years involved the Supreme Court's consideration of whether Vice President Dick Cheney must reveal the details of deliberations that led to the President's national energy plan in 2002. See *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 400 n.6 (2004). This was also the case in which Justice Scalia refused to recuse himself after taking the (in)famous duck hunting trip with the Vice President just months before the Court heard the case. *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004). Of course, this should not be confused with the Vice President's other (in)famous duck hunting trip in which he shot his long time friend, attorney Harry Whittington. Michael Kranish, *Cheney Accidentally Shoots Hunting Partner*, BOSTON GLOBE, Feb. 13, 2006, at A1.

357. See Jonathan K. Geldert, *Presidential Advisors and Their Most Unpresidential Activities: Why Executive Privilege Cannot Shield White House Information in the U.S. Attorney Firings Controversy*, 49 B.C. L. REV. 823, 824 (2008). The matter appears to have begun with the issuance of a highly confidential order in March 2006 delegating, to two of his top aides, extraordinary authority over the hiring and firing of most non-civil-service employees of the Justice Department. See Murray Waas, *Secret Order by Gonzales Delegated Extraordinary*

Many of these attempts by the Bush administration to insulate itself from congressional, judicial, and public scrutiny over its decisionmaking were defended by presidential supporters on the grounds of constitutional separation of powers.³⁵⁹ While such an argument may be plausible with respect to those areas of executive authority enumerated in the Constitution, such as the military and foreign affairs, it is difficult to imagine that such an argument could be honestly made with regards to the decisions of administrators tasked by Congress to make legislative-type social and economic policy choices.³⁶⁰ To accept that the Executive Branch can assert its political will over how these decisions are made, and then conceal it through the deliberative process privilege,³⁶¹ would be to go one step beyond the fiction of a fourth branch and toward total acceptance of the transfer of legislative power to the President. Such political intrusion into the administrative process has been rejected twice before: once by Congress in 1946 when it adopted the APA,³⁶² and once in 1972 by the Supreme Court when it adopted the hard look doctrine in *Overton Park* to address the changing nature of administrative decisionmaking.³⁶³ Thus, in order to once again restore the balance between the branches in the administrative process, the courts, Congress, or both must take steps to address the rampant assertion of the deliberative process privilege in APA cases and mandate that the “whole” of the decision-making record be before the reviewing court. Only then can we again realize the required check on the executive and administrative power that assures accountability and openness.

Powers to Aides, NAT'L J., April 30, 2007, available at <http://news.nationaljournal.com/articles/070430nj1.htm>. The matter gained more attention when the White House announced that thousands of e-mails dealing with the firings of the U.S. Attorneys and other official government business may have been lost because they were improperly sent through private accounts intended to be used for political activities. Tom Hamburger, *Key Bush Aides' E-mail May Be Lost*, L.A. TIMES, April 12, 2007, at A9. The matter was vigorously investigated by Congress through a series of public hearings in which the White House flatly refused to cooperate, asserting “executive privilege.” See Richard B. Schmitt, *Bush Refuses to Cooperate in Probe of Attorney Firings*, L.A. TIMES, July 10, 2007, at A9.

358. Sofia E. Biller, *Flooded by the Lowest Ebb: Congressional Responses to Presidential Signing Statements and Executive Hostility to the Operation of Checks and Balances*, 93 IOWA L. REV. 1067, 1125–26 (2008).

359. See Robert D. Sloane, *The Scope of Executive Power in the Twenty-First Century: An Introduction*, 88 B.U. L. REV. 341, 343–48 (2008). Separation of powers has also been explicitly identified by some to legitimize the deliberative process privilege. See Maska, *supra* note 306, at 67.

360. Maska, *supra* note 306, at 67. Of course, such arguments have been made since at least the time of the New Deal. See Donald R. Brand, *The President as Chief Administrator: James Landis and the Brownlow Report*, 123 POL. SCI. Q. 69 (2008).

361. See Biller, *supra* note 358, at 1120–22.

362. Pub. L. No. 79–404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

363. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

IV. AVAILABLE OPTIONS FOR COURTS TO PREVENT UNNECESSARY DISCLOSURE OF TRULY SENSITIVE GOVERNMENT INFORMATION IN APA CASES

It is not the purpose of this Article to argue that *all* governmental information should be made available to the public without restriction. Certainly it cannot be denied that there will always be a need to protect the nature of some government activities.³⁶⁴ Even in the case of rulemakings related to domestic policy, it is at least possible that information will be considered by the agency that could undermine, for instance, national security interests or unnecessarily infringe upon individual privacy.³⁶⁵ Nonetheless, one cannot ignore the striking increase in recent years of the government's assertion of the deliberative process privilege in APA cases to withhold information that most Americans would not consider associated with truly secretive proceedings. To the contrary, every indication is that the federal government is—more often than not—invoking the deliberative process privilege to withhold information relevant to policies that impact the daily domestic lives of Americans. Thus, we are left with the need for a judicial tool that will effectively shield what is actually of a highly sensitive nature to the government, while ensuring that a court has before it a sufficiently “whole record” to enable review under the “hard look” doctrine.

Of course, we may have at least one tool that already can go a long way toward fulfilling this need—the “state secrets” privilege. It has been argued that the Constitution, which vested primacy in the field of foreign affairs to the President, required the judiciary to take a cautionary role in examining whether to order the Executive Branch to publicly release documents that bear on national security.³⁶⁶ Given that the deliberative process privilege is, at least in

364. As even the American Civil Liberties Union, a staunch advocate of open government, has acknowledged, not “*every* piece of information the government has can or should be made open to the public.” *Openness in Government and Freedom of Information: Examining the Open Government Act of 2005: Hearing on S. 394 Before the S. Subcomm. on Terrorism, Technology and Homeland Security of the Comm. on the Judiciary*, 109th Cong. 16 (2005) (Statement of Lisa Graves, Senior Counsel for Legis. Strategy, ACLU) (emphasis added).

365. One need only point to the recent case challenging the failure of the U.S. Navy to evaluate the environmental impact that the use of sonar may have on the world's remaining whale populations. *Natural Res. Def. Council v. Winter*, 518 F.3d 658 (9th Cir. 2008), *rev'd*, 129 S. Ct. 365 (2008). While much of what constitutes the administrative record in this case likely involves information of a technical and scientific nature, there is no doubt that some information—like location of U.S. military assets—constitutes the type of information which is probably better left secret and out of the hands of enemies.

366. *N.Y. Times Co. v. United States*, 403 U.S. 713, 757–58 (1971) (Harlan, J., dissenting). In Justice Harlan's view, the court should not go beyond two inquiries: (1) a review of the initial Executive determination to a point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power; and (2) insisting that the determination by the government that disclosure would irreparably impair the national security be

part, the result of a mistaken use by the Court of Claims of the state secrets privilege,³⁶⁷ a strong argument can be made to abolish the deliberative process privilege altogether and instead, require the government to demonstrate the national importance of information it seeks to remove from a rulemaking record.

From a realistic standpoint, however, abolishing the deliberative process privilege at this time, given its prevalent use by the lower courts, would likely require an opinion directly from the Supreme Court, or, possibly, an act of Congress to amend the APA. Thus, as an alternative, it is proposed that courts, while continuing to acknowledge the privilege, also utilize other tools at their disposal to balance the need to protect the disclosure of actual sensitive information with their obligation to take a hard look at the basis of an agency's rulemaking. Two such tools, if used properly, are in camera review and the ability to issue protective orders.

A. *In Camera Review*

The term "in camera," Latin for "in chambers," refers to a legal proceeding which is held before the judge in the privacy of chambers.³⁶⁸ Courts have regularly required that a party asserting an evidentiary privilege, which is appropriately objected to by opposing counsel, submit the disputed material to the court for in camera review to help determine whether the material is actually of a privileged nature.³⁶⁹ This approach has also been taken with regards to disputes over the deliberative process privilege.³⁷⁰ However, in camera review in these situations is generally limited to: (1) whether the material at issue actually contains deliberative material and (2) "whether the

made by the head of the Executive Department concerned after personal consideration of the document(s). *Id.* at 757 (citing *United States v. Reynolds*, 345 U.S. 1, 8 (1953); *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, 638 (H.L.)).

367. *See supra* notes 100–110 and accompanying text.

368. BLACK'S LAW DICTIONARY 75 (8th ed. 2004).

369. *See, e.g.*, *Renner v. Chase Manhattan Bank*, No. 98 CIV 926 (CSH), 2001 WL 1819215, at *4 (S.D.N.Y. July 13, 2001). As a general rule in federal court, the opposing party must present to the court a factual basis adequate to support a reasonable, good faith belief that in camera review may reveal evidence to establish that the material is actually not privileged, or that an exception to the privilege applies. *See United States v. Zolin*, 491 U.S. 554, 572 (1989); *see also United States v. Corporation*, 974 F.2d 1068, 1072 (9th Cir. 1992). The threshold, however, "is set sufficiently low to discourage abuse of privilege and to ensure that mere assertions of the attorney-client privilege will not become sacrosanct." *Corporation*, 974 F.2d at 1072.

370. *See, e.g.*, *Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580–81 (Fed. Cir. 1985); *Conservation Law Found. v. Dep't of the Air Force*, 864 F. Supp. 265, 273 (D.N.H. 1994); *Safari Club Int'l v. Babbitt*, No. 91-2523, 1994 U.S. Dist. LEXIS 18183, at *30 (D.D.C. Dec. 15, 1994); *Ctr. for Biological Diversity v. Norton*, No. CIV 01-409 TUC ACM, 2002 WL 32136200, at *3–4 (D. Ariz. July 23, 2002); *Elkem Metals Co. v. United States*, Nos. Slip. Op. 00–41, 99-10-00628, 2000 WL 461006, at *1–2 (Ct. Int'l Trade Apr. 17, 2000).

government's interest in confidentiality outweighs the litigant's need for public disclosure."³⁷¹

At first blush, one might assume that the mere allowance of in camera review by the courts should significantly lessen the impact the privilege has on judicial review under the APA. To some extent this is true. For instance, if the material does not involve a statement by an agency official reflecting "advisory opinions, recommendations and deliberations" on policy matters,³⁷² then it obviously is not protected, and upon in camera review the court should order such material be added to the record. Of course, absent a blatant attempt to hide factual or technical material from the court, what makes the privilege problematic with regards to judicial review is that the sheer breadth of the privilege likely covers significant portions of any rulemaking record.

This leaves most parties seeking disclosure of deliberative information in APA cases to argue the qualified nature of the privilege,³⁷³ asking that the court weigh the benefits and burdens of disclosure in a specific case. At this point, however, it becomes next to impossible for the challenging party to overcome the government's assertion of the privilege. With respect to the government's need for the privilege, "most courts engage in only the most perfunctory analysis . . . [parroting] the harms suggested by Justice Reed in *Kaiser [Aluminum]* . . . [but] rarely [will they] examine whether these harms really occur."³⁷⁴ Similarly, while "the litigant's need for the information[] can be defined more objectively . . . few courts do so," and even where the information would be relevant or material to some legitimate objective, it is usually insufficient to overcome the privilege.³⁷⁵ Thus, in the end, the burden on the litigant, even when given the opportunity for in camera review, is simply too difficult to carry.³⁷⁶

What is needed is for courts to change the nature of in camera review when it comes to the assertion of deliberative process privilege in cases seeking judicial review of agency rulemakings. Instead of inquiring into elements and the qualified nature of the privilege, in camera review should be used to satisfy the court, in accordance with *Overton Park*, that material has not been excluded from the record that would show the agency's decision to be arbitrary or capricious, or outside of its statutory mandate. In other words, in camera

371. *Elkem Metals*, 2000 WL 461006, at *1; see also *Weaver & Jones*, *supra* note 300, at 312–20.

372. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

373. See *supra* note 48.

374. *Weaver & Jones*, *supra* note 300, at 315–16.

375. *Id.* at 318.

376. See *Nat'l Courier Ass'n v. Bd. of Governors of the Fed. Reserve Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975) ("[I]t will normally be far easier for the agency to establish its interest in suppressing . . . documents than for the private litigants to establish their interest in exposing them to judicial scrutiny.").

review should be used to protect the claimed “candor” of agency officials, while at the same time assuring that the entire administrative record is before the court.

B. Protective Orders

While appropriate use of in camera review would go a long way to restoring the damage inflicted upon the hard look doctrine by the deliberative process privilege, it is a flawed approach in another sense: it lacks the adversarial process necessary for a court to understand the various strengths and defects in the government’s reliance on information in the record, or the overall decision-making process.³⁷⁷ One solution to this problem would be for the court to impose a protective order on the parties. Grounded in Fed. R. Civ. P. 26, courts are given broad discretion to issue orders on a case-by-case basis to control the flow of information between parties.³⁷⁸ Through a protective order, a court may limit who can be present for either side when examining certain documents,³⁷⁹ or order all parties to protect confidential material from broader disclosure.³⁸⁰

Unfortunately, the government often argues that the presence of opposing attorneys—“even if the court enters a protective order prohibiting parties from divulging the contents of the documents”—compromises the deliberative process privilege, and as such, courts have been unwilling to permit adversary representation during in camera review.³⁸¹ This is a strange position for the government to take, in that one of the primary purposes recognized for issuance of a protective order is “to protect a party or person from annoyance, embarrassment, [or] oppression,”³⁸² which are allegedly the very justifications for the deliberative process privilege. Thus, one would assume that so long as the candor of the agency is generally maintained (that is, outside of one or two opposing counsels), a protective order is the ideal way to balance the privilege

377. *Hayden v. NSA*, 608 F.2d 1381, 1385 (D.C. Cir. 1979) (“We recognize that a fuller public record could enhance the adversary process.” (citation omitted)); *cf.* *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993) (discussing the failure of the adversary system with respect to a court approval of settlements of representative actions); *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 689 (N.D. Cal. 1990) (discussing failure of adversary system in context of plaintiffs’ attorneys’ fee application).

378. *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002); *United States ex rel. Bagley v. TRW, Inc.*, 204 F.R.D. 170, 175 (C.D. Cal. 2001).

379. *See* FED. R. CIV. P. 26(c)(5).

380. *See* FED. R. CIV. P. 26(c)(7).

381. *Weaver & Jones*, *supra* note 300, at 314–15.

382. FED. R. CIV. P. 26(c). And of course, if the reason the government asserted the privilege was to actually protect matters of national importance, the state secrets privilege remains to protect that information. *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

with the assurance that the record is sufficient for purposes of judicial review under *Overton Park*.

CONCLUSION

It has been said that “[a]nyone concerned with the state of our democracy and the performance of our government must be concerned with . . . rulemaking” in that “[w]e can be no less demanding about this process than we are about any other, and certainly no less aware.”³⁸³ Indeed, given the size and reach of the modern administrative state, there is little doubt that control of the administrative process will greatly enhance the power of any one branch of government far beyond anything envisioned by the Founders when they ratified the American Constitution. For this reason, for well over a half of a century now, the Executive Branch, the courts, and Congress have tussled over placing proper checks on administrative authority. And amid this fight, the deliberative process privilege has almost stealthily come to be one of the Executive Branch’s most effective weapons to fight back against judicial oversight. It has also played an important role in the White House’s attempts to control, encapsulate, and then conceal the underlying political basis of many recent administrative decisions. It is this use of the privilege, in particular, that reeks of administrative absolutism, amounts to rule by fiat, and should raise the greatest alarm among Congress, the judiciary, and the American public.

383. KERWIN, *supra* note 220, at 278.