

STIFLING GUBERNATORIAL SECRECY: APPLICATION OF EXECUTIVE PRIVILEGE TO STATE EXECUTIVE OFFICIALS

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INTRODUCTION

“Since the beginnings of our nation,” opined the Circuit Court of Appeals for the District of Columbia, “executive officials have claimed a variety of privileges to resist disclosure of information the confidentiality of which they felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our government.”¹ The most common of these privileges is known as executive privilege.

The concept of executive privilege was created to shield confidential, executive branch communications from disclosure. It is based upon the principle that “those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests” to the injury of the executive branch.² On the other hand, executive privilege runs contrary to the democratic principles of open government and the free flow of information. As James Madison aptly noted, “[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. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”³

Attempting to balance these competing interests, the United States Supreme Court recognized a qualified version of executive privilege in *United States v. Nixon*.⁴ Concluding that executive privilege is “fundamental to the operation of Government and inextricably rooted in the separation of powers,”⁵ the Court acknowledged the need to protect

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¹ *In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997).

² *United States v. Nixon*, 418 U.S. 683, 705 (1974).

³ *In re Sealed Case*, 121 F.3d at 749 (quoting Letter from James Madison to W.T. Berry (Aug. 4, 1822), in 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910)).

⁴ 418 U.S. at 705–13.

⁵ *Id.* at 708.

some communications of the chief officer of the executive branch of governments.⁶

Executive privilege, as defined by the *Nixon* Court, has not been limited to federal executive branch officials. The Court's decision in *Nixon* was not binding on the states, but ten states have looked to the decision for guidance in applying executive privilege to governors.⁷ Unfortunately, in analyzing and applying the federal law doctrine of executive privilege, state courts have produced convoluted decisions that misinterpret the fundamental differences between the two subcategories of the privilege: the chief executive communications privilege⁸ and the deliberative process privilege.⁹

⁶ See *id.* at 713.

⁷ The states that have applied executive privilege at the state level include: Alaska (*Doe v. Alaska Super. Ct.*, 721 P.2d 617, 623 (Alaska 1986)); California (*Times Mirror Co. v. Super. Ct.*, 813 P.2d 240, 250–52 (Cal. 1991)); Delaware (*Guy v. Jud. Nominating Comm'n*, 659 A.2d 777, 785 (Del. Super. Ct. 1995)); Kentucky (*Courier-Journal v. Jones*, 895 S.W.2d 6, 8–9 (Ky. Ct. App. 1995)); Maryland (*Hamilton v. Verdow*, 414 A.2d 914, 924 (Md. 1980)); New Jersey (*Nero v. Hyland*, 386 A.2d 846, 853 (N.J. 1978)); New Mexico (N.M. *ex rel. Attorney General v. First Jud. Dist. Ct. of N.M.*, 629 P.2d 330, 333 (N.M. 1981)); Vermont (*Killington, Ltd. v. Lash*, 572 A.2d 1368, 1375 (Vt. 1990)); and Virginia (*Taylor v. Worrell Enters., Inc.*, 409 S.E.2d 136, 139 (Va. 1991)). The Commonwealth of Massachusetts has refused to recognize any form of executive privilege. *Babets v. Sec'y of Exec. Office of Human Servs.*, 526 N.E.2d 1261, 1266 (Mass. 1988).

⁸ The chief executive privilege has otherwise been referred to as the presidential communications privilege. See *In re Sealed Case*, 121 F.3d at 738. As discussed below, the presidential communications privilege represents a broad version of executive privilege based on the federal constitutional doctrine of separation of powers. *Id.* at 745 (“The presidential privilege is rooted in constitutional separation of powers principles and the President’s unique constitutional role . . .”); see also *Nixon*, 418 U.S. at 708 (“The [presidential] privilege is . . . inextricably rooted in the separation of powers under the Constitution.”).

⁹ Narrower in scope and more limited, the deliberative process privilege derives from the common law. *In re Sealed Case*, 121 F.3d at 745 (“[U]nlike the deliberative process privilege, the presidential communications privilege applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.”); see also Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 289 (1989) (“Recent decisions seem to treat the [deliberative process] privilege as common law based . . .”). Its purpose is to allow executive officials to withhold documents that would reveal “advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss*, 40 F.R.D. 318, 324 (D.D.C. 1996).

This Article seeks to clarify and redefine the distinction between the chief executive communication and deliberative process privileges and to suggest the need for consistency and uniformity in the applicability of executive privilege at the state level. Part I examines the historical background of executive privilege at the federal level. It defines and analyzes the scope of both the chief executive communications and deliberative process privileges. Part II focuses on the application of executive privilege to state executive officials, including an analysis of relevant state case law. Part III introduces a proposed solution to the lack of consistency and symmetry in executive privilege jurisprudence at the state level. By recognizing a hybrid version of the two privileges, state courts are presented with a simple standard of review that would provide uniformity among state executive privilege jurisprudence, recognize the differing concerns regarding confidentiality within the federal and state executive branches, and support the overarching goal of free and open government.

I. DEFINING EXECUTIVE PRIVILEGE: DELIBERATIVE PROCESS PRIVILEGE VERSUS CHIEF EXECUTIVE COMMUNICATIONS PRIVILEGE

The doctrine of executive privilege has historical underpinnings dating back to the founding of the United States. Over the centuries, courts have recognized two primary categories of executive privilege: the deliberative process privilege and the chief executive communications privilege.¹⁰

A. *Deliberative Process Privilege*

The deliberative process privilege is the most oft-cited form of executive privilege.¹¹ The premise for this privilege is that certain executive communications are “so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank

¹⁰ In the decades since *Nixon*, courts often have referred to the chief executive communications privilege as the presidential communications privilege. See, e.g., *In re Sealed Case*, 121 F.3d at 738. The naming of the privilege impliedly limits its availability to the President. As one court concluded, it “is invoked only rarely . . . to preserve the confidentiality of presidential communications.” *Id.* Yet, state courts have applied a gubernatorial form of this privilege based upon the analogous positions held by the President and governor in the federal and state executive hierarchies. See, e.g., *Hamilton*, 414 A.2d at 921. As a result of its dual application, the presidential communications privilege will hereinafter be referred to by the more appropriate title of chief executive communications privilege.

¹¹ *In re Sealed Case*, 121 F.3d at 737.

communication.”¹² In its simplest form, the deliberative process privilege refers to:

the common sense-common law principle that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.¹³

“[U]nlike the presidential version of executive privilege, which the President has invoked in several well-publicized confrontations with Congress and the judiciary, including the Watergate controversy, the deliberative process privilege has a less glamorous past. Its major impact has been on the day-to-day functioning of . . . government[s].”¹⁴ As such, the deliberative process privilege allows government officials to “withhold documents and other materials that would reveal ‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’”¹⁵

The deliberative process privilege is well-grounded in the common law.¹⁶ Legal scholars have traced its roots to the centuries-old English “crown privilege,” which protected “parliamentary deliberations, state secrets and papers, confidential proceedings of the Privy Council, and communications by or to public officials in the discharge of their public

¹² *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Further expounding on this principle, the Supreme Court explained in *Nixon* that “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.” 418 U.S. at 705; see also *Weaver & Jones*, *supra* note 9, at 287–88; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–51 (1975) (quoting *Nixon*, 418 U.S. at 705).

¹³ *Soucie v. David*, 448 F.2d 1067, 1080–81 (D.C. Cir. 1971) (Wilkey, J., concurring).

¹⁴ *Weaver & Jones*, *supra* note 9, at 279.

¹⁵ *In re Sealed Case*, 121 F.3d at 737 (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss*, 40 F.R.D. 318, 324 (D.D.C. 1996)); see also *NLRB*, 421 U.S. at 151–53; *EPA v. Mink*, 410 U.S. 73, 86–93 (1973); *Weaver & Jones*, *supra* note 9, at 279.

¹⁶ *In re Sealed Case*, 121 F.3d at 737. Still, some courts hold that the protection of the mental processes of government officials is constitutionally based. *Weaver & Jones*, *supra* note 9, at 288–89.

duties.”¹⁷ In the United States, the Supreme Court recognized in *Morgan v. United States* that it “was not the function of the court to probe the mental processes” of government officials, specifically the Secretary of Agriculture.¹⁸ The principle of protecting the mental processes of government officials later was incorporated into the deliberative process privilege in *Kaiser Aluminum & Chemical Corp. v. United States*.¹⁹

Courts have established two substantive requirements that must be satisfied before the privilege presumptively attaches.²⁰ First, the material must be predecisional, meaning that it was created before the end of the deliberative process.²¹ Elaborating on this idea, the Supreme Court explained that this substantive requirement is supported by well-documented public policy considerations.²² Explaining the rationale behind the privilege, the Supreme Court added that there is a strong public interest in discovering the underlying basis of governmental decisionmaking.²³ Thus, the quality of decisionmaking by government officials will not be negatively affected by the disclosure of final decisions.²⁴

“Certain types of communications are more likely to be predecisional than others,” such as “upstream inquiries (from subordinates to superiors).”²⁵ As time passes, communications also tend to lose their predecisional status because the potential impact on “frank, candid advice may diminish.”²⁶ Furthermore, predecisional information that is explicitly or implicitly adopted in a final decision loses its privileged status.²⁷

¹⁷ Weaver & Jones, *supra* note 9, at 283 & n.24.

¹⁸ 304 U.S. 1, 18 (1938).

¹⁹ See *Kaiser*, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (citing *Morgan*, 304 U.S. at 18); see also *Carl Zeiss Stiftung*, 40 F.R.D. at 325–26. The decision in *Kaiser Aluminum* was authored by former Supreme Court Justice Stanley Reed, sitting by designation on the United States Court of Claims. Weaver & Jones, *supra* note 9, at 286–87.

²⁰ See *In re Sealed Case*, 121 F.3d at 737.

²¹ Weaver & Jones, *supra* note 9, at 290.

²² *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151–52 (1975).

²³ See *id.* at 152.

²⁴ *Id.* at 152 n.19.

²⁵ Weaver & Jones, *supra* note 9, at 291; see also *Senate of P.R. v. U.S. Dep’t of Justice*, 823 F.2d 574, 586 (D.C. Cir. 1987) (citing *Schlefer v. United States*, 702 F.2d 233, 238 (D.C. Cir. 1983)).

²⁶ Weaver & Jones, *supra* note 9, at 293.

²⁷ *Id.*; see also *NLRB*, 421 U.S. at 161.

The second substantive requirement is that the material must be deliberative, thereby reflecting the “give-and-take of the consultative process.”²⁸ This second prong requires that the material be “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.”²⁹ Accordingly, purely factual information is not privileged, unless it is “so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government’s deliberations.”³⁰

In addition to these substantive requirements, the party asserting the privilege must satisfy strict procedural requirements. Because the burden of proof initially lies with the executive branch official asserting the privilege,³¹ that official must specifically designate which documents or communications fall within the parameters of the deliberative process privilege.³²

There are various means by which the party asserting the privilege can achieve such specificity. Most commonly (and often in conjunction with federal Freedom of Information requests), the federal courts use the *Vaughn* Index.³³ The *Vaughn* Index provides an itemized and detailed summary of each document claimed to be privileged,³⁴ “cross-referenced

²⁸ *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

²⁹ *Weaver & Jones*, *supra* note 9, at 296.

³⁰ *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *see also* *EPA v. Mink*, 410 U.S. 73, 87–88 (1973).

³¹ *Coastal States Gas Corp.*, 617 F.2d at 868.

³² *Weaver & Jones*, *supra* note 9, at 301 & n.100 (citing a collection of federal district court cases). For example, in *Exxon Corp. v. Dep’t of Energy*, 91 F.R.D. 26 (N.D. Tex. 1981), the court held that the documents in question did not fall under the deliberative process privilege because the “agency ha[d] not designated with particularity those materials alleged to be privileged.” *Id.* at 44.

³³ The *Vaughn* Index is named for the court of appeals case in which it was first implemented. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). This case involved a law professor who sought information from the Bureau of Personnel Management under the federal Freedom of Information Act (FOIA). *Id.* at 822. The Bureau withheld this information under claims of privilege. *Id.* In outlining what would become known as the *Vaughn* Index, the Circuit Court of Appeals for the District of Columbia created “a widely used and effective method of placing the burden of showing why information should be exempt on the agency attempting to do so.” *Wightman v. Bureau of Alcohol, Tobacco & Firearms*, 755 F.2d 979, 981 n.1 (1st Cir. 1985). The process was deemed especially helpful when large documents are involved. *See Vaughn*, 484 F.2d at 827.

³⁴ *See Vaughn*, 484 F.2d at 826–27 (“An analysis sufficiently detailed would not have to contain factual descriptions that if made public would compromise the secret nature of
(continued)

to the relevant parts of the government's justifications for the privilege."³⁵ A proper index includes a description of the author, recipient, and subject matter of the documents in question.³⁶ Additionally, the index must include an explanation of why the document is privileged, including the role it played in the deliberative process.³⁷ Finally, if the document contains nonredactable factual information, "the index should state the existence of that material and explain why it is not segregable."³⁸

In addition to the Vaughn Index, courts often require the filing of affidavits by the executive official or agency invoking the privilege.³⁹ An appropriate affidavit would include information from the *Vaughn* Index as well as an explanation of why disclosure would be harmful.⁴⁰

Once the substantive and procedural requirements are satisfied, a presumptive, qualified privilege attaches to the documents in question. The burden of proof then shifts to the party seeking disclosure to demonstrate a "sufficient showing of need."⁴¹ The court must balance the executive's desire for confidentiality with the claimant's need for the information. In essence, the court conducts an "ad hoc balancing of the

the information, but could ordinarily be composed without excessive reference to the actual language of the document."). And, as the Supreme Court of Alaska aptly concluded, a proper *Vaughn* Index should:

- (1) describe specifically each document claimed to be privileged, noting its author, recipient, and subject;
- (2) explain how each document qualifies for the privilege, describing the deliberative process to which the document is related and the role the document played in that process;
- (3) include an affidavit discussing why disclosure would be harmful; and
- (4) describe which portions of large documents are and are not subject to disclosure.

Gwich'in Steering Comm. v. Office of the Governor, 10 P.3d 572, 580 (Alaska 2000).

³⁵ City of Colo. Springs v. White, 967 P.2d 1042, 1053 (Colo. 1998).

³⁶ Weaver & Jones, *supra* note 9, at 301–02 (citing Arthur Anderson & Co. v. IRS, 679 F.2d 254, 258 (D.C. Cir. 1982)).

³⁷ *Id.* at 302.

³⁸ *Id.* at 303.

³⁹ *Cf. id.* at 306. The filing of affidavits is designed to ensure that the privilege is not lightly invoked. *Id.*

⁴⁰ *Cf. id.*; see also Exxon Corp. v. Dep't of Energy, 91 F.R.D. at 43–44.

⁴¹ See *supra* note 31; *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

evidentiary need against the harm that may result from disclosure.”⁴² The court takes into account such factors 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.”⁴³ And, when the harm from disclosure outweighs the need for the information, the communications are protected by the deliberative process privilege.

B. Chief Executive Communications Privilege

Although the two privileges “are closely affiliated,”⁴⁴ the chief executive communications privilege is broader in scope than the deliberative process privilege. Unlike the deliberative process privilege, it “applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.”⁴⁵ Although the chief executive communications privilege lacks the technical substantive and procedural requirements of the deliberative process privilege, it remains a qualified privilege.⁴⁶ When an adequate showing of need has been established, the

⁴² *In re Sealed Case*, 121 F.3d at 738 (quoting *Developments in the Law – Privileged Communications: VI Institutional Privileges. Part Six of Eight*, 98 HARV. L. REV. 1592, 1621 (1985)).

⁴³ *Id.* at 737–38 (quoting *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992) (internal quotation marks omitted)).

⁴⁴ *Id.* at 745.

⁴⁵ *Id.*

These materials often will be revelatory of the President’s deliberations – as, for example, when the President decides to pursue a particular course of action, but asks his advisors to submit follow-up reports so that he can monitor whether this course of action is likely to be successful. The release of final and post-decisional materials would also limit the President’s ability to communicate his decisions privately, thereby interfering with his ability to exercise control over the executive branch.

Id. at 745–46.

⁴⁶ The cases described in the remainder of this section suggest that the chief executive communications privilege requires a more focused or particularized showing of need, thus making it more difficult to overcome. See *United States v. Nixon*, 418 U.S. 683, 713 (1974) (“The . . . privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”). It has even been suggested that this heightened showing of need also attaches when there are charges of governmental misconduct. *In re Sealed Case*, 121 F.3d at 746.

court proceeds to an *in camera* review of the materials so irrelevant materials can be redacted before disclosure.⁴⁷

The historical origin of the chief executive communications privilege can be traced to the Supreme Court's ruling in *Marbury v. Madison*.⁴⁸ In *Marbury*, Chief Justice John Marshall hinted at some form of a chief executive communications privilege in his examination of the ramifications of presidential investigations.⁴⁹ Noting the irksome nature of such an investigation, Marshall stated that some might view judicial intervention as an attempt to "intermeddle with the prerogatives of the executive."⁵⁰

Chief Justice Marshall again addressed the chief executive communications privilege four years later in conjunction with the treason trial of Aaron Burr.⁵¹ Burr's counsel sought a subpoena duces tecum directed at President George Washington for the production of a letter he had received from General James Wilkinson.⁵² In an effort to withhold this letter, President Washington asserted a rudimentary version of the chief executive communications privilege.⁵³ Although Chief Justice Marshall ultimately issued the subpoena, he explained that if the letter "does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed."⁵⁴

In a subsequent decision regarding the same letter, Chief Justice Marshall clarified the applicability of executive privilege.⁵⁵ He wrote that the "[P]resident, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production."⁵⁶

The chief executive communications privilege did not again appear in national current events until the Watergate scandal percolated through the

⁴⁷ *In re Sealed Case*, 121 F.3d at 745.

⁴⁸ 5 U.S. 137 (1 Cranch 1803).

⁴⁹ *Id.* at 141–42.

⁵⁰ *Id.* at 170.

⁵¹ *In re Sealed Case*, 121 F.3d at 738.

⁵² *United States v. Burr*, 25 F.Cas. 30, 31 (C.C.Va. 1807) (No. 1462D).

⁵³ *Id.*

⁵⁴ *Id.* at 37–38.

⁵⁵ *United States v. Burr*, 25 F.Cas. 187, 191–92 (C.C.Va. 1807) (No. 14,694).

⁵⁶ *Id.*

nation's conscience in the 1970s.⁵⁷ A series of decisions involving President Richard Nixon remain the leading—if not the only—case law defining the parameters of the chief executive communications privilege.⁵⁸

The first case to address the chief executive communications privilege was *Nixon v. Sirica*.⁵⁹ In *Sirica*, the grand jury investigating the Watergate break-in ordered President Nixon to produce nine tapes for *in camera* review.⁶⁰ President Nixon refused, claiming executive privilege.⁶¹ In upholding the district court's subpoena for these tapes,⁶² the Court of Appeals for the District of Columbia recognized a preliminary version of the chief executive communications privilege.⁶³ Noting the strong public interest in protecting "the confidentiality of conversations that take place in the President's performance of his official duties" and "the effectiveness of the executive decision-making process," the court attached a presumptive privilege to presidential communications.⁶⁴ Yet, it found the chief executive communications privilege to be qualified, indicating that it could be overcome by a sufficient showing of need.⁶⁵ Using this balancing test, the court struck down President Nixon's claim of privilege generally because the information sought was relevant and necessary to the ongoing Watergate investigations.⁶⁶

A year later, the United States Supreme Court addressed the availability of executive privilege in *United States v. Nixon*.⁶⁷ In *Nixon*, the special prosecutor appointed by the Attorney General to conduct the

⁵⁷ *In re Sealed Case*, 121 F.3d 729, 739, 742 (D.C. Cir. 1997). The Watergate scandal refers to the 1972 burglary of the Democratic National Convention headquarters by high-ranking governmental officials with the goal of hiding listening devices. See STANLEY I. KUTLER, ABUSE OF POWER: THE NEW NIXON TAPES xiii (1997). After a lengthy investigation, it was discovered that President Nixon possessed secret tape recordings implicating himself in the controversy. See *In re Sealed Case*, 121 F.3d at 742. It was this series of events that ultimately resulted in President Nixon's impeachment and resignation. Kutler, *supra*, at xiv.

⁵⁸ *In re Sealed Case*, 121 F.3d at 742.

⁵⁹ 487 F.2d 700 (D.C. Cir. 1973); *In re Sealed Case*, 121 F.3d at 742.

⁶⁰ *Sirica*, 487 F.2d at 704; see also *In re Sealed Case*, 121 F.3d at 742.

⁶¹ *Sirica*, 487 F.2d at 704–05.

⁶² *Id.* at 704.

⁶³ *Id.* at 717.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 719–22.

⁶⁷ 418 U.S. 683 (1974).

Watergate investigations issued a subpoena for additional tapes possessed by President Nixon.⁶⁸ These tapes were to be used as evidence in criminal prosecutions against seven governmental officials linked to the Watergate break-in.⁶⁹ In response to the subpoena, President Nixon filed a motion to quash based on claims of executive privilege.⁷⁰

In a unanimous opinion, the Court recognized a “presumptive privilege for Presidential communications” grounded in the constitutional doctrine of separation of powers.⁷¹ Due to the President’s unique role in the government, the privilege was necessary for the

protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.⁷²

The Court’s rationale implies that the form of executive privilege it adopted is broader than the deliberative process privilege, and also encompasses it. Therefore, at a minimum, it protects the deliberative and mental processes of the President.

Yet, the Court expressly rejected President Nixon’s contention that the privilege was absolute.⁷³ It held that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege.”⁷⁴ Instead, the Court recognized that the presumptive privilege attached to presidential communications could be overcome by a focused

⁶⁸ *Id.* at 688.

⁶⁹ *See id.* at 687.

⁷⁰ *Id.* at 688.

⁷¹ *Id.* at 708 (“The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”); *see also* Guy v. Jud. Nominating Comm’n, 659 A.2d 777, 782 (Del. 1995) (“The privilege is constitutionally based to the extent the interest in confidentiality relates to the effective discharge of a President’s powers.”).

⁷² *Nixon*, 418 U.S. at 708.

⁷³ *Id.* at 706.

⁷⁴ *Id.* In essence, an absolute privilege “would upset the constitutional balance of a ‘workable government’ and gravely impair the role of the courts under Art. III.” *Id.* at 707.

demonstration of need.⁷⁵ In this case, President Nixon's general assertions of executive privilege yielded to the "demonstrated, specific need for evidence in a pending criminal trial."⁷⁶

The Supreme Court's next foray into the chief executive communications privilege occurred in *Nixon v. Administrator of General Services*.⁷⁷ Upon enactment of the Presidential Recordings and Materials Preservation Act (PRMPA),⁷⁸ a large number of materials—including the Watergate tapes—were transferred from the Nixon administration to the General Services Administrator.⁷⁹ President Nixon challenged the constitutionality of the PRMPA, claiming among other things that the statute impinged on the chief executive communications privilege.⁸⁰

The Court first distinguished between sitting and former presidents, holding that the privilege is given less weight when asserted by the latter.⁸¹ Next, the Court quoted *United States v. Nixon* so as to limit the privilege to "communications 'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions.'"⁸² As the Court explained, there was only minor interference with the confidentiality of presidential communications when the material was screened by archivists.⁸³ Because such screening had been accomplished without problems for earlier Presidents, the court viewed the interference as insubstantial and justified by the public interests underlying the PRMPA.⁸⁴

More recently, the chief executive communications privilege arose in *Cheney v. United States District Court for the District of Columbia*.⁸⁵ In

⁷⁵ *Id.* at 713.

⁷⁶ *Id.* 713–14.

⁷⁷ 433 U.S. 425 (1977).

⁷⁸ Pub. L. No. 93-526, 88 Stat 1696 (codified as amended at 44 U.S.C. § 2107 Note (2000)).

⁷⁹ *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. at 433–34.

⁸⁰ *Id.* at 439–40.

⁸¹ *Id.* at 448.

⁸² *Id.* at 449 (citations omitted) (quoting *United States v. Nixon*, 418 U.S. 683, 708, 711, 713 (1974) (alteration in original)).

⁸³ *Id.* at 451–54.

⁸⁴ *Id.* at 452–53. Among the public interests served was the restoration of "public confidence in our political processes" through preservation of materials shedding light on President Nixon's resignation. *Id.* at 453.

⁸⁵ 542 U.S. 367 (2004), *motion granted on remand*, *In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005).

Cheney, two organizations filed a civil lawsuit alleging that an energy task force chaired by Vice President Richard Cheney violated the Federal Advisory Committee Act (FACA).⁸⁶ The two organizations obtained discovery orders against Vice President Cheney and other high-ranking executive officials requiring the production of information relating to the structure and membership of the task force.⁸⁷ Although the district court mentioned the possible applicability of the chief executive communications privilege, Vice President Cheney did not raise the issue while petitioning for a writ of mandamus to abate enforcement of the discovery order.⁸⁸

In a divided opinion, the Court of Appeals dismissed Vice President Cheney's petition for a writ.⁸⁹ Despite its recognition that the discovery orders were overly broad, the Court of Appeals justified dismissal based upon the availability of alternative remedies.⁹⁰ The alternative remedies included an assertion of the chief executive communications privilege with the requisite specificity.⁹¹

The Supreme Court ultimately reversed the Court of Appeals' decision and denied Vice President Cheney's writ of mandamus.⁹² In the majority opinion, the Court attempted to distinguish the present matter from the facts in *Nixon*. Focusing on the nature of lawsuits in which the allegedly privileged materials are needed, the Court held that the "need for information for use in civil cases, while far from negligible, does not share

⁸⁶ *Id.* at 373; Pub. L. No. 92-463, 86 Stat. 770 (codified as amended at 5 U.S.C. app. §§ 1-16 (2000)). Enactment of this law was designed to provide advice to administrative agencies and prevent public funds from being wasted. 5 U.S.C. app. § 2; *see also Cheney*, 542 U.S. at 372. Groups that satisfy the statutory definition of advisory committees were subjected to certain open meetings and disclosure requirements. *Cheney*, 542 U.S. at 373-74. Such requirements did not apply if the advisory committee was comprised only of government employees. *Id.* at 374. This lawsuit alleged that non-federal employees, including "private lobbyists," participated in private meetings of the energy task force and were therefore members of the committee. *Id.* As a result, the plaintiffs argued that the energy task force was subject to the disclosure requirements of FACA. *Id.*

⁸⁷ *Cheney*, 542 U.S. at 375. The task force was "established to give advice and make policy recommendations to the President." *Id.* at 372.

⁸⁸ *Id.* at 375-77.

⁸⁹ *Id.* at 376.

⁹⁰ *Id.* at 376-77.

⁹¹ *Id.* at 376.

⁹² *Id.* at 378.

the urgency or significance of the criminal subpoena requests in *Nixon*.⁹³ In essence, the Court held that the need for disclosure is much weaker in civil lawsuits, thereby making it more difficult to overcome an assertion of the chief executive communications privilege.

Additionally, the Court expounded on its holding in *Nixon*. Distinguishing between the narrow subpoena in *Nixon* and the plaintiffs' broad discovery requests, the Court opined that "our precedent provides no support for the proposition that the Executive Branch 'shall bear the burden' of invoking executive privilege with sufficient specificity and of making particularized objections."⁹⁴ Instead, such specificity would only be required after the party seeking disclosure has "satisfied his burden of showing the propriety of his requests."⁹⁵ In *Nixon*, the special prosecutor met this burden.⁹⁶ Here, the plaintiffs "discovery requests [were] anything but appropriate."⁹⁷

Together, the *Nixon* cases and the recent holding in *Cheney* outline the parameters and scope of the constitutionally based chief executive communications privilege.⁹⁸ Unlike the deliberative process privilege, the chief executive communications privilege is rarely invoked⁹⁹ and only applies to the decisionmaking of chief executive officers at the federal level. Once invoked, the documents in question become presumptively privileged—a direct correlation to the "President's unique constitutional role."¹⁰⁰ After *Cheney*, this presumption seemingly would attach regardless of the specificity of the President's assertion of the privilege.

II. APPLICATION OF THE FEDERAL DOCTRINE OF EXECUTIVE PRIVILEGE TO STATE EXECUTIVE OFFICIALS

A. States Recognizing Executive Privilege

Shortly after the Supreme Court's decision in *Nixon*, the doctrine of executive privilege was recognized at the state level. The New Jersey

⁹³ *Id.* at 384.

⁹⁴ *Id.* at 388 (quoting *In re Cheney*, 334 F.3d 1096, 1105 (C.A.D.C. 2003), *vacated and remanded*, *Cheney*, 542 U.S. 367, *motion granted on remand*, *In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005)).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997).

⁹⁹ See *id.* at 737.

¹⁰⁰ *Id.* at 744–45.

Supreme Court addressed gubernatorial claims of executive privilege in *Nero v. Hyland*.¹⁰¹ *Nero* involved a public records request for a background investigatory report compiled for the governor about a potential nominee for the state Lottery Commission.¹⁰²

Based upon a rudimentary version of executive privilege, the New Jersey Supreme Court held that the governor did not have to disclose the background report.¹⁰³ Drawing an analogy to the chief executive communications privilege recognized in *Nixon*, the court adopted a qualified privilege designed to “protect the confidentiality of communications pertaining to the executive function.”¹⁰⁴ The court then applied a simple balancing test weighing the interest in disclosure against the public’s interest in confidentiality.¹⁰⁵ With little analysis, the court concluded that the “public interest in maintaining confidentiality outweigh[ed] plaintiff’s interest in disclosure and that no common law right to total access or *in camera* inspection exist[ed].”¹⁰⁶

Two years later, the Court of Appeals of Maryland provided an in-depth analysis of the applicability of executive privilege at the state level. *Hamilton v. Verdow*¹⁰⁷ involved a wrongful death lawsuit filed by the legal representative of a boy murdered by a patient recently released from a state mental hospital.¹⁰⁸ Following the boy’s death, members of the Maryland Governor’s staff prepared an investigative report regarding the handling and release of the patient.¹⁰⁹ During the discovery phase, the plaintiffs requested copies of the investigative report.¹¹⁰ The Maryland Attorney General withheld the documents based upon executive privilege.¹¹¹ Unable to resolve this issue, the federal district court presented the issue as a certified question to the Maryland Court of Appeals.¹¹² The question to

¹⁰¹ 386 A.2d 846 (N.J. 1978).

¹⁰² *Id.* at 848.

¹⁰³ *Id.* at 853.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* Ironically, the court cites to a line of cases analyzing the deliberative process privilege in discussing the public’s interest in confidentiality and nondisclosure. *See id.*

¹⁰⁶ *Id.*

¹⁰⁷ 414 A.2d 914 (Md. 1980).

¹⁰⁸ *Id.* at 916–17.

¹⁰⁹ *Id.* at 917; *see also* Jason M. Whiteman, *Recent Decisions: The Court of Appeals of Maryland*, 61 MD. L. REV. 798, 968 (2002).

¹¹⁰ *Hamilton*, 414 A.2d at 917.

¹¹¹ *Id.*

¹¹² *Id.* at 917–18.

be answered was whether the investigative report was “barred from discovery and *in camera* inspection by the doctrine of executive privilege.”¹¹³

Drawing an analogy between the governor and the President, the Maryland court explained that “the Governor is entitled to the same privileges and exemptions in the discharge of his duties as is the President.”¹¹⁴ Recognizing both the constitutional and common law bases of executive privilege,¹¹⁵ the court used the separation-of-powers rationale underlying the chief executive communications privilege to justify recognition of the doctrine in Maryland.¹¹⁶ Accordingly, the Maryland court cited the *Nixon* line of cases as support for the proposition that when a “formal claim of . . . privilege is made for confidential communications of the chief executive,” a presumptive privilege attaches.¹¹⁷ The court acknowledged that the privilege is qualified and can be overcome by a sufficient showing of need.¹¹⁸

To confuse matters, the court also employed language consistent with the deliberative process privilege. At the beginning of its analysis, the court noted that executive privilege “gives a measure of protection to the deliberative and mental processes of decision-makers.”¹¹⁹ In outlining the contours of the privilege, the court stated that factual material ordinarily is not privileged unless it is so intertwined with privileged materials that it

¹¹³ *Id.* at 920.

¹¹⁴ *Id.* at 921.

¹¹⁵ *Id.* at 924 (“The executive privilege concept has been considered part of the common law of evidence. . . . In addition, it is clear that the doctrine of executive privilege also has a basis in the constitutional separation of powers principle.”).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 925. Such a formal claim of privilege requires affidavits stating that the materials fall within the parameters of the privilege. *Id.* at 926. Interestingly, the affidavit requirement is also a common feature of the deliberative process privilege. *See Weaver & Jones, supra* note 9, at 306.

¹¹⁸ *Hamilton*, 414 A.2d at 927. Upon a sufficient showing of need, the court should hold an *in camera* review of the materials. *Id.* Such a review “may be used to determine whether the material is privileged, to sever privileged from non-privileged material if severability is feasible, and to weigh the government’s need for confidentiality against the litigant’s need for production.” *Id.*

¹¹⁹ *Id.* at 924.

cannot be severed.¹²⁰ Coincidentally, only the deliberative process privilege is consistent with this position because the chief executive communications privilege covers documents in their entirety—even purely factual information.¹²¹

In its decision, the Maryland court ordered the governor's report to be disclosed for *in camera* review.¹²² Deemed consistent with the state's recognition of a conflated version of executive privilege, the purpose of the *in camera* inspection was to resolve issues of waiver and how the privilege would apply to factual material in the investigative report.¹²³

The next state to tackle the executive privilege dilemma was Alaska. *Doe v. Alaska Superior Court*¹²⁴ involved a public records request by a doctor whose appointment to the State Medical Board had been rescinded primarily because of strong public opposition.¹²⁵ The doctor sought disclosure of the governor's appointment file, which contained private letters from concerned citizens and internal memoranda to the governor.¹²⁶ In response, the governor asserted that executive privilege barred disclosure of both the private letters and internal memoranda.¹²⁷

At first glance, the Alaska Supreme Court appears to have adopted the chief executive communications privilege recognized in *Nixon*. Using the separation-of-powers rationale in *Nixon*, the court explained: "While we have not had occasion to address the executive privilege doctrine in the context of Alaska's Constitution, the doctrine has been widely recognized by both federal and state courts based on their respective constitutions."¹²⁸ The *Doe* Court, citing *Nixon*, found that executive privilege presumptively attached upon a formal and particularized claim.¹²⁹

¹²⁰ *Id.* at 925–26. In a subsequent decision, the Maryland court emphasized that executive privilege did not extend to factual material. See *Whiteman*, *supra* note 109, at 961 (explaining *Office of the Governor v. Wash. Post Co.*, 759 A.2d 249 (Md. 2000)).

¹²¹ See *supra* notes 45–46.

¹²² *Hamilton*, 414 A.2d at 927.

¹²³ *Id.* at 927–28.

¹²⁴ 721 P.2d 617 (Alaska 1986).

¹²⁵ *Id.* at 619.

¹²⁶ *Id.*

¹²⁷ *Id.* at 622. The case was eventually remanded to the trial court to provide the state with the opportunity to describe how and why the internal memoranda fall within the scope of executive privilege. *Id.* at 626.

¹²⁸ *Id.* at 623. Still, the court reasoned that the qualified privilege is designed to "protect the deliberative and mental processes of decision-makers." *Id.*

¹²⁹ *Id.* at 626.

A detailed analysis of the court's decision in *Doe*, however, reveals the implementation of a series of strict procedural requirements analogous to those required by the deliberative process privilege. First, the burden of proof lies with the government to "specifically identify and describe the documents sought to be protected and explain why they fall within the scope of the executive privilege."¹³⁰ To meet this burden, the government must introduce affidavits based on a "personal examination of the documents by the affiant official."¹³¹ Once these procedural requirements are satisfied, the court must engage in the balancing test elucidated in *Nixon*.¹³² Finally, upon a sufficient showing of need, the trial court must engage in an *in camera* review of the documents to determine whether disclosure is appropriate.¹³³

Nearly a decade later, the Alaska Supreme Court clarified its holding regarding executive privilege in *Capital Information Group v. State*.¹³⁴ Initially, the court acknowledged its prior acceptance of the constitutionally based executive privilege articulated in *Nixon*.¹³⁵ Then, it stated: "[T]he term 'executive privilege' in *Doe* encompasses what other commentators have called the deliberative process privilege."¹³⁶ In doing so, the court adopted the substantive requirements underlying the deliberative process privilege—namely, that the materials be both deliberative and predecisional.¹³⁷ Accordingly, purely factual material falls outside the scope of the privilege unless disclosure "would reveal the deliberative process, or if the facts are 'inextricably intertwined' with the policymaking process."¹³⁸

At this point, the strict procedural requirements imposed by *Doe* apply.¹³⁹ If a formal and particularized privilege claim is asserted, "there is

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 923 P.2d 29, 33 (Alaska 1996). This case involved a public records request by a news service provider seeking budget impact memoranda and legislative budget proposals sent to the governor. *Id.* at 32. The Governor's Office asserted that the deliberative process privilege covered all documents relating to the state budget. *Id.*

¹³⁵ *See id.* at 33.

¹³⁶ *Id.* at 34.

¹³⁷ *Id.* at 35–36.

¹³⁸ *Id.* at 36 (quoting *Paisley v. C.I.A.*, 712 F.2d 686, 699 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984)).

¹³⁹ *Id.* at 37.

a presumption in favor of nondisclosure and the party seeking access to the document must overcome that presumption.”¹⁴⁰ In essence, the Alaska Supreme Court adopted a skeleton of the deliberative process privilege outlined in Part I of this Article.¹⁴¹

In *Killington, Ltd. v. Lash*,¹⁴² the Vermont Supreme Court addressed the issue of executive privilege in the context of the state’s public records law. The plaintiff filed three requests for information from the Agency of Natural Resources, seeking all materials related to any state regulatory proceeding to which it was a party.¹⁴³ The agency withheld “communications directly to or from the Governor’s office” on the basis of executive privilege.¹⁴⁴ Thereafter, the plaintiff instituted a public records lawsuit asking the court to mandate disclosure of the requested materials.¹⁴⁵

In a case of first impression in Vermont, the court began with a brief explanation of the confusion surrounding the doctrine of executive privilege.¹⁴⁶ The court recognized that the “phrase ‘executive privilege’ has not been used with precision or uniformity by the courts.”¹⁴⁷ The main source of contention centered on the separation-of-powers principle—and whether it barred the other branches of government from resolving disputes over executive privilege claims.¹⁴⁸ Based upon “strong precedent and necessity,” the court affirmatively declared itself the final “arbiter among the branches of government on the issue of executive privilege.”¹⁴⁹ Deemphasizing the separation-of-powers rationale, the court “stressed the role of the privilege as part of the common law of evidence.”¹⁵⁰

Addressing the scope of executive privilege, the court noted that “in the absence of a demonstration that the information sought is necessary as evidence in a criminal or civil trial, a prima facie claim of executive privilege enjoys a rebuttable presumption over an asserted interest in

¹⁴⁰ *Id.*

¹⁴¹ *See supra* Part I.

¹⁴² 572 A.2d 1368 (Vt. 1990).

¹⁴³ *Id.* at 1370.

¹⁴⁴ *Id.* at 1371.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1371–72 nn.3–4.

¹⁴⁷ *Id.* at 1371 n.3.

¹⁴⁸ *Id.* at 1372.

¹⁴⁹ *Id.* at 1373.

¹⁵⁰ *Id.* In fact, the court emphasized that Vermont’s adoption of a qualified privilege has both “constitutional and common-law roots.” *Id.* at 1374.

disclosure.”¹⁵¹ The Vermont case flirted with an unprecedented form of executive privilege that would be close to absolute. Still, if the party seeking disclosure can satisfy a heightened showing of need, the court will proceed to *in camera* review to complete the balancing test borrowed from the Maryland Court of Appeals ruling in *Hamilton*.¹⁵²

Five years later, the Vermont Supreme Court revisited the common law form of executive privilege to resolve lingering questions about the scope and operation of the privilege. In *New England Coalition for Energy Efficiency & the Environment v. Office of the Governor*,¹⁵³ the governor received a records request seeking disclosure of materials related to contracts between several state utility companies.¹⁵⁴ Refusing to accede to this request, the governor withheld a series of memoranda under a claim of executive privilege.¹⁵⁵

The Vermont Supreme Court’s insightful analysis clarified its prior decision in *Killington*. The court expressly recognized that its *Killington* decision adopted a form of executive privilege rooted in the common law.¹⁵⁶ Yet, the court expressly refused to adopt the substantive requirements mandated by the federal deliberative process privilege.¹⁵⁷ In particular, the court noted:

The decision-making process of the chief executive is not prescribed by statute, nor does it consist of regularized procedures. . . . Moreover, because the chief executive has a range of consultative and decisional responsibilities not easily separated into discrete decisions, predecision and postdecision line-drawing would be an arbitrary exercise.¹⁵⁸

Despite its rejection of the deliberative process privilege’s *substantive* requirements, the Vermont court did not completely ignore that privilege’s other prerequisites. Instead, the court outlined the parameters of the

¹⁵¹ *Id.* at 1376. Earlier in its opinion, the court also created a presumption for disclosure when the litigation concerns possible governmental malfeasance. *Id.* at 1374.

¹⁵² *See id.* at 1375.

¹⁵³ 670 A.2d 815 (Vt. 1995).

¹⁵⁴ *Id.* at 816.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 817. This would seem to parallel the common-law, deliberative process privilege recognized by the federal courts.

¹⁵⁷ *See id.* at 818.

¹⁵⁸ *Id.*

privilege in terms of the deliberative process privilege's highly technical *procedural* requirements. The Court held that a prima facie case of executive privilege is established by supporting affidavits "based on 'actual personal consideration' by the responsible official."¹⁵⁹ Additionally, the "executive must specifically identify the documents for which the privilege is claimed, and must explain why the documents are protected by the privilege."¹⁶⁰ It is only at this point that the presumption attaches and the burden shifts to the party seeking disclosure to establish a sufficient showing of need.¹⁶¹

In 1995, the State of Delaware addressed the executive privilege issue in *Guy v. Judicial Nominating Committee*.¹⁶² *Guy* involved a commission organized to assist the governor in making judicial nominations.¹⁶³ The plaintiff requested records compiled by the commission regarding potential judicial nominees.¹⁶⁴ The governor denied that request,¹⁶⁵ asserting executive privilege based on his expectation that communications about judicial nominees would not be disclosed to the public.¹⁶⁶

Opening its opinion with a thorough discussion of the historical basis of executive privilege, the Delaware Superior Court noted that it was based on both the constitutional doctrine of separation of powers and the common law rules of evidence.¹⁶⁷ Citing the Maryland Court of Appeals' holding in *Hamilton*, the court drew an analogy between the governor and the President.¹⁶⁸ It contended that the governor "is entitled to the same executive privileges and exemptions in the discharge of his duties as is the President."¹⁶⁹

This statement, however, may be misleading. Immediately following this analogy, the court noted that state courts have recognized executive

¹⁵⁹ *Id.* at 820 (quoting *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953)).

¹⁶⁰ *Id.* The specificity element is designed to "ensure that the public's right to inspect public documents is protected while also safeguarding the Governor's ability to engage in private deliberations over matters of public policy." *Herald Ass'n v. Dean*, 816 A.2d 469, 476 (Vt. 2002).

¹⁶¹ *New England Coal.*, 670 A.2d at 817.

¹⁶² 659 A.2d 777 (Del. 1995).

¹⁶³ *Id.* at 779.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *See id.* at 779–80.

¹⁶⁷ *Id.* at 782.

¹⁶⁸ *Id.* at 783.

¹⁶⁹ *Id.*

privilege to protect the mental and deliberative processes of the governor.¹⁷⁰ In a span of two sentences, the court appeared to adopt a blend of both the chief executive communications and deliberative process privileges. Further conflating matters, the Delaware court found that both the “constitutional and common law roots of the privilege strongly require its recognition.”¹⁷¹ These inconsistencies make it difficult to ascertain the scope and contours of the executive privilege in the state of Delaware.

Five other states have recognized executive privilege. The first three—California,¹⁷² Virginia,¹⁷³ and Kentucky,¹⁷⁴—did so in the context of public records requests for copies of the governor’s appointment schedules, calendars, notebooks, and/or telephone billing logs. The Virginia Supreme Court relied on the United States Supreme Court’s holding in the *Nixon* cases in reaching its decision.¹⁷⁵ The court held that mandatory disclosure of the governor’s telephone logs would violate the separation-of-powers doctrine and have a chilling effect on the governor’s use of the telephone to carry out his executive duties.¹⁷⁶

Using a different rationale, the state courts of California and Kentucky reached the same conclusion regarding a governor’s appointment books and calendars. The California Supreme Court used the terms “executive privilege” and “deliberative process privilege” interchangeably.¹⁷⁷ The court disregarded the constitutional bases of the privilege, remarking that “the term ‘executive’ privilege as used here and by the federal courts interpreting the FOIA [Freedom of Information Act] does not refer to whatever constitutional content the doctrine might have but rather to the traditional common law privilege that attached to confidential intraagency advisory opinions.”¹⁷⁸

The court then engaged in an analysis of other state court decisions addressing executive privilege. It summarized these rulings as providing a means of protecting the “mental or deliberative processes” of the governor.¹⁷⁹ Continuing on, the court recognized the predecisional-

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 785.

¹⁷² *Times Mirror Co. v. Super. Ct.*, 813 P.2d 240 (Cal. 1991).

¹⁷³ *Taylor v. Worrell Enter., Inc.*, 409 S.E.2d 136 (Va. 1991).

¹⁷⁴ *Courier-Journal v. Jones*, 895 S.W.2d 6 (Ky. Ct. App. 1995).

¹⁷⁵ *Taylor*, 409 S.E.2d at 138–39 & n.3.

¹⁷⁶ *Id.* at 138–39.

¹⁷⁷ *Times Mirror Co.*, 813 P.2d at 248 n.10.

¹⁷⁸ *Id.* at 249 n.10 (citation omitted).

¹⁷⁹ *Id.*

postdecisional dichotomy inherent in the deliberative process analysis¹⁸⁰ but refused to draw a bright-line rule regarding how the privilege applied to factual materials.¹⁸¹ The Kentucky Court of Appeals quoted large portions of the California Supreme Court's decision in *Times Mirror Co.* and followed that holding.¹⁸²

The fourth state to recognize executive privilege was New Mexico. *New Mexico v. First Judicial District Court of New Mexico*¹⁸³ involved requests for investigatory reports about a riot at a state penitentiary.¹⁸⁴ The Attorney General had compiled the reports for use in litigation relating to the riots.¹⁸⁵ The Attorney General claimed he was exempt from disclosure based upon executive privilege.¹⁸⁶ Relying on *Nixon* and the separation-of-powers doctrine, the New Mexico Supreme Court defined executive privilege as the "recognition by one branch of government, the judiciary, that another co-equal branch of government, the executive, has the right not to be unduly subjected to scrutiny in a judicial proceeding where information in its possession is being sought by a litigant."¹⁸⁷ As a member of the executive department, the Attorney General was deemed to have the right to assert such a privilege.¹⁸⁸

The New Mexico court imposed the familiar balancing test and burden-shifting analysis used at both the federal and state levels.¹⁸⁹ Interestingly, the court concluded its discussion by stating that the privilege does not attach to communications "between the executive department and members of the public or others not employed in the executive department."¹⁹⁰

The most recent state to recognize executive privilege is Ohio. In the spring of 2005, the Ohio media shed light on mismanaged investments made by the Ohio Bureau of Worker's Compensation (BWC) that resulted

¹⁸⁰ *Id.* at 249–50.

¹⁸¹ *Id.* at 250.

¹⁸² See *Courier-Journal v. Jones*, 895 S.W.2d 6, 8–9 (Ky. Ct. App. 1995).

¹⁸³ 629 P.2d 330 (N.M. 1981).

¹⁸⁴ *Id.* at 331.

¹⁸⁵ *Id.* at 332.

¹⁸⁶ *Id.* at 333.

¹⁸⁷ *Id.* at 334.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

in state losses of over \$200 million.¹⁹¹ Seeking to obtain information regarding Governor Bob Taft's knowledge of these investments, State Senator Mark Dann submitted public records requests to the governor.¹⁹² Senator Dann requested weekly memoranda and reports from BWC officials to the Office of the Governor.¹⁹³ Although Governor Taft produced a number of these documents, he withheld a significant number on the grounds of executive privilege.¹⁹⁴ As a result, Senator Dann instituted a mandamus action in the Ohio Supreme Court to compel production of the requested documents.¹⁹⁵

Before ruling on the parties' discovery motions, the Ohio Supreme Court asked the parties to brief the issue of whether the "Governor of Ohio may claim an executive privilege to prevent disclosure of documents provided to the Governor by staff members or other executive-branch officials."¹⁹⁶ In *State ex rel. Dann v. Taft*, the Court expressly adopted a qualified form of executive privilege remarkably similar to the privilege adopted by the United States Supreme Court in *Nixon*.¹⁹⁷

Opening its opinion with an historical examination of executive privilege, the Ohio Supreme Court recognized its development at both the

¹⁹¹ *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 476 (Ohio 2006); T.C. Brown, *Ohio Democrats Cry Foul; Taft Surprised by Investment Losses*, CLEVELAND PLAIN DEALER, June 10, 2005, at B7.

¹⁹² *Taft*, 848 N.E.2d at 476.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 477.

¹⁹⁷ *Id.* at 482–85. The Court's syllabi defined the contours of the privilege as follows:

1. A governor of Ohio has a qualified gubernatorial-communications privilege that protects communications to or from the governor when the communications were made for the purpose of fostering informed and sound gubernatorial deliberations, policymaking, and decisionmaking.
2. The qualified gubernatorial-communications privilege is overcome when a requester demonstrates that the requester has a particularized need to review the communications and that that need outweighs the public's interest in according confidentiality to communications made to or from the governor.

Id. at 474.

federal and state level.¹⁹⁸ At the federal level, the court noted the evolution of two separate and independent forms of executive privilege: the deliberative process privilege and the chief executive communications privilege.¹⁹⁹ The court, however, touched only briefly on the deliberative process privilege because the Governor disclaimed any reliance on it.²⁰⁰ Instead, the court focused on the chief executive communications privilege.²⁰¹

In conjunction with its discussion of the chief executive communications privilege, the Ohio court placed heavy reliance on the United States Supreme Court's decision in *Nixon*. Quoting the *Nixon* opinion at great length, the court used the same rationale in applying the presidential communications privilege to the "chief executive official of a state."²⁰²

As further support for its holding, the court noted that a number of other states had applied some form of executive privilege to the chief executive officers of their states.²⁰³ The court's cursory examination of these holdings overlooked or ignored the true meaning of these decisions and the scope of the executive privilege adopted by these states.

The court recognized the "[c]onfidentiality of certain internal communications in the legislative and judicial branches of Ohio government."²⁰⁴ The court seemed to reason that, because both judicial and legislative communications are privileged, then it would only be just to grant the executive branch an analogous privilege.

Finally, the court grounded its holding in the doctrine of separation of powers. This doctrine mandates that each branch of government be allowed to carry out its constitutional responsibilities without interference from the other branches.²⁰⁵ The privilege is designed to protect the governor's independence.

¹⁹⁸ *Id.* at 479–82.

¹⁹⁹ *Id.* at 479–81.

²⁰⁰ *Id.* at 480.

²⁰¹ *See id.*

²⁰² *Id.* at 481.

²⁰³ *Id.* at 481–82. Ironically, the language used by the Court stated that "the presidential communications privilege is specific to the President," thereby seemingly rendering it inappropriate to state executive officials. *Id.* at 481 (quoting *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004)).

²⁰⁴ *Id.* at 482–83.

²⁰⁵ *Id.* at 484.

Ohio's version of executive privilege parallels the qualified privilege recognized in *Nixon*. The court established a tripartite analysis for determining when the privilege attaches. First, the governor must formally assert the privilege.²⁰⁶ To do so, the governor must state that "he or she has reviewed the requested materials" and concluded that they fall within the scope of the privilege.²⁰⁷ Once a formal assertion of the privilege has been made, the requested materials are presumed to be privileged.²⁰⁸ This presumption, in favor of nondisclosure, shifts the burden to the party seeking disclosure to "demonstrate a particularized need for disclosure of the material deemed confidential by the governor"—the second prong in the analysis.²⁰⁹ The language used by the court indicates that this high evidentiary standard can only be satisfied by if the requested materials are: (1) needed for an ongoing civil or criminal prosecution, or (2) have been requested by a "representative of the general public" who needs it to "serve the public interest."²¹⁰

Third, and only after the first two prongs have been satisfied, the court will hold an *in camera* hearing to review the requested documents and actually determine whether the privilege applies.²¹¹ If the hearing establishes that the "communications to the governor were, in fact, made for the purpose of fostering informed and sound deliberations, policymaking, and decisionmaking," the court will "balance the requester's need for disclosure against the public's interest in ensuring informed and unhindered gubernatorial decisionmaking."²¹² Materials will be disclosed only when the balancing test weighs in favor of the public interest.²¹³

In a powerful dissenting opinion, Justice Paul Pfeifer rebuked the governor's attempt to assert the presidential communications privilege in

²⁰⁶ *Id.* at 485.

²⁰⁷ *Id.* at 485–86.

²⁰⁸ *Id.* at 485.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 486.

²¹¹ *Id.* at 485. In Justice Alice Robie Resnick's dissenting opinion, she noted that the "majority makes it possible for the governor to withhold the documents on the basis of a privilege that is not applicable in the first place." *Id.* at 489 (Resnick, J., dissenting). Instead, the party seeking the requested materials must jump through a series of procedural hoops (including making a particularized showing of need) before the court will even analyze the applicability of the privilege. *Id.*

²¹² *Id.* at 485 (majority opinion).

²¹³ *Id.*

the “midst of a crisis of politics.”²¹⁴ Questioning the majority’s decision to ignore the deliberative process privilege, Justice Pfeiffer asked why that form of executive privilege was not enough.²¹⁵ The dissent then took issue with the majority’s decision to adopt such an exceptional privilege applicable only to the President.²¹⁶ Notably, the dissent explains that the “duties present in Article II for the President that most require secrecy—national security and diplomacy—simply are not part of the governor of Ohio’s responsibilities.”²¹⁷ The executive communications privilege is unique to the President alone.²¹⁸

Finally, the dissent argues that the privilege recognized by the majority goes against the state’s longstanding support of the principle of open government.²¹⁹ The rationale underlying any public records law is to provide the public with the free flow of information, thereby allowing citizens to learn about the government.²²⁰ Instead of furthering this goal, the “majority has made it easy for the governor to thwart that intent,” an act made even worse by the fact that the allegedly privileged materials would shed light on a “serious state government scandal.”²²¹ The dissent concluded by stating that “[f]or the first time in our history, Ohio governors will be free to operate in the dark.”²²²

B. Standing Alone: Massachusetts’s Refusal to Recognize Executive Privilege

The lone state to deny the recognition of executive privilege at the state level is Massachusetts. In *Babets v. Secretary of the Executive Office of Human Services*,²²³ several individuals challenged the constitutionality of regulations promulgated by the Department of Social Services (DSS).²²⁴ During the discovery phase, the plaintiffs requested certain documents related to the process by which the regulations were enacted.²²⁵ Although

²¹⁴ *Id.* at 489 (Pfeifer, J., dissenting).

²¹⁵ *Id.* at 490.

²¹⁶ *Id.*

²¹⁷ *Id.* at 491.

²¹⁸ *Id.*

²¹⁹ *Id.* at 491–94.

²²⁰ *See id.* at 491.

²²¹ *Id.* at 495.

²²² *Id.* at 496.

²²³ 526 N.E.2d 1261 (Mass. 1988).

²²⁴ *Id.* at 1262.

²²⁵ *Id.*

many of the requested records were released, DSS withheld certain internal memoranda and proposed drafts of the regulations under a claim of executive privilege.²²⁶

The Massachusetts court rejected a constitutionally based version of executive privilege.²²⁷ Its analysis began with the defendant's argument that Massachusetts should recognize a privilege modeled on the federal version and rooted in the constitutional doctrine of separation of powers.²²⁸ Immediately, the court challenged the premise of that argument by stating that "the doctrine of separation of powers does not require recognition of the asserted privilege."²²⁹ The court was not convinced that the absence of any executive privilege would cause the executive branch to function any less effectively.²³⁰ The founders of the Commonwealth chose not to include an executive privilege in the state constitution.²³¹ If the founders had intended for there to be an executive privilege in Massachusetts, "it is reasonable to expect that they would expressly have created one."²³² Finally, the court noted that even the federal doctrine of executive privilege is not absolute and that "there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive branch."²³³

The court then analyzed the claim of executive privilege based on the common law. Foreshadowing its ultimate decision, the court warned of its strong reluctance to create common law privileges that "exclude relevant evidence."²³⁴ Instead, the court announced its preferred practice of deferring to the legislature, which offers "an appropriate forum for the balancing of the competing social values necessary to sound decisions concerning privilege."²³⁵ Concluding with a renunciation of the defendant's unsupported and speculative public policy arguments,²³⁶ the

²²⁶ *Id.* at 1262–63.

²²⁷ *Id.* at 1263.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 1264 (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 445 (1977)).

²³⁴ *Id.*

²³⁵ *Id.* at 1264–65 (quoting CHARLES TILFORD, MCCORMICK, EVIDENCE § 75, at 180 (3d ed. 1984)).

²³⁶ *Id.* at 1266. The proffered policy justifications for executive privilege included that it would "advance[] the public interest in well considered executive policymaking, by
(continued)

court declined to recognize an executive privilege grounded in the common law.²³⁷

C. Summary

State courts have exhibited near uniformity in extending at least some form of executive privilege to communications involving executive branch officials. Regardless of constitutional or common law origins, no state has been willing to take an unprecedented leap and declare the doctrine of executive privilege to be absolute. Although most of the states have refused to implement the substantive requirements of the deliberative process privilege, they generally have implemented the highly specific and technical procedural requirements.²³⁸ In particular, state courts overwhelmingly have expressed the necessity of asserting executive privilege with specificity. Affidavits often provide such specificity by explaining how and why the materials in question fall within the scope of executive privilege. After the requisite showing of specificity, the presumptive privilege attaches.²³⁹

Once the privilege has been properly asserted, most states adopted and applied a balancing test borrowed from the federal courts. This test pits the need for disclosure against the government's interest in confidentiality.²⁴⁰ Upon a sufficient showing of need, the majority of the states require the court to conduct an *in camera* review. The purpose of *in camera* review is "to determine whether the material is privileged, to sever privileged from non-privileged material if severability is feasible, and to weigh the government's need for confidentiality against the litigant's need for production."²⁴¹ If the party seeking disclosure is unable to demonstrate "need," the privilege serves as a bar to disclosure.

III. DEMYSTIFYING EXECUTIVE PRIVILEGE: THE CREATION OF A SIMPLE, DEFINITE, AND PRACTICAL TEST FOR STATE COURTS

Development of the federal doctrine of executive privilege has produced enigmatic jurisprudential principles often misunderstood—and misapplied—by state court judges. The overwhelming majority of state

promoting candid and unconstrained communication and exchange of ideas between and among executive policymakers and their advisors." *Id.*

²³⁷ *Id.*

²³⁸ See *supra* Part II.A.

²³⁹ See *supra* Part II.A.

²⁴⁰ See *supra* Part II.A.

²⁴¹ *Hamilton v. Verdow*, 414 A.2d 914, 927 (Md. 1980).

courts have not debated the existence or necessity of recognizing executive privilege. In fact, with the exception of Massachusetts, every state facing the issue has recognized at least some form of executive privilege applicable to its executive officials. The difficult tasks have been to determine which form of executive privilege to apply and how to define the scope and parameters of the privilege.

The state court holdings addressing executive privilege have identified two primary evolutionary lines: the chief executive communications privilege and the deliberative process privilege.²⁴² Yet, the state courts have spoken of both forms of executive privilege together, thereby blurring distinctions between them. The deliberative process privilege is a “common sense-common law privilege” that is “shorn of any constitutional overtones of separation of powers.”²⁴³ On the other hand, the chief executive communications privilege is “rooted in [the] constitutional separation of powers principle[] and the President’s unique constitutional role.”²⁴⁴

The fundamental distinction between the two forms of executive privilege, however, appears to be inconsequential at the state level. First, regardless of which form of the privilege applies, the same fundamental purpose is achieved, i.e. insulating executive officials from the disclosure of confidential communications.

Second, although the chief executive communications privilege is decisively broader in scope, it may not be as relevant to state executive officials. Several state courts expanded the chief executive communications privilege by drawing an analogy between the President and the governor.²⁴⁵ In doing so, however, they ignore (or fail to account for) the fact that governors lack the special prominence, singularly unique constitutional status, and responsibilities of the President.

As the United States Supreme Court explained, “[t]he President’s unique status under the Constitution distinguishes him from other executive officials.”²⁴⁶ The Court added:

²⁴² See Weaver & Jones, *supra* note 9, at 279 (distinguishing between the deliberative process privilege and the “presidential version,” which has only been invoked by the President on a limited basis); see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 n.17 (1975) (noting the constitutional basis of the presidential communications privilege established in *Nixon*).

²⁴³ Vaughn v. Rosen, 523 F.2d 1136, 1146 (D.C. Cir. 1975).

²⁴⁴ *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997).

²⁴⁵ See, e.g., Doe v. Alaska Super. Ct., 721 P.2d 617, 623 (Alaska 1986).

²⁴⁶ Nixon v. Fitzgerald, 457 U.S. 731, 750 (1982).

A President's communications and activities encompass a vastly wider range of sensitive material than would be true of any "ordinary individual." . . . The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment.²⁴⁷

Because of these differences, the presumption in favor of nondisclosure should not be as strong at the state level.

Even those states applying the chief executive communications privilege at the state level have done so only in name. Substantively, the state courts have applied only half-heartedly some form of the deliberative process privilege. The end result is a piecemeal application of the federal law doctrine of executive privilege at the state level.

This Article proposes a simple, definite, and more practical standard that would bring uniformity to executive privilege jurisprudence. This new standard would function as a "watered-down" version of the deliberative process privilege, combined with some elements of the chief executive communications privilege. Perhaps more importantly, it would eliminate the often standardless, ad hoc review currently required by deliberative process precedents.

A. Overview

A qualified privilege protects the confidentiality of communications essential to the duties, responsibilities, and processes of the executive branch of state government. The presumptive privilege arises when the governmental official or agency specifically identifies documents or communications alleged to fall within the contours of executive privilege.²⁴⁸ The party seeking disclosure then acquires the burden of demonstrating a sufficient need, such as showing that the interests in disclosure outweigh the government's interest in confidentiality.

²⁴⁷ Nixon v. United States, 418 U.S. 683, 715 (1974).

²⁴⁸ If a court chose to adhere to a more stringent standard, it could adhere to a principle noted by the Delaware Superior Court, namely that the presumptive privilege does not arise if a state freedom-of-information law places the burden of establishing an exemption upon the government. *Guy v. Jud. Nominating Comm'n*, 659 A.2d 777, 785 (Del. 1995) ("This burden does not shift when [the] records are being sought pursuant to a state freedom of information statute which places the burden of establishing any exemption to disclosure on the public agency.").

B. A New Standard of Review

As noted in Part I.A, the deliberative process privilege is designed to protect executive branch decisionmaking. It keeps secret those communications “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”²⁴⁹ But, such communications are deemed privileged only upon satisfaction of specific substantive and procedural requirements imposed by the courts.

Judicially created, substantive requirements of the deliberative process privilege mandate that the communication in question be both predecisional and deliberative.²⁵⁰ The predecisional requirement, in particular, has caused much of the confusion and jurisprudential disarray surrounding the deliberative process privilege. The standard proposed herein would adopt a stricter version of the deliberative process privilege with some features borrowed from the chief executive communications privilege. The new standard would eliminate the predecisional requirement and place a renewed emphasis on the highly technical procedural requirements of the deliberative process privilege, and it would incorporate the balancing test used in analyzing both the chief executive communications and deliberative process privileges.

The substantive requirements of the deliberative process privilege label communications as predecisional when they are created before the adoption of an executive branch decision.²⁵¹ Yet, there is not always a clear line that can be drawn between predecisional and postdecisional communications. In fact, the Supreme Court noted that “even the prototype of the postdecisional document—the ‘final opinion’—serves the dual function of explaining the decision just made and providing guides for decisions of similar or analogous cases arising in the future.”²⁵² Furthermore, scholars have emphasized that a determination of whether a communication is predecisional must be made on a case-by-case basis, thereby virtually eliminating the possibility of uniformity in the area of executive privilege.

The precise procedural requirements imposed by the courts require the executive branch official asserting the privilege to designate specifically

²⁴⁹ *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss*, 40 F.R.D. 318, 324 (D.D.C. 1966).

²⁵⁰ *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

²⁵¹ *City of Colo. Springs v. White*, 967 P.2d 1042, 1051 (Colo. 1998).

²⁵² *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 n.19 (1974).

those documents or communications alleged to be privileged.²⁵³ These requirements are designed to eradicate “governmental obfuscation and mischaracterization” and ease the burden on the courts in evaluating the nature of the documents in question.²⁵⁴ Furthermore, they provide litigants with information necessary to challenge the privilege, as the government has the advantage of maintaining possession of the debated materials.²⁵⁵

Maintaining the strict procedural requirements of the deliberative process privilege would serve the dual purposes of: (1) ensuring that the privilege is not lightly invoked, and (2) reducing the burden on the court in determining whether the communications at issue are privileged.

To satisfy the specificity requirement, executive branch officials must submit affidavits that specifically support their assertions of privilege. As such, “courts will simply no longer accept conclusory and generalized assertions of exemptions.”²⁵⁶ The affidavit submitted to the court should “specifically identify the documents for which the privilege is claimed.”²⁵⁷ Included in this description should be the names of the author and recipient, as well as the subject matter of the communication. Additionally, the affidavit should “explain why the documents are protected by the privilege,”²⁵⁸ and why disclosure would be harmful.²⁵⁹

To reduce the burden on the courts, when large numbers of documents are in question, the executive branch official is required to submit a *Vaughn* Index. A *Vaughn* Index itemizes and describes the documents in question.²⁶⁰ It provides the same detailed summary as the affidavit, except on a larger scale.

Once these strict procedural requirements are satisfied, the presumption inherent in the chief executive communications privilege attaches to the documents in question. But, the inquiry is not complete. As a qualified privilege, the presumption against disclosure can be

²⁵³ Weaver & Jones, *supra* note 9, at 301.

²⁵⁴ See *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973).

²⁵⁵ Weaver & Jones, *supra* note 9, at 303.

²⁵⁶ *Vaughn*, 484 F.2d at 826.

²⁵⁷ *New England Coal. v. Office of the Governor*, 670 A.2d 815, 820 (Vt. 1995); see also *Doe v. Alaska Super. Ct.*, 721 P.2d 617, 626 (Alaska 1986).

²⁵⁸ *New England Coal.*, 670 A.2d at 820; *Doe*, 721 P.2d at 626.

²⁵⁹ See *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 43–44 (N.D. Tex. 1981). Yet, rather than reintroducing the substantive requirements of the deliberative process privilege, this element of the affidavit can be satisfied by a statement as simple as one that the communications are confidential and contain policy advice and opinions.

²⁶⁰ *Vaughn*, 484 F.2d at 827; see *supra* notes 33–38 and accompanying text.

overcome “upon a showing that the discoverant’s interests in disclosure of the materials is [*sic*] greater than the government’s interests in their confidentiality.”²⁶¹ In essence, the burden shifts to the party seeking disclosure to demonstrate a sufficient showing of need.

Under the new standard of review created in this Article, the fact-specific balancing test conducted by the court should be completed by *in camera* review. As a Maryland state court explained, the purpose of *in camera* review is “to determine whether the material is privileged, to sever privileged from non-privileged material if severability is feasible, and to weigh the government’s need for confidentiality against the litigant’s need for production.”²⁶² During *in camera* review, the court cannot be left to conduct an examination devoid of tangible standards of review. Specific factors must be established to guide the court in balancing the public’s interest in disclosure against the government’s interest in confidentiality.

The first relevant factor should be the information’s relevance to pending criminal or civil proceedings.²⁶³ As noted in *Nixon*, an assertion of executive privilege often “must yield to the demonstrated, specific need for evidence in a pending criminal trial.”²⁶⁴ Further supporting this idea is the notion that “[c]ourts are more inclined to order disclosure when the information sought is important to a pending civil or criminal proceeding.”²⁶⁵

The second factor is whether the communication is deliberative. A communication is deliberative if it reflects the “give-and-take of the consultative process,”²⁶⁶ thereby representing ““a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.””²⁶⁷ It is here that courts have drawn a distinction between fact and opinion—a test that offers a ““quick, clear, and predictable rule of decision.””²⁶⁸ Accordingly, purely factual information is not privileged unless it is “so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably

²⁶¹ *City of Colo. Springs v. White*, 967 P.2d 1042, 1054 (Colo. 1998).

²⁶² *Hamilton v. Verdow*, 414 A.2d 914, 927 (Md. 1980).

²⁶³ See *Weaver & Jones*, *supra* note 9, at 318.

²⁶⁴ *Nixon v. United States*, 418 U.S. 683, 713 (1974).

²⁶⁵ *Weaver & Jones*, *supra* note 9, at 318.

²⁶⁶ *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.D.C. 1980).

²⁶⁷ *Weaver & Jones*, *supra* note 9, at 296.

²⁶⁸ *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (quoting *Wolfe v. Dep’t of Health & Human Serv.*, 839 F.2d 768, 774 (D.C. Cir. 1988)).

reveal the government's deliberations."²⁶⁹ But the fact/opinion determination is "not infallible and must not be applied mechanically."²⁷⁰ Therefore, rather than serve as a substantive requirement of the deliberative process privilege—and prerequisite to this balancing test—the fact/opinion dichotomy should serve only as evidence of whether the privilege applies. This approach provides the court with the opportunity to redact privileged material from the communications at issue, thereby only allowing factual information to be disclosed.

A third factor is whether there is a reasonable belief that the information will shed light on possible governmental misconduct. Courts have "routinely denied" application of the privilege when communications may provide information about governmental misconduct "on the grounds that shielding internal government deliberations in this context does not serve 'the public's interest in honest, effective government.'"²⁷¹ As President Andrew Jackson eloquently stated, if "there is the slightest reason to suspect corruption or abuse of trust, no obstacle which I can remove shall be interposed to prevent the fullest scrutiny by all legal means. The offices of all the departments will be opened to you, and every proper facility furnished for this purpose."²⁷²

There could be additional factors relevant to the balancing test. They might include: the availability of the information from other sources, including whether similar information has already been obtained;²⁷³ and, "the 'possibility of future timidity by government employees.'"²⁷⁴

C. *Practical Application of the New Standard Using Dann v. Taft as a Template*

As noted above, *State ex rel Dann v. Taft* involved a public records request to the governor seeking weekly memoranda and reports from officials in the Bureau of Workers' Compensation to the Office of the

²⁶⁹ *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); see also *EPA v. Mink*, 410 U.S. 73, 87–91 (1973).

²⁷⁰ *Mapother*, 3 F.3d at 1537 (citing *Wolfe*, 839 F.2d at 774).

²⁷¹ *In re Sealed Case*, 121 F.3d at 738 (quoting *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995)).

²⁷² Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1405 (1974) (quoting 13 CONG. DEB., App. 202 (1837)).

²⁷³ See *In re Sealed Case*, 121 F.3d at 737–38; Weaver & Jones, *supra* note 9, at 319.

²⁷⁴ *In re Sealed Case*, 121 F.3d at 738 (quoting *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992)).

Governor.²⁷⁵ In response, Governor Taft withheld or redacted a number of relevant documents upon assertion of a generalized claim of executive privilege.²⁷⁶

The new standard established in this Article begins with an examination of whether the governmental official or agency specifically identifies documents or communications alleged to fall within the contours of the privilege. To satisfy the specificity requirement, Governor Taft had to submit affidavits that “specifically identify the documents for which the privilege is claimed.”²⁷⁷ The generalized claims of executive privilege made by Governor Taft would be insufficient to satisfy this requirement. More specifically, Governor Taft would have to include the names of the authors and recipients as well as the subject matter of the communications. Additionally, the affidavit must “explain why the documents are protected by the privilege”²⁷⁸ and why disclosure would be harmful. This explanation could be as simple as one that the communications are confidential and contain policy advice and opinions.

Perhaps more importantly, the public records request to Governor Taft was fairly broad and was anticipated to result in the disclosure of hundreds of documents.²⁷⁹ To reduce the burden on the court, it would be required that Governor Taft submit a *Vaughn* Index to reduce the burden on the court.

Once the procedural requirements are satisfied, a presumptive privilege attaches to the communications. Yet, as a qualified privilege, this presumption against disclosure can be overcome upon a sufficient showing of need. In essence, the court would engage in a fact-specific balancing test by *in camera* review that balances the need for disclosure against Governor Taft’s interest in confidentiality.

The first relevant factor is the information’s relevance to pending criminal or civil proceedings.²⁸⁰ When the public records request was made to Governor Taft, the state was in the midst of a serious financial crisis involving the mismanagement of state funds that resulted in millions of dollars of losses.²⁸¹ These financial improprieties resulted in criminal

²⁷⁵ 848 N.E.2d 472, 476 (Ohio 2006).

²⁷⁶ *Id.*

²⁷⁷ *New England Coal. v. Office of the Governor*, 670 A.2d 815, 820 (Vt. 1995); *see also Doe v. Alaska Super. Ct.*, 721 P.2d 617, 626 (Alaska 1986).

²⁷⁸ *New England Coalition*, 670 A.2d at 820.

²⁷⁹ *See Taft*, 848 N.E.2d at 476.

²⁸⁰ *See Weaver & Jones, supra* note 9, at 318.

²⁸¹ *See supra* note 191 and accompanying text.

charges against a local coin dealer involved in the investment scheme, as well as allegations of criminal and ethical misconduct by state government officials, including members of the Governor's Office.²⁸² The public records request sought to shed light on the governor's knowledge of these investments, which could advance the pending criminal and ethical investigations.

The second factor is whether the communications are deliberative. A communication is deliberative if it reflects the "give-and-take of the consultative process."²⁸³ Perhaps more importantly, purely factual information is not privileged unless it is "so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations."²⁸⁴ Even then, the deliberative portions of the communication could be redacted prior to disclosure.

A third factor is whether there is a reasonable belief that the information will shed light on possible government misconduct. This factor probably would be the most important to the court's holding. In this case, the sole reason for the public records request was to uncover Governor Taft's suspected knowledge of serious financial mismanagement in the state government. This information purportedly would shed light on allegations of governmental malfeasance resulting in millions of dollars in losses to the state's taxpayers.

Additional factors relevant to the balancing test include: the availability of the information from other sources, including whether similar information has already been obtained;²⁸⁵ and "the possibility of future timidity by government employees."²⁸⁶

Only Governor Taft and others he communicated with would have the information necessary to determine the governor's knowledge of the BWC's investments and the state's investment strategies. As such, the information likely would not be available from other sources.

The governor's only argument in favor of nondisclosure is that it would make future executive officials reluctant to communicate with the governor. In light of the other factors expressing a substantial need for the documents, disclosure surely would be warranted in the *Taft* case.

²⁸² See Brown, *supra* note 191.

²⁸³ Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.D.C. 1980).

²⁸⁴ *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

²⁸⁵ See *In re Sealed Case*, 121 F.3d at 737-38; Weaver & Jones, *supra* note 9, at 319.

²⁸⁶ *In re Sealed Case*, 121 F.3d at 738.

CONCLUSION

To rectify the piecemeal application of the federal law doctrine of executive privilege at the state level, this Article proposes a simple, pragmatic, and easy-to-apply standard that would bring uniformity to executive privilege jurisprudence. Incorporating salient features of both categories of executive privilege, this new standard eliminates the old, ad hoc analysis that has muddled this area of the law. By adopting and applying a blended version of the chief executive communications and deliberative process privileges, state courts would have at their disposal a new standard that strikes a satisfactory balance between the government's interest in confidentiality and the democratic principles of open government and free flow of information. And, as Justice Blackmun aptly noted, it is the protection of these democratic principles that are essential to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."²⁸⁷

²⁸⁷ *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).