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Justifying Secrecy: An Objection to the General Deliberative Privilege†

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The general deliberative privilege1 is relatively new2 to the list of evidentiary privileges that the federal executive may assert in the course of judicial proceedings.3 It is a qualified privilege under which the executive is now

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2. See, e.g., MCCORMICK ON EVIDENCE § 108, at 265-67 (E. Cleary 3d ed. 1984) (“the privilege is newly emergent”); infra notes 38-123 and accompanying text.

3. A great deal of confusion surrounds the general deliberative privilege by virtue of our failure to draw clear distinctions between, first, those “judicial” privileges that the executive may interpose as limitations upon the powers or actions of the judiciary and, second, those other and sometimes related privileges that it may assert against the Congress. See, e.g., R. BERGER, EXECUTIVE PRIVILEGE (1978) (deals primarily with the assertion of executive privilege as against Congress and not with questions of judicial privilege). Further confusion arises from our failure to draw clear distinctions among various forms of judicial privilege available to the federal executive.

Apart from the general deliberative privilege, see infra note 10, the particular judicial privileges that are available to the federal executive but are unavailable to private litigants include:

routinely excused from the obligation to disclose, in civil litigation, the


(4) The privilege protecting quasi-judicial deliberations of high executive officials. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); United States v. Morgan, 313 U.S. 409 (1941) (Morgan I); Morgan v. United States, 304 U.S. 1 (1938) (Morgan II); Cox, supra, at 1417-18. Though there seems to be no question concerning the availability of this privilege, none of the basic evidence treatises contain any consideration of it. It is, however, in all the basic works dealing with administrative law.

(5) The privilege protecting information related to ongoing criminal, civil and administrative investigations. Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336 (D.C. Cir. 1984); United States v. O'Neill, 619 F.2d 222 (3d Cir. 1980); Black v. Sheraton Corp. of Am., 564 F.2d 531 (D.C. Cir. 1977); Freeman, 405 F.2d at 1326; Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600 (5th Cir. 1966); Olson Rug Co. v. NLRB, 291 F.2d 655 (7th Cir. 1961) (discovery sought by defendant in an action brought by the government); see also R. BERGER, supra, 227-28; 2 D. LOUISELL & C. MUELLER, supra, §§ 228, 230; MCCORMICK, supra note 2, § 108, at 265-67 (law enforcement investigational files); 2 J. WEINSTEIN & M. BERGER, supra, ¶ 509[51]-509[58]; Note, Discovery of Government Documents and the Official Information Privilege, 76 COLUM. L. REV. 142, 157-62 (1976) [hereinafter Note, Discovery].

(6) The privilege protecting information that is subject to a statutory prohibition against disclosure or publication. Merchants Nat'l Bank & Trust Co. v. United States, 41 F.R.D. 266 (D.N.D. 1966); Rosee v. Board of Trade, 36 F.R.D. 684 (N.D. Ill. 1965); see also R. BERGER, supra, at 228-30; MCCORMICK, supra note 2, § 112 (statutory privileges for certain reports of individuals to government agencies); 2 J. WEINSTEIN & M. BERGER, supra, ¶ 501[41]-501[46]; 8 C. WRIGHT
advice, opinions and recommendations that are communicated during a deliberation that leads to the making of any decision within the executive branch. The privilege is "general" in that it is not confined, as are two of its close relatives, either to presidential deliberations or to the "quasi-judicial" deliberations of high executive officials. The underlying rationale is that disclosure of deliberative communications will chill future communications, thus diminishing the effectiveness of executive decisionmaking and injuring the public interest. It has also been justified by reference to various bodies of authority including the doctrine of sovereign immunity,

& A. MILLER, supra, at 160-64; Note, Discovery, supra, at 149-56.

In addition, there are other privileges, all less well established, that have been said to be available to the federal executive:


(3) The privilege protecting information that has been communicated to the government under promises or expectations of confidentiality. Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963).


Also, prior to 1970, the government, like others, enjoyed the protection—barely distinguishable from that of a qualified privilege—of the rule that allowed document discovery only on a showing of "good cause." 8 C. WRIGHT & A. MILLER, supra, §§ 2201, 2205.

4. See the executive privilege protecting presidential deliberations described supra note 3.

5. See supra note 3.
the separation of powers, the rule that is known to administrative lawyers as the Morgan doctrine,⁶ the Federal Rules of Evidence, and the Freedom of Information Act (FOIA).

The privilege was first adopted by a federal court in Kaiser Aluminum & Chemical Corp. v. United States,⁷ a 1958 Court of Claims decision. Although the privilege has been approved by neither the Congress nor the Supreme Court,⁸ it has taken strong hold in the general federal courts⁹ and has been applied in a large and growing number of cases.¹⁰ As an evidentiary privilege available to the executive, it has also been applied through the case law that has developed under the Freedom of Information Act (FOIA).¹¹

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6. See infra notes 215-35 and accompanying text.
7. 157 F. Supp. 939 (Ct. Cl. 1958); see infra notes 83-113 and accompanying text.
8. See infra notes 38-148 and accompanying text; notes 184-253 and accompanying text.
9. I mean by this term to identify the courts of general federal jurisdiction, thus including the district courts and the courts of appeals but not the Court of Claims.
11. The Freedom of Information Act provides generally that a broad range of executive records shall be made available to the public. Exemption five excludes from this general obligation of disclosure those "inter-agency or intra-agency" documents which are the subject of a judicial privilege. See infra notes 124-31, 245-53 and accompanying text.
Cases in which the general deliberative privilege is applied by virtue of its incorporation into
This Article addresses the question of whether there ought to be a general deliberative privilege, a question assumed by many to be properly answered in the affirmative. Part I defines the privilege and details its rationale. Part II examines its history and thus lays a foundation for its assessment. Part III then addresses the question of whether the privilege is warranted. It deals with the allocation of the burden of persuasion in arguments of this kind, with the full range of relevant real-world effects, and with the arguments from legal authority that have been offered in support of the privilege.

Contrary to conventional wisdom, I conclude that this privilege simply ought not exist. I believe this conclusion is supported by the history of the privilege, the law assigning the burden of persuasion to the proponents of a judicial privilege, the weakness of the instrumental and doctrinal arguments in favor of the privilege, and the availability of alternatives to the privilege that will satisfy its purposes at lower cost to the public interest. Though my arguments are not exotic, most of them have not been applied previously to the general deliberative privilege. Once applied, I find that they lead to an unconventional conclusion.

I. THE PRIVILEGE, ITS RATIONALE AND ITS DIMENSIONS

The general deliberative privilege is a privilege that is best defined in terms of its rationale. That rationale is the instrumental claim that secrecy is necessary to candor, that candor is necessary to effective decisionmaking by the executive, and that enhancing the effectiveness of executive decisionmaking serves the public interest. Accordingly, the establishment of a general deliberative privilege is warranted because it promotes the public interest.

Thus, one court has observed that "[f]reedom of communication vital to [the] fulfillment of the aims of wholesome relationships is obtained only by removing the specter of compelled disclosure" and that the "government . . . needs open but protected channels for the kind of plain talk that is
essential to the quality of its functioning."\textsuperscript{12} Other courts tell us that the "purpose of [the] privilege is to foster freedom of expression among governmental employees involved in decision making and policy formulation"\textsuperscript{13} and to facilitate "candid and confidential internal debate" within the government.\textsuperscript{14} The operating assumption is that "effective and efficient governmental decision making requires a free flow of ideas among government officials and that inhibitions will result if officials know that their communications may be revealed to outsiders."\textsuperscript{15} Often described in terms of a desire to prevent the "chilling" of deliberative communications, one recognizes and is disposed to accept this rationale because claims of this kind underlie a wide range of well-established privileges\textsuperscript{16} and are legitimate, important elements of first amendment jurisprudence.\textsuperscript{17}

Apart from this argument based on instrumental effects, some courts have also found justification for the existence of the privilege in arguments based on legal authority.\textsuperscript{18} Such arguments have been based upon: the powers granted the executive under article II of the Constitution, the

\begin{itemize}
  \item Text cited in the context of the privilege as a "necessary evil."\textsuperscript{12}
  \item The privilege is designed to foster freedom of expression among governmental employees involved in decision making and policy formulation.\textsuperscript{13}
  \item The privilege is intended to facilitate "candid and confidential internal debate" within the government.\textsuperscript{14}
  \item The privilege is often described in terms of a desire to prevent the "chilling" of deliberative communications.\textsuperscript{15}
  \item The privilege is legitimate, important elements of first amendment jurisprudence.\textsuperscript{16}
  \item The privilege is based on legal authority.\textsuperscript{17}
  \item The privilege is based on the powers granted the executive under article II of the Constitution.\textsuperscript{18}
\end{itemize}
separation of powers doctrine, the *Morgan* doctrine which protects the thought processes of high executive officials performing quasi-judicial functions, the Freedom of Information Act and cases decided under that statute, and proposed—but ultimately rejected—rule 509 of the Federal Rules of Evidence. Other such arguments have been based upon precedent in the British House of Lords, in the United States Court of Claims, or, as the number of such cases has grown, in the general federal courts.

Beyond the question of the basic justification for the privilege, the courts have also specified the scope of the privilege both in terms of the communications that it covers and the litigation circumstances in which it may be raised. Generally, the privilege extends to written and oral communications comprised of opinions, recommendations or advice offered in the course of the executive's decisionmaking processes. It does not cover, however, communications of fact, communications

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19. The great majority of decisions involving the general deliberative privilege involve the production of documents. The privilege also extends, however, to the provision of live testimony. See, e.g., United States v. Hooker Chemicals & Plastics Corp., 123 F.R.D. 3 (1988) (decision of a special master).


21. Branch, 638 F.2d at 882; McClelland, 606 F.2d at 1287; Machin v. Zuckert, 316 F.2d 336, 340 (D.C. Cir. 1963), cert. denied, 375 U.S. 896 (1963); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 660-61 (D.C. Cir. 1960); In re *Franklin*, 478 F. Supp. at 581-82 and cases cited therein (Privilege does not extend to facts or to material that is "primarily reportorial and expository, not deliberative"); generally "the lower the level of abstraction in the writing, the less the need for the privilege."); SCM Corp. v. United States, 473 F. Supp. 791, 797 (Cust. Ct. 1979); Sprague Elec. Co. v. United States, 462 F. Supp. 966, 974 (Cust. Ct. 1978); Smith v. FTC, 403 F. Supp. 1000, 1015 (D. Del. 1975); EEOC v. Los Alamos Constructors, Inc., 382 F. Supp. 1373, 1379 (D.N.M. 1974); Mobil Oil Corp. v. Department of Energy, 102 F.R.D. 1, 5 (S.D.N.Y. 1983) (*Mobil I*); Simons-Eastern Co., 55 F.R.D. at 88-89 and cases cited therein (facts discoverable, federal agent's conclusions and opinions are privileged); Wood v. Breier, 54 F.R.D. 7, 10 (E.D. Wis. 1972) (no privilege where information was factual and contained no recommendations for future action); *Carl Zeiss Stiftung*, 40 F.R.D. at 324; see also Mink, 410 U.S. at 85-94 (FOIA exemption five); Parke, Davis & Co., 623 F.2d at 5 (FOIA); Coastal States Gas, 617 F.2d at 866-69 (FOIA); Schwartz v. IRS, 511 F.2d 1303, 1305 (D.C. Cir. 1975) (FOIA); Soucie v. David, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971)
of final decisions\textsuperscript{22} or communications that are post-decisional.\textsuperscript{23} As to the circumstances in which it may be asserted, some courts have held that the privilege has been waived when the discovery is sought in connection with the \textit{defense} of a civil suit brought by the government.\textsuperscript{24} Similarly, many courts have found an exception to the privilege in cases involving allegations of governmental misconduct or, more recently, of serious governmental mistake.\textsuperscript{25}

The courts have also established a set of procedures that the executive must follow in asserting the privilege. First, the privilege must be asserted


The rule that opinions are subject to protection while facts are not seems to rest on two assumptions. The first is that the communication of opinions can be chilled but that the communication of facts cannot. See, e.g., In re Franklin, 478 F. Supp. at 582 (disclosure of facts would not "hinder the free flow of advice in government"); see also Mink, 410 U.S. at 88-89, 91 (FOIA); Machin, 316 F.2d at 40; Boeing Airplane Co., 280 F.2d at 660-61. The second is that "facts" are important to litigation and that "opinions" are not. Neither of these assumptions appears to be warranted. They also assume an ability to distinguish "fact" from "opinion" that is, at the very least, problematic. See, e.g., In re Franklin, 478 F. Supp. at 583-84.

22. Ash Grove Cement Co. v. FTC, 511 F.2d 815, 818 n.12 (D.C. Cir. 1975) (FOIA request for purposes of discovery), \textit{reh'g denied}, 519 F.2d 934 (D.C. Cir. 1975):

\textit{[T]he policy of promoting the free flow of ideas . . . does not apply here, for private transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public.}

\textit{Id.} (quoting Sterling Drug v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971)).

23. \textit{Taxation with Representation Fund}, 646 F.2d at 677-78; \textit{Coastal States Gas}, 617 F.2d at 866; Mobil Oil Corp. v. Department of Energy, 520 F. Supp. 414, 417 (N.D.N.Y. 1981) (\textit{Mobil II}); Cliff, 496 F. Supp. at 575; Pilar v. S.S. Hess Petrol, 55 F.R.D. 159 (D. Md. 1972) (suit for damages from shipboard fire; subpoena to non-party federal agency; discovery permitted as to the agency's official conclusions; individual conclusions and departmental conclusions privileged); \textit{Wood}, 54 F.R.D. at 10-12 (no privilege where there is no recommendation for future action); \textit{Carl Zeiss Stiftung}, 40 F.R.D. at 324 (material "comprising part of a process by which governmental decisions and policies are formulated"); see also NLRB v. Sears, Roebeck & Co., 421 U.S. 132, 151-52 & n.19 (1975) (FOIA exemption five).


These decisions are all modeled, more or less explicitly, on Judge Hand's decisions involving the government's waiver when it was in the position of being a prosecutor in a criminal action. United States v. Grayson, 166 F.2d 863 (2d Cir. 1948); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Krulwich, 145 F.2d 76 (2d Cir. 1944); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944).

by the head of an executive agency who must base his claim on his personal assessment of the documents in question. Second, the claim of privilege must include a specific and particularized description of the documents that the executive seeks to withhold. Third, the executive must provide a clear statement of the need for confidentiality. Should the government fail to meet any of these procedural prerequisites, some courts have simply concluded that the privilege has not been properly claimed and therefore cannot be granted.

Finally, the courts have developed a set of rules concerning the decisional process to be followed once the privilege has been asserted. At the threshold, it is established that the privilege is qualified, that it is for the courts to decide whether it applies in a particular case, that, at least in theory, the burden is on the government to prove that it ought to be applied in the particular case, and that in making its decision the court may, if circum-


27. Mobil Oil II, 520 F. Supp. at 416; Sprague Elec. Co., 462 F. Supp. at 970; Smith, 403 F. Supp. at 1016; Black I, 371 F. Supp. at 101 (proper claim of privilege requires "a specific designation and description of the documents" because otherwise "it is impossible for a court to analyze the claim short of disclosure of the very thing sought to be protected"); see also Ellsberg v. Mitchell, 709 F.2d 51, 64 (D.C. Cir. 1983) (privilege for state secrets; privilege should be justified in as much detail as possible without undermining the privilege), cert. denied, 465 U.S. 1038 (1984).

28. Mobil Oil II, 520 F. Supp. at 416; Smith, 403 F. Supp. at 1016 ("there must be a demonstration of 'precise and certain reasons for preserving' the confidentiality of the governmental communications"); Black I, 371 F. Supp. at 101 (proper claim of privilege requires a statement of "precise and certain reasons for preserving confidentiality"); see also Black v. Sheraton Corp. of Am., 564 F.2d 531, 543 (D.C. Cir. 1977) (Black II) (investigative files).


30. Mobil Oil II, 520 F. Supp. at 417; In re Franklin, 478 F. Supp. at 582; SCM Corp., 473 F. Supp. at 797 ("courts must weigh the need for the materials sought against the potential harm that would result from their disclosure"); Sprague Elec. Co., 462 F. Supp. at 974; Smith, 403 F. Supp. at 1015; Black I, 371 F. Supp. at 100; Kaiser Aluminum, 157 F. Supp. at 946; Carl Zeiss Stiftung, 40 F.R.D. at 327; see also Nixon I, 418 U.S. at 711-12 (presidential deliberative privilege). But see Freeman v. Seligson, 405 F.2d 1326, 1347 (D.C. Cir. 1968) (treating privilege as absolute).

31. Sprague Elec. Co., 462 F. Supp. at 969 and cases cited therein ("there is no question that the judiciary has the power to" decide whether the documents may be withheld).

32. There seems never to have been any doubt that, at least in theory, the burden is on the government to demonstrate that particular documents come within the scope of the general deliberative privilege. Coastal States Gas, 617 F.2d at 868 (FOIA); Spell v. McDaniel, 591 F. Supp. 1090, 1116 (E.D.N.C. 1984) ("The law will sustain a claim of privilege only when
stances warrant, inspect the documents in camera.\textsuperscript{33}

absolutely necessary to protect and preserve an interest of significant public importance that the asserted privilege is designed to serve."); \textit{Mobil Oil II}, 520 F. Supp. at 416 ("[T]he government has the burden of proof on the applicability of the pre-decisional privilege."); \textit{Smith}, 403 F. Supp. at 1016; \textit{Los Alamos Constructors}, 382 F. Supp. at 1375 ("[B]ureaucrats cannot hide behind a privilege claim unless . . . an overwhelming public interest demands [secrecy] . . . . [A] recognition of governmental privilege is the rare exception, while full disclosure is the almost universal rule."); \textit{see also} Gulf Oil v. Schlesinger, 465 F. Supp. 913, 917 (E.D. Pa. 1979) (attorney-client privilege); United States v. Mandel, 415 F. Supp. 1025 (D. Md. 1976) (legislative privilege).

There have, nevertheless, been a great many cases that have \textit{in fact} placed the burden of persuasion on the party seeking discovery. Some of these are perfectly appropriate because they arose prior to 1970, when the proponent of document discovery was entitled to discovery only on an affirmative showing of "good cause." In these cases, the burden was on the proponent of discovery even before the privilege was asserted.

But even after the "good cause" rule was eliminated in 1970, a significant number of cases have assigned the burden of persuasion to the party seeking the assertedly deliberative material. Thus, \textit{Smith}, 403 F. Supp. at 1016, clearly acknowledges that "[a]s with any privilege the burden is upon the claimant of executive privilege to demonstrate a proper entitlement to exemption from disclosure." \textit{Id}. But when the court actually struck the balance to decide whether to sustain the claim of privilege, it did so in terms of the "showing necessary to surmount a governmental claim of privilege." Further, it indicated that a litigant must show a "pressing need . . . in order to overcome a properly raised claim of executive privilege," \textit{Id}. at 1015 n.46 (quoting \textit{SEC v. Bausch & Lomb Co.}, 19 Fed. R. Serv. 2d (Callaghan) 332 (S.D.N.Y. 1974)).

Similarly, in \textit{SCM Corp.}, the court announced that the government's interest in candid conversation generally "take[s] precedence" over the interests of the litigant seeking discovery; thus, that litigant must demonstrate a specific need for the documents that is "clear," "persuasive" and "compelling." \textit{SCM Corp.}, 473 F. Supp. at 798-99 (quoting \textit{SEC v. Bausch & Lomb Co.}, 19 Fed. R. Serv. 2d (Callaghan) 332 (S.D.N.Y. 1974)). Again, in \textit{Carl Zeiss Stiftung}, the court held that the government's interest in candor is the "preponderating policy" and that, prior to considering specific questions of application, we have already "str[uck] the balance in favor of nondisclosure . . . ." \textit{Carl Zeiss Stiftung}, 40 F.R.D. at 324; \textit{see also} \textit{Sprague Elec. Co.}, 462 F. Supp. at 974, 976; \textit{EW Bliss Co. v. United States}, 203 F. Supp. 175, 176 (N.D. Ohio 1961) (quoting J. Moore, J. Lucas & G. Grotheer, Moore's FEDERAL PRACTICE \textsection{} 26.61[-4] (2d ed. 1989), to the effect that information should be disclosed unless "the court is satisfied that it would be against public policy to do so,") but then explaining that "in all but exceptional cases it is considered against the public interest to compel the government to produce inter-agency advisory opinions."); \textit{Kaiser Aluminum}, 157 F. Supp. at 947.

33. "[C]ourts frequently examine documents in camera in order to determine whether they should be held in a confidential status or be disclosed to the party seeking production." \textit{Sprague Elec. Co.}, 462 F. Supp. at 974, 976 and cases cited therein; \textit{In re Franklin}, 478 F. Supp. at 582.

Some courts, however, have imposed significant restrictions on the availability of in camera inspections on the ground that the occasional disclosure of documents in the course of litigation will offend the policies underlying the privilege, even when the disclosure is to a single federal judge sitting in chambers. \textit{SCM Corp.}, 473 F. Supp. at 798 (inspection would constitute an improper probing of the executive's "mental processes"); \textit{Kaiser Aluminum}, 157 F. Supp. at 947 ("the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy is somewhat impaired" by in camera inspection); \textit{see also Mink}, 410 U.S. at 92-94 (FOIA; candid communication is "somewhat impaired" by in camera inspection). \textit{But see Nixon I}, 418 U.S. at 706 (presidential deliberative privilege; confidentiality is not diminished by in camera inspection).

The courts that have limited the availability of in camera inspections have sometimes done
As to the substantive content of their decisions, the courts have claimed to engage in a balancing process that takes account of relevant factors and interests. While it has become customary to recite a list of five such factors,\textsuperscript{34} they may be better understood as three. The first is the discovering party's need for the evidence.\textsuperscript{35} The second is the perceived risk that the disclosure of the documents in question will chill future communications.\textsuperscript{36} The third is the belief—also reflected in the rules governing the scope of the privilege—that at some point the government ought not be permitted to hide its own misconduct behind a claim of executive privilege.\textsuperscript{37} So by requiring that some showing of need be made before the court will inspect the subject documents. \textit{Kaiser Aluminum}, 157 F. Supp. at 947 (party seeking discovery failed to make a “definite showing . . . of facts indicating reasonable cause” for in camera inspection); \textit{Carl Zeiss Stiftung}, 40 F.R.D. at 331-32; cf. \textit{Smith}, 403 F. Supp. at 1015 (investigative file; a showing of “relevance” satisfies the requirement for a “preliminary showing of necessity” prior to in camera inspection).

Other courts that have limited the availability of in camera inspections have done so by drawing distinctions as to the purpose of the inspection. Thus, some courts will specifically decline to inspect documents to verify the claims made by the executive in the course of asserting the privilege. \textit{Sprague Elec. Co.}, 462 F. Supp. at 978; \textit{Carl Zeiss Stiftung}, 40 F.R.D. at 331-32. Others have indicated a willingness to inspect documents but only after they have somehow been persuaded that the documents include material that ought to be disclosed and then only for the purpose of separating the material that ought to be disclosed from the material that ought not. \textit{SCM Corp.}, 473 F. Supp. at 799; Armstrong Bros. Tool Co. v. United States, 463 F. Supp. 1316 (Cust. Ct. 1979); \textit{Sprague Elec. Co.}, 462 F. Supp. at 978; \textit{Carl Zeiss Stiftung}, 40 F.R.D. at 331-32.

As far as I can tell, all of these restrictions on the availability of in camera inspections represent unwarranted spillovers from \textit{Reynolds}, 345 U.S. at 1. \textit{Reynolds} involved military secrets of state and, under those circumstances, the Court expressed reservations about the appropriateness of in camera disclosure. There is no reason to believe that any such reservations are appropriate when the government asserts the general deliberative privilege.

34. The factors are enumerated in In re \textit{Franklin} as follows:

In this balancing of competing interests, some of the factors that assume significance are (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

In re \textit{Franklin}, 478 F. Supp. at 583 (citations omitted).

35. The courts' concern for the discovering party's need for the evidence in question is sometimes expressed directly and sometimes through attention to the relevance of the evidence in question or to the availability of similar evidence from other sources. \textit{Mobil Oil II}, 520 F. Supp. at 417 (taking account of relevance, individual's need, availability of evidence elsewhere); In re \textit{Franklin}, 478 F. Supp. at 582-83, 586 (taking account of relevance, individual's need, availability of evidence elsewhere); \textit{Sprague Elec. Co.}, 462 F. Supp. at 974; \textit{Black I}, 371 F. Supp. at 100 (weighing the "individual's need for disclosure of particular information"); United States v. Beatrice Foods Co., 52 F.R.D. 14, 20 (D. Minn. 1971) (individual's need); \textit{Carl Zeiss Stiftung}, 40 F.R.D. at 331 (availability of evidence from other sources).

36. \textit{Mobil Oil II}, 520 F. Supp. at 416-17; In re \textit{Franklin}, 478 F. Supp. at 580-83; \textit{Sprague Elec. Co.}, 462 F. Supp. at 974; \textit{Black I}, 371 F. Supp. at 100 (weighing "the public's interest in preserving confidentiality to promote open communication necessary for an orderly functioning of the government").

37. \textit{Mobil Oil II}, 520 F. Supp. at 417, 419 ("public interest in the proper functioning" of
In light of these rules that address the scope of the privilege, the applicable procedures, and the decisional processes, one might add to the case in favor of the privilege the further argument that it has been carefully defined and reasonably implemented. The scope of the privilege, for instance, is no broader than the scope of its rationale. And the courts supervise its implementation on a case-by-case basis. Under these circumstances, it is unlikely that systematic injustice is being done in its name. Thus, even if the case in favor of this privilege is not particularly strong, neither will be the case against it.

II. THE DEVELOPMENT OF THE PRIVILEGE

I begin the examination of the general deliberative privilege with the history of its development. There are several purposes for considering this history. It makes clear what is already known but tends to be forgotten—that ideas, including those ideas that become embedded in legal doctrine, are not timeless truths but are cultural artifacts. Moreover, these artifacts have highly specific histories and contexts within which they have evolved. They are, in this respect, contingent upon their circumstances. These circumstances include such things as the configuration of individual and institutional interests and, it seems, the availability or non-availability of certain kinds of questions and of certain rhetorical possibilities. This focus upon the cultural and historical contingency of these ideas, upon the relevant configurations of interests and rhetorical possibilities, and upon the circum-
stances of their conveyance from one place to another reveals much that is interesting in its own right and much that is valuable in the assessment of this particular body of law.

The general deliberative privilege was unknown in the United States federal courts until 1958 and represents a body of ideas that was conveyed, first, from the British House of Lords and from Dwight Eisenhower’s principles of military leadership to the United States Court of Claims and, then, from the Court of Claims to the federal district courts. The federal courts’ acceptance of this privilege was part of a long-standing and multifaceted contest between the proponents of open and closed government. The history of that contest includes chapters devoted to the Housekeeping Act and its amendment, the range of common law privileges available to the executive, the contest between Dwight Eisenhower and Joseph McCarthy, the enactment and implementation of the Freedom of Information Act, the struggle over the privilege provisions of the Federal Rules of Evidence, the Watergate break-in and the ensuing contest between Richard Nixon, the Congress, and the courts, the Iran-Contra scandal, and the testimony of Oliver North.

This is a play in which there is a finite set of actors who have played their parts with great consistency. The foremost of these, of course, has been the federal executive. Other institutional actors have included the Supreme Court, the Congress, the freedom of information movement and the political and media interests that comprised that movement, and the Court of Claims. The principal individual actors have been Justice Stanley Reed, General-cum-President Dwight Eisenhower and President Richard Nixon.

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.” These choruses celebrate the competing values that are at stake in this controversy, and they vary in their relative strength from one time and place to another. In the broad arena of national politics, the urge to secrecy and executive prerogative was strongest during the period from which the general deliberative privilege emerged, a period marked by the administrative aspirations of Roosevelt’s presidency, the military conti-

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38. The urge to secrecy is composed of several subordinate themes, some of which are sung by groups that one would not expect to find in the same chorus. On the right side of this chorus is a group whose primary commitment is to law and order and to prosecuting the Cold War. They are all but royalists when it comes to the prerogatives of the executive in pursuing these objectives. On other issues they may be doctrinaire anti-statists.

The left side of the chorus is comprised of New Deal liberals who saw the enlargement of Franklin Roosevelt’s prerogatives vis-à-vis the judiciary as a prerequisite for progressive political action. Just to the right of this group are the administrators, the managers and the policy analysts whose primary commitment is to the possibility of the technocratic, expert management of the public’s business. These groups tend to be statist on precisely the issues that the right side of this chorus is not—and visa versa.
gencies of World War II, and the early period of the Cold War, the era of the Rosenbergs, of Hiss and of Joseph McCarthy. The urge to democracy and accountability, barely audible in national politics from the beginning of World War II through the early 1950s, became strongest during and after the Vietnam War and Watergate. And, of course, even within a single period of time, the strength of these choruses has varied dramatically from one institutional location to another—"secrecy" being strongest in the executive and, more particularly, the national security establishment, and "democracy and accountability" being strongest in the media and the Congress.

A. Origins in the British House of Lords

Before 1958, the general deliberative privilege had been embraced by the British House of Lords but had never been considered by the federal courts of the United States. In the House of Lords, this particular Crown privilege is found in two decisions, *Smith v. East India Co.* in 1841 and *Duncan v. Cammell Laird & Co.* in 1942.

*Smith* involved a demand for documents related to communications between the East India Company and its government-appointed Board of Control. After finding that these were entities that could invoke Crown privilege (Americans would say "could invoke the privileges available to the federal executive"), the House of Lords set out and approved what is now recognized as the standard justification for the deliberative privilege:

> Now, it is quite obvious that public policy requires . . . that the most unreserved communication should take place between the East India Company and the Board of Control, that it should be subject to no restraints or limitations; but it is also quite obvious that if, at the suit of a particular individual, those communications should be subject to be produced in a Court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved. I think, therefore, that these communications come within that class of official communications which are privileged, inasmuch as they cannot be subject to be communicated, without infringing the policy of the Act of Parliament and without injury to the public interests.41

Thus, in 1841, the House of Lords understood Crown privilege to protect certain communications from disclosure on the ground that such disclosure would inhibit candid communication and thus would injure the public interest.

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The more recent case, *Duncan*, was brought by survivors of the crew of a new military submarine that sank during test dives in the first years of World War II. The plaintiffs sought documents related to the submarine’s design and construction. The First Lord of the Admiralty refused to provide the documents, and the House of Lords accepted his claim of privilege. While obviously concerned with the security of military secrets during a particularly perilous time of war, the Lords spoke in general terms about how, in the administration of justice, “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, quite unconnected with the interests or claims of the particular parties in litigation.”

Though the textual justification for this reading is weak, the *Duncan* decision has subsequently been read to incorporate the deliberative rationale that was first articulated in *Smith*.

The House of Lords’ opinions on the general deliberative privilege were important in two ways to the privilege’s development in the federal courts. First, the procedures adopted by the Lords in *Duncan* for assertion of the privilege were soon adopted, verbatim but without attribution, by the United States Supreme Court in *United States v. Reynolds*.


43. The closest we get in *Duncan* to an express approval of the *Smith* rationale is the descriptive statement, made in the Lord Chancellor’s introduction to his opinion, that the Crown’s objection to the production of its documents:
is sometimes based upon the view that the 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.

*Id.* at 635. Nowhere in their decision do the Lords approve this basis for objection.

44. 345 U.S. 1 (1953).
Crown. The British approach is far more favorable to this privilege than the American approach. Thus, the proposition that "there is a general deliberative privilege in Britain" will not support the inference that "there ought to be such a privilege in the United States." It is, under these circumstances, particularly ironic that at the very time the federal courts of the United States were embracing the deliberative rationale, the House of Lords, in 1968, reversed themselves and announced that they found the deliberative rationale to be implausible.  

B. United States Supreme Court: Executive Privilege
Prior to 1974

Before 1958, consideration by the United States Supreme Court of matters related to executive privilege are found in two lines of cases. The oldest of these involved the Court's rulings on the executive's claims of power to manage and withhold documents under the federal Housekeeping Act. The other involved the identification of a number of narrowly defined common law executive privileges.

1. The Housekeeping Act

The federal Housekeeping Act, passed in 1789, authorized the head of each executive department to "prescribe regulations for . . . the custody, use, and preservation of . . . records, papers, and property" appertaining to the department. For many years the executive branch had invoked this statute as authority for issuing regulations that "centralized" in senior agency officials all decisions related to the disclosure of documents. By such

45. Conway v. Rimmer, [1968] 1 All E.R. 874 (H.L.), involved a police officer's request for a routine personnel report that had led to his being fired. The local police superintendent asserted a Crown privilege based on the general deliberative rationale and the House of Lords took the occasion to reject the rationale in its entirety. Lord Morris asked:

Would the knowledge that there was a remote chance of possible enforced production really affect candour? If there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that candour on the part of the writer of the report would be encouraged rather than frustrated.

Id. at 891. Similarly, Lord Upjohn said "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." Id. at 915. Rejecting the factual premise underlying the deliberative rationale, the Lords rejected the assertion of privilege and ordered that the personnel report be produced. See also Williams v. Home Office, [1981] 1 All E.R. 1151 (Q.B.).

Even as they were rejecting the deliberative rationale in Conway, the Lords expressed their readiness to approve claims of privilege based on the Crown's interest in protecting itself from "ill-informed or captious public or political criticism." Conway, [1968] 1 All E.R. at 818.

46. 5 U.S.C. § 301 (1988). As to the history of enactment see H. Cross, supra note 3, at 311 n.3.
centralization, the executive claimed to remove from junior officials the power to disclose official documents—including the power to comply with subpoenas and other demands made by the courts. The executive thus took the position that, because of the Housekeeping Act and the executive's own regulations, the federal courts had no power to compel the production of any documents by junior agency officials. Because of the sometimes insurmountable difficulties involved in securing orders against senior agency officials, this amounted, as a practical matter, to the assertion that the executive's disclosure of documents in response to court orders was a matter wholly within the discretion of the executive.47

In 1951, this matter came before the Supreme Court in Touhy v. Ragen,48 where, for the evident purpose of protecting the identity and safety of an informer, a local FBI agent was ordered not to comply with a court-ordered subpoena. The district court found the local agent in contempt and the court of appeals reversed on the grounds that the department's "centralizing" regulations were authorized by the statute and that, under those regulations, the department enjoyed a "privilege" to withhold the documents.

When the matter came before the Supreme Court, the executive branch claimed that, under the statute and the regulations, it enjoyed a broad and absolute privilege and that it was the sole judge of the application of that privilege.49 Justice Stanley Reed, writing for a majority, ruled simply that the Attorney General had the power to instruct his subordinate to refuse to produce the documents in question. In so doing, he justified his decision by reference to "the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court."50 Given the breadth of his expressed concern, Reed—one of Franklin Roosevelt's first solicitors general and an extraordinarily consistent supporter of the prerogatives of the federal executive—apparently supported the executive's claim that it ought to enjoy not just the power to disgorge its documents only through senior officials but also the further power not to disgorge, even if the subpoena were directed at the senior official.51 But whatever might have been Reed's preference in the matter,

47. Such a privilege-in-effect would correspond closely to a statutory privilege that the executive enjoyed under the "call rule" in the Court of Claims. See infra notes 83-113 and accompanying text.
49. According to the handwritten notes—evidently Reed's—on the informal bench memo that was prepared for Reed by his clerk, the "U.S. does not admit A.G. can be forced to disclose to court. Response 15." Memorandum to Justice Stanley Reed From Law Clerk (No. 83, 1950 Term) (available from University of Kentucky Library, Box 205, Stanley Reed Papers) (on file at offices of the Indiana Law Journal).
50. Touhy, 340 U.S. at 468 (emphasis added).
51. Fred Rodell reports that "[i]t has become common to assess Reed's record on the
the Court did not reach the executive's claim of privilege. The reason, so far as I can tell from the opinion and from Reed's own notes, was that the Court was deeply divided on the question and that Reed simply did not have the votes. In any event, it was understood at the time that Reed and

Court in terms of his allegedly inconsistent voting position and his consequent shifts between left, right, and center during his seventeen years as a Justice." F. RODELL, NINE MEN 267 (1955). Rodell, however, finds Reed's votes to be:

neither inconsistent nor even unpredictable if read in terms of the different kinds of issues he has faced. From 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 freedom of citizens; relatively, he has been against state regulation and taxes where they might butt in to national control. If he has sometimes seemed liberal on labor problems and conservative, or anti-tax, on taxes, it was partly because the labor cases dealt more often with pro-labor federal action and the new taxes came mostly from states. . . . In the civil liberties cases, where Reed, despite his personal good-will-toward-men, built up the most reactionary record of any Roosevelt Justice, he was simply deferring as usual to state action where it did not interfere with the supremacy of the nation.

Id. at 268-69; see also id. at 307 (to Reed—"alone of the Roosevelt Justices—Uncle Sam could almost do no wrong"), 252 ("argued most of the big New Deal cases before the Court"), 278 ("conspicuously did not" insist on giving constitutional breaks to criminals).

52. Justice Frankfurter, concurring, explained his belief—evidently contrary to what he understood to be Reed's view—that the Attorney General could indeed be reached by legal process and could not take refuge behind the Housekeeping Act. Touhy, 340 U.S. at 472-73 (Frankfurter, J., concurring).

This concurrence provided the occasion for a disagreement between Reed and Frankfurter that degenerated into highly inventive name-calling. Frankfurter evidently believed that Reed was ruling that "the Attorney General is empowered to forbid his subordinates, though within a court's jurisdiction, to produce documents" and that he would be prepared in another case to hold that "the Attorney General himself cannot in any event be procedurally reached." This, according to Frankfurter, "would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle." Id. at 473. It is noteworthy that Frankfurter's original draft had Mr. Bentham turning in his grave. That language was corrected when the Justice was reminded "that Bentham's body was not buried but dissected, so that his skeleton is still seeable at the University College, London." Memorandum for the Conference to Justice Stanley Reed from Justice Felix Frankfurter (March 3, 1951) (on file at offices of the Indiana Law Journal). Justice Reed's copies of those drafts and of the March 3, 1951 "memorandum for the conference" from "F.F." are available from University of Kentucky Library, Box 205, Stanley Reed Papers.

Justice Reed evidently took all of this business about fox-hunting, turning bodies and rattling skeletons quite personally. His hand-written note on the first draft of Frankfurter's concurrence reads as follows: 'FF—As Hughes was told by Butler - 'You know better.' . . . For the life of me I don't see the point. This last will set all the judges nutty. Respectfully, S. Reed.' Draft of Supreme Court opinion in United States ex rel. Touhy v. Ragen, Justice Stanley Reed's copy (dated for recirculation February 2, 1951) (available from University of Kentucky Library, Box 205, Stanley Reed Papers) (on file at offices of the Indiana Law Journal). After receiving Frankfurter's answer, Reed responded as follows on the next draft he received from Frankfurter: "It makes Reed writhe in his chair, if he were deader he would turn in his grave, to see a revered associate try to poison the reason of his successors with a suggestion that the AG may be beyond process." Draft of Supreme Court opinion in United States ex rel. Touhy v. Ragen, Justice Stanley Reed's copy (dated for recirculation February 2, 1951) (available from University of Kentucky Library, Box 205, Stanley Reed Papers) (on file at offices of the Indiana Law Journal).
his brethren had approved what was the practical, if not the formal, equivalent of an absolute privilege.\footnote{In 1960, a commentator observed that, despite the technically narrow holding in \textit{Touhy}, "the practical effect of these cases [\textit{Touhy} and a predecessor case] would not have been greater had they expressly ruled that the department heads need not respond to a subpoena. Since subordinate officials within a court's jurisdiction cannot under \textit{Boske} and \textit{Touhy} be held in contempt, and since the trial court ordinarily has no jurisdiction over the department head, discretion as to what information, if any, will be released lies with the department's chief." Note, \textit{Private Litigants, supra} note 3, at 452.}

Thus, at least until its amendment in 1958, the Housekeeping Act was read, in effect, to empower the federal executive to create, through its own internal regulations, an absolute privilege-in-effect that permitted the executive to keep documents secret from the courts when, in its judgment, disclosure would be contrary to the public interest.\footnote{There is strong evidence that after \textit{Touhy} the executive found a great many occasions to keep secrets. See legislative history of the 1958 amendment, in particular the House Committee's surveys of executive agencies and the bases they claimed for the right to keep secrets. H.R. REP. No. 1461, 85th Cong., 2d Sess. 634 (1958) [hereinafter H.R. REP. No. 1461]. The privilege did not, however, come before the courts. In part, this was because the executive asserted the privilege against the Congress and the public. The executive may also have had some incentive not to give the judiciary the opportunity to approve or disapprove its reading of the statute. There was, after all, no evidence that Congress ever intended the statute to authorize the keeping of secrets and, when they came before the courts, statutory privileges were being narrowly read.}

The assertion of this privilege-in-effect could be based on any argument that satisfied the executive. In this way this privilege could incorporate among a great many other claims, the deliberative rationale and the general deliberative privilege.

2. The Establishment of Common Law Executive Privileges for Quasi-judicial Deliberations, State Secrets, and the Identity of Informers

Apart from developments related to the privilege-in-effect that may have been provided by the Housekeeping Act, the Supreme Court also identified and approved a series of specific, narrowly drawn common law privileges available to the executive. These common law privileges involved quasi-judicial deliberations, state secrets, and the identity of informers. What is significant for present purposes is that none of these common law privileges were either intended or understood to include those matters that subsequently came to be covered by the general deliberative privilege.

The first of these common law privileges arose from the Supreme Court's 1936 and 1941 decisions in \textit{Morgan v. United States}.\footnote{United States v. Morgan, 313 U.S. 409 (1941) (\textit{Morgan IV}); Morgan v. United States, 304 U.S. 1 (1938) (\textit{Morgan II}).} In 1936, the Court had observed that "it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing
which the law required." In 1941, the Court explained its deference to the Secretary by reference to the fact that Congress had expressly charged the Secretary with "adjudicatory functions," that the administrative proceeding had a "judicial" character, and that the Secretary had proceeded in the manner of a judge. Thus, the Court regarded the administrative proceedings as those of a "collaborative instrumentalit[y] of justice" and gave the Secretary the same deference, respect and immunity it would have given to another court. Accordingly, the Supreme Court demonstrated an unwillingness to probe the mental processes of a cabinet secretary acting, pursuant to congressional delegation, in the manner of a judge charged with resolving a formally-contested proceeding.

The next case involving executive privilege was United States v. Reynolds, decided in 1953. In Reynolds, the Secretary of the Air Force sought to avoid disclosure of information that was sought in connection with a suit arising from the death of three civilians killed in a crash of a military aircraft engaged in testing secret electronic equipment. The executive asserted that "the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest." The Court, however, rejected this broad "public interest" standard in favor of a much narrower "privilege against revealing military secrets." Moreover, it adopted the procedures that the House of Lords had established in Duncan when it ruled that, before documents may be regarded as privileged, "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." It followed Duncan still further when it ruled that "[t]he court ... must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure [to the court] of the very thing the privilege is designed to protect." Thus, in matters related to the preservation of military secrets, the courts were instructed to probe the claims of the Secretary only in proportion to the showing that had been made concerning

57. Morgan IV, 313 U.S. at 421-22.
58. Id. at 422 (quoting Morgan v. United States, 298 U.S. 468, 480 (1936) (Morgan I)). The Court had also noted in Morgan II that "[t]he proceeding had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other." Morgan II, 304 U.S. at 20.
59. Morgan IV, 313 U.S. at 422.
60. Id.; see also United States v. Morgan, 307 U.S. 183, 191 (1939) (Morgan III).
61. Reynolds, 345 U.S. at 1.
62. Id. at 6 (footnote omitted).
63. Id. at 6-7.
64. Id. at 7-8 (footnotes omitted).
65. Id. at 8 (footnotes omitted). As to the derivation of these rules from Duncan, see Reynolds, 345 U.S. at 7-9 and especially notes 20-22.
the necessity of disclosure. In this case, the Court found the showing of necessity to be weak and concluded that the trial judge ought not to have ordered that they be produced for his inspection.

The third case, *Roviaro v. United States*, decided in 1957, involved the right of a criminal defendant to compel the government to disclose the identity of an undercover informant who had been directly involved in the allegedly criminal transaction. The government asserted that the informer's identity was privileged and both the trial court and the Supreme Court agreed. The high Court also concluded, however, that the privilege was qualified, that its availability depended on the balance of public interests in light of the particular circumstances of the case, and that the circumstances in the case at bar did not warrant its availability.

C. Eisenhower Asserts the Privilege in Stonewalling McCarthy, 1954

Until 1958, when the Court of Claims decided *Kaiser Aluminum & Chemical Corp. v. United States*, what I have called the deliberative rationale was unknown to the federal courts. Indeed, when this rationale made its first appearance in federal discourse, it was neither through a court nor through lawyers but through an army general turned President. Dwight Eisenhower offered the rationale as the justification for the assertion of executive privilege by which he barred his subordinates from providing certain testimony demanded by Senator Joseph McCarthy in the course of the Army-McCarthy proceedings.

66. *Id.* at 9-11.
67. *Id.* at 11.
69. *Id.* at 59.
70. *Id.* at 60-61, 65.
72. The confrontation between Eisenhower and his fellow-Republican Senator McCarthy came in the last stages of the Senator's notorious crusade against "communists" in the federal government. See, e.g., S. AMBROSE, *EISENHOWER, VOLUME II: THE PRESIDENT* (1984). The crusade began in 1950 as an assault against President Truman's Democratic administration. But it continued well beyond Eisenhower's Republican victory in 1952, ending only with the televised Army-McCarthy hearings and the Senate's censure of McCarthy in 1954. Though the nature of the contest changed when McCarthy found himself campaigning against a Republican administration, the stakes remained quite high. From Eisenhower's perspective, McCarthy threatened, among other things, Eisenhower's control of his own party and administration, the reputations and effectiveness of the President's subordinates, and the viability of the nation's nuclear weapons program. See, e.g., *id.* at 141, 163, 165-66, 171, 219.

At the time of the Army-McCarthy hearings, the American people were taking Senator McCarthy very seriously. Thus, "opinions polls reported in early 1954 that 50 percent of the people approved of McCarthy and another 21 percent 'did not know.'" A. LINK & W. CATTON, *AMERICAN EPOCH* 743 (1963).

There were three issues involved in the hearing. The first was the charge that McCarthy's
Eisenhower's lawyers had advised him that he was entitled to refuse to cooperate with McCarthy, but offered, as justification for that entitlement, only what was by then the executive's conventional recitation on the separation of powers. But when, amid suggestions that McCarthy had found the "smoking gun," Eisenhower ordered that no further information be disclosed, he relied not on these separation of powers arguments but instead—and, so far as I can determine, for the first time in federal discourse—on what is now recognized as the deliberative rationale. Thus, he argued that "it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters." Therefore, he said, "it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be dis-

associate, Roy Cohn, had put improper pressure on the Army in order to secure special treatment for his colleague David Schine. The second arose from McCarthy's counter-attack in which he accused the Army of lax security and of an attempt to blackmail his committee. And the third was McCarthy's charge that members of Eisenhower's administration had taken improper measures to frustrate McCarthy's, and thus the Senate's, investigation of the charges concerning Fort Monmouth. The crisis in that confrontation came in May, 1954, when testimony before McCarthy's subcommittee revealed that there had been a high-level meeting within the administration for the evident purpose of laying a strategy to frustrate McCarthy's probe.

73. In March of 1954, Eisenhower made the first of a series of requests to Attorney General Brownell for advice concerning his powers to protect his subordinates from McCarthy's Senate investigation. Eisenhower's notes indicate that he called Brownell on March 2 to discuss the subpoena powers of the committee. Those notes say, "I suppose the President can refuse to comply, but when it comes down to people down the line appointed to office, I don't know what the answer is. I would like to have a brief memo on precedent, etc.—just what I can do in this regard." S. AMBROSE, supra note 72, at 162 n.31 (quoting Eisenhower Papers and telephone calls from March 2, 1954). Further requests were made on March 29 and on May 3 and 5. Id. at 165-66 n.42, 186.

What he received in response to this and later inquiries to the Justice Department appear to have been boilerplate recitations of conventional separation of powers arguments. Those arguments contained not so much as a hint of the deliberative rationale. The formal memorandum of law that President Eisenhower attached to his claim of privilege was signed by Attorney General Brownell and, despite its considerable length, makes no reference to "preserving candor" on which Eisenhower said he was resting his claim. The Brownell memorandum is reprinted under the title Memorandum on Separation of Powers, 14 Fed. B.J. 73 (1954).

Brownell's arguments were the same ones that had earlier been made by Herman Wolkinson, then a subordinate attorney at the Department of Justice, in a series of articles titled Demands of Congressional Committees for Executive Papers, 10 Fed. B.J. 103, 223, 319 (1949). The consistency of the department's position on these matters is reflected in the fact that Attorney General William P. Rogers submitted the Wolkinson material, largely verbatim and wholly without attribution, in a memo to Congress. Freedom of Information and Secrecy in the Government: Hearing on S. 921 and the Power of the President to Withhold Information from the Congress Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary, 85th Cong., 2d Sess. 52-54 (1958) (letter from Attorney General William P. Rogers to Senator Thomas C. Hennings, Jr. (March 13, 1958)); see also Rogers, Constitutional Law: The Papers of the Executive Branch, 44 A.B.A. J. 941 (1958).

74. Letter to the Secretary of Defense, PUB. PAPERS 483 (May 17, 1954) (directing him to withhold certain information from the Senate Committee on Government Operations).
The evidence suggests that this idea did not come from the
President's lawyers but that it represented, instead, one of those "principles
of organizational leadership" that Dwight Eisenhower had brought with
him from his career in the military.76

Three things should be noted about Eisenhower's assertion of the privilege.
First, the privilege was not initially asserted in court, but rather in the
political arena. Moreover, that initial use was in connection with a contre-
temps in which the President's assertion of executive privilege was popu-
larly—even uncritically—received. Second, the source of that assertion was
the military culture in which Dwight Eisenhower had spent almost his entire
adult life. Third, once the deliberative rationale was offered and accepted,
it spread like wildfire.77 By 1958, the persuasiveness of this rationale had

75. Id. at 483-84.
76. Eisenhower's views on the responsibilities that a commander owes to his subordinate
are related to his thinking about military leadership. During World War II, he wrote to Lord
Mountbatten on the occasion of Mountbatten's appointment as Supreme Commander of the
Southeast Asia Theater:

[W]hen the time comes that [the supreme commander] himself feels he must
make a decision, he must make it in clean-cut fashion and on his own respon-
sibility and take full blame for anything that goes wrong; in fact he must be
quick to take the blame for anything that goes wrong whether or not it results
from his mistake or from an error on the part of a subordinate.

S. AMBROSE, THE SUPREME COMMANDER: THE WAR YEARS OF GENERAL DWIGHT D. EISENHOWER
224 (1970). Similarly, in explaining why he regarded George Marshall as having the leadership
characteristics of a "great soldier," Eisenhower praised him as "quick, tough, tireless, decisive
and a real leader. He accepts responsibility automatically and never goes back on a subordi-
nate." Id. at 50.

Further evidence that the deliberative rationale had its origins in Eisenhower's military career
can be found in the particular language he used in speaking about the matter. It was a matter
between "a staff officer" and "his chief," D. EISENHOWER, MANDATE FOR CHANGE 328 (1963);
between a "commander" and "his subordinates," E. RICHARDSON, THE PRESIDENCY OF DWIGHT
D. EISENHOWER 84 (1979) (News Conference Remarks, July 6, 1955); and between a "superior
and his subordinates." F. GREENSTEIN, THE HIDDEN HAND PRESIDENCY (1982). Similarly, some
months before the McCarthy matter came to a head in May, Eisenhower had issued a
"Personal and Confidential" memorandum to all department and agency heads concerning
the need to protect subordinates from Senator McCarthy. It contained the exhortation that:

Each superior, including me, must remember the obligations he has to his own
subordinates. These obligations comprise, among other things, the protection of
those subordinates, through all legal and proper means available, against attacks
of a character under which they might otherwise be helpless. . . . No hope of
any kind of political advantage, no threat from any source, should lead anyone
to forsake these principles of organizational leadership.

Id. at 193-94 (footnote omitted).

77. Once articulated, this deliberative rationale spread quickly within the executive branch.
Eisenhower repeatedly invoked it and executive agencies came to rely heavily upon the May
17 letter as primary authority for keeping secrets. See, e.g., Eisenhower's invocation of the
rationale during the Dixon-Yates controversy; see also H.R. REP. No. 1461, supra note 54, at
3-12 (responses to the 1955 questionnaire and the 1955-56 testimony on the amendment of the
Housekeeping Act).

Even the lawyers, after initially ignoring it, began to include it in their arguments. In 1958,
the government argued the rationale, based solely on the Eisenhower statement, to the Court
become something that at least one legal commentator already took for granted.\textsuperscript{78} When the executive placed this argument before the Court of Claims—citing as authority nothing but the British House of Lords and Eisenhower's May 17 letter—the deliberative privilege entered easily into the jurisprudence of the federal courts.

\textbf{D. Congress Amends the Housekeeping Act, 1958}

In 1958, participants in the still-young "freedom of information" movement\textsuperscript{79} succeeded, despite executive opposition, in securing an amendment that limited the scope of the Housekeeping Act.\textsuperscript{80} The statute had

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\textsuperscript{78} By 1957, Professor Bishop could remark that it seemed odd that earlier evidence treatises had overlooked it. Bishop, \textit{supra} note 3, at 477.

\textsuperscript{79} The freedom of information movement had its origin in the concerns that certain members of the print media felt over censorship and threats to press freedoms in other countries in the period immediately following World War II. The American Society of Newspaper Editors (ASNE) first became involved in this issue in 1943, G. Kennedy, \textit{Advocates of Openness: The Freedom of Information Movement 17} (August 1978) (Ph.D. dissertation published on demand by Univ. Microfilms Int'l, 300 N. Zeeb Rd., Ann Arbor, MI 48106), and formed its Committee on World Freedom of Information in 1948, \textit{Id}. at 24.

During the earliest period of the Cold War, ASNE also became involved in opposing various domestic initiatives that adversely affected the media's access to governmental information. \textit{Id}. at 21-25. One of these involved its opposition to a regulation issued by the Veterans Administration, pursuant to President Truman's 1947 loyalty program, that forbade as "disloyal" the unauthorized disclosure of any information "which, although not endangering the national security, would be prejudicial to the interests or prestige of the nation, any governmental activity, or any individual, or would cause administrative embarrassment or difficulty."

\textsuperscript{80} In about 1950, the freedom of information movement had begun to organize against what it perceived to be excessive secrecy on the part of the federal executive. The movement originated in certain parts of the national media and soon found allies in Congress, the most important of whom was Congressman John Moss. Its initial campaign was in two parts, one conducted in the arena of public education and the other, in Congress, directed toward an amendment limiting the scope of the Housekeeping Act. The movement was specifically concerned that the statute was being used to shield thoroughly routine documents—"papers pertaining to the day-to-day business of Government which are not restricted under other specific laws nor classified as military information or secrets of state." H.R. Rep. No. 1461, \textit{supra} note 54, at 1.

Those who sought this amendment saw themselves less as seeking to modify the doctrine or the effect of \textit{Touhy} than as seeking to modify the day-to-day behavior of the executive, behavior that took place generally outside the courts and that often involved executive assertions of privilege against Congress. Nevertheless, the movement sought changes that would eliminate Justice Reed's argument that the Housekeeping Act might be a basis for asserting a broad executive privilege. The proponents of the amendment clearly saw certain kinds of government secrets as antithetical to good government. Thus, the House Committee charged that "[t]he executive departments and agencies and some of their employees have used [the Housekeeping Act] to cover up their own shortcomings." \textit{Id}. at 14. Lower levels of secrecy would lead to higher levels of accountability which, in turn, would lead to more effective government. \textit{See}
previously authorized the head of each executive department to "prescribe regulations, not inconsistent with law, for ... the custody, use, and preservation" of the department's "records" and "papers." To that language was now added the proviso that "[t]his section does not authorize withholding information from the public or limiting the availability of records to the public." By this Act, Congress eliminated any broad privilege-in-effect that might have been approved by Justice Reed's decision in *Touhy*. It also eliminated the possibility that the executive might one day persuade the judiciary to read this statute as authority for the kind of omnibus privilege—as broad as the executive's notion of the public interest—that the House of Lords had granted to the British Crown, and that Justice Reed had seemed ready to grant to the federal executive.

E. The Privilege Adopted in the Court of Claims:
The Kaiser Decision, 1958

The general deliberative privilege was first approved by a United States federal court in 1958 when the Court of Claims decided *Kaiser*. That decision was written by Justice Stanley Reed who had, since writing the majority opinion for the Supreme Court in *Touhy*, retired from the high court and accepted a seat, by designation, on the Court of Claims.

The Court of Claims has been unique among federal courts both for its general resistance to the liberalization of discovery and for its historical penchant for granting asymmetric advantages to the federal executive. Regarding the former, this court has remained about forty years behind the district courts. Thus, for instance, depositions have been freely available in the district courts since 1938—without leave of court, without regard to whether the deponent was a party or a non-party, and without regard to whether the deposition was being taken for purposes of evidence or for purposes of discovery. In the Court of Claims, it was not until 1964 that

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*id.* at 2.

This first freedom of information campaign was conducted through numerous initiatives including the publication of Harold Cross' *The People's Right to Know*, *supra* note 3, and a series of highly visible hearings held by Moss' congressional committee during 1955. H.R. *Rep.* No. 1461, *supra* note 54, at 3-11. Throughout, the proponents of open government sought to publicize the degree and circumstances of government secrecy as well as particular allegations of abuse.

82. *See supra* notes 46-54 and accompanying text.
83. 157 F. Supp. at 944, 946.
84. 8 C. WRIGHT & A. MILLER, *supra* note 3, at 361-64 & 364 nn.1-2 (discussing Federal Rule of Civil Procedure 30 and setting out all forms taken by the rule since its adoption in 1938).
depositions could be taken for purposes of discovery\textsuperscript{85} and not until 1982 that they could be taken without leave of the court.\textsuperscript{86} The same kind of generational lag can be found in connection with written interrogatories,\textsuperscript{87} document demands,\textsuperscript{88} and requests for admission.\textsuperscript{89}

The Court of Claims' attitude toward discovery against the federal executive was not just restrained but asymmetric. This is a court that has only one job—to hear claims brought against the federal executive. At this time in its history it was still an article I court. For reasons that were probably related to its specialized function and its relatively low status, it seems fair to say that it was dominated by—or at least extraordinarily attentive to—the interests of the federal executive. The clearest example of this is to be found in the rules governing the discovery of documents. Until the early 1950s, the only way a plaintiff in the Court of Claims could secure pre-trial discovery against the government was through the "call rule."\textsuperscript{90} That rule permitted the discovery of non-privileged information or papers but it also provided that, when the discovery is sought against the government, "the head of any department or agency may refuse to comply with [the] call issued pursuant to this subsection [i.e., the document request] when, in his opinion, compliance would be injurious to the public interest."\textsuperscript{91} Thus, while discovery against the private plaintiff was compulsory, the government enjoyed a broad option to decline compliance with discovery

\textsuperscript{85} The 1957 rules of the Court of Claims permitted depositions to be taken only for purposes of preserving evidence. Ct. Cl. R. 29. The 1964 rules permitted, for the first time, depositions to be taken for purposes of discovery. Ct. Cl. R. 30.

\textsuperscript{86} Compare the 1982 Rules of the Federal Claims Court, Ct. Cl. R. 30 (a) (no requirement of leave of court) with the strict requirements of the 1969 rules, Ct. Cl. R. 74, or the 1957 rules, Ct. Cl. R. 29.

\textsuperscript{87} In the federal district courts, written interrogatories have been available without leave of court since the adoption of the Federal Rules of Civil Procedure in 1938. 8 C. WRIGHT & A. MILLER, supra note 3, at 481-82 & nn.1-2 (setting out all forms taken by the rule since its adoption in 1938). In the Court of Claims, written interrogatories first became available on leave of the court in 1982. See Ct. Cl. R. 73 (1969); Ct. Cl. R. 33 (1982).

\textsuperscript{88} Under the federal rules, document discovery has been available, on a showing of good cause, since 1938. The requirement of good cause was dropped as to discovery against third parties in 1948 and, in 1970, as to discovery against parties to the litigation. 8 C. WRIGHT & A. MILLER, supra note 3, at 582-83 & nn.1-2. In the Court of Claims, document demands with leave of the court were not available until 1964 and document demands without leave of the court did not become available until 1982. Ct. Cl. R. 40(a) (1964); Ct. Cl. R. 34 (1982). This discovery device is different from a subpoena duces tecum issued in connection with a oral deposition.

\textsuperscript{89} Requests for admission without leave of court have been available under the federal rules since 1938. 8 C. WRIGHT & A. MILLER, supra note 3, at 700-02 & n.1 (setting out all forms taken by the rule since its adoption in 1938). In the Court of Claims, they became available on leave of the court in 1963, Ct. Cl. R. 42(a), and without leave of the court in 1982. Ct. Cl. R. 36(a).


\textsuperscript{91} Id. § 2507(a).
requests coming from the private plaintiff. Even the official history of the Court of Claims concedes that this arrangement "gave the Government, always the defendant in the court, an obvious lopsided advantage in discovery." An effort was made, beginning in 1947, to revise the rules of the Court of Claims in order to close the gap between its discovery provisions and those of the federal rules of civil procedure and to bring the discovery rights of the private plaintiff into better balance with those of the government defendant. Thus, the rules of the Court of Claims were twice modified, once in 1951 to incorporate the subpoena power contained in Federal Rule of Civil Procedure 45 and again in 1953 to incorporate, subject to a number of weakening modifications, the general discovery provisions of the federal rules. In response, the executive mounted and sustained a vigorous campaign to defend the asymmetrical prerogatives that it had historically enjoyed in this court. Its first two lines of defense proved insufficient; the Kaiser decision tested its third.

First, the executive argued that the "call rule" was the sole and exclusive authority by which the court could secure the production of government documents and that, accordingly, the newly authorized subpoena duces tecum must be understood as available for use by the government but not by the private plaintiff. This argument was rejected first by the Court of Claims and then by Congress. Next, the executive sought to regain the ground that it had lost by working within the new discovery rules. Those rules, like the civil rules on which they were modelled, limited discovery to material "not privileged." Thus, the executive claimed that the plaintiff's right of discovery was subject, through this "not privileged" language, to

94. 1964 Ct. Cl. R. iii.
95. 1964 Ct. Cl. R. iv; Evans, Current Procedures in the Court of Claims, 55 Geo. L.J. 422, 424 n.11 (1966) (Evans was a member of the Court of Claims Committee on Rules beginning in 1950 and served as chairman of the Committee beginning in 1959. Id. at 422 (biographical information)).
96. W. Cowen, P. Nichols & M. Bennett, supra note 93, at 106.
97. The first of those revisions incorporated, with modifications, large segments of the Federal Rules of Civil Procedure but, while it included the subpoena power provided in Federal Rule of Civil Procedure 45, it did not include the other discovery provisions of the federal rules. 118 Ct. Cl. 25, 25-38 (1951). The 1953 revisions incorporated those discovery rules subject to a number of weakening provisions. 126 Ct. Cl. 26 (1953).
100. Rule 38(a)(1) of the 1964 rules defines the "scope of discovery" by explaining that "[a]ny method of discovery authorized by these rules may be directed to any relevant matter not privileged."
the government’s right under the old call rule to refuse to produce documents that, in its unreviewable judgment, ought not to be disclosed. The attempt to preserve prerogatives by converting them into privileges was, in 1955, rejected by the Court of Claims.

Finally, in Kaiser, the government sought to retain most of the benefits it had enjoyed under the call rule by arguing that the “not privileged” language incorporated not the government’s prerogatives under the call rule—for that rule had been displaced by the new provisions—but a common law privilege that, as fortune would have it, granted the executive virtually all the prerogatives it had enjoyed under the old, asymmetric regime. The case involved the plaintiff’s post-war purchase of three aluminum plants from the Liquidator of War Assets and its claim that the government had breached the most-favored-basis provision of its purchase agreement. The plaintiff originally sought discovery under the call rule but the executive exercised its prerogative under the rule and refused to produce. The plaintiff resubmitted its request under the newly adopted discovery rules. The executive then claimed privilege and refused to permit the commissioner to inspect the documents for purposes of validating the claim. The commissioner recommended sanctions and the government appealed to the court.

In writing the court’s decision in Kaiser, Justice Reed took what might be regarded, in the contexts of the Court of Claims and of the extremity of the executive’s claims, as a moderate position. He approved the deliberative privilege while rejecting the executive’s claim that it was the sole

101. The government “took the position that the words ‘not privileged’ could not be given their customary meaning, as understood in the law of evidence, in relation to departments and agencies of the Government, but must be construed only to mean not privileged according to determination by the head of the department or agency.” Evans, supra note 95, at 429.

102. Benson v. United States, 130 F. Supp. 347 (Ct. Cl. 1955). The government continued to argue this position for at least three years after its loss in Benson. In its argument to the Court of Claims in Kaiser, the government made plain that it was not abandoning this position. While acknowledging that its position had been rejected in Benson, it “reasserted” this argument “with the respectful request that the Court reconsider its decision in that case.” Defendant’s Motion for Reconsideration of Order Requiring Production (No. 102-54) at 6 n.2, Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958) (available from the Office of the Clerk of the U.S. Court of Claims in Washington, D.C.) [hereinafter Defendant’s Motion].

103. The government argued first that it enjoyed, under the law of evidence, a privilege for all documents, including all deliberative documents, the disclosure of which would be contrary to the public interest. Then the government asserted that under the law of evidence the executive had the sole and unreviewable discretion to decide what documents were in the public interest. See Defendant’s Motion, supra note 102. This position would have restored all the prerogatives that the government had enjoyed under the call rule.

105. Id. at 942-43.
106. Id.
107. Id. at 943-44.
judge of the validity of its assertion of the privilege in particular cases.\textsuperscript{108} What is interesting for this Article's purposes is Reed's approval of a privilege that had never been approved previously by a federal court. In doing so, he relied on the House of Lord's decision in \textit{Duncan}\textsuperscript{109} and on the short form of the deliberative rationale that asserts that the disclosure of documents will chill future deliberations and thus impede effective administration.\textsuperscript{110} He also offered an argument, based on sovereign immunity, that the executive "must" enjoy this privilege because the "[g]overnment from its nature has necessarily been granted a certain freedom from control beyond that given to the citizen."\textsuperscript{111} And finally, he deduced the privilege from a reading of the \textit{Morgan}\textsuperscript{112} decision that ignored the Supreme Court's explanation that its decision was warranted by the "quasi-judicial" nature of the cabinet secretary's deliberation. Reed thus extended that rule to cover all decisionmaking by the executive.\textsuperscript{113}

Within the Court of Claims, Justice Reed's decision had the immediate effect of restoring to the executive most of the asymmetric advantages it had enjoyed when the call rule had been the only means of securing the discovery of documents. In that respect, the decision substantially undid the reforms by which the Court of Claims might otherwise have eliminated the government's lopsided advantage in the conduct of discovery.

Beyond the Court of Claims, the effect of Reed's decision would depend entirely upon the readiness of the general federal courts to follow his lead. If they were to do so, the doctrine he established would restore to the executive most of the privilege-in-effect that it had enjoyed under the Housekeeping Act. In that way, it would undo what the Congress had done when it amended the Housekeeping Act to preclude the executive's claim that the statute granted it the authority to keep secrets. Further, if the

\textsuperscript{108} The court's decision granted the first but not the second of the government's claims as set out \textit{supra} in note 103. And in at least one sense, the court granted \textit{more} than the government had sought. The government's argument had, with some care, centered upon the claim that a privilege existed for the intra-agency advice that had been provided to "Cabinet officials and agency heads." Defendant's Motion, \textit{supra} note 102, at 8. Justice Reed's decision ignored that limitation, went further than was necessary to decide the \textit{Kaiser} case, and established a privilege for all "confidential intra-agency advisory opinions." \textit{Kaiser Aluminum}, 157 F. Supp. at 946.

\textsuperscript{109} [1942] App. Cas. 624; \textit{see also} \textit{supra} notes 40-45 and accompanying text.

\textsuperscript{110} Justice Reed's enthusiasm for this argument pales compared to that of the government defendant. Justice Reed's views were that the government had argued that, without the general deliberative privilege, government officials "could not obtain advice" and that "[i]t is plain common sense that Government as we know it would all but stop functioning." Defendant's Motion, \textit{supra} note 102, at 8-10.

\textsuperscript{111} \textit{Kaiser Aluminum}, 157 F. Supp. at 946. He further asserted that the prerogatives of the sovereign warrant such an evidentiary privilege even though the government has consented to be sued. \textit{Id}.

\textsuperscript{112} \textit{Morgan IV}, 313 U.S. 409 (1941); \textit{Morgan II}, 304 U.S. 1 (1938); \textit{see also} \textit{supra} notes 55-70 and accompanying text and \textit{infra} notes 215-35 and accompanying text.

\textsuperscript{113} \textit{Kaiser Aluminum}, 157 F. Supp. at 946.
general federal courts were to follow Reed's lead, the doctrine he had established would grant the executive most of the "public interest" privilege that the executive had sought in *Touhy* and that Justice Reed, though not the Supreme Court as a whole, had seemed ready to grant.

The next episode in this history reveals the wholesale adoption of Reed's privilege by the federal district courts and the courts of appeal. At this juncture three points should be noted. One is that, if the executive had been successful with either of the first two arguments by which it sought to preserve the prerogatives it had historically enjoyed in the Court of Claims, its victory would have been confined to that court. Because the executive lost the first two rounds but won the third, its victory proved magnificently exportable.

The second point is that, notwithstanding what actually happened next, there was good reason why this privilege might not have made its way from the Court of Claims to the district courts. These reasons include the facts that the Court of Claims was, at that time, a decidedly marginal court and that Reed's arguments were not particularly strong. Still more striking though, is the fact that *Kaiser* was a single battle in a larger war over whether the federal executive would continue to enjoy prerogatives in the Court of Claims that were greater than those that it enjoyed in the district courts. The argument that, because the Court of Claims granted this privilege to the executive, the district court must then modify its rules to conform to those in the Court of Claims is, to say the least, less than compelling.

The third point is that the text of the *Kaiser* opinion has two different meanings depending upon whether it is read strictly within the context in which it was decided. Within its context, the meaning of the text is "Justice Reed, retired, imposes a compromise to end a decade of wrangling over whether the government shall continue to enjoy the idiosyncratic prerogatives that it has historically enjoyed in the Court of Claims." Lifted out of its context, the same text may be read instead to mean "Justice Reed, retired, approves the general deliberative privilege for use in the federal courts." It now seems clear that the power of this text to project the general deliberative privilege into the federal district courts has been considerably enhanced by the fact that there is nothing within the text that forces its contextualization and that those who litigate in the general federal courts know almost nothing about the Court of Claims. Thus, *Kaiser* has been read exactly as if it had been decided by a federal district court. Only the government was knowledgeable about both bars, and it was the clear beneficiary of the non-contextual reading of *Kaiser*.

F. *Kaiser* is Followed and Elaborated Upon in the General Federal Courts

Since *Kaiser* was decided in 1958, the general deliberative privilege has spread from the Court of Claims to the federal district courts and circuit
courts of appeal. Moreover, in the large number of decisions written by the
general federal courts in the last 30 years, the question of whether there
ought to be a privilege has received only the most perfunctory and stylized
attention. All the serious energies of the courts have, instead, gone into the
development of rules related to the application of the privilege.

The propriety of the privilege itself has generally not been the subject of
serious examination or inquiry but only of short, conclusory recitations.
Most courts have confined themselves to a simple citation to one or more
of what have come to be regarded as the leading cases dealing with this
privilege. Those few courts that go further in the direction of instrumental
analysis have done no more than to offer a short, epigrammatic quote from
one of the leading cases. Invariably, these epigrams are nothing but an
uncritical recitation of the claim that disclosure in the course of litigation
will diminish the effectiveness of future deliberations and thus do injury to
the public interest. Finally, a certain number of courts have gone still further
and offered, without elaboration, their view that the general deliberative
privilege is either authorized or supported by some body of authority external
to the common law of judicial privilege. Thus, courts have invoked such
bodies of authority as the separation of powers, the Morgan doctrine, the
Freedom of Information Act and cases decided under that act, and
proposed—but rejected—Federal Rule of Evidence 509. In the end, these
courts have taken entirely for granted the conclusion that this privilege
exists and that its continued existence is fully warranted. While they have
sometimes gone through certain of the motions that might be associated
with the exercise of judgment, the federal district courts and courts of
appeal have not identified or probed any of the weaknesses in the deliberative
rationale or in the proffered arguments from external authority.

The efforts of the federal courts with regard to the rules governing the
application of this privilege have, however, been prodigious. They have
defined the scope of the general privilege both in terms of the communica-
tions to which it applies and to the litigation circumstances in which it
may be raised. Thus, the federal courts have confined the privilege to those
communications that seem most vulnerable to chilling and, at least some-
times, they have disallowed the privilege in those litigation circumstances in
which it is most likely to cause serious injustice. The courts have also
imposed demanding procedural requirements on the executive, requiremen
that were borrowed from Reynolds\textsuperscript{120} and, before that, Duncan.\textsuperscript{121} According to these requirements, the privilege must be asserted through an affidavit from the head of the executive agency on the basis of his personal review of the documents in question, the documents must be identified with particularity, and the agency head must provide a clear statement of the need for confidentiality.\textsuperscript{122} Finally, the courts have adopted a decisional process that appears sensitive to the needs of justice. Thus, on the basis of the executive's particularized submission, the court claims to balance the relevant factors—including the discovering party's need for the evidence and the risk that disclosure will lead to chilling—and determine whether the claim of privilege ought to be sustained.\textsuperscript{123}

The procedural regime established in Duncan and adopted in Reynolds was designed to protect military secrets even from the judge. When those rules were imported as a rule of application for the general deliberative privilege, they were imported into an arena that was different in important respects from the arena of military secrets. With regard to the general deliberative privilege, the need for secrecy is inherently weaker. The interest in avoiding embarrassments that chill is much more easily confused with "advantage in litigation" than is concern to protect military secrets, and the secrecy justification for relying on the representations of the executive and refusing disclosure even to the court is virtually non-existent. If, in the realm of the general deliberative privilege, the courts have fashioned a decisional process that relies heavily on the representations of the party seeking to avoid disclosure, the justification for such a process must rest on judicial efficiency and not the need to keep these deliberations secret even from the judge.

Each of these procedural requirements has a purpose, although it is not clear how likely the procedures are to satisfy those purposes. Thus, the requirement of participation by the agency head is likely to improve the integrity of the system or restrain the frequency with which the privilege has been asserted only if the agency head is either more principled or less committed to winning than is his lawyer. The requirement that the documents be identified with specificity probably has made it easier for the parties to narrow the controversy, for the parties seeking discovery to make their case concerning their need for particular documents, and for the courts to assess that statement of need. Finally, the requirement that the agency head provide a clear statement of the need for confidentiality has brought the courts nothing but rote, boilerplate recitations of the deliberative ra-
tionale. There is certainly no evidence that agency heads have ever shown any ability to distinguish between those deliberative documents that are likely to chill future communications and those that are not.

As to the balancing process, what the courts have done appears roughly to have been as follows. First, they accept the executive's contention that disclosure in the course of judicial proceedings will injure the public interest through chilling executive deliberations. They then grant discovery if and only if the party seeking discovery shows serious countervailing interests. This normally means that the party seeking discovery must show that the documents in question are not just otherwise discoverable but that they are demonstrably important to her case. Sometimes, in cases of government misconduct, the court may also take account of the public's right to know. What is important to note, however, is that while balancing of this kind may eliminate the most serious injustices that might result from an absolute privilege, the courts are not conducting a case-by-case assessment of the seriousness of the risk that disclosure will cause injury to the public interest. Throughout this balancing process, that proposition is taken as having been established.

The good news is that the scope of the privilege has been confined so that it does not extend to those communications where the deliberative rationale cannot sensibly apply. Moreover, the procedural requirements and the balancing process appear to have created a situation that minimizes the likelihood that egregious injury will be done by the application of the privilege. The bad news, however, is that the courts have taken for granted that the deliberative rationale is coherent and persuasive and, more generally, that there is warrant for the continued existence of this privilege. Unfortunately, the procedural requirements and the balancing process have not, in practice, eliminated quite so many problems as one might have hoped.

G. The Freedom of Information Act

The enactment in 1966 of the Freedom of Information Act (FOIA) was the second and larger victory for the open-government movement that had, eight years earlier, amended the federal Housekeeping Act to limit its use as authority for secret-keeping by the executive. As before, the proponents of change were a combination of those in the media and those in Congress who, for separate reasons, shared an interest in limiting what they regarded as overly aggressive claims of secrecy by the executive. Predictably, the executive opposed this initiative, both before and after enactment of the statute. Enactment of FOIA was based on the general premise that governments, especially democracies, function most effectively when they function openly and are, by virtue of that openness, held accountable for their
actions. The principle is a mirror image of the rationale for executive secrecy as it had been explained by the House of Lords, by President Eisenhower and by the retired Justice Reed.

By its terms, FOIA mandates that, in response to requests properly made, each federal agency "shall make available to the public" a wide array of information and agency records. This obligation is, in turn, subject to nine specified exemptions for, among other things, documents related to national defense, trade secrets and law enforcement investigations. Exemption five excludes from the general obligation of disclosure those "inter-agency or intra-agency memorandums or letters which would not be available by law" to a non-governmental party in litigation with the agency.

The relationship between, on the one hand, FOIA and its exemption five and, on the other hand, the general deliberative privilege has several dimensions. First, and most generally, the enactment of FOIA is, like the privilege, a chapter in the continuing contest between those who favor secrecy in government and those who favor disclosure. Second, exemption five incorporates into its administrative regime a number of judicial privileges enjoyed by the federal executive—in whatever form the courts may have given them at the time of the FOIA request. These incorporated privileges include, among others, the attorney-client privilege and the general deliberative privilege. Thus, there has been occasion for a great many FOIA courts to apply, if not necessarily to assess, the general deliberative privilege.

124. The Senate Report begins a section captioned "Purpose of Bill" by quoting James Madison to the effect that "[K]nowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prelude to a farce or a tragedy or perhaps both." FREEDOM OF INFORMATION SOURCE BOOK, S. Doc. No. 82, 93d Cong., 2d Sess. 37-38 (1974) [hereinafter SEN. FOIA SOURCE BOOK]. The report then explains that the Act is, among other things, meant to "establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." Id. at 38. Less felicitously, the House Report declares that "[a] democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies." Id. at 33.

In signing the bill, President Johnson explained that "[t]his legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits." Id. at 1.

Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives.

126. Id. § 552(b).
127. Id. § 552(b)(5).
128. See infra note 248 and accompanying text.
Finally, it has been argued that, through the enactment of exemption five or through the Supreme Court decisions interpreting that exemption, Congress or the Court has either authorized or expressly approved the general deliberative privilege. As I explain later in this article, these claims are unwarranted.

H. The Proposed Rules of Evidence

The next controversy involving the general deliberative privilege arose in the drafting and enactment, from 1965 through 1973, of the Federal Rules of Evidence. This is a story of high-stakes advocacy and by the end, it became entangled in the rich intrigue of Watergate. Ultimately, though, it is only the broad outline that is necessary for this work.

The Federal Rules of Evidence were drafted by an Advisory Committee to the Judicial Conference of the United States. The Committee produced a preliminary draft in 1969 and a revised draft in 1971, both of which were made available for public comment. It then prepared a revised, final draft that was transmitted to the Supreme Court. The Court promulgated those rules in November 1972 and submitted them to Congress under a statute that made those rules effective unless vetoed by Congress. The Department of Justice was a central participant in the process and clearly sought to protect, to codify and, if possible, to expand the range of evidentiary privileges that were available to the executive branch. Nevertheless, when it came to the general deliberative privilege, the Advisory Committee rejected both the Department's proposed expansion of the privilege and the entire privilege as it then existed at common law.

129. See infra notes 250-53.
130. See infra notes 245-53 and accompanying text.
131. Id.
136. See Berger, supra note 135. The Justice Department's objections to the Advisory Committee's handling of the general deliberative privilege appear in a memorandum that accompanied the August 9, 1971 letter from Deputy Attorney General Richard Kleindienst to the Chairman of the Rules Committee. Both documents can be found in 117 CONG. REC. S33648-57 (daily ed. Sept. 28, 1971). For his part in the Watergate affair, Mr. Kleindienst pleaded guilty to not testifying fully before the Senate Judiciary Committee. Berger, supra note 135, at 748 n.5.
137. In both the preliminary (1969) and the revised (1971) drafts, proposed rule 509 dealt only with "military and state secrets" and no other provision might be said to extend to the general deliberative privilege. This omission would have had the effect of eliminating this
Then, when the Advisory Committee had all but completed its work and Watergate was beginning to influence the situation, a powerful congressional ally of the White House announced that, unless the Advisory Committee proved more attentive to the advice it was receiving from the Department of Justice, he would press forward with newly introduced legislation that would eliminate the rule-making powers of the Supreme Court and, through the Court, the Judicial Conference and its Advisory Committees. The Advisory Committee saw the light and chose to capitulate. Thus, it withdrew its objection and endorsed verbatim the entirety of the executive's proposal to expand and codify the general deliberative privilege through what became proposed rule 509.

At this point, the executive's fortunes changed and what had been won by bullying the experts on the Advisory Committee was lost in the throes of Watergate. The House Judiciary Committee was offended by what it regarded as inappropriate political interference with the work of the Advisory Committee, and would not approve the expansion or codification of a form of executive privilege that was not supported by a strong showing of need and that seemed potentially unlimited in its scope and, thus, in its privilege except as it might be otherwise required by the Constitution or by statute. See rule 501 of the revised draft, 51 F.R.D. at 356.

In its published comments to the revised draft, the Committee made clear that the omission was intentional. See the Advisory Committee's notes to the revised draft, 51 F.R.D. at 377-78 (standards of relevance sufficient to protect the government's legitimate interests).

138. The White House ally was Senator John McClelland, who chaired the subcommittee that controlled appropriations for the federal judiciary and the Judicial Conference. McClelland came to believe that the executive ought to have its "official information" privilege and, to underscore this point, he introduced the Court Practice Approval Act, a piece of legislation that would have all but eliminated the rule-making authority of the Supreme Court and the Judicial Conference. S. 2432, 92d Cong., 1st Sess., 117 Cong. Rec. 29893 (1971). He then made it clear that if the Advisory Committee did not accede to the suggestions that he and the Justice Department were making, both these rules of evidence and the entire future of judicial rule-making would be in grave jeopardy. If, on the other hand, the rules were to become what McClelland euphemistically called "less controversial," he would be prepared to defer action on his Court Practice Act. 117 Cong. Rec. 33641-42 (1971).

139. The Advisory Committee got the message. Its leadership met with Senator McClelland and expressed a willingness to accommodate his suggestions. Berger, supra note 135, at 756 & n.50. According to McClelland's account:

the chairman of both the standing committee and the Evidence Committee and the reporter for the rules were kind and generous enough to meet with me here in Washington . . . . [W]hat they said to me need not bind their colleagues on the standing committee but they did express a willingness to take to the committee a number of additional modifications and clarifications . . . ."


When the Committee sent its revised final draft to the Supreme Court in December, 1971, the draft omitted the Committee's previously stated objection to the privilege and provided—for the first time—an executive privilege for "official information." 2 J. Weinstein & M. Berger, supra note 3, ¶ 509[01], at 509-24. Because this provision appeared for the first time in the Committee's third and final draft, it was never subjected to public comment.

140. All the operative language in the proposed rule came from the Department's draft. See supra note 133.
potential for abuse.\textsuperscript{141} The firestorm surrounding proposed rule 509 was ultimately quenched by a compromise under which all of chapter 5—all the rules concerning privilege—were deleted in favor of a short statement that these matters would be left to development under common law.

In the end, things looked very much the way they had looked before the process had begun. All that had happened was that, for a short time before their rejection by Congress, the executive's grandest hopes had been embodied in proposed rule 509 and had secured the formal support of an Advisory Committee that had been subjected to the strongest form of political coercion. As shall be shown, however, some would soon be arguing that these events provided warrant for the continued existence of the general deliberative privilege.\textsuperscript{142}

\textbf{I. The United States Supreme Court: The Nixon Cases, 1974 and 1977}

As has been shown, the development of the executive privilege in the United States Supreme Court proceeded through increments that were, in each case, a narrow and well-justified slice of the much broader privilege that the executive would plainly have preferred. The first of these involved quasi-judicial deliberations,\textsuperscript{143} the second military and state secrets\textsuperscript{144} and the third, the identity of informers.\textsuperscript{145} By the mid-seventies, the Watergate crisis, having already provided the background against which the fate of proposed evidence rule 509 was determined, provided the occasion for the Court to expand the executive privilege through the addition of another narrow slice of doctrine, this one a "presumptive" privilege for presidential communications.

The question first arose in \textit{United States v. Nixon},\textsuperscript{146} a 1974 decision dealing with the efforts of the Watergate special prosecutor to secure President Nixon's infamous tapes through the issuance of a third-party criminal subpoena against the President. The question arose again in \textit{Nixon v. Administrator of General Services},\textsuperscript{147} in which then-ex-President Nixon challenged Congress' efforts to preserve government custody of all of Nixon's presidential papers through the Presidential Recordings and Materials Preservation Act. The rule established by these decisions was that

\begin{itemize}
  \item \textsuperscript{141} J. Weinstein & M. Berger, supra note 3, at viii.
  \item \textsuperscript{142} Id.; see also infra note 236 and accompanying text.
  \item \textsuperscript{143} See Morgan IV, 313 U.S. at 409; Morgan II, 304 U.S. at 1; see also supra notes 55-60 and accompanying text & infra notes 215-35 and accompanying text.
  \item \textsuperscript{144} Reynolds, 345 U.S. at 1; see also supra notes 61-67 and accompanying text.
  \item \textsuperscript{145} Roviaro v. United States, 353 U.S. 53 (1957); see also supra notes 68-70 and accompanying text.
  \item \textsuperscript{146} 418 U.S. 683 (1974).
  \item \textsuperscript{147} 433 U.S. 425 (1977).
\end{itemize}
presidential deliberations were presumptively privileged but that, in the right circumstances, that presumption could be overcome.

The relationship between the *Nixon* cases and the general deliberative privilege is, in certain respects, at the heart of the inquiry into whether there is authority or justification for that privilege. Some will argue that the *Nixon* cases authorize the existence of the general deliberative privilege. I will argue instead, that the privilege approved by these decisions is carefully and clearly limited to communications involving the President.\(^{148}\) I will also argue that these cases actually support the case against the general deliberative privilege. This argument rests on the Court’s language about the costs of granting evidentiary privileges and about the burden that must be borne by the proponent of such a privilege. I will further argue that these decisions support the case against the privilege through the position the Court takes on the separation of powers—that the Constitution does not require airtight separation and that, in matters involving executive privilege, the doctrine of the separation of powers cuts both ways. As to the rationale underlying deliberative privileges—the claim of chilling—the Court in *United States* v. *Nixon* offers clear statements on both sides of the issue and then takes the position that, whatever else may be true, this claim of injury is more general, less direct and weaker than that involved in the other forms of executive privilege that the Court has approved.

**J. Summary**

The general deliberative privilege is still new to the federal courts. It has come to those courts from two quite different places. One was the British House of Lords and the other was Dwight Eisenhower and the ideas about command and “organizational leadership” that he brought with him to the White House from a lifetime in the military. These two tributaries joined at the Court of Claims where the privilege was adopted as a compromise in the struggle over the modernization of that court’s discovery rules and the elimination of the idiosyncratic, asymmetric advantages that the federal executive had long enjoyed in that court. In the Court of Claims, the privilege was propounded by Justice Stanley Reed who thus managed to accomplish in his retirement what he had never been able to accomplish during his tenure on the Supreme Court.

The privilege is a product of historical contingencies and of its being in the right place at the right time. Moreover, it has managed, in all the cases in which it has been applied, to escape full and careful scrutiny.

\(^{148}\) See *infra* notes 186-214 and accompanying text.
III. Arguments For and Against the General Deliberative Privilege

In moving from the history of the general deliberative privilege to its assessment, I address three topics. The first deals with the law and policy concerning the assignment of the burden of persuasion in matters of this kind. The second deals with a series of problems that need to be addressed concerning the instrumental case in favor of the privilege, i.e., the deliberative rationale. And the third assesses the arguments from authority that are being offered in support of this privilege.

A. The Burden of Persuasion

The broad inquiry of this Article is whether the general deliberative privilege ought to exist. This inquiry is conducted according to certain ground rules that are the subject of this section. Among these rules are those that assign the burden of persuasion and that specify the methods by which that burden may be satisfied. According to these rules, the burden of persuasion falls squarely on the proponents of the general deliberative privilege and the interests they must overcome are of the highest order.

As to the question of burden, Sisella Bok has argued persuasively that the right to keep secrets is, as a matter of general moral discourse, a right that requires justification. For its part, the law has made it clear that privileges impose serious costs and that they are the rare exception, not the general rule. Thus, in approaching the question of whether there ought to be a privilege for presidential deliberations, Chief Justice Burger, writing for a unanimous Court, drew on a stable body of thought when he justified the Court's caution. Privileges, he explained, derogate the shared interests in finding truth and doing justice. They impair a litigant's fundamental right to discover and develop all the facts. They operate to "defeat" the "ends of . . . justice" and diminish "the rule of law." They erode "[t]he very integrity of the judicial system and public confidence in the system . . . ." Therefore, they are not to be "lightly created or expansively construed."

151. Under our adversarial system, the opportunity to discover and develop all the facts is "both fundamental and comprehensive." Id. at 709.
152. Id.
153. Id. at 708.
154. Id. at 709. Under our adversarial system, "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts." Id.
155. Id. at 710. To express the caution with which the courts have historically approached questions of privilege, Chief Justice Burger goes on to quote Justice Frankfurter's dissent in
Accordingly, the right to withhold otherwise discoverable information in the course of litigation is a right that must be affirmatively justified. A party who seeks to apply an established privilege to a particular set of circumstances bears the burden of demonstrating that the application is warranted. Similarly, and more to the specific question addressed here, so does a party who argues that some particular privilege ought to exist. The burden of persuasion is therefore on the proponent of the privilege to show that the privilege is of such importance to outweigh these extraordinary interests.

The proponents of the privilege may discharge their burden in a number of ways. If the matter is not resolved by statute or rule, it must be resolved by the courts. Those courts may be persuaded either by instrumental analysis or by arguments from authority. The arguments from authority may, in turn, rely on some body of law external to the law of judicial privilege (e.g., sovereign immunity or the separation of powers) or on someone else’s prior approval of the privilege. For present purposes, though, it is enough to say, first, that the proponents of the general deliberative privilege bear the burden of winning the argument over whether it ought to exist and, second, that there are only a limited number of ways in which that argument might be won.

B. Arguments Based on Instrumental Effects

The purpose of this section is to assess the sufficiency of the instrumental argument—i.e., the argument based on effects—that is conventionally of-

Elkins v. United States, 364 U.S. 206 (1960): "Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Nixon I, 418 U.S. at 710 n.18 (quoting Elkins, 364 U.S. at 234 (Frankfurter, J., dissenting)).

156. 8 C. WRIGHT & A. MILLER, supra note 3, § 2016 & n.68.

157. Id.

158. A 1962 Yale Law Journal Note overstates the matter when it asserts that “[t]he day of new judge-made privileges is apparently over” and that privileges will be created or extended “if at all only through the passage of a statute.” Note, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 YALE L.J. 1226, 1229 n.21 (1962).

159. Wigmore provides the classic formulation of the instrumental test. He wrote that a privilege is properly established only if the proponents of the privilege satisfy the following conditions:

(1) The communications must originate in a confidence that they will not be disclosed.
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 WIGMORE, supra note 3, § 2285 (emphasis in original).
ferred in support of the general deliberative privilege. In probing what has earlier been described as the deliberative rationale, I will first consider certain matters related to the nature of secrecy. Then I will identify and assess a series of problems that, in my judgment, demonstrate that the deliberative rationale is radically incomplete and ultimately unpersuasive. While this section addresses the instrumental argument that has been offered in support of the general deliberative privilege, the section that follows will address the arguments for the privilege that have been made on the basis of legal authority.

1. On the General Nature of Secrecy

The cases dealing with the general deliberative privilege usually speak of the decision on whether to disclose particular documents as a technocratic, value-free judgment. The history of the privilege, however, shows that people on both sides of the question fully understand that something is at stake in addition to the technocratic optimization of management practices.

These other dimensions of secrecy are, in fact, well known to all of us in our own personal and professional lives. For present purposes, I will reduce them to four propositions. First, information, and the control over its flow, is power. As Sissela Bok has written, the ability "to hold back some information about oneself or to channel it and thus influence how one is seen by others gives power; so does the capacity to penetrate similar defenses and strategies used by others."160 Second, because the control of information is power, people and organizations systematically seek, as a matter of self-interest, the right to keep secrets. Thus, Max Weber found that bureaucratic administrations have inherent in them a drive to enhance their power by keeping secrets.161 In light of this self-interest, we should be

160. S. Bok, supra note 149, at 20. She also writes that "[c]onflicts over secrecy—between state and citizen... or parent and child, or in journalism or business or law, are conflicts over power...." Id.
161. He stated that:

Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of "secret sessions": in so far as it can it hides its knowledge and action from criticism.... The tendency toward secrecy in certain administrative fields follows their material nature: everywhere that the power interests of the domination structure toward the outside are at stake, we find secrecy.

From MAX WEBER: ESSAYS IN SOCIOLOGY 233 (H. Gerth & C. Mills eds. 1946), quoted in B. LADD, CRISIS IN CREDIBILITY 216-17 (1968).

Bok explains this matter of self-interest in a way that also sheds light on what she sees as secrecy's inherent tendency to spread:

Aware of the importance of exercising control over secrecy and openness, people seek more control whenever they can, and rarely give up portions of it voluntarily. In imitation and in self-protection, others then seek more as well. Control shifts
at least a little skeptical about the arguments that people and institutions make about their need or right to keep secrets. This skepticism comes easily to anyone who has sought or resisted discovery under the Federal Rules of Civil Procedure. Third, there is a strong association between secrecy and bad acts. Not that secrecy always entails a bad act, but that bad acts always seek out secrecy. Finally, secrecy operates to alienate—to create subjective distance between—the secret keeper and the one from whom the secret is kept. In the public sphere, such alienation between the governed and the governors tends toward hierarchy and away from democracy and citizen sovereignty.

In the United States all this combines with a commitment to democracy and popular self-government and with a strong belief in the virtues of full and open discourse and well-informed debate. The net effect seems to be a general, if sometimes contested, preference for openness in government, a preference that exists without regard for the efficiency costs that may be entailed.

2. On Whether the Disclosure Causes Chilling

The first problem with the instrumental case in favor of this particular form of executive privilege is that the central claim of a "chilling" effect on deliberation is not well established, is easily countered, and is inconsistent with the way the executive has chosen to conduct its own affairs.

The evidence that has been proffered by the executive is nothing but the repeated recitation of the bare conclusory assertion that disclosure will cause
chilling. So far as I have been able to determine, the proponents of this privilege have never offered any kind of formal empirical evidence in support of its assertion. Nor do the cases or the literature contain so much as a single specific and verifiable anecdote. Rather, the proponents have confined themselves to boilerplate recitations of the barest form of the deliberative rationale. These recitations are drafted by trial lawyers for whom the discovery dispute is a strategically significant episode in the course of hard-fought litigation that they have been asked to win. And they are signed by agency heads who have clear and strong motives for resisting discovery, quite apart from the fear that future deliberations might be chilled.

But even if we are prepared to assume that the risk of disclosure may sometimes "chill" future communications, that cannot be the end of our inquiry. Following Justice Cardozo's lead, we should probably concern ourselves not with all risks of chilling, but only with the risk that a reasonable person might be chilled. Moreover, there are distinctions to be drawn that bear upon the likelihood that any particular risk of disclosure will chill any particular future communications. In terms of each of these distinctions—the probability of disclosure, the seriousness of the harm that disclosure might bring to the speaker, and the speaker's incentives to speak despite the risks—the proponents of the general deliberative privilege are holding the short end of the stick.

The general deliberative privilege involves a probability of future disclosure that is relatively low. It is not concerned with the kind of routine, almost automatic disclosure that sometimes occurs under the Freedom of Information Act or that might be expected if, in pursuing an appeal, a losing litigant were permitted to probe the lower court's deliberations. Rather, we are concerned with the relatively remote possibility of disclosure

164. The Supreme Court in *Nixon I* quoted Mr. Justice Cardozo, speaking about the secrecy of jury deliberations, as follows:

A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice.

*Nixon I*, 418 U.S. at 712 n.20 (quoting *Clark v. United States*, 289 U.S. 1 (1933)).

165. The empirical research appears to support two general propositions. The first is that people are most likely to censor themselves or otherwise modify their behavior under circumstances in which either (a) the risk of subsequent, adverse disclosure is high or salient or (b) the incentive to communicate is weak (as it is in responses to social science surveys). The second is that people are least likely to censor themselves under circumstances in which either (a) the risk of subsequent, adverse disclosure is low and non-salient or (b) the incentive to communicate is significant (as in a work setting in which the speakers have a commitment to the success of the enterprise or an interest in being seen as useful). See, e.g., *Privileged Communications, supra* note 3, at 1472-76.
in the event that a lawsuit is brought, that it survives dismissal, and that, absent the privilege, the information in question would be discoverable. Further, we are dealing with circumstances in which, not only is the probability of disclosure low, but so, at least as a general matter, is the risk that would befall the speaker in the event of disclosure. We are not, for instance, dealing with a criminal defendant who must decide whether to provide his lawyer with information that, if disclosed, would send him to jail.

Finally, in thinking about the general deliberative privilege, we are dealing with circumstances in which the communication that might be chilled is a communication that the speaker has a clear and strong interest in making. These are people who are presumed to be committed to the success of the agency for which they work and who have a strong incentive to help solve the problems that confront that agency and to get credit for their contributions. Thus, along each of these dimensions, the claim of chilling as a basis for the general deliberative privilege is on the weakest available ground. In light of all this, and the proponents’ failure to offer evidence that chilling actually occurs, it is hard to take this argument very seriously.

The implausibility of the claim that chilling occurs is underscored by the executives’ own conduct after leaving office. It is a time-honored and distinctly American tradition that when high officials of the federal executive—the higher the better—leave office, they immediately sell to the highest bidder, for personal profit, their self-serving account of what went on in the behind-the-scenes deliberations in which they may have played some part. The bigger and more embarrassing the deliberative secret, the greater the personal profit. No one, least of all those who have not yet left office, criticizes the practice in terms of the oft-recited deliberative rationale. When these authors are criticized, it is not because they have chilled future deliberations but because they have breached their duty of loyalty by painting their former teammates as stupid, venal or crazy. Thus, it is common knowledge that everyone who really matters will, at the earliest possible moment, publish his account of the deliberations in which he was involved. It is equally well-known that those officials are, even as they engage in those deliberations, generating contemporaneous records, for use in connection with that publication. It is simply not plausible that an executive branch that tolerates this extraordinary situation might also believe that the public interest requires a prohibition against the disclosure, in the course of formal litigation, of otherwise discoverable information.

3. On Whether Chilling Diminishes the Effectiveness of the Executive

There are at least three other ways in which granting this privilege may bear upon the effectiveness of the executive, and all of these ways work in
the opposite direction to the one that is assumed. The first of these effects is that chilling, if it occurs, is likely to have a greater effect on "bad" speaking than on "good" speaking. The first speech to be chilled must presumably be that speech which would have the most drastically adverse effects upon the speaker if it were disclosed. This, it seems, would be that speech which the speaker believes an outsider would perceive as being against the public interest—including, most particularly, speaking that is directed toward corrupt or illegal purposes.

The second way in which granting this privilege may diminish the effectiveness of the executive is that the privilege enhances the secrecy of executive deliberations and this secrecy, adopted to maintain the flow of information, then operates to constrict the flow of information and opinions available to the decision-maker. Granting the privilege may thus lessen the effectiveness of the executive's decisionmaking process by depriving the decision-maker of access to an active, probing, testing, alternative-generating "marketplace" in ideas.166 This argument is recognizable to lawyers, of course, because it is the bedrock of first amendment jurisprudence. What the proponents of the general deliberative privilege have so far succeeded in doing is to make an argument that is persuasive precisely because it takes this flow-of-ideas jurisprudence, stands it on its head, and asserts it on behalf of executive secrecy and diminished opportunities for public participation and debate.

[When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe in the foundations of their own conduct that the ultimate good is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can safely be carried out.

Id. This idea may also be said to underlie the Supreme Court's declaration in New York Times v. Sullivan, 376 U.S. 254 (1964), concerning our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Id. at 270; see also J. Mill, On Liberty (1859).

Decisions made in secret may be substantively inferior to those that would have been reached without the supposed benefit of secrecy but with, instead, the benefit of a widened range of input and criticism. Bok argues that "secrecy can debilitate judgment and choice." S. Bok, supra note 149, at 26. More specifically, she explains:
Secrecy can harm those who make use of it in several ways. It can debilitate judgment, first of all, whenever it shuts out criticism and feedback, leading people to become mired down in stereotyped, unexamined, often erroneous beliefs and ways of thinking. Neither their perception of a problem nor their reasoning about it then receives the benefit of challenge and exposure.

Id. at 25.

This is also the assumption that underlies the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1982). The statutory requirement of an environmental impact statement "is designed to attract knowledgeable agency comment [from other agencies] on the environmental issues raised by proposed federal projects." Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1021 (9th Cir. 1980).
The third way in which granting the privilege may tend to diminish the effectiveness of the executive involves not the quality of the decisions that are reached but the ability of the executive to implement those decisions. My concern here is with the effect that granting this privilege is likely to have on the legitimacy and credibility of the government in the eyes of its own citizens. When a government keeps secret the processes by which its most ordinary decisions are reached or defends itself in court through a poorly justified form of executive privilege, it uses up some of the respect, the legitimacy and the credibility on which rests its ability to govern. When a government is easily persuaded that its interests are more important than those of the public or when it allows itself to play by different rules than it requires of its citizens, that government is calling down its most important account. It is using up some of the readiness to be led which is the foundation of that government’s ability to be taken seriously by its citizens, to wage war or to collect taxes. That is not to say that granting the general deliberative privilege is the same as being caught in that first lie about the U-2 overflight or hiding the truth about the war in Vietnam. The point is simply that keeping secrets and asserting poorly justified privileges is likely to have some effect in diminishing public confidence in the integrity of the government and its commitment to serving the public interest. Thus, it is likely to have some impact on the executive’s ability to govern effectively.

The proponents of the general deliberative privilege have argued that occasional disclosure in the course of litigation will chill future deliberative communications and thus diminish the effectiveness of the executive. I have, in this brief section, accepted that assertion but then identified other plausible ways in which granting the privilege might diminish, not enhance, the effectiveness of the executive. In the end, even if we grant the proponents of the privilege the only claim that they have made—that disclosure will cause chilling—it simply does not follow that disclosure will have a net adverse effect on the effectiveness of the executive.

4. On Whether Diminished Executive Effectiveness Reflects a Net Adverse Effect on the Public Interest

Even if we set aside all of the counterarguments that have so far been made and grant the claim, arguendo, that the risk of disclosure chills future deliberations and thus has a net adverse effect on the effectiveness of the executive, it still does not follow that there ought to be a general deliberative privilege. The reason is that the decision whether to grant this privilege affects interests other than the executive’s and that those other interests

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must also be taken into account. Thus, as will be shown, the decision to grant this privilege will have significant adverse effects on a branch of the government that is co-equal to the executive, on individual litigants including those who have perfectly just claims against the government, and on the principle of citizen sovereignty.

a. Effects on the Judiciary

The claims here granted *arguendo* not only fall short of warranting the conclusion that the public interest would be served by establishing a general deliberative privilege, they even fall short of warranting the conclusion that such a step would serve the government's interest. The reason is that this privilege empowers the executive precisely by disempowering the judiciary and the public interests it serves. Thus, for a unanimous Supreme Court in *United States v. Nixon*, Justice Burger explained that one of the reasons for proceeding cautiously in the matter of the presidential deliberative privilege was that the granting of such a privilege would be in derogation of the public's right to every man's evidence, of the search for truth, and of "our historic commitment to the rule of law."168 He further observed that privileges operate to defeat "[t]he ends of justice" and that they threaten "[t]he very integrity of the judicial system and public confidence in that system."169 This intrusion upon the ability of the judiciary to do justice and upon the public's confidence in the system is particularly

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168. *Nixon I*, 418 U.S. at 708-10. Questions involving the general deliberative privilege would not even arise unless a litigant was sufficiently interested in the documents to make the demand and to litigate the objection. Nor would these questions arise unless all of those who had drafted and approved the Federal Rules of Civil Procedure agreed that the documents in question were of such significance that they ought generally to be disclosed to the litigants. Nor, finally, would the questions arise if the district court did not believe that these documents were of a kind that ought normally to be disclosed.

Under the discovery rules, the district court judge has broad powers to block discovery on grounds that are far less problematic and far less susceptible to reversal than the general deliberative privilege. Thus, he can deny production on grounds that the documents in question are not sufficiently relevant to the lawsuit, that the discovery request is unduly burdensome, that it is redundant and unnecessary, etc. He is expected to deny discovery if he believes that it is being sought not to prepare for trial but to harass the other side into premature settlement. The likelihood of reversal on any of these grounds is extraordinarily low. As a practical matter, courts reach questions of privilege only if the question is very easy (e.g., a memo from a lawyer) or if the court believes that the document is otherwise discoverable.

Discovery is, of course, sometimes sought, and sometimes litigated, for reasons other than the good faith desire to prepare for trial. These reasons might include the desire to delay the trial on the merits, to overwhelm the other side's limited staffing capabilities, to spend the other side into the ground, or to force the other side to choose between giving up the contest and disclosing information that for some reason it simply cannot disclose.

If the court believes that a litigant is seeking discovery for improper purposes, it has all the power it might need to respond. Questions of privilege only require resolution if the court believes that the discovery is being sought in good faith.

important because the judiciary—powerful, appointed for life, lacking the means to implement its own decisions—must have the confidence and respect both of the public and of individual litigants in order to perform its constitutionally assigned duties.

b. Effects on Private Litigants

The establishment of the general deliberative privilege has its most direct effect on individual litigants who are denied access to documents and testimony that bear closely enough upon their case that, absent the privilege, discovery would have been permitted. The effects that the privilege is likely to have on individual litigants include: a diminished likelihood that the individual will win a case that, absent the privilege, would have been decided in her favor; a diminished likelihood that she will secure a settlement consistent with the true strength of her claim; an increase in the cost of the litigation; and, in the event that she loses, a diminished sense that she has been treated fairly by the system. One might object and say that, because this is a qualified privilege and the courts take such matters into account, it does not operate in a way that affects the outcome of litigation. But this assumes that the only discovery that matters is that discovery which the party seeking it could, prior to discovery, demonstrate to be particularly important. The falsehood of that assumption is well known to litigators and is deeply embedded in the very structure of the Federal Rules of Civil Procedure.

c. Effects on Citizens and Citizen Sovereignty

Executive secrecy also has a number of effects, almost all bad, on the power and effectiveness of the citizens who we regard as sovereigns and on the possibilities that we might realize the ideals of democracy and self-government.

First, executive secrecy operates to disempower citizens by depriving them of the information that they may need in order effectively to promote their interests. This is the core insight underlying the Freedom of Information Act, the provisions of the National Environmental Protection Act that require the issuance of environmental impact statements, and the right-of-access doctrine that has developed under the first amendment. Specifically,

170. It also assumes that the balance is being struck in such a way that discovery is being granted whenever the individual litigant has shown that the discovery she seeks may be important to her case. There is no reason, either in what the courts are saying or in what they are doing, for assuming this to be true.
173. See, e.g., Richmond, 448 U.S. at 555.
the general deliberative privilege may operate to diminish the level of information available to citizens on the actual operation of the executive, on the character or competence of government officials, and on the degree to which the government is attending to their needs and interests.

Additionally, the establishment of the general deliberative privilege will operate to diminish the sense of accountability under which executive officials do their business. That diminished sense of accountability may increase the likelihood that the official will act in a way that is sloppy or incompetent, that he will confuse his own self-interest (or that of a particular constituency) with the interests of the public, or that he will engage in various kinds of bad acts with which he would not want to be publicly associated. This may indeed constitute an expansion of the discretion and prerogatives of the executive, but it is an expansion that is generally contrary to the interests of the public and to the possibility of democracy based on citizen sovereignty.

Finally, there is one sense in which the establishment of this privilege may be said to enhance, not diminish, citizen sovereignty. If we assume that an executive may have been elected to perform certain tasks that may have unpleasant dimensions—to fight a war, to identify and prosecute criminals, to suppress domestic subversion, to deregulate an economy—then it will sometimes be true that executive secrecy may enhance the power of the citizens (or some of the citizens) to get done the job that they want done. But if one looks carefully there are two ways in which this might be so. In one, I will call these first order effects, our concern is that someone we all recognize as “the enemy” (the Axis powers, the drug dealer, the agent of a hostile power) will receive information that will enhance its ability to foil our collective efforts. There are also second order effects in which it is the public that must be kept in the dark for fear that, if it knew all that it might, its consent would be withdrawn. The first order effects are the ones that the Supreme Court has identified as “specific” and that are all the subject of specific privileges. The general deliberative privilege, at least insofar as it is not redundant with other, more clearly warranted privileges, is concerned only with second order effects. While the argument may be made that the avoidance of these effects may strengthen citizen

174. At least one influential commentator provided what now seems a downright antidemocratic justification for executive secrecy. Walter Lippman was concerned to insulate executive leadership from “mass opinion” and “prevailing public opinion.” Thus, he argued that “[w]here mass opinion dominates the government, there is a morbid derangement of the true functions of power. The derangement brings about the enfeeblement, verging on paralysis, of the capacity to govern. This breakdown in the constitutional order is the cause of the precipitate and catastrophic decline of Western society.” W. LIPPIN, THE PUBLIC PHILOSOPHY 20-21, 55, 179 (1955). Arguments of this sort, still being made in the mid-1960s, disappeared in the wake of the Vietnam debacle.
sovereignty, it may just as well be said that the avoidance of these effects strengthens citizen sovereignty only by *weakening* it.

d. Summary

Even if we assume that disclosure will decrease the effectiveness of the executive, it does not follow that disclosure will have a net adverse effect on the public interest as a whole. Granting the privilege will have other effects—most of them adverse—on the judiciary and thus on the government as a whole, on the private litigants who would otherwise be entitled to discovery, and on citizens in general. These effects are, at the highest level of abstraction, adverse to the possibilities of democracy, citizen sovereignty, public accountability and justice.

5. On Whether There Are Less Costly Ways of Promoting Executive Effectiveness and Protecting the Public Interest

The judges and commentators who have approved the general deliberative privilege structure the issue in terms of whether the government's claim of necessity is strong enough to warrant approval of the privilege. They have failed even to consider whether there might be alternative preferable means of satisfying that claim of necessity. But a showing that the possibility of disclosure will disserve the public interest cannot logically warrant a grant of privilege unless the government has also shown—or unless we are prepared to assume—that the privilege is the only acceptable way of eliminating that risk to the public interest.

This section explores alternatives to granting the executive its deliberative privilege, alternatives that would permit disclosure of the disputed documents for purposes of litigating the particular claim but that might restrict the disclosure in ways that would eliminate the risk of chilling. I will first explore the alternatives that are available prior to trial and, then, those that are available at and after trial.

During pre-trial discovery proceedings, which is where almost all of these problems arise, Federal Rule of Civil Procedure 26(c) provides that on motion and for good cause the court may make any discovery-related order "which justice requires to protect a party or person from . . . embarrassment, oppression, or undue burden..."175 This rule is understood to

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175. Fed. R. Civ. P. 26(c). It also explains that these protective orders may specifically provide:

(2) that the discovery may be had only on specified terms and conditions . . . ;
(5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened by order of the court; [or] (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

*Id.*
provide the courts with all the power they may need, when good cause is shown, to close discovery proceedings to outsiders and even to certain persons connected with the litigation, or to seal the record prior to trial.\textsuperscript{176}

The most usable example under rule 26(c) is that involving the protection of trade secrets.\textsuperscript{177} The general arrangement in dealing with trade secrets is that the person opposing discovery must first demonstrate that the information is, in fact, confidential commercial information. The party seeking discovery must then show that the information sought is sufficiently germane to the litigation that the harm that might be associated with disclosure is, after account has been taken of the availability of court-imposed protections, outweighed by the benefits of disclosure. The protective conditions that may be imposed are "limited only by the needs of the situation and the ingenuity of court and counsel."\textsuperscript{178} The most common orders simply restrict access to and use of the information that is in question.\textsuperscript{179} Such orders would satisfy virtually all of the interests that may arguably be served by the general deliberative privilege.

While virtually all contests involving the general deliberative privilege arise in connection with pre-trial discovery, there also remains the question of whether there is an alternative to secrecy-through-privilege by which the trial and its record may be closed to public scrutiny. While there is no specific rule that grants the court the power to close a trial or limit access

\textsuperscript{176} See Manual for Complex Litigation § 21.431 (2d ed. 1985). This section explains that certain objections (the example it uses involves trade secrets):

- are typically handled by entry of a protective order. . . . These orders usually specify that information claimed to be confidential will be provided to opposing counsel during the discovery process on condition that the information not be disclosed by them, without court order, except to certain persons for particular purposes. Counsel receiving confidential materials are generally forbidden from making disclosures other than at trial or in preparing for trial or settlement. For example, counsel are ordinarily permitted to disclose such information to assistants in their offices and to potential expert witnesses. Whether disclosure to the clients themselves is permitted will depend upon the circumstances of the case, balancing the client's "need to know" for purposes of the litigation against the risks and consequences of misuse. In any event, those to whom disclosure is made are usually required to agree in writing to abide by the terms of the order limiting further disclosure. For additional protection, the information may be sealed or, under Fed. R. Civ. P. 5(d), exempted from filing with the court.

\textsuperscript{177} Federal Rule of Civil Procedure 26(c) sets out the general power of the court and lists eight illustrative types of protective orders that might be issued. The seventh item on that list refers to orders "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed in a designated way." Id. There is no reason to believe that all of the powers available for the protection of trade secrets are not also available for the preservation of such confidentiality as may be shown necessary to protect the effective operation of the executive.

\textsuperscript{178} 8 C. WRIGHT & A. MILLER, supra note 3, § 2042 (note particularly Judge Friendly's statement to the effect that he has no doubts about the constitutionality of such restraints "prior to trial.").

\textsuperscript{179} Id. at 307.

\textsuperscript{179} Id. at 315 n.29.
to its record—Rule 26 applies only to discovery—there is no question but that, within certain limits, the courts possess this authority. The limits in question are constitutional and they may arise in terms either of a right to a public trial or of a right of access arising from a first amendment right to receive information. The "public trial" question is easily answered because the sixth amendment, which sets out that right, applies only to criminal trials. As to the first amendment, it seems clear that, though the matter may not be so easily dismissed at trial as it is during the discovery stage, existing law will allow a limited closure of a civil trial on the basis of a persuasive showing of need. Thus, at all relevant stages of the

180. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." U.S. Const. amend. VI. No comparable right exists regarding civil litigation.

181. The first amendment constitutionality of orders protecting the confidentiality of material disclosed in the course of pretrial discovery was tested in Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984). Such restrictions are undeniably a prior restraint on free speech. In re Halkin, 598 F.2d 176 (D.C. Cir. 1979). Nevertheless the Court, in Seattle Times, concluded that these orders do not fall within the prohibition of the first amendment. In this defamation suit against a newspaper, the defendant sought certain discovery that the court granted subject to a protective order. The order provided that:

The defendants . . . shall make no use of and shall not disseminate the [subject] information . . . which is gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. . . . [I]nformation gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination. This protective order has no application except to information . . . gained through the use of discovery processes.

Id. at 27 n.8. The defendant newspaper claimed that this order violated its first amendment right to disseminate the information.

The Court unanimously rejected the defendant's argument. In so doing, it explained that, whatever the publicness of civil trials, discovery is not a public component of the civil justice system and that different rules may apply when the person seeking to disseminate information has secured that information only through legislative grace and state power operating through the discovery rules. Id. at 32. The Court then held that:

where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26c, is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the first amendment.

Id. at 37.

Note, in connection with this case, that the language about the order being limited to the pretrial context does not mean that the order does not extend beyond trial. It does. But the order does not, without more, seal the trial record.

182. Here we find guidance in Richmond, 448 U.S. at 555. There a trial court had closed a criminal murder trial without a hearing, without findings and without giving considerations to other means of protecting the interests that might be served by closure. A local newspaper objected and the Supreme Court reversed the trial court's closure order. It did so on the basis of its conclusions that criminal trials are historically and presumptively open, that the first amendment rights of third parties are not absolute and countervailing interests may warrant limited closures. Id. at 569-77. The Court clearly pointed out, though, that, even in connection with criminal trials, the first amendment rights of third parties are not absolute and countervailing interests may warrant limited closures. Id. at 576,
proceedings, the courts have at hand the tools by which they can grant
discovery of the otherwise discoverable deliberative documents and, when
the circumstances warrant, still keep the documents in question from be-
coming available to the general public. This possibility has dramatic con-
sequences for the debate over the general deliberative privilege. In one
stroke, it eliminates virtually the entire case in favor of this privilege.8

The claim in favor of this privilege is that the risk of disclosure causes
chilling which, in turn, causes such injury as warrants the approval of the
privilege. Without disclosure, the entire argument disappears. The question
then is whether the argument has any strength when disclosure of the
deliberative communications is confined to the litigants and the court. Here
it may be useful to distinguish between two kinds of chilling that sometimes
occur. One is the chilling that occurs when, in an attempt to accomplish a
goal that everyone shares, we say something that, if disclosed, might seem
stupid or unwise and thus subject us to a kind of public ridicule. The other
occurs when, in pursuit of a purpose that is known to be corrupt or illegal,
someone says something which, once disclosed, gives rise to public condem-
nation and perhaps also to liability. While both kinds of disclosures can be
embarrassing, it is my experience as a litigator that a client’s embarrassment
at the second kind of disclosure is by far the more acute. In the presence
of a protective order like the ones routinely provided for the protection of
trade secrets, the only risk that remains is the risk of this second kind of
embarrassment. But the chilling that might result from a fear of that kind
of embarrassment is precisely not the sort of chilling that warrants the
protection of a judicial privilege.

6. Summary

On reflection, it seems clear that the instrumental argument in favor of
the general deliberative privilege is a great deal weaker than everyone—
courts, commentators and lawyers alike—seems to have assumed. First, the
deliberative rationale rests on the conclusory and unverified assertions of

581 n.18.

But the question with which we are concerned is not the permissibility of a full closure of
a criminal trial without consideration to the costs of closure. We are instead concerned with
the availability of a limited closure in a civil trial on the basis of what we assume will have
been a persuasive showing of need. Richmond tells us that, even in criminal proceedings,
limited closures may be permissible in response to precisely the sort of “need” that we are
assuming the government can show. Id. And the standards for criminal proceedings can only
be higher for criminal than for civil proceedings because criminal trials are subject to the sixth
amendment and to a strong presumption that they shall be public. This presumption does not
extend to civil trials.

183. It also narrows, but does not eliminate, some of the arguments that might otherwise
be made against the privilege, those being the arguments that rely on the benefits associated
with open government.
interested parties and has never been supported by anything that might fairly be called evidence. It is unpersuasive in light of the relevant circumstances (contingent disclosure, low embarrassment, strong incentive to speak fully) and inconsistent with the ways in which the executive has otherwise chosen to conduct its affairs.

Second, even if it is assumed that disclosure may chill future deliberations, it does not follow that disclosure disserves the executive. The conclusion does not follow from the assertion because disclosure has other, countervailing effects that must be, but have not been, taken into account.

Third, even if it is assumed that disclosure may chill future deliberations and will do a net disservice to the executive, one cannot conclude that disclosure disserves either the government as a whole or the public interest. The assumption does not warrant the conclusion because the choice between privilege and disclosure has effects elsewhere in the system that work, at the very least, to offset the assumed effects on the executive. These other effects bear upon the effectiveness of the judiciary, the constitutional system of checks and balances, the interests of litigants and the possibilities of justice, accountability and democracy.

Finally, even if it is assumed that disclosure chills future deliberations, that it does a net disservice to the executive, and that it does a net disservice to the government as a whole and to the public interest, it still does not follow that there ought to be a general deliberative privilege. Here again, the assumption does not warrant the conclusion because of what has been left out of consideration. This time, what has not been taken into account is the availability of procedural alternatives that are sufficient to protect the executive's legitimate interest, but that are far less disadvantageous than granting a privilege.

Therefore, the instrumental argument in favor of the general deliberative privilege is far weaker than has been assumed, the costs associated with granting the privilege are greater and more numerous than have been admitted, and the availability of less costly alternatives has never been taken into account. More narrowly to the point, the argument is altogether unpersuasive and insufficient to carry the burden that the proponents of this privilege must bear.

C. Arguments Based on Authority

The second set of arguments made on behalf of the general deliberative privilege rely not upon claims concerning instrumental effects but rather on claims related to various sources of authority. These arguments from authority have taken a number of different forms. The Kaiser decision in the Court of Claims\textsuperscript{184} relied on precedent in the British House of Lords and

the doctrine of sovereign immunity. Since Kaiser, the general federal courts have relied on the Kaiser decision, the separation of powers doctrine, the Morgan doctrine in administrative law, exemption five of the Freedom of Information Act and the cases decided under that statutory provision, federal evidence rule 509 as it was proposed to and rejected by the Congress, and the now considerable accumulation of decisions in which the lower federal courts have approved or applied the privilege.

I begin this section by considering the two core arguments, those relying on the separation of powers and on the Morgan doctrine. I will then examine the arguments that rely on sovereign immunity, the Freedom of Information Act, proposed evidence rule 509 and stare decisis.185

1. The Separation of Powers

The basis for the general deliberative privilege is often said to be the constitutional doctrine of separation of powers.186 The argument is that the occasional disclosure of general deliberative materials in the course of a judicial proceeding would be an unconstitutional interference with or intrusion upon the executive branch. The principal claim is that the occasional disclosure of these materials will chill future deliberative communications and thus diminish and in that sense interfere with the effectiveness of the executive in performing the substantive duties that he is assigned under the Constitution.187 Whatever may be the case with regard to presidential delib-

185. The arguments that are based on precedent in the House of Lords and then in the Court of Claims are of chiefly historical interest (Kaiser has been cited countless times. See, e.g., Branch v. Phillips Petroleum Co., 638 F.2d 873 (5th Cir. 1981); McClelland v. Andrus, 606 F.2d 1278 (D.C. Cir. 1979); In re Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577 (E.D.N.Y. 1979)). Apart from what has already been said—namely, that these claims of authority were weak but nevertheless important to the process by which this authority was carried into the federal courts—these arguments will not be subjected to further consideration.


187. Some have also asserted that the control of executive documents is itself an executive function that the judiciary is not permitted to usurp. See, e.g., Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 515 (1977) (Burger, C.J., dissenting) (Nixon II). This argument, however, proves too much. If compulsory judicial process were a usurpation of executive functions, then the same would be true of such unquestionably constitutional statutes as the Freedom of Information Act.

Burger's response to these examples is to suggest that those statutes are directed only to those parts of the executive branch that are creatures of the legislature and that they are, therefore, constitutionally permissible while process or legislation directed at the Presidency is not. Id. Even if his argument is correct, it would not be an argument in favor of the general deliberative privilege which, by definition, involves judicial process directed at non-presidential executive officials.
erations, this argument is unpersuasive in its application to the non-presidential materials that come within the scope of the general deliberative privilege.

The argument usually begins with the assertion that the executive has the constitutional power to keep order in its own house, to control its own documents, to keep certain kinds of secrets and, most narrowly, to keep secrets of the kind that are here at issue. If these powers do exist, and many of them certainly do, they exist by implication for they are not among the enumerated powers of the executive. In this respect, the claim of executive privilege rests on weaker ground than the claim of legislative privilege. If these powers exist by implication, they do because they are necessary to or useful in the executive’s performance of his constitutionally assigned responsibilities. Thus, the narrow claim that the executive has

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188. The Nixon I Court stated:
Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

Nixon I, 418 U.S. at 705-06 (footnote omitted). The Nixon II Court further stated: “Control of Presidential papers is, obviously, a natural and necessary incident of the broad discretion vested in the President in order for him to discharge his duties.” Nixon II, 433 U.S. at 515 (Burger, C.J., dissenting). The Chief Justice went further and asserted that the legislation in question was “an exercise of executive—not legislative—power by the Legislative Branch” in that “it [was] an attempt by Congress to exercise powers vested exclusively in the President—the power to control files, records, and papers of the office.” Id. at 506, 514; see also Nixon I, 418 U.S. at 703-15 (treatment of article II powers may simply be as predicate for separation of powers argument); Kramer & Marcuse, Executive Privilege—A Study of the Period 1953-1960, 29 GEO. WASH. L. REV. 827, 899-900 (1961) (dealing with executive privilege to withhold information from Congress); “The Present Limits of 'Executive Privilege,'” Government and General Research Division, Library of Congress 3 (1973) (dealing with executive privilege to withhold information from Congress).

189. The Constitution expressly provides that “for any Speech or Debate in either House,” the “Senators and Representatives . . . shall not be questioned in any other Place.” U.S. CONST. art. I, § 6, cl. 1. The Constitution makes no such provision for any form of executive or presidential privilege. The Supreme Court has held that “the silence of the Constitution on this score is not dispositive” of whether there might be a constitutionally based executive privilege. Nixon I, 418 U.S. at 706 n.16.

190. In Nixon I, 418 U.S. at 705 n.16, the Court cites McCulloch v. Maryland, 17 U.S. (4 Wheat.) 163 (1819), for the proposition that the President may have certain powers that are not enumerated but implied. The Court appears to suggest that the criterion for implying legislative powers under article I (“that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant’) would also apply to problems involving implication of executive powers under article II. Id.

Professor Van Alstyne has written that “surely the reference to McCulloch v. Maryland [in footnote 16 of Nixon I, supra] did not mean to read into article II an implied equivalent of the necessary-and-proper clause . . . in article I.” Van Alstyne, A Political and Constitutional Review of United States v. Nixon, 22 UCLA L. REV. 116, 118-19 (1974) [hereinafter Van Alstyne, Constitutional Review]. It is his view that the range of powers that may be implied on behalf of the executive is substantially narrower than the range of powers that may be
the power to keep general deliberative secrets is no stronger than the instrumental argument that the general deliberative privilege promotes the effectiveness of the executive, a claim that has already been found to be weak. But even if this power exists it is the beginning, not the end, of analysis under the separation of powers.

If the separation of powers question is not settled by arguments over the scope of the executive's powers, it is also not settled by United States v. Nixon. There, the Supreme Court found a qualified privilege for presidential deliberations and that this qualified privilege rests in part on the separation of powers. But the Court also made it clear that it was dealing with an assertion of presidential privilege, that it mattered that the executive official in question was the President, and that, in important respects, it regarded the President as standing apart from the rest of the executive branch in matters of this kind. In any event, the Court went out of its way to make it clear that it was not dealing with what I am calling the general—that is, by definition, a non-presidential—deliberative privilege.

Moreover, there are strong reasons to believe that there might be one rule, the Nixon rule, for the President and another, less deferential rule for his underlings. The first of these reasons is that a court would not be tempted, as the United States v. Nixon Court clearly and properly was, to approve the claim of privilege simply out of respect for and deference to the high office of the presidency. Second, there is a clear sense in which the President is, together with the Vice President, constitutionally distinct from other members of the executive branch. These two offices stand on a different constitutional footing because they are the only executive offices that are expressly created by the Constitution. All other offices of the

implied on behalf of the legislature. Id.; see also Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause, 40 LAW & CONTEMP. PROBS. 102 (Spring 1976); see also 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1563, at 418-19 (1st ed. 1833) (quoted in Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (Nixon II) ("There are ... incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions which are confided to it.").

191. It is useful to distinguish between (a) the power to keep secrets that is common to all autonomous entities in the absence of an authoritative demand and (b) the power to keep secrets in the face of an otherwise authoritative demand. Only the second of these is usefully regarded as a constitutional power.

192. See supra notes 160-67 and accompanying text.

193. 418 U.S. at 683.

194. Id. at 703-07.

195. See supra notes 146-48 and accompanying text.

196. Nixon I, 418 U.S. at 683; Nixon III, 457 U.S. at 753 (["T]he President's status is unique among executive officials and United States v. Nixon saw that unique status as a factor "counseling judicial deference and restraint."]).

197. Nixon III, 457 U.S. at 749-52 (arguing, for instance, that "[t]he President occupies a unique position in the constitutional scheme"); see also Nixon II, 433 U.S. at 508 (Burger,
executive branch are, at least in some respect, creatures of the legislature. It would be surprising if this constitutional distinction did not make some difference in the application of the separation of powers doctrine. The third reason is that the President is functionally distinct from other members of the executive branch in ways that bear upon the question of this privilege. On this basis the Supreme Court has decided that the President enjoys a higher level of immunity from civil suit than do his advisors, the members of his cabinet and most other members of the executive branch.

Moreover, the Constitution does not require airtight separation of the branches. The Supreme Court has "squarely rejected the argument that

C.J., dissenting) (President stands on "a very different footing"; only he and the Vice President were mandated by the Constitution; all other executive officials are "creatures of the Congress"); Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 596, 626, 635-36, 639-40 (1984). 198. See Nixon II, 433 U.S. at 508 (Burger, C.J., dissenting); Strauss, supra note 197, at 596, 626, 635-36, 639-40.

199. In Nixon III, 457 U.S. at 731, the constitutional distinction between the President and other members of the executive branch was found to help warrant granting the President a higher level of immunity from civil suit than was granted to most other officials of the executive branch. Professor Strauss argues that the constitutional distinction between the President and other executive officials warrants granting to the President a greater measure of protection under the separation of powers doctrine than is granted to his subordinates. Strauss, supra note 197, at 625-29.

Chief Justice Burger, in his dissent in Nixon II argued that a statute controlling the disposition of executive papers might be constitutional when applied to subordinate executive officials but unconstitutional when applied to the President. Nixon II, 433 U.S. at 504 (Burger, C.J., dissenting).


Montesquieu did not mean that these departments [the legislative and the executive] ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import . . . can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

Id. at 301-02 (emphasis in original); Strauss, supra note 197, at 573.

While there have been cases that have relied on strict separationist arguments, those cases have involved issues of usurpation that are not present in cases involving assertions of executive privilege. See, e.g., Myers v. United States, 272 U.S. 52 (1926). In the privilege cases, the judiciary is performing an undeniably judicial function, the performance of which may bear upon the activities of another branch. These questions of involved interference without usurpation cannot be resolved through strict separationism.

The other "bright line" cases under the separation of powers involve the interpretation of textual provisions of a kind that have bearing on executive privilege. See, e.g., INS v. Chadha, 462 U.S. 919 (1983); J. Nowak, R. Rotunda & J. Young, Constitutional Law 121 (1983): [W]hile the Constitution created separate executive, legislative, and judicial departments, there was no clear delineation between their functions. Instead, the drafters of the Constitution sought to establish a system of checks and balances
the Constitution contemplates a complete division of authority between the three Branches"\textsuperscript{202} or that the Government "operate with absolute independence"\textsuperscript{203} and has approved the characterization of the argument for "airtight departments" as "archaic."\textsuperscript{204} It has declared that the Constitution does not require "a hermetic sealing off of the three branches of Government from one another."\textsuperscript{205} To this effect, the Court has repeatedly approved Justice Jackson's statement that "while the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."\textsuperscript{206} Thus, if the asserted intrusion of one branch upon another is to violate the separation of powers doctrine, it must be significant and unwarranted.\textsuperscript{207} The claim that there might be some intrusion—in this case, that there might be a diminishment in the effectiveness of the executive—is not, standing alone, sufficient.

Moreover, this is a case in which the separation of powers cuts both ways. This constitutional doctrine is no less concerned with protecting the judiciary from intrusions by the executive than it is with protecting the executive from the judiciary.\textsuperscript{208} Granting the privilege would, according to

between the branches of government to ensure the political independence of each branch and to prevent the accumulation of power in a single branch. Today, we may not recognize that the system of "checks and balances" runs counter to a separation of functions concept, but that was clearly realized at the time of the Revolution.

\textit{Id.}

\textsuperscript{202} \textit{Nixon II}, 433 U.S. at 443.

\textsuperscript{203} \textit{Id.} (emphasis deleted) (quoting \textit{Nixon I}, 418 U.S. at 707).

\textsuperscript{204} \textit{Id.}

\textsuperscript{205} \textit{Buckley}, 424 U.S. at 121.

\textsuperscript{206} \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), \textit{quoted with approval in Morrison}, 487 U.S. at 694; \textit{Buckley}, 424 U.S. at 122; \textit{Nixon I}, 418 U.S. at 707.

\textsuperscript{207} \textit{See Morrison}, 487 U.S. at 693-96.

\textsuperscript{208} The independence and co-equality of the judiciary is central to our constitutional design. Thus, Judge Irving Kaufman, writing in the \textit{Columbia Law Review}, has explained that: [h]aving scarcely emerged from the shadow of a tyrannical Parliament, and with ever increasing examples of legislative excess throughout the states, the Framers understood that the security of individual rights could be preserved only if the legislative and executive powers were kept within the limits prescribed by a higher, fundamental law. Recognizing the dangers inherent in unbounded power, the Founders went beyond the legacy of British and colonial history and adopted a written constitution with an independent judiciary for its guardian. The Framers realized, moreover, that their bold experiment could succeed only if the judicial power were kept absolutely separate and distinct from the executive and legislative branches. If it were not, the Constitution's promise of a government of limited powers could be broken with utter impunity. The solution was thus to elevate the judiciary to a third, co-equal branch of government, whose authority flowed directly from the same constitutional wellspring as its sister branches . . . . It is this additional step, inconceivable in England, that made the American Consti-
the unanimous Court in *United States v. Nixon*, intrude upon the efficacy of the judiciary and upon the performance of its constitutionally-assigned duty to do "justice." It would derogate "the search for truth" in the individual case; it would tend to defeat "the ends of . . . justice"; it would diminish "[t]he very integrity of the judicial system"; and it would put at issue "our historic commitment to the rule of law." Accordingly, "[t]o ensure that justice is done, it is imperative to the function of courts that compulsory process be available . . . ." Thus, the decision whether

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*Kaufman, The Essence of Judicial Independence*, 80 COLUM. L. REV. 686 (1980); see also *The Federalist* No. 78, supra note 201, at 484 (the judiciary is the weakest of the departments of government; it is in continual jeopardy of being overpowered, awed or influenced by the other branches; and its "complete independence" is "peculiarly essential in a limited Constitution.").


Professor Van Alstyne ignores the language of the decision and argues as if the case did not involve any threatened intrusion upon the constitutional responsibilities of the judiciary. Van Alstyne, *Constitutional Review*, supra note 190, at 116. Not only does he refrain from acknowledging that aspect of the Court’s reasoning, but he repeatedly refers to the case as one "solely" involving "executive interests." *Id.* at 119, 121, 133. He supports this with his assertion that "the judiciary has no separate superintending authority as to what cases shall be brought by the executive, or what evidence shall be sought by the executive." *Id.* at 134. The applicability of this argument to the *Nixon I* case depends, however, upon his further claim that Nixon had, by resisting the subpoena, exercised his power to advise the Court that the executive "does not seek" this evidence. The Court expressly rejected that argument when it concluded that the executive had neither amended nor revoked the delegation by which it had expressly granted the Special Prosecutor the power to contest assertions of executive privilege. *Nixon I*, 418 U.S. at 695. What remains at issue, then, is the interest of the executive—properly delegated to the Special Prosecutor—the power to contest assertions of executive privilege. *Nixon I*, 418 U.S. at 710. What remains at issue, then, is the interest of the executive—properly delegated to the Special Prosecutor—and, as the Court has suggested, the constitutionally-assigned duty of the courts to "do justice" in matters that are properly before it.

211. *Id.* at 709.
212. *Id.*
213. *Id.* at 708.
214. *Id.* at 709 (emphasis added). To be sure, the *Nixon I* case involved a criminal proceeding and not a civil suit of the kind that is likely to present the general deliberative privilege. But Burger’s argument cannot depend on this fact. The constitutional status of criminal and civil proceedings differ only in the sense that the Constitution assures certain rights to criminal defendants. In *Nixon I*, it was the prosecutor who was seeking the documents. *But see Nixon III*, 457 U.S. at 754 n.37 (The Court has recognized that there is a lesser public interest in civil actions based on the corruption of public officials than there is on criminal actions against such individuals.).
to grant the general deliberative privilege involves two questions, not one, in connection with the separation of powers. The first involves the seriousness of the intrusion that the risk of occasional disclosure might impose on the executive. The other, no less important, involves the seriousness of the intrusion that granting the privilege might impose on the judiciary.

Against these legal standards, all that is offered by the proponents of this privilege is the assertion that the occasional disclosure of deliberative materials in the course of litigation may chill future deliberative communications which may, in turn, diminish the effectiveness of the executive. But that is not enough. This claim has already been shown to be speculative and unpersuasive. Moreover, there is reason to believe that disclosure, and even certain forms of chilling, may actually enhance the effectiveness of the executive. Not only can this risk of diminished effectiveness be avoided through the issuance of protective orders, but regardless, the intrusion upon the executive is no greater than the intrusion upon the judiciary that would result from granting this privilege. The net intrusion on the executive is both reasonable and warranted by the standards of a Constitution that envisions a certain amount of "interdependence" and "reciprocity" between the branches of the government.

In accepting the implications of this conclusion, we would be left with a set of rules that would be almost symmetrical to those that the Supreme Court has fashioned in the closely related area of executive immunity from civil litigation. As with executive immunity, distinctions would be drawn within the executive branch. As with immunity, the President and certain others—including those whose responsibilities are quasi-judicial—would enjoy a level of protection that is markedly higher than the protection afforded other officers and employees of the executive branch. And as with immunity, these distinctions and this higher level of protection might be justified on the basis of the special constitutional status of the President and the special "functional" characteristics of the protected offices. United States v. Nixon would provide a privilege for presidential deliberations and the Morgan cases would provide a privilege for quasi-judicial deliberations within the executive. Beyond those two, there would be no privilege for "general" deliberations. Outside the realm of the "deliberative" privileges, the other forms of executive privilege would remain unimpaired.

2. The Morgan Doctrine in Administrative Law

A great many cases and commentaries have argued that authority for the general deliberative privilege is found in the Morgan cases.\(^\text{215}\) Thus, we are

\(^{215}\) International Paper Co. v. FPC, 438 F.2d 1349 (2d Cir.), cert. denied, 404 U.S. 827
told, again and again, that the Morgan Court accepted the government's contention that "it was not the function of the court to probe the mental processes of the Secretary"216 and that "[j]ust as a judge cannot be subjected to such a scrutiny, . . . so the integrity of the administrative process must be equally respected."217

The problem with this claim is that the Morgan decisions218 represent a category of cases that are analytically and functionally distinct from those that fall within the realm of the general deliberative privilege. Thus, Morgan approves not the privilege that is here at issue, but, instead, something that I shall provisionally call the "quasi-judicial deliberative privilege." To be specific, the Court was dealing with the deliberations of a cabinet secretary who had been expressly charged by Congress with performing "adjudicatory functions."219 The proceeding before the Secretary had resembled a "judicial proceeding"220 and he had actually "dealt with the enormous record in a manner not unlike the practice of judges."221 As to the nature of the proceeding, the Court had previously observed that it "had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other."222 Moreover, the Secretary's decision was subject to appeal in the same way as would have been the decision of a lower court. Accordingly, the Court regarded the proceedings as those of a "collaborative instrumentality of justice" and gave the Secretary the same deference, respect and immunity it would have given to another court.223

The cases and commentaries that rely on Morgan as authority for the general deliberative privilege are generally written as if this language about the quasi-judicial nature of the Secretary's activities simply was not a part

(1971); Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600, 604 (5th Cir. 1966) (deliberations of a "quasi-adversary" are more in need of protection than are those of a judge or jury; court ignored availability of attorney-client privilege); NLRB v. Botany Worsted Mills, 106 F.2d 263, 267 (3d Cir. 1939) (applies Morgan privilege to the deliberations of the "quasi-adversary NLRB"); Green v. IRS, 556 F. Supp. 79, 84 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984); In re Franklin, 478 F. Supp. at 581; Sprague Elec. Co., 462 F. Supp. at 972-73, 976; Kaiser Aluminum, 157 F. Supp. at 946; Carl Zeiss Stiftung, 40 F.R.D. at 325 ("the judiciary is not authorized 'to probe the mental processes' of an executive or administrative officer"); Rosee v. Board of Trade, 36 F.R.D. 684, 689 (N.D. Ill. 1965) ("[T]he cerebrations and mental processes of government officials, leading to admittedly proper exercises of power, can never be a factor in a judicial proceeding and, therefore, need not be disclosed."); see also Montrose Chem. v. Train, 491 F.2d 63, 70 (D.C. Cir. 1974) (FOIA exemption five).

216. Morgan v. United States, 304 U.S. 1, 18 (1938) (Morgan II).


218. I will refer to the four Morgan decisions collectively as Morgan unless a particular decision is specifically identified.

219. Id.

220. Id.

221. Id.; Morgan v. United States, 298 U.S. 468, 480 (1936) (Morgan I).


of the Court’s opinion. But that language is so central to the opinion that the proponents of the privilege must do something more than simply announcing, without explanation, that Morgan authorizes their position. They might, for instance, try to show that the Court had no interest in the quasi-judicial nature of the activities in question and that this language imposes no restriction upon the reach of these decisions. Or they might argue that they are applying Morgan correctly because the Morgan Court used the language of “adjudication” and of “quasi-judicial” activities in a way that properly applies to all executive decisionmaking. But both of these arguments could, if made, be easily dismissed. More interestingly, they might argue that the Court has extended the Morgan doctrine, perhaps through Citizens to Preserve Overton Park v. Volpe, in ways that render it applicable to all executive decisions—or that the policies at work in Morgan warrant extension of the doctrine to all executive decisions. These last two arguments require closer examination.

Like Morgan, Overton Park dealt with the decision of a cabinet secretary who had been directed by Congress to resolve a dispute in accordance with specified criteria. The Secretary in Overton Park made his decision on the basis of a full administrative record that reflected the views of advocates on both sides of the question on which the Secretary was required to pass. He did not, at the time of the decision, provide any statement of his reasons. The Court concluded, in this connection, that he had been under

224. “Quasi-judicial” was a term that, at the time of the Morgan decisions, can fairly be said to have had two meanings. One was the meaning given to it in separation of powers cases like Humphrey’s Executor v. United States, 295 U.S. 602 (1935). There the terms quasi-judicial and quasi-legislative were used to distinguish the activities of certain independent agencies from the kind of constitutionally “executive” activities that could not be removed from the control of the executive branch. In Humphrey’s Executor, for instance, the statutorily independent Federal Trade Commission was declared to be a “quasi-judicial” and “quasi-legislative” agency and thus “wholly disconnected from the executive department.” Accordingly, Congress could limit the causes for which the President could remove a commissioner without violating the separation of powers. Id. Since the decisionmaker in Morgan was not a member of some independent agency but was the Secretary of Agriculture, the Supreme Court in Morgan could not have meant “quasi-judicial” to have this constitutional meaning. Rather, it appears that the Court used the term to describe someone who was charged with doing the kind of job that judges do, who was doing it in the way that judges do it, and who was doing it subject to the kind of appellate review that judges receive.

I can imagine no plausible interpretation of “quasi-judicial” that might justify understanding that term to encompass the full range of executive decisions. Nor can I imagine a defensible reading of the Morgan decisions that would not take account of this aspect of the Court’s opinion.

225. 401 U.S. 402 (1971). I am discussing the Morgan decisions precisely because numerous lower federal courts have relied upon them as authority for the general deliberative privilege. The question with which I am concerned is whether that reliance is warranted. It would be boot-strapping of the worst kind to assert that these courts were warranted in their reliance on Morgan because Morgan has been extended to authorize this privilege—and that Morgan has been extended to authorize this privilege because these courts have said that it does.

226. Id. at 405, 411.

227. Id. at 408.
no obligation to provide such a statement. At the same time, however, the Court concluded that the plaintiffs were entitled to "effective" judicial review of the Secretary's decision. It further found that, while "inquiry into the mental processes of administrative decisionmakers is usually to be avoided," such an inquiry might here be necessary to assure an effective review. The Court made it clear that this necessity, if it existed, was closely related to—if indeed it did not arise expressly from—the Secretary's wholly lawful failure to provide formal and contemporaneous findings.

But this does not warrant the conclusion that Overton Park extends Morgan across the entire range of executive decisionmaking. Overton Park is still, in its own way, quasi-judicial and its holding, after all, is that the Morgan privilege may not apply in the absence of formal and contemporaneous findings.

However, if we are to conclude that Morgan and its progeny still do not apply across the full range of the general deliberative privilege, where, one might ask, ought the boundary be drawn? It appears that, this boundary ought to be drawn in terms of the role that the federal court—or, more precisely, the lowest federal court to whom the matter is presented—is asked to play in connection with the particular executive decisions the deliberations over which are at issue. There are two possibilities. Either, first, that court will have the relationship to the executive that a trial court normally has to a party or, second, that court will have the appellate relationship that a higher tribunal normally has to a lower one. In both cases, of course, the entry-level federal court sits as a part of a continuous, hierarchic structure for the framing, winnowing and resolving of disputes. The difference is that when the federal court sits as a trial court it serves as the first step in that decisional structure while, when it sits in an appellate capacity, it serves as an upper-level tribunal in a continuous, hierarchical decisional structure that begins within the federal executive.

In drawing this distinction, there are two things that must be kept in mind. First, we are concerned with the nature of the relationship between the federal executive and the first federal court to which the matter is presented. That first court may be either the district court or the court of

228. Id. at 409, 417-19.
229. Id. at 420.
230. Id.
231. The Court's opinion stated:

[W]here there are administrative findings that were made at the same time as the decision, as was the case in Morgan, there must be a strong showing of bad faith or improper behavior before such an inquiry may be made [into the mental processes of administrative decisionmakers]. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.

Id.
appeals.232 Second, at least for purposes of this distinction, the relationship of de novo review—as, for example, a district court may have with regard to the decision of a magistrate—is an appellate relationship. Whatever may be their differences with respect to procedures and formalities, Morgan and Overton Park both involved the power of entry-level federal courts sitting in an appellate relationship to the executive decisionmaker whose deliberations the court had been asked to probe. That, I assert, is the proper realm of the Morgan doctrine.233

This distinction between trial (non-appellate) and appellate proceedings becomes important when we recognize that all appellate tribunals must have some set of rules concerning the scope and standard of review and, more generally, the degree of deference and respect to be afforded the lower tribunal. Under this reading, Morgan and Overton Park are properly understood as providing one such rule as to the deference that a federal court ought afford to an administrative tribunal whose work that court is reviewing in an appellate capacity. Thus, the lower tribunal—in these cases the cabinet secretaries—enjoys a presumption of regularity not because they work for the executive, but rather because the Supreme Court has, in a way that is entirely consistent with our normal practice, incorporated that presumption into this particular appellate system. Morgan and Overton Park thus specify forms of deference that are like, in general kind, the deference that a court of appeals might show in reviewing the work of a district court trial judge. Thus, the administrators in Morgan and Overton Park are like judges, not just in the way they might process disputes but also, and perhaps more importantly, in their relationship to the reviewing court. They are, in that sense, quasi-judicial instrumentalities of justice. Accordingly, the Supreme Court has declared that they warrant deference and respect of the kind that an appellate court would normally show to a trial court.

With these observations in mind, there are two conclusions that may be drawn. One, technically beyond the scope of this Article,234 is that, within

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232. The entry-level federal court for the judicial “review” of administrative actions may be either the district court or the court of appeals. As the terms are here being used, the district courts will sometimes sit in an appellate capacity and sometimes in a non-appellate capacity.

233. If the Morgan rule is no more than a part of the structure of deference that an appellate tribunal owes to a subordinate one, then we would expect the deference to extend no more broadly than the deliberations of subordinate tribunals within the continuous, hierarchic decisional structure that has led to the federal court. Even in cases where the entry-level federal court sits in an administrative capacity, issues will sometimes arise about the permissibility of probing some executive deliberation that is the subject of the original dispute or that is otherwise a deliberation external to the chain of appeals. Such an issue would fall outside of the Morgan doctrine as I am proposing it be understood.

234. The general deliberative privilege is one that exists even in the absence of any special or “specific” justification. When the federal executive claims that particular circumstances warrant a privilege and the courts reject that claim, the executive still may argue that the case
the realm that I have characterized as "appellate," there are distinctions to be drawn that bear upon the exact level of deference that the courts might be expected to show to the executive. Such was the distinction that the Supreme Court drew when in Overton Park it announced that the Morgan doctrine would not apply, at least in its original strong form, in the judicial review of a cabinet secretary's decision reached in the course of what the Administrative Procedure Act denounces as informal adjudication.235 The

in question comes within the general deliberative privilege. Thus, any time a specific privilege (e.g., that protecting the identity of informers, state secrets or quasi-judicial deliberations) is either rejected or narrowed, the realm within which the general deliberative privilege exists is, at least potentially, expanded. While the exact scope of the executive's other privileges bears in this way upon the scope of the general deliberative privilege, no attempt will be made here to pronounce upon the exact scope of all such privileges.

235. Within the appellate realm, the cases that appear to warrant the highest level of deference are those where the proceedings that are the subject of appellate review were most formal, most judge-like, and in which, because the record is known and the reasons have been contemporaneously stated, there is least occasion to probe the deliberations of the subordinate tribunal. In the parlance of the federal Administrative Procedure Act, this category includes judicial review of both on the record adjudication and on the record rulemaking of a kind that now includes rate making like that in Morgan.

The case for deference is somewhat weaker when the entry-level federal court sits in an appellate capacity and reviews executive action involving the kind of informal adjudication that gave rise to the decision in Overton Park. There is no requirement that the decision be made on the basis of an exclusive record, that it be made after a formal hearing, or that it be accompanied by a formal statement of reasons. Here, where the occasion and need may be stronger, the Court has shown a higher readiness to permit a litigant to probe deliberative processes.

The remaining subcategory of appellate proceedings are those in which the federal court sits in judicial review of notice and comment rulemaking. Here, the court's deference, and the attendant limits on its willingness to probe the executive's decisional process and to substitute its judgment for that executive, may be understood either in terms of the deference that a higher court shows to a lower one, or in terms of the deference that a court will, under certain circumstances, show to a legislature. If it is the latter that is at work, then we would appear to be dealing with an occasion for deference that ought to be dealt with on its own terms and not in the quasi-judicial terms of Morgan. See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977) (restraint in probing "legislative or executive motivation"); Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (restraint in probing deliberations related to notice and comment rulemaking). In either event, we are dealing with a "specific" occasion for judicial deference which, if it actually warrants deference, removes these cases from the realm of the general deliberative privilege.

Thus, within the appellate arena, we find a number of important differences that bear upon the strength of the executive's claim for deference. We also find that the Morgan case involves one of those sets of circumstances in which we would expect the courts to afford the highest level of deference. Under other circumstances, the Supreme Court has shown lower levels of deference.

The larger point, of course, is that there is a significant volume of litigation involving the federal executive that falls entirely outside this appellate arena. Occasionally one hears it said that adjudication under the Administrative Procedure Act is a residual category and that adjudication and rulemaking, taken together, encompass the entire range of executive action. Such statements may be plausible in light of the definitions contained in the federal Administrative Procedure Act, see 5 U.S.C. § 551 (1988), and in light of the fact that everything a court does could be characterized as the judicial "review" of someone's conduct. Neither of these semantic arguments, however, is relevant to the functional analysis by which I have
second conclusion, and for present purposes the more important one, is that the core rationale underlying the Morgan doctrine extends no further than the reasonably broad arena of cases in which the entry-level federal court sits in an appellate capacity and reviews work of what is, functionally, a subordinate tribunal located within the executive branch.

3. Other Arguments

Here I consider three other arguments from authority that have been offered in support of the privilege. These rest, respectively, on proposed federal rule of evidence 509, on the Freedom of Information Act and certain of the cases decided under that act, on sovereign immunity and on stare decisis.

a. Proposed Federal Rule of Evidence 509

A number of federal courts and at least one important pair of commentators have found authoritative support for the general deliberative privilege in proposed rule 509 of the Federal Rules of Evidence—despite its rejection by Congress.236 The argument is unpersuasive in ways that are best seen through an examination of the reasons that Weinstein and Berger offer for paying attention to the rejected proposal.

First, they state that the proposed rules “are the culmination of three drafts by an Advisory Committee consisting of judges, practicing lawyers and academicians,” of “seven years of work,” and of “hundreds of suggestions received in response to the circulation of the drafts throughout the legal community.”237 That was, as has already been shown, simply not the case with regard to proposed rule 509. In the only two drafts of that rule that were circulated for public comment, the Advisory Committee clearly expressed its judgment that the government ought not enjoy a general deliberative privilege. The basic language approving the privilege was written not by the Committee but by the Department of Justice that was preoccupied with defending the Nixon Presidency against the rising tide of Watergate.

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The rule was then adopted by a resistant Advisory Committee only as a result of heavy-handed political coercion.\(^{238}\)

Weinstein and Berger next argue that the proposed rules carry authority because they were "adopted by the Supreme Court by an eight to one vote."\(^{239}\) This argument is considerably overdrawn. It suggests that the Supreme Court sat in judgment of the merits of the particular rules and that only one Justice disapproved of the merits of those rules. In fact, the Court did not consider the merits of particular rules\(^{240}\) and the one dissent was on the ground that the Court's involvement in the rule-making process would give people the unwarranted impression that the Court had exercised its substantive judgment.\(^{241}\)

Finally, we are told that the rejected rules are useful authority because they accurately state the law, and that Congress rejected it not on grounds related to the substance of the rule but for reasons of political expediency.\(^{242}\) That may be true of some of the rejected rules but it is not true of rule 509. Rule 509 clearly misstated existing law in at least three ways—all of which dramatically advantaged the executive.\(^{243}\) Moreover, it was rejected for reasons that had everything to do with its substance.\(^{244}\) Under these circumstances, there is simply no good reason to conclude that proposed rule 509 should be understood as providing authoritative support for the general deliberative privilege.

\(^{238}\) See supra notes 138-40 and accompanying text.

\(^{239}\) 2 J. Weinstei\textsuperscript{n} & M. Berger, supra note 3, ¶ 501[03], at 501-32 (Supp. 1989).

\(^{240}\) In his dissent to the order transmitting the rules, Justice Douglas explained that: [T]his Court does not write the Rules, nor supervise their writing, nor appraise them on their merits, weighing the pros and cons. The Court concededly is a mere conduit. Those who write the Rules are members of a Committee named by the Judicial Conference. The members are eminent; but they are the sole judges of the merits of the proposed Rules, our approval being merely perfunctory. In other words, we are merely the conduit to Congress. Order, 56 F.R.D. 184, 185 (1972) (Douglas, J., dissenting).

\(^{241}\) Id.

\(^{242}\) 2 J. Weinstei\textsuperscript{n} & M. Berger, supra note 3, ¶ 501[03], at 501-33 (Supp. 1989).

\(^{243}\) First, it adopted exemption five to the Freedom of Information Act as a codification of the privilege. This is not only without judicial precedent, it is also nonsensical. Second, it expanded the privilege by granting the government, in addition to the right to withhold evidence, the right to prevent others from providing information related to the deliberative process. Finally, it eliminated the requirement that the privilege must be claimed by the head of the agency and replaced it with a provision that allowed the privilege to be asserted "by any attorney representing the government." Fed. R. Evid. 509, 56 F.R.D. 183, 251-52 (1972) (rejected by Congress 1973).

Each of these provisions was a major departure from the law previously established by the courts. So major, in fact, that I have not been able to find a single court that accepted any of these rules. Indeed, there is even some doubt as to whether the executive ever dared to ask a court to accept these rules.

\(^{244}\) See supra note 141 and accompanying text.
b. The Freedom of Information Act

The proponents of the general deliberative privilege have sometimes argued that "Congress expressly approved this . . . privilege" when it enacted the Freedom of Information Act (FOIA) subject to exemption five for certain "inter-agency or intra-agency" documents.245 They have also argued that authority for the approval of the privilege can be found in judicial decisions applying FOIA exemptions.246

The first problem with this argument is that exemption five is not, by its terms, a statement about the general deliberative privilege. If, as often seems to be assumed, exemption five incorporated only the general deliberative privilege, this might not be the case. But as it is, exemption five incorporates a long list of privileges available to the government including the attorney-client privilege, the work-product doctrine, the Morgan doctrine and the privilege for presidential deliberations.247 Under these circumstances,
there is no justification for reading this exemption as a message from Congress on the particular subject of the general deliberative privilege. Moreover, even if Congress had singled out the general deliberative privilege for incorporation into FOIA, congressional judgment that the deliberative rationale warrants an exemption from a public information statute does not entail the judgment that it warrants a judicial privilege. The reason is that, at least as a general matter, granting disclosure through FOIA is much more likely, in comparison to a judicial privilege, to result in the kind of routine, systematic disclosure that is most likely to cause chilling. Moreover, there are fewer interests favoring disclosure under FOIA than there are in a lawsuit.

The second problem with the FOIA argument is that exemption five is not a statement of approval but, instead, a statement of incorporation. Moreover, it is a statement of incorporation that is expressly subject to the possibility of modification or elimination by the courts. Thus, Congress has spoken in such a way that its message automatically incorporates any change of mind that the courts might have regarding any of the privileges incorporated through exemption five. Under these circumstances, there is no basis for the claim that Congress has expressed the substantive view that the courts ought to take some particular position—in this case, continued approval—with regard to one of the incorporated privileges.

The third problem is that, as a practical matter, Congress had no choice but to make the statement it did about the governmental privileges incorporated by exemption five. Had it done anything else, it would have brought chaos to the law of judicial privileges and pretrial discovery in litigation involving the government. If, for instance, the Congress had omitted exemption five, parties in litigation against the government would stop seeking documents through pre-trial discovery and would proceed instead through collateral actions brought under FOIA. The Morgan doctrine, the Nixon doctrine and the government’s attorney-client privilege would continue to be the law in name only. Through their collateral FOIA actions, the opposing parties would secure all the documents that come within the "protection"

249. It is ironic that the case for the general deliberative privilege as an exemption to FOIA is somewhat stronger than the case for this privilege as an exception to the general obligation to produce materials in the course of litigation. This marginal difference exists because FOIA raises the possibility, not generally present in litigation, that someone might put in place a standing, continuing request for all documents of a particular kind. Under these circumstances, the argument that the possibility of disclosure may "chill" future communications seems somewhat stronger under the law of FOIA than under the law of judicial privilege.

It is nevertheless clear that Congress chose to make the scope of FOIA depend upon the decisions that are made within the law of judicial privilege. There is no warrant for putting the cart before the horse in the name of what Congress might reasonably have chosen to do. Their decision was clear: the scope of FOIA is dependent on the law of judicial privilege and the courts are under no obligation to shape the law of judicial privilege to give, or to avoid giving, particular meaning to FOIA.
of those privileges. The procedural table would be steeply tilted and government litigators would be in a position of nearly hopeless disadvantage. Thus, Congress may have done what it did with regard to exemption five not because it thought especially well of the general deliberative privilege but because, as a practical matter, there was nothing else to be done.

Finally, it has been argued that judicial decisions under exemption five of FOIA, particularly the Supreme Court’s decisions in *EPA v. Mink*\(^{250}\) and *NLRB v. Sears, Roebuck & Co.*\(^{251}\) constitute authoritative approval of the general deliberative privilege. This argument fails on two counts. First, it fails to account for the distinction between cases in which higher courts are acting under a statutory mandate to *apply* a privilege that unquestionably exists in the lower courts and other cases in which a higher court might be asked to *approve or disapprove* such a privilege.\(^{252}\) Cases arising under exemption five are of the first, but not the second sort. Second, this argument fails because it relies upon a misreading of those Supreme Court decisions.\(^{253}\)

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252. Granting that exemption five incorporates the privilege as it exists, there remains a crucial difference between what courts do when, on the one hand, they are asked to apply this privilege as a rule incorporated into FOIA and, on the other hand, they are asked to consider it as a straight-up rule of judicial privilege.

When this privilege comes before the Supreme Court as a rule of judicial privilege, rather than as a rule of privilege that has been incorporated into some other body of law, the Court will be confronted with two questions. The first will be whether the proponent of the privilege is right in her assertion that there is authority for the *existence* of this privilege in the law of the lower federal courts. The second will be whether under all the circumstances the Supreme Court is warranted in granting its *approval* to the privilege.

The question facing a FOIA court is, however, much narrower and much less relevant to our present analysis. The only question of interest to such a court is the existence and scope of the privilege as it may already exist. The job of a FOIA court is to apply the law of a particular privilege, not to make it. Even if the court in question is the Supreme Court and even if it has never before had the opportunity to approve or disapprove of the general deliberative privilege, a FOIA case presents only the question of whether there is a general deliberative privilege. Unlike cases that may arise directly out of the law of judicial privilege, a FOIA case simply does not present the question of whether there *ought* to be such a privilege.

This is not to say that the Supreme Court lacks the capacity to volunteer its views on the general deliberative privilege in the course of rendering a decision under FOIA. It is, instead, simply to say that there is reason for it not to do so. One reason, usually sufficient without more, is that the question is not presented. Another is that the circumstances and interests surrounding the application of FOIA are different from those surrounding the application of a judicial privilege *qua* privilege. Thus, interests that are central to the law of privilege are not even represented in a FOIA case. And, finally, the general deliberative privilege actually makes more sense as an exemption to FOIA than it does as a part of the rules of evidence.

253. *Mink*, 410 U.S. at 73, is the first of the Supreme Court’s FOIA decisions that is sometimes asserted to constitute Supreme Court approval of the general deliberative privilege. That action was brought by members of Congress who sought certain documents related to underground nuclear explosions. The Supreme Court found that the documents were exempt from disclosure under the Act because they were either classified secret, thus coming within
In sum, there is simply nothing that Congress did in passing the FOIA or that the Supreme Court and courts of appeals have done in applying the Act that can fairly stand as authority for the proposition that there ought to be a general deliberative privilege.

c. Sovereign Immunity

One of the first arguments that was offered in support of the general deliberative privilege was Justice Reed's reliance, in Kaiser, on the doctrine of sovereign immunity. At the time, it was a plausible extension of that doctrine. Within six months, however, the Supreme Court expressly rejected the use of sovereign immunity to limit the scope of discovery. Thus, in United States v. Procter & Gamble Co., the Court held that when the government consents to be sued, it agrees to play by the same rules that apply to everybody else. That is not to say that there are no evidentiary privileges that are available only to the government. Rather, it is to say that there are no privileges available to the government simply by virtue of its status as "sovereign." This conclusion is consistent with the American (but not British) idea that it is the people who are sovereign and with the exemption one, or they were "inter-agency or intra-agency" documents within the scope of exemption five. Justice White, writing for himself and three others, argued that the lower courts had created a general deliberative privilege, that documents coming within the scope of that privilege came also within the scope of exemption five, and that Congress had intended that incorporation.

Sears, Roebuck & Co., 421 U.S. at 132, has also been cited as evidencing Supreme Court approval of the general deliberative privilege. It does nothing of the kind. The case dealt with Sears' demand for certain documents generated by the NLRB's Office of the General Counsel concerning the decision whether to permit the filing of unfair labor practice complaints with the Board. The principal question was whether those documents fell within exemption five. The Court decided that certain of the documents were final agency decisions outside the scope of the exemption and that others were "squarely within Exemption five's protection of an attorney's work product." Id. at 160. Clearly neither of these elements of the decision rested on any kind of determination that there is—much less that there ought to be—such a thing as the general deliberative privilege.

There are only two ways in which the Sears decision may be said to speak of the deliberative privilege. First, the Court recites the fact that the government expressly asked it to rest its decision on Kaiser and "the 'generally ... recognized' privilege for 'confidential intra-agency advisory opinions ...'" Id. at 149 (quoting Kaiser Aluminum, 157 F. Supp. at 946). This, quite clearly, the Court declined to do. Second, the Court noted "[t]hat Congress had the Government's executive privilege specifically in mind in adopting Exemption five ..." Id. at 150. But its discussion of the scope of that privilege is generalized, wholly derivative and irrelevant to the decision.

256. Id.
257. The very idea that sovereign immunity could be raised as a defense to a private suit implies (1) that the executive is sovereign and that the citizen is not, and (2) that sovereignty resides in the executive and not in the judiciary. These positions make sense in Great Britain
principle that sovereign immunity applies to claims for relief and not to matters internal to the litigation of permissible claims.\textsuperscript{258} It therefore seems

but not in the United States.

The difference between the United States and Great Britain with regard to the applicability of the doctrine of sovereign immunity has been clearly expressed by the Supreme Court.

Notwithstanding the progress which has been made since the days of the Stuarts in stripping the crown of its powers and prerogatives, it remains true to-day that the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their Queen being turned out of her pleasure garden by a writ of ejectment. . . . The crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government.

It is not to be expected, therefore, that the courts will permit their process to disturb the possession of the crown. . . .

Under our system the people, who are there [in Britain] called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of the monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered.

United States v. Lee, 106 U.S. 196, 208 (1882) (concerning the availability of suits against government officers and agents); see also Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1980) (English practice regarding sovereign immunity); C. WRIGHT, A. MILLER & E. COOPER, \textit{Federal Practice and Procedure: Jurisdiction} § 3654, at 200 (2d ed. 1987) (English concept that the king can do no wrong "seems very inconsistent with the democratic principle of popular sovereignty prevailing in the United States").


258. Moreover, it is a doctrine that has no application to matters of discovery and privilege. It applies to claims for relief, not to the rules according to which litigation is conducted. Absent a statutory waiver, it bars:

1. Lawsuits against the government for monetary and non-monetary relief. It is well established that the United States may not be sued without its consent. C. WRIGHT, A. MILLER & E. COOPER, \textit{supra} note 257, § 3654, at 186 & n.2. There are three principal statutes that waive sovereign immunity and grant subject matter jurisdiction for suits against the federal government. The Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (1982), and the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982), establish and regulate the government’s monetary liability. The Administrative Procedure Act provides for actions for non-monetary relief through judicial review of certain types of federal conduct. 28 U.S.C. §§ 702 (1982) (1976 amendment permits suits against the government), 701(a) (precludes judicial review where such preclusion is embodied in another statute or where the injuries action is committed by law to agency discretion).

2. Counterclaims and cross-claims against the government. The rule with regard to counterclaims against the United States is that "in an action instituted by the government a counterclaim, like any other claim against the United States, can be interposed only when the government has waived its immunity from suit or that claim." 6 C. WRIGHT & A. MILLER, \textit{supra} note 3, § 1426, at 138; see
entirely reasonable that no one is now arguing that this privilege is authorized by the doctrine of sovereign immunity.

e.g., United States v. Shaw, 309 U.S. 495 (1940); United States v. Anew, 423 F.2d 513 (9th Cir. 1970). Federal Rule of Civil Procedure 13(d) reaffirms this rule by providing that the counterclaim provisions of the civil rules shall not be read to extend a party's right to sue the United States beyond the limits established by statute. Thus, it is clear that the limitation on counterclaims that arises from the doctrine of sovereign immunity does not mean that there is one set of federal rules for non-governmental parties and another for the government. It simply reflects the fact that the possibility of a counterclaim under the civil rules does not, absent the kind of express statutory waiver that is always required, eliminate the jurisdictional defense of sovereign immunity.

(3) And claims for particular items of relief including:

(a) Interest. It is clearly established that "in the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." Library of Congress v. Shaw, 478 U.S. 310, 314 (1986) (denying award of interest on statutory attorney's fees under Title VII); United States v. Tillamooks, 341 U.S. 48, 49 (1951); United States v. New York Rayon Importing Co., 329 U.S. 654, 658 (1947); Smyth v. United States, 302 U.S. 329 (1937) (recognizing an exception to the general rule where the suit is brought under the takings provision of the fifth amendment); Tillson v. United States, 100 U.S. 43 (1879). But see United States v. The Thekla, 266 U.S. 328 (1924) (awarding interest); United States v. McKee, 91 U.S. 442, 450-51 (1876) (awarding interest; if "[t]he claim is one which the government has by law agreed to pay, we see no reason why it should not be paid in full, with all its legal incidents . . ..").

What is of interest for purposes of this article is the fact that "[t]his requirement of a separate waiver reflects the historical view that interest is an element of damages separate from damages on the substantive claim." Library of Congress, 478 U.S. at 314; see also Note, Interest in Judgments Against the Federal Government: The Need for Full Compensation, 91 YALE L.J. 297, 300 n.18, 302-03, 307 (1981) (interest originally a penalty, a separate remedy for a separate injury). Thus, interest is barred by sovereign immunity "unless the government consented not only to liability for the underlying substantive claim but also to liability for the additional wrong addressed by an award of interest." Id. at 303. It is therefore plain that, for purposes of the application of sovereign immunity, a claim for interest is a claim for relief in the same sense in which the substantive claim for compensation or a claim for punitive damages is a claim for the award of relief.

(b) Costs. 14 C. WRIGHT, A. MILLER & E. COOPER, supra note 257, § 3654.

(c) Attorney's fees. Id. § 3654, at 192-93 ("The rule requiring consent applies not only to the general subject of the suit but also to specific items of award, particularly the award of attorney's fees."). Prior to the enactment of the Equal Access to Justice Act, 5 U.S.C. § 504 (1988), the Court had consistently held that an award of attorney's fees had to be based on an express waiver of sovereign immunity. Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) (awards of attorney's fees against the U.S. "are generally prohibited by the express assertion of sovereign immunity found in 28 U.S.C. § 2412 (Supp. II 1978)"); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 267-68 (1975); and cases cited in C. WRIGHT, A. MILLER & E. COOPER, supra note 257, § 3660, at 367 n.21; see also West's
Finally, one might grant everything that has been said to this point and conclude, on grounds of stare decisis, that the privilege ought to continue to exist for no other reason than that it has been applied by dozens upon dozens of lower federal courts. This argument is weak in several ways. First, the general deliberative privilege is a matter, not of substantive law, but of the "adjective" law that governs the way the court handles its own business. As such, it belongs to a class of rules in which our interest in stability is particularly low, the freedom accorded to the courts is particularly high, and claims of stare decisis are particularly weak. Second, the argument for stare decisis is relatively weak because what I am proposing is a reconsideration of the privilege in light of a number of arguments and

Federal Practice Digest, United States key 147. Section 2412 of the Judicial Code provided statutory authority for a "judgment of costs" against the United States, but that provision was clear in excluding "the fees and expenses of attorneys" from the authorized award. The result was a situation in which attorney's fees—available against other litigants under rare exceptions to the "American rule"—were never available against the government unless explicitly authorized by statute.

In 1981, § 2412 was amended by the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2512 (1988), by which the government gives up its special treatment and agrees to be subject to the award of attorney's fees under the established exceptions to the American rule.

d) Punitive Damages. It is expressly provided under the Federal Torts Claims Act (FTCA) that the United States "shall not be liable... for punitive damages." 28 U.S.C. § 2674 (1988). It is also customary to say that punitive damages against the government are barred by the doctrine of sovereign immunity, citing this provision of the FTCA not as a statutory prohibition upon punitive damages but, instead, as the explicit withholding of a waiver of sovereign immunity. Thus, the FTCA is read as waiving sovereign immunity for tort claims against the government but not for claims for punitive damages. See, e.g., Hunt, 636 F.2d at 584; Ferrero v. United States, 603 F.2d 510 (5th Cir. 1979); Johnson v. United States, 547 F.2d 688 (D.C. Cir. 1976); Felder v. United States, 543 F.2d 657 (9th Cir. 1976); Fitch v. United States, 513 F.2d 1013 (6th Cir.), cert. denied, 423 U.S. 866 (1975); Glickman v. United States, 626 F. Supp. 171 (S.D.N.Y. 1985).

It does not apply to matters internal to the litigation of permissible claims. See, e.g., Procter & Gamble Co., 356 U.S. at 681; cases cited in 8 C. WRIGHT & A. MILLER, supra note 3, § 2019 n.65 (Supp. 1988).

While the law does not provide a right to a jury trial against the government, it is a manifestation of the seventh amendment not of sovereign immunity. There is, in other words, no seventh amendment right to a jury trial against the government because the seventh amendment applies only to "suits at common law" and because there is no such thing as a "suit at common law" against the government, not because the sovereign is "immune" from jury trials. 9 C. WRIGHT & A. MILLER, supra note 3, § 2314, at 68-69.

259. See, e.g., Branch, 638 F.2d at 873; McClelland, 606 F.2d at 1278. The one district court case most frequently cited is Carl Zeiss Stiftung, 40 F.R.D. at 318.

260. See 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.402 (2d ed. 1988).
alternatives that the courts have not previously considered. Finally, the stare decisis argument is weak because the cases that have approved this privilege have been, on their own terms, wrongly decided. Thus, to one degree or another, they have rested upon a series of mistakes concerning the history of the privilege, the instrumental interests involved, the alternatives available, and the force of the arguments from authority that have been offered by the proponents of the privilege.

4. Summary

The “arguments from authority” that are offered on behalf of the general deliberative privilege are of two general kinds. Some involve the claim that the privilege must exist because of the requirements of some body of law that is external to the law of evidence—the Constitution, for instance—while others involve reliance upon someone else’s prior approval of the privilege qua privilege.

The arguments from authority external to the law of evidence include those that rely on the separation of powers, the Morgan doctrine in administrative law and the doctrine of sovereign immunity. Each of these are unpersuasive in that they depend upon a misunderstanding or misapplication of the doctrines invoked. Moreover, as suggested above, the proponents of the privilege have failed to establish the instrumental predicates—i.e., the injury to the public interest—that might warrant the expansion of any of these doctrines to include the general deliberative privilege.

The arguments based on someone else’s prior approval of the privilege all entail the claim that the questions that are relevant within the law of evidence have already been asked and answered. Here, the proponents of the privilege point to decisions of the British House of Lords and the Court of Claims, to the congressional enactment and judicial application of the Freedom of Information Act, to proposed rule 509 of the Federal Rules of Evidence and to the now considerable accumulation of lower federal court decisions involving the privilege.

These arguments, too, are unpersuasive. The House of Lords and the Court of Claims have, indeed, approved the privilege. But, given the fundamental differences between both of those arenas and the federal district courts, it simply does not follow that their approval of this privilege might be justification for its adoption in the district courts. At the same time, the claims concerning the Freedom of Information Act and proposed evidence rule 509 are unpersuasive because in neither of these cases was there an

261. See generally id.
262. See generally id.
263. See supra notes 160-83 and accompanying text.
approval of the general deliberative privilege. Finally, the stare decisis claim in this case is too weak to justify the perpetuation of an otherwise unwarranted privilege.

CONCLUSION

The general deliberative privilege has been adopted by the federal courts without full and careful scrutiny. Careful examination reveals that the privilege rests on a series of arguments that have been accepted as compelling but that, in fact, are incomplete and unpersuasive. These include claims concerning the history of the privilege, its instrumental effects and a variety of potentially controlling legal doctrines.

One might respond to these circumstances in a number of different ways. For example, one might look more closely and conclude that this Article's statement of the situation is mistaken and that the arguments on behalf of the privilege are, in fact, fully persuasive. Beyond that, there are five options. First, one might accept this Article's statement of the deficiencies in the instrumental argument but then somehow remedy those deficiencies, thereby strengthening the argument and rendering it sufficient. Second, one might note that the privilege is a qualified one and tinker with the decisional apparatus by which individual judges apply it in particular cases. Third, one might concede that there is no legal doctrine that now warrants the privilege, but conclude that some doctrine ought to be extended to warrant the privilege. Fourth, one might conclude that for some reason the weaknesses of the arguments in favor of this privilege are either not relevant to or not dispositive of the question whether there ought to be a privilege. Or, fifth, one might abandon the privilege until the case in its favor is convincingly made. I shall leave to others the rich possibility of proving my criticism to be unjustified and consider, in turn, each of the other possible responses.

The first of these possibilities involves granting the deficiencies in the instrumental argument offered in favor of the privilege and then curing those deficiencies, presumably through some kind of empirical evidence that disclosure has the bad effects that are asserted. The problem with this approach is that it seems unlikely that a full and persuasive showing will ever be made. The question that must be answered is not whether the risk of disclosure can cause chilling but whether this particular risk of disclosure will cause such chilling as is, after everything has been taken into account, contrary to the public interest. This question requires us to take account of a range of factors that diminish the force of the argument in favor of the privilege. These factors include the contingency of the risk of disclosure, the presumption that she-who-might-be-chilled is reasonable both in her firmness and in her commitment to her job, and that she faces incentives to speak that operate to offset the disincentives associated with the risk of
disclosure. They also include the fact that the chilling of some (e.g., corrupt) communications is beneficial, that disclosure brings certain benefits associated with higher levels of openness and accountability, and that granting a privilege will have adverse effects on the judiciary, on presumably worthy litigants, on the supposedly sovereign citizenry, and, in those ways, on the possibilities of justice and democracy. And, finally, there are alternative means of protecting the executive’s asserted interest that carry a lower cost to the public interest than does granting the privilege. It is my judgment that the deficiencies in the instrumental case in favor of this privilege cannot and will not be cured. Not because it is hard to devise the necessary tests, though that is certainly true. But rather, because the case is just not strong enough.

Moving to the second option, one might try to salvage the instrumental case in favor of this privilege by asking individual judges to distinguish between those cases in which the deliberative rationale is strong from those in which it is not. This is, after all, a qualified privilege and one might simply tinker with the decisional apparatus by which individual judges balance interests in individual cases. The difficulty with this approach is that, in working their way through these problems, the courts have shown themselves to be capable of distinguishing between those documents that are important to the litigation and those that are not, but not of distinguishing the relative strength, in particular cases, of the deliberative rationale. They have invariably taken that rationale to be fully established. Even if the courts were willing and able to establish a decisional process that actually tested the strength of the deliberative rationale, there is no evidence that anything would be gained by considering that question on a case-by-case basis. There are two reasons for this statement. One is that there is no evidence that occasional disclosure in the course of judicial proceedings will ever cause injury to the public interest, particularly in light of the other means by which we can all but eliminate the risk of chilling. The second is that there is no reason to believe that the strength of the deliberative rationale depends upon the circumstances of the particular case.

Apart from the possibilities of filling the gaps in the instrumental argument or fixing the problem by tinkering with the decisional process that the judges follow in individual cases, a third response to my argument would be to conclude that existing doctrine ought to be extended to support the general deliberative privilege. Here we assume that neither the Morgan nor the Nixon cases can be read as requiring a lower court to honor the general deliberative privilege, but conclude that the privilege ought to be warranted by an extension of one of those doctrines. The problem with this approach is that there exists no strong argument in favor of that doctrinal extension. If the separation of powers doctrine does not currently warrant the general deliberative privilege but ought to be extended so that it does, we must offer some reason other than the separation of powers itself. That other
reason would, presumably, involve a demonstration of instrumental effects. But I have already concluded that a compelling demonstration of instrumental effects cannot be made. If the doctrine of separation of powers does not now require the granting of a general deliberative privilege, there is also no convincing argument as to why that doctrine should be extended to warrant that privilege.

The fourth possibility, that we are setting too high a standard when we reject the privilege on the ground that the case in its favor is weak, is not persuasive. Would it not, for instance, be more reasonable to place the burden on those who want to permit discovery against the government? Under this approach, the fact that the case in favor of the privilege might be unpersuasive would not lead to abandonment of the privilege. Or, in any event, it would not be dispositive.

There are, in fact, two perspectives from which we could approach this problem. Each is mutually exclusive of the other and—what is more interesting—each is clear, familiar and perfectly coherent. Under the first of these perspectives, we should plainly err on the side of nondisclosure. The government’s administrative personnel are presumed to be competent, fair-minded, committed to serving the public interest, and disinclined toward corruption or political chicanery. Litigation is viewed as an intrusion upon the process of governance. We are disinclined to interfere with the administration’s exercise of its responsibilities and we take at face value the government’s assertion that disclosure will disserve the public interest.

From the other perspective, we should clearly err on the side of openness and accountability. We are distrustful of the administrative apparatus and view it as potentially antidemocratic and likely to be dominated by special interests. Sovereignty ought to reside in the people. There is little reverence for the expertise and fair-mindedness of administrators. Openness and accountability are necessary to prevent the corruption or distortion of the public interest. The Freedom of Information Act is a good idea and ought to be broadly construed. Far from being an unwanted interference, litigation is an important tool in the kit-bag of democracy. Moreover, in the spirit of the Federal Rules of Civil Procedure, broad discovery is the all but inalienable right of those who litigate, particularly those who litigate against powerful adversaries. Another litigant’s boilerplate claim that discovery ought to be denied because of the harm it will cause is certainly not to be taken at face value.

On the matter of the general deliberative privilege, it is not now possible to reconcile these two positions. But the task of resolving the conflict

264. The controversy would presumably end if we were to prove the certainty of the arguments that comprise the case against the privilege (e.g., that the risk of disclosure in the course of litigation does not cause chilling). But if the proof went the other way and chilling
between the predispositions associated with these different perspectives is, in fact, fairly straightforward because there is a clearly applicable rule of decision. This rule assigns to the proponents of a judicial privilege the burden of proving that the privilege is justified. Moreover, this rule applies equally to qualified and absolute privileges. Thus, though the proponents of this privilege might prefer to err on the side of secrecy and to give the executive the benefit of the doubt, the law of evidence stands clearly in their way. In theory, they could argue that this decisional rule does not, or ought not, apply. Such an argument has not been made and, even if it were, it would be extremely difficult to sustain.

It has been taken for granted that the federal executive ought to enjoy the protections of the general deliberative privilege. That privilege has been supported by a wide range of arguments based on history, instrumental effects and legal doctrine. On close examination, however, these arguments have proven to be incomplete, unpersuasive and sometimes simply wrong. The case in favor of the general deliberative privilege has not been made and, it seems fair to conclude, cannot be made. Under these circumstances, it seems that the only reasonable and appropriate course is to abandon the privilege.

was shown to be a serious problem, a trade-off would still be required between administrative efficiency on the one hand and, on the other hand, accountability, citizen sovereignty, justice in the individual case, and the even-handed treatment of litigants. Even perfect knowledge concerning the effects of the privilege could not eliminate controversy over the relative weight to be assigned to those competing interests. This problem is, of course, substantially compounded by one's ignorance concerning the effects of the privilege.