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O'Neill, oh O'Neill, Wherefore Art Thou O'Neill: Defining and Cementing the Requirements for Asserting Deliberative Process Privilege

Andrew Scott

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O'Neill, oh *O'Neill*, Wherefore Art Thou *O'Neill*: Defining and Cementing the Requirements for Asserting Deliberative Process Privilege

Andrew Scott*

ABSTRACT

The government may invoke the deliberative process privilege to protect the communications of government officials involving policy-driven decision-making. The privilege protects communications made before policy makers act upon the policy decision to allow government officials to speak candidly when deciding a course of action without fear of their words being used against them.

This privilege is not absolute and courts recognize the legitimate countervailing interest the public has in transparency. The Supreme Court in *United States v. Reynolds* held that someone with control over the protected information should personally consider the privilege before asserting it but did not provide definitive requirements. It is clear that a department head must assert the privilege, usually through an affidavit. The U.S. Court of Appeals for the Third Circuit, in *United States v. O'Neill*, left room for judicial discretion in determining who counts as a department head and what would constitute an adequate review of the materials before asserting the privilege.

This Comment examines the ambiguity in the procedure for asserting the deliberative process privilege which has resulted in the adoption of an inefficient and ambiguous process. Specifically, whether the court requires an affidavit from a department head is left to the discretion of the court. When a party asserts the privilege without a department head's approval and withholds documents, district courts may either take the asserting party's word at face value or conduct an in camera review. This Comment argues that taking the claim of privilege from the government gives too much deference to government agencies who may invoke the privilege inappropriately. On the other hand, in

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camera review is a time-consuming process that places the court in a position to evaluate information that the court sometimes has little expertise in. Finally, this Comment asserts the need for a stricter adherence to the standards set by *O'Neill* in asserting the deliberative process privilege in the Third Circuit.

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I. INTRODUCTION

On November 11, 2014, a corrections officer in Blair County, Pennsylvania allegedly used excessive force against a prisoner.[1] Following the incident, the prisoner brought a lawsuit against the county and filed a request for the production of a Pennsylvania Department of Corrections investigative report related to the incident.[2] Blair County objected to the request on privilege grounds

1. Smith v. Rogers, No. 3:15-cv-264, 2017 WL 2937957, at *1 (W.D. Pa. July 10, 2017).
2. *Id.*

and provided a heavily redacted version of the report to the plaintiff.[3] Blair County's assertion of privilege prompted the court to conduct an in camera review of the unredacted investigative report to determine whether Blair County properly asserted the privilege.[4] Blair County relied on the deliberative process privilege[5] to protect the investigative report and, in doing so, failed to follow the procedural rules set forth by the U.S. Court of Appeals for the Third Circuit[6] for asserting the privilege.[7] Specifically, Blair County failed to include an affidavit from a department head as required to assert the deliberative process privilege under Third Circuit precedent.[8] Blair County's failure to follow the procedural rules in asserting the deliberative process privilege left the court in the difficult position of deciding whether the importance of following those procedural rules outweighed the risk to Blair County Prison's security if the court revealed the unredacted documents.[9] The *Smith* court noted it would need to speculate on the effects of disclosure without the required affidavit of the department head.[10] Ultimately, the court concluded that portions of the report could remain redacted in light of the security of the prison but noted that in camera review was "at best only a partial substitute for the affidavit requirement."[11]

The deliberative process privilege protects communications made by decision-makers when deliberating policy decisions.[12] But the government frustrates the transparency upon which a democracy thrives by invoking the deliberative process privilege, or any executive privilege for that matter.[13] The frustration is necessary sometimes when the government has a legitimate need to keep in-

3. *Id.*

4. *Id.* at *4.

5. *Id.* at *7.

6. *See* United States v. O'Neill, 619 F.2d 222, 226 (3d Cir. 1980). The head of the department or governmental agency must personally review the documents in question and provide both "'a specific designation and description of the documents' claimed to be privileged'" as well as "'precise and certain reasons for preserving' the confidentiality of the communications." *Id.* (quoting Smith v. FTC, 403 F. Supp. 1000, 1016 (D. Del. 1975)).

7. *Smith*, 2017 WL 2937957, at *3 (noting that Blair County failed to properly assert its claim of privilege).

8. *Id.* at *3; *accord O'Neill*, 619 F.2d at 226.

9. *See Smith*, 2017 WL 2937957, at *3.

10. *Id.*

11. *Id.*

12. Shilpa Narayan, Note, *Proper Assertion of the Deliberative Process Privilege: The Agency Head Requirement*, 77 FORDHAM L. REV. 1183, 1184 (2008).

13. *See generally* MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY (2d ed. 2002) (detailing the consequences of various assertions of executive privilege).

formation secret, and when revealing such information would violate public policy or even put lives at risk.[14]

One requirement for the deliberative process privilege is that the department asserting it should be a department head or someone with the authority and intimate knowledge necessary to know whether the information is privileged.[15] The Third Circuit reinforced this limitation for invoking the privilege because the Third Circuit recognized that courts are not in the best position to evaluate highly complex and esoteric issues of policy.[16]

Yet, circuit courts are split over the use of the department head requirement.[17] The requirements set out in *United States v. O'Neill*[18] leave much room for judicial discretion in determining whether or not a department head has adequately reviewed the materials.[19] Prior court decisions have left future courts to make educated guesses and depend on the reasonableness of discretion to decide the outcome when the government improperly invokes the deliberative process privilege.[20] The government places the onus on the court to analyze the policy concerns that support or oppose disclosure—the undesired outcome that the department head requirement prevents.[21] The Third Circuit allows in camera review to substitute for a department head affidavit in some cases, but making in camera review a regular consequence of the invocation of the deliberative process privilege places both the burden of review and

14. *See, e.g.*, *Smith*, 2017 WL 293795714, at *3 (suggesting the court is loath to potentially jeopardize the security of Blair County's prison by revealing redacted documents).

15. United States v. Reynolds, 345 U.S. 1, 7–8 (1953).

16. *See* United States v. O'Neill, 619 F.2d 222, 227 (3d Cir. 1980).

17. *See, e.g.*, Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1306 (Fed. Cir. 2006) (noting sister circuits are split whether the department head requirement applies fully to deliberative process privilege); *compare* Landry v. FDIC, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (noting that lower officials can invoke the privilege), *and* Branch v. Phillips Petroleum Co., 638 F.2d 873, 882–83 (5th Cir. 1981) (holding EEOC subordinate could properly invoke the privilege), *with* *O'Neill*, 619 F.2d at 225 (holding an attorney could not assert the privilege in lieu of a department head).

18. United States v. O'Neill 619 F.2d 222 (3d Cir. 1980).

19. *See id.* at 226 (noting it was not necessary to decide if it is always the case that an attorney cannot invoke the deliberative process privilege).

20. *See, e.g.*, Smith v. Rogers, No. 3:15-cv-264, 2017 WL 2937957, at *3 (W.D. Pa. July 10, 2017).

21. *See O'Neill*, 619 F.2d at 227; *see also* United States v. Reynolds, 345 U.S. 1, 10 (1953) (warning against judicial insistence on inspecting documents related to national security).

policy decisions on the court.[22] Furthermore, regular in camera review invalidates the need and use of a department head requirement because, in such an instance, the court conducts independent review regardless.[23]

This Comment seeks to address the ambiguous requirements to assert the deliberative process privilege in the Third Circuit and proposes that courts should strictly adhere to the standards established in *O'Neill.* Enforcing the department head requirement strictly and utilizing a uniform set of factors on which courts can rely will simplify and ease the burden on the courts to address matters of deliberative process privilege.[24] The risk of losing the privilege due to a technicality provides sufficient incentive for department heads to review their documents before asserting the privilege.

Part II of this Comment addresses the background and development of the deliberative process privilege from the English common law to the current law in the Third Circuit.[25] Part III of the Comment assesses the current predicament of the deliberative process privilege in the Third Circuit.[26] Finally, Part IV assesses the competing ways that parties to a lawsuit acceptably invoke the deliberative process privilege and advocates for a stricter adherence to the requirements in *O'Neill*.[27]

II. BACKGROUND

Some courts consider the deliberative process privilege to be the most frequently asserted executive privilege.[28] The purpose of

22. *See* Conoco, Inc. v. U.S. Dep't of Justice, 687 F.2d 724, 727–28 (3d Cir. 1982); *see also Smith*, 2017 WL 2937957, at *3 (requiring the court to conduct in camera review to determine privilege).

23. Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 309 (1989).

24. *See* discussion *infra* Part IV.

25. *See* discussion *infra* Part II.

26. *See* discussion *infra* Part III.

27. *See* discussion *infra* Part IV; *see also* United States v. O'Neill, 619 F.2d 222, 226 (3d Cir. 1980).

28. *In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (noting the deliberative process privilege is derived from the executive privilege). Early on, the Supreme Court identified two types of executive privilege that the executive branch could use to withhold documents. *See* United States v. Nixon, 418 U.S. 683, 706 (1974); *see also* United States v. Reynolds, 345 U.S. 1, 6–8 (1953). These privileges included the executive privilege derived mainly from "military, diplomatic, or sensitive national security secrets" and one involving issues of "broad, undifferentiated claim of public interest." *Nixon,* 418 U.S. at 706. These privileges granted to the president are broad but qualified and not limitless. *See, e.g.*, Cheney v. U.S. Dist. Court, 542

the deliberative process privilege is to allow decision-makers to discuss policy decisions freely before making them.[29] Underlying the privilege is the idea that sound policy decisions require decision-makers to engage in "'frank discussion of legal or policy matters'" and recognizes that releasing records of such debate to the public may inhibit open and honest discussion.[30] Another policy consideration entailed in the deliberative process privilege is the concern that the public may confuse policy makers' deliberations with enacted policy.[31]

Parties to a lawsuit can invoke the privilege only for material which a department produces before a policy maker makes a policy decision, and the material must be deliberative, meaning contemplative, of that policy decision.[32] Furthermore, the privilege protects only opinions and not factual information, even if the factual information is in an otherwise protected document.[33]

U.S. 367, 382 (2004) (commenting that the president is not above the law). Courts have also granted the privilege of withholding the identity of government informants to the executive branch. *See* Roviaro v. United States, 353 U.S. 53, 59–61 (1957). This privilege has been extended to law enforcement as the law enforcement investigatory privilege which protects investigatory materials including informant identities. *See* Smith v. Rogers, No. 3:15-cv-264, 2017 WL 2937957, at *3 (W.D. Pa. July 10, 2017); *see also In re* Sealed Case, 856 F.2d 268, 270 (D.C. Cir. 1988); *see also* Frankenhauser v. Rizzo, 59 F.R.D. 339, 342 (E.D. Pa. 1973). There is also an executive privilege related to pending investigations. *See* Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341–43 (D.C. Cir. 1984). The president is also absolutely immune from civil liability for official acts as part of the executive privilege. *See* Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982). Additionally, the executive branch is also protected by the attorney-client privilege in the same way a private entity is. *See, e.g.*, Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980).

29. *Sears, Roebuck & Co.*, 421 U.S. at 150.

30. *Id.* at 150 (citing S. Rep. No. 813, at 8 (1965)).

31. Narayan, *supra* note 12, at 1194. A government official may discuss unpopular policy decisions in the process of determining the proper decision. *See id.* The public may confuse the deliberation of an unpopular decision with that official's personal stance. *See id.* Consequently, the public official will be discouraged from the free communication needed in deliberation. *See id.*

32. *Id.* at 1184.

33. *See* Redland Soccer Club v. Dep't of the Army, 55 F.3d 827, 854 (3d Cir. 1995) (citing *In re* Grand Jury, 821 F.2d 946, 959 (3d Cir. 1987)). Courts have implied that if a document is protected by the deliberative process privilege, material within that document which is factual, rather than deliberative, is not protected by the privilege insofar as it can be "severable" from material which is deliberative. *See id.*

A. History of the Deliberative Process Privilege

1. Origin of Privilege in the Colonies

The concept of privileges has its genesis in the feudal system.[34] In the feudal era, when the king granted land to nobles and clergy, the king would sell immunities to individuals, granting the landholders the king's privileges which protected against liability to encourage the landowner to run the property efficiently.[35] The immunities conferred allowed the landowner to punish individuals on their land, independent of the national justice system.[36]

The deliberative process privilege is a relatively new privilege, but elements of this privilege stem from the "crown privilege" of England in the 18th century.[37] Throughout the 19th century, English courts permitted the use of the crown privilege to protect intragovernmental communications between officials.[38] The crown privilege did not explicitly protect deliberations, but the crown privilege tacitly included many communications, such as military reports and letters between various levels of government officials.[39] The crown privilege persists in England today and operates similar to the executive privilege of the United States.[40]

2. Early American Deliberative Process Privilege

Early in the history of the United States, the remnants of the crown privilege lingered, and courts drew upon the privilege in considering whether to require the disclosure of information that government officials sought to protect.[41] Multiple presidents asserted the privilege starting with the first, George Washington.[42] As the

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34. *See* Thomas Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 CAMPBELL L. REV. 7, 12–13 (2011).

35. *Id.*

36. *Id.* at 17–18.

37. Weaver & Jones, *supra* note 23, at 283 n.24 ("'Crown privilege' makes secret such things as parliamentary deliberations, state secrets and papers, confidential proceedings of the Privy Council, and communications by or to public officials in the discharge of their public duties.").

38. *Id.* at 283 n.26 (citing various cases supporting where English courts found communications of government officials privileged).

39. *See id.*

40. *See* Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 945 (Ct. Cl. 1958) ("The law is that the Crown is entitled to full discovery, and that the subject as against the Crown is not.").

41. Weaver & Jones, *supra* note 23, at 284.

42. *The Power of the President to Withhold Information from the Congress: Hearing on S. 921 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 85th Cong., 2d Sess. 78–82, 108–12 (1958). President George Washington and President Andrew Jackson asserted the privilege against congres-

role of the executive office and the presidency took shape and the government delegated more powers to the executive office, courts applied the privilege to lower government officials.[43] Early courts in the 19th century protected intragovernmental communications without specific mention to any particular privilege associated with deliberation or policy-making.[44]

3. *Development of the Modern Deliberative Process Privilege*

The deliberative process privilege shares its roots with the development of other executive privileges.[45] It was not until the 20th century that the deliberative process privilege fully developed as a distinct privilege in American jurisprudence.[46] The privilege originated in the common law from the courts but was also codified for use outside of litigation.[47]

a. Deliberative Process Privilege as Utilized in Litigation

The deliberative process privilege can be traced to a few Supreme Court cases in the early-20th century.[48] The Supreme Court held in *Morgan v. United States*[49] that the courts cannot probe the internal mental processes of government officials used to make administrative conclusions.[50]

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sional inquiries, while President Thomas Jefferson asserted the privilege during the Burr trials. *See id.*

43. Weaver & Jones, *supra* note 23, at 285 (explaining that the state secrets and informers privileges encompass some of what is now known as the deliberative process privilege).

44. *See, e.g.*, Gardner v. Anderson, 9 F. Cas. 1158, 1159 (C.C.D. Md. 1876) (No. 5,220) (holding a letter to the Secretary of Treasury was privileged because it was in the course of official duty, relating to the business of their offices); *see also* United States v. Cooper, 25 F. Cas. 631, 637 (C.C.D. Pa. 1800) (No. 14,865) (holding official documents would not be disclosed); Howard v. Thompson, 21 Wend. 319, 335–36 (N.Y. Sup. Ct. 1839) (stating in dicta that a letter from a postmaster to the Secretary of the Treasury would be privileged because it involves the operation of the government).

45. *See supra* Part II.A.1–2.

46. *See, e.g.*, United States v. Reynolds, 345 U.S. 1, 7–8 (1953).

47. *See infra* Part II.A.3.a–b.

48. Weaver & Jones, *supra* note 23, at 286–87 (citing Morgan v. United States, 304 U.S. 1, 18 (1938), and Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958)).

49. Morgan v. United States, 304 U.S. 1 (1938).

50. *Id.* at 18 ("[I]t 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."). The Court in *Morgan* dealt with the deliberations of the Secretary of Agriculture in setting prices for market. *Id.* at 13. In this role, the Secretary was in a quasi-judicial position making the extent to which the court in *Kaiser* could reasonably rely on it questionable. *See* Narayan, *supra* note 12, at 1189–90.

Shortly after *Morgan*, the Supreme Court decided *United States v. Reynolds*,[51] another seminal case in the development of executive privilege.[52] In *Reynolds*, the Court established the broad requirements in asserting executive privilege.[53] The Supreme Court established the requirement that a head of a department, intimate with the factual matter at issue, must assert the privilege.[54] After the party asserts the privilege with an affidavit from the department head, the court would then decide whether the circumstances require the privilege.[55] The Court in *Reynolds* was concerned with issues of military secrets, but courts have applied the requirements *Reynolds* established to all types of executive privilege.[56]

At the time of the *Morgan* and *Reynolds* decisions, the United States was in the midst of a turbulent political atmosphere.[57] During this period, increased scrutiny of governmental officials prompted the invocation of privilege by President Dwight D. Eisenhower and his subordinates during the McCarthy hearings.[58] Testimony in the McCarthy hearings revealed that the Eisenhower Administration held private meetings discussing how to counter the McCarthy hearings.[59] Shortly after Senator Joseph McCarthy became aware of the details of Eisenhower's meetings, the Eisenhower Administration ceased providing information to the Senate hearings, asserting the deliberative process privilege.[60]

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51. United States v. Reynolds, 345 U.S. 1 (1953).

52. Narayan, *supra* note 12, at 1185; *see* Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1306 (Fed. Cir. 2006) (noting the agency head requirement originated in *Reynolds*).

53. *Reynolds*, 345 U.S. at 7–8 ("There 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. The court itself must determine whether the circumstances are appropriate for the claim of privilege . . . .").

54. *Id.*

55. *Id.*

56. *See* Carter v. Carlson, 56 F.R.D. 9, 10 (D.D.C. 1972) ("[I]ts prerequisites for formal invocation of the privilege have been uniformly applied irrespective of the particular kind of executive claim advanced.").

57. *See* Narayan, *supra* note 12, at 1191 (referencing the McCarthy hearings); *see also* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 857–58 (1990). There was a heightened fear of communist infiltration in the 1950s, resulting in indiscriminate allegations and hearings for alleged communist spies. *See* Paul Achter, *McCarthyism*, ENCYCLOPEDIA BRITANNICA, https://bit.ly/2oYrSpN [https://perma.cc/9HKQ-BXT6].

58. Narayan, *supra* note 12, at 1191–92. The McCarthy hearings were hearings conducted in the search for communists operating in the United States Government between 1950 and 1954. *See generally* 2 STEPHEN E. AMBROSE, EISENHOWER: THE PRESIDENT (1984).

59. Narayan, *supra* note 12, at 1192.

60. *Id.* ("Eisenhower remarked in a letter . . . 'it is essential to efficient and effective administration that employees of the Executive Branch be in a position to

In 1958, the Court of Claims addressed the issue of whether internal documents detailing the opinions of a government official concerning a sale of manufacturing plants were privileged.[61] This case, *Kaiser Aluminum & Chemical Corp. v. United States*,[62] concerned a breach of contract action between a chemical company and a government agency tasked with liquidating war assets.[63] The source of the privilege debate in this case involved the refusal of a government agency to release an intra-office policy relating to the contract with the chemical company.[64] The court in *Kaiser* reasoned that the documents were privileged as a matter of public interest because of an important need to protect the "frank discussion between subordinate and chief concerning administrative action."[65] Consequently, the *Kaiser* court held that the government asserted a well-founded privilege and therefore the court withheld the documents from discovery.[66] The court further noted that the "power must lie in courts to determine executive privilege in litigation."[67] While the court recognized that the commissioner of the court could determine the issue of privilege in *Kaiser*, the court noted that other matters of privilege would best be understood by the officer most aware of the needs of the government in showing the preliminary executive interest in privilege.[68] Justice Reed, the presiding judge in *Kaiser*, relied upon the decisions of *Morgan* and

be completely candid in advising with each other on official matters.'") (citing Letter from Dwight Eisenhower to Secretary of Defense (May 17, 1954) (on file with author)).

61. Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 943–44 (Ct. Cl. 1958).

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

63. *Id.* at 941.

64. *Id.* at 943.

65. *Id.* at 946.

66. *Id.* at 948.

67. *Id.* at 947.

68. *See id.* In considering the need for examination of the privileged document, the court held:

> To require it here would mean the creation of an absolute right for judicial examination and determination of all evidence whose discovery the executive deemed contrary to the public interest. If executive determination is to be merely preliminary, the officer and agency most aware of the needs of government and most cognizant with the circumstances surrounding the legal claim will have to yield determination to another officer less well equipped. Circumstances may require such a course. This should not be ordered without definite showing by plaintiff of facts indicating reasonable cause for requiring such a submission.

Id. at 947–48.

Reynolds in reaching his decision, noting the cases presented similar circumstances to the instant matter.[69]

Another aspect of *Kaiser*, revealed by Professor Gerald Wetlaufer's analysis, is the suggestion that courts arrived at the deliberative process privilege not only through the crown privilege but partly through the doctrine of sovereign immunity.[70] Mere months after the decision in *Kaiser*, the Supreme Court ruled against allowing sovereign immunity to limit the scope of discovery, suggesting that when the government is a litigant, the government must abide by the same procedural rules as all other litigants.[71]

The courts further strengthened the executive privilege during President Richard Nixon's term.[72] The Supreme Court recognized that the executive privilege is a constitutional right in *United States v. Nixon*[73] based on the separation of powers and the need for intragovernmental confidential communication.[74] Because the deliberative process privilege stems from executive privilege, the Court also recognized the deliberative process privilege as a constitutional right.[75] The Court recognized the executive privilege protecting President Nixon's deliberations as a qualified one.[76] However, the

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69. *Id.* at 946.

70. *See* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 873 (1990).

71. United States v. Proctor & Gamble Co., 356 U.S. 677, 681 (1958).

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

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

74. *See id.* at 703.

75. *Id.*; Weaver & Jones, *supra* note 23, at 288. Scholars and courts debate whether the deliberative process privilege is rooted in the common law or in the Constitution. *See id*. Some courts have posited that the basis of the deliberative process privilege exists separately from the Constitution based on the commonsense notion that not all public business should be discussed in the open. *See, e.g.*, Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971) (Wilkey, J., concurring); *In re* Certain Complaints Under Investigation, 783 F.2d 1488, 1519 (11th Cir. 1986). At least one scholar has argued that no aspect of the executive privilege is based in the Constitution. *See* Maurice Holland, *Executive Privilege: A Constitutional Myth, by Raol Berger*, 50 IND. L. J. 193 (1974) (book review). However, district courts have treated the mental process protection in the deliberative process privilege as constitutionally based. *See, e.g.*, *In re* Franklin Nat'l Sec. Litig., 478 F. Supp. 577, 581 (E.D.N.Y. 1979). It stands to reason that it is proper to hold that because the *Nixon* Court held the executive privilege to be derived from the Constitution, and the deliberative process privilege arises from the executive privilege, at least some aspect of the deliberative process privilege is derived from the Constitution. *See* Weaver & Jones, *supra* note 23, at 288–89.

76. *Nixon*, 418 U.S. at 706 ("[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."). The Court recognized that the privilege that the executive holds is qualified insofar as it is limited to specific situations, which allows the Court to hold the privilege did not protect against the specific instance

link between the executive privilege as seen in *Nixon* and courts have questioned the deliberative process privilege due to the unique nature of the Office of the President.[77]

In the year following the decision in *Nixon*, the Supreme Court decided *NLRB v. Sears, Roebuck & Co.*[78] which, while not using the term "deliberative privilege," recognized the need to protect the deliberation of government officials.[79] The Court distinguished between pre-decisional communications, which are privileged, and post-decision communications, which are not.[80]

In the early 1970s, the Federal Rules of Evidence advisory committee attempted to codify the deliberative process privilege.[81] The advisory committee made multiple drafts of the proposed codified deliberative process privilege between 1969 and 1973.[82] During this time, the Department of Justice (DOJ) and the advisory committee discussed what standard of harm the government would have to demonstrate to pass the bar for the proposed rule to avoid the disclosure of secrets.[83] Had the legislature accepted the rule, the 1973 version of the rule would have set the standard articulated

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of demonstrated need found in *Nixon*, as well as allowing future courts to refine what exactly executive privilege protects. *See id.*

77. Wetlaufer, *supra* note 70, at 901–02. Wetlaufer suggests that presidential deliberations are distinct from the general deliberative process privilege because the position of president is a special one which deserves deference over the lower-ranked offices. *Id.* Furthermore, the U.S. Constitution recognizes the offices of president and vice president specifically while the constitution does not recognize the lower offices. *Id.*

78. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

79. *Id.* at 150. Specifically, the Court noted:

> Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made.

Id. at 151. The Court addressed exemption five of the Freedom of Information Act, 5 U.S.C. § 552 (2018), but discussed the contours of the need to protect the deliberation of policy decisions. *Id.*

80. *Id.* at 152 ("This distinction is supported not only by the lesser injury to the decisionmaking process flowing from disclosure of postdecisional communications, but also, in the case of those communications which explain the decision, by the increased public interest in knowing the basis for agency policy already adopted."). For the purposes of privilege, pre-decisional communications are communications made before policy decisions by public officials. *Id.*

81. Anthony Rapa, Comment, *When Secrecy Threatens Security:* Edmonds v. Department of Justice *and a Proposal to Reform the State Secrets Privilege*, 37 SETON HALL L. REV. 233, 251 (2006) (discussing the development of the failed FED. R. EVID. 509).

82. *Id.* at 252–53.

83. *Id.* (noting the DOJ argued for a lower standard such as the classification of the document be conclusive on the issue of state secrets).

in *Reynolds* into a statute, requiring that a department head or agency head assert the privilege.[84] The proposed rule went to a vote at the same time that the Watergate scandal broke.[85] Naturally, Congress hesitated to codify privileges for the executive while engaged in a conflict with a sitting president concerning the withholding of information.[86] Ultimately, Congress voted down the proposed amendments to the Federal Rules of Evidence.[87]

b. Deliberative Process Privilege Outside of Litigation

Outside of the scope of litigation, the deliberative process privilege applies to the Freedom of Information Act (FOIA).[88] FOIA provides a process for any person to request information that the United States government is in possession of but has not released and requires the disclosure of that information unless a privilege protects the information.[89] There are a number of exemptions to FOIA, but FOIA incorporates the deliberative process privilege into exemption five which applies to "intra-agency memorandums or letters."[90] Courts interpret the purpose of the FOIA as providing the public with a "broad spectrum of information."[91] However, FOIA provides limits in exemption five for the same reason that courts limit discovery by the deliberative process privilege at common law.[92] That reason is to protect both deliberative materials as well as deliberative process of executive agencies and to allow agen-

84. *Id.* at 254.

85. *Id.* at 255.

86. *Id.*

87. *Id.*

88. *See* 5 U.S.C. § 552(b)(5) (2018); Narayan, *supra* note 12, at 1195.

89. 5 U.S.C. § 552.

90. *Id.* § 552(b)(5). FOIA includes nine enumerated exemptions. *Id.* § 552(b). The first exemption is for matters authorized by "[e]xecutive order to be kept secret in the interest of national defense." *Id.* § 552(b)(1)(A). The next exemption is for material related "solely to the internal personnel rules and practices of an agency." *Id.* § 552(b)(2). FOIA also includes an exemption for any material specifically exempted by another statute subject to qualification. *Id.* § 552(b)(3)(A)–(B). FOIA also includes exemptions for trade secrets and financial information, and personnel and medical files in § 552(b)(4)–(5), an exemption similar to the Law Enforcement Privilege which protects "records or information compiled for law enforcement purposes," and an exemption for "geological and geophysical information and data," in § 552(b)(9). The last of FOIA's exemptions is the exemption for "examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." *Id.* § 552(b)(8).

91. Envtl. Prot. Agency v. Mink, 410 U.S. 73, 74 (1973).

92. 5 U.S.C. § 552(b); *Mink*, 410 U.S. at 89–91.

cies to deliberate on policy matters free of the fear of disclosure.[93] FOIA is not explicitly a part of the deliberative process privilege but overlaps concerning deliberative materials, and therefore has been a significant consideration in deliberative process jurisprudence.[94]

B. Deliberative Process Privilege Now

The deliberative process privilege is a common-law privilege.[95] The privilege protects executive officials from disclosure of information in discovery.[96] The general common-law deliberative process privilege requires only that the information be pre-decisional and deliberative.[97] As a consequence, information which is purely factual or relating to an existing policy already implemented is not covered by the deliberative process privilege.[98]

The Federal Rules of Civil Procedure require a party responding to requests for the production of documents to state "with specificity the grounds for objecting to the request, including the reasons."[99] An objection must also specify what the objecting party is withholding and, if the objecting party only partially withholds an item, permit the court to inspect what the party is withholding.[100]

If a party claims a privilege, the party claiming the privilege must, usually through a privilege log, expressly assert the privilege and describe the material the party withholds in such a way as to allow other parties to assess the merit of the privilege without revealing the privileged information.[101] The party claiming any privilege must assert more than a bare conclusion to ensure that the

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93. *See* 5 U.S.C. § 552(b); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975); Montrose Chem. Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974).

94. *See* Narayan, *supra* note 12, at 1193.

95. *Id.*

96. *Id.*

97. *See In re* Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997). The material which is privileged must be made before policy decisions are carried out, commonly referred to as "predecisional" material, and must be made in the course of deliberating over those decisions. *Id.* Deliberative materials "reflect[ ] the advisory and consultative process by which decisions and policies are formulated." Army Times Publ'g Co. v. Dep't of the Air Force, 998 F.2d 1067, 1070 (D.C. Cir. 1993).

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

99. FED. R. CIV. P. 34(b)(2)(B).

100. FED. R. CIV. P. 34(b)(2)(C); *see, e.g.*, Smith v. Rogers, No. 3:15-cv-264, 2017 WL 544598, at *1 (W.D. Pa. July 10, 2017) (producing a partially redacted requested document for inspection).

101. FED. R. CIV. P. 26(b)(5)(A). The privilege log is an accounting of the material being claimed privileged and the reason the party is asserting the privilege as required by Rule 26. *Id.*

court can accurately assess whether or not the claim of privilege is legitimate.[102] The government bears the initial burden of showing the necessity of the deliberative process privilege.[103] These rules are consistent in every jurisdiction but their application varies between jurisdictions.[104]

C. Deliberative Process Privilege in the Third Circuit

In *United States v. O'Neill*, the Third Circuit established procedural requirements that the government must satisfy to assert the privilege.[105] Specifically, the head of the department or agency attempting to assert the privilege must personally review the material the party seeks to protect and provide the court with both a "specific designation and description" of the material and "'precise and certain reasons for preserving' the confidentiality of the communications."[106] The court further noted in *O'Neill* that an assertion of the privilege should include an affidavit claiming the department head reviewed the documents properly.[107]

Once the court evaluates the sufficiency of the asserted privilege, the court conducts a two-step review of the material.[108] "First, [the court] must decide whether the communications are in fact privileged. Second, the court must balance the parties' interests."[109] However, not all courts follow this process in the same way.

D. Differences Within the Third Circuit Procedural Requirement

1. Department Head Requirement

District courts in the Third Circuit have generally held that a department head must assert the deliberative process privilege

102. *See* Schreiber v. Soc'y for Savings Bancorp, 11 F.3d 217, 221 (D.D.C. 1993) (holding that courts retain the discretion to determine if a factual portion of a document protected by the deliberative process privilege cannot be separated).

103. Redland Soccer Club v. Dep't of the Army, 55 F.3d 827, 854 (3d Cir. 1995).

104. *See* source cited *supra* note 17.

105. *See* United States v. O'Neill, 619 F.2d 222, 226 (3d Cir. 1980); *see also Schreiber*, 11 F.3d at 221.

106. *O'Neill*, 619 F.2d at 226 (quoting Smith v. FTC, 403 F. Supp. 1000, 1016 (D. Del. 1975)).

107. *Id.* The court in *O'Neill* asserted that it was not deciding if it was always the case that the department head must personally review the documents. *Id.* ("We need not decide if this is always the case . . . .").

108. *See Redland Soccer Club*, 55 F.3d at 854.

109. *Id.*

rather than solely counsel.[110] Some courts have declined to grant the privilege when the government failed to show that a department head made the kind of careful examination required to assert the deliberative process privilege.[111] The Third Circuit emphasizes that an "indiscriminate claim of privilege may in itself be sufficient reason to deny it."[112] Such an indiscriminate claim makes it impossible for the court to make just assessment of the legitimacy of a claim of privilege.[113] Furthermore, a District Court in the Western District of Pennsylvania suggested that a failure to include an affidavit from a department head "could be fatal to [its] claim of executive privilege."[114]

Historically, courts have waived the department head requirement when in camera review presented a viable solution to determining the validity of a claim of privilege.[115] Courts in the Third

110. *See, e.g.*, Griffin-El v. Beard, No. 06-cv-2719, 2009 WL 678700, at *7 (E.D. Pa. Mar. 16, 2009) (noting a lack of specificity and no indication by affidavit or otherwise that a department head reviewed the documents at issue); Startzell v. City of Phila., No. 05-cv-5287, 2006 WL 2945226, at *2 n.5 (E.D. Pa. Oct. 13, 2006) (noting there is a clearly established protocol when documents are at issue as opposed to testimony); Scott Paper Co. v. United States, 943 F. Supp. 501, 502 (E.D. Pa. 1996) (requiring the Commissioner of the IRS to assert the deliberative process privilege).

111. *See, e.g.*, *O'Neill*, 619 F.2d at 226. *O'Neill* involved a claim against city officials for alleged police brutality. *Id.* at 224. The appellant, the U.S. Civil Rights Commission, served upon the appellee city officials administrative subpoenas which prompted the appellees to assert deliberative process privilege. *Id.* at 225–26. Appellees asserted the privilege through an attorney and not in writing. *Id.* The court in *O'Neill* held that the manner of assertion for the privilege was insufficient without a written assertion and without a department head's affidavit. *Id*. at 231; *see also* Lee v. Developers Diversified Realty Corp., No. 09-cv-210, 2009 WL 1607900, at *1 (W.D. Pa. June 8, 2009). The plaintiffs in *Lee* attempted to enforce a subpoena for production of documents from Allegheny County. *Id.* at *1. Allegheny County asserted the deliberative process privilege initially without a department head affidavit and was given time to comply with the requirements by the court. *Id.* at *1. Allegheny County responded with an affidavit not from the department head but from a supervisor. *Id.* While the court in *Lee* rejected Allegheny County's claim of privilege on other grounds, it noted that the deficiencies in their deliberative process privilege claim "alone could be fatal to Allegheny County's claim of executive privilege." *Id.* at *1–2.

112. *O'Neill*, 619 F.2d at 227. The court noted in *O'Neill* that the city indiscriminately asserted the privilege in ways which were impossible. *Id.* at 226. For example, the city attempted to invoke the Fifth Amendment for the protection of documents, but the Fifth Amendment in this context is a personal claim of privilege and there was no indication that the Commissioner was personally claiming protection from self-incrimination. *Id.*

113. *Id.*

114. *Lee*, 2009 WL 1607900, at *1.

115. *E.g.*, Harris v. City of Phila., No. CIV.A. 82-1847, 1995 WL 350296, at *8 (E.D. Pa. June 6, 1995); Conoco, Inc. v. Dep't of Justice, 687 F.2d 724, 727–28 (3d Cir. 1982).

Circuit have inconsistently applied the waiver by in camera review.[116] In the Third Circuit, courts faced with an improperly asserted privilege have been typically cautious to deny a party the protection afforded by the deliberative process privilege purely because of a technicality of procedure such as the failure to submit an affidavit by a department head.[117]

2. Balancing Test

After determining that the privilege was properly asserted and has merit, the court must balance the policy considerations and necessity of the privilege with the need for the evidence by the party requesting it.[118] Lower courts within the Third Circuit rely on two different factor tests; some use a ten-factor test and the others use a five-factor test.[119] For courts employing the ten-factor balancing test, a court weighs:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information;
>
> (2) the impact upon persons who have given information of having their identities disclosed;
>
> (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure;
>
> (4) whether the information sought is factual data or evaluative summary;
>
> (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question;

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116. *Compare* Conoco, 687 F.2d at 727–28 (holding affidavits submitted by solicitor at DOJ was sufficient for in camera review), *with Lee*, 2009 WL 1607900, at *1 (holding that privilege assertion made by an attorney, even with in camera review, was not enough to assert the privilege).

117. *See* Smith v. Rogers, No. 3:15-cv-264, 2017 WL 544598, at *3 (W.D. Pa. July 10, 2017) (allowing the assertion of the privilege despite a lack of consideration by a department head); *see also* Crawford v. Dominic, 469 F. Supp. 260, 264 (E.D. Pa. 1979) ("A court should be wary of dismissing possibly meritorious claims for such a technical reason, especially where important interests of the public at large may be involved.").

118. *See* Redland Soccer Club v. Dep't of the Army, 55 F.3d 827, 854 (3d Cir. 1995); *see also* United States v. O'Neill, 619 F.2d 222, 227 (3d Cir. 1980) (requiring the court to balance on one hand the policies which give rise to the privilege and their applicability to the facts at hand against the need for the evidence sought to be obtained in the case at hand).

119. *Compare* Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973) (using a ten-factor balancing test), *with* Chisler v. Johnston, 796 F. Supp. 2d 632, 640 (W.D. Pa. 2011) (using a five-factor test).

> (6) whether the police investigation has been completed;
>
> (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation;
>
> (8) whether the plaintiff's suit is non-frivolous and brought in good faith;
>
> (9) whether the information sought is available through other discovery or from other sources; and
>
> (10) the importance of the information sought to the plaintiff's case.[120]

Courts give the most weight to the importance of the information sought for the plaintiff's case as a factor.[121]

The five-factor test is similar in theme but the streamlining of the factors into only five results in a test that demands less specificity. It includes:

> (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.[122]

III. ANALYSIS

Courts have never held the application and procedure of the agency head requirement for asserting the deliberative process privilege to be fully established.[123] The language of the leading Supreme Court decision left a lot of room for discretion by asserting, "The court itself must determine whether the circumstances are appropriate for the claim of privilege . . . ."[124] Furthermore, the Supreme Court has not made the proper form of the department head requirement explicitly clear; some courts hold that an affidavit is

120. *Frankenhauser*, 59 F.R.D. at 344; *see also Lee*, 2009 WL 1607900, at *1.

121. *See Crawford*, 469 F. Supp. at 263 (citing Culp v. Devlin, 78 F.R.D. 136, 139–41 (E.D. Pa. 1978)).

122. *Chisler*, 796 F. Supp. 2d at 640 (quoting *Redland Soccer Club*, 55 F.3d at 854).

123. *See* Weaver & Jones, *supra* note 23, at 307–09 (listing the different ways courts have chosen to handle the department head requirement); *see also* Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1306–07 (Fed. Cir. 2006) (noting the split within the circuit regarding the department head requirement).

124. United States v. Reynolds, 345 U.S. 1, 8 (1953). The Court in *Reynolds* also noted that this requirement is the one that presents the most difficulty. *Id.*

not necessarily the only means.[125] Increasingly, courts have abandoned the department head requirement altogether and instead conduct in camera reviews to determine the legitimacy of a claim of deliberative process privilege.[126] Further conflict between courts arises from the interpretation and application of who constitutes a "department head."[127] Regardless of whether the department head meets the affidavit requirement or a court uses in camera review, courts in the Third Circuit employ two different sets of factors to determine whether or not the information shall remain protected.[128] The lack of uniformity is a burden on judicial resources because it forces the court to conduct in camera review more frequently.[129] If courts applied a more stringent and uniform standard, they would benefit and the standard would provide clarity to litigants.

Part III.A argues for stricter adherence to the standards established by *O'Neill* by consistently requiring an affidavit by a department head for cases filed in the Third Circuit. Part III.B discusses what positions constitute department heads. Part III.C briefly discusses the need for a uniform set of factors to determine whether or not a party properly invokes a privilege.

A. Consequences of Failing to Apply the Department Head Requirement

Courts often use in camera review as an alternative to the department head requirement.[130] In camera review is the review of documents in chambers, usually for the purposes of determining the admissibility of evidence based on matters such as privilege and relevance.[131] Conducting in camera review can involve a lengthy re-

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125. *See* United States v. O'Neill, 619 F.2d 222, 226 (3d Cir. 1980) ("*Usually* such claims must be raised by affidavit." (emphasis added)).

126. *See* Weaver & Jones, *supra* note 23, at 310.

127. *See O'Neill*, 619 F.2d at 226 (requiring more than a mere supervisor to assert the deliberative process privilege); *see also* Landry v. FDIC, 204 F.3d 1125, 1135 (D.C. Cir. 1984) (allowing someone who was not at the very top of an agency to fulfill the department head requirement).

128. *Compare*, Redland Soccer Club v. Dep't of the Army, 55 F.3d 827, 854 (3d Cir. 1995) (employing a five-factor test), *with* Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973) (employing a ten-factor test).

129. *See* Narayan, *supra* note 12, at 1206–07.

130. *See, e.g.,* Smith v. Rogers, No. 3:15-cv-264, 2017 WL 544598, at *3 (W.D. Pa. July 10, 2017) (employing in camera review in absence of a department head affidavit); *see also* U.S. Dep't of Energy v. Brett, 659 F.2d 154, 155 (Temp. Emer. Ct. App. 1981) (holding that an affidavit is only required in absence of in camera review); Ass'n for Women in Sci. v. Califano, 566 F.2d 339, 347–48 (D.C. Cir. 1977).

131. *See In camera*, BOUVIER LAW DICTIONARY (8th ed. 2012).

view of sizeable documents to determine, line by line, whether each sentence is privileged or not.[132] Employing an in camera review standard places a large burden on courts which slows the litigation process, especially when compounded by the number of parties that could invoke the privilege.[133] If a party disregards the department head requirement and merely submits the claim of privilege, the court has no other choice than to conduct an in camera review because the court lacks any assurance from a department head that the privilege is necessary.

Without a department head affidavit, the court could blindly accept a claim of privilege without review for the sake of judicial economy, but this standard would inevitably lead to the government improperly protecting documents under the guise of the deliberative process privilege.[134] In addition, even if in camera review will always be necessary when a party invokes the deliberative process privilege, the department head requirement exists to ensure that the party did not claim documents to be privileged carelessly, which helps avoid wasting the court's time.[135]

Scholars such as Weaver and Jones disagree with the necessity of the department head requirement and argue that it is superfluous considering the increased reliance on in camera review.[136] However, Weaver and Jones ignore the stated purpose of the department head requirement, which is to ensure that a department head, who is in the unique position to have personal knowledge on the subject, reviewed the material and gave a specific description of what a party claims is privileged as well as certain reasons to preserve the confidentiality of the communications.[137] After all, parties invoking the deliberative process privilege are in the position to conceal the actions and inner workings of the government from its

132. *See, e.g., Smith*, 2017 WL 544598, at *3 (requiring the court to evaluate documents in camera).

133. *See* Weaver & Jones, *supra* note 23, at 303; *see also* Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973) (noting such an examination would be overly burdensome without some argument to illuminate the importance by the party asserting a privilege).

134. *See* United States v. Nixon, 418 U.S. 683, 706–07 (1974) (noting the need for qualified executive privilege rather than absolute and unqualified privilege).

135. *See* United States v. O'Neill, 619 F.2d 222, 226 (3d Cir. 1980) (citing Smith v. FTC, 403 F. Supp. 1000 (D. Del. 1975)).

136. *See* Weaver & Jones, *supra* note 23, at 310; *see also* Founding Church of Scientology, Inc. v. FBI, 104 F.R.D. 459, 465–66 (D.D.C. 1985).

137. *See, O'Neill*, 619 F.2d at 226; *see also* Mobil Oil Corp. v. Dep't of Energy, 102 F.R.D. 1, 5 (N.D.N.Y. 1983); Resident Advisory Bd. v. Rizzo, 97 F.R.D. 749, 752 (E.D. Pa. 1983).

citizens, and departments should not lightly invoke the privilege.[138] Transparency and accountability are pillars of democracy, and the assertion of a privilege over information by public entities slowly erodes this pillar.[139]

The department head requirement also encourages a more politically responsible outcome when parties attempt to assert the privilege because those with the most responsibility in the department would be asserting it.[140] The "master" of a department is in a better position to understand the political consequences of asserting or not asserting the deliberative process privilege in any given situation.[141]

The trend may be, as some scholars have suggested, that in camera review is a sufficient and preferable replacement for the department head affidavit requirement.[142] In camera review may even be necessary in many cases. However, courts should properly view it as supplemental to the procedure of asserting deliberative process privilege where courts employ in camera review only as necessary after the department head requirement is met.[143]

B. *Application and Adherence to the Department Head Requirement*

Courts have had a difficult time discerning who would constitute a department head for the purposes of asserting the deliberative process privilege.[144] Solving this problem uniformly would make the department head requirement much more viable.

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138. *See O'Neill*, 619 F.2d at 227; *see also* Exxon Corp. v. Dep't of Energy, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *see also* Coastal Corp. v. Duncan, 86 F.R.D. 514, 518 (D. Del. 1980).

139. *See* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1254 (2009) ("Modern public law is strongly devoted to the notion that public officials should be held 'accountable' for their decisions.").

140. United States v. Reynolds, 345 U.S. 1, 6 (1953) (requiring the affidavit to come from the political head); *Duncan*, 86 F.R.D. at 518 (noting the affidavit did not come from a politically responsible party).

141. *See* Resident Advisory Bd. v. Rizzo, 97 F.R.D. 749, 752 (E.D. Pa. 1983); *see also* Pierson v. United States, 428 F. Supp. 384, 395 (D. Del. 1977).

142. *See* Weaver & Jones, *supra* note 23, at 310.

143. *See, e.g.*, Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 330–33 (D.D.C. 1966), *aff'd sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir. 1967) (holding in camera inspections appropriate only when non-asserter demonstrated right to disclosure and a dispute).

144. *Compare* United States v. Exxon Corp., 87 F.R.D. 624, 637 (D.D.C. 1980) (holding affidavit need not be sworn by the head of an agency but one who has delegated authority), *with O'Neill*, 619 F.2d at 226 (holding that a police supervisor was not a department head).

Some courts hold that the personal consideration required by the deliberative process privilege can be accounted for in subordinates when a department head relies upon the advice of those subordinates.[145] Other courts have held that department heads can delegate their review authority to subordinates, who may constitute either other high-level officials or lower-level subordinates with strict guidelines.[146] The ambiguity lies in the complex nature of agencies and their personnel structures, making it difficult to discern who, outside of the top executive office, would have proper authority and knowledge to assert the deliberative process privilege.[147]

An agency could assert the privilege with minimal risk of abuse if courts required them to make a showing of content guidelines that they implemented when invoking the privilege.[148] However, these content guidelines still leave the determination to the discretion of the courts to guess what those types of guidelines should look like.[149]

The most consistent position for courts to take would be that which the *O'Neill* court took.[150] As the court in *O'Neill* held, departments should assert the deliberative process privilege with an affidavit by a department head, not a subordinate, showing contemplation and scrutiny over the material they are seeking to protect.[151] The government should not invoke the deliberative process privilege lightly, especially if the material under review is not related to national security and military secrets as was the case in *Reynolds*.[152] Only the highest-level department head of an agency can truly be accountable to assert the deliberative process privilege with the consideration and intimate knowledge required.[153]

145. *See* Peck v. United States, 88 F.R.D. 65, 74 (S.D.N.Y. 1980) (holding the Attorney General properly asserted the deliberative process privilege despite not having personally reviewed the considered documents).

146. *See* Mobile Oil Corp. v. Dep't of Energy, 102 F.R.D. 1, 5 (N.D.N.Y. 1983) (permitting high level subordinates to satisfy the department head requirement); *see also* Exxon Corp. v. Dep't of Energy, 91 F.R.D. 26, 44 (N.D. Tex. 1981) (holding department head requirement not needed if case-specific content guidelines which will insure appropriate and consistent assertion are present).

147. *See* Narayan, *supra* note 12, at 1203.

148. *See, e.g.*, *Exxon Corp.*, 91 F.R.D. at 44; *see also* Coastal Corp. v. Duncan, 86 F.R.D. 514, 518 (D. Del. 1980).

149. *Cf. Exxon Corp.*, 91 F.R.D. at 44.

150. *See O'Neill*, 619 F.2d at 226 (requiring an affidavit from the head of the department).

151. *Id.*

152. *See* United States v. Reynolds, 345 U.S. 1, 7–8 (1953); *see also* Weaver & Jones, *supra* note 23, at 309.

153. *See O'Neill*, 619 F.2d at 226.

IV. CONCLUSION

The deliberative process privilege provides an avenue to protect the legitimate deliberative processes of government officials.[154] The government can also invoke it without cause in the hopes that the court will protect otherwise discoverable documents from entering the hands of adverse parties.[155] Courts have developed safeguards to protect against the possibility of abusing the privilege.[156] The main protection against abuse of the privilege is the department head review requirement and the in camera review that courts may conduct.[157]

In camera review has been an intuitive option for courts evaluating whether material should not be discoverable, but it is not always an option if the protected material concerns national security.[158] The Supreme Court developed the department head requirement to account for material so sensitive that even the court should not review it, but it also applied equally for material that the court could review in camera.[159] The department head requirement applies because in camera review is burdensome on the courts and, even when conducted, the disputed documents may be of an esoteric nature such that the court cannot properly evaluate them.[160] The court's inability to properly evaluate the privileged material is why a careful consideration of potentially privileged material must be done by someone intimately familiar with the subject matter, and the government should make the court aware of that evaluation and its analysis through an affidavit.[161]

There is no uniform standard for what a department head is.[162] Some courts have held that a subordinate may assert the privilege with the department head's permission, while other courts have held only someone at the top of an organization may assert the privilege.[163] A test based off of the locus of relevant knowledge or

154. *See Reynolds*, 345 U.S. at 7–8.

155. *See* Smith v. Rogers, No. 3:15-cv-264, 2017 WL 544598, at *3 (W.D. Pa. July 10, 2017).

156. *See* Narayan, *supra* note 12, at 1206–07; *see also Reynolds*, 345 U.S. at 7–8.

157. *See* Narayan, *supra* note 12, at 1206–07; *see also Reynolds*, 345 U.S. at 7–8.

158. *See Reynolds*, 345 U.S. at 10.

159. *Id.* at 11–12.

160. *See supra* Part III.A.

161. *See supra* Part III.A.

162. *See* Narayan, *supra* note 12, at 1203.

163. *Compare, e.g.*, Peck v. United States, 88 F.R.D. 65 (S.D.N.Y. 1980) (holding the Attorney General properly asserted the deliberative process privilege

policy-making authority would suffice.[164] After determining who the department head is, that department head should consistently be the one to assert the privilege as the *O'Neill* standard suggests.[165]

The application of the deliberative process privilege can be complex and requires an amount of discretion from the courts to determine what is deliberative and what is decisional or factual.[166] When the court gives too much deference to a government agency, then the result can be a blanket and arbitrary assertion of the privilege over unprivileged documents leaving litigants bereft of their due discovery.[167]

Courts should not waive the department head requirement even where in camera review is a viable and applicable option. The purpose of the department head requirement is not only to ensure that the government asserts the privilege properly, but to hold department heads accountable for when it is not.[168]

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despite not having personally reviewed the considered documents), *with* United States v. O'Neill, 619 F.2d 222, 226 (3d Cir. 1980).

164. *See* Narayan, *supra* note 12, at 1203, 1206.

165. United States v. O'Neill, 619 F.2d 222, 226 (3d Cir. 1980).

166. *See supra* Part III.A.

167. *See, e.g.*, Smith v. Rogers, No. 3:15-cv-264, 2017 WL 544598, at *3 (W.D. Pa. July 10, 2017).

168. *See supra* Parts II.B., III.A.