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## A Small Illegitimate Power: Executive Privilege in Rhode Island

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# A Small Illegitimate Power: Executive Privilege in Rhode Island

## I. INTRODUCTION

In mid-July of 2003, the Narragansett Indian Tribe of Rhode Island opened a smoke-shop that sold tobacco products tax-free.<sup>1</sup> Pursuant to an investigation, the Rhode Island State Police obtained a warrant to search the premises. The ensuing raid erupted into a violent fracas, pitting the police against members of the tribe.<sup>2</sup> The media publicized film of the incident, allowing stunned Rhode Island residents to watch as the state police forced their way past tribe members to enter the smoke-shop. Seven tribe members were subsequently tried for misdemeanor offenses that included obstruction, resisting arrest, disorderly conduct, and assault.<sup>3</sup> The trial received hours of news footage and involved high emotions.<sup>4</sup> Ultimately, the jury blamed all parties involved, including the governor:<sup>5</sup> the jury only convicted three tribe members, and acquitted the defendants on twelve of the sixteen counts it decided.<sup>6</sup>

Lost in the outskirts of this tale, however, is Rhode Island Governor Donald A. Carcieri's attempt to block the defendants' subpoena, which would have required him to testify at trial, by invoking the executive privilege.<sup>7</sup> Throughout the state's existence, the people of Rhode Island and Providence Plantations

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1. Katie Mulvaney, *Smoke-shop Trial to Begin*, PROVIDENCE J., Jan. 13, 2008, at A1, available at 2008 WLNR 825056.

2. *Id.*

3. Katie Mulvaney, *Court Decision Delays Trial in Smoke-shop Raid*, PROVIDENCE J., Sept. 7, 2007, at B1, available at 2007 WLNR 17749975.

4. Katie Mulvaney et al., *A Split Decision*, PROVIDENCE J., Apr. 5, 2008, at A1, available at 2008 WLNR 6427897.

5. Katie Mulvaney, *Smoke-shop Jurors Agree: They're Glad the Trial is Over*, PROVIDENCE J., Apr. 13, 2008, at A1, available at 2008 WLNR 6927418.

6. Mulvaney et al., *supra* note 4.

7. See Mulvaney, *supra* note 1.

have had their fair share of reasons not to trust those in the seats of state and local government.<sup>8</sup> Governor Carcieri's invocation of executive privilege may have given state residents another.<sup>9</sup>

The phrase "executive privilege" has several meanings and connotations. For example, *Black's Law Dictionary* defines it as "[a] privilege, based on the constitutional doctrine of separation of powers, that exempts the executive branch of the federal government from usual disclosure requirements when the matter to be disclosed involves national security or foreign policy."<sup>10</sup> A college dictionary, on the other hand, defines it as "[t]he principle that members of the executive branch of government cannot legally be forced to disclose confidential communications when such disclosure would adversely affect executive operations or procedures."<sup>11</sup> The Ohio Supreme Court recently deemed that the doctrine is based on the "unassailable" premise—to serve the public interest—in order protect its governor from compelled disclosure.<sup>12</sup> This implies that the doctrine itself is "unassailable" because of its irrefutable premise.

The executive privilege is well established for the federal executive branch,<sup>13</sup> and many states presume its existence in their own executive departments.<sup>14</sup> But how can the doctrine be "unassailable" when the power or protection is not expressly granted in both the Federal and Rhode Island Constitutions? This comment explores the murky doctrine of executive privilege throughout the country, placing a particular emphasis on Rhode Island, and suggests a comprehensible solution. Part II discusses the modern history of executive privilege. It begins with a review of federal case-law, followed by a representative sampling of

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8. Examples include everything from the Dorr Rebellion of 1841 to Plunder Dome. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (landmark case that held whether a new government was formed to replace an existing, corrupt government with little suffrage rights was a political question and nonjusticiable); MIKE STANTON, *THE PRINCE OF PROVIDENCE* (2003) (discussing the history of corruption in the city of Providence, culminating in the RICO conviction of former Providence Mayor Vincent "Buddy" Cianci).

9. See discussion *infra* Part II.D.

10. BLACK'S LAW DICTIONARY 1216 (7th ed. 1999).

11. THE AMERICAN HERITAGE COLLEGE DICTIONARY 479 (3d ed. 2000).

12. *State ex rel. Dann v. Taft (Dann I)*, 848 N.E.2d 472, 484 (Ohio 2006).

13. See *United States v. Nixon (Nixon I)*, 418 U.S. 683, 708 (1974).

14. See discussion *infra* Part II.B.

gubernatorial uses of the privilege, and finishes with a survey of Rhode Island's legal landscape as it relates to the privilege. Part III analyzes the problems surrounding executive privilege, starting with the absence of any specific grant in the Federal and Rhode Island Constitutions, followed by rejections of the commonly used rationales of separation of powers and the public interest. Finally, Part IV proposes adopting the deliberative-process privilege as a viable solution to the problem of protecting governmental material that legitimately should not be available for public disclosure.

## II. BACKGROUND

### A. Presidential Executive Privilege and Nixon

Many presidents, going as far back as George Washington, have claimed a right to withhold information linked with their role as a public official.<sup>15</sup> President Washington, for instance, declined the House of Representatives' request for papers concerning the negotiation of the Jay Treaty,<sup>16</sup> and President Thomas Jefferson may have refused, at least initially, to comply with a subpoena in the treason trial of Aaron Burr.<sup>17</sup> The United States Supreme Court, however, did not formally recognize a constitutionally-based executive privilege until 1974, when it decided the seminal case of *United States v. Nixon*.<sup>18</sup> There, the Court established that a privilege protecting presidential communications from dissemination "is fundamental to the operation of [g]overnment and inextricably rooted in the

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15. See Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1391-93, 1395-1405 (1974). Archibald Cox was the Special Prosecutor dismissed by President Nixon. Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>.

16. JOHN R. LABOVITZ, *PRESIDENTIAL IMPEACHMENT* 211 (1978).

17. See *United States v. Burr*, 25 F. Cas. 187, 190 (C.C.D. Va. 1807) (No. 14,694); *United States v. Burr*, 25 F. Cas. 30, 32 (C.C.D. Va. 1807) (No. 14,692d). The presiding judge was Chief Justice John Marshall, sitting on circuit. See also Raoul Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1111-12 (1974). There seems to be some debate as to whether Jefferson actually complied with the subpoena. See *id.* at 1114-15.

18. *Nixon I*, 418 U.S. at 711; see also DAVID M. GREENWALD ET AL., 2 TESTIMONIAL PRIVILEGES § 9:3 (3d ed. 2005).

separation of powers under the Constitution.”<sup>19</sup> Although the Court used the label “executive privilege,” a more accurate classification would be “presidential communication privilege,” as “[g]overnors . . . cannot claim the privilege with respect to their communications.”<sup>20</sup>

*Nixon I* stemmed from the Watergate scandal, in which seven people were indicted on charges that included conspiracy to defraud the United States and to obstruct justice.<sup>21</sup> The United States District Court for the District of Columbia issued a subpoena *duces tecum* to President Richard Nixon, an unindicted co-conspirator in the case, ordering him to produce “certain tapes, memoranda, papers, transcripts or other writings relating to certain precisely identified meetings between the President and others.”<sup>22</sup> President Nixon did not fully comply with the order and moved to quash it on the grounds that the material sought was privileged.<sup>23</sup> The district court denied Nixon’s motion, and the President appealed to the Supreme Court.<sup>24</sup> There, he claimed that the separation of powers doctrine prevented judicial review of his absolute privilege claim.<sup>25</sup> In the alternative, he argued that a subpoena *duces tecum* could not overcome his executive privilege as a matter of constitutional law.<sup>26</sup>

The Court reaffirmed the principle established in *Marbury v. Madison*<sup>27</sup> that the judicial branch determines what the law is in quickly rejecting Nixon’s first contention.<sup>28</sup> Thus, the Court concluded that it had the power to adjudicate the President’s privilege claim,<sup>29</sup> and further agreed that the President’s “interest in preserving confidentiality is weighty indeed and entitled to great respect.”<sup>30</sup> But despite the President’s strong interest in

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19. *Nixon I*, 418 U.S. at 708; see also GREENWALD ET AL., *supra* note 18, at § 9:3.

20. See GREENWALD ET AL., *supra* note 18, at § 9:3 n.3.

21. *Nixon I*, 418 U.S. at 687.

22. *Id.* at 687-88; see also GREENWALD ET AL., *supra* note 18, at § 9:3.

23. *Nixon I*, 418 U.S. at 688.

24. *Id.* at 688-90.

25. *Id.* at 703.

26. *Id.*

27. 5 U.S. (1 Cranch) 137 (1803).

28. *Nixon I*, 418 U.S. at 703 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177-78).

29. *Id.* at 705.

30. *Id.* at 712.

confidentiality, it may be outweighed by the interest in relevant evidence in criminal trials—an interest that guarantees due process of law in the criminal justice system.<sup>31</sup> To balance these competing concerns, the Court recognized a qualified privilege for the President regarding matters that did not involve military, diplomatic, or national security interests.<sup>32</sup> This privilege, however, “must yield to the demonstrated, specific need for evidence in a pending criminal trial.”<sup>33</sup> As one commentator noted, “[b]ecause the [P]resident’s ability to perform his Article II functions might be impaired if presidential advisers failed to offer candid advice out of fear of public disclosure of their statements, the Court accepted the existence of a qualified presidential communications privilege, even without an explicit constitutional provision creating it[.]”<sup>34</sup> Finding no error with the district court’s order, the Court affirmed.<sup>35</sup>

In a second case in which Nixon (by then no longer president) asserted executive privilege, the Supreme Court noted that the privilege was “limited to communications in performance of [a President’s] responsibilities of his office and made in the process of shaping policies and making decisions.”<sup>36</sup> It appears that the Court limited the presidential communications privilege to reflect the deliberative-process privilege, which protects “only those materials that are both [predecisional] and deliberative.”<sup>37</sup>

However, the Court of Appeals for the D.C. Circuit, in its decision of *In re Sealed Case*,<sup>38</sup> notably expanded the presidential

31. *Id.* at 712-13.

32. *Id.* at 706, 713. *See also id.* at 715 (“The need for confidentiality even as to idle conversations with associates in which causal reference might be made concerning political leaders within the country or foreign statesman is too obvious to call for further treatment.”); GREENWALD ET AL., *supra* note 18, at § 9:3.

33. *Nixon I*, 418 U.S. at 713; *see also* GREENWALD ET AL., *supra* note 18, at § 9:3.

34. GREENWALD ET AL., *supra* note 18, at § 9:3.

35. *Nixon I*, 418 U.S. at 714. Nixon eventually complied with the order. John Herbers, *Tapes Released: President Still Hopeful that the Senate Will Vote for Acquittal*, N.Y. TIMES, Aug. 6, 1974, at 1.

36. *Nixon v. Adm’r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 449 (1977) (alteration in original) (citations and internal quotations omitted); GREENWALD ET AL., *supra* note 18, at §9:4.

37. GREENWALD ET AL., *supra* note 18, at §9:4; *see also infra* Part III.D.

38. 121 F.3d 729 (D.C. Cir. 1997).

communications privilege beyond the deliberative-process privilege.<sup>39</sup> The case arose when the White House withheld documents from the Office of the Independent Counsel concerning whether President William Clinton should retain a cabinet member.<sup>40</sup> Upon exploring the President's need to protect post-decisional materials or final decisions, in addition to deliberative materials, the court of appeals held that the presidential communications privilege "affords greater protection" than the general deliberative-process privilege.<sup>41</sup> Continuing this line of analysis, the court of appeals held that the presidential communications privilege extends beyond those communications that directly include the President: the privilege includes all communications made or received by White House advisors or "members of an immediate White House advisor's staff who have broad and significant responsibility" in advising the President,<sup>42</sup> provided "the communications occurred in conjunction with the process of advising the President."<sup>43</sup> The court cautioned that "[t]he presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President."<sup>44</sup> Moreover, at least on the facts of the case, the court held that the President need not be a party to, nor have specific knowledge of, the contents of these communications in order to be covered by the privilege.<sup>45</sup> One commentator clarified:

While the presidential communications privilege extends to conversations involving presidential advisers, the advisers themselves cannot invoke the privilege. Instead, only either a sitting [P]resident or the [P]resident during whose tenure the communications occurred may invoke

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39. GREENWALD ET AL., *supra* note 18, at §9:4 (citing *In re Sealed Case*, 121 F.3d 729).

40. *In re Sealed Case*, 121 F.3d at 734-35.

41. *Id.* at 745-46.

42. *Id.* at 752.

43. *Id.*

44. *Id.*

45. *Id.* at 753 ("[I]n this case there is assurance that even if the President were not a party to the communications over which the government is asserting presidential privilege, these communications [concerning appointment or removal of a cabinet member] nonetheless are intimately connected to his presidential decisionmaking.").

the presidential communications privilege—regardless as to whether the one agrees with the other as to the necessity of invoking the privilege. The [P]resident or former [P]resident can even invoke the privilege against allegations of governmental wrongdoing or criminal activities because the applicability of the presidential communications privilege does not turn “on the nature of the presidential conduct that the subpoenaed material might reveal, but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment.”<sup>46</sup>

In any event, the presidential communications privilege is not absolute and can be overcome.<sup>47</sup> Nonetheless, as explained below, high-ranking federal officials are not alone in trying to take advantage of it.

#### B. Gubernatorial Use of Executive Privilege

The Arizona Supreme Court was one of the first courts to recognize the modern notion<sup>48</sup> of executive privilege in the 1952 case of *Mathews v. Pyle*.<sup>49</sup> There, the editor of the Arizona Daily Star petitioned for the right to review certain documents pertaining to an investigation Governor Dan Garvey requested concerning the State Land Commissioner.<sup>50</sup> The governor refused to permit the inspection on the basis that the implied powers of his office granted him an absolute privilege to withhold confidential information.<sup>51</sup> Rather than recognize an absolute privilege, the court held that the governor possessed a

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46. GREENWALD ET AL., *supra* note 18, at §9:4 (footnote call numbers omitted) (quoting Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974)).

47. *Id.*

48. From the nineteenth century through the early twentieth century, state courts mostly dealt with a governor’s amenability to mandamus—the power of a court to compel a governor to perform mandatory or purely ministerial duties correctly. See Daniel Farber, Comment, *Executive Privilege at the State Level*, 1974 U. ILL. L.F. 631, 633 & n.20 (1974); R. E. Heinselman, Annotation, *Mandamus to Governor*, 105 A.L.R. 1124 (1936).

49. 251 P.2d 893 (Ariz. 1952).

50. *Id.* at 894.

51. *Id.*



presumptive privilege to deny the right to inspect documents and that an *in camera* inspection by the trial court would be necessary to determine whether the materials sought were “confidential and privileged or whether their disclosure would be detrimental to the best interests of the state.”<sup>52</sup> Thus, as one commentator put it, “the court [in *Mathews*] created an executive privilege which balances the interests of the parties involved to determine whether disclosure is in the best interests of the state.”<sup>53</sup>

In 1978, the New Jersey Supreme Court recognized a qualified executive privilege that protected the governor’s confidential communications in *Nero v. Hyland*.<sup>54</sup> The controversy in *Nero* surrounded a character investigation report about the plaintiff that was compiled for the governor.<sup>55</sup> The plaintiff demanded disclosure of the report in order to defend his reputation after the governor publicly stated that the report led him to forgo appointing the plaintiff to the New Jersey Lottery Commission.<sup>56</sup> The attorney general, however, responded that the investigation was confidential and would not disclose it.<sup>57</sup> In holding that the governor possessed an executive privilege, the court stated that the plaintiff’s “interest in disclosure must be balanced against the public interest in the confidentiality of the[] files.”<sup>58</sup> The court specifically set out to make the gubernatorial executive privilege akin to the qualified presidential privilege created in *Nixon I*.<sup>59</sup> Furthermore, without referring to it, *Nero* essentially adopted the same balancing rationale as *Mathews*.

The Court of Appeals of Maryland also recognized an executive privilege for its governor and his or her advisors when it decided *Hamilton v. Verdow* in 1980.<sup>60</sup> The plaintiff, the personal representative of a murdered child’s estate, sought disclosure of a report made to the governor of Maryland with regard to a

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52. *Id.* at 896-97.

53. Matthew Singer, Comment, *Protecting the Public’s Interest in an Open Government Through the Creation of an Executive Privilege?: The Dann v. Taft Decisions*, 75 U. CIN. L. REV. 1741, 1747 (2007).

54. 386 A.2d 846, 853 (N.J. 1978).

55. *Id.* at 848.

56. *Id.*

57. *Id.*

58. *Id.* at 852.

59. *Id.* at 853.

60. 414 A.2d 914, 924 (Md. 1980).

convicted child murderer who had been released from a state-run mental hospital prior to committing two murders.<sup>61</sup> The governor requested the report to determine if there were ways to prevent similar occurrences of releasing mentally unstable patients.<sup>62</sup> The court recognized that the gubernatorial privilege rested on the doctrine of separation of powers and the public interest, and found that there was a significant interest in protecting, in addition to military and diplomatic concerns, a governor's deliberative and mental processes.<sup>63</sup>

The Alaska Supreme Court used *Nixon I* to justify its creation of a qualified executive privilege in *Doe v. Alaska Superior Court*.<sup>64</sup> Like *Nero*, the plaintiff in *Doe* sought files containing information about her potential appointment to a state office.<sup>65</sup> Similar to *Nixon I*, the court based its qualified executive privilege on the necessity of protecting decisionmakers' thought processes.<sup>66</sup>

On the other hand, the Connecticut Supreme Court recently expressed its disfavor of granting its governor categorical immunity. Connecticut's office of the governor, in an effort to stave off impeachment proceedings against Governor John G. Rowland, moved to quash a subpoena issued to him by the Connecticut House of Representatives' Select Committee of Inquiry in 2004.<sup>67</sup> The office claimed that the subpoena was invalid because Rowland was categorically immune from testifying about his official duties by virtue of the separation of powers provision of the Connecticut Constitution.<sup>68</sup> While the decision was mostly based on the legislature's role in impeachment proceedings, the court ultimately rejected

61. *Id.* at 917.

62. *Id.*

63. *Id.* at 924-25.

64. 721 P.2d 617, 623, 625-26 (Alaska 1986).

65. *Id.* at 619.

66. *Id.* at 623-25. A decade later, the court reaffirmed the governor's privilege in *Capital Information Group v. Office of the Governor*, 923 P.2d 29, 33-35 (Alaska 1996).

67. *Office of the Governor v. Select Comm. of Inquiry*, 858 A.2d 709, 712-13 (Conn. 2004).

68. *Id.* at 713. The Connecticut separation of powers provision reads in pertinent part: "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." CONN. CONST. art. II.

categorical immunity for the governor: "If the separation of powers doctrine does not give the [P]resident categorical immunity from suit by a private party while in office, it does not, a fortiori, do so with respect to a legislative subpoena to the governor . . ." <sup>69</sup> After the court issued a preliminary decision in this case, but before it issued its full opinion, Rowland resigned from office and the Select Committee of Inquiry discontinued its investigation. <sup>70</sup>

Ohio is the most recent state <sup>71</sup> to recognize the gubernatorial executive privilege. In a series of three decisions, <sup>72</sup> the Ohio Supreme Court sought to determine whether Governor Bob Taft, through an executive privilege, could prevent disclosure of documents provided to him by staff members and other executive branch officials. <sup>73</sup> As noted by one commentator, "[t]hese decisions rel[ied] upon the historical power of the executive in deciding what privilege should protect [gubernatorial] communications." <sup>74</sup> The court reviewed the common-law privileges of attorney-client, the judicial mental process privilege, and other statutory privileges; yet, it could not find any statutory, constitutional, or common-law basis for gubernatorial executive privilege. <sup>75</sup> Nonetheless, the court held that a qualified

69. *Office of the Governor*, 858 A.2d at 739.

70. *Id.* at 712 n.1. For the preliminary decision, see *Office of the Governor v. Select Comm. of Inquiry*, 850 A.2d 181 (2004).

71. In August of 2007, Louisiana Governor Kathleen Babineaux Blanco tried to invoke executive privilege in refusing to testify in a homicide trial concerning thirty-five nursing home patients who drown during Hurricane Katrina. Emily Kern, *Survivor Describes Flooding Scene*, BATON ROUGE ADVOC., Aug. 23, 2007, at A1, available at 2007 WLNR 16427494. The trial court rejected her motion to quash the subpoena issued by the defendants, and the Louisiana Supreme Court denied her writ of review virtually without opinion. See *State v. Mangano*, 961 So.2d 1163, 1163-64 (La. 2007) (mem.); Adam Nossiter, *Governor Refuses Blame in 35 Hurricane Deaths*, N.Y. TIMES, Aug. 29, 2007, at A14. As a result, the state decided to call Governor Blanco as a witness, probably to mitigate the effect of the defense's line of questioning. Paul Rioux, *Blanco to Testify in St. Rita's Trial Today*, NEW ORLEANS TIMES PICAYUNE, Aug. 28, 2007, at 1, available at 2007 WLNR 16783219.

72. *Dann I*, 848 N.E.2d 472 (Ohio 2006); *State ex rel. Dann v. Taft (Dann II)*, 850 N.E.2d 27 (Ohio 2006); *State ex rel. Dann v. Taft (Dann III)*, 853 N.E.2d 263 (Ohio 2006).

73. *Dann I*, 848 N.E.2d at 475.

74. Singer, *supra* note 53, at 1749.

75. *Dann I*, 848 N.E.2d at 478-79.

gubernatorial communications privilege existed in Ohio,<sup>76</sup> a privilege that protects the “public interest in ensuring that their [g]overnor can operate in a frank, open, and candid environment in which information and conflicting ideas, thoughts, and opinions may be vigorously presented to the [g]overnor without concern that unwanted consequences will follow from public dissemination.”<sup>77</sup> Accordingly, the court recognized the privilege for the benefit of the public, rather than the governor.<sup>78</sup>

### C. Executive Privilege in Rhode Island

The Rhode Island Constitution, like its federal counterpart, makes no textual reference to the executive privilege. Traditionally, the separation of powers doctrine in Rhode Island has favored a strong legislature and weak executive.<sup>79</sup> The voters, however, approved the separation of powers amendment in a statewide referendum in 2004, which enacted four separate constitutional amendments to stop the legislative exercise of executive power.<sup>80</sup> The two amendments most relevant to this discussion are article V, concerning the distribution of powers,<sup>81</sup> and the repeal of article VI, section 10.<sup>82</sup> The amendment added the words “separate and distinct” to article V to describe the three

76. *Id.* at 484-85.

77. *Id.* at 484.

78. *Id.*

79. See, e.g., Sheldon Whitehouse, *Appointments by the Legislature Under the Rhode Island Separation of Powers Doctrine: The Hazards of the Road Less Traveled*, 1 ROGER WILLIAMS U. L. REV. 1 (1996) (criticizing legislative appointments to administrative bodies, which under the federal separation of powers doctrine is the realm of the executive).

80. See Liz Anderson, *General Assembly Unanimously Approves Separation of Powers*, PROVIDENCE J., July 1, 2003, at 1, available at 2003 WLNR 6760687. For the amended provisions, see R.I. CONST. art. III, § 6 (forbidding state legislators from serving on any state or quasi-public entity that exercises executive power); *id.* art. V (adding the words “separate and distinct” to the description of the three governmental departments—the legislative, executive, and judicial); *Id.* art. VI, § 10 (repealed 2004) (repealing the entire section, which allowed the general assembly to exercise powers that it had historically exercised unless prohibited by the state constitution); *id.* art. IX, § 5 (language similar to Article II, Section 2, Clause 2 of the United States Constitution on the appointment of officers).

81. R.I. CONST. art. V.

82. R.I. CONST. art. VI, § 10 (repealed 2004).

government departments.<sup>83</sup> The relevancy of this amendment to the current discussion centers on whether these words allow the Rhode Island judiciary to interpret the powers of the executive branch, including whether the governor has an executive privilege.<sup>84</sup> On the other hand, article VI, section 10, which stated “[t]he [G]eneral [A]ssembly shall continue to exercise the powers it has heretofore exercised, unless prohibited in this Constitution,”<sup>85</sup> was completely repealed by the statewide referendum. This begs the question whether Rhode Island voters would want the governor to invoke a power—such as the executive privilege—just because the office holder always had that power, if an express allowance to the General Assembly was just repealed by a voter referendum.<sup>86</sup>

The Rhode Island Supreme Court has yet to squarely address the executive privilege issue. Leading up its recent decision in *State v. Thomas*,<sup>87</sup> only two other cases even remotely touched upon the idea of executive privilege.<sup>88</sup> In *Narragansett Indian Tribe of Rhode Island v. State*, the court held that the governor’s powers are limited to those powers expressly granted to him or her by the Rhode Island Constitution or legislature.<sup>89</sup> Putting it another way, the court specifically denied that the governor had any implied powers.<sup>90</sup>

In 2006, the court held in *Gaumond v. Trinity Repertory Co.* that it would not create a “school-disabled student privilege,” similar to an attorney-client privilege.<sup>91</sup> The court stated that “immunity from discovery is in derogation of both common-law and the general policy favoring discovery, as such, we do not easily embrace the creation of new privileges.”<sup>92</sup> The court further noted

83. Compare R.I. CONST. art. V (amended 2004), with R.I. CONST. art. V.

84. See *infra* Part III.B.

85. R.I. CONST. art. VI, § 10 (repealed 2004).

86. See *infra* Parts III.B, III.D.

87. 936 A.2d 1278 (R.I. 2007).

88. *Gaumond v. Trinity Repertory Co.*, 909 A.2d 512 (R.I. 2006); *Narragansett Indian Tribe of R.I. v. State*, 667 A.2d 280 (R.I. 1995).

89. 667 A.2d at 282.

90. *Id.* at 281-82.

91. 909 A.2d at 516. The student argued that a school and disabled student share a relationship of confidentiality analogous to the confidentiality required between an attorney and his or her client. *Id.*

92. *Id.* at 519 (internal quotation marks omitted) (quoting *Moretti v. Lowe*, 592 A.2d 855, 857 (R.I. 1991)).

that it has refused to recognize privileges from statutes having policies promoting confidentiality,<sup>93</sup> and that privileges must be explicitly defined and strictly construed<sup>94</sup> to prevent them from being “used as a shield to obstruct *proper* discovery of relevant information[.]”<sup>95</sup>

#### D. The Smoke-shop Case

On August 3, 2007, Superior Court Judge Susan E. McGuirl ruled that Rhode Island Governor Carcieri must testify in the criminal trial of seven Narragansett Indians arrested in the July 2003 smoke-shop raid.<sup>96</sup> The story of the case began in July 2003 when the state police executed a search warrant to stop the Narragansett Indian Tribe from selling tobacco products tax-free at their smoke-shop.<sup>97</sup> Local news crews captured the intense scene on video, and after a court battle not relevant to this discussion,<sup>98</sup> seven tribe members ended up in court facing misdemeanor charges.<sup>99</sup>

The defendants subpoenaed Carcieri because they sought testimony regarding orders he gave to the state police.<sup>100</sup> After the raid, Carcieri announced publicly that he had told the police to withdraw if they encountered resistance.<sup>101</sup> During pretrial testimony, former State Police Superintendent Steven Pare (“Col. Pare”) denied that he received those particular instructions from the governor.<sup>102</sup> Carcieri claimed that an executive testimonial privilege should preclude him from testifying, but the trial court

93. *Id.* at 517.

94. *Id.* at 516.

95. *Id.* (alteration in original) (quoting *Moretti*, 592 A.2d at 858).

96. *State v. Thomas*, 936 A.2d 1278, 1280-81 (2007).

97. *Id.* at 1280.

98. *See Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 673 (2006).

99. *Thomas*, 936 A.2d at 1280. For a summary of the history between Rhode Island and the Narragansett Indian Tribe, see Mulvaney, *supra* note 1.

100. *Thomas*, 936 A.2d at 1280-81.

101. Katie Mulvaney, *Governor Won't Testify in Smoke-shop Raid Trial*, PROVIDENCE J., Dec. 22, 2007, at A1, available at 2007 WLNR 25405572.

102. Transcript of Testimony of Colonel Pare and Major Leyden and Arguments on Motion in Limine at 14-16, *State v. Brown*, No. W3/07-44A (R.I. Super. Ct. July 31, 2007).

disagreed,<sup>103</sup> prompting the governor to petition the Rhode Island Supreme Court for a writ of certiorari, which was granted.<sup>104</sup>

At both the trial level and on appeal, the governor argued for an executive testimonial privilege that would require him to testify only in extraordinary circumstances.<sup>105</sup> Such extraordinary circumstances exist—and the executive privilege can consequently be overcome—only if the official has direct personal knowledge of a material issue that is highly relevant and not otherwise available from any source.<sup>106</sup> In recognizing that this was an issue of first impression in Rhode Island, the trial court assumed that the state supreme court would adopt the privilege and thus applied the extraordinary circumstances test.<sup>107</sup> Judge McGuirl found that each obstacle had been overcome, as due process gives defendants the right to obtain necessary witnesses for trial.<sup>108</sup> She noted that the governor's involvement in the decision to execute the search warrant was unusual and that any order he may have issued with regard to the warrant may have affected how the state police acted.<sup>109</sup> Specifically, the governor's orders were relevant to the defendants' disorderly conduct charges and their defense of excessive force: for instance, in determining whether the police used excessive force, the jury must look at the totality of the circumstances, which includes the governor's instructions concerning the execution of the warrant.<sup>110</sup> Judge McGuirl also found that the governor's testimony may be relevant for impeachment and credibility purposes, due to the apparent inconsistency between the

103. *Thomas*, 936 A.2d at 1281.

104. *Id.*

105. See Brief of Petitioner at 12-13, *Thomas*, 936 A.2d 1278 (No. 2007-264-M.P.) [hereinafter Governor's Brief].

106. *Id.* (citing federal cases).

107. Transcript of Decision: Motion to Compel Testimony of Governor Carcieri at 9-10, *State v. Brown*, No. W3/07-44A (R.I. Super. Ct. Aug. 3, 2007).

108. *Id.* at 10-18. Notably, Judge McGuirl also found that the governor had not waived any executive testimonial privilege when he spoke publicly about his decision: "It does not appear to me to be inconsistent with the protection the defendants enjoy under our [c]onstitution to allow a witness to decline to appear and testify before a jury considering this incident, having made many public statements on the same incident." *Id.* at 17.

109. *Id.* at 10-12.

110. *Id.* at 11-12.

governor's public statement and Col. Pare's pretrial testimony.<sup>111</sup>

The Rhode Island Supreme Court granted the governor's writ and heard his appeal on an expedited basis.<sup>112</sup> All parties submitted briefs and argued the scope of the executive privilege, if any.<sup>113</sup> The state attorney general agreed with the governor that the court should recognize an executive testimonial privilege, such that before a "high level government official" must testify, the testimony sought must be essential, admissible, unavailable from any other source, and within the witness's direct personal knowledge.<sup>114</sup> The court, however, found that the governor's testimony was irrelevant to the defendants' excessive force defense, and therefore did not address whether an executive testimonial privilege exists.<sup>115</sup> The court based its decision on the procedural execution of search warrants; specifically, the warrant, a court order, superseded any order by the governor or Col. Pare as "the troopers were bound by the warrant's command."<sup>116</sup> Additionally, the court noted that the Fourth Amendment of the United States Constitution, as interpreted by the United States Supreme Court in *Graham v. Conner*,<sup>117</sup> requires the evaluation of a police officer's actions "from the perspective of a reasonable officer on the scene."<sup>118</sup> Consequently, as both the governor and Col. Pare were not at the smoke-shop on the day of the incident,

111. *Id.* at 3-4, 12-13.

112. *State v. Thomas*, 936 A.2d 1278, 1281 (R.I. 2007). *See also* Mulvaney, *supra* note 3.

113. *See* Governor's Brief, *supra* note 105; Brief of the Appellees, *Thomas*, 936 A.2d 1278 (No. 2007-264-M.P.) [hereinafter Defendants' Brief]; Brief of Designated Party Respondent State of Rhode Island, *Thomas*, 936 A.2d 1278 (No. 2007-264-M.P.) [hereinafter Attorney General's Brief].

114. Attorney General's Brief, *supra* note 113, at 13. It seems a conscious decision from the attorney general to use "high level government official," rather than just "governor," for then the privilege could apply to officials such as the attorney general himself.

115. *Thomas*, 936 A.2d at 1282-85. It is customary for the court to decide cases without considering constitutional issues, if possible. *See, e.g.*, *Mackie v. State*, 936 A.2d 588, 596 (R.I. 2007) ("In the typical case, this [c]ourt is quite reluctant to reach constitutional issues when there are adequate non-constitutional grounds upon which to base our rulings.") (internal quotation marks omitted) (quoting *State v. Lead Indus. Ass'n*, 898 A.2d 1234, 1239 (R.I. 2006)).

116. *Thomas*, 936 A.2d at 1283.

117. 490 U.S. 386 (1989).

118. *Thomas*, 936 A.2d at 1284 (citing *Graham*, 490 U.S. at 396).



neither could have given the officers guidance in light of the circumstances.<sup>119</sup> Thus, the court, unfortunately,<sup>120</sup> left the issue of whether the governor possessed any executive testimonial privilege open for debate.

### III. ANALYSIS

#### A. The Textual Problem

For those who prefer the plain meaning, textual approach to their analysis of the law, the concept of executive privilege surely disappoints. The Federal Constitution, along with every state constitution, lacks an express reference to the executive privilege.<sup>121</sup> When executive privilege is found to exist, it rests on two principle rationales: separation of powers and the public interest. Each rationale has its imperfections with respect to gubernatorial use of executive privilege, especially in Rhode Island.

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119. *Id.*

120. The author of this comment strongly disagrees with the basis of the court's decision. Specifically, if jurors are allowed to weigh the totality of the circumstances regarding the reasonableness of an officer's actions from the perspective of a reasonable officer on the scene, then there seems to be ample room for a jury to consider what orders, if any, were given to the officers prior to arriving on the scene. Would not a reasonable officer on the scene have his superior's specific orders with regard to the search warrant's execution on his mind, especially if the superior says the governor commands it? It also seems that a reasonable officer on the scene would follow subsequent instructions about how to execute the warrant from superior officers rather than the previously issued warrant itself. While the court questions whether the governor's order was ever communicated to the officers at the scene, *id.* at 1284 n.3, such evidence only need be shown by a preponderance of the evidence. If a proper foundation is not introduced, the trial judge can instruct the jury to disregard the evidence resting on the conditional fact. See R.I. R. EVID. 104(b); *Huddleston v. United States*, 485 U.S. 681, 690 (1988). See also *State v. Pena-Lora*, 710 A.2d 1262, 1264 (R.I. 1998) ("Rule 104(b) . . . provides that the trial justice is not bound by the rules of evidence when resolving preliminary questions concerning the admissibility of evidence."). To the court's credit, however, this argument was not sufficiently addressed by defense counsel. See Defendants' Brief, *supra* note 113.

121. See generally Vitauts M. Gulbis, Annotation, *Construction and Application, Under State Law, of Doctrine of "Executive Privilege,"* 10 A.L.R.4th 355 (1981).

### 1. Separation of Powers Rationale

The separation of powers doctrine is essential to the heart of both the Rhode Island and the federal governments. Separation of powers is the concept of dividing governmental authority between three separate but coequal branches: the legislature, the judiciary, and the executive.<sup>122</sup> This idea of checks and balances between the three branches has been touted as one of the Founders' greatest achievements.<sup>123</sup> Most of the Founders were classically educated and feared all forms of tyranny, which they believed could come from any government branch that was too powerful.<sup>124</sup> Carl J. Richard explained:

The [F]ounders' immersion in ancient history had a profound effect upon their style of thought. They developed from the classics a suspicious cast of mind. They learned from the Greeks and Romans to fear conspiracies against liberty. Steeped in a literature whose perpetual theme was the steady encroachment of tyranny on liberty, the founders became virtually obsessed with spotting its approach, so that they might avoid the fate of their classical heroes. It has been said of the American Revolution that never was there a revolution with so little cause. Whatever his faults, George III was hardly Caligula or Nero; however illegitimate, the moderate British taxes were hardly equivalent to the mass executions of the emperors. But since the [F]ounders believed that the central lesson of the classics was that *every illegitimate power, however small, ended in slavery*, they were determined to resist every such power.<sup>125</sup>

In other words, the classic Greek anti-models influenced the

122. See BLACK'S LAW DICTIONARY 1369 (7th ed. 1999).

123. See, e.g., DINESH D'SOUZA, WHAT'S SO GREAT ABOUT AMERICA 92-94 (2002); Antonin Scalia, Associate Justice of the U.S. Supreme Court, Separation of Powers Address to second year law students at Roger Williams University School of Law (Apr. 7, 2008) (" [The separation of powers doctrine] was the Founders' favorite . . . [because it] would preserve liberty. ").

124. CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT 118-19 (1994).

125. *Id.* (emphasis added).

Founders to structure a government that made it difficult for one branch to become too powerful. From such a reading, it seems quite plausible that, in the Founders' eyes, the idea of executive privilege would be akin to an illegitimate power of a tyrannical monarchy.<sup>126</sup> Yet, when some of them held the presidency, their view became a little less clear.<sup>127</sup>

The basic argument for the rationale that the separation of powers doctrine endorses a privilege for the chief executive is that the judiciary (and the legislature, in the case of a legislative subpoena) lacks the power to compel the chief executive to perform any act.<sup>128</sup> Modern cases, such as *Office of the Governor v. Select Committee of Inquiry*, refute this rationale in light of federal precedents such as *Nixon I*.<sup>129</sup> More precisely, no one, not even the President, is above the law; accordingly, government executives are subject to the power of courts.<sup>130</sup> As one commentator put it:

Separation of powers was not intended as an end in itself. Rather, it was considered a means of ensuring government by laws instead of men. Allowing any public official to willfully disregard his legal duties in the name of separation of powers frustrates the very purpose of the doctrine.<sup>131</sup>

This relatively consistent holding by state and federal courts does not mean courts cannot find support for an executive privilege, but it does mean the privilege, where found, is qualified and not absolute.<sup>132</sup>

In Rhode Island, the traditional view concerning separation of

126. The idea of executive privilege arose from the British monarch's categorical immunity deriving from divine right rule—i.e. because God appointed the King or Queen, he or she was only answerable to God. See GODFREY DAVIES, *THE EARLY STUARTS: 1603-1660*, at 31-32 (2d ed. 1959) (explaining King James I's articulation of divine right rule before he became king). A telling passage from James I: "[A] good king will frame all his actions according to the law, yet he is not bound thereto but of his own good will." *Id.*

127. See *supra* Part I discussion of George Washington and Thomas Jefferson's utilization of some kind of executive privilege.

128. Farber, *supra* note 48, at 633-34.

129. 858 A.2d 709, 734-40 (Conn. 2004).

130. See *id.* at 734 (discussing *Nixon I* and *Burr*).

131. Farber, *supra* note 48, at 635 (footnote call numbers omitted).

132. See Part II.A-B.

powers is that “the General Assembly’s power is not limited to the powers specifically enumerated whereas the [g]overnor’s authority is so limited.”<sup>133</sup> The separation of powers amendment arguably changed this by repealing the reserved powers clause,<sup>134</sup> because now the legislature no longer possesses any implied powers. However, since there was no similar grant of implied powers to the executive branch, the governor remains limited to powers specifically enumerated in the state constitution.<sup>135</sup>

Therefore, before the 2004 amendment, the governor’s power (including privileges) was restricted by the express grants of the Rhode Island Constitution, meaning that he or she could not exercise any implied powers. Logically, it should follow that after the General Assembly’s implied powers were repealed, and without a similar grant of implied powers to the executive branch, the governor still cannot exercise any other power that is not specifically granted to him or her. Recently, the Rhode Island Supreme Court held in *Gaumont* that it would not recognize nor create a “school-disabled student privilege.”<sup>136</sup> Any new privilege, the decision implies, would need to be expressly enacted.<sup>137</sup> Consequently, because (1) the executive was limited to the express powers in the Rhode Island Constitution before the separation of powers amendment; (2) the executive was not expressly granted any implied powers by the amendment; and (3) the Rhode Island Supreme Court subsequently held that any new privilege would need to be expressly enacted, there can be no implied basis for an executive privilege in Rhode Island.

133. *Narragansett Indian Tribe of R.I. v. State*, 667 A.2d 280, 282 (R.I. 1995).

134. R.I. CONST. art VI, § 10 (repealed 2004).

135. The amendment amended article IX, section 5, giving the governor the power to make appointments with the advice and consent of the senate. R.I. CONST. art IX, § 5. However, as it is an express power, it is not the equivalent of replacing article VI, section 10. Essentially, such an amendment would read something similar to: “The governor shall continue to exercise the powers it has heretofore exercised, unless prohibited in this Constitution.” *Cf.* R.I. CONST. art VI, § 10 (repealed 2004).

136. 909 A.2d 512, 516 (R.I. 2006).

137. *Id.* The court seems to imply that the General Assembly could create new privileges by statute. *Id.* at 517. However, because of possible due process concerns regarding privileges, to be discussed in *infra* Part III.D, a constitutional amendment may be necessary.

## 2. The Public Interest Rationale

Presidents and governors alike will often speak of how their every act is for the public interest—especially on the campaign trail. The Ohio Supreme Court arguably recognized this in *Dann I* when it established a gubernatorial executive privilege: “It is for the benefit of the public that we recognize this qualified privilege and not for the benefit of the individuals who hold, or will hold, the office of governor of the state of Ohio.”<sup>138</sup> The court held that such a privilege was necessary to protect the public interest, as it would make certain that the governor could “operate in a frank, open, and candid environment in which information and conflicting ideas, thoughts, and opinions may be vigorously presented to the governor without concern that unwanted consequences will follow from public dissemination.”<sup>139</sup> In a footnote, the court blended the public interest rationale with the separation of powers doctrine:

More recently, the [United States Supreme Court] noted that the “public interest requires that a coequal branch of [g]overnment afford [p]residential confidentiality the greatest protection consistent with the fair administration of justice . . . and give recognition to the paramount necessity of protecting the [e]xecutive [b]ranch from vexatious litigation that might distract it from the energetic performance of its constitutional duties.”<sup>140</sup>

Not only does this sound like the rationale behind the deliberative-process privilege, which the court was not reviewing,<sup>141</sup> but the court also seemed to imply that political fallout for a governor is not in the public interest. To put it another way, rather than let the political processes work for the public interest via a better informed electorate through public dissemination of gubernatorial decisions, the court instead held, in a paternalistic manner, that the governor will know what information is proper to publicize. With decisions like this, giving

138. *Dann I*, 848 N.E.2d 472, 484 (Ohio 2006).

139. *Id.*

140. *Id.* at 484 n.3 (internal quotation marks omitted) (quoting *Cheney v. U.S. Dist. Court for the D.C.*, 542 U.S. 367, 382 (2004)).

141. *Dann I*, 848 N.E.2d at 480.

courts, as well as executive officials, the power to weigh the public interest in disclosure is indeed dangerous.

The people of Rhode Island have seen glimpses of what can happen behind closed government doors over the years.<sup>142</sup> Former Providence Mayor Vincent “Buddy” Cianci’s conviction in the Plunder Dome scandal in the 1990s,<sup>143</sup> and former Rhode Island House majority leader Gerard M. Martineau’s recent guilty plea to selling his office to CVS Pharmacy and Blue Cross Blue Shield of Rhode Island,<sup>144</sup> probably makes the public wonder what information is being withheld—or if an executive privilege were recognized, what would not be disclosed. In other words, it appears that the public interest would be better served without an executive privilege, especially in Rhode Island.

#### B. The Proposed Solution—A Deliberative-Process Privilege

While a satisfactory rationale for the gubernatorial executive privilege may not exist, the need for administrative efficiency dictates that a common-law privilege may be useful—the deliberative-process privilege. The purpose of this privilege is to protect the mental processes of government decisionmakers from interference, permitting them to engage in free, frank, and open exchange of opinions and recommendations without being inhibited by fear of later public disclosure.<sup>145</sup> In order for something to be privileged under the deliberative-process privilege, it must be both predecisional and deliberative,<sup>146</sup> whereas executive privilege is potentially all encompassing.<sup>147</sup> Predecisional material contributes to a particular decision or policy.<sup>148</sup> Deliberative material is the opinions and

142. The depth of corruption in the Rhode Island government may never be known.

143. See STANTON, *supra* note 8, at 382.

144. See Mike Stanton, *State House Influence Peddling – Martineau Pleads Guilty – Ex-Rep. Admits Selling Office to CVS, Blue Cross*, PROVIDENCE J., Nov. 3, 2007, at A1, available at 2007 WLNR 21928282.

145. *Gwich’in Steering Comm. v. State*, Office of the Governor, 10 P.3d 572, 578 (Alaska 2000).

146. *Id.* at 579.

147. See *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997) (discussing differences between the deliberative-process and presidential communications privileges).

148. *Gwich’in Steering Comm.*, 10 P.3d at 579; *Sealed Case*, 121 F.3d at

recommendations comprising the formulation of decisions or policies—the “give-and-take” of decisionmaking.<sup>149</sup> For instance, in *Thomas*, an executive privilege would protect the discussions that Governor Carcieri and Col. Pare had about the smoke-shop, as well as whatever plan they may have formulated to execute the search warrant. On the other hand, a deliberative-process privilege would protect only the discussions they had prior to the decision; the plan they eventually formulated would not be protected.

State and federal courts have had a tendency to confuse the two privileges.<sup>150</sup> The problem is that those who want to justify an executive privilege through a common-law rationale often find themselves repeating the rationale for the deliberative-process privilege. For instance, in *Dann I*, after stating it would not rule on the governor’s deliberative-process privilege claim,<sup>151</sup> the court proceeded to ground a qualified executive privilege using the rationale for the deliberative-process privilege: “Recognition of a qualified gubernatorial-communications privilege advances the same interests advanced by the analogous presidential privilege, including the public interest in candid, objective, and even blunt or harsh opinions in executive decisionmaking.”<sup>152</sup>

The deliberative-process privilege is preferable to any executive privilege for four intertwined reasons. First, the deliberative-process privilege is limited in scope, as it only protects materials that are predecisional and deliberative. Protecting predecisional material helps ensure better-informed decisionmaking. Post-decisional material has no effect on the decision and is thus not privileged. Additionally, by protecting materials that are deliberative, opinions, recommendations, and advice about a policy can be spoken freely. Note, however, that purely factual material, such as the policy or decision itself, is not privileged.<sup>153</sup> The ultimate policy or decision is the “end game,” or

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737.

149. *Gwich'in Steering Comm.*, 10 P.3d at 579; *Sealed Case*, 121 F.3d at 737.

150. *See, e.g.*, *City of Colorado Springs v. White*, 967 P.2d 1042, 1046-49 (Colo. 1998) (surveying federal and state court precedents that refer to deliberative-process privilege as executive privilege).

151. *Dann I*, 848 N.E.2d 472, 480 (Ohio 2006).

152. *Id.* at 484 (internal quotation marks omitted).

153. *Sealed Case*, 121 F.3d at 737.

the result of predecisional and deliberative discussions. While problems may result as to identifying a “decision” in some circumstances, *in camera* review by judges and evolving precedent will help shape the bounds of this privilege.

The second reason why the deliberative-process privilege is preferable is that it applies government-wide, not just for one person or small group, such as the governor and his staff. While some may be alarmed at this realization, fearing that the government could become even more corrupt, the scope of the privilege is very limited. Politicians will still be responsible for their ultimate decisions on matters.

A third reason to prefer a deliberative-process privilege is that it is qualified: if the material is found to be both predecisional and deliberative, the privilege can still be overcome if the seeker’s interests in disclosure outweigh the incidental right of the government to be free from unreasonable interference. For instance, in a criminal case, a defendant’s due process rights will more than likely overcome the government’s need to be candid behind closed doors.

An additional reason to adopt a deliberative-process privilege in Rhode Island is implementation. As discussed earlier, the Rhode Island Supreme Court will not recognize or create any new privileges.<sup>154</sup> Nor does the Rhode Island Constitution allow any implied powers for any of the three government branches following the 2004 separation of powers amendment.<sup>155</sup> Additionally, the General Assembly may not be able to enact the privilege on its own, as it would also be granting itself the privilege, and if drafted incorrectly, the privilege could be found unconstitutional on the ground that it violates due process principles. For instance, in criminal cases, the privilege could prevent a defendant from presenting a full defense. To address these problems, the deliberative-process privilege would have to be ratified through an amendment to the Rhode Island Constitution. Most would probably view this as a problem in itself, as any amendment would have to be carefully worded and an advisory opinion from the Rhode Island Supreme Court would probably be necessary. Yet, the amendment process would ensure

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154. See *supra* Part III.D.

155. See *supra* Parts III.B, III.D.



that the privilege would be truly desirable by the people of Rhode Island. Then, if the amendment is enacted correctly, everyone wins—those in government positions have their decisionmaking processes protected, while state citizens can hold public officials accountable for their actions and decisions.

#### IV. CONCLUSION

If the proposed deliberative-process privilege does nothing else, it will at least give boundaries that the current, nebulous executive privilege lacks. It truly is unfortunate that the Rhode Island Supreme Court left the executive privilege issue open. Knowing Rhode Island, however, another instance should arise when an executive's use of privilege should be challenged.

Executive privilege will continue to be a contentious issue throughout the country, so long as there are politicians with something to hide. It has been over thirty years since the Watergate tape scandal, yet executive privilege seems to be as amorphous as ever. Political reforms, whether they are state or federal constitutional amendments, or simply better politicians, are needed more than ever. The mixed government with checks and balances that the Founders envisioned and implemented, having studied history before them, will deteriorate into tyranny if people continue to pervert the separation of powers doctrine to further their own ends. The safeguards are in place to prevent such a fate, but action is necessary for those defenses to be effective. In the interim, it may simply be that a governor saves some political backlash and the excessive force defense is harder to prove. Perhaps it will take years, but eventually, if executive power is strengthened by an unchecked executive privilege, consequences will lie in store for Rhode Island as a whole. The Founders' lessons from the classics should not be lost: "[E]very illegitimate power, however small, end[s] in slavery."<sup>156</sup>

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156. Richard, *supra* note 124, at 119.

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\* Juris Doctorate Candidate, Roger Williams University School of Law, May 2009; Bachelor of Arts, History, Roger Williams University, 2006. I would like to thank all my friends and family; especially Mom, Dad, and Stephen for their continual support, and Amanda for being my bedrock. Additionally, I would like to thank all of my editors for their assistance and guidance throughout this process. All errors, however, are mine.