Avoiding the 'Bare Record': Safeguarding Meaningful Judicial Review of Federal Agency Actions

DANIEL J. ROHLF*

I. INTRODUCTION

"We've been given an answer now we need to find an analysis that works[,]" a U.S. Fish and Wildlife Service ("FWS") biologist observed wryly during a conference call with officials in the agency's Washington D.C. office.[1] "We have marching orders," agreed a colleague on the call.[2] A few weeks later, FWS issued a decision denying environmentalists' petition to extend protections under the Endangered Species Act to a dwindling, reproductively isolated population of bald eagles that have adapted to survive in the harsh deserts of the American Southwest.[3] In 2008, a federal district court in Arizona ruled that FWS had unlawfully denied the conservation groups' listing request.[4] In ruling against the agency, the court seemed particularly troubled by the exchanges among FWS officials participating in the decisive conference call described above.[5] Handwritten notes taken by one of the agency participants in the call documented the tense exchange between biologists in agency's Arizona field office, who found little information to refute the petition, and officials from the regional and Washington, D.C. offices who ordered that the agency issue a finding denying protections for the population.[6] After recounting this conversation in its opinion, the court noted—not surprisingly—that it had "no confidence in the objectivity of the agency's decision making process[.]"[7] The judge therefore required FWS to re-evaluate its negative decision, and took the extraordinary step of ordering that desert eagles—which FWS had recently removed from

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* Professor of Law and Director of the Pacific Environmental Advocacy Center, Lewis and Clark Law School. The author wishes to thank Ohio Northern University, Pettit College of Law for an opportunity to participate in the Dean's Lecture Series, and for tremendous hospitality during his visit. Thanks in particular to Professor David Raack, as well as to Kim Tocco for her excellent research assistance.

1. Center for Biological Diversity v. Kempthorne, No. CV 07-0038-PHX-MHM, 2008 WL 659822, at *11 (D. Ariz. Mar. 6, 2008) (quoting notes of a telephone conference contained in the administrative record submitted to the court by defendant FWS).
2. *Id.* (quoting Administrative Record 1985, 1987).
3. *Id.* at *1.
4. *Id.* at **16-18.
5. *See id.* at *11.
6. *Kempthorne*, 2008 WL 659822, at * 11.
7. *Id.* at *12.

the ESA's protected rolls along with all other bald eagles in the Lower forty-eight states—be returned to the list of threatened species.[8]

This decision dramatically illustrates how the contents of a federal agency's administrative record can influence judicial review of the decision it documents. With narrow exceptions, federal courts base their review of agency decisions solely on a record compiled and presented to the court by the agency itself. Had the notes describing the crucial desert eagle conference call not found their way into the agency's record, the court may well have sided with arguments by FWS that the agency properly reached a scientific conclusion that desert eagles do not deserve their own ESA listing, particularly given the deferential standard of review applicable to agency decisions. The court's knowledge of the conference call, however, likely made the difference between a decision upholding what would have appeared to be a federal agency's routine technical finding and a textbook example of the judiciary's crucial role in exposing and correcting misuses of governmental authority.

Unfortunately, that these notes made it into FWS's administrative record for its decision on the desert eagle petition is somewhat remarkable. Particularly during the tenure of George W. Bush, the federal Executive Branch placed a high premium on secrecy in many of its dealings, a philosophy that manifested itself in part as a trend toward increasingly skimpier records filed with reviewing courts pursuant to the Administrative Procedure Act ("APA")[9] when decisions made by federal agencies were challenged. Agencies that had previously followed an "everything-but-the-kitchen-sink" approach to compiling records for judicial review developed policies—some written, most simply de facto—calling for narrowly interpreting what constituted the records documenting their decisions.[10] It is

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8. *Id.* at *14.

9. 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344; *see* Michael Harris, *Standing In The Way Of Judicial Review: Assertion Of The Deliberative Process Privilege In APA Cases*, 53 ST. LOUIS U. L.J. 349 (2009) (detailing a discussion of the history and structure of the APA).

10. *See, e.g.*, Pat Holt, *Someone, Blow the Whistle on Bush's Excessive Secrecy*, CHRISTIAN SCIENCE MONITOR, Feb. 6, 2003, http://www.csmonitor.com/2003/0206/p09s02-coop.html (the popular press, legal scholarship, and even government reports documented extensively the Bush Administration's penchant for secrecy and greatly expanded use of executive privilege); *see also*, Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege and the Bush Administration*, 24 J.L. & POL. 1 (Winter, 2008); UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT REFORM—MINORITY STAFF SPECIAL INVESTIGATIONS DIVISION, SECRECY IN THE BUSH ADMINISTRATION 2-5 (Sept. 14, 2004), *available at* http://oversight.house.gov/features/secrecy_report/pdf/pdf_secrecy_report.pdf. Little if any of this literature focused on how these tendencies affected the contents of administrative records documenting federal agency decisions. Indirect evidence of increased withholding of material from agency administrative records can be gleaned from agencies' increased withholding of documents under the Freedom of Information Act, since a common statutory exemption under this statute parallels allowed

almost certain that materials akin to the notes documenting the desert eagle conference call did not make their way into administrative records for many federal agency decisions. Agencies left out many additional documents from their records based on various claims of privilege—again, some made explicitly, but many left unstated. It is of course impossible to know how these record decisions influenced the outcomes of court challenged to agency decisions during the Bush Administration. However, cases such as the one involving desert eagles indicates this influence may have been profound if reviewing courts did not have access to information documenting the full range of data, policies, and pressures that shaped the disputed decisions.

George W. Bush's immediate predecessor in office noted in an executive order "that the free flow of information is essential to a democratic society."[11] One of the most important innovations of American democracy is broad citizen participation in decisions by Executive Branch agencies—including an ability to challenge those decisions before a neutral court. Information is the very lifeblood of these processes. With the rise of the modern administrative state and consequent influence of decisions by federal agencies over many aspects of daily life in the United States, protecting the courts' role in reviewing the validity of federal agency decisions is crucial to safeguarding American democracy itself. Agencies' administrative records serve as both the public's and reviewing courts' sole window on the actions and decisions of those agencies. Accordingly, ensuring the integrity of procedures used by federal agencies to compile administrative records that accurately and completely reflect both their decision-making processes and the bases for their decisions must rapidly emerge from the backwaters of administrative law to become a national priority.

This article begins with a discussion in Section II of the origins of modern judicial review of federal agencies' decisions under the APA, as well as early decisions by the Supreme Court interpreting this seminal statute. This section addresses the substantive scope of agency records, including means of adding and deleting material from the record, as well as the surprisingly loose and fluid procedural standards for compiling these records. Section III then analyzes factors tempting agencies to inappropriately shape their administrative records in order to cast agency decisions in a more favorable light, as well as reasons that make it difficult or impossible for plaintiffs challenging agency

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withholdings from agency records. During the Bush years, some agencies developed more restrictive policies for compiling administrative records. Finally, in his capacity as the director (since 1996) of a law school clinic that often handles challenges to decisions of federal agencies, the author accumulated substantial anecdotal evidence of shrinking administrative records after January 2001.

11. President William J. Clinton, *Veto Message from the President of the United States* (Nov. 4, 2000), *available at* http://en.wikisource.org/wiki/Veto_Message_for_H.R._4392.

decisions—and even courts themselves—to detect such inappropriate conduct. Finally, Section IV sets forth a series of suggestions for how all three branches of the federal government, as well as plaintiffs that may challenge decisions of federal agencies, can take actions to make certain that federal agencies compile records that allow for fair and meaningful judicial review of their decisions.

II. ADMINISTRATIVE RECORDS: A PRIMER

Undoubtedly influenced by an endless parade of lawyer television shows and movies, for many people the search for evidence to be presented in court conjures up images of forensic investigations and tracking down witnesses, culminating in a dramatic presentation to the judge or jury at a trial. In reality, a plaintiff's hunt for evidence in a lawsuit challenging a rule or decision made by a federal agency[12] is almost always, rather untelegenically, a paper exercise. Counsel for those seeking review of the decision must sift through stacks of documents—or these days stacks of CDs containing electronic information—compiled and already submitted to the reviewing court by the very agency whose decision is subject to review.

Just what is in the materials transmitted to the court by a federal agency whose decision is being challenged—the administrative record—is of course of the utmost importance. In most cases, the corollary of judicial review on the basis of the administrative record is that courts may not consider information not in that record.[13] Additionally, plaintiffs in almost all cases cannot take advantage of traditional discovery tools to seek additional documents or information, including the testimony of officials involved in the decision at issue.[14] This means that except in unusual circumstances, the record includes only what the agency defendant submits to the reviewing court.

In addition to containing virtually the sole evidence a court will consider in resolving a suit against a federal decision, administrative records' contents are crucial in light of the standard of review federal courts apply to cases involving agency decisions. Under the APA, a court may set aside the decisions of a federal agency only if the judge finds, on the basis of the agency

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12. *See* 5 USC §§ 553-54, 556-57 (the APA divides agency decision-making processes into formal and informal adjudication and rulemaking categories); *see also* Harris, *supra* note 9, at 383-90. This article focuses on the administrative records that form the basis for judicial review of informal rulemaking by federal agencies, including in particular the everyday decisions by these agencies, which of course range widely in subject matter and scope. While many of the examples in the article are drawn from the field of environmental and natural resources law, the principles discussed are applicable to review of decisions by any federal agency.

13. *See* Harris, *supra* note 9, at 383-90. In limited circumstances, courts may allow supplementation of the administrative record; see *infra* notes 58-74 and accompany text.

14. *Id.*

record, that the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"[15] As should be clear from this language, this standard sets a high bar for plaintiffs. Particularly in cases involving science or technical disputes—which are very common in disputes over federal decisions relating to regulation in fields such as human health and safety, pollution control, and managing land and natural resources—courts have made it clear that they will be especially deferential to an agency's judgment. While decisions such as the Ninth Circuit's recent en banc opinion in *Lands Council v. McNair*[16] exemplify judicial reluctance to question an agency's exercise of discretion, especially in areas of technical complexity, judges, like most people, can often sense when things do not quite add up. In addition to the ESA listing dispute over desert eagles, there are myriad examples of cases in which evidence of backroom dealings, fudged analyses, and political pressures have, like a finger withdrawn from the dike, resulted in a strategic breach that collapses the wall of judicial deference to agency decisions.[17] The catch, of course, is that such evidence of an agency considering or being influenced by factors beyond its authority must come from the agency's own record.

In sum, the stakes are extremely high when it comes to what is in—and what is not in—the administrative record presented to a court by a federal agency whose decision has been challenged. In one way or another, the record often determines the outcome of the case—and with it perhaps the fate of a species, an industry practice, approval of a permit to build a highway or discharge pollution, or a the shape of a dizzying array of other federal actions.

A. Origins and Contours of the APA's "Whole Record" Requirement

Congress enacted the Administrative Procedure Act in 1946 as its attempt to strike a balance between New Deal reformers and those interested in limiting the burgeoning new powers of the administrative state, which one

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15. 5 U.S.C. § 706(2)(A) (2006).

16. 537 F.3d 981, 993 (9th Cir. 2008) (noting that that proper role for an appellate court is to ensure that the federal agency "made no 'clear error of judgment' that would render its action 'arbitrary and capricious'").

17. *See, e.g.*, Earth Island Institute v. Hogarth, 494 F.3d 757, 768 (9th Cir. 2007) (upholding a decision by the district court to overturn an agency decision, after observing that "this Court has never, in its 24 years, reviewed a record of agency action that contained such a compelling portrait of political meddling"); *see also* Seattle Audubon Soc. v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991) ("The problem here has not been any shortcoming in the laws, but simply a refusal of administrative agencies to comply with them."); Ctr for Biological Diversity v. U.S. Fish & Wildlife Serv, No. C04-04324 WHA, 2005 WL 2000928, at *15 (N.D. Cal. Aug. 19, 2005) ("Internal memorandums indicate that the scientific review team struggled to draft a rule to draw a discernible path from their own scientists' analysis to the ordained outcome.").

commenter characterized as a "direct challenge to the traditional system of checks and balances embodied in the Constitution."[18] The key tool for curbing Executive Branch authority embodied in the APA is a broad conferral of authority to the judiciary—the power to compel agency actions "unlawfully withheld or unreasonably delayed," and, perhaps most significantly, authority to review actions by federal agencies. Section 706 of the APA empowers federal courts to "hold unlawful and set aside agency action" found to be (1) "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law;" (2) in excess of constitutional or statutory authority, or (3) in violation of established procedures.[19] Courts also may set aside agency adjudications they find to be "unsupported by substantial evidence."[20] In exercising their broad "quasi-constitutional"[21] authority to review agency actions, rulemakings, and adjudications, the APA specifies that courts "shall review the whole record or those parts of it cited by a party[.]"[22] Thus began the ongoing enigma of what exactly constitutes the "whole record."

The APA itself, which has no implementing regulations, provides no guidance as to this crucial question. Its legislative history is only slightly more illuminating. In its extensive debates prior to enacting the APA in 1946, Congress discussed at length the appropriate evidentiary standard for agency decisions made after formal hearings.[23] In the context of those conversations, lawmakers highlighted the importance of reviewing courts considering all information in the record in passing on agency decisions, including evidence that may "weaken or indisputably destroy the case."[24] This strongly suggests that lawmakers intended the "whole record" to consist not merely of the information upon which an agency relies to *support* its decision—which of course consists mainly if not exclusively of information favorable to the agency's position—but also information in the agency's possession that undermines or even contradicts its ultimate decision. The idea that a record should include information at opposite ends of the spectrum—from documents that back the agency's rational to those potentially capable of destroying it—indicates a congressional desire to cast a very broad net over the information an agency should make available to a reviewing court.

Rather astoundingly, it was not until the APA was well over two decades old, when the Supreme Court squarely confronted the nature of judicial review

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18. *See* Harris, *supra* note 9, at 369.

19. § 706(2)(A) - (D).

20. *Id.* at § 706(2)(E); *see,* Harris, *supra* note 9, at 387-90 (discussing the APA's "quagmire" over which standard of review applies to which sorts of agency decisions).

21. Harris, *supra* note 9, at 391.

22. § 706(2).

23. *See, e.g.*, Walter O. Boswell Mem. Hosp. v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984).

24. *Id.*

of federal agency decisions in *Citizens to Preserve Overton Park v. Volpe*,[25] that courts began to apply the APA's "whole record" requirement. In that case, the Court found itself in a difficult position. In reviewing a challenge to the Secretary of Transportation's concurrence with local officials' decision to route a highway through Overton Park—a decision the Secretary left unexplained—the Court was somewhat at a loss to identify a basis for judicial review.[26] It was clearly unimpressed by the lower courts' acceptance of an explanation of the decision in the form of affidavits filed during the litigation, dismissing these as "merely 'post-hoc' rationalizations, which have traditionally been found to be an inadequate basis for review."[27] On the other hand, the Court expressed a reluctance to require some sort of new examination of agency personnel, observing that "inquiry into the mental processes of administrative decisionmakers is usually to be avoided."[28] The Court remanded the decision to the Secretary, ordering that its review "be based on the full administrative record that was before the Secretary at the time he made his decision."[29] Though review based on the contemporaneous record seemingly appealed to the justices as a middle ground between post-hoc justifications and potentially intrusive questioning of agency officials themselves, the Court still expressed concern that the district court on remand would find a necessity for "additional explanation" of the agency's rationale; it left to the lower court's discretion "which method will prove the most expeditious so that full review may be had as soon as possible."[30]

In the wake of *Overton Park's* somewhat waffling approach, subsequent case law development solidified the administrative record's central role as the basis for judicial review of agency decisions. This trend has two important prongs. First, courts have elaborated on the *Overton Park* court's distaste for seeking post-decision explanations and inquiring into the minds of federal decision-makers.[31] In *Florida Power & Light v. Lorion*, the Supreme Court emphasized that "the focal point for judicial review [of agency decisions] should be the administrative record already in existence, not some new record made initially in the reviewing court[;]"[32] if the agency did not consider a particular document or piece of information in making its decision, a reviewing court using that information as a basis for review would be compiling a "new" record by itself and inappropriately taking into account

25. 401 U.S. 402 (1971).
26. *Id.* at 410.
27. *Id.* at 419 (internal citations omitted).
28. *Id.* at 420.
29. *Id.*
30. *Overton Park*, 401 U.S. at 420-21.
31. *See, e.g.*, Florida Power & Light v. Lorion, 470 U.S. 729, 743-44 (1985).
32. *Id.* (quoting Camp v. Pitts, 411 U.S. 138, 142 (1973)).

information not considered by the agency.[33] In a similar vein, harking back to *Overton Park's* preference for avoiding direct inquiry into decision makers' motives, courts typically are reticent to permit parties challenging federal decisions to employ traditional discovery tools. When courts have allowed plaintiffs challenging an agency decision to conduct discovery, opinions almost always couch use of this tool as permissible only to ascertain whether the agency's record is complete, not as a means of gathering "new" information.[34] However, as the next section discusses in greater detail, judicial emphasis of the limitations on looking beyond the contemporaneous administrative record has been counterbalanced by a host of cases stressing the broad scope of the record itself.

B. Contents of the Administrative Record

1. A "Full" Record's Broad Scope

As courts focused on the administrative record as the touchstone for judicial review of federal decisions, they recognized as a corollary of the record's primacy the need, using the Supreme Court's terminology from Overton Park, to carry out their review function on the basis of a "full" rather than "bare" record. A district court in Texas drew this link perhaps most clearly, declaring that courts "must have access to the full record upon which the [agency's] conclusions were based. Succinctly put, to require less denies effective judicial review, and leaves the agency unaccountable, contrary to congressional purpose."[35] The Ninth Circuit has cast this issue in terms of a search for truth, arguing that "[a]n incomplete record must be viewed as a 'fictional account of the actual decision-making process.'"[36] Another Ninth Circuit panel asserted that "[i]f the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless."[37] Courts' emphasis on the record as a crucial tool of judicial review has important implications for defining precisely what constitutes a "full" record. While sensitive to the Supreme Court's admonition to avoid making a "new" record at the review stage, judges almost invariably take a court-centered rather than agency-centered perspective on the proper scope of the record.[38] In other words, a decision maker may see the universe of

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33. *Id.*

34. See note 36, *infra* and accompanying text.

35. Exxon Corp. v. Dept. of Energy, 91 F.R.D. 26, 39 (D.C. Tex. 1981).

36. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993).

37. *Id.*

38. *See, e.g.*, County of San Miguel v. Kempthorne, 587 F. Supp. 2d 64, 71 (D.C. Cir. 2008) (explaining the importance of a complete record from its perspective of a body tasked with resolving a

information relevant to her decision as including only the documents and other data that she actually examined in weighing what to do, as well as the information she cited to support her ultimate decision. On the other hand, courts as neutral arbiters of a decision's validity tend to take a much broader view, one that includes documents and materials the decision maker considered even indirectly, as well as evidence that both supports and undercuts the agency's ultimate decision. In short, courts take the position that "'[t]he whole record' includes everything that was before the agency pertaining to the merits of its decision."[39]

Reflecting this court-centered perspective, case law is well settled that a complete administrative record includes information that was directly or indirectly considered by the relevant agency.[40] This principle has two components. First, the actual agency decision-maker need not necessarily have seen, cited, or specifically relied upon documents or materials in order for the information to be part of the record; however, the information needs to have been before the agency involved in the decision in some fashion.[41] Second, the agency's use of documents and materials may be a step removed from the decision in question and nonetheless be deemed to have been considered by the agency. For example, in a challenge to the Environmental Protection

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dispute between two opposing parties, observing that "[t]he policy requiring a reviewing court to consider the entire record before the agency prior to rendering its decision ensures that neither party is withholding evidence unfavorable to its position and that the agencies are not taking advantage of post hoc rationalizations for administrative decisions").

39. *Id.*; *see also* Ad Hoc Metals Coalition v. Whitman, 227 F. Supp. 2d 134, 139 (D.C. Cir. 2002) (holding that a complete record must include any materials that were "referred to, considered by, or used by [the agency] before it issued its final rule"). On the other hand, courts have cautioned against too broad a view as to what information was "before" an agency. *See* Fund for Animals v. Williams, 245 F. Supp. 2d 49, 57 n.7 (D.C. Cir. 2003) (warning that "interpreting the word 'before' [the deciding agency] so broadly as to encompass any potentially relevant document existing within the agency or in the hands of a third party would render judicial review meaningless;" *see also* Kent County v. Envtl. Prot. Agency, 963 F.2d 391, 396 (D.C. Cir. 1992) (concluding that the Environmental Protection Agency need not "find *all* documents discussing filtration located in *any* office" of the agency) (emphasis in original).

40. *See* Thompson v. U.S. Dept. of Labor, 885 F.2d 551, 553 (9th Cir. 1989); Stainback v. Sec'y of Navy, 520 F. Supp. 2d 181, 185 (2007); *see also* Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 487-88 (1951); *Exxon Corp.*, 91 F.R.D. at 33 ("a record may be 'adequate' because it fully articulates the agency's reasoning, yet at the same time be 'inadequate' because it fails to provide the court all documents, memoranda and other evidence which were considered directly or indirectly by the agency."); Amfac Resorts v. Dep't of Interior, 143 F. Supp. 2d 7, 12 (D.C. Cir. 2001) ("[A] complete administrative record should include all materials that 'might have influenced the agency's decision, and not merely those on which the agency relied in its final decision.'").

41. *See* Miami Nation of Indians v. Babbitt, 979 F. Supp. 771, 777 (N.D. Ind. 1996) ("[A] document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record."); *see also* Center for Biological Diversity v. U.S. Bureau of Land Management, No. C-06-4884-SI, 2007 WL 3049869, at *4 (N.D. Cal. Oct. 18, 2007) ("[M]aterials should not be excluded simply because defendants did not 'rely' on them in arriving at the final decision.").

Agency's ("EPA") approval of specific state water quality standards, the court ruled that scientific studies employed by the EPA in formulating a generic guidance document fell within the scope of the record for the agency's approval decision, reasoning that the EPA considered the guidance document—and thus by extension indirectly considered the scientific basis for the guidance—in ruling on the specific state standards at issue in the case.[42] However, courts have not set forth a general test for assessing what constitutes an agency's "indirect" consideration of documents or other information, so judges have broad latitude to decide this issue in the context of the factual circumstances of individual cases.

One category of "indirectly" considered information has led to a significant number of disputes between federal agencies and parties challenging their decisions, as well as produced different results among various federal courts. Materials such as draft decision documents, internal memoranda, and notes of agency personnel can provide significant insight into agencies' decisions, but also may reveal frank internal deliberations. Many courts have required inclusion of draft documents and records of agency discussions in administrative records,[43] but others have permitted agencies to categorically exclude such material.[44] These disputes often play out in the context of whether agencies have properly excluded information from the record under the deliberative process privilege.[45]

On the other hand, judicial decisions also make it clear that a "full" record includes all information considered by the deciding agency regardless

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42. Northwest Environmental Advocates v. U.S. Environmental Protection Agency, 2008 WL 111054 (D. Ore. 2008).

43. *See, e.g.*, Ohio Valley Envtl. Coalition v. Whitman, No. Civ.A. 3:02-0059, 2003 WL 43377, at *5 (S.D. W.Va. Jan. 3, 2003) ("The administrative rulemaking process is precisely one of initial proposals, comments, compromise, revisions and final drafts, and the materials produced in this process are typically part of the administrative record."); *see also Miami Nation of Indians*, 979 F. Supp. at 776 (ordering inclusion of drafts, notes, comments, and internal communications in record); Southwest Ctr. for Biological Diversity v. Bureau of Reclamation, 143 F.3d 515, 522-23 (9th Cir. 1998) (court reviewed drafts included in administrative record in ruling on summary judgment).

44. *See, e.g.* Tafas v. Dudas, 530 F. Supp. 2d 786, 794 (E.D.Va., 2008) (asserting that "'only the pleadings and the evidence constitute the record upon which the decision must be based,' and '[b]riefs, and memoranda made by the [agency] or its staff, are not parts of the record'" (quoting Norris & Hirshberg v. S.E.C., 163 F.2d 689, 693 (D.C. Cir. 1947) and Seattle Audubon Soc. v. Lyons, 871 F. Supp. 1291, 1308-09 (W.D. Wash. 1994) (finding that the administrative record was "legally sufficient" even though "[t]housands of pages of notes, memoranda, and other working documents and electronic communications were destroyed."); Town of Norfolk v. U.S. Army Corps of Eng'rs, 968 F.2d 1438, 1456 (1st Cir. 1992) (citing Nat'l Wildlife Fed'n v. Burford, 677 F. Supp. 1445, 1457 (D. Mont. 1985)) (finding that the contents of personal files and notes of government employees were not properly part of the administrative record).

45. See Part II.B.2, *infra*.

whether it supports or contradicts the agency's position.[46] This is obviously necessary for effective judicial review given that a record consisting solely of information supporting an agency's decision would not provide a basis for objective evaluation of that decision.

Even though courts have left no doubt as to an administrative record's broad scope, determining exactly what should be in a "full" record in a given case involves making sometimes difficult determinations as to whether certain information pertains to the challenged agency decision or whether certain documents or materials were before an agency or considered by the agency. Identifying these important judgment calls raises a key question: who has the last word in making these choices—the agency or the court reviewing its decision? On one hand, the APA and other federal statutes generally counsel courts to show substantial deference in reviewing the merits of decisions by Executive Branch agencies. On the other, given that an agency record is typically the sole basis for this review, plenary agency control of the record could severely undermine courts' objective review of agency decision.

Courts have resolved this tension with a two-step test. First, reviewing courts employ a presumption that the administrative record certified by the agency properly reflects the full record of materials it considered in reaching the decision at issue.[47] This can present a high hurdle for parties challenging a record's sufficiency.[48] However, if a party challenging the agency provides

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46. *See, e.g., Universal Camera Corp.*, 340 U.S. at 488 ("[R]equirement for canvassing 'the whole record' . . . include[es] the body of evidence opposed to the [agency's] view[.]"); *Fund for Animals*, 245 F. Supp. 2d 49, 55 (D.D.C. 2003) ("[A]gency may not skew the record in its favor by excluding pertinent but unfavorable information"); *Exxon Corp.*, 91 F.R.D. at 33 ("'whole' administrative record consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position"); Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993).

47. *See, e.g.*, Amfac Resorts, L.L.C. v. U.S. Dept. of the Interior, 143 F. Supp. 2d at 12 ("[A] party must overcome the standard presumption that the [administrative] 'agency properly designated the Administrative Record.'"); *see also Bar MK Ranches*, 994 F.2d at 740. For a more detailed discussion of this presumption, *see* James N. Saul, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENVTL. LAW 1301, 1311-13 (2008) [hereinafter *Overly Restrictive Records*].

48. *See, e.g.*, McCrary v. Gutierrez, 495 F. Supp. 2d 1038, 1042 (N.D. Cal. 2007) (denying plaintiffs' motion to complete the administrative record, finding no basis for plaintiff's allegations of agency bad faith in light of sworn declarations to the contrary and the presumption of regularity enjoyed by the agency); Pacific Shores Subdivision Cal. Water District v. U.S. Army Corps of Eng'rs, 448 F. Supp. 2d. 1, 6-7 (D.D.C. 2006) (denying motion to supplement the administrative record where plaintiff failed to identify reasonable grounds—not pure speculation—that documents were considered by agency but not included in record, and sheer volume and complexity of the record suggested it was complete); *Fund for Animals*, 245 F. Supp. 2d at 58 (D.D.C. 2003) (denying motion to compel defendants to produce complete administrative record where plaintiff failed to identify applicable exception under which court may undertake extra-record review).

"clear evidence"[49] indicating the record is not complete, courts may order agencies to add materials to the record, or may allow discovery by plaintiffs to ferret out information that should be part of the record but was not included by the agency in its version. Courts justify this authority on the basis that the judiciary, and not agencies, is the final arbiter of what makes up a "full" record, a role the judiciary claims as essential to allow it to carry out its constitutional function of independently reviewing agency decisions.[50]

One district court, for example, declared that "[i]t would be a hypocritical scheme indeed to hand to a decision-maker the power to control review of its decision."[51] Another explained that "it would be improper . . . to allow the federal defendants to determine unilaterally what shall constitute the administrative record and thereby limit the scope of the court's inquiry."[52] A number of other decisions have thus made it clear that although a record filed with a court by an agency enjoys an initial presumption of validity, the record according to the agency is not necessarily what a reviewing court will consider as the proper basis for its review of the agency's decision.[53]

In sum, more than six decades after Congress declared the "whole record" to be the basis of judicial review of federal agency decisions, no precise definition exists as to what that record must include. Significantly, in what amounts to an unheralded reprise of *Marbury v. Madison*[54] in the context of the APA, courts have made it clear that the judiciary has the last word in deciding when agencies' records are sufficient. While this view of the

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49. In *National Archives and Records Administration v. Favish*, the Court noted that the presumption of legitimacy accorded to government officials' conduct, a presumption the Court characterized as "perhaps . . . less a rule of evidence than a general working principle[,]" usually requires a party challenging governmental conduct to present "clear evidence" in order to rebut. 541 U.S. 157, 174 (2004). Courts have applied this "clear evidence" requirement to plaintiffs challenging the completeness of administrative records. *See, e.g., Tafas*, 541 F. Supp. 2d at 811. Other courts have articulated somewhat different characterizations of the same sort of idea. *See County of San Miguel*, 587 F. Supp. 2d at 72 (holding that a party seeking to add material to the record "must establish that the additional information was known to the agency when it made its decision, the information directly relates to the decision, and it contains information adverse to the agency's decision."); *see also Fund for Animals*, 245 F. Supp. 2d at 57-58 (noting that the parties challenging the record must make a "strong showing" that the agency excluded documents in bad faith or the record is so bare as to preclude effective judicial review); Woodhill Corp. v. Fed. Emergency Mgmt. Agency, No. 97 C 677, 1997 U.S. Dist. LEXIS 13311 (N.D. Ill. Sept. 2, 1997) (holding that the presumption that the record is complete and accurate disappears if plaintiff "affirmatively demonstrates that the agency relied on materials not included in the record submitted to the court").

50. *Exxon Corp.*, 91 F.R.D. at 32-33.

51. *Id.* at 39.

52. *Miami Nation of Indians*, 979 F. Supp. at 776.

53. *See, e.g., Fund for Animals*, 245 F. Supp. 2d at 56, 58 (holding that although agency initially determines what constitutes a "full" record before the agency, the agency does not always have the last word).

54. 5 U.S. 137 (1 Cranch) (1803).

respective power of agencies and courts has not led to the latter running roughshod over the former, thanks to a presumption of regularity in favor of records submitted by agencies whose actions are the subject of review, it means that a very important check exists against agencies' ability to unilaterally shape the information used to decide the legality of their actions and decisions.

2. Adding To and Removing Information From Administrative Records Available to Parties and Reviewing Courts

It is important to note from the outset that the "whole record" under the APA is not a malleable concept. Technically, no process exists for adding materials to, or removing information from, the record itself for an agency decision. Rather, when a court orders an agency to add material to a particular administrative record, the judge is simply defining the "whole record" as properly including the material at issue.[55] Similarly, an agency has no authority to withhold material from the record when it was considered by the agency as part of its decision.

The agency may have the ability to prevent the public, parties challenging the agency's decision in court, and even reviewing courts from seeing or at least considering certain documents and information. In other words, a court reviewing an agency decision may under certain circumstances consider information in addition to the "whole record." Alternatively, in rendering its opinion on the legality of an agency action, a court may be precluded from considering, and the public and parties challenging an agency decision prevented from even seeing, certain materials even though the information is part of the agency's "whole record" under the APA.

i. Supplementing the Administrative Record

Somewhat counter-intuitively, the APA's requirement for review of agency actions based on the "whole record" functions in one important sense as a *limitation* on the information courts may consider in reviewing an agency decision. Review based on an administrative record means that courts generally cannot consider information *not* in the record.[56] Such extra-record

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55. James N. Saul discusses the distinction between *completing* an administrative record and *supplementing* the record in *Overly Restrictive Records*, *supra* note 47, at 1319-23. Mr. Saul notes that a request to complete a record requires a party challenging an agency action to make different showings and carry a different burden than a party asking the court to supplement an administrative record and thus consider information outside of the agency's record in reviewing the challenged agency action. See Part II.B.2.i, *infra*.

56. *See, e.g.*, Fort Sumter Tours, Inc. v. Babbitt, 66 F.3d 1324, 1335 (4th Cir. 1995) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.") (citations omitted).

material is usually submitted to a reviewing court by a party challenging the agency's decision,[57] and includes materials such as information that post-dates the decision being challenged, declarations or affidavits from outside experts, and reports or other sources of information that, while perhaps relevant to the issue before the court, were not considered by the agency in making its decision. As in their justifications for the judiciary's primary role in defining the proper scope of the record, courts also explain in terms of separation of powers their view of the APA as placing limitations on courts' use of information outside the agency's "whole record."[58]

Courts allow parties challenging an agency action to submit information to the court *in addition* to material properly within the scope of the agency's record only if they find that the proffered material falls into one of several court-made exceptions to the APA's mandate that courts limit their review to only the "whole to the principal that record" before the agency. Many courts often cite a list of four exceptions to the principle that reviews should be based only on the record, that were first discussed in the Ninth Circuit's decision in *Public Power Council v. Johnson*.[59] The exceptions permit adding to the record when (1) "there is 'such a failure to explain administrative action as to frustrate effective judicial review,' the court may 'obtain from the agency, either through affidavits or testimony, such additional explanations of the reasons for the agency decision as may prove necessary[;]'"[60] (2) "when it appears the agency has relied on documents or materials not included in the record[;]"[61] (3) when it "is necessary to permit explanation or clarification of technical terms or subject matter involved in the agency action under review[;]"[62] and (4) when plaintiffs allege that an agency has acted in bad faith.[63]

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57. However, there are a few instances in which courts have allowed the defendant agency to supplement its own record. *See, e.g.*, Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 15-16 (2d Cir. 1997) (upholding a district court's decision to invite and receive additional information from the defendant U.S. Forest Service to determine whether the agency had fully analyzed and mitigated environmental impacts of road building and logging). However, allowing an agency to submit extra-record evidence which post-dates its decision in order to support that decision is arguably in tension with the courts' general reluctance to allow agencies to provide post-hoc rationalizations of their decisions. *See, e.g.*, *County of San Miguel*, 587 F. Supp. 2d at 64.

58. *See, e.g.*, Asarco, Inc. v. U.S. Envtl. Protection Agency, 616 F.2d 1153, 1160 (9th Cir. 1980) ("When a reviewing court considers evidence that was not before the agency, it inevitably leads the reviewing court to substitute its judgment for that of the agency.").

59. 674 F.2d 791 (9th Cir. 1982). For additional discussion of factors supporting record supplementation, see *Overly Restrictive Records, supra* note 47, at 1308-11.

60. *Id.* at 793-94 (citing Camp v. Pitts, 411 U.S. 138, 143 (1973) and *Citizens to Preserve Overton Park*, 401 U.S. at 420).

61. *Id.* at 794.

62. *Id.*

63. *Id.* at 795.

These exceptions to review based only on the record are interesting in part because they help reveal common misunderstandings by courts regarding the scope of the record itself. Considered carefully, the second "exception" is really no exception at all; if an agency relied on documents or other information not contained in the agency's version of the record, that simply means that the record submitted to a reviewing court by the agency was incomplete. Therefore, when a court orders materials to be added to the record because they were in fact relied upon or considered by the agency, the court is technically not *supplementing* the record. Rather, it is using the court's authority to determine the scope of the record itself by defining the proper record for review of the action in question as including the materials at issue. The same may hold true for material left out of the record by an agency as a result of bad faith, although this exception could also encompass truly supplemental material such as post-hoc evidence of bad faith on the part of the agency.

The first and third *Public Power Council* exceptions cover the circumstances under which courts will allow true additions to an administrative record. However, as the Supreme Court indicated in *Overland Park*, circumstances justifying a reviewing court conducting investigative proceedings to garner additional explanation for agency decisions are nearly nonexistent.[64] In contrast, it is at least plausible that much more often courts' review of agency actions could be informed by material outside the record to clarify or explain technical terms or subject matter. Indeed, plaintiffs most commonly cite this exception to justify their efforts to place extrinsic materials before a reviewing court, with decidedly mixed results over time.[65]

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64. For example, in Doraiswamy v. Secretary of Labor, the court noted "that the Supreme Court has left the door ajar for a call upon an administrative agency to more adequately explain, through affidavits or testimony in the reviewing court, the reasons for its decision." 555 F.2d 832, 842 (D.C. Cir. 1976). The court declined to make such an inquiry of the agency, noting that "appellants challenge the correctness of the Secretary's decisions rather than the fullness of the reasons he gave, and [thus] surely there is no such 'failure to explain administrative action as to frustrate effective judicial review.'" *Id.* (quoting *Camp*, 411 U.S. at 142-43); *see, e.g.*, Envtl. Defense Fund, Inc. v. Costle, 657 F.2d 275, 286 (D.C. Cir. 1981) (rejecting plaintiff's effort to create "an exception which would enable challenging parties to submit affidavits addressing the merits and propriety of the agency decision").

65. Some cases have allowed parties challenging federal agency decisions to supplement the administrative record for this reason. *See, e.g.*, Natural Res. Def. Council v Kempthorne, 506 F. Supp. 2d 322, 346 (E.D. Cal. 2007) (finding documents outside administrative record admissible in challenging biological opinion issued by United States Fish and Wildlife Service because documents either were admitted to explain complex or technical matters, or they related to whether FWS adequately considered issue of climate change); Colorado Envtl. Coal. v. Lujan, 803 F. Supp. 364, 370-71 (D. Colo.1992) (admitting declaration of expert to explain a valuation model employed by the federal agency to make its challenged decision). Courts occasionally allow portions of supplemental declarations and reject the remainder. *See* Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., Nos. CV 01-640RE, CV 05-23-RE., 2005 WL 878602, at *8 (D. Or. Apr. 8, 2005). There are many decisions rejecting an alleged need to clarify

Much like for plaintiffs' challenges to the scope of a record, courts considering a request to introduce information beyond the record for any reason generally begin with a presumption that their review should focus exclusively on the record submitted by the agency. The parties must overcome this presumption with a "strong showing" of a need to supplement the record.[66]

In limited instances, courts may consider supplementing the record when time constraints may have prevented compilation of a complete record. [67] These situations most commonly involve statutes requiring challenges to federal agency decisions to be brought in the Courts of Appeal rather than the district courts.

Finally, a line of cases has considered attempts by plaintiffs to supplement the administrative record based on a combination of the first and third *Public Power Council* factors. In *Asarco, Inc. v. U.S. Environmental Protection Agency*,[68] the Ninth Circuit observed that a record submitted by the agency should not "straightjacket"[69] a reviewing court in circumstances where the court found it necessary to consider material outside the record to determine whether the agency had considered all relevant factors in its decision-making, but such a foray outside the record raised risks that a court would be tempted to "substitute its judgment for that of the agency."[70] The court reasoned that these "conflicting considerations" could be reconciled if a court considered evidence outside the record which is relevant to the

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or explain technical terms as reason to add to an agency's record. *See, e.g.*, Inland Empire Pub. Lands Council v. Schultz, 807 F. Supp. 649, 652 (E.D. Wash. 1992) (court will not allow addition of technical information absent "clear reasons" for doubting the agency's technical explanations or expertise in the subject matter); *Asarco*, 616 F.2d at 1161 (holding district court went too far in considering extra-record testimony regarding emissions from copper smelter because it was plainly elicited for purpose of determining scientific merit of agency decision); The Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005) (warning that "[w]ere the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making"). Courts also apply their reluctance to supplement the record to agency efforts to add post-decisional information to the record. *See, e.g.*, Natural Res. Def. Council, Inc. v. Evans, No. C-02-3805-EDL, 2003 WL 22025005, at *2 (N.D. Cal. Aug. 26, 2003) (rejecting federal defendant's attempt to add expert declarations prepared after the disputed decision to its own record).

66. *See, e.g.*, Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697, 704 (9th Cir. 1996); James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996).

67. Nat'l Audubon Soc'y v. U.S. Forest Service, 46 F.3d 1437, 1448 (9th Cir. 1993) (quoting *Public Power Council* 674 F.2d at 795 (9th Cir. 1982) (The administrative record may be supplemented to "insure there will be a full presentation of the issues" where the statutory scheme provides for accelerated judicial review procedures.).

68. 616 F.2d 1153 (9th Cir. 1980).

69. *Id.* at 1160.

70. *Id.*

substantive merits of the agency action "only for background information . . . or for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision."[71] Such a rationale for courts using information outside the record in their review of agency decisions comes up most commonly in challenges to the adequacy of agencies' Environmental Assessments and Environmental Impacts Statements under the National Environmental Policy Act.[72]

ii. Preventing Courts' Consideration of Information in the Record

In contrast to supplementing an administrative record to enable a reviewing court to consider materials outside those in the record, courts also recognize privileges which narrow the basis of judicial review of agency decisions.[73] These privileges allow agencies to withhold from plaintiffs materials that are properly part of the agency record, as well as preclude courts from considering portions of the record subject to the privilege in reviewing agency decisions. By far, the most common privileges involved in administrative record issues include the attorney-client and attorney work product privileges, and the deliberative process privilege.

Given that privileges result in portions of the administrative record being unavailable to a reviewing court, the judiciary has applied a number of tools in attempts to ensure that agency defendants do not use them to prevent courts from considering materials that in fact should remain in the available record. Perhaps most important among these is the requirement that an agency must *disclose* the materials properly in the record but for which the agency asserts a privilege against disclosure to the reviewing court and other parties, commonly known as a Vaughn index.[74] In a case involving President Nixon's various claims of privilege to withhold documents related to the Watergate scandal, the D.C. Circuit held that a proper Vaughn index must satisfy three elements: (1) the list of materials properly in the record for an agency decision yet withheld by the agency from the reviewing court and parties to a case must be set forth in one complete document, (2) the index must set forth a "clear and cogent summary of exactly what material is being withheld[,]" and (3) the

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71. *Id.*

72. *See generally*, Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929 (1993); Suffolk County v. Sec'y of Interior, 562 F.2d 1368, 1384 (2d Cir. 1977) ("[I]n NEPA cases . . . a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored.") (internal citations omitted).

73. *See* Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

74. *See id.*

index "must state the exemption [or privilege] claimed for each deletion or withheld document, and explain why the exemption [or privilege] is relevant[.]"[75] Courts have drawn a link between availability of a Vaughn index and the ability of the judiciary to exercise its authority to be the final arbiter of the sufficiency of an agency's record.[76] Although federal courts have universally accepted the requirement that agencies submit a Vaughn index of materials withheld from agency records, there is much less unanimity over how specific agencies must be in justifying their decisions to withhold specific documents and material from the record.[77]

In disputes over federal agencies' exclusion of allegedly privileged documents from the portion of the record available for review, courts have noted that these privileges are available "only when necessary to achieve [their] purposes[s]" and are "narrowly and strictly construed."[78] Moreover, the party asserting a privilege bears the burden of demonstrating that a privilege applies to specific materials, so federal agencies bear the burden of showing that an applicable privilege or privileges allow them to withhold materials from the record.[79] Merely offering to make materials withheld from the record available to a reviewing court for in camera inspections does not suffice to carry the agency's burden.[80] Rather, courts look to explanations for exclusion in an agency's Vaughn index, declarations submitted with the administrative record, and in some circumstances, after in camera review of

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75. Dellums v. Powell, 642 F.2d 1351, 1359-60 (D.C.Cir. 1980).

76. *See, e.g.*, Northwest Envtl. Advocates v. U.S. E.P.A., No. 05-1876-HA, 2008 WL 111054, at *4 (D. Or. Jan. 7, 2008) ("Because the agencies bear the burden of establishing that a privilege applies, they must reveal, through a detailed log, the documents excluded from the record. Absent such a log, plaintiff has no way to challenge assertion of the privilege, and this court has no way to evaluate the claim.").

77. *See, e.g.*, Maine v. U.S. Dept. of Interior, 298 F.3d 60, 72 (1st Cir. 2002) (rejecting the agency's Vaughn index because virtually every entry "is very general, without any explanation justifying the privilege, and fails to identify any circumstance expressly or inferentially supporting confidentiality"); Miccosukee Tribe of Indians of Florida v. United States, 516 F.3d 1235, 1260 (11th Cir. 2008) (holding that plaintiffs sought to impose too heavy a "burden of factual specificity" on a federal agency to explain its basis for withholding privileged documents).

78. Modesto Irrigation Dist. v. Gutierrez, No. 1:06-cv-00453 OWW DLB, 2007 WL 763370, at *13 (E.D. Cal. Mar. 9, 2007) (citing Fisher v. United States, 425 U.S. 391, 403 (1976) and United States v. Gray, 876 F.2d 1411, 1415 (9th Cir.1989)).

79. *See, e.g.*, Wilderness Soc. v. U.S. Dept. of Interior, 344 F. Supp. 2d 1, 10 (D.D.C. 2004) ("[C]onclusory assertion of privilege will not suffice to carry' the agency's burden" of establishing its right to withhold records"); Columbia Snake Irrigators' Ass'n v. Lohn, No. C07-1388MJP, 2008 WL 750574, at **5-6 (W.D. Wash. Mar. 19, 2008) (noting that the federal agency's claim of privilege must be explained in sufficient detail to allow the district court to make a *de novo* assessment of the government's claim of exemption); Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1092 (9th Cir. 1997) (holding that whether the federal agency has met its burden to justify a claim of privilege is a question of law that courts review *de novo*); Scott Paper Co. v. United States, 943 F. Supp. 489, 499 (E.D. Pa. 1996).

80. *See Maricopa Audubon Soc'y* 108 F.3d at 1093 (9th Cir. 1997) (citing Church of Scientology of Cal. v. U.S. Dept. of Army, 611 F.2d 738, 743 (9th Cir. 1979)).

the allegedly privileged material.[81] However, what exactly agencies must show to carry this burden generally depends on the circumstances of a particular case. There are numerous instances in which courts have rejected an agency's assertion of privilege in their Vaughn index or declarations as too vague to be the basis for withholding materials from their records,[82] but many decisions rely on only these documents to reject plaintiffs' attacks on agencies' claims of privilege.[83]

The attorney-client privilege exists to promote "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."[84] Courts recognize that an attorney-client relationship exists between an agency and both its agency counsel and Department of Justice attorney

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81. If a court refuses to overrule an agency's assertion of privilege based on information in the Vaughn index or agency declarations, plaintiffs contesting the privilege typically encourage the court to review the materials in camera. Courts are often leery of doing so due to the time and effort involved in potentially reviewing many documents. In *Ocean Conservancy v. Evans*, the court set out four factors to consider in deciding whether to conduct an in camera review of materials withheld from the record by an agency under claim of privilege: "(1) judicial economy; (2) actual agency bad faith, either in FOIA action or in the underlying activities that generated the records requested; (3) strong public interest; and (4) whether the parties request in camera review." 260 F. Supp. 2d 1162, 1189 (M.D. Fla. 2003); *see also* Marsh v. Safir, No. 99CIV.8605JGKMHD, 2000 WL 460580, at *15 (S.D.N.Y. Apr. 20, 2000) ("*[I]n camera* review is not routinely conducted whenever a privilege issue is presented for resolution[]" because such a practice would "inevitably and unnecessarily burden the courts."). Court rulings on plaintiffs' requests for in camera review are, of course, decidedly mixed. *See, e.g.*, Ocean Mammal Inst. v. Gates, Civil No. 07-00254 DAE-LEK, 2008 WL 2185180, at *15 (D. Haw. May 27, 2008) ("A court need not conduct an *in camera* review of documents withheld on the basis of the deliberative process privilege if the agency provides 'reasonably detailed descriptions of the documents and allege[s] facts sufficient to establish an exemption.'"); Fishermen's Finest, Inc. v. Gutierrez, No. C07-1574MJP, 2008 WL 2782909, at **3, 5 (W.D. Wash. July 15, 2008) (conducting in camera review of five documents after finding on the basis of the Vaughn index and declarations that the agency improperly claimed deliberative process privilege for twenty-eight documents); Northwest Envtl. Advocates v. EPA, No. 05-1876-HA, 2008 WL 111054, at *4 (D. Ore. Jan. 7, 2008) (court ordered agency to add documents to the record and revisit its claims of deliberative process privilege for hundreds more after conducting in camera review of forty documents selected by plaintiffs).

82. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 861 (D.C. Cir. 1980) (agencies "must supply the courts with sufficient information to allow us to make a reasoned determination that they were correct [in withholding material from the record]"); Senate of the Commonwealth. of P.R. on Behalf of Judiciary Comm. v. U.S. Dept. of Justice, 823 F.2d 574, 585 (D.C. Cir.,1987) ("We do not endeavor an encompassing definition of 'conclusory assertion'; for present purposes, it is enough to observe that where no factual support is provided for an *essential* element of the claimed privilege or shield, the label 'conclusory' is surely apt.") (emphasis in original).

83. *See, e.g.*, Ctr. for Biological Diversity v. Norton, 336 F.Supp.2d 1149, 1154-55 (D.N.M. 2004) (citing the adequacy of the agency's Vaughn index and declarations in refusing plaintiffs demand for an in camera review of documents withheld under the deliberative process privilege).

84. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

representing the agency in litigation.[85] Accordingly, communications between agency personnel and counsel, as well as the work product of agency counsel, are potentially privileged in the same manner as communications involving other entities and their attorneys.[86] On the other hand, recognizing that the attorney-client privilege "obstructs the truth-finding process[,]"[87] courts have defined limits to this privilege in an agency context. Judges have rejected the so-called "unitary executive" theory under which a government attorney's communications with any federal agency would be considered privileged, although the privilege may apply when an attorney works or communicates with more than one agency that share a "common legal interest" in the subject of an agency decision.[88]

Communications between an attorney and agency client also must have been intended by the parties to be confidential, and the agency must maintain that confidence.[89] Attorneys working for federal agencies also often act in capacities other than as legal advisors. Documents or information related to such work is not privileged and thus must be included in the records upon which courts base their review of agency decisions.[90] At least one commentator has suggested that courts should move toward treating federal agencies'

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85. *See, e.g.*, Blue Lake Forest Products, Inc. v. United States, 75 Fed. Cl. 779, 792 (Fed. Cl. Ct. 2007).

86. *See, e.g.*, General Elec. Co. v. Johnson, No. Civ.A.00-2855(JDB), 2006 WL 2616187, at *14 (D.D.C. Sept. 12, 2006) (rejecting the contention that government attorneys are "categorically less entitled than private lawyers to invoke the attorney-client privilege"); *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984) ("For the purposes of the attorney-client privilege, there is nothing special about another federal agency in the role of potential adversary as compared to private party litigants acting as adversaries.").

87. Wyoming v. U.S. Dept. of Agric., 239 F. Supp. 2d 1219, 1228 (D. Wyo. 2002).

88. *See Modesto Irrigation Dist.*, 2007 WL 763370, at *15.

89. *See Coastal States Gas*, 617 F.2d at 863. In *Eugene Burger Management Corp. v. U.S. Department of Housing and Urban Development*, the court characterized a communication as "confidential" if it is communicated: (1) with the intention that the attorney will not disclose its contents; and (2) for the purpose of securing legal advice or services. 192 F.R.D. 1, 5 (D.D.C. 1999). Applying the confidentiality requirement to a federal agency, the court in *Wyoming* held that confidential documents were only those "circulated no further than among those members 'of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication' . . . if circulated to a larger group of individuals, the privilege does not apply because the agency did not maintain the confidentiality of the information." 239 F. Supp. 2d. at 1230 (quoting *Coastal States Gas*, 617 F.2d at 865).

90. *See General Elec.*, 2006 WL 2616187, at *15 (recognizing as not privileged "communications [that] are made not for the purpose of securing legal advice or services, but rather for the purpose of developing policy"); *Wyoming*, 239 F. Supp. 2d at 1229 ("[W]hen an attorney for a governmental agency has ceased to function as an attorney and began to function as a regulator or administrator, the communications are no longer protected by the attorney-client privilege.").

claims of attorney-client privilege more restrictively than similar claims by other entities in order to advance principles of open government.[91]

The deliberative process privilege, sometimes also called executive privilege, has generated the most controversy and greatest number of disputes over agencies' exclusions from administrative records. Although recognized by federal courts in the United States relatively recently, the privilege's long and complex history dates back to a mid-nineteenth century decision by the British House of Lords.[92] In an explanation of privilege typically echoed by other federal courts, the D.C. Court of Appeals set forth three primary reasons for allowing agencies to exclude from administrative records information describing their internal deliberations leading up to a decision:

> [The deliberative process] serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.[93]

Agency claims of deliberative process privilege to withhold materials from an administrative record result in a two-step review by a reviewing court. First, the court must decide whether the communications are in fact privileged. The government has the burden of showing privilege at this first step,[94] which generally entails showing that specific material[95] is pre-decisional and that it is "deliberative in nature."[96] Courts may also require an agency to show that

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91. *See* Lory A. Barsdate, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725 (1988).

92. For a comprehensive discussion of the deliberate process privilege itself and its history, *see* Harris, *supra* note 9. Saul also presents a valuable discussion of the privilege and its use in the context of agency's administrative records. *See Overly Restrictive Records*, *supra* note 47, at 1323-29.

93. *Coastal States Gas*, 617 F.2d at 866.

94. *See, e.g.*, Mary Imogene Bassett Hosp. v. Sullivan, 136 F.R.D. 42, 44 (N.D.N.Y.1991) ("[T]he agency must provide 'precise and certain' reasons for preserving the confidentiality of the requested information."), *rev'd on other grounds*, 659 F.2d 150 (Temp. Emer. Ct. App.), *cert. denied*, 454 U.S. 1110 (1981)); *Scott Paper Co.*, 943 F. Supp. at 497.

95. *See Mary Imogene Bassett Hosp.*, 136 F.R.D. at 44 ("[T]he claim of privilege 'must specifically designate and describe the information that is purportedly privileged.'").

96. *See* Fed. Trade Comm'n v. Warner Commc'n, Inc., 742 F.2d 1156, 1161 (9th Cir. 1984) (characterizing deliberative material as "containing opinions, recommendations, or advice about agency policies"); *Fishermen's Finest*, 2008 WL 2782909, at *3(holding that an agency must demonstrate that documents withheld are "deliberative in the sense that they implicate policy-oriented judgment.").

the material it seeks to exclude was an "essential element" of its deliberations,[97] and force the agency to comply with a specific process in order to assert the privilege.[98]

Many decisions examining the privilege have drawn a distinction between agency material relating to an agency's policy deliberations or policy-making processes[99] as opposed to discussions of scientific and technical findings,[100] but some courts have refused to draw a bright line based on these factors between materials which do or do not fall within the privilege.[101] Significantly, a claim of deliberative process privilege may be overcome if a plaintiff bears the burden of showing that its need for the documents outweighs

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97. Parke, Davis & Co. v. Califano, 623 F.2d 1, 6 (6th Cir. 1980) ("The district court must know how each document fits into the deliberative process, and whether it is an essential element of that process or possibly a peripheral item which just 'beefs up' a position with cumulative materials.").

98. *See* Elkem Metals Co. v. United States, 126 F. Supp. 2d 567, 573 (Ct. Int'l Trade 2000) (holding that in order to withhold materials from an administrative record "(1) the [deliberative process] privilege [must] be asserted by the highest ranking member of the government agency or his or her designated subordinate, and (2) such individual [must] submit an affidavit sufficiently describing the documents") (internal citations omitted). *See* Shilpa Narayan, *Proper Assertion of the Deliberative Process Privilege: The Agency Head Requirement*, 77 FORDHAM L. REV. 1183 (2008) (discussing the "agency head" requirement, including its interpretation by federal courts).

99. Petroleum Info. Corp. v. U.S. Dep't of Interior, 976 F.2d 1429, 1435(D.C. Cir. 1992) ("To fall within the deliberative process privilege, materials must bear on the formulation or exercise of agency policy-oriented *judgment.*") (emphasis in original). The decision in this case, like many examining the deliberate process privilege, arose in the context of a federal agency's refusal to disclose documents under the Freedom of Information Act's exemption 5, 5 U.S.C. § 552(b)(5), which allows agencies to withhold documents which would not be available to parties in litigation involving the same issue. *See Petroleum Info. Corp.*, 976 F.2d at 1433; McClelland v. Andrus, 606 F. 2d 1278, 1288 (D.C. Cir. 1979) ("Exemption 5 is co-extensive with the common law discovery privileges"); *see also* Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 39 (D.C. Cir. 2002) ("Because the material cannot 'reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.'").

100. *See, e.g., Petroleum Info. Corp.*, 976 F.2d at 1436 ("[R]elease of materials that do not embody agency judgments-for example, materials relating to standard or routine computations or measurements over which the agency has no significant discretion-is unlikely to diminish officials' candor or otherwise injure the quality of agency decisions."); Greenpeace v. Nat'l Marine Fisheries Serv. 198 F.R.D. 540, 544 (W.D. Wash. 2000) (holding that an agency's findings under section 7 of the Endangered Species Act are "limited to objective, fact-based scientific conclusions" and thus "the process as a whole is not 'deliberative' within the meaning of the privilege"); *McClelland*, 606 F.2d at 1287 ("[F]actual material falls outside the scope of this [deliberative process] privilege."); see also Kirk D. Jensen, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information Under the Federal Deliberative Process Privilege*, 49 DUKE L.J. 561 (1999).

101. *See, e.g.*, Nat'l Wildlife Fed'n v. U.S. Forest Service, 861 F.2d 1114, 1118 (9th Cir. 1988) (materials with factual information are not "automatically ineligible" for protection under the deliberative process privilege as expressed through exemption 5 of the Freedom of Information Act); *Parke, Davis & Co.*, 623 F.2d at 6 ("Nor is it possible to hold that all factual material is subject to disclosure while all advisory material, containing opinions and recommendations, is covered by Exemption 5[.]").

the government's interests in withholding it.[102] Given that documents and other materials describing an agency's deliberations in making a decision often go to the heart of what is at issue in challenges to that decision, disputes involving agencies' use of the deliberative process privilege are legion, and agencies' use of the privilege has generated much controversy.[103]

C. Requirements and Procedures for Assembling Administrative Records

As the preceding section makes clear, putting together an administrative record necessarily involves answering a number of potentially close questions with respect to a broad array of documents and materials. For example, was certain information considered directly or even indirectly by the decision-maker? Should draft documents go into the record? What about e-mails and hand-written notes of agency personnel? Even if the decision-maker clearly considered certain material, does an applicable privilege allow the agency to nonetheless exclude it from the administrative record filed with a reviewing court and supplied to the public and parties challenging the agency's decision in court? Answers to all of these and similar questions directly shape the record available to the public, to parties challenging an agency decision, and to courts reviewing the agency's decision.

Of course, *who* makes these determinations and the *process* by which they are made exert significant influence over the resulting answers—and thus

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102. *See, e.g.*, United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993) ("The deliberative process privilege may be overcome where there is a sufficient showing of a particularized need to outweigh the reasons for confidentiality."); *Fed'l Trade Comm'n*, 742 F.2d at 1161 ("The deliberative process privilege is a qualified one. A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure."). In *North Pacifica, LLC v. City of Pacifica*, the court set out a list of factors to courts should consider in deciding whether a plaintiff's need for deliberative information outweighs the agency's interest in non-disclosure: "(1) [T]he relevance of the evidence; (2) the availability of other evidence, (3) the government's role in the litigation, and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. Other factors that a court may consider include: (5) the interest of the litigant, and ultimately society, in accurate judicial fact finding, (6) the seriousness of the litigation and the issues involved, (7) the presence of issues concerning alleged governmental misconduct, and (8) the federal interest in the enforcement of federal law." 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003).

103. Professor Harris identifies and examines trends in cases dealing with disputes over application of the privilege. *See* Harris, *supra* note 9. He ultimately concludes that both the courts and Congress should take steps to reign in agencies' prodigious use of the privilege to exclude material from their administrative records, which he argues undermines the "required check on the executive and administrative power that assures accountability and openness." *Id.*; *see infra* notes 177-181 and accompanying text. For an opposite perspective on the deliberative process privilege, *see* Michael N. Kennedy, *Escaping the Fishbowl: A Proposal to Fortify the Deliberate Process Privilege*, 99 NW. U. L. REV. 1769 (2005).

over the scope and contents of the record itself. It is therefore vital to explore how agencies go about assembling their administrative records.

In a limited number of instances, Congress itself has set forth administrative record requirements.[104] For example, in the environmental area, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")—more commonly known as Superfund—requires that the EPA establish an administrative record available to the public when it begins to design a response action for a listed cleanup site.[105] The statute also mandates that the EPA allow interested persons, including parties potentially responsible for cleanup costs, to participate in building the record.[106] The law provides for specific procedures to carry out its participation requirement and sets forth material that the EPA must include in its record for a specific cleanup.[107] The EPA has issued regulations which discuss more specifically the required contents for administrative records.[108] Of particular note, the regulations provide a list of materials that the EPA will generally not add to the record, including "draft documents, internal memoranda, and day-to-day notes of staff unless such documents contain information that forms the basis of selection of the response action and the information is not included in any other document in the administrative record file."[109] Finally, an EPA policy requires each of the agency's regional offices to designate an Administrative Records Coordinator to carry out a wide array of record-related administrative tasks,[110] but provides that decisions about what materials actually go into the record are to be made by agency management personnel in consultation with agency counsel.[111]

Other statutory requirements influence administrative records indirectly by specifying information that agencies must consider in making decisions, and thus by extension must be represented in the record. While Congress sometimes requires agencies to use very specific information in making a

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104. In addition to the administrative record requirements associated with the Comprehensive Environmental Response, Compensation, and Liability Act, *see infra* notes 105-114 and accompanying text, statutory and regulatory requirements specifically discussing administrative records include the acid rain provisions of the Clean Air Act, 42 U.S.C. § 7607(d), and regulations implementing the Oil Pollution Act, 15 C.F.R. § 990.45 (2008).

105. *See* 42 U.S.C. § 9613(k)(1).

106. *See* § 9613(k)(2)(B).

107. *Id.*

108. *See* 40 C.F.R. § 300.810 (2008).

109. *Id.* § 300.810(b).

110. U.S. ENVIRONMENTAL PROTECTION AGENCY, FINAL GUIDANCE ON ADMINISTRATIVE RECORDS FOR SELECTING CERCLA RESPONSE ACTIONS 4 (1990), *available at* http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/adrec-cerra-rpt.pdf.

111. *Id.* at 5.

particular decision,[112] it more often establishes general guidelines. The Endangered Species Act, for instance, requires federal agencies to employ "the best scientific and commercial data available" in making decisions under section 7 of the Act.[113] Accordingly, a federal agency that leaves out of its administrative record information that is clearly relevant to the particular species or effect at issue in its decision runs a significant risk of having its decision overturned by a reviewing court for failing to consider such information.[114]

Policy directives from the Executive Branch also exert substantial influence over formulation of agencies' administrative records. Agencies' interpretation and implementation of the Freedom of Information Act ("FOIA") can provide a proxy for assessing trends in how agencies behave in assembling their records. This is true on a general level because agencies' willingness—or lack thereof—to make information public likely correlates with their willingness to expansively or narrowly view what material belongs in administrative records, and more specifically because FOIA Exemption 5 allows agencies to refuse to disclose documents they believe is subject to the deliberative process privilege and which can thus be withheld from administrative records.[115] In 1993, then-Attorney General Janet Reno issued a memorandum to all federal agencies calling for a "presumption of disclosure" for government information requested under FOIA and warning that the Department of Justice would not defend in court agencies' decisions not to disclose requested information merely because there is a 'substantial legal basis' for doing so.[116] The Department of Justice's Environment and Natural Resources Division ("ENRD") maintained this general slant toward disclosure of information in guidance it issued to federal agencies in 1999 on the proper contents of administrative records.[117] On the other hand, Attorney

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112. For example, much controversy has surrounded regulation of tuna fisheries because dolphins often swim near schools of tuna are injured or killed as boats by certain fishing techniques. In directing the National Marine Fisheries Service to consider whether to ban or more closely regulate tuna fishing in the eastern tropical Pacific, Congress amended the Marine Mammal Protection Act to require the agency to conduct three very specific studies on dolphins in the area. *See* 16 U.S.C. § 1414a(a)(3) (2006).

113. *Id.* at § 1536(a)(2).

114. *See* Katherine Renshaw, *Leaving the Fox to Guard the Henhouse: Bringing Accountability to Consultation Under the Endangered Species Act*, 32 COLUM. J. ENVTL. L. 161 (2007); Laurence M. Bogert, *That's My Story and I'm Stickin' To It: Is the "Best Available" Science Any Available Science Under the Endangered Species Act?* 31 IDAHO L. REV. 85 (1994).

115. See *supra* note 99 and accompanying notes.

116. Memorandum from U.S. Att'y Gen. Janet Reno to Heads of Departments and Agencies (Oct. 4, 1993), *available at* http://www.fas.org/sgp/clinton/reno.html.

117. *See Overly Restrictive Records*, *supra* note 47, at 1314-17 (discussing provisions favoring a broad view of what constitutes a "whole record"). The guidance includes e-mails within its definition of material that may contain information pertinent to the record, but calls for generally excluding "working

General John Ashcroft reversed course in 2001, issuing a memo instructing agencies to release information under FOIA "only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure[,]" and assuring agencies that "the Department of Justice will defend your decisions unless they lack a sound legal basis[.]"[118] This position, not surprisingly, resulted in agencies withholding substantially more material subject to FOIA requests.[119] Coming full circle, President Obama on his first full day in office issued a memorandum to all Executive Branch directing that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails."[120]

A few Executive Branch departments and agencies have their own written policies on compiling administrative records. The National Marine Fisheries Service ("NMFS") issued one of the most detailed policies in 2005.[121] In keeping with the era during which it was issued, the memo takes a narrow view of a record's required contents. In addition to restrictively interpreting when it is appropriate to include e-mails and draft documents in the record, the policy instructed the agency to include in its records only information that is both "relevant" and "significant."[122] It provided that information is significant if it "bear[s] directly on the substantive issues examined by the agency while undertaking its decision-making process relating to the final action[,]"[123] and directed that an agency attorney should review records compiled by the agency prior to filing with a court in order to determine whether "additional documents should be included or if irrelevant, insignificant documents should be removed."[124] The policy also defined privileged material as not properly part of the record rather than as record material that the agency could withhold from the public and reviewing courts

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drafts" of documents absent some indication they contain information reflecting a significant input into the decision-making process, as well as personal notes of agency personnel unless the notes were included in an agency file. *See id.* at 1316.

118. Memorandum from U.S. Att'y Gen. John Ashcroft to Heads of All Departments and Agencies (Oct. 12, 2001), *available at* http://www.usdoj.gov/oip/011012.htm.

119. *See, e.g.*, Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479 (2006).

120. Memorandum from The White House, Barack Obama, President, to Heads of Executive Departments and Agencies (Jan. 21, 2009), *available at* http://www.gwu.edu/~nsarchiv/news/20090121/2009_FOIA_memo.pdf.

121. James Saul describes this records guidance in detail in *Overly Restrictive Records*, *supra* note 47, at 1314, 1317-19.

122. *Id.* at 1318.

123. *Id.* (quoting Nat'l Marine Fisheries Serv., U.S. Dep't of Commerce, Guidelines for Agency Administrative Records (2005) (on file with author)).

124. *Trout Unlimited*, 2006 WL 120790, at *2 .

so long as it appeared in a Vaughn index.[125] However, in what is apparently the only decision to address an agency's record policy, a federal district court ruled that the policy's significance criterion is "counter to the caselaw" defining a whole record as including "documents that were *not* relied upon by a decisionmaker, or evidence relating to such documents and their non-consideration," as well as material "directly and indirectly considered by the decisionmaker."[126]

The Department of the Interior in 2006 also issued detailed guidance for compiling administrative records.[127] This guidance takes a less restrictive view of the record than that of FWS's aquatic counterpart, advising agencies that they must "take great care in compiling a complete [administrative record]."[128] It calls for a designated agency employee, in consultation with the Interior Solicitor's Office, to maintain a contemporaneous "Decision File" which contains "the complete 'story' of the agency decision-making process, including options considered and rejected by the agency[.]"[129] This file, which the guidance notes will contain "most, if not all" the material that becomes the administrative record, is used by a designated "AR Coordinator" to compile the record, although the guidance directs the AR Coordinator to conduct "an additional and thorough search in order to collect other relevant documents" which did not make their way into the decision file.[130] The AR Coordinator then works with the Interior Solicitor's Office and Department of Justice to determine the scope of the record.[131] In contrast to NMFS' policy, the Interior guidance calls for privileged documents to be initially included in the record, but then later excluded and included in an index of material withheld from the record available to litigation parties and the court.[132] The guidance specifies that records should generally not include three types of documents:[133]

(1) "[T]he great majority of e-mail 'chatter' about a decision" unless e-mails "contain relevant factual information, a substantive analysis or discussion that formed a material part of the

125. *Overly Restrictive Records*, *supra* note 47, at 1319.

126. *Trout Unlimited*, 2006 WL 1207901, at *3.

127. OFFICE OF THE SOLICITOR, U.S. DEP'T OF THE INTERIOR, STANDARDIZED GUIDANCE ON COMPILING A DECISION FILE AND AN ADMINISTRATIVE RECORD (2007), *available at* http://www.fws.gov/policy/e1282fw5.pdf.

128. *Id.* at 1.

129. *Id.* at 2.

130. *Id.* at 5.

131. *Id.* at 5-6.

132. U.S. DEP'T OF THE INTERIOR, STANDARDIZED GUIDANCE, *supra* note 127, at 12-13.

133. *See id.* at 8.

decision-making process, or that actually document the agency decision-making process[;]"[134]

(2) "Personal memorializations" of agency employees, including "diaries, journals, 'to-do' lists, personal notes and personal calendars that were created for the author's personal use[.]" However, such notes should be included in the record if they are the only written documentation of a meeting and were given to a colleague who could not attend the meeting, and "it may be necessary" to include such notes in the meeting if they are "the only evidence that a relevant meeting occurred or contain[] substantive evidence relevant to the decision-making process[.]"[135]

(3) Draft documents, unless they "help substantiate and evidence the decision-making process[.]" However, the guidance elaborates on this qualification, noting that drafts should be in the record if they contain "unique information such as an explanation of a substantive change in the text of an earlier draft, or substantive notes that represent suggestions or analysis tracing the decision making process."[136]

Finally, the Interior guidance notes that the AR Coordinator ultimately signs, under penalty of perjury, a certification to the reviewing court that the administrative record is "full and complete."[137]

While some departments and agencies make very clear how they construct their administrative records and who makes the judgment calls that are an inherent part of this process, many federal agencies lack written record policies altogether—at least policies that are publically available. These agencies thus make decisions about their records based on processes and criteria which are not subject to scrutiny by affected parties, including the judges who hold final authority over the records' contents, or simply put many agencies gather their administrative records on an ad hoc basis after an agency decision is challenged in court.

III. LESS THAN WHOLE: POTENTIAL PROBLEMS IN COMPILING COMPLETE ADMINISTRATIVE RECORDS

To most people, April 15th each year is "tax day," the deadline for submitting federal income tax returns from the previous year and the time to determine whether to celebrate a refund or to reluctantly write a check for

134. *Id.* at 8-9.
135. *Id.* at 9-10.
136. *Id.* at 10.
137. U.S. DEP'T OF THE INTERIOR, STANDARDIZED GUIDANCE, *supra* note 127, at 13.

money due to Uncle Sam. In another sense, however, the same date could be called "ethics day." Many portions of a tax return depend on the taxpayer to self-report various aspects of her finances, information that not only is difficult for the government to verify or dispute, but which can significantly affect an individual's tax liability. For many people, it is at least tempting to slant their returns in their favor, perhaps overestimating the value of their charitable deductions or "forgetting" to report all of their income from tips or cash transactions. While most people are probably honest most of the time, the Internal Revenue Service nevertheless estimates that cheating on income tax calculations deprives the federal treasury of hundreds of billions of dollars every year.[138]

A federal agency compiling an administrative record faces choices much like a taxpayer preparing her return. As the following sections explain, a variety of factors may tempt—or perhaps even force—an agency to provide a reviewing court with less than the "whole record."

A. High Stakes

In the modern administrative state, actions by federal agencies can affect millions of people, leverage hundreds of millions of dollars, raise sensitive issues of public policy, and be the focus of intense public debate and lobbying. Even less momentous decisions are often extremely important to affected companies, property owners, interest groups, and individuals.

In addition to the intense interests of those affected by federal agencies' actions, agencies themselves typically have substantial "investments" in their decisions. Once an agency finally selects a course of action given such pressures, it is usually understandably reluctant to return to the drawing board. An agency also may work for months or even years on the *process* of reaching a decision—engaging the public, preparing detailed and lengthy environmental and other analyses, and consulting with other agencies, tribes, and governmental bodies.[139]

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138. The Internal Revenue Service estimated that in 2001 the so-called "tax gap"—the difference between the tax amount individual U.S. taxpayers should pay to the federal government and the amount they actually paid—was $290 billion. *See The IRS and the Tax Gap: Hearing Before the H. Comm. On the* Budget, 110th Cong. 1 (2007) (written testimony of Nina E. Olson, National Taxpayer Advocate), *available at* http://www.irs.gov/pub/irs-utl/nta_housebudget_testimony_021607.pdf.

139. For example, in 2001, the U.S. Forest Service issued a decision prohibiting most forms of development within so-called "roadless" areas in national forests throughout the country. The Forest Service's public involvement process supporting this decision included holding hundreds of public meeting all over the country, considering well over one million written comments and postcards, consulting with other federal agencies and states, tribes, and local officials, and issuing a four volume Environmental Impact statement. *See* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294). As of 2009, the fate of this decision remained tied up in federal courts in two different circuits.

In this light, a great deal is often riding on the contents of an agency's administrative record. If a formal record is available at the time an agency makes a decision—for example EPA records documenting cleanup decisions under CERCLA[140]—materials in the record may determine or strongly influence parties' decisions whether or not to challenge the agency in court. Moreover, if suit is filed against a given agency action, the record's contents will decide the outcome of the case unless the court bases its ruling on legal grounds other than the merits of the agency's decision.

An agency compiles its all-important administrative record on its own, usually with little or no outside assistance or oversight, and it is often based on procedures that the agency has not disclosed to the public or has simply created on an ad hoc basis. In the process of compiling its record, the agency will make scores or even hundreds of judgment calls whether or not to include certain materials, as well as whether to exclude documents and other information based on claims of privilege. Some of these documents are likely to contain information from either internal or external sources that does not support the agency's decision, or that even directly contradicts it.

B. Limited Bases for Detecting and Challenging Exclusions and Withholdings from Agency Records

As a practical matter, it is often difficult or impossible for parties challenging an agency decision, and even for reviewing courts, to determine whether an agency has left important information out of an administrative record. If an agency official decides that a given document or other information does not fall within the scope of the record, it is possible—and in most cases likely—that parties and courts examining the record will have no idea of the material's existence, and thus of course no knowledge of its exclusion from the administrative record. In effect, therefore, many or perhaps even most of the numerous judgment calls agencies make regarding the scope of their records are unreviewable.[141]

Circumstances may be different for material an agency excludes from the record based on privilege. If an agency complies with its obligation to provide with its administrative record an index of material falling within the scope of the record but withheld due to a claim of privilege, parties and reviewing courts will at least be aware of the exclusions, and plaintiffs challenging an agency action have an opportunity to contest exclusions that they believe are

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140. See *supra* notes 105-114 and accompanying text.

141. If parties have knowledge of documents' existence through some means, or in some circumstances if an administrative record is so thin as to arouse suspicions that more relevant information *must* exist, it is possible for litigants or reviewing courts to challenge exclusions from an agency record. See *supra* notes 64-68 and accompanying text, as well as *infra* notes 171-177 and accompanying text.

unwarranted, or, in the case of material excluded on the basis of deliberative process privilege, can attempt to make that case that their need for the material outweighs the government's interest in withholding it.[142] However, even if parties and reviewing courts receive an index of documents and other information withheld on the basis of privilege, the specificity of the index's descriptions of the material may affect their ability to evaluate and potentially challenge specific exclusions.[143] In some cases, agencies may withhold documents or other information from their records based on claims of privilege but fail to supply a Vaughn index of the material withheld, as NMFS' now defunct 2005 record policy appeared to allow.[144] While inconsistent with judicial requirements,[145] this practice also is very difficult for parties and courts to detect and challenge, again, because parties may have no way of knowing of the material's existence, much less of its exclusion on grounds of privilege.

C. Pressures and Politics

In one of the most blatant, and later most documented, recent examples of political interference with agency decision-making, Julie MacDonald, a deputy assistant secretary in the Department of the Interior, carried out a multiple-year campaign of intervention in decisions made by the U.S. Fish and Wildlife Service.[146] Most of her actions aimed to prevent the agency from adding species to the Endangered Species Act's list of threatened and endangered species, as well as to prevent or minimize designations of "critical habitat" for species protected by the ESA; MacDonald told a FWS Regional Director that her job was to "represent industry," though of course nothing in the law provides for such a role by any federal official.[147] MacDonald routinely edited and altered agency findings, as well as often called agency biologists on the telephone to harass them with the intent of altering their

142. See *supra* note 101 and cases cited.

143. See *supra* note 78 and accompanying text.

144. See *supra* note 120 and accompanying text.

145. See cases cited *supra* notes 82-99 and accompanying text.

146. Two federal investigative reports exhaustively detail Ms. MacDonald's activities. *See* OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF THE INTERIOR, INVESTIGATIVE REPORT: THE ENDANGERED SPECIES ACT AND THE CONFLICT BETWEEN SCIENCE AND POLICY (2008), *available at* http://wyden.senate.gov/newsroom/interior_ig_report.pdf [hereinafter INVESTIGATIVE REPORT: ENDANGERED SPECIES ACT]; OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF THE INTERIOR, INVESTIGATIVE REPORT: ALLEGATIONS AGAINST JULIE MACDONALD, DEPUTY ASSISTANT SECRETARY, FISH, WILDLIFE, AND PARKS (2007), *available at* http://wyden.senate.gov/DOI_IG_Report.pdf [hereinafter INVESTIGATIVE REPORT: JULIE MACDONALD]

147. INVESTIGATIVE REPORT: ENDANGERED SPECIES ACT, *supra* note 146, at 133; INVESTIGATIVE REPORT: JULIE MACDONALD, *supra* note 146, at 4-5.

scientific determinations.[148] An Interior Inspector General report concluded that her actions had broad influence over agency findings, noting that "FWS biologists were so tired of being 'yelled at,' they simply acquiesced to the culture created by MacDonald and gave up the fight."[149] Moreover, the Inspector General revealed the existence of an ever-evolving "informal policy" document maintained by MacDonald regarding critical habitat designation that was "neither on letterhead nor on nor on any sort of formal approval/surname pathway" and which significantly influenced agency decision-making.[150] This document was one of a variety of vehicles for conveying the administration's policy direction to FWS; a former high-ranking agency official noted that mechanisms for such direction ranged from "verbal and e-mail policy direction to the local policy memoranda to national policy memoranda and finally to formal promulgation of policy through *Federal Register* notification and publication."[151] As a result of investigations into MacDonald's actions, FWS announced that it would reconsider some of the agency decisions she improperly influenced.[152]

While the MacDonald saga provides a somewhat extreme example, it effectively illustrates that both policy direction from high levels of the Executive Branch and old-fashioned politics and political pressure often affect agency decisions. Sometimes this influence is entirely appropriate—elected officials and political appointees are expected to formulate policy and implement it through administrative agencies. On the other hand, sometimes high-level officials, politicians, or powerful interest groups force agencies to make decisions that, while expedient, are not consistent with the underlying facts or scientific findings, are not consistent with statutory authority or legal requirements, or are not serving the public interest. While such improper outcomes may be more or less prevalent depending on the people and parties in power at a given time, a gap between the way agency decision-making is supposed to work and the way it actually works will likely always exist.

In addition to influencing the substantive outcomes of agency decisions, this gap also shapes the administrative records underlying those actions. Indeed, improper pressures directed against agency officials and employees often occurs primarily to prevent them from conducting certain studies, considering specific information, writing memos, or otherwise taking action

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148. *See* INVESTIGATIVE REPORT: ENDANGERED SPECIES, *supra* note 146, at 2; INVESTIGATIVE REPORT: JULIE MACDONALD, *supra* note 146, at 5, 6.

149. INVESTIGATIVE REPORT: ENDANGERED SPECIES ACT, *supra* note 146, at 18.

150. *See id.* at 129-31. One high-ranking FWS official opined that there was "way too much informal policy" directing actions of the agency. *Id.* at 131.

151. *Id.*

152. *See* letter from Kenneth Stansell, Acting FWS Director, to Rep. Nick Rahall (Nov. 23, 2007), *available at* http://www.fws.gov/endangered/pdfs/macdonald/rahallsigned.pdf.

that would produce information in the agency record undercutting the decision desired by whomever is applying that pressure. In other words, ethical and legal lapses in agency decision-making often result in corresponding lapses in administrative records.[153] To the extent that materials *do* exist which may prove embarrassing or undercut a pre-ordained agency action, it is likely that officials willing to skirt legal and ethical standards to force a specific decision outcome will not hesitate to improperly exclude these materials from the record. Finally, agencies often routinely exclude e-mails, "draft" documents and similar sorts of informal documentation from their administrative records. Therefore, as occurred in the case of ESA critical habitat designations, officials interested in shielding specific policy guidance or directives from the public, plaintiffs, and reviewing courts may couch this information in a form which makes it easier to exclude it from the record.

D. A Muddle

Last, policies and procedures for compiling administrative records, as well as for judging their completeness, are something of a muddle. This ambiguity, confusion, and even contradiction increases the overall likelihood that agencies will produce less than a "full" record supporting their decisions.

As explained in Section II.C., *supra*, departments and agencies are subject to an array of statutes, regulations, and external or internal policies in compiling records for their decisions, and many agencies simply put together records on an ad hoc basis if, and when, a party mounts a court challenge to one of their actions. Of the explicit agency record policies, some set forth standards and processes designed to produce a relatively full record.[154] Others clearly do not; NMFS, for example, clearly designed its record policy to exclude many materials, so much so that a court essentially struck it down.[155]

Many agencies are in the middle, lacking either a publically-available policy on compiling administrative records or simply putting together their records on a case-by-case basis. While policies like that of NMFS are obviously likely to result in less than a full record for specific decisions, agencies are also more likely to leave out materials from their records or employ improper exclusions if they lack a public records policy to serve as a

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153. For instance, high-level Interior Department officials apparently deliberately avoided committing certain policy directives to writing, thus guaranteeing that these policies would never appear in a record and thus allowing the officials "to retain the maximum amount of flexibility in making future decisions." INVESTIGATIVE REPORT: ENDANGERED SPECIES ACT, *supra* note 146, at 133.

154. For example, James Saul argues that the record guidelines issued by the Department of Justice's Environmental and Natural Resources Division in 1999 "will give the reviewing court the ability to assess the agency's decision-making process fully." *Overly Restrictive Records*, *supra* note 47, at 1315.

155. See *supra* notes 121-126 and accompanying text.

sort of "backstop" against temptations or pressures to shape their records in a manner favorable to their decisions. Even if an agency has no intention of deliberately manipulating its record, a lack of clear standards and procedures for assembling its records increases the chances that agency officials will inadvertently omit pertinent materials from a record.

In a related vein, the scattered and sometimes conflicting judicial treatment of record issues discussed in Section II.B., *supra*, also does not foster an atmosphere that encourages full agency records. With relatively few explicit legal standards, or even administrative policies upon which to rely, courts' treatment of record issues often turns on fact-specific issues in the case at hand, leading to decisions that generally do not coalesce to form clear common law directions for compiling complete records, and which not infrequently even set out conflicting directions. This mish-mash of district court decisions, coupled with a high degree of appellate deference to lower courts' records determinations,[156] produces relatively few appellate court decisions dealing with administrative record issues. Accordingly, while courts have the last word in determining whether an agency has compiled an adequate administrative record, they have generally not produced clear guidelines for doing so. This ambiguity in turn increases the likelihood that agencies will produce less than full records.

E. Summation

A taxpayer is less likely to file an accurate return if she faces ambiguous or even conflicting tax rules, if she lacks any system for tracking and organizing her finances, if those close to her encourage her to cheat, and if her chances of getting caught are low. Similar reasons increase the chances that agencies will produce administrative records documenting their decisions that fall short of the APA's "full record" standard. The lack of clear guidance for assembling records makes it more likely that agencies will mistakenly leave out relevant information. Additionally, political pressures, muddled administrative and judicial standards, and difficulties faced by plaintiffs and reviewing courts in detecting record omissions can in some cases make it difficult for agencies to resist sculpting their all-important records, which serve as virtually the sole basis upon which their decisions will stand or fall.

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156. *See* Sierra Club v. Slater, 120 F.3d 623, 639 (6th Cir. 1997) (reviewing the district court's refusal to allow supplementation of the administrative record for abuse of discretion); Northcoast Envtl. Ctr. v. Glickman, 136 F.3d 660, 665 (9th Cir. 1998) (reviewing the district court's decision to exclude extra-record evidence under the deferential "abuse of discretion" standard).

IV. TOWARD ENSURING A "FULL RECORD"

In order to ensure that public disclosure and judicial review can effectively play their vital roles in ensuring the legality and integrity of federal agencies' decision-making, it is crucial to both create mechanisms that foster full records. To do so requires an understanding of the forces which tempt agencies to exclude relevant materials, as well as a willingness on the part of all entities involved in the process of making and reviewing agency decisions to take concrete steps toward improving agency records. Fortunately, as set forth in the following subsections, most of these steps are relatively straightforward, and many can be taken within existing legal and policy frameworks.

A. Legislative Actions

Relatively few statutory schemes flesh out the APA's cryptic "full record" requirement. However, Congress need not necessarily rush to add more to existing statutory schemes; actions by the Executive Branch, courts, and interested private parties can go much of the way toward ensuring complete records for decisions agencies presently make. At the same time, lawmakers should become more aware of the dangers posed by incomplete administrative records and consider ways to avoid this problem when they devise new statutory schemes likely to prove particularly contentious or far-reaching. For example, tremendous interest and controversy has surrounded congressional discussions of imposing federal limitations on greenhouse gas ("GHG") emissions.[157] Any statutory scheme setting a federal cap on such emissions will almost certainly generate an enormous amount of interest, controversy, and of course litigation. Congress should thus consider including in GHG legislation provisions analogous to those in CERCLA and the Clean Air Act that require the EPA or other agencies implementing the legislation to keep a record open to the public consisting of specified information relevant to key decisions.[158] Therefore, when the EPA goes through the process of creating caps on the amount of GHG emissions from specified sources and allocating to various polluters the rights to a portion of those allowable emissions, the agency would have to create and maintain public access to a record documenting precisely how the agency makes these decisions. Such steps would help foster public confidence in these far-

157. *See, e.g., Technical Approaches and Policy Options For Reducing Greenhouse Gas Emissions, available at* http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/SHSU5BVKEX/$File/part-2.pdf (last visited Mar. 22, 2009).

158. See *supra* notes 104-113 and accompanying text.

reaching decisions and help ensure that reviewing courts have access to full records.

B. Administrative Actions

1. Commitment to Openness and Transparency

The overall "culture" within the Executive Branch sets an important tone that exerts at least some degree of influence over virtually all agency actions. An emphasis on openness and transparency at the highest levels undoubtedly fosters more inclusiveness in compiling administrative records and makes it more difficult to shape records to support the agency's chosen course.

Early actions by the Obama Administration provide clear indications that it will encourage such a culture of openness. In his opening remarks to his Cabinet on his first full day in office, President Obama emphasized that "the way to make government accountable is make it transparent so that the American people can know exactly what decisions are being made, how they're being made, and whether their interests are being well served."[159] The President issued on the same day an order to implement a presumption of disclosure under the Freedom of Information Act, an action that strongly suggests agencies will less frequently withhold information from administrative records under claims of privilege.[160] He also issued a directive to the heads of all Executive Branch departments and agencies calling for "an unprecedented level of openness in Government."[161] While tracking how well politicians keep their promises is often a difficult and subjective endeavor, the contents of administrative records filed by federal agencies provide a relatively concrete indication of how closely the Obama Administration is adhering to its promises of transparency in government.

2. Guidance for Compiling Administrative Records

The U.S. Department of Justice ("DoJ") represents federal agencies in virtually all litigation, and thus has broad authority to influence the contents of administrative records that agencies file with reviewing courts. Taking a page from guidelines for administrative records issued by its Environmental

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159. Barack Obama, President of the United States, Remarks of the President in Welcoming Senior Staff and Cabinet Secretaries to the White House (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/RemarksofthePresidentinWelcomingSeniorStaffandCabinetSecretariestotheWhiteHouse/).

160. See *supra* note 120 and accompanying text.

161. Memorandum for the Heads of Executive Departments and Agencies on Transparency and Open Government (Jan. 21, 2009) *available at* http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/.

and Natural Resources Division,[162] the DoJ itself should issue overall guidelines for compiling administrative records which apply to all Executive Branch agencies. This guidance should be available to the public, and should set forth an outline of minimum requirements for agencies to follow in compiling their records and making judgments about what material, if any, to withhold from the record based on claims of privilege.

Substantively, the general DoJ record guidelines should establish a presumption of openness and inclusiveness in compiling a record for judicial review of agency decisions. The ENRD's guidance provides a good framework for what should be key elements of the broader guidelines' key components: recognition of an administrative record's broad scope, including material considered directly or indirectly by the agency; information that supports and does not support the ultimate decision, including documents and materials before the agency even if they were not specifically considered by the final decision-maker; a declaration that the record includes materials that may be privileged; an inclusive interpretation of record materials, including agency policies, guidelines, and similar directives relevant to the decision at issue; communications between the agency and outside parties; minutes and notes from relevant meetings and memorializations of phone calls; draft documents circulated to other agencies or outside the author's immediate office and personal notes included in the agency file or shared with others; and an allowance for only limited presumptive exclusions from the record, such as e-mail communications for routine or ministerial matters such as scheduling or personal communications. [163]

The broad record guidance issued by DoJ should also include key required procedures for compiling and certifying administrative records. It should require agencies to designate Administrative Record Coordinators tasked with maintaining and compiling agency record files, including any publically available files, as well as the responsibility for working with agency and DoJ counsel to file administrative records with reviewing courts. DoJ guidelines should also emphasize that agencies may withhold materials within the scope of the record from the public and reviewing courts based on claim of privilege only if the agency files a detailed index describing the documents and the basis for an applicable privilege. Finally, DoJ's overall guidance should require individual agencies to establish and make public their own regulations or guidelines adapting the DoJ record guidance to their own circumstances. These agency-specific guidelines would in turn provide additional specificity for each agency's own record practices, including setting

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162. In 1999, the Department of Justice's Environmental and Natural Resources Division issued a detailed guidance document on assembling an administrative record. *See* Saul, *supra* note 47, at 1315-17.

163. *Id.* at 1315-16.

forth circumstances under which agencies will maintain publically-accessible decision records during the pendency of an agency decision. Such public decision records, such as those required under CERCLA,[164] allow interested parties to follow more effectively an agency's decision-making process, and in some cases may encourage better communications between the agency and interested parties that could help resolve disagreements short of litigation. Agencies should thus formulate specific records policies that maximize instances in which agencies will maintain project or decision files available to the public prior to when the agency chooses its final course of action.

3. Tighten Agencies' Ethics Standards

Perhaps one of the most disturbing aspects of Julie MacDonald's campaign to alter FWS decisions is the fact that she broke virtually no laws, regulations, or even policies in the process. In its initial report on MacDonald's activities, the Interior Inspector General's office described a litany of ways in which she pressured and influenced FWS listing and critical habitat designations under the ESA, but the only violation of agency policies or regulations it cited as applicable to her actions was a few instances in which MacDonald disclosed without authorization non-public agency information to industry lobbyists.[165] In other words, neither the Interior Department nor FWS had rules or regulations setting forth clear ethical standards for official conduct.

Recognizing this problem, Secretaries of Interior in both the Bush and Obama Administrations have called for more stringent ethics standards for Department employees.[166] In 2003, then-Secretary Gale Norton announced that the Interior was developing a code of scientific conduct for Department employees to be "independently reviewed and approved by a panel of leading scientists and ethicists."[167] However, this code was never finalized, and both the MacDonald saga and a 2008 sex-and-drugs scandal within the Department's Minerals Management Service ("MMS")[168] illustrated that

164. *See supra* notes 105-111 and accompanying text.

165. INVESTIGATIVE REPORT: JULIE MACDONALD, *supra* note 146, at 18-22.

166. *See, e.g.*, Press Release, U.S. Department of Interior (May 30, 2003) *available at* http://www.doi.gov/news/03_News_Releases/030530b.htm.

167. *Id.* Interestingly, the original draft of the code of conduct applied to all Interior officials, and included a pledge that employees would not succumb to coercion. These provisions were removed from a later draft.

168. In September, 2008, the Interior Inspector General issued a report outlining illicit activities by MMS employees, including accepting gifts from companies they regulated, as well as instances of sexual relations and drug use involving agency employees and oil and gas companies. *See* DEPARTMENT OF INTERIOR OFFICE OF INSPECTOR GENERAL, MMS OIL MARKETING GROUP—LAKEWOOD (Sept. 9, 2008) *available at* http://www.doioig.gov/upload/RIK 20REDACTED 20FINAL4_082008 with transmittal 9_10 date.pdf.

ethics issues remained a concern at the Interior. Shortly after taking office in 2009, Department of Interior Secretary Ken Salazar announced a new Department-wide ethics reform initiative, as well as new ethics guidelines for MMS.[169]

All federal agencies should undertake—and actually follow through with—ethics reform efforts comparable to the 2009 Interior initiative. Other federal agencies have had their share of ethics-related scandals, and many share the Department of Interior's lack of clear policies and regulations governing ethical conduct. Without such standards, actions such as altering or destroying agency findings, pressuring subordinates to avoid gathering certain information, and adhering to pre-ordained outcomes can have a significant impact on the contents of agencies' administrative records. Clear ethics guidelines—backed up by personnel policies and whistleblower procedures that protect agency employees who abide by these standards even under pressure—are an important way to ensure that unscrupulous agency officials find it difficult to shape administrative records in an effort to place questionable decisions in a favorable light for public or judicial review.

C. Judicial Actions

1. Recognize importance of record issues

Given the record's often determinative role in judicial review of agency actions, it is crucial for courts to treat record issues as a vital aspect of cases involving federal agencies and not as minor procedural speed-bumps on the road to the ultimate result. Courts should be aware of the factors discussed in Section III that can lead agencies to file incomplete records and, particularly when plaintiffs indicate potential problems with the record, look carefully for signs that an agency may have cut corners. For example, in *Tenneco Oil Co. v. Department of Energy*, [170] the court observed that "[i]t strains the Court's imagination to assume that the administrative decision-makers reached their conclusions without reference to a variety of internal memoranda, guidelines, directives, and manuals, and without considering how arguments similar to [plaintiff's] were evaluated in prior decisions by the agency."[171] This is precisely the sort of awareness of the record's importance and—in appropriate circumstances—healthy skepticism as to the record's contents that courts should apply as a matter of routine.

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169. *See* News Release, U.S. Department of Interior (Jan. 29, 2009) *available at* http://www.doi.gov/news/09_News_Releases/012909.html. The new MMS ethics code is available at http://www.doi.gov/secretary/speeches/mmscode.html.

170. 475 F. Supp. 299 (D. Del. 1979).

171. *Id.* at 317.

It is also important for courts to identify and carefully apply the respective burdens that parties must carry in disputes about the record. For example, James Saul notes that courts often confuse motions to *complete* the administrative record with motions to *supplement* the record; while both seek to add to the information before the court, they involve very different types of information and require parties to carry distinctive burdens.[172]

2. Rein in Exclusions and Withholdings of "Deliberative" Documents

Simply put, "deliberative" material is often what reviewing courts most need to consider when reviewing the legality of agency decisions. However, the current judicial tolerance for excluding such information from the record simply encourages agencies to exclude or withhold from their records information that could prove damaging or embarrassing by simply labeling it deliberative.

In addition to providing a cautionary tale of the dangers of lax ethical standards, the Interior Inspector General's reports discussing the activities of Julie MacDonald illustrates some of the shortcomings of a broad policy favoring exclusion or withholding of so-called "deliberative" documents from administrative records that serve as the sole basis for judicial review of agency decisions under the APA. High-level Interior officials deliberately structured policies as "draft" documents in an apparent attempt to provide a plausible basis for keeping them out of the record, even though those policies likely played a determinative role in agency decision-making.[173] In a similar vein, agencies can often keep from public and judicial scrutiny much of the information showing how and why their decisions evolved simply by splashing a "DRAFT" label across all decision-related documents short of the agency's final or near-final determination.[174]

Professor Harris warns that "the deliberative process privilege has almost stealthily come to be one of the Executive branch's most effective weapons to fight back against judicial oversight."[175] The same holds true for agency exclusions of "draft" documents from the scope of the record, which agencies typically justify on grounds similar to the deliberative process privilege. Courts should therefore look skeptically on any agency record policy which excludes "draft" documents from the scope of the record itself; if agencies wish to withhold such information from the record, they should do so only if

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172. Saul, *supra* note 47, at 1319-23.

173. See *supra* notes 129-130 and accompanying text.

174. For instance, NMFS' now defunct record policy called for excluding virtually all draft documents from its administrative records. See *supra* note 127.

175. Harris, *supra* note 9, at 83.

the agency can meet its burden of showing that material satisfies the requirements for exclusion under the deliberative process privilege. As for the privilege itself, courts should accept Harris' call to "take steps to address the rampant assertion of the deliberative process privilege in APA cases, and mandate that the 'whole' of the decisionmaking record be before the reviewing court."[176] Harris suggests that, short of action by the Supreme Court or Congress to limit withholdings from the record due to deliberative process, courts could much more closely limit use of the privilege in an APA context through greater us of in camera review of allegedly privileged material, including the use of protective orders to allow the courts' review of allegedly privileged information to be adversarial rather than unilateral.[177]

3. Look for Opportunities to Make Cohesive Record Law

As noted in Section III.D., *supra*, case law on records issues is often somewhat muddled, at least apart from broad principles. Appellate courts should thus look for opportunities to clarify what constitutes a "whole record" under the APA, as well as make clearer the procedures and burdens that directly influence compiling a complete record.

D. Plaintiff Self-Help

1. Take Prospective Action to Shape the Record

Prior to when an agency actually releases its decision in a given matter, interested parties typically have ample opportunity to submit information to the agency that will go into the agency's administrative record if litigation eventually ensues. As a matter of course, agencies include material received from interested parties through public comment opportunities or through public involvement procedures in a related NEPA process. Additionally, agencies typically include in their records pre-decisional correspondence from interested parties to an agency. Therefore, a prospective challenger to an agency decision can directly influence the contents of the administrative record simply by submitting to the agency documents and other materials the prospective plaintiff wishes to see in the record. The catch, of course, is that this opportunity vanishes when an agency makes its decision; parties wishing to take advantage of their broad opportunities to fill administrative records must anticipate agency decisions that they may eventually wish to challenge and take advantage of pre-decisional opportunities to provide information and comments regarding proposed agency actions.

176. *Id.* at 77.
177. *Id.* at 79-82.

2. Be Aware of Available Information

Prospective plaintiffs as well as those actually challenging agency actions can help ensure that an agency's administrative record is complete simply by carefully following what an agency is doing throughout its decision-making process and beyond. In particular, if an agency maintains a decision file for a proposed action that is publically available prior to when the agency makes a final decision, a party interested in potentially challenging the decision should periodically inspect the record. It is possible that an agency may eventually decide not to include in the scope of the record, or potentially even claim a privilege over, material that was originally in a public decision file. If a party examined or obtained a copy of material when it was publically available, it will be much easier to contest its exclusion from the record since the plaintiff would know of its existence, as well as be familiar with its contents. Additionally, a showing that material was once in the public record would almost certainly lead to a finding that the agency waived attorney-client privilege,[178] and would likely defeat an assertion of deliberative process privilege as well.[179]

Last, plaintiffs should endeavor to structure the litigation process to facilitate development of a complete administrative record. Agencies and parties challenging their decisions often agree on a schedule whereby an agency will provide plaintiffs with a draft of its record prior to the agency filing the record with the court, with a time period following for the parties to attempt to resolve any disputes over the record and, if necessary, to file appropriate motions asking the court to settle remaining disagreements. Plaintiffs should also insist upon a Vaughn index of any documents or other information withheld from the record based on a claim of privilege if an agency has not provided one with its final administrative record.

V. CONCLUSION

The bald eagle, the United States' symbol and the figure on the U.S. Department of Justice seal, serves as a tangible reminder of American freedom and democracy. But a specific population of these magnificent birds—desert eagles to be exact—should encourage courts, government officials, attorneys, and the public to remember that the strength of a key pillar of American

178. An agency must demonstrate continued confidentiality to support a claim of attorney-client privilege. See *supra* note 89 and accompanying text.

179. Since the key rationale for the deliberative privilege is to protect from disclosure candid discussions among decision-makers, prior public release of material would eliminate the fundamental basis for claiming it is privileged and thus may be withheld from an administrative record. See *supra* notes 93-94 and accompanying text).

democracy, independent judicial review of government actions, depends on the existence of administrative records which fairly and completely reflect the information and judgments that underlie decisions made by agencies within the Executive Branch. Although in recent years agencies looked for ways to narrow the scope of their records and increase information withheld from the public and reviewing courts, a new trend toward openness and more complete records may have begun. Nevertheless, by better understanding the legal principles that govern assembly of administrative records, by promoting reforms in Congress, the courts, and within agencies, and by using existing tools for shaping agencies' records, those interested in ensuring that federal agencies act in accordance with the law can promote "full records" and thus help safeguard effective judicial review under the APA.