

# The President's Secrets

Gia B. Lee\*

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\* Acting Professor of Law, UCLA School of Law. For helpful conversations and comments, I am grateful to Rick Abel, Devon Carbado, Ann Carlson, Myriam Gilles, Robert Goldstein, Jerry Kang, Russell Korobkin, Jeremy Maltby, Dawn Johnsen, Carrie Menkel-Meadow, Jennifer Mnookin, Bill Rubenstein, Fred Schauer, Seana Shiffrin, David Sklansky, Jon Varat, Eugene Volokh, Adam Winkler, John Yoo, Steve Yeazell, Noah Zatz, Jonathan Zasloff, and participants in faculty workshops at UCLA, Southwestern Law School, and Cardozo School of Law. For excellent research support and funding, I am indebted to June Kim, Jill Fukunaga, Kevin Gerson, Alice Ko, Linda O'Connor, Paul Blanco, James Field, Andy Shawber, Joy Stransky, Jake Veltman, the Hugh and Hazel Darling Law Library, and the UCLA Dean's Summer Research Fund.

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### Introduction

When congressional committees sought information relating to the U.S. attorney firings<sup>1</sup> and Hurricane Katrina,<sup>2</sup> when the 9/11 Commission called for the National Security Advisor to testify,<sup>3</sup> when Senators requested memoranda authored by judicial nominees while working as Department of Justice and White House lawyers,<sup>4</sup> when the General Accounting Office<sup>5</sup> and two nonprofit groups asked for information on the meetings of the Vice President's energy policy task force, and on numerous other occasions,<sup>6</sup> the current Bush administration provided the same response: the requested information involves internal deliberations, and its disclosure would have a chilling effect on full and frank communications.<sup>7</sup> The White House accordingly denied the requests, arguing that maintaining the deliberations' confidentiality would ensure the "unfettered" or "unvarnished" advice necessary to presidential decision making.<sup>8</sup>

The current Administration is not alone in advancing that argument. Past presidential administrations also regularly claimed that they needed confidentiality for the same reason.<sup>9</sup> The Clinton administration, for instance, used that theory when it rejected inquiries

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<sup>1</sup> See Dan Eggen & Paul Kane, *2 Former Aides to Bush Get Subpoenas: Miers, Taylor Had Roles in Firings of U.S. Attorneys*, WASH. POST, June 14, 2007, at A1.

<sup>2</sup> See Eric Lipton, *White House Declines to Provide Storm Papers*, N.Y. TIMES, Jan. 24, 2006, at A1.

<sup>3</sup> See Philip Shenon & Richard W. Stevenson, *9/11 Panel Wants Rice Under Oath in Any Testimony*, N.Y. TIMES, Mar. 29, 2004, at A1.

<sup>4</sup> See Elisabeth Bumiller & David D. Kirkpatrick, *Bush Refuses to Release Nominee's Papers*, N.Y. TIMES, Oct. 24, 2006, at A3.

<sup>5</sup> In 2004, the General Accounting Office's ("GAO") legal name became the "Government Accountability Office." See GAO's Name Change and Other Provisions of the GAO Human Capital Reform Act of 2004, <http://www.gao.gov/about/namechange.html> (last visited Oct. 23, 2007) (citing GAO Human Capital Reform Act of 2004, Pub. L. 108-271, 118 Stat. 811).

<sup>6</sup> See Charles Lane, *High Court Hears Case on Cheney Energy Panel: White House Argues for Confidentiality*, WASH. POST, Apr. 28, 2004, at A1.

<sup>7</sup> See Jo Becker, *Work on Rights Might Illuminate Roberts's Views: Democrats Seek Papers, but Administration Balks*, WASH. POST, Sept. 8, 2005, at A1; *Washington in Brief: For the Record*, WASH. POST, Mar. 19, 2005, at A8.

<sup>8</sup> See Sheryl Gay Stolberg, *2 Decline to Testify on Drug Cost*, N.Y. TIMES, Apr. 2, 2004, at A17; Jim VandeHei, *Bush Reasserts Presidential Prerogatives: Eavesdropping, Katrina Probe Cited as Concerns*, WASH. POST, Jan. 27, 2006, at A6.

<sup>9</sup> See, e.g., ADAM CARLYLE BRECKENRIDGE, *THE EXECUTIVE PRIVILEGE: PRESIDENTIAL CONTROL OVER INFORMATION* 108-09 (1974) (Kennedy and Nixon); Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1071-93 (1999) (Nixon, Ford, and Carter); Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L. REV. 845, 865-66 (1990) (Eisenhower); *infra* notes 10-14 and accompanying text (Clinton).

about the reasoning behind the President's pardons,<sup>10</sup> when the President's aides declined to answer questions before the grand jury in the Monica Lewinsky inquiry,<sup>11</sup> when the Attorney General challenged a House subpoena seeking reports on whether to appoint an independent counsel for alleged campaign finance abuses,<sup>12</sup> when the White House turned down a congressional request for a report on the United States' approach to Iran's weapons shipments to Bosnian Muslims,<sup>13</sup> and when the White House denied access to the Deputy White House Counsel's files after he committed suicide.<sup>14</sup> In each of these cases, the Clinton administration stressed that it had to shield internal deliberations to promote full and frank discussion.

It is understandable that presidential administrations routinely rely on that argument. The Supreme Court has validated the reasoning in *United States v. Nixon (Nixon I)*,<sup>15</sup> citing the need to promote candor as the primary basis for protecting presidential communications under the executive privilege.<sup>16</sup> As the Court stated, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with concern for appearances and for their own interests to the detriment of the decisionmaking process."<sup>17</sup> As a political matter, the claim is intuitively appealing. Indeed, that emphasis on candor and decision making provides some justification for confidentiality in a broad variety of contexts,<sup>18</sup> both

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<sup>10</sup> See Katharine Q. Seelye, *Clinton Refuses Subpoena for Material on Clemency: Says Congress Lacks Authority over the Matter*, N.Y. TIMES, Sept. 17, 1999, at A1.

<sup>11</sup> See Brian D. Smith, *A Proposal to Codify Executive Privilege*, 70 GEO. WASH. L. REV. 570, 596 (2002); Stephen Labaton, *Testing of a President: The Supreme Court; Administration Loses Two Legal Battles Against Starr*, N.Y. TIMES, Nov. 10, 1998, at A27. In litigation, the aides asserted the rationale as a basis for attorney-client privilege. See *In re Lindsey*, 148 F.3d 1100, 1103 (D.C. Cir. 1998).

<sup>12</sup> See Neil A. Lewis, *Freeh Says Reno Clearly Misread Prosecutor Law*, N.Y. TIMES, Jul. 16, 1998, at A1; David E. Rosenbaum, *Panel Votes to Charge Reno with Contempt of Congress*, N.Y. TIMES, Aug. 7, 1998, at A1.

<sup>13</sup> See Tim Weiner, *Congress Is Denied Report on Bosnia: Citing Privilege, Clinton Bars Data on Iran Arms Exports*, N.Y. TIMES, Apr. 16, 1996, at A1.

<sup>14</sup> See Lester Brickman, *Foster's Papers: What Executive Privilege?*, N.Y. TIMES, Aug. 2, 1995, at A19. The Administration also stressed the need for confidentiality to encourage candor as a justification for asserting the attorney-client privilege. See *id.*

<sup>15</sup> *United States v. Nixon (Nixon I)*, 418 U.S. 683 (1974).

<sup>16</sup> See *id.* at 708.

<sup>17</sup> *Id.* at 705. The Court also explained that it recognized a presumptive privilege for presidential communications because of the "necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Id.* at 708.

<sup>18</sup> For a comparative analysis of the impact of confidentiality on deliberations in a variety of institutional contexts, see Gia Lee, *Secrecy, Deliberation & Institutional Design* (unpublished manuscript on file with author).

inside and outside government, including jury and judicial deliberations,<sup>19</sup> academic and medical peer review,<sup>20</sup> police review boards,<sup>21</sup> and the attorney-client and doctor-patient privileges.<sup>22</sup>

But how robust, really, is that argument? Is confidentiality necessary for full and frank communications among the President and his advisors? And if so, do those candid communications lead to better decisions or decision-making processes? Put another way, does the interest in encouraging full and frank communications provide a substantial reason for shielding presidential deliberations from outside scrutiny? Despite the voluminous literature on executive privilege,<sup>23</sup>

<sup>19</sup> See Diane Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 211 (2005); J. Woodford Howard, Jr., *Comment on Secrecy and the Supreme Court*, 22 BUFF. L. REV. 837, 839–40 (1973); Alison Markovitz, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1505–15 (2001); Laurence H. Tribe, *Trying California's Judges on Television: Open Government or Judicial Intimidation?*, 65 A.B.A. J. 1175, 1178 (1979); Note, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230, 1237–38 (1981).

<sup>20</sup> See Lisa M. Nijm, *Pitfalls of Peer Review: The Limited Protections of State and Federal Peer Review Law for Physicians*, 24 J. LEGAL MED. 541, 542 (2003); Kent M. Weeks, *The Peer Review Process: Confidentiality and Disclosure*, 61 J. HIGHER EDUC. 198, 201 (1990).

<sup>21</sup> See John Powers, Jr., *Eroding the Blue Wall of Silence: The Need for an Internal Affairs Privilege of Confidentiality*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 19, 29–30, 35 (2000).

<sup>22</sup> See *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Jaffee v. Redmond*, 518 U.S. 1, 11–12 (1996); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Fisher v. United States*, 425 U.S. 391, 403 (1976). See generally *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1612 (1985) (noting that privileges protecting institutional communicative processes exist so as not to chill internal exchanges of information and opinions).

<sup>23</sup> See generally RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974); BRECKENRIDGE, *supra* note 9; MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* (2d ed. 2002); Akhil Reed Amar, *Nixon's Shadow*, 83 MINN. L. REV. 1405 (1999); George W. Calhoun, *Confidentiality and Executive Privilege*, in *THE TETHERED PRESIDENCY: CONGRESSIONAL RESTRAINTS ON EXECUTIVE POWER* 172–95 (Thomas M. Franck ed., 1981); Archibald Cox, *Executive Privilege*, 122 U. PENN. L. REV. 1383 (1974); Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109 (1996); Christopher Griffin, *An Egalitarian Case Against Executive Privilege*, 12 J. INFO. ETHICS 34 (2003); Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559 (2002); Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127 (1999); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489 (2007); Robert Kramer & Herman Marcuse, *Executive Privilege—A Study of the Period 1953–1960 (pts. 1 & 2)*, 29 GEO. WASH. L. REV. 623 (1961); Randall K. Miller, *Congressional Inquests: Suffering the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631 (1997); Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337 (1999); Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563 (1991); Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143 (1999); Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403 (2002); Rozell, *supra* note 9, at 1070; William W. Van Alstyne, *The Role of Congress in Determining*

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and the fact that these issues underlie the Supreme Court's principal justification for the privilege,<sup>24</sup> these questions have received remarkably little attention.<sup>25</sup>

Constitutional law scholars espousing a broad variety of perspectives on executive privilege seem to accept, as a matter of course, the *Nixon I* Court's assertion that "the importance of this confidentiality is too plain to require further discussion."<sup>26</sup> Some scholars have expressly agreed with the Court's reasoning.<sup>27</sup> For example, Michael Stokes Paulsen, who acknowledges executive privilege but denies the role of the judiciary in defining the privilege's scope,<sup>28</sup> has emphasized the importance of "the confidentiality of presidential conversations with advisors . . . in order to enable the President to receive uninhibited, fully-informed advice."<sup>29</sup> By contrast, Mark J. Rozell recognizes the legitimacy of a judicial balancing test to adjudicate executive privilege disputes, but has taken a similar view. He has stated, "The [P]resident's constitutional duties necessitate his being able to consult with advisers, without fear of public disclosure of their advice. If of-

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*Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102 (1976).

<sup>24</sup> See *infra* Part I.

<sup>25</sup> Though two scholars have questioned the validity of the claim, neither has analyzed the issue in-depth. See Berger, *supra* note 23, at 243–45 (noting that the candor claim was a "debatable assumption"); Griffin, *supra* note 23, at 37–39 (expressing skepticism about the candor rationale). Some journalistic commentators have also raised doubts about the claim's validity. See John W. Dean, *WORSE THAN WATERGATE* 184–85 (2004); William Safire, *Behind Closed Doors*, N.Y. TIMES, Dec. 17, 2003, at A1; Bruce Fein, *Executive Nonsense*, SLATE, July 11, 2007, <http://slate.com/id/2170247>.

Scholars have given some attention to related questions in discussing the deliberative process privilege, which applies more broadly to communications among all executive branch officials. See Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 316–17 (1989); Wetlaufer, *supra* note 9, at 886–90. For a brief description of some of the differences between the presidential communications privilege and the deliberative process privilege, see *infra* Part I.A.

<sup>26</sup> *United States v. Nixon (Nixon I)*, 418 U.S. 683, 705 (1974).

<sup>27</sup> Kathleen Sullivan, for example, has stated that the privilege "reflects the very common sense principle that you couldn't conduct policy-making in the White House if every top aide to the President knew that his or her communications with the President or with each other could be revealed to the whole world at the drop of a hat." *The NewsHour with Jim Lehrer* (PBS television broadcast Mar. 24, 1998), available at [http://www.pbs.org/newshour/bb/white\\_house/jan-june98/executive\\_3-24.html](http://www.pbs.org/newshour/bb/white_house/jan-june98/executive_3-24.html). Similarly, Akhil Amar has contended that "[s]enators must be free to talk candidly and confidentially amongst themselves and with staff in cloakrooms; judges must enjoy comparable freedom in superconfidential judicial conferences, and in conversations with law clerks; jurors in the jury room ordinarily deliberate together with absolute secrecy to promote candor; and the same basic principle holds true for the Presidency and the Oval Office." Amar, *supra* note 23, at 1410.

<sup>28</sup> See Paulsen, *supra* note 23, at 1340–41.

<sup>29</sup> *Id.* at 1381.

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ficers of the executive branch believed that their confidential advice could eventually be disclosed, the quality of that advice would be seriously damaged.”<sup>30</sup> Other scholars have recounted the Court’s recitation of the interest in encouraging candor, but have expressed no position on it.<sup>31</sup> Saikrishna Prakash, for instance, describes the Court’s reliance on the President’s need for confidentiality to encourage candor, but does not question it as part of his argument asserting the lack of any basis for executive privilege in constitutional text, structure, or history.<sup>32</sup>

This Article examines this candor-based justification for maintaining the confidentiality of deliberations, involving the President or his immediate White House advisors, that underlies publicly acknowledged policies.<sup>33</sup> The Article argues that, from a constitutional perspective, this commonsense assumption is significantly incomplete and, as a result, overstates the strength of the President’s confidentiality interest. It fails to take into account the qualified and contingent nature of the President’s need for confidentiality. The extent to which the lack of confidentiality will chill presidential deliberations is neither fixed nor always substantial, but turns on a range of factors, including the information under discussion and the specifics of the proposed disclosure. It also overstates the likelihood that confidentiality-induced candor will lead to better decisions. It stresses one potentially salutary effect of confidentiality—reducing speaker inhibitions—while ignoring other, more troubling consequences.

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<sup>30</sup> ROZELL, *supra* note 23, at 46–47.

<sup>31</sup> See BRECKENRIDGE, *supra* note 9, at 103–04; Iraola, *supra* note 23, at 1573–74; Kirtrosser, *supra* note 23, at 500.

<sup>32</sup> See Prakash, *supra* note 23, at 1143, 1149–89.

<sup>33</sup> The Supreme Court first acknowledged the privilege for presidential communications in the context of President Nixon’s efforts to protect the confidentiality of his personal conversations with his chief White House advisors in the Oval Office. *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004) (citing *United States v. Nixon (Nixon I)*, 418 U.S. 683, 705 (1974)). The Court has not specified whether the privilege extends “beyond communications directly involving and documents actually viewed by the President.” See *id.* The D.C. Circuit has held that the privilege extends only to those communications “‘solicited and received’ by the President or his immediate White House advisors who have ‘broad and significant responsibility for investigating and formulating the advice to be given the President.’” *Id.* (quoting *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997)).

To be clear, this Article focuses on the candor-based justification for maintaining the confidentiality of presidential deliberations underlying publicly acknowledged policies. It thus does not examine other justifications—such as the need to protect national security secrets or to preserve the President’s ability to act with surprise—for maintaining confidential deliberations. Nor does it analyze rationales for keeping presidential policies or conduct secret.

Based on that assessment, the Article rejects the constitutional analysis, exemplified most recently in the Supreme Court's *Cheney v. U.S. District Court*,<sup>34</sup> that assumes the substantiality of the President's generalized or undifferentiated confidentiality interest in information disputes concerning his high-level deliberations.<sup>35</sup> It argues instead for an approach—akin to the analysis suggested in the two *Nixon* cases of the Watergate era<sup>36</sup> but largely overlooked by subsequent lower court and Department of Justice opinions<sup>37</sup>—that acknowledges the varying force of the President's confidentiality interest and requires a searching review of the extent of that interest in each case. To differentiate among presidential confidentiality claims, this approach, like the *Nixon* cases', assesses the likelihood that the proposed disclosure would chill candid deliberations.<sup>38</sup> Moving beyond the *Nixon* cases, the differentiation approach also considers the other ways, distinct from chilling, that the sought-after disclosure would affect the quality of presidential decisions.<sup>39</sup>

This Article appreciates the powerful intuition that the government needs some measure of confidentiality for its deliberations, to perform its functions effectively and efficiently. It thus presumes that government claims to a need for confidentiality merit serious consideration. Yet the Article also recognizes that maintaining the deliberations' confidentiality inevitably compromises other important, widely recognized, and deeply held values and ideals. Most obviously, confidentiality interferes with basic commitments to political accountability and the people's checking function. It diminishes the public's ability to identify and evaluate government decisions and decision-making processes, and hence compromises the polity's efforts to limit or direct official conduct. In addition, confidentiality impedes public understanding of political processes. In veiling the discussions underlying government decisions, confidentiality impairs the public's ability to gain knowledge of government practices, to construct narratives or histories of them, and to learn from past experiences.

Maintaining the confidentiality of deliberations also erodes public trust and confidence in government. It fuels speculation that government officials have something to hide. And even when officials reach

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<sup>34</sup> *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004).

<sup>35</sup> *See id.* at 385.

<sup>36</sup> *United States v. Nixon (Nixon I)*, 417 U.S. 683, 684 (1974); *Nixon v. Adm'r of Gen. Servs. (Nixon II)*, 433 U.S. 425 (1977).

<sup>37</sup> *See infra* notes 269 & 276 and accompanying text.

<sup>38</sup> *See infra* Part III.A.

<sup>39</sup> *See infra* Part III.A.

decisions in a manner consistent with public ideals and aspirations, it impairs the public's ability to confirm that that is true. Further, shielding deliberations from outside scrutiny discourages civic engagement. With less of a sense of how officials reach decisions and whether their input receives serious consideration, some individuals become less interested in participating in the political process from the outset. Even if they remain interested, individuals are less able to follow, contribute to, or evaluate government decisions and decision-making processes. Mindful of the inevitable costs that accompany the benefits of government confidentiality, this Article thus also presumes the need to take seriously claims for disclosure.<sup>40</sup>

The Article proceeds in three parts. Part I reviews the constitutional status of the President's confidentiality interest. Briefly charting the evolution of the Supreme Court's treatment of this interest, Part I details how the Court's decision in *Cheney* altered the constitutional landscape established by the two *Nixon* cases of the Watergate era. Part II critically assesses the interest. It identifies the variable need for, and the potential risks of, maintaining confidential presidential deliberations. Finally, Part III turns to the practical implications of that assessment and sets forth the differentiation approach. In doing so, it clarifies the distinctiveness of this approach from those in *Cheney* and the *Nixon* cases. A brief conclusion follows.

### I. *Toward Uncritical Acceptance of the Confidentiality Interest*

#### A. *Marbury and the Nixon Cases*

The Supreme Court acknowledged early in our nation's history the President's interest in maintaining the confidentiality of his deliberations. It first confronted the issue in the oft-cited *Marbury v. Madison*,<sup>41</sup> concerning the alleged failure of the Secretary of State to deliver commissions of judicial appointments to their respective appointees.<sup>42</sup> In seeking to prove that the President had signed, and the Secretary had sealed, the commissions, petitioners sought the testimony of the Attorney General, who had been Acting Secretary of State.<sup>43</sup> When the Attorney General objected, arguing in part that

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<sup>40</sup> For an illuminating discussion of the significance of disclosure in constitutional law, see generally Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991) (analyzing the risks and benefits of government disclosure of information).

<sup>41</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>42</sup> See *id.* at 138–39.

<sup>43</sup> See *id.* at 143.

“[h]e did not think himself bound to disclose his official transactions while acting as [S]ecretary of [S]tate,” the Court, then sitting, dismissed the argument, explaining that “whether such commissions had been in the office or not, could not be a confidential fact,” but instead “a fact which all the world have a right to know.”<sup>44</sup> The Court noted, however, that, “[i]f there had been [something confidential required to be disclosed,] he was not obliged to answer it; and if he thought any thing was communicated to him in confidence[,] he was not bound to disclose it.”<sup>45</sup>

It was not until more than 150 years later, in the Watergate-related lawsuits of the 1970s, that the Court explicitly addressed why the President and his advisors could maintain their communications in confidence.<sup>46</sup> In *Nixon I*, the Supreme Court distinguished between two types of executive privilege: one involving “military, diplomatic, or sensitive national security secrets,” and another concerning “a broad, undifferentiated claim of public interest in the confidentiality of [presidential communications].”<sup>47</sup> The latter type (herein referred

<sup>44</sup> *Id.* at 144–45. Echoing that sentiment, Chief Justice Marshall noted in his opinion for the Court that the case involved no “intrusion into the secrets of the cabinet.” *Id.* at 170.

<sup>45</sup> *Id.* at 144. Four years later, sitting as circuit judge in the Aaron Burr trial for treason, Chief Justice Marshall, who had authored *Marbury*, again suggested that presidential communications were entitled to confidentiality. See *United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (“If [the President’s letter] does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed.”). For further discussion of the Burr trial, see BERGER, *supra* note 23, at 187–94; Paul A. Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 23–31, 24 n.60 (1974); Nathaniel L. Nathanson, *Commentary, From Watergate to Marbury v. Madison: Some Reflections on Presidential Privilege in Current and Historical Perspectives*, 16 ARIZ. L. REV. 59, 61–65 (1974).

<sup>46</sup> Notably, in *EPA v. Mink*, 410 U.S. 73 (1973), the Court had occasion to consider the extent to which presidential communications should receive protection from disclosure, *see id.* at 91–92 (noting that the government stressed that the materials were “submitted directly to the President by top-level Government officials” and “involve[d] matters of major significance”), but decided the issue by discussing the deliberative process privilege as applied more generally to government communications. *See id.* at 91–93.

Although the President and Congress had many disputes over access to information, limits on congressional standing and the courts’ reluctance to engage in political battles meant that very few struggles reached the courts. See BRECKENRIDGE, *supra* note 9, at 158–59; DANIEL N. HOFFMAN, *GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS* 79 (1981); MORTON ROSENBERG, *CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS* 1 (1999); ROZELL, *supra* note 23, at 101; Cox, *supra* note 23, at 1426; Kramer & Marcuse, *supra* note 23, at 903. An important court of appeals case considering the presidential privilege prior to *Nixon I* was *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 726–27 (D.C. Cir. 1974).

<sup>47</sup> *United States v. Nixon (Nixon I)*, 418 U.S. 683, 706 (1974).

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to as the “presidential privilege”<sup>48</sup>) finds its primary justification in the candor rationale. As the *Nixon I* Court explained:

The expectation of a President to the confidentiality of his conversations and correspondence . . . is [grounded in] the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.<sup>49</sup>

Recognizing the privilege, the Court stated, is thus “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”<sup>50</sup>

The scope of the presidential privilege defined by *Nixon I* is quite sweeping. It includes “communications ‘in performance of (a President’s) responsibilities,’ ‘of his office,’ and made ‘in the process of shaping policies and making decisions.’”<sup>51</sup> A comparison to the deliberative process privilege, a common-law privilege protecting communications in all levels of the executive branch,<sup>52</sup> illustrates the breadth of the presidential privilege. Like the presidential privilege, the deliberative process privilege seeks principally to foster candid discussions among government officials engaged in policymaking functions. But unlike the presidential privilege, it extends only to non-factual communications that precede the relevant decision.<sup>53</sup> In other words, the deliberative process privilege covers only opinions and advice—not facts separable from them—expressed before a decision is made or incorporated into official policy.<sup>54</sup> By contrast, the presidential privilege shields all policy-related communications—both opinions and facts, and even those that follow decisions.<sup>55</sup>

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<sup>48</sup> *Nixon v. Adm’r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 446–47 (1977). The D.C. Circuit has referred to this privilege as the “presidential communications privilege.” See, e.g., *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1109–14 (D.C. Cir. 2004); *In re Sealed Case*, 121 F.3d 729, 742–57 (D.C. Cir. 1997).

<sup>49</sup> *Nixon I*, 418 U.S. at 708.

<sup>50</sup> *Id.*

<sup>51</sup> *Nixon II*, 433 U.S. at 449 (quoting *Nixon I*, 418 U.S. at 711, 713, 708, respectively).

<sup>52</sup> See *EPA v. Mink*, 410 U.S. 73, 91–93 (1973); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 947 (Ct. Cl. 1958); Arthur Piacenti, *The Deliberative Process Privilege: Preserving Candid Communications or Facilitating Evasion of Justice*, 12 REV. LITIG. 275, 275–78 (1992); Weaver & Jones, *supra* note 25, at 845–48; Wetlaufer, *supra* note 9, at 287–90.

<sup>53</sup> See *United States v. Irvin*, 127 F.R.D. 169, 172 (C.D. Cal. 1989).

<sup>54</sup> See *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866–67 (D.C. Cir. 1980).

<sup>55</sup> See *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997).

Yet the President's confidentiality interest justifies only a qualified privilege, not an absolute one.<sup>56</sup> In *Nixon I*, the President asserted an absolute executive privilege to challenge a district court order requiring him to submit for in camera review documents subpoenaed for use in the criminal prosecution of third parties.<sup>57</sup> Despite acknowledging that the President's confidentiality interest was "weighty indeed and entitled to great respect," the Court nonetheless upheld the district court order.<sup>58</sup> In rejecting the privilege's assertion, the Court focused largely on the ground that withholding the documents in a criminal case would significantly impair "the guarantee of due process of law" and "the basic function of the courts."<sup>59</sup> In passing, the Court also expressed skepticism that mandating in camera review, "with all the protection that a district court will be obliged to provide,"<sup>60</sup> would substantially chill presidential communications. As the Court stated, "we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."<sup>61</sup>

Three years later, in *Nixon v. Administrator of General Services* (*Nixon II*),<sup>62</sup> the Court once again declined to accept the President's claimed need for confidentiality at face value.<sup>63</sup> At issue there was President Nixon's contention that the Presidential Recordings and Materials Preservation Act,<sup>64</sup> which directed the General Services Administrator to take custody of his Administration's papers and tape recordings, impermissibly infringed on the presidential privilege.<sup>65</sup> In deciding the threshold question of whether a former President could assert the privilege, the Court reaffirmed the importance of confidentiality to ensure "the full and frank submissions of facts and opinions

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<sup>56</sup> See *United States v. Nixon* (*Nixon I*), 418 U.S. 683, 706 (1974). As I discuss below, the Court's recent decision in *Cheney v. U.S. District Court*, 542 U.S. 367 (2004), renders that limit, at least in civil cases, less meaningful. See *infra* Part I.B.

<sup>57</sup> See *Nixon I*, 418 U.S. at 686.

<sup>58</sup> *Id.* at 712.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 706; see also *Nixon v. Adm'r of Gen. Servs.* (*Nixon II*), 433 U.S. 425, 447 (1977) (quoting *Nixon I*, 418 U.S. at 706).

<sup>61</sup> *Nixon I*, 418 U.S. at 712.

<sup>62</sup> *Nixon v. Adm'r of Gen. Servs.* (*Nixon II*), 433 U.S. 425 (1977).

<sup>63</sup> See *id.* at 455.

<sup>64</sup> Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974).

<sup>65</sup> *Nixon II*, 433 U.S. at 429.

upon which effective discharge of [the President's] duties depends.”<sup>66</sup> In turning to the disclosure mandated by the statute, however, the Court clarified that the alleged infringement on presidential confidentiality was not as great as the President claimed it to be. Because the statute directed the Administrator to issue regulations that would allow the President to assert privilege claims before any eventual public release of the documents, only professional archivists—“personnel in the Executive Branch sensitive to executive concerns”—would necessarily gain access to the materials.<sup>67</sup> Professional archivists had regularly screened similar materials for each of the prior presidential libraries, the Court noted, yet there had never been any suggestion that such screening interfered with executive confidentiality, though executive officials must have known of the practice.<sup>68</sup> The limited intrusion was justified, the Court explained, in light of Congress's desire to preserve the materials for “legitimate historical and governmental purposes,” the need in the wake of the Watergate incident “to restore public confidence” in the nation's political processes, and the need to enhance Congress's ability to craft remedial legislation.<sup>69</sup>

In sum, although the Court in the *Nixon* cases recognized the presidential privilege and “the very important interest”<sup>70</sup> served by it, the Court took a measured approach to invocations of presidential confidentiality. Beyond the obvious fact that the Court rejected the privilege claims, finding in each case that the asserted need overcame the confidentiality interest,<sup>71</sup> the Court did not simply credit the President's claims that the sought-after disclosure would impair the President's confidentiality interest. Rather, in each case, it took into account the particular nature of the anticipated disclosure to assess its likely impact on chilling deliberations.

#### B. *Cheney v. U.S. District Court*

Since the *Nixon II* decision in 1977, the Court has not entertained another case involving a presidential privilege claim.<sup>72</sup> Recently, how-

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<sup>66</sup> *Id.* at 449 (quoting Brief for the Appellees at 33, *Nixon II*, 433 U.S. 425 (No. 75-1605)).

<sup>67</sup> *Id.* at 451.

<sup>68</sup> *Id.* at 451–52.

<sup>69</sup> *See id.* at 452–54.

<sup>70</sup> *United States v. Nixon (Nixon I)*, 418 U.S. 683, 706 (1974).

<sup>71</sup> *See Nixon II*, 433 U.S. at 455; *Nixon I*, 418 U.S. at 712–13.

<sup>72</sup> The lower courts, however, have considered some cases. *See, e.g.*, *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997); *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir. 1982); *Dellums v. Powell*, 642 F.2d 1351 (D.C. Cir. 1980); *Dellums v. Powell*, 561 F.2d 242, 245–49 (D.C. Cir. 1977); *United States v. Haldeman*, 559

ever, in *Cheney v. U.S. District Court*,<sup>73</sup> it considered again the President's general confidentiality interest that underlies the privilege.<sup>74</sup> In *Cheney*, two nonprofit organizations, Judicial Watch and the Sierra Club, brought suit against the Vice President, among others, in connection with the National Energy Policy Development Group, a task force established by President George W. Bush to advise him about energy policy.<sup>75</sup> The plaintiffs argued that the task force had failed to comply with the Federal Advisory Committee Act ("FACA"),<sup>76</sup> which imposes a variety of open-meeting and disclosure requirements on groups that advise executive branch officials.<sup>77</sup> Although the task force formally included only government officials and hence would normally fall under FACA's exemption for groups wholly composed of government employees, the plaintiffs alleged that private individuals were de facto members.<sup>78</sup> The plaintiffs sought "declaratory relief and an injunction requiring [the defendants] to produce all materials allegedly subject to FACA's requirements"<sup>79</sup>—information concerning the substance of, and participants in, the task force's meetings.<sup>80</sup>

The Vice President moved to dismiss.<sup>81</sup> He raised a variety of constitutional arguments, the essence of which was that application of FACA to the task force would undermine the President's ability to receive full and frank advice from his chosen advisors.<sup>82</sup> Because it

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F.2d 31, 76–77 (D.C. Cir. 1976); *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976); *Sun Oil Co. v. United States*, 514 F.2d 1020, 1024 (Ct. Cl. 1975); *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 24–30 (D.D.C. 1998), *aff'd in part, rev'd in part sub nom., In re Lindsey*, 158 F.3d 1268 (D.C. Cir. 1998).

<sup>73</sup> *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004).

<sup>74</sup> *See id.* at 383–89.

<sup>75</sup> *See id.* at 373. The two plaintiffs filed separate actions, which the district court consolidated. *Id.* The plaintiffs also sued the task force itself as well as members of the Cabinet appointed to the task force and private individuals alleged to be members. *See id.* at 374.

<sup>76</sup> Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2 §§ 1–15 (2000).

<sup>77</sup> 5 U.S.C. app. 2 § 10; *see Cheney*, 542 U.S. at 373.

<sup>78</sup> *See Cheney*, 542 U.S. at 374.

<sup>79</sup> *Id.* The task force dissolved after suit was filed, but before discovery. *See id.* at 373, 375.

<sup>80</sup> *See id.* at 387.

<sup>81</sup> *See id.* at 374.

<sup>82</sup> *See id.* at 375. Vice President Cheney argued, among other things, that the task force fell under the Act's exemption. *See id.* He maintained that disregarding the exemption and applying the Act to the task force would impermissibly interfere with the President's responsibility under the Recommendations Clause, U.S. CONST. art. II, § 3, cl. 1, to recommend legislation to Congress, and his power under the Opinions Clause, U.S. CONST. art. II, § 2, cl. 1, to require opinions of his department heads. *See Brief for the Petitioners at 28–32, Cheney*, 542 U.S. 367 (No. 03-475). He also contended that the Act's application would violate separation-of-powers principles. *See id.*

In a separate case, the Comptroller General of the United States, the head of the GAO, also

was unclear whether any private individuals had served as de facto members—whether, in other words, it was necessary to address the constitutional question of FACA’s application to the task force—the district court rejected those arguments as premature, and instead ordered the Vice President to provide the plaintiffs with preliminary discovery.<sup>83</sup> After the district court declined to certify an interlocutory appeal,<sup>84</sup> the Vice President petitioned the D.C. Circuit for a writ of mandamus vacating the discovery orders, directing the district court to rule based on the administrative record, and ordering dismissal of the Vice President as a party.<sup>85</sup> The circuit court declined the petition, explaining that the Vice President could secure full relief through appeal following final judgment, and, at least at that stage of the litigation, could avoid harm in the district court through asserting executive privilege or requesting narrower discovery.<sup>86</sup> In a 7–2 decision, the Supreme Court vacated and remanded.<sup>87</sup> The remand was proper, the Court explained, because the D.C. Circuit had misinterpreted *Nixon I* to require the Vice President to assert executive privilege to object to

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sued the Vice President in relation to his capacity as chair of the National Energy Policy Development Group. See *Walker v. Cheney*, 230 F. Supp. 2d 51, 53 (D.D.C. 2002). Pursuant to statutes providing the GAO with investigative and litigating authority, the Comptroller General sought documents concerning the identities of individuals who participated in task force meetings to determine, inter alia, whether the task force followed laws mandating outreach efforts in the development of energy policy, and whether the task force’s composition called for compliance with the open-meeting and recordkeeping requirements of the FACA. See *id.* at 67. The Vice President also invoked the President’s confidentiality interest as a justification for dismissing the suit. See *id.* at 61. The district court ruled in favor of the Vice President on standing grounds, see *id.* at 75, and the GAO did not appeal. See Mike Allen, *GAO Cites Corporate Shaping of Energy Plan*, WASH. POST, Aug. 26, 2003, at A1.

<sup>83</sup> See *Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Group*, 230 F. Supp. 2d 12, 15–16 (D.D.C. 2002). Discovery, the court explained, could show that the Act did not apply to the task force, thus justifying summary judgment for the Vice President on statutory grounds and obviating the need to address the constitutionality of applying the Act to the Vice President. *Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 45 (D.D.C. 2002). Though the preliminary discovery itself could raise some constitutional issues, the court acknowledged, those issues of executive privilege would be “much more limited in scope” than the broad constitutional challenge to the application of the Act. *Id.* at 55.

<sup>84</sup> See *Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 31 (D.D.C. 2002).

<sup>85</sup> *In re Cheney*, 334 F.3d 1096, 1101 (D.C. Cir. 2003).

<sup>86</sup> *Id.* at 1104–07.

<sup>87</sup> *Cheney*, 542 U.S. at 378, 392. Chief Justice Rehnquist as well as Justices Stevens, O’Connor, and Breyer joined in Justice Kennedy’s majority opinion. *Id.* at 372. Justice Stevens wrote a concurring opinion. *Id.* at 392 (Stevens, J., concurring). Justice Thomas, joined by Justice Scalia, wrote an opinion concurring in part and dissenting in part; they would have reversed the judgment below and remanded with instructions to the district court to issue the writ. *Id.* at 393, 395 (Thomas, J., concurring in part, dissenting in part). Justice Ginsburg wrote a dissent, in which Justice Souter joined. *Id.* at 396 (Ginsburg, J., dissenting).

the district court's discovery order, and thus "prematurely terminated" its consideration of the Vice President's mandamus petition.<sup>88</sup>

The Court placed substantial weight on the President's confidentiality interest to justify its decision.<sup>89</sup> At the outset, the Court credited the confidentiality interest as providing the urgency necessary to justify the invocation of the extraordinary remedy of mandamus.<sup>90</sup> Because the Vice President alleged that the discovery orders "threaten 'substantial intrusions on the process by which those in closest operational proximity to the President advise the President,'" the Court explained, interlocutory appellate review through mandamus was appropriate.<sup>91</sup> The Court also relied, in significant part, on the confidentiality interest for its ultimate holding. "[S]pecial considerations control when the Executive Branch's interest in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated."<sup>92</sup> Because an executive privilege claim places courts in the "awkward position of evaluating the Executive's claims of confidentiality and autonomy," the Court stated, district courts ought "to explore other avenues, short of forcing the Executive to invoke privilege, when they are asked to enforce against the Executive Branch unnecessarily broad subpoenas."<sup>93</sup>

In response to the D.C. Circuit's opinion, the Court focused largely on the inapplicability of the *Nixon I* holding to the facts at issue in *Cheney*.<sup>94</sup> In particular, the Court stressed the differences between the need for evidence in criminal and civil cases.<sup>95</sup> On the one hand, the Court maintained, "the need for information in the criminal context is 'much weightier'" and implicates the ability of the judiciary to perform its "essential functions" of "do[ing] justice in criminal prosecutions."<sup>96</sup> On the other hand, the Court added, civil discovery

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<sup>88</sup> *Id.* at 391 (majority opinion).

<sup>89</sup> *See id.* at 385.

<sup>90</sup> *See id.*

<sup>91</sup> *Id.* at 381. The Court also stressed that "the public interest requires that a coequal branch of Government 'afford Presidential confidentiality the greatest protection consistent with the fair administration of justice.'" *Id.* at 382.

<sup>92</sup> *Id.* at 385.

<sup>93</sup> *Id.* at 389–90. The autonomy concern involved the need to protect the President from vexatious litigation so that he could perform his constitutional duties. For further discussion, see *infra* text accompanying notes 104–09.

<sup>94</sup> *See id.* at 383–89.

<sup>95</sup> *See id.* at 383–84.

<sup>96</sup> *Id.* at 384 (quoting *United States v. Nixon (Nixon I)*, 418 U.S. 683, 707–09 (1974)). In evaluating the Vice President's separation-of-powers objections, the Court appeared to undertake the same sort of balancing between competing interests that it would have had the Presi-

orders impose more substantial burdens because the various constraints on the prosecution of criminal cases that filter out insubstantial legal claims and preclude overbroad subpoenas do not exist in the civil context.<sup>97</sup> Accordingly, Justice Kennedy reasoned, *Nixon I* did not strike the appropriate balance for civil cases.<sup>98</sup>

In distinguishing the facts of *Cheney* from *Nixon I*, the Court applied a *Nixon I*-like balancing test by weighing the need for disclosure against the burden such disclosure would place on the executive.<sup>99</sup> Yet, unlike the *Nixon* cases, *Cheney* failed to assess, with any specificity, the confidentiality interests implicated in the case. Though the *Cheney* Court repeatedly stressed the importance of the President's confidentiality interest, it gave no serious attention to how deciding the case would in fact affect that interest.<sup>100</sup> The Court spoke in general terms about the lack of adequate safeguards to screen out frivolous civil litigation and overbroad discovery requests against the executive,<sup>101</sup> but those issues were not before the Court—or at least, given the procedural posture of the case, not before the Court at that time. The question at issue was whether the Vice President was entitled to mandamus relief to set aside the district court's discovery order though he had not asserted privilege or requested narrower discovery.<sup>102</sup> In holding that the Vice President could be so entitled,<sup>103</sup> the Court assumed, without explanation, that requiring the executive to assert privilege or move for narrower discovery—or, in other words, to be subject to any discovery—would likely impermissibly interfere with the President's confidentiality interest.

As mentioned above, the *Cheney* Court also alluded to a concern for the President's autonomy interest as informing its mandamus review.<sup>104</sup> Yet it barely discussed that interest; instead, the Court simply pointed to the “paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties.”<sup>105</sup> Citing, *inter alia*,

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dent claimed the privilege. *See id.* at 385. Thus, the *Cheney* Court ironically applied a privilege analysis at the same time that it held that the President need not raise the claim.

<sup>97</sup> *See id.* at 386–87.

<sup>98</sup> *See id.* at 384.

<sup>99</sup> *See id.* at 384–85.

<sup>100</sup> *See id.* at 385.

<sup>101</sup> *See id.* at 386–88.

<sup>102</sup> *See id.* at 372, 378.

<sup>103</sup> *Id.* at 390–91 (suggesting that the district court should have, *sua sponte*, narrowed the discovery order).

<sup>104</sup> *See id.* at 382.

<sup>105</sup> *See id.*

*Clinton v. Jones*<sup>106</sup> for the proposition that the Court had consistently required that litigation against the President proceed with judicial deference and constraint, the *Cheney* Court made no effort to clarify the divergent outcomes in *Jones* and *Cheney*.<sup>107</sup> That is, the Court did not address why, as *Jones* held, requiring the President to defend himself in a sexual harassment suit for which he could be personally liable did not impermissibly infringe on his autonomy interest,<sup>108</sup> while obliging the Vice President either to assert privilege or to move for narrower discovery in response to a discovery order in a FACA case could.<sup>109</sup> The point here is not that the two cases are indistinguishable. Rather, it is that the *Cheney* Court blithely invoked the autonomy concern while offering little clarification of its scope or significance.

Instead, the Court devoted the bulk of its opinion to stressing the threat to the President's confidentiality interest.<sup>110</sup> In doing so, the *Cheney* Court suggested that courts need not discern in what ways, or to what extent, the President's confidentiality interest is actually threatened.<sup>111</sup> In other words, *Cheney* exemplifies deference to rote invocations of the President's generalized confidentiality interest. It moves away from the *Nixon* cases' scrutiny of the executive's claim of interference toward uncritical acceptance of it. *Cheney* thus alters the constitutional balance, heightening the President's ability to insulate his deliberations and decision making from outside review.<sup>112</sup>

## II. Qualifying the Confidentiality Interest

The candor-based justification for confidential presidential deliberations emphasizes the critical role that confidentiality plays in enhancing the President's ability to carry out the responsibilities of his office. On this view, the expectation of confidentiality gives the President and his advisors the freedom to express their unvarnished views, and that, in turn, improves the process of presidential decision making.<sup>113</sup> Put another way, when people need not worry about what the

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<sup>106</sup> *Clinton v. Jones*, 520 U.S. 681 (1997).

<sup>107</sup> *See Cheney*, 542 U.S. at 381–85 (citing *Jones*, 520 U.S. 681).

<sup>108</sup> *See Jones*, 520 U.S. at 684.

<sup>109</sup> *See Cheney*, 542 U.S. at 389–90.

<sup>110</sup> *See id.* at 382–86.

<sup>111</sup> *See id.*

<sup>112</sup> In describing the implications of ruling in favor of the Vice President, the D.C. Circuit noted, "Were we to hold, as [the Vice President and others] urge, that the Constitution protects the President and Vice President from ever having to invoke executive privilege, we would have transformed executive privilege from a doctrine designed to protect presidential communications into virtual immunity from suit." *In re Cheney*, 334 F.3d 1096, 1105 (D.C. Cir. 2003).

<sup>113</sup> *See supra* note 8. To be clear, the argument based on candor is concerned primarily

public will think of their statements, they will provide their most thorough and honest assessment of a situation—their candid, and hence best, analysis of a matter. The promise of confidentiality enables the President to seek and receive better advice, and thereby helps him to make better decisions.<sup>114</sup>

This account resonates strongly with commonsense assumptions and is quite persuasive as a general matter. Yet closer scrutiny reveals that its descriptive power, and hence the normative case for confidentiality, is more qualified than it initially seems. As this Part argues, (1) the chilling effect of anticipated disclosure is varied and contingent, and (2) the impact of candid advice on the quality of presidential decisions is unclear.<sup>115</sup>

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with the results, not the procedure, of presidential decision making. Candid discussions are valuable because of their presumed effects on actual decisions, not because of any conception of an ideal decision-making process.

<sup>114</sup> Some might question for whom these “decisions” are “better.” Decisions that are “better” for the President, politically, may not be “better” for the public more generally when they result in personal or partisan concerns trumping or displacing the public interest. Yet sometimes, of course, better decisions for the President, politically, may also be better for the public, as, for example, when the President selects a strategic course of action that will build and promote support for policies that serve the long-term public interest but are unpopular in the short term. For my purposes, I focus on whether confidential presidential deliberations lead to better decisions for the public more generally. I discuss briefly below basic criteria for assessing the quality of government decisions. See *infra* notes 197–98 and accompanying text.

<sup>115</sup> One might question whether “better decisions” are the ultimate or sole end of presidential confidentiality. In many other contexts, societal practices and institutions protect confidentiality where the end might be something other than, or at least in addition to, better decisions. For instance, many evidentiary privileges protect confidential conversations for the purpose of fostering or preserving particular relationships, such as those between (1) spouses, see *Wolfe v. United States*, 291 U.S. 7, 17 (1934); *SEC v. Lavin*, 111 F.3d 921, 933 (D.C. Cir. 1997), (2) clergy and penitent, see *Trammel v. United States*, 445 U.S. 40, 51 (1980), (3) doctors and patients, see *id.*; *Street v. Hedgepath*, 607 A.2d 1238, 1246 (D.C. 1992), and (4) attorneys and clients, *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). In addition, the reporter’s privilege shields certain communications so that confidential sources will be willing to speak without fear of recriminations, thereby enhancing journalists’ ability to collect and report information. *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 991 (D.C. Cir. 2005) (Tatel, J., concurring); *Zerilli v. Smith*, 656 F.2d 705, 710–11 (D.C. Cir. 1981). In the presidential context, confidentiality similarly receives protection at least in part to enhance relationships among the President and his advisors or to improve their abilities to collect and disseminate information. But those interests are predominantly, if not exclusively, designed to improve the quality of presidential decisions.

Some defenses of confidentiality value candid communications as an end in itself. See SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 23–24 (1982) (discussing the significance of secrecy for individual flourishing).

### A. *Chilling Effect*

Anticipated disclosure chills the President's advisors from taking part in full and frank discussions in at least three ways. First, anticipated disclosure inhibits candid speech. It makes advisors less willing to express risky views: unpopular, controversial, or unorthodox perspectives,<sup>116</sup> or tentative, incomplete, or off-the-cuff ones. Advisors worry about harm to their reputations or other repercussions because of public association with their statements. They also fear the public will misinterpret or distort their views. Second, anticipated disclosure encourages not-so-candid speech. People regularly modify or misrepresent their genuine views to make them more palatable or agreeable for public consumption.<sup>117</sup> Expecting broader dissemination of their views through disclosure, advisors tailor their statements to please outside audiences. Third, and relatedly, anticipated disclosure inhibits candid exchange by making advisors less willing to engage in meaningful give-and-take and hence less likely to explore issues fully and comprehensively. Advisors become less likely and less willing to change their minds, or to acknowledge that change, if they expect it to appear on the record. Others simply wish to avoid giving offense. More sensitive about appearing too aggressive or dismissive towards others, they become less inclined to express doubt about, reservations toward, or disagreement with the views of others, particularly those of higher status or rank.

Though this account corresponds with powerful intuitions about human motivation and behavior, whether, and to what extent, advisors anticipating disclosure refrain from speaking candidly depends on a range of factors. They include, among other things, the types of information discussed, the nature of the expected disclosure, and the speaker's particular motivations. I discuss these factors in turn.

#### 1. *Type of Information*

Most obviously, anticipated disclosure will have a greater chilling effect on some types of information than on others. Beyond simply risky views, specific categories of information are more likely to be chilled. “[M]ilitary, diplomatic, or sensitive national security

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<sup>116</sup> As I discuss further below, many of these concerns underlie the First Amendment's protection for anonymous speech. *See infra* text accompanying notes 326–30.

<sup>117</sup> For a study of the widespread phenomenon of preference falsification, see generally TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* (1995) (defining preference falsification as “the act of misrepresenting one's genuine wants under perceived social pressures”).

secrets”—the subject of absolute privilege—fall into this category.<sup>118</sup> But so, too, does information protected only by the President’s general privilege. Consider, for example, privacy-related information. When advisors suggest health care policies, they will be more reluctant to discuss proprietary information about new drug research if they cannot expect confidentiality. Or when advisors formulate Internet policies, they will feel more constrained about bringing up a company’s secret long-term effort to develop a new technology. Likewise, in discussing pardon applications or presidential nominees, they will be less likely to raise private, though relevant, personal information.<sup>119</sup>

Anticipated disclosure will also have a heightened chill on enforcement-related information. Some types of enforcement-related information, if disclosed, compromise the President’s ability to execute his decisions, or to implement them as effectively as he would prefer. Illustrative of this information are the reasons underlying then-Attorney General Ashcroft’s decision not to prosecute charges relating to alleged corruption in the Boston office of the Federal Bureau of Investigation.<sup>120</sup> Congress asked the Attorney General to testify on why the Department of Justice did not bring charges, but, at the White House’s direction, he turned down the request.<sup>121</sup> As the Administration plausibly argued, the investigation was then ongoing, and disclosures at the time would have derailed it.<sup>122</sup>

Expected disclosure will also particularly chill information relating to performance reviews. Although advisors normally have strong

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<sup>118</sup> United States v. Nixon (*Nixon I*), 418 U.S. 683, 706 (1974).

<sup>119</sup> In responding to the President’s request for advice concerning congressional subpoenas for pardon-related documents, the Department of Justice’s Office of Legal Counsel opined that the President may rightfully assert privilege over those documents. See Memorandum from Janet Reno, Att’y Gen., Re: Assertion of Executive Privilege with Respect to Clemency Decision (Sept. 16, 1999), available at 1999 WL 33490208. Because the President’s pardon power is plenary, Congress may not exercise legislative or oversight authority on pardon-related decisions, and thus lacks a specific need for pardon-related documents. See *id.* By contrast, my emphasis here is on the likely chilling effect of disclosing pardon review information.

<sup>120</sup> See Neil A. Lewis, *Bush Claims Executive Privilege in Response to House Inquiry*, N.Y. TIMES, Dec. 14, 2001, at A26.

<sup>121</sup> See *id.*

<sup>122</sup> See *id.* The Administration has made similar types of arguments to justify not disclosing advice underlying terrorist alerts. See, e.g., Douglas Jehl & Richard W. Stevenson, *New Qaeda Activity Is Said to Be Major Factor in Alert: Warning Stemmed from More than Moves of Terrorists Long Ago, Officials Say*, N.Y. TIMES, Aug. 4, 2004, at A1 (reporting that the Bush administration had declined to disclose specific details justifying the raising of the terrorism alert level “out of concern that such a step could compromise intelligence and law enforcement operations”).

career and reputational incentives to provide the President with their best advice, those incentives are subverted when they are asked to evaluate their superiors, close colleagues, or themselves. In those cases, speaking truthfully can harm (or be perceived as harmful to) one's career prospects. A promise of confidentiality will help draw out critical views that otherwise would remain unsaid.<sup>123</sup> Consider, for example, an internal investigation by the Intelligence Oversight Board, a group of overseers established and appointed by the President and unaffiliated with the nation's intelligence agencies.<sup>124</sup> Under President Clinton, the Board investigated whether his Administration had violated a reporting law when it did not inform Congress of its decision to abstain from intervening in UN-banned weapons shipments from Iran to Bosnian Muslims.<sup>125</sup> After the Board concluded that there had not been a violation, congressional committees sought a copy of its report.<sup>126</sup> The President declined to provide it, invoking executing privilege and the need to avoid a chilling effect.<sup>127</sup> Absent an expectation of confidentiality, individuals under questioning from the Board would have been far more reluctant to provide any potentially incriminating or damaging information about either their own or their close associates' roles in the matter.<sup>128</sup> Most presidential deliberations do not involve critical assessments of executive branch performance. Yet, because they concern the effectiveness of the executive branch, those that do are quite important.

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<sup>123</sup> Similar concerns underlie what has been referred to as the self-critical analysis privilege, which protects the confidentiality of internal reviews. See, e.g., *Keyes v. Lenoir Rhyne Coll.*, 552 F.2d 579, 581 (4th Cir. 1977) (faculty evaluations); *Brown v. Thompson*, 430 F.2d 1214, 1215–16 (5th Cir. 1970) (police records); *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 524–27 (N.D. Fla. 1994) (protecting environmental regulation compliance reports “prepared after the fact for the purpose of candid self-evaluation and analysis of the cause and effect of past pollution”); *Granger v. Nat'l R.R. Passenger Corp.*, 116 F.R.D. 507, 510 (E.D. Pa. 1987) (internal railroad accident reports); *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250–51 (D.D.C. 1970) (medical staff reviews), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

<sup>124</sup> Tim Weiner, *Congress Is Denied Report on Bosnia: Citing Privilege, Clinton Bars Data on Iran Arms Exports*, N.Y. TIMES, Apr. 17, 1996, at A1.

<sup>125</sup> See *id.* The question there was whether the Administration's actions constituted “covert action,” which must be supported by a written presidential order and reported to Congress. See *id.*

<sup>126</sup> See *id.*; Michael Dobbs & Ann Devroy, *GOP Wants Probe of Clinton Policy that Let Bosnia Get Iranian Arms*, BUFF. NEWS (N.Y.), Apr. 6, 1996, at A4; Doyle McManus & James Risen, *GOP Lawmakers Say Bosnia Arms Inquiries Rebuffed*, L.A. TIMES, Apr. 18, 1996, at A12; James Risen, *House Panel to Probe Iran Arms to Bosnia*, L.A. TIMES, Apr. 25, 1996, at A12.

<sup>127</sup> See McManus & Risen, *supra* note 126, at A12; Doyle McManus, *U.S. Envoy May Have Aided Arms Convoy to Bosnia*, L.A. TIMES, Apr. 17, 1996, at A1.

<sup>128</sup> See Weiner, *supra* note 124, at A1.

By contrast, anticipated disclosure of other types of information is likely to have little, if any, chilling effect. Consider, for instance, information sought by the GAO in connection with its investigation of Vice President Cheney's National Energy Policy Development Group ("NEPDG").<sup>129</sup> The GAO sought, among other things, the identities of the non-federal parties that attended task force meetings.<sup>130</sup> The Vice President declined to disclose any of the identities, arguing that releasing the information would interfere with the President's ability to receive candid advice.<sup>131</sup>

But the Vice President's claim is unpersuasive. Although some parties might have declined to provide information to the task force if they expected their identities to be revealed, it is highly unlikely that all, or even most, would have been so chilled. It was in the strong self-interest of many non-federal parties—energy companies, environmental groups, local government officials, etcetera—to meet with the task force. Many also would not have suffered any embarrassment, humiliation, or other political or economic costs had the fact of their attendance at task force meetings become public. Indeed, disclosure of a group's attendance likely would have had the opposite effect. Suggesting the status of being a "player" in national energy debates, disclosure would have inured to the group's benefit. That many parties readily acknowledged their participation in the task force meetings and the subjects of their discussions to the *New York Times* supports that view.<sup>132</sup>

To be clear, there might have been some groups that would not have attended meetings absent an expectation of their participation's confidentiality. For those groups, the Vice President could have more persuasively argued for withholding their identities. Yet because disclosing some parties' identities would not have compromised the identities or interests of others,<sup>133</sup> the Vice President had no legitimate basis to resist disclosing all the identities. Though the Vice President might have suffered political embarrassment had all the identities become known—on the theory, for example, that the task force met disproportionately with the most generous political contributors—that would presumably have affected the task force's incentives to meet

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<sup>129</sup> See *Walker v. Cheney*, 230 F. Supp. 2d 51, 55–57 (D.D.C. 2002).

<sup>130</sup> See *id.*

<sup>131</sup> See *id.* at 59–60.

<sup>132</sup> See Don Van Natta, Jr. & Neela Banerjee, *Top G.O.P. Donors in Energy Industry Met Cheney Panel*, N.Y. TIMES, Mar. 1, 2002, at A1.

<sup>133</sup> It is true that identification of some parties would make it easier for an investigator to determine who to question to learn about the other parties in attendance.

with some groups and not others. It would not have diminished the outside groups' incentives to provide advice.

Disclosing advisors' identities can diminish the President's (or his agent's) freedom to consult with his preferred advisors. The President might worry that revealing his advisors' identities would imply issues under discussion that he wished to keep confidential. The President might also wish to consult with politically unpopular parties. Sometimes the President has a legitimate need to seek insulation from public pressure when selecting his outside advisors. The task force, for example, might have met with foreign diplomats that the President reasonably wished to avoid identifying for fear of damaging relations with interested nations that had not been consulted. Yet the Vice President did not make any such argument with respect to the NEPDG; he offered only a vague, undifferentiated assertion that any disclosure would interfere with the President's ability to receive candid advice.<sup>134</sup>

## 2. *Nature of Disclosure*

The extent of the chilling effect turns not only on the types of information discussed, but also on the nature of the anticipated disclosure. A variety of disclosure dimensions, such as time, detail, audience, certainty, and form, are significant.

*Time.* The timing of the anticipated disclosure will also have a significant impact on chilling. Not surprisingly, disclosure contemporaneous with discussions, or, in other words, open deliberations, have a profound chilling effect.<sup>135</sup> Scholars focusing on governmental (though not presidential) contexts have documented how, in the political world, open deliberations often translate into hollow or staged discussions. Jon Elster, for instance, compared the closed and secret debates of the Philadelphia Constitutional Convention of 1787 with the open debates of the French constituent assembly of 1789–1791 and the Frankfurt assembly of 1848, which accommodated up to 600 or 2000 persons, respectively, in the galleries.<sup>136</sup> Stressing secrecy's role

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<sup>134</sup> See *Walker*, 230 F. Supp. 2d at 59.

<sup>135</sup> Evidence suggests that live audiences have a greater impact on deliberants than do on-lookers separated by time or space. See generally Robert S. Baron, Danny Moore & Glenn S. Sanders, *Distraction as a Source of Drive in Social Facilitation Research*, 36 J. PERSONALITY & SOC. PSYCHOL. 816 (1978) (explaining how the presence of others affects task performance); Eric S. Knowles, *Social Physics and the Effects of Others: Tests of the Effects of Audience Size and Distance on Social Judgments and Behavior*, 45 J. PERSONALITY & SOC. PSYCHOL. 1263 (1983) (finding that reactions to presence of others varies depending on audience proximity and size).

<sup>136</sup> See Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J.

in stamping out spectacle and superficiality, he found that “[m]any of the debates at the Federal Convention were indeed of high quality: remarkably free from cant and remarkably grounded in rational argument.”<sup>137</sup> The public assemblies differed significantly. Whereas the American discussions were free of moralizing cant,<sup>138</sup> the latter were marked by it, “heavily tainted by rhetoric, demagoguery, and overbidding.”<sup>139</sup>

Studies of “government sunshine” or “open meeting” laws corroborate those findings. Because the laws force agency commissioners to open their policy meetings to the public, critics argue, the laws inhibit the full and frank discussion necessary for effective agency decision making.<sup>140</sup> For fear of appearing uninformed and uncertain, commissioners refrain from requesting information or raising questions.<sup>141</sup> Concerned about embarrassing others or themselves, they tend also to avoid critically examining or challenging the positions of others.<sup>142</sup> Unwilling “to appear weak, indecisive, or unprincipled,”

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CONST. L. 345, 345, 410–11 (2000) [hereinafter Elster, *Arguing and Bargaining*]; Jon Elster, *Deliberation and Constitution Making*, in DELIBERATIVE DEMOCRACY 97, 109–11 (Jon Elster ed., 1998) [hereinafter Elster, *Constitution Making*].

<sup>137</sup> Jon Elster, *Strategic Uses of Argument*, in BARRIERS TO CONFLICT RESOLUTION 236, 251 (Kenneth J. Arrow et al. eds., 1995) [hereinafter Elster, *Strategic Uses*]. Elster does not argue that secrecy thus led to the exclusive reliance on reason-based decision making at the Federal Convention. *See id.* at 343, 250–51. To the contrary, he argues that secrecy also led to the prevalence of “hard-nosed bargaining” as opposed to reason-based arguing for many of the convention’s decisions. *See id.* at 251; *see also* Elster, *Constitution Making*, *supra* note 136, at 110 (noting that secrecy also shifts “the mode of the proceedings toward the bargaining end of the continuum”); Elster, *Arguing and Bargaining*, *supra* note 136, at 386 (same).

<sup>138</sup> *See* Elster, *Arguing and Bargaining*, *supra* note 136, at 411.

<sup>139</sup> *Id.*; Elster, *Strategic Uses*, *supra* note 137, at 251; *see* Elster, *Constitution Making*, *supra* note 136, at 111.

<sup>140</sup> *See, e.g.*, David A. Barrett, *Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under the Federal Sunshine Act*, 66 TEX. L. REV. 1195, 1211 (1988); Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 DRAKE L. REV. 11, 22–28 (2004); Thomas H. Tucker, “Sunshine”—*The Dubious New God*, 32 ADMIN. L. REV. 537, 545–49 (1980); Andrew D. Lipman & Joshua S. Lamel, *Harsh Glare: Sunshine Has Scorched Frank Discussions Among Agency Members*, LEGAL TIMES, Mar. 7, 2005, at 68. For an argument that the positive effects of the federal sunshine law, such as increased public debate and public access, outweigh the negative effects such as reduced candor and procedural burdens, *see* Terry W. Hartle & Stephen R. Chitwood, *Increasing Public Access to Government: The Implementation and Impact of the Government in the Sunshine Act*, 10 GOV’T PUBLICATIONS REV. 269, 277–81 (1983).

<sup>141</sup> *See* David M. Welborn et al., *Implementation and Effects of the Federal Government in the Sunshine Act*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS 199, 229 (1984); Barrett, *supra* note 140, at 1211.

<sup>142</sup> *See* Administrative Conference of the United States, *Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act*, 49 ADMIN. L. REV. 421, 422 (1997).

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they become resistant to rethinking or changing their initially expressed views.<sup>143</sup> Instead, the meetings become “staged presentations,”<sup>144</sup> with commissioners’ comments “aimed more at representatives of the media than a member’s colleagues.”<sup>145</sup> The discussions are not only “more likely to be short, contrived, stilted, [and] scripted,”<sup>146</sup> but also “simplif[ied] and trivialize[d] . . . ‘boiling a matter down to two sides’ for the public’s benefit even though ‘most important questions have five or six sides at least.’”<sup>147</sup>

Though studies generally have not examined the impact of opening up presidential deliberations, there is little reason to believe that the effect would be any different. A recent “insider account” of a former presidential advisor supports that view. Paul O’Neill, the first Treasury Secretary of the current Bush administration, reported that he regularly participated in highly choreographed, public Cabinet meetings, where each Secretary received pre-written questions or concerns that they were expected to raise in a pre-determined order.<sup>148</sup> Though that sort of practice does not establish that advisors will always refrain from speaking candidly in public, it does suggest that when the President has other arenas in which to deliberate confidentially with his chosen advisors—and it would be constitutionally impermissible to foreclose such arenas completely—opening some presidential deliberations may simply lead them to become scripted performances.<sup>149</sup>

That contemporaneous disclosure has a strong chilling effect on presidential advisors does not, however, lead to the same conclusion with respect to other forms of disclosure. As one might expect, research suggests that the chill diminishes the further away in time individuals anticipate disclosure will take place after the discussions.<sup>150</sup> Some milestones are especially significant. For instance, anticipated disclosure following discussions, but pre-decision, will likely have a greater impact on advisors than post-decision disclosure. Advisors

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<sup>143</sup> Welborn, *supra* note 141, at 229; see Barrett, *supra* note 140, at 1211.

<sup>144</sup> Welborn, *supra* note 141, at 229.

<sup>145</sup> Johnson, *supra* note 140, at 25 (citing Welborn, *supra* note 141, at 228–32).

<sup>146</sup> *Id.* at 25; see Kathy Bradley, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 FED. COMM. L.J. 473, 482 (1997).

<sup>147</sup> Barrett, *supra* note 140, at 1211.

<sup>148</sup> See RON SUSKIND, *THE PRICE OF LOYALTY: GEORGE W. BUSH, THE WHITE HOUSE, AND THE EDUCATION OF PAUL O’NEILL* 147–48 (2004).

<sup>149</sup> The failure to recognize confidentiality as limited to only parts of larger decision-making processes also accounts for similar criticisms of government sunshine laws. See *supra* text accompanying notes 140–48.

<sup>150</sup> See *infra* notes 151, 153 and accompanying text.

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will have less developed positions, more reason to fear that others—who have only an incomplete view of the decision process—will misinterpret or distort their views, and more reason to expect outsider scrutiny and urgent efforts to intervene.<sup>151</sup> Similarly, the timing of the anticipated disclosure relative to an administration's tenure is important. As the *Nixon II* Court acknowledged, advisors' reputational concerns outlive an administration's conclusion.<sup>152</sup> Yet the immediate political significance of their statements surely recedes.<sup>153</sup> Accordingly, the extent of chill will be substantially less when advisors expect disclosure to take place after, rather than during, a presidential administration.<sup>154</sup>

*Detail.* The anticipated disclosure's level of detail also affects the degree of chilling. A recent study of the Federal Reserve's Federal Open Market Committee ("FOMC") illustrates this point.<sup>155</sup> Researchers examined transcripts of committee deliberations on interest rate changes both before and after the FOMC's 1993 decision to release transcripts of its meetings after a five-year delay.<sup>156</sup> Prior to that decision, the FOMC published only "individual votes of committee members [and] summary minutes of meetings."<sup>157</sup> The researchers found that, following the decision to release full transcripts, committee members became far less likely to express disagreement with the committee chair's short-term interest rate proposals.<sup>158</sup> By contrast,

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<sup>151</sup> See Barbara Koremenos, *Open Covenants, Clandestinely Arrived At* 15 (unpublished manuscript, on file with author) (focusing on international treaty negotiations).

<sup>152</sup> See *Nixon v. Adm'r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 450–51 (1977).

<sup>153</sup> See *id.* at 451 (holding that executive privilege survives the individual President's tenure while noting that the common practice of depositing official papers in presidential libraries illustrates that "[t]he expectation of confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office").

<sup>154</sup> For helpful discussions of secrecy's temporal dimension, see Pablo da Silveira, *Representation, Secrecy, and Accountability*, 12 J. INFO. ETHICS 8, 12–15 (2003); Dennis F. Thompson, *Democratic Secrecy*, 114 POL. SCI. Q. 181, 184–85 (1999).

<sup>155</sup> See Ellen E. Meade & David Stasavage, *Publicity of Debate and the Incentive to Dissent: Evidence from the US Federal Reserve*, 117 ECON. J. (forthcoming 2008) (manuscript at 26–27), available at <http://www.nyu.edu/gsas/dept/politics/faculty/stasavage/feddeliberation11.pdf>.

<sup>156</sup> See *id.* at 1, 4.

<sup>157</sup> *Id.* at 4. Under pressure from Congress, the FOMC in 1993 decided to publish lightly edited transcripts dating back to 1976. *Id.* Prior to 1993, the FOMC's practice had been to tape record meetings, but most officials believed that the recordings were used to prepare minutes and were subsequently recorded over. *Id.* at 4, 17. Accordingly, the researchers were able to compare pre-1993 transcripts, in which committee members believed their remarks would remain private, and post-1993 transcripts, in which the members expected eventual publication of their statements. *Id.* at 4.

<sup>158</sup> *Id.* at 5. The analysis controlled for variables such as the specific status of committee

the study found no change with respect to the official votes, which the FOMC made public throughout the entire period.<sup>159</sup>

Summaries obviously vary significantly in the level of detail recounted. Transcripts, too, exhibit substantial variation in their specificity.<sup>160</sup> Of particular significance here are transcripts with or without speaker identification. The former has a greater chilling effect because some advisors may fear disclosure of only their associations with particular views, but not the views themselves.<sup>161</sup> For example, an advisor might be comfortable with public disclosure of her statements on a potential nominee's questionable business practices, as long as the statement does not identify her as the speaker. In other words, the advisor fears the consequences of disclosure for herself, not the President; publicizing the President's consideration of that factor, she believes, would not harm his interests.

It is critical to consider the level of detail required by disclosure when assessing the likelihood of chill. In the GAO's suit against the Vice President discussed above, for instance, the Vice President argued that disclosing even the subject matter of any of the NEPDG's meetings would chill deliberations.<sup>162</sup> But that position was extreme and untenable. Whatever the precise meaning of "subject matter," it clearly does not involve a substantial degree of detail. The President established the NEPDG "to develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound protection and distribution of energy" for the

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participants and other potential determinants of individual committee member positions. *See id.* at 5.

<sup>159</sup> *See id.* at 26.

<sup>160</sup> Some transcripts limit themselves to spoken words, while others include a range of non-verbal communications—facial expressions, body language, brief pauses, extended silences, laughs, intonations, etc. *See, e.g.,* Adam Liptak, *So, Guy Walks up to the Bar, and Scalia Says . . .*, N.Y. TIMES, Dec. 31, 2005, at A1 (noting that transcripts of Supreme Court oral arguments include the notation "[laughter]"). Some recount statements with or without attribution to the speaker. *See, e.g., id.* (noting that transcripts of Supreme Court oral arguments did not identify the justices by name until October 2004). And even when transcripts include attribution, some omit the actual names of the speakers and instead employ pseudonyms (e.g., "speaker A" or "speaker B"), which enable readers to decipher the views of particular speakers, but not necessarily the speakers' identities.

<sup>161</sup> *Cf. ELIE ABEL, LEAKING: WHO DOES IT? WHO BENEFITS? AT WHAT COST?* 55–60 (1987) (noting that administration insiders regularly leak information to the press on the condition that the leaker remain anonymous or be identified only as an "Administration official"); Randy Dotinga, *Off the Record, Newspapers Have a Problem*, CHRISTIAN SCI. MONITOR, May 25, 2005, at 2 (same).

<sup>162</sup> *See Walker v. Cheney*, 230 F. Supp. 2d 51, 56–57 (D.D.C. 2002).

future.<sup>163</sup> The subject matters of the NEPDG's meetings thus presumably concerned various topics relating to energy policy.<sup>164</sup> Though the prospect of having to disclose the subject matters of some of the meetings might have had a chilling effect—leading advisors not to hold some meetings—it is implausible that that would have been the case for all, or even most, of the meetings.

*Audience.* The anticipated parties who will gain access to the disclosures will also affect the degree of chilling. Generally, the broader the disclosure, the more likely the chilling. Also, if the President or his advisors anticipate disclosure to politically motivated parties who oppose or at least question the administration, the chilling effect will be greater. By contrast, as the *Nixon II* Court reasoned, when advisors expect that only professional archivists will review records of their deliberations, there will be a weaker chilling effect than when they expect general public access to the records.<sup>165</sup> Similarly, as the *Nixon I* Court intimated, the prospect of courts reviewing documents in camera for a specific purpose will have less of an impact on advisors than would the anticipation of congressional aides doing so.<sup>166</sup>

*Certainty.* The extent of chilling will also turn on the certainty of actual disclosure. Comparing the application of FACA with that of the Freedom of Information Act (“FOIA”)<sup>167</sup> to presidential deliberations illustrates this point. As mentioned above, FACA requires presidential advisory committees that include non-federal employees to give notice of its meetings and open them to the public, to keep detailed minutes of its meetings, and to make those minutes and any records or transcripts of the meetings publicly available.<sup>168</sup> FOIA authorizes parties to request agency records related to government decision making, subject to a variety of limitations.<sup>169</sup> Though FOIA defines “agency” to include the Executive Office of the President,<sup>170</sup> the Supreme Court concluded on the basis of the statute’s legislative history that the term does not apply to “units in the Executive Office whose sole function is to advise and assist the President.”<sup>171</sup> In *Public*

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<sup>163</sup> *Id.* at 54 (quoting Complaint, Exhibit A at 2, *Walker*, 230 F. Supp. 2d 51 (No. 1:02cv00340)).

<sup>164</sup> *See id.*

<sup>165</sup> *See Nixon v. Adm’r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 451–52 (1977).

<sup>166</sup> *See United States v. Nixon (Nixon I)*, 418 U.S. 683, 706 (1974).

<sup>167</sup> Freedom of Information Act, 5 U.S.C. § 552 (2000 & Supp. IV 2004).

<sup>168</sup> *See* 5 U.S.C. app. 2 § 10 (2000); *supra* Part I.B.

<sup>169</sup> *See* 5 U.S.C. § 552(a)(3).

<sup>170</sup> *Id.* § 552(f)(1).

<sup>171</sup> *Kissinger v. Reports Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting

*Citizen v. U.S. Department of Justice*,<sup>172</sup> the Supreme Court relied, in part, on the constitutional avoidance doctrine to hold that FACA did not apply to the Department of Justice's confidential solicitation of the American Bar Association's views on prospective judicial nominees.<sup>173</sup> Interpreting FACA to apply to the Justice Department's consultations, the Court suggested, could impermissibly interfere with the President's interest in "confidentiality and freedom of consultation in selecting judicial nominees."<sup>174</sup>

Applying FACA to presidential deliberations would have a far greater chilling effect on advisors than would extending FOIA. Part of the reason has to do with the certainty of disclosure.<sup>175</sup> FACA gives the public a right of notice and access to meetings, and mandates detailed keeping of minutes, which must then be made publicly available.<sup>176</sup> By contrast, FOIA authorizes outsiders only to request government records after-the-fact.<sup>177</sup> Despite the heightened interest in presidential records, actual disclosure under FOIA is far less certain. Parties are generally less likely to seek information under FOIA because of the lack of public knowledge that specific discussions took place and the more limited interest in information after the fact.<sup>178</sup> Also, unlike FACA's open meeting requirements,<sup>179</sup> FOIA's records mandates do not preclude the President from screening materials prior to disclosure, or asserting privileges or other statutory exceptions to withhold statements. Furthermore, FOIA's lack of a detailed

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H.R. Conf. Rep. No. 1380, at 15, 93rd Cong., 2d Sess. 14 (1974)); *see* *Armstrong v. Executive Office of the President*, 90 F.3d 553, 557–58 (D.C. Cir. 1996); *Meyer v. Bush*, 981 F.2d 1288, 1292 (D.C. Cir. 1993).

<sup>172</sup> Pub. *Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989).

<sup>173</sup> *See id.* at 466–67.

<sup>174</sup> *Id.* at 448 (quoting *Wash. Legal Found. v. U.S. Dep't of Justice*, 691 F. Supp. 483, 496 (1988), *aff'd sub nom. Pub. Citizen*, 491 U.S. 440); *see id.* at 466–67. The D.C. Circuit has similarly relied on the avoidance doctrine to interpret FACA narrowly to exclude deliberations involving the President or his high-level advisors. *See In re Cheney*, 406 F.3d 723, 728–29 (D.C. Cir. 2005) (holding that nongovernmental employees qualify as de facto members of presidential advisory committees only if they are voting members, and then dismissing the case because neither Judicial Watch nor Sierra Club alleged that NEPDG included nonfederal voting members); *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 910–11 (D.C. Cir. 1999) (holding that the First Lady was a "federal employee" for purposes of FACA, and hence, the President's health care task force, which included only the First Lady and other federal employees, did not fall under FACA).

<sup>175</sup> The comparative timing and details of disclosure would also lead FACA to have a greater chilling effect than FOIA.

<sup>176</sup> 5 U.S.C. app. 2 § 10 (2000).

<sup>177</sup> *See* 5 U.S.C. § 552(a)(3)(A) (2000 & Supp. IV 2004).

<sup>178</sup> *See supra* notes 176–77 and accompanying text.

<sup>179</sup> 5 U.S.C. app. 2 § 10(a)(1).

minute-keeping requirement makes it far less likely that any particular statement or position will be unveiled.

*Form.* Finally, another feature of disclosure is its form. I refer here, in particular, to whether disclosure takes the form of live testimony or record production. Though form is not a meaningful dimension against which one can generally assess the greater likelihood of chill, the obviousness of its status as a distinguishing feature of disclosure in the presidential context, particularly in executive-congressional disputes, warrants its discussion here.

At first glance, one might argue that the prospect of live testimony about deliberations would have a greater chilling effect than would the expectation of producing records. Unlike records, live testimony risks the possibility of interactive, broad-ranging, and unforeseeable questions, and makes it more difficult for an administration, or any advisor, to control in advance what is disclosed. Whereas an advisor could herself attempt to decline to testify or even deny recalling matters, she has very little control over what other advisors will say. Though records are usually more difficult to dispute or to deny, and an advisor similarly has limited control over what records other advisors create or maintain, the centralized control of official records production by the President, and his ability to assert privileges prior to their disclosure, alleviate some of those concerns.

Although the prospect of live testimony likely causes greater fear among advisors about the possibilities of disclosing too much, and thereby leads them to refrain from speaking freely, the expectation of record production will chill deliberations in other ways. As numerous commentators have pointed out, the President's advisors, particularly those with immediate access to him, will continue to strive to give the President their best advice, but will take pains to ensure that there is no, or minimal, record of it.<sup>180</sup> Because complex and difficult deci-

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<sup>180</sup> See, e.g., Michael Beschloss, *Knowing What Really Happened*, 32 *PRESIDENTIAL STUD. Q.* 642, 644 (2002); David E. Rosenbaum, *How Washington Remembers, and Forgets*, N.Y. *TIMES*, Oct. 19, 1997, at D5; Michael Tackett, *President's Private Thoughts Can Now Too Easily Go Public*, *CHIC. TRIB.*, Feb. 10, 2002, at C1.

Of course this issue should not be overstated. Concerned first and foremost with providing the best advice, some advisors will nevertheless make records if not doing so would undermine their ability to make complex or difficult decisions. Cf. Elizabeth Thornburg, *Rethinking Work Product*, 77 *VA. L. REV.* 1515, 1530–31 (1991) (arguing that lawyers will nevertheless commit to writing their work product even if the work product doctrine were abolished). Presidential advisors may also pursue other means of avoiding disclosure. Recent reports suggest that advisors in the current Administration have pursued such an alternative route. See Tom Hamburger, *Rove, Others Were Warned to Save E-mails*, L.A. *TIMES*, Apr. 14, 2007, at A10 (deleting e-mails). Some White House advisors regularly used nongovernmental Republican National Committee

sions benefit from sustained and rigorous analysis, this avoidance of documentation can negatively affect presidential advisors' abilities to formulate the best advice. In other words, advisors will continue to speak frankly, but the anticipated disclosure will chill them from following processes to develop the best advice from the start. Accordingly, it is unclear whether anticipated disclosure through live testimony or document production causes a greater, or at least more significant, chilling effect.

### 3. Dissenters

Finally, contrary to commonsense assumptions, it is worth noting that, in some instances, the expectation of confidentiality actually inhibits full and frank advice. The candor-based justification for confidential presidential deliberations assumes that the promise of confidentiality encourages candor by assuring advisors freedom from public or outside scrutiny, hence encouraging them to analyze issues more fully and frankly.<sup>181</sup> Yet that assumption is not always valid. The impulse to moderate one's views comes from not only the public or outsiders. Even when they expect their communications to remain in confidence, advisors still feel pressure to adjust their expression. The pressures come not from those outside the deliberating group but from those within it.<sup>182</sup> The norms and characteristics of some groups discourage full and frank communications.<sup>183</sup> Although those norms affect speakers regardless of the expectation of confidentiality, studies suggest that the salience and influence of those norms are stronger in the absence of scrutiny from outsiders.<sup>184</sup>

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servers to send e-mails related to government policymaking. See Michael Abramowitz, *Rove E-Mail Sought by Congress May Be Missing: RNC Took Away His Access to Delete Files in 2005*, WASH. POST, Apr. 13, 2007, at A1. Congressional investigators allege that the advisors did so to avoid being required to make those e-mails available as official records. See *id.*

<sup>181</sup> See *United States v. Nixon (Nixon I)*, 418 U.S. 683, 705, 708 (1974); *supra* notes 28–29 and accompanying text.

<sup>182</sup> See S. Reicher & M. Levine, *Deindividuation, Power Relations Between Groups and the Expression of Social Identity: The Effects of Visibility to the Out-Group*, 33 BRIT. J. SOCIAL PSYCHOL. 145, 145–48 (1994) [hereinafter Reicher & Levine, *Power Relations*]; S. Reicher & M. Levine, *On the Consequences of Deindividuation Manipulations for the Strategic Communication of Self: Identifiability and the Presentation of Social Identity*, 24 EUR. J. SOCIAL PSYCHOL. 511, 512, 519–22 (1994); see also Karen M. Douglas & Craig McGarty, *Identifiability and Self-Presentation: Computer-Mediated Communication and Intergroup Interaction*, 40 BRIT. J. SOCIAL PSYCHOL. 399, 409 (2001) (noting that participants of a group “may feel more ‘pressured’ to adhere to the norms of their group because they are accountable for what they say”).

<sup>183</sup> See *supra* Part II.A.2.

<sup>184</sup> See Reicher & Levine, *Power Relations*, *supra* note 182, at 145–48.

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Put another way, the candor-based argument suggests that advisors act primarily as atomized individuals rather than as group members. It assumes that the veil of secrecy removes social pressures on advisors, freeing them to focus exclusively on the subjects under consideration. But because presidential advisors do not provide their advice anonymously, social pressures, albeit different ones, remain. The current social psychology literature on deindividuation theory, which analyzes the loss of individual identity in groups, reflects that distinction.<sup>185</sup> Although earlier “mob psychology” studies tended to assume that individuals, lost in the crowd and hence less likely to be observable to outsiders, shed all social inhibitions, later studies have refined that view, suggesting that individuals lose some inhibitions but gain others.<sup>186</sup> Individuals become less concerned about the thoughts and reactions from outside onlookers, but more interested in the judgments and responses from fellow group members.<sup>187</sup>

Studies and other accounts of presidential policymaking suggest that norms or practices discouraging candid advice are not uncommon. President Johnson, for example, created an atmosphere in which advisors felt reluctant to express any doubts or reservations about his policies.<sup>188</sup> President Reagan, too, wished to avoid receiving a bevy of competing views; he preferred instead that his advisors meet with one another and reach a consensus, or at least present a unified perspective, before counseling him.<sup>189</sup> During both the Eisenhower and Kennedy administrations, some senior-level advisors perceived their colleagues as trying to silence or exclude them from providing their views to the President.<sup>190</sup> In a number of recent insider accounts of the second Bush administration, former presidential advisors in a broad range of fields—from foreign affairs and national security to economic policy and faith-based programs—report that the President

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<sup>185</sup> *See id.*

<sup>186</sup> *See id.*

<sup>187</sup> *See id.* at 146 (“[W]e should not think of deindividuation, in the sense of ‘immersion’ in a group, as leading to identity loss and unconstrained behaviour. Instead it leads to social identification and conformity to in-group stereotypes.”).

<sup>188</sup> *See* David M. Barrett, *Secrecy and Openness in Lyndon Johnson’s White House: Political Style, Pluralism, and the Presidency*, 54 *REV. POL.* 72, 75–78 (1992) (discussing generally advisor complaints that President Johnson’s management style stifled dissent).

<sup>189</sup> *See* PAUL A. KOWERT, *GROUPTHINK OR DEADLOCK* 147–48 (2002).

<sup>190</sup> *See id.* at 71 (Eisenhower administration); NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* 137–39 (1991) (Kennedy administration).

and his innermost circle of advisors were uninterested in considering views or perspectives different from their own.<sup>191</sup>

That some presidential administrations have been less receptive to dissenting or competing views does not mean, of course, that an expectation of confidentiality thus inhibits the expression of such views. Indeed, most advisors who disagree during the course of the decision-making process will prefer to express their concerns discretely or in private, and hence the promise of confidentiality will help draw out their views. But, in some instances, particularly when advisors believe that the administration is hostile to contrary or divergent views, and thus conclude that raising them would be useless or ineffective, the expectation of confidentiality simply reinforces the judgment of futility. By contrast, anticipated disclosure makes speaking out seem more valuable or worthwhile.

Former Treasury Secretary Paul O'Neill's experiences are relevant here. He perceived President George W. Bush and other senior administration officials as hostile or indifferent to his views or any views that did not conform to the "party line."<sup>192</sup> Though he knew the President preferred to keep his policymaking discussions secret, O'Neill nonetheless shared his contrary views with the public in the belief that doing so was important and worthwhile.<sup>193</sup> Seeing the public, rather than his fellow advisors or the President, as more receptive to his ideas, he sought wide dissemination of his views. Of course, O'Neill chose on his own accord to speak to the public, or, in other words, he controlled the fact of disclosure. Yet the circumstances suggest that the prospect of public disclosure of his advice to the President outside his control, would not have generally inhibited his advice, but instead would have encouraged him to develop his views further so that he could make them as persuasively as possible.

Presidential advisors like O'Neill, who are unafraid of openly challenging or contradicting his fellow advisors or the President, are, of course, rare.<sup>194</sup> O'Neill spoke freely in large part, no doubt, because

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<sup>191</sup> See RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* 32, 244 (2004); DAVID KUO, *TEMPTING FAITH: AN INSIDE STORY OF POLITICAL SEDUCTION* 204, 239–40; RON SUSKIND, *THE ONE PERCENT DOCTRINE* 23, 26, 101 (2006); SUSKIND, *supra* note 148, at 117, 151–52, 165–66, 327.

<sup>192</sup> See SUSKIND, *supra* note 148, at 117, 151–53, 165–66, 327.

<sup>193</sup> See *id.* at 52, 206–09.

<sup>194</sup> Cf. John S. Koppel, Op-Ed., *Bush Justice Is a National Disgrace*, DENVER POST, July 5, 2007, at E2 (op-ed by career Department of Justice ("DOJ") attorney commenting on the inappropriate politicization of the DOJ); Eric Lichtblau, *President Asked Aide to Explore Iraq Link to 9/11*, N.Y. TIMES, Mar. 29, 2004, at A1 (former top counterterrorism advisor, Richard A.

he did not fear losing his job or alienating those around him. He could “speak truth to power,” he explained, because “I’m an old guy, and I’m rich. And there’s nothing they can do to hurt me.”<sup>195</sup> Nonetheless, because of the significance of publicly disclosed internal dissent for public opinion and presidential decision making,<sup>196</sup> the possibility that anticipated disclosure will encourage dissenting views ought not to be ignored.

### B. *Better Decisions*

The foregoing Part argued that the effect of anticipated disclosure on presidential deliberations varies significantly, depending mainly on the type of information discussed, the nature of the expected disclosure, and the speaker’s preferred audience. But even if we were to assume, in any given case, that the prospect of disclosure would have a significant chilling effect, the other assumption underlying the interest—that the resulting candid advice leads to better decisions—is also overstated. First, candid advice does not necessarily mean better advice, and, in some cases, less-than-candid advice leads to better decisions. Second, and relatedly, the emphasis on candid advice focuses myopically on candor to the exclusion of other effects of anticipated confidentiality on presidential decision making. The account presents an overly optimistic forecast of better decisions because it overlooks the adverse effects, unrelated to candor, of anticipated confidentiality on the decision-making process.

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Clarke, urging President to publicize his testimony and counterterrorism memoranda that he authored days before President took office). As compared to presidential appointees, career civil servants outside the White House are more likely to see the public, rather than their superiors, as sympathetic to their views, and welcome, after the fact, the prospect of mandatory disclosure. The recent stream of federal employees who have publicized discrepancies between policy recommendations by career civil servants and the ultimate decisions by political appointees supports this point. An employee from the Department of Health and Human Services, for example, testified at a congressional hearing that agency officials had disregarded and revised budget estimates that he had provided for a controversial Medicare proposal. *See* Stolberg, *supra* note 8, at A17. An individual involved in a DOJ decision leaked to reporters that senior officials had overruled a conclusion by department lawyers proposing that the Texas redistricting plan violated the Voting Rights Act, 42 U.S.C. §§ 1973 to 1973bb-1 (2000), and had approved the plan. *See* Dan Eggen, *Justice Staff Saw Texas Districting as Illegal: Voting Rights Finding on Map Pushed by DeLay Was Overruled*, WASH. POST, Dec. 2, 2005, at A1; Dan Eggen, *Politics Alleged in Voting Cases: Justice Officials Are Accused of Influence*, WASH. POST, Jan. 23, 2006, at A1; Nina Totenberg, *High Court Hears Texas Redistricting Case* (NPR Radio Broadcast, Mar. 1, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5239025>.

<sup>195</sup> SUSKIND, *supra* note 148, at 323.

<sup>196</sup> *See, e.g.*, Bart Barnes, *J.W. Fulbright, Outspoken Senator-Scholar, Dies*, WASH. POST, Feb. 10, 1995, at A1 (describing how Senator’s “stance helped mobilize widespread public dissent” against the Vietnam War).

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Of course, reasonable minds may differ on what constitutes “better” or “worse” decisions. The Supreme Court—and indeed most commentators on presidential secrecy—have provided little guidance on the issue. Here, I presume three basic criteria for assessing the quality of government decisions: (1) the extent to which decisions rest on relevant, accurate, and sufficient information; (2) the degree to which decisions reflect or incorporate the values of individual liberty, dignity, and the entitlement of all citizens to equal consideration and respect;<sup>197</sup> and (3) the extent to which the decisions serve the public interest, broadly understood.<sup>198</sup> Decisions serve the public interest when they ultimately privilege the collective well-being, rather than individual well-being alone. This analysis assumes that government decision makers ought, at a minimum, to take those considerations into account.

### *1. Preferred Less-Than-Candid Advice*

The candor-based justification for confidential deliberations assumes that if the President’s advisors feel free to provide candid advice, then that freedom will encourage better decisions. Advisors become less likely to withhold relevant considerations or to bring up unimportant ones simply to pander to the public. But candid advice also worsens decisions. This is because candid advice does not necessarily mean better or sound advice. As Christopher Griffin explained:

[F]rankness and candor are essentially psychological attributes about the motivational profile of the advisor. These attributes are separate from the facts that make an advisor’s counsel true, prudent or genuinely publicly beneficial. The psychological attributes indicate merely that the advisor is not moved by one consideration that might possibly induce the advisor to issue counsel falling short of the advisor’s best judgment.<sup>199</sup>

Yet that one consideration—a concern for appearances—might also induce advisors to give better counsel. In other words, less-than-

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<sup>197</sup> I rely here on values traditionally associated with liberal democratic societies.

<sup>198</sup> To be clear, I set forth these criteria to clarify the assumptions underlying my arguments that confidentiality, and the candor resulting from it, do not necessarily lead to better decisions. I neither offer a defense of these particular criteria, nor devote sustained analysis of whether particular presidential decisions meet them. Instead, I simply reference the criteria or rely on them implicitly when arguing that confidentiality and candor sometimes result in worse decisions. *See, e.g., infra* 231–32, 251–52 (explicit references to criteria); 233–34, 236, 238–39 (implicit reliance on criteria).

<sup>199</sup> Griffin, *supra* note 23, at 36.

candid counsel may sometimes be preferable to candid advice. It would have better served the public interest had some of President Nixon's advisors felt less free to recommend covering up the break-in to Democratic Party offices at the Watergate Hotel.<sup>200</sup> Similarly, it would have promoted the value of individual dignity had a concern for appearances led some of President George W. Bush's advisors to resist suggesting that the "war" against terrorism could justify prisoner interrogations involving "outrages upon personal dignity" or "inhuman treatment."<sup>201</sup>

Concededly, candid advice for the President rarely entails such extreme counsel. But less extreme situations also call for less-than-candid counsel. For instance, when presidential advisors, speaking frankly, use racially derogatory epithets or advocate positions based on racist stereotypes,<sup>202</sup> we—a polity committed to equal concern and respect for its citizens—would prefer the advisors to resist being candid.<sup>203</sup> Though one might counter that it would actually be valuable for advisors to reveal their genuine views and thus "out" themselves, that would be true only if we were confident that the advisors would suffer adverse consequences for their views. Although negative ramifications are highly likely for publicly disclosed racist views,<sup>204</sup>

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<sup>200</sup> See Stephen E. Ambrose, *Why Didn't Nixon Burn the Tapes and Other Questions About Watergate*, 18 NOVA L. REV. 1775, 1778 (1994); Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 650–52 (1997).

<sup>201</sup> See Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogations Under 18 U.S.C. §§ 2340–2340A, at 15 n.8, 19 (Aug. 1, 2002), available at <http://www.slate.com/features/whatistorture/pdfs/020801.pdf>. Some might argue that because the extreme prisoner interrogations served to protect against assaults on individual liberty and dignity by terrorists, the advice ultimately respected those values. See *id.* at 42–46. Yet, respect for individual dignity demands treating each person with a minimal level of basic concern, and would not permit sacrificing that concern to accord greater respect to others' interests.

<sup>202</sup> Cf. George Skelton, *Response to Governor's 'Hot' Tape Is Too Much*, L.A. TIMES, Sept. 11, 2006, at B3 (discussing the uproar over California Governor Schwarzenegger's private comments to his speechwriter stating that "they [Puerto Ricans or Cubans] are all very hot" because "they have . . . part of the [B]lack blood in them and part of the Latino blood in them").

<sup>203</sup> For an interesting discussion of social science findings indicating that many people hold latent racist assumptions of which they are unaware, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1506–14 (2005).

<sup>204</sup> See, e.g., Daryl Fears, *Civil Rights Leaders Widen Attack on GOP After Lott Exit: Groups Charge Senator's Actions Reflect Party's Agenda*, WASH. POST, Dec. 23, 2002, at A2 (public pressure forced Senate Majority Leader Trent Lott's resignation after praising Strom Thurmond, who had advocated racist views); Rong-Gong Lin II, *Kramer vs. Kramer Without Kramer: Michael Richards' Accusers Get Their Day in Mock Court as the Comedian Is 'Tried' for His N-word Outburst at an L.A. Comedy Club*, L.A. TIMES, Feb. 18, 2007, at B3 (strong public reaction against comedian for use of the term "nigger"); Lisa de Moraes, *Don Imus Is Punished with Two Weeks of Radio Silence*, WASH. POST, Apr. 10, 2007, at C1 (talk show host fired follow-

they are substantially less likely when stated in conversations, like many high-level presidential deliberations, that are private, face-to-face, and involve very few people.<sup>205</sup>

Furthermore, as Elster's concept of the "civilizing force of hypocrisy"<sup>206</sup> illustrates, there are affirmative reasons to prefer some false or insincere statements. Government officials routinely invoke the importance of the public good, even when they have little regard for it, and instead prioritize particular private interests.<sup>207</sup> Despite the purely strategic or self-interested nature of such appeals, Elster argues, the officials' emphasis on the public good is nonetheless desirable for matters of public policy.<sup>208</sup> The speaker's rhetoric might lead her to reevaluate and adjust her opinions on a matter.<sup>209</sup> Even if it does not, the articulation of the views nonetheless affects listeners. In other words, presidential advisors providing socially or politically desirable counsel have positive effects notwithstanding their lack of candor.

There are other, more mundane reasons why less-than-candid advice can be desirable. Candid counsel includes not only wise and worthwhile views, but foolish and worthless ones. Off-the-cuff statements, hunches, or contradictory views, frankly expressed, can be ill-conceived, irrelevant, or unnecessarily repetitive. In the buildup to the 2003 war with Iraq, for example, one former senior official reported that some high-level presidential advisors insisted repeatedly, despite the lack of any factual support for the claim, that Saddam Hussein was responsible for the terrorist acts of September 11, 2001.<sup>210</sup> In leading the President and his advisors to consider more—and sometimes poorly conceived or supported—ideas, candid counsel can render presidential decision making less efficient and less effective.<sup>211</sup> In addition, candor affects substance through tone. Advisors unconcerned with appearances outside the deliberative group are more likely to indulge in harsh rhetoric, with the effect of stifling speech by

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ing racist comments about the Rutgers women's basketball team); Skelton, *supra* note 202, at B3.

<sup>205</sup> See Kang, *supra* note 203, at 1586.

<sup>206</sup> See Elster, *Strategic Uses*, *supra* note 137, at 250 (emphasis omitted).

<sup>207</sup> See *id.* at 244–45.

<sup>208</sup> See *id.* at 250.

<sup>209</sup> See Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 103, 113 (Jon Elster & Aanund Hylland eds., 1986).

<sup>210</sup> See CLARKE, *supra* 191, at 30–33.

<sup>211</sup> To be clear, my point here is not that off-the-cuff statements, hunches, or contradictory views are generally undesirable. It is instead that such views are not necessarily better views, and in some cases, their consideration leads to worse decisions.

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other group members, thereby reducing the substantive quality of the discourse.<sup>212</sup>

Simply put, there is no necessary relationship between frank advice and better advice. The emphasis on candid advice rests on the premise that uninhibited deliberations ultimately lead to better outcomes. In that way, the candor-based justification for presidential confidentiality echoes a standard misconception advanced to justify the freedom of speech, the “marketplace of ideas” theory. On that theory, “truth will most likely surface when all opinions may freely be expressed, when there is an open and unregulated market for the trade in ideas.”<sup>213</sup> Yet, as Frederick Schauer has persuasively argued, that view rests on a mistaken assumption about the truth valence of the market.<sup>214</sup> In many domains, there is reason to doubt whether truth will be expressed, or whether it will prevail over falsity.<sup>215</sup> Similarly, in the context of presidential deliberations, there is reason to question whether, or to what extent, enabling advisors to speak candidly will improve the quality of decisions.

## 2. *Beyond Candor*

*Deliberations.* The emphasis on the role of confidentiality in engendering full and frank advice is misleading. The advice is full in the sense that advisors are willing to offer thorough and complete airings of their views—their full appraisals of matters. The argument that full and frank advice encourages better decisions also suggests that the advice is full, in a broader, objective sense. It implies that advisors provide comprehensive and exhaustive views of the matters under consideration. Yet studies on presidential decision making, as well as others on deliberation and decision making more generally, undercut that conception.<sup>216</sup> Though few studies focus directly on the impact of confidentiality on decision making,<sup>217</sup> their related findings, which I

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<sup>212</sup> See *infra* Part II.B.2.

<sup>213</sup> FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 16 (1982).

<sup>214</sup> See *id.* at 23.

<sup>215</sup> See *id.* at 21–23.

<sup>216</sup> See *infra* notes 217–19.

<sup>217</sup> In reviewing the literatures and consulting experts in a variety of fields, including psychology, sociology, political science, economics, small-group decision making, and business/management studies, I found little empirical research focusing directly on the impact of confidentiality on group decision making. In a recent review of the past forty-five years of empirical research on jury deliberations, for instance, not one study, of more than 200 reviewed, examined the impact or significance of confidentiality on jury decision making. See Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 *PSYCHOL., PUB. POL'Y, & L.* 622, 622–24 (2001) (reviewing variables of numerous jury decision-

discuss in this Part, suggest that confidentiality, and the expectation thereof, can also encourage deliberations that are substantially less thorough or complete. In other words, confidentiality can lead to “frank but less full” deliberations.

As others have suggested, maintaining the confidentiality of presidential deliberations contributes to “groupthink.”<sup>218</sup> Groupthink delineates a set of conditions and processes that leads groups toward an “extreme consensus-seeking” tendency and thereby interferes with critical thinking.<sup>219</sup> Though unintentional and unacknowledged, the tendency causes “a deterioration of mental efficiency, reality testing, and moral judgment.”<sup>220</sup> Decision-making groups most prone to groupthink include those that are “highly cohesive, insulated from experts, perform limited search and appraisal of information, operate under directed leadership, and experience conditions of high stress with low self-esteem and little hope of finding a better solution to a pressing problem than that favored by the leader or influential members.”<sup>221</sup> The initial proponent of groupthink theory, Irving Janis, as well as others, have applied it to explain, among other things, major presidential decision-making fiascoes, including the Bay of Pigs invasion, Watergate, and the failure to anticipate Pearl Harbor.<sup>222</sup>

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making studies, none of which discuss confidentiality). A recent study has, however, sought to study the impact of juror anonymity (i.e., nondisclosure of juror names and addresses to the parties or in public records) on decision making. See D. Lynn Hazelwood & John C. Brigham, *The Effects of Juror Anonymity on Jury Verdicts*, 22 L. & HUM. BEHAV. 695, 695–700 (1998).

<sup>218</sup> See, e.g., DEAN, *supra* note 25, at 188; ROZELL, *supra* note 23, at 13–14.

<sup>219</sup> See Marlene E. Turner & Anthony R. Pratkanis, *Twenty-Five Years of Groupthink Theory and Research: Lessons from the Evaluation of a Theory*, 73 ORG. BEHAV. & HUM. DECISION PROCESSES 105, 106 (1998). See generally IRVING L. JANIS, *GROUPTHINK* 7–9 (2d ed. 1982) [hereinafter JANIS, *GROUPTHINK*] (introducing the concept of “groupthink” before analyzing a number of foreign policy “fiascoes”); IRVING L. JANIS, *VICTIMS OF GROUPTHINK* 3–9 (1972) [hereinafter JANIS, *VICTIMS*] (same).

<sup>220</sup> See JANIS, *GROUPTHINK*, *supra* note 219, at 9.

<sup>221</sup> See Turner & Pratkanis, *supra* note 219, at 105–06.

<sup>222</sup> See JANIS, *VICTIMS*, *supra* note 219, at iv (discussing Roosevelt and the failure to prepare for the attack on Pearl Harbor; Truman and the invasion of North Korea; Kennedy and the Bay of Pigs invasion; and Johnson and the escalation of the Vietnam War); Turner & Pratkanis, *supra* note 219, at 107. Many scholars have theorized about or applied the groupthink model in case studies, but lab-based experimental research provides only varying support for the theory. See James K. Esser, *Alive and Well After 25 Years: A Review of Groupthink Research*, 73 ORG. BEHAVIOR & HUMAN DECISION PROCESSES 116, 133 (1998); Norbert L. Kerr & R. Scott Tindale, *Group Performance and Decision Making*, 55 ANN. REV. PSYCHOL. 623, 640 (2004). Some scholars have explained the limited support in part by pointing to the difficulty of reproducing the broad set of groupthink conditions in a single experiment. See Esser, *supra* at 139; Turner & Pratkanis, *supra* note 219, at 107–08. Consistent with the groupthink model, the existing research shows that “constructs that typically are seen as positive aspects of groups (cohesiveness,

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Isolating the President and his advisors from public scrutiny helps to induce groupthink conditions at the outset and to exacerbate consensus-seeking tendencies once established. With an expectation of confidentiality, advisors feel less pressure to consult outside information or individuals with a variety of perspectives. Confidentiality during deliberations forecloses outsiders from contributing to discussions or counteracting any tendencies towards groupthink. Maintaining confidentiality following the deliberations precludes outsiders from identifying when the President and his advisors have failed to consult experts or consider additional information, and from remedying any resulting deficiencies in analysis. As confidentiality renders advisors' contributions invisible to outsiders, but not to the President and his other advisors, internal consensus-seeking norms become more salient and forceful, while external, potentially critical self-reflective norms subside.<sup>223</sup>

The other ways in which confidentiality can impair the quality of presidential deliberations have received less attention. For example, studies have observed a phenomenon called "group polarization" (or "choice shifts"), in which "members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members' pre-deliberation tendencies."<sup>224</sup> Three factors tend to account for that phenomenon: reward, identification, and information.<sup>225</sup> The former two involve social influences: individuals follow the dominant view, seeking reward in terms of material benefits or reputation, or enhanced feelings of power and self esteem through identification.<sup>226</sup> The last factor refers to the quality of information

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collective efficacy, etc.) do not invariably lead to improved group outcomes." Kerr & Tindale, *supra* at 640.

<sup>223</sup> See *supra* notes 219–20 and accompanying text. To be clear, Part II.A.3 focuses on how confidentiality exacerbated the tendencies of individuals to conform to internal group norms and become less willing to speak candidly. By contrast, the discussion here recounts how confidentiality contributes to groupthink processes and thereby affects critical thinking. In other words, the point here is not that individuals become unwilling to speak frankly, but instead that the content of their contributions become diminished.

<sup>224</sup> Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175, 176 (2002) [hereinafter Sunstein, *Group Polarization*]; see Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 85 (2000) [hereinafter Sunstein, *Deliberative Trouble*].

<sup>225</sup> See Sara M. Baker & Richard E. Petty, *Majority and Minority Influence: Source-Position Imbalance as a Determinant of Message Scrutiny*, 67 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1994). In addition, Sunstein points to two factors, collapsing reward and identification into the single category of "social comparison." See Sunstein, *Group Polarization*, *supra* note 224, at 179.

<sup>226</sup> See Baker & Petty, *supra* note 225, at 5–6 (citing, inter alia, GABRIEL MUGNY & JUAN A. PÉREZ, *THE SOCIAL PSYCHOLOGY OF MINORITY INFLUENCE* 4 (Vivian Waltz Lamongie trans., 1991); Herbert C. Kelman, *Compliance, Identification, and Internalization: Three*

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available to deliberators and, in particular, the limited “argument pools” within any group.<sup>227</sup>

The President and his inner circle of advisors are at high risk of group polarization. Selected in large part because of their affinities with, or loyalties to, the President's views and positions, the advisors are prone to a convergence or homogeneity in outlooks or perspectives. In light of that homogeneity, for reasons similar to those in the groupthink context, confidentiality, and the anticipation thereof, increases the likelihood and extent of group polarization.<sup>228</sup> Advisors become more sensitive and responsive to internal group norms, and thus more apt to agree with the dominant view and move to a more extreme position.<sup>229</sup> Further, insulated from outside observation or interference, the already homogeneous advisors feel greater freedom to forego seeking additional information or including outsiders in their deliberations;<sup>230</sup> the argument pools thereby become even narrower or more limited.<sup>231</sup> To be clear, the point here is not that confidentiality itself causes group polarization. When deliberants espouse diverse perspectives, deliberating groups are less likely to experience extreme polarization. That is true regardless of whether the group deliberates openly or in secret. The point is instead that when the President and his advisors, who are already likely to have similar perspectives, anticipate their deliberations to remain confidential, they likely become even more apt to follow the group consensus and to avoid including, as part of their deliberations, those with outsider or dissenting views.

Cognitive studies on the impact of accountability on decision making suggest another way in which confidentiality can harm deliberations. According to these studies, when individuals know in advance that they will be called on to justify their decisions, especially to audiences with views that are unknown, individuals spend more cognitive resources in decision making.<sup>232</sup> They are more inclined to engage

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*Processes of Attitude Change*, 2 J. CONFLICT RESOL. 51, 53 (1958); John M. Levine & Candice J. Ranelli, *Majority Reaction to Shifting and Stable Attitudinal Deviates*, 8 EUR. J. SOC. PSYCHOL. 55, 65 (1978); Serge Moscovici, *Toward a Theory of Conversion Behavior*, in 13 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 209–39 (Leonard Berkowitz ed., 1980)).

<sup>227</sup> See Baker & Petty, *supra* note 225, at 5.

<sup>228</sup> See *supra* notes 224–27 and accompanying text.

<sup>229</sup> See Sunstein, *Deliberative Trouble*, *supra* note 224, at 74–75.

<sup>230</sup> See Bok, *supra* note 115, at 25–26.

<sup>231</sup> See *id.* at 85–96 (stressing the tendency of homogeneity to exacerbate group polarization, but not focusing on the significance of confidentiality *per se*).

<sup>232</sup> See Andrew Quinn & Barry R. Schlenker, *Can Accountability Produce Independence? Goals as Determinants of the Impact of Accountability on Conformity*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 472, 473 (2002); Philip E. Tetlock et al., *Social and Cognitive Strategies for*

in a thorough and sustained analysis of a problem rather than to rely on simple cues or heuristics.<sup>233</sup> Most of these studies focus on individual rather than group decision making,<sup>234</sup> and so the relevance of their findings for group deliberations is unclear. Yet because confidentiality tends to diminish individual accountability in favor of collective accountability for publicly announced decisions, advisors anticipating confidentiality can reasonably be expected to expend less cognitive effort in their deliberations.<sup>235</sup>

One of the few studies examining the impact of accountability on group decision making supports this reasoning.<sup>236</sup> There, researchers examined the relationship between accountability, defined as a pre-decisional expectation by individuals to have to give reasons for their group decision, and groupthink.<sup>237</sup> The researchers analyzed three decision-making conditions: individual accountability, collective accountability, and no accountability.<sup>238</sup> The researchers found that collective accountability protected against groupthink more than no accountability, and that individual accountability provided the great-

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*Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCHOL. 632, 632–33 (1989); see also Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 257 (1999) [hereinafter Lerner & Tetlock, *Accounting*] (noting that “simple conformity is not an option” for an individual when the audience’s views are unknown); Jennifer S. Lerner & Philip E. Tetlock, *Bridging Individual, Interpersonal, and Institutional Approaches to Judgment and Decision Making: The Impact of Accountability on Cognitive Bias*, in EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH 431, 438 (Sandra L. Schneider & James Shanteau eds., 2003) [hereinafter Lerner & Tetlock, *Bridging*] (proposing that accountability leads individuals to increase their “cognitive effort”).

<sup>233</sup> See Tetlock, *supra* note 232, at 638–39. In some cases, the additional efforts to analyze a problem may hinder, rather than improve, judgment and decision making. As one study found, accountability may motivate individuals to over-interpret meager evidence, or, in other words, to overvalue information irrelevant to a problem. See Philip E. Tetlock & Richard Boettger, *Accountability: A Social Magnifier of the Dilution Effect*, 57 J. PERS. & SOC. PSYCHOL. 388, 397 (1989). But see Lerner & Tetlock, *Bridging*, *supra* note 232, at 438 (finding that an individual’s “increased cognitive effort” decreases his or her “susceptibility to a host of common biases” such as oversensitivity to the order of information).

<sup>234</sup> See Marceline B. R. Kroon et al., *Group Versus Individual Decision Making: Effects of Accountability and Gender on Groupthink*, 23 SMALL GROUP RES. 427, 428–29 (1992). See generally Lerner & Tetlock, *Accounting*, *supra* note 232 (reviewing research on individual accountability); Lerner & Tetlock, *Bridging*, *supra* note 232 (same). A few studies examine the impact of accountability on groups. See, e.g., Dennis D. Stewart et al., *Accountability and the Discussion of Unshared, Critical Information in Decision-Making Groups*, in 2 GROUP DYNAMICS: THEORY, RESEARCH & PRACTICE 18, 19–20 (Donelson R. Forsyth ed., 1998); Kroon, *supra*, at 428–29.

<sup>235</sup> See Marceline B. R. Kroon et al., *Managing Group Decision Making Processes: Individual Versus Collective Accountability and Groupthink*, 2 INT’L J. CONFLICT MGMT. 91, 111 (1991).

<sup>236</sup> See *id.* at 105–11.

<sup>237</sup> See *id.* at 100–01.

<sup>238</sup> *Id.* at 101.

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est protection.<sup>239</sup> In other words, when members of a group can hide behind the collective—a possibility enhanced by maintaining confidentiality—groups are more likely to engage in groupthink decision making, and the quality of deliberations thus suffers.

*Decision making.* Finally, even if maintaining confidentiality encourages candor and enhances the quality of deliberations, it risks worsening presidential decisions in another way. It reduces the President's incentives to follow the advice that all might agree best serves the public interest. When the President announces a policy but declines to disclose the deliberations leading to it, individuals and interest groups can evaluate the policy on its own terms, of course. They cannot assess, however, the options or alternatives that the President or his advisors considered and passed over. Although they can identify their own alternatives, the cost or difficulty of accessing information and undertaking analyses makes that option less efficient and probably less effective.<sup>240</sup> Public scrutiny of the underlying policy deliberations forces decision makers to explain or justify their choices of one policy over others. Put another way, public scrutiny pressures decision makers to choose the best, or at least the most justifiable, of available options.

Elizabeth Garrett and Adrian Vermeule identify an important factor that minimizes the risk that confidentiality will lead decision makers to privilege their narrow self-interest over the public good.<sup>241</sup> Focusing on the congressional budget process, they make the obvious point that legislators cannot make decisions favoring their own interests when they cannot identify those decisions: “the less information legislators have about how decisions will affect their interests, the less self-interested bargaining is possible in any event.”<sup>242</sup> Less obviously, Garrett and Vermeule point to decision making at the initial stage of overall budget allocation as an instance when congressional legislators

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<sup>239</sup> See *id.* at 109–11. An earlier study, co-authored by one of the same co-authors of the study discussed above (David van Kreveld), did not find support for the hypothesis that individual accountability would reduce groupthink tendencies more than would collective accountability. See Kroon, *supra* note 234, at 450.

<sup>240</sup> Beyond wishing to know the best alternative, the public has a distinct interest in discovering what information presidential advisors sought and which issues they actually knew or contemplated. In other words, the public has an interest in understanding the President's decision-making processes.

<sup>241</sup> See Elizabeth Garrett & Adrian Vermeule, *Transparency in the Budget Process* 10 (Univ. S. Cal. Ctr. in Law, Econ. & Org., Working Paper No. CO6-2, 2006), available at <http://ssrn.com/abstract=877951>.

<sup>242</sup> *Id.*

operate under a “partial veil of uncertainty.”<sup>243</sup> When Congress allocates overall spending levels across budget categories or functions, Garrett and Vermeule explain, “it is simply unclear what particular programs and appropriations will emerge from the later stages of the budget process, and hence unclear exactly how legislators’ interests will be affected by large-scale choices.”<sup>244</sup>

In the process of presidential decision making, there are few moments of uncertainty that serve to check the President and his advisors from privileging the President’s self-interest. Except in situations when the President must respond with extraordinary haste to an unforeseen circumstance, the President and his advisors, aided in part by sophisticated modern political polling, can determine in advance which courses of action (or which ways of presenting a course of action) will inure to his political self-interest.<sup>245</sup> Also, because the President retains exclusive control over executive policy choices, there is no comparable stage of initial decision making when the President operates under a “partial veil of uncertainty.”<sup>246</sup> His initial choices will not necessarily constrain his later ones, as he remains free for the most part to adjust or revise his policies in light of changing information or circumstances.<sup>247</sup> Accordingly, a significant check on secret self-interested policymaking applicable to some stages of congressional decision making, is absent in presidential decision making.

To recap, this Part clarified the limits of the argument that maintaining the confidentiality of presidential deliberations is necessary to encourage candid advice and thereby improve the quality of presidential decisions. The need for confidentiality to elicit candor cannot casually be assumed; whether, or to what extent, anticipated disclosure will chill advisors varies substantially, depending on a range of factors.

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<sup>243</sup> See *id.* at 10, 13–14.

<sup>244</sup> *Id.* at 13.

<sup>245</sup> See Diane J. Heith, *Staffing the White House Public Opinion Apparatus: 1969–1988*, 62 *PUB. OPINION Q.* 165, 186–87 (1998). See generally DOUGLAS C. FOYLE, *COUNTING THE PUBLIC IN: PRESIDENTS, PUBLIC OPINION, AND FOREIGN POLICY* (1999) (asserting that both a President’s understanding of the proper function public opinion should have on foreign policymaking as well as the decision-making context govern his reaction to public opinion); DIANE J. HEITH, *POLLING TO GOVERN: PUBLIC OPINION AND PRESIDENTIAL LEADERSHIP* (2004) (arguing that polling affects presidential messages and responses, but often to a lesser degree than the public imagines); LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, *POLITICIANS DON’T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS* (2000) (arguing that polls influence efforts to sell policies but not the policies themselves).

<sup>246</sup> Cf. *supra* note 243 and accompanying text.

<sup>247</sup> See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 *J.L. ECON. & ORG.* 132, 138, 144 (1999).

For example, advisors will more likely refrain from discussing some types of information than other kinds.<sup>248</sup> Also, the specific nature of the sought-after disclosure, considering, for example, its timing, the level of detail called for, the expected audience, and the certainty that the disclosure will occur, will affect the degree of chilling.<sup>249</sup> In addition, some advisors—dissenters who are convinced that the administration is unwilling to consider alternative viewpoints, and are unafraid of speaking out publicly—will be more likely to speak candidly if they anticipate disclosure.<sup>250</sup>

Nor can better decisions be confidently predicted. Candid advice does not necessarily mean better advice. There are often times when we might prefer that advisors resist being candid—when, for example, they recommend blatantly illegal conduct that clearly conflicts with our polity's fundamental commitments, or when they insincerely, though desirably, stress the importance of the public good.<sup>251</sup> In addition, confidentiality has adverse effects, unrelated to candor, on presidential decision making. Confidentiality exacerbates the potential that presidential deliberations will exhibit groupthink and group polarization.<sup>252</sup> In diminishing individual accountability, confidentiality also encourages individuals to spend less cognitive resources in decision making.<sup>253</sup> Furthermore, even when it does not impair the quality of advice given to the President, confidentiality nonetheless risks worsening decisions by withholding the considered alternatives from the public and thus reducing the President's incentives to follow what all might agree is the best advice.<sup>254</sup>

To be clear, my point here is not that confidentiality (and the candor it engenders) leads to worse presidential decisions than would be the case absent confidentiality—indeed, much as there are situations involving confidentiality and bad presidential decisions, there are also identifiable instances characterized by confidentiality and good presidential decisions.<sup>255</sup> Although it would be ideal if we could determine with reasonable certainty confidentiality's overall impact on presidential decision quality, that assessment is elusive, at least at

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<sup>248</sup> *See supra* Part II.A.1.

<sup>249</sup> *See supra* Part II.A.2.

<sup>250</sup> *See supra* Part II.A.3.

<sup>251</sup> *See supra* Part II.B.1.

<sup>252</sup> *See supra* Part II.B.2.

<sup>253</sup> *See supra* Part II.B.2.

<sup>254</sup> *See supra* Part II.B.2.

<sup>255</sup> *See, e.g.,* JANIS, GROUPTHINK, *supra* note 219, at 132–58 (discussing the Cuban Missile Crisis).

the moment. One could not satisfactorily investigate that question through analyzing past presidential decisions alone, in part because of the absence of conditions allowing one to isolate confidentiality's causal impact on presidential decision making (which is influenced, of course, by a broad range of factors). The broader social science literature, moreover, has rarely focused on the impact of confidentiality on decision making.<sup>256</sup>

My claim here instead is that it is simply unclear whether, or to what extent, confidentiality leads to better presidential decisions. In light of related social science findings concerning groupthink, group polarization, and individual versus collective accountability, on the one hand, and the structural features of presidential decision making—including the centralization of presidential decision making in a single individual, the hierarchical organization of the President and his advisors, and the President's discretion to select only advisors that share his views—on the other, there is a substantial basis to question whether confidentiality usually encourages better presidential decisions. Put another way, my point is that we ought not to accept too hastily the conventional wisdom—embraced by courts and legal commentators—that maintaining confidentiality is generally needed to ensure full and frank deliberations, which, in turn, improve the presidential decision-making process.

### *III. Differentiating Confidentiality Claims*

#### *A. The Differentiation Approach*

Having explained the limits of the candor-based justification for maintaining confidential presidential deliberations, this Part now turns to the legal implications of that analysis. Returning to the constitutional standards discussed in Part I, this Part argues for reinstating a nuanced analysis of the President's confidentiality interest akin to that embodied in (though not clearly required by) the *Nixon* cases and rejecting the unquestioning approach of *Cheney*. In other words, this Part argues against a constitutional approach that simply assumes the substantiality of a generalized or undifferentiated interest in confidential presidential deliberations, and in favor of an approach that demands differentiating among confidentiality claims, depending on the specific disclosures sought.

The varying need for confidentiality to encourage candor, and the lack of clarity about the net impact of confidentiality-induced candor

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<sup>256</sup> See *supra* note 217.

on presidential decision making, does not, of course, inexorably lead to the conclusion that the President's assertion of his confidentiality interest should, as a matter of constitutional law, invite careful scrutiny.<sup>257</sup> One might argue that, notwithstanding the uncertainty about the overall effect of confidentiality, the President's determinations on when and whether confidentiality is needed to improve his administration's decision-making process, deserve great deference. On this view, the President's unique and important responsibilities constitutionally assigned to him as the head of the executive branch, in combination with our powerful intuition that confidentiality improves the quality of deliberations and decision making, counsel in favor of assuming the substantiality of the President's undifferentiated interest.

Yet competing, deeply held constitutional and democratic values and the President's special status also counsel against that assumption. As mentioned above, withholding information about governmental decision making conflicts with our basic commitments to democratic accountability, public trust and confidence in government, civic engagement, and public understanding of our political processes.<sup>258</sup> In light of the President's singular status as the nation's representative and the tremendous public attention focused on him, denying details about his decision-making processes impairs those values in especially significant ways. In arguing that the constitutional weight accorded the President's confidentiality interest should depend on a context-specific analysis of that interest, I advocate a middle ground position, taking seriously both the public interest in effective presidential decision making and the public interest in transparent political processes.

Differentiating the President's confidentiality interest would not resolve the question of disclosure in any given case. It leaves in place, for the most part, the traditional balancing of the interests in confidentiality against those in disclosure. It simply demands, as a part of that balancing, a searching review of the extent of the President's confidentiality interest in the dispute at issue. In counseling against deference to the mere invocation of the President's generalized confidentiality interest, this approach departs from the existing constitutional regime ushered in by *Cheney*,<sup>259</sup> and reinstates the spirit of

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<sup>257</sup> I deliberately avoid using the term "heightened scrutiny" here because I do not mean to suggest a form of review, akin to those in the constitutional equal protection and fundamental rights contexts, that is generally skeptical of the asserted interests. I argue that courts should discern the particularity of the President's interest.

<sup>258</sup> See *supra* Part II.B.

<sup>259</sup> See *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 383–92 (2004).

the *Nixon* cases.<sup>260</sup> Though *Nixon I* explicitly recognized a presumptive privilege for presidential communications, neither *Nixon I* nor *Nixon II* straightforwardly assumed that the sought-after disclosure would impair the confidentiality interest.<sup>261</sup> Instead, as discussed above, *Nixon I*, to a limited extent, and *Nixon II*, even more, examined the nature of the proposed disclosure to assess the likelihood of threat to the interest.<sup>262</sup> In other words, the *Nixon* cases did not equate the presumption of a privilege for presidential communications with a presumption that any disclosure would impair the confidentiality interest.

The differentiation approach focuses only on the appropriate weight afforded the President's interest in the balancing analysis. The approach thus does not call for abandoning the presumption in favor of presidential confidentiality. Consistent with current case law, only after the party seeking disclosure establishes that its need for information outweighs the President's confidentiality interest would disclosure be required. Nor does the approach suggest according more weight to the asserted need for information. The differentiation approach leaves the assessment of the need for information unaffected.<sup>263</sup> Because differentiating the President's confidentiality interest will sometimes, though certainly not always,<sup>264</sup> result in a finding that his interest is insubstantial (e.g., when the proposed disclosure poses minimal risk of chilling), the analysis clearly diverges from that in *Cheney*. But, while *Cheney*-inspired balancing operates on a baseline assumption that the President's confidentiality interest is substantial,<sup>265</sup> differentiation-informed balancing does not rest on the opposite assumption that the interest is insubstantial. Rather, the latter assumes that, once a party seeking information has shown a legitimate need for it, much as that party must describe the need with particularity, so too must the President explain with specificity his need for confidentiality.

Though largely consistent with the spirit of the *Nixon* cases, the differentiation approach goes beyond their analyses in at least two

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<sup>260</sup> See *Nixon v. Adm'r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 446–55 (1977); *United States v. Nixon (Nixon I)*, 418 U.S. 683, 705–16 (1974).

<sup>261</sup> See *Nixon II*, 433 U.S. at 446–55; *Nixon I*, 418 U.S. at 705–16.

<sup>262</sup> See *supra* Part I.A.

<sup>263</sup> As I make clear below, the differentiation approach's applicability extends beyond litigation contexts. See *infra* Part III.B.

<sup>264</sup> I discuss below an instance where following the differentiation approach would lead to a finding that the President has an especially strong interest in confidentiality. See *infra* Part III.C.

<sup>265</sup> See *supra* note 89 and accompanying text.

ways. First, it makes explicit the need to assess the President's interest. Though that distinction might seem minor, it is significant in light of subsequent interpretations, or applications, of the *Nixon* cases. In balancing the competing interests, *Nixon I* focused largely on the compelling need for evidence in criminal cases, and mentioned only in passing that the anticipated disclosure there would have little chill on presidential advisors.<sup>266</sup> Though *Nixon II* analyzed, with more specificity, the confidentiality side of the balancing equation,<sup>267</sup> courts and other legal actors applying the *Nixon* balancing have largely overlooked that fact.<sup>268</sup>

There have been only a few lower court cases in which a court has balanced the President's need for confidential high-level deliberations against the interest in disclosure.<sup>269</sup> Yet in those cases that have—except in one case involving then-former President Nixon's challenges to regulations implementing the Presidential Recordings and Materials Preservation Act,<sup>270</sup> the same statute challenged in *Nixon II*—the courts have not analyzed with specificity the extent of the President's confidentiality interest.<sup>271</sup> Most courts have simply noted that the President has a presumptive interest in maintaining the confidentiality of his deliberations with his high-level advisors and then focused on the extent of the need for disclosure.<sup>272</sup> Like *Cheney*, the courts applying *Nixon* balancing have largely assumed a static interest in confidentiality but a varying need for disclosure. Admittedly, in two cases, *Dellums v. Powell*<sup>273</sup> and *Sun Oil Co. v. United States*,<sup>274</sup> the courts noted the point suggested in *Nixon II* that a former President's claim of privilege, in light of the passage of time, has less significance than does an incumbent President's. But neither case analyzed the confidentiality interest any further. In *Dellums*, for example, the court did

<sup>266</sup> See *United States v. Nixon (Nixon I)*, 418 U.S. 683, 711–13 (1974).

<sup>267</sup> See *Nixon v. Adm'r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 450–55 (1977).

<sup>268</sup> See *infra* notes 269–84 and accompanying text.

<sup>269</sup> The cases that have applied *Nixon* balancing include *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir. 1982), *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977), *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998), *aff'd in part, rev'd in part sub nom. In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), *Dellums v. Powell*, 70 F.R.D. 648 (D.D.C. 1976), *aff'd in part, rev'd in part*, 561 F.2d 242 (D.C. Cir. 1977), and *Sun Oil Co. v. United States*, 514 F.2d 1020 (Ct. Cl. 1975).

<sup>270</sup> See *Freeman*, 670 F.2d at 347–48, 355–56.

<sup>271</sup> See *In re Sealed Case*, 121 F.3d at 741–61; *Dellums*, 561 F.2d at 246–48; *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 25–29; *Dellums*, 70 F.R.D. at 648–51; *Sun Oil Co.*, 514 F.2d at 1024.

<sup>272</sup> See *In re Sealed Case*, 121 F.3d at 741–61; *Dellums*, 561 F.2d at 246–48; *In re Grand Jury Proceedings*, 5 F. Supp. 2d at 25–29; *Dellums*, 70 F.R.D. at 648–51; *Sun Oil Co.*, 514 F.2d at 1024.

<sup>273</sup> *Dellums v. Powell*, 561 F.2d 242, 247–48 (D.C. Cir. 1977).

<sup>274</sup> *Sun Oil Co. v. United States*, 514 F.2d 1020, 1024 (Ct. Cl. 1975).

not consider whether the President's confidentiality interest might deserve more weight there than in *Nixon I*, because the disclosure contemplated in *Dellums*—directly to a party in civil litigation—would likely have a greater chilling effect than would the disclosure for in camera judicial review in *Nixon I*.<sup>275</sup>

Though few court opinions have applied the *Nixon* balancing analysis, many opinions of the Department of Justice's Office of Legal Counsel ("OLC") have done so.<sup>276</sup> On numerous occasions, the President or his high-level advisors have sought OLC's advice on the President's authority to resist sought-after disclosures. Like the courts, OLC has consistently interpreted *Nixon* balancing to require an assessment of only the need for disclosure and not the President's confidentiality interest. In undertaking *Nixon* balancing, OLC opinions routinely analyze the specific need for disclosure in the dispute at issue while treating the President's confidentiality interest only mechanically, simply quoting *Nixon I*'s statements about the President's need for candor.<sup>277</sup>

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<sup>275</sup> In holding that the plaintiffs in *Dellums* had demonstrated a specific need for disclosure sufficient to overcome the President's presumptive privilege, the *Dellums* court counseled that disclosure ought not be made to the public, but instead "should be restricted to counsel, unless and until the documents are made part of the public trial record." See *Dellums*, 561 F.2d at 249. The court did not, however, suggest that the availability of that option diminished the strength of the President's confidentiality interest in that case. See *id.* at 245–48.

<sup>276</sup> See, e.g., Memorandum from Janet Reno, Att'y Gen., Re: Assertion of Executive Privilege with Respect to Clemency Decision (Sept. 16, 1999), available at 1999 WL 33490208; Memorandum from Janet Reno, Att'y Gen., Re: Assertion of Executive Privilege for Memorandum to the President Concerning Efforts to Combat Drug Trafficking (Sept. 30, 1996), available at 1996 WL 33680443; Memorandum from Janet Reno, Att'y Gen., Re: Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti (Sept. 20, 1996), available at 1996 WL 34386606; Memorandum from Janet Reno, Att'y Gen., Re: Assertion of Executive Privilege Regarding White House Counsel's Office Documents (May 23, 1996), available at 1996 WL 34386607; Congressional Requests for Confidential Executive Branch Information, 13 Op. Off. Legal Counsel 153, 154–61 (1989); Investigative Authority of the General Accounting Office, 12 Op. Off. Legal Counsel 171, 176–80 (1988); Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. Off. Legal Counsel 481, 484–90 (1982); Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. Off. Legal Counsel 27, 29–32 (1981).

<sup>277</sup> OLC has implicitly acknowledged that the strength of the President's confidentiality interest varies. For example, in concluding that the President could, consistent with *Nixon I*, assert executive privilege against Congress, OLC reasoned that "[t]he possibility that deliberations will be disclosed to Congress [rather than to a court] is, if anything, more likely to chill internal debate among executive branch advisers." See 13 Op. Off. Legal Counsel at 156. Yet OLC did not suggest that the President's interest in withholding information from Congress, as opposed to the courts, thus deserves more weight under the *Nixon* balancing analysis. See *id.* at 156–57.

OLC's discussion of the D.C. Circuit's position on the President's and Congress's constitutional obligations in information disputes to negotiate and accommodate each other's legitimate needs is particularly illustrative here.<sup>278</sup> In a memorandum summarizing the principles governing congressional requests for confidential executive branch information, OLC explained that the accommodation process "requires that each branch explain to the other why it believes its needs to be legitimate."<sup>279</sup> "The duty of *Congress*" to explain, OLC added, "is established in the case law as well."<sup>280</sup> In the case law, according to OLC, a dispute's resolution turns on the strength of Congress's need for the sought-after information.<sup>281</sup> Implicit in OLC's discussion is the understanding that the case law requires no explanation, and hence no assessment, of the extent of the President's need for confidentiality.

Second, the differentiation approach moves beyond the *Nixon* cases in calling for a more sustained analysis, both in degree and in kind, of the President's confidentiality interest. *Nixon I* mentioned only fleetingly that requiring disclosure there would have little chill on presidential advisors.<sup>282</sup> Though *Nixon II* analyzed the alleged interference with the confidentiality interest in more detail, the Court nonetheless considered only a few factors—the timing of the disclosure and its intended audience—and confined its analysis of the interest to the chilling effect component.<sup>283</sup> By contrast, the differentiation approach calls for analyzing a broader range of factors (e.g., type of information and level of detail) to assess the likelihood of chill, and for considering the ways distinct from chilling in which disclosure would affect the quality of decisions.<sup>284</sup>

The dispute discussed above, between the GAO and the Vice President concerning the identities of non-federal participants in the energy task force meetings, illustrates this difference.<sup>285</sup> Following either the differentiation or *Nixon* approach, a court would accord weight to the Vice President's claim of interference with the Presi-

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<sup>278</sup> See *id.* at 157–59, which quotes the D.C. Circuit's opinion in *United States v. AT&T*, 567 F.2d 121, 127, 130 (D.C. Cir. 1977).

<sup>279</sup> See 13 Op. Off. Legal Counsel at 159.

<sup>280</sup> See *id.* (emphasis added).

<sup>281</sup> See *id.*

<sup>282</sup> See *United States v. Nixon (Nixon I)*, 418 U.S. 683, 711–13 (1974).

<sup>283</sup> See *Nixon v. Adm'r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 450–55 (1977).

<sup>284</sup> The differentiation approach is not at odds with the *Nixon* cases; it simply raises issues that the *Nixon* cases did not have occasion to decide.

<sup>285</sup> See *Walker v. Cheney*, 230 F. Supp. 2d 51, 55–57 (D.D.C. 2002).

dent's confidentiality interest because (1) the information concerned the incumbent President's policymaking; and (2) the threat of GAO, as opposed to criminal, inquiries was a continuing one.<sup>286</sup> A court would then discount that claim, however, because (1) had the President asserted executive privilege, a court could have reviewed the materials in camera before any disclosures to the GAO;<sup>287</sup> and (2) disclosing the participants' identities would have revealed limited information about deliberation content and thus would not have as great a chilling effect as, for example, releasing meeting transcripts.

Under the differentiation approach, a court would additionally inquire into whether there were any reasons, beyond a general concern for appearances, for the President to have feared disclosing the non-federal participants' identities. Had the Vice President alleged (in camera), as imagined above, that the task force met with foreign diplomats, but that the President wished to avoid revealing their identities for fear of damaging relations with interested nations that had not been consulted, then a court would defer to the President and conclude that there was a strong interest in withholding those diplomats' names. By contrast, had the Vice President simply made the blanket assertion that disclosure chills the President's ability to receive candid advice, a court would not accord much weight to the President's confidentiality interest.

Furthermore, under the differentiation approach, the particular significance of disclosing the non-federal participants' identities for the quality of presidential decision making would be relevant. Ensuring the heterogeneity of participants—or as Simone Chambers has nicely put it, “reproducing the pluralism of the public in private”<sup>288</sup>—provides a unique means of preserving confidentiality while counteracting its tendency to encourage bad decisions. Including deliberants with diverse interests and perspectives reduces the risk of reaching decisions based on irrelevant, inaccurate, or insufficient information (due to groupthink or group polarization), and decreases the likelihood of decisions that privilege narrow, private concerns over the public interest.<sup>289</sup> Recognizing that public scrutiny of the task force's

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<sup>286</sup> See *id.* at 53–58.

<sup>287</sup> See *Nixon I*, 418 U.S. at 706 (discussing in camera review).

<sup>288</sup> Simone Chambers, *Behind Closed Doors: Publicity, Secrecy, and the Quality of Deliberation*, 12 J. POL. PHIL. 389, 408 (2004).

<sup>289</sup> Also, the fewer the parties involved in deliberations, the higher the risk of illegality. Advisors become more likely to suggest unlawful conduct, and the President becomes more inclined to sanction it. However, because there are also strong reasons favoring presidential deliberations involving very few advisors, such as the need for quick decision making or for a

outside contacts would have pressured it to consult with a broad array of interest groups,<sup>290</sup> a court following the differentiation approach would view with some skepticism the Vice President's claim that maintaining confidentiality there improved presidential decision making. The court would thus accord less weight to the President's interest in that case.

### *B. Objections*

The differentiation approach invites three sets of objections. This Part discusses each set in turn.

#### *1. Executive Prerogative and the Role of the Courts*

Some might argue that the differentiation approach violates separation-of-powers principles because it calls for too great an incursion into presidential confidentiality. On that view, in requiring the President to establish the substantiality of his interest, the differentiation approach forces the President to divulge too much information. Yet, when the President asserts executive privilege based on an undifferentiated interest in confidentiality, courts may already inspect the disputed materials *in camera*.<sup>291</sup> The President may submit explanatory

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close hold of highly sensitive information, there should not be a presumption against small decision-making groups.

<sup>290</sup> In some cases, outside scrutiny leads agents to resist consulting a broad range of groups for fear of angering their principals. Along those lines, some officials feel greater freedom to agree to compromise in favor of the public interest and to abandon their supporters' more immediate, parochial interests because of the ability to bargain behind closed doors. See Daniel Naurin, *Why Increasing Transparency in the European Union Will Not Make Lobbyists Behave Any Better than They Already Do*, Eur. Union Stud. Ass'n 9th Biennial Int'l Conf. (Mar. 31–Apr. 2, 2005) (unpublished manuscript, on file with author), available at <http://aei.pitt.edu/3074>; David Stasavage, *Open-Door or Closed-Door? Transparency in Domestic and International Bargaining*, 58 INT'L ORG. 667, 672–73 (2004); cf. AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 114–15 (1996) (noting that secrecy can enable officials to take risks in developing policy and thereby encourages deliberation). In the NEPDG case, however, the task force was billed as developing an energy policy for the nation. See *Walker*, 230 F. Supp. 2d at 54. Also, laws requiring the executive branch to develop national energy policy directed the Executive to consult a broad range of interest groups. See Plaintiff's Consolidated Reply in Support of His Motion for Summary Judgment and Opposition to Defendant's Motion to Dismiss at 64, *Walker*, 230 F. Supp. 2d. 51 (No. 1:01cv00340) (citing 42 U.S.C. § 7321(a), (d) (2000)). Though the President did not invoke those particular laws when creating the NEPDG, such laws would have reinforced public pressure on the task force to consult with a variety of interest groups. *Id.* Hence, in this case, it is reasonable to conclude that public scrutiny would have led the NEPDG to consult with a broader, rather than narrower, range of interests and perspectives.

<sup>291</sup> See *Nixon I*, 418 U.S. 683, 706 (1974).

materials in conjunction with that review,<sup>292</sup> and the differentiation approach would not alter that practice. It is true that, under current law, the authority for in camera inspection arises only after the President asserts executive privilege.<sup>293</sup> But it is unpersuasive to argue that the President should have greater protections from judicial processes when he declines to claim the privilege and instead simply asserts an interest in confidentiality.

Also, when courts hear cases and uphold the President's confidentiality interest to deny information requests,<sup>294</sup> they affirm the legitimacy of his actions. Before legitimizing presidential practices, courts ought to require the President to explicate the reasons for doing so. The differentiation approach prevents courts from crediting rote insistences on the President's need for confidentiality. It does not preclude courts from according substantial deference to the President's interest in confidentiality once he describes the need for it with specificity. In any event, moreover, at least for congressional-executive disputes that are found justiciable, it is unclear whether separation-of-powers principles call for courts to defer more to the President's decision to withhold information, than to Congress's determination to seek it.

Some might further argue that the judicial after-the-fact balancing contemplated by the differentiation approach inadequately encourages candor in the first instance. Some advisors will resist being candid because they do not know in advance whether their statements will remain confidential. The differentiation approach seeks to address that issue, at least in part, by counseling that the presidential confidentiality interest should receive more weight when there is greater reason to believe that the expectation of confidentiality is a prerequisite for better advice; in deciding whether to speak frankly, advisors will know beforehand that that standard would apply. That solution is, of course, imperfect, and there will inevitably be some degree of undesirable chilling. Yet *ex ante* determinations are impracticable, and, insofar as courts adjudicate disputes involving presidential confidentiality claims, a context-specific balancing analysis is more attractive than a rigid rule-based approach in accommodating the com-

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<sup>292</sup> See *In re Sealed Case*, 121 F.3d 729, 744–45 (D.C. Cir. 1997); *Dellums v. Powell*, 642 F.2d 1351, 1363–64 (D.C. Cir. 1980).

<sup>293</sup> See *In re Sealed Case*, 121 F.3d at 745.

<sup>294</sup> The differentiation approach does not presuppose that courts ought to hear disputes over access to information concerning presidential deliberations. As I explain below, even if courts refrained from hearing such cases, the differentiation approach would remain relevant, as its applicability extends beyond litigation contexts.

peting interests of confidentiality and disclosure because of the multiple, complex, and varied factors weighing for and against disclosure in each case.

Some might contend that, apart from infringing on the President's confidentiality interest, the differentiation approach pays insufficient deference to the President's autonomy interest protected by separation-of-powers principles.<sup>295</sup> Yet the differentiation approach applies only when the President asserts his confidentiality interest; it has no application when he raises autonomy concerns. As noted above, the Supreme Court in *Cheney* stressed both confidentiality and autonomy concerns to explain its decision that the Vice President need not assert executive privilege before objecting to civil discovery.<sup>296</sup> Applying the differentiation approach there would have required the Court to clarify the basis for only the confidentiality concern. Because such scrutiny would have made clear that, at least at that stage of the litigation, there was no real threat to the President's confidentiality interest, the Court would have had to place greater weight on the autonomy interest and to explain why that concern justified its decision. That obligation would have arisen because applying the differentiation approach would have exposed the weakness of the confidentiality interest, not because it would have placed any additional limits on the President's autonomy interest.

Others might accept the general concept of the differentiation approach but object only to a court's role of considering disclosure's likely effects, distinct from chilling, on the quality of presidential decisions. They would argue that such inquiries are necessarily imprecise and conjectural, and hence detract from judicial legitimacy. But courts regularly assess the likely effects of one course of action rather than another, and that is precisely what they do when they evaluate the extent to which the anticipated disclosure will have a chilling effect.<sup>297</sup> It is unpersuasive to argue that the decision quality analysis is more objectionable because it takes into account social science studies, like those on groupthink, that are controversial or disputed. The chilling effect analysis also relies on unproven assumptions; that they are uncontroversial is hardly surprising given that they have not been

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<sup>295</sup> See *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 385, 389 (2004); see also *supra* pp. 249–50 (analyzing separation of powers in relation to the President's confidentiality interest).

<sup>296</sup> See *supra* note 92 and accompanying text.

<sup>297</sup> See generally *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1169 (D.C. Cir. 2006) (Tatel, J., concurring) (discussing courts' regular reliance on commonsense assumptions to assess the chilling effect in a variety of privilege-related contexts).

subject to any significant empirical study.<sup>298</sup> Some might reply that the chilling effect analysis is acceptable because it relies on common sense. Yet, it is no less commonsensical to assume that, when a group developing the nation's energy policy lacks access to a diversity of perspectives, it is less likely to reach decisions that are adequately informed, that accord citizens equal consideration and respect, and that privilege the public interest over narrow, private interests. In arguing that courts ought to assess disclosure's impact, independent of chilling, on decision quality, the differentiation approach simply calls on courts to take into account such commonsense assumptions.

In objecting to the decision quality assessment component, some might alternatively argue that courts ought not to take a position on how the President structures his decision-making process. That is, courts should treat the President no differently if he chooses to consult with a broad diversity of interests or a narrow range of like-minded perspectives. Yet that position mistakes the courts' purposes under the differentiation approach. Courts do not seek, in any way, to regulate the President's conduct. Rather, they simply seek to determine whether, as a constitutional matter, the President has authority to deny information requests.<sup>299</sup> As the constitutional text provides no guidance on the issue, and historical practice is, at best, inconclusive,<sup>300</sup> the Supreme Court has relied on the structural separation-of-powers principle to conclude that, "to the extent [the confidentiality] interest relates to the effective discharge of a President's powers, it is constitutionally based."<sup>301</sup> Consistent with that understanding, the differentiation approach calls on courts to evaluate whether maintaining confidentiality is needed to improve the process of presidential decision making. Because confidentiality has effects, other than encouraging candor, on presidential decision making, it is proper for courts to take them into account.

It bears emphasis that the differentiation approach does not assume that courts may or ought to hear cases involving congressional-executive disputes, or that courts should in general resolve presidential confidentiality or executive privilege claims. The differentiation approach would apply in litigation contexts only after a court decided to hear a case. Yet, even assuming that courts declined to adjudicate

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<sup>298</sup> See *supra* note 217.

<sup>299</sup> See, e.g., *United States v. Nixon (Nixon I)*, 418 U.S. 683, 703 (1974).

<sup>300</sup> See Kitrosser, *supra* note 23, at 510; Kramer & Marcuse, *supra* note 23, at 624; Prakash, *supra* note 23, at 1145; Rozell, *supra* note 9, at 1070-71.

<sup>301</sup> See *Nixon I*, 418 U.S. at 711.

executive privilege disputes or other suits seeking information concerning presidential deliberations, the differentiation approach would still have relevance. My point here is that the constitutional weight afforded the President's confidentiality interest ought to depend on the dispute at issue, regardless of whether the dispute has entered the courts. Thus, for instance, when congressional officials seek information concerning presidential deliberations, and the President declines to provide it, they (and their legal counselors)—as constitutionally conscientious actors—ought to follow the differentiation approach when evaluating the propriety of their own and the opposing sides' conduct.<sup>302</sup> In taking this position, I reject the notion, suggested by others, that congressional-executive disputes over executive branch information are, and should largely be, issues of political negotiation.<sup>303</sup> Congressional officials should not force the President to release as much information as is politically advantageous or possible. Nor should the President withhold as much information as he politically can. Rather, consistent with their obligations to uphold the Constitution, they ought always to calibrate their positions in information disputes to their best understanding of what the differentiation approach would require.<sup>304</sup>

## 2. Importance of Disclosure

Some might argue that the recent proliferation of insider and tell-all accounts obviates the need for the differentiation approach and other legal arrangements regulating post-decision disclosure.<sup>305</sup> On this view, presidential deliberations do not remain confidential for long, and the more significant the issue, the more likely the disclosure. Yet the actual extent to which such personal accounts reveal presidential deliberations is unclear, and the lack of official disclosure makes it difficult to offer a satisfactory assessment. Moreover, relying on the market for such accounts provides little assurance that the parties

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<sup>302</sup> In light of the varying state constitutions and local charters, I do not take a position on whether the differentiation approach ought also to apply to chief executives at other governmental levels.

<sup>303</sup> See, e.g., Johnsen, *supra* note 23, at 1139, 1140 (citing *Executive Privilege—Secrecy in Government: Hearings Before the Subcomm. on International Relations of the S. Comm. on Government Operations*, 94th Cong. 125 (1975) (statement of Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel)); Rozell, *supra* note 9, at 1101–02.

<sup>304</sup> The differentiation approach is consistent in spirit with the constitutionally required accommodation process set forth by the D.C. Circuit in *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977). See *supra* text accompanying notes 278–81.

<sup>305</sup> See sources cited *supra* note 191. I thank Steve Yeazell for this point.

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seeking information can attain what they want, when they want. Even assuming that disclosures are extensive and timely, there is an important difference between individual and official accounts of presidential deliberations.<sup>306</sup> One person's or many persons' versions of the deliberations represent only private retellings of what occurred, and can casually be dismissed as "he said, she said" accounts. Materials disclosed by the government constitute a formally acknowledged record. To be clear, the independent value of official disclosure does not reflect on its comparative truthfulness. Indeed, insider retellings may well be more truthful or comprehensive than officially provided ones. But the President's formal account of the deliberations is one which he stands behind and cannot claim to deny; it is the one for which he cannot deny accountability. And, when it is false or misleading, the President's version will tell us more about the President than about the deliberations.

Along similar lines, some might stress the inevitable heightened scrutiny of presidential decisions to argue for the minimal need for public disclosure of the underlying policy deliberations.<sup>307</sup> According to this view, commentators would identify the limits or shortcomings of presidential decisions, and thus cure any defects in the President's deliberative or decision-making processes caused by the expectation of confidentiality.<sup>308</sup> Yet, despite the critical attention focused on the President, he also has a powerful agenda-setting ability: barring any particular scandals or controversies, he has substantial power to steer public attention towards some issues and away from others.<sup>309</sup> In times of war or other national emergencies, the public is especially reluctant to question presidential policies, let alone demand explanations about their origins and development. The period following the terrorist attacks on September 11, 2001, when the vast majority of Americans rallied around the flag and the government, and questioned those who did otherwise, vividly illustrates that point.<sup>310</sup>

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<sup>306</sup> Along similar lines, there are significant differences between official and individual accounts of jury deliberations.

<sup>307</sup> See *supra* note 257 and accompanying text.

<sup>308</sup> By contrast, this process would not be the case for decisions that remained confidential.

<sup>309</sup> See Brandice Canes-Wrone, *A Theory of Presidents' Public Agenda Setting*, 13 J. THEORETICAL POL. 183, 201-02 (2001).

<sup>310</sup> See, e.g., Adam Frankel, *The Value of Debate in the War on Terrorism*, THE DAILY PRINCETONIAN, Sept. 24, 2001; Sally Kalson, *9/11 Changes? They're Just Stories, So Far*, PITT. POST-GAZETTE, Jan. 6, 2002, at A-1; Kelly Moskal, *Bush's Popularity Soars in His 'Defining Moment'*, THE LANTERN (Columbus, Ohio), Oct. 11, 2001; Chuck Raasch, *Expectations Are High, Future Uncertain*, GANNETT NEWS SERVICE, Oct. 6, 2001; Rosemary Roberts, *Questioning Bush on 9/11 Not Unpatriotic*, NEWS & REC. (Greensboro, N.C.), May 22, 2002, at A15.

Though disclosure does not undermine the President's agenda-setting power or a "go with the President" mentality, anticipating it can help ward off some of the defects in the decision-making process caused by confidentiality from the outset.

Of equal, if not greater, significance, the public has an interest in learning about the presidential decision-making process distinct from its interest in the outcome. It is relevant, for instance, whether the President reached a decision based on mutual consensus or in response to promises by powerful interest groups. It is significant whether a decision resulted from input from a broad spectrum of parties or from only the President's main contributors. And it matters even if the President and his advisors reach what all would agree to be the best decisions. The public has an interest in knowing not only what decisions the President and his advisors reach, but also how and why they reached them.

### 3. *Other Legal Doctrines*

Some might question whether the differentiation approach ought also to apply to the deliberative process privilege, which protects from disclosure internal policy deliberations of the executive branch more generally.<sup>311</sup> The inquiry naturally arises because the deliberative process privilege rests on a similar concern that disclosure will chill agency decision making, and the law typically accords less weight to agency interests than the President's interest.<sup>312</sup> Though the foregoing arguments cast some doubt on the justification for the deliberative process privilege, there are relevant distinctions between the two contexts. Most important, the deliberative process privilege is far less sweeping than executive privilege.<sup>313</sup> As mentioned above, it covers opinions, not facts, and only pre-decisional deliberations.<sup>314</sup> The deliberative process privilege's narrower reach thus requires a less powerful justification. Also, agency decision makers include individuals with a broader range of perspectives. That diversity results from a

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<sup>311</sup> The privilege is recognized at common law and codified as an exception to the FOIA. See 5 U.S.C. § 552(b)(5) (2000).

<sup>312</sup> See *Nixon v. Fitzgerald*, 457 U.S. 731, 749–50 (1982) (recognizing the special nature of the President's constitutional office and functions); *United States v. Nixon (Nixon I)*, 418 U.S. 683, 706, 708 (1974); *United States v. Burr*, 25 F. Cas. 30, (C.C.D. Va. 1807). Some scholars have questioned the bases for presidential exceptionalism. See, e.g., Moe & Howell, *supra* note 247, at 136; Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 319 (2006).

<sup>313</sup> See *supra* notes 53–55 and accompanying text.

<sup>314</sup> See *supra* notes 53–54 and accompanying text.











