The President’s Secrets

Gia B. Lee*

Introduction .................................................... 198
I. Toward Uncritical Acceptance of the Confidentiality Interest .................................................. 204
   A. Marbury and the Nixon Cases ......................... 204
   B. Cheney v. United States District Court ............... 208
II. Qualifying the Confidentiality Interest ................. 213
   A. Chilling Effect .......................................................... 215
      1. Type of Information ............................................. 215
      2. Nature of Disclosure ............................................ 219
      3. Dissenters ............................................................ 227
   B. Better Decisions .................................................... 230
      1. Preferred Less-Than-Candid Advice .................... 231
      2. Beyond Candor ..................................................... 234
III. Differentiating Confidentiality Claims .................. 242
   A. The Differentiation Approach ............................. 242
   B. Objections .............................................................. 249
      1. Executive Prerogative and the Role of the Courts ........................................... 249
      2. Importance of Disclosure ....................................... 253
      3. Other Legal Doctrines .......................................... 255
   C. Operationalizing Differentiation: The U.S. Attorney Firings ......................................... 258
   Conclusion ............................................................... 261

* 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 Malby, Dawn Johnsen, Carrie Menkel-Meadow, Jennifer Mnookin, Bill Rubenstein, Fred Schauer, Scana 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 Stranský, Jake Veltman, the Hugh and Hazel Darling Law Library, and the UCLA Dean’s Summer Research Fund.

The author served as one of the outside counsel for the General Accounting Office’s suit against Vice President Cheney, Walker v. Cheney, 230 F. Supp. 2d 51, 53 (D.D.C. 2002), which is discussed throughout this Article. This Article reflects the views of the author and does not necessarily represent the views of the General Accounting Office or other outside counsel.
Introduction

When congressional committees sought information relating to the U.S. attorney firings\(^1\) and Hurricane Katrina,\(^2\) when the 9/11 Commission called for the National Security Advisor to testify,\(^3\) when Senators requested memoranda authored by judicial nominees while working as Department of Justice and White House lawyers,\(^4\) when the General Accounting Office\(^5\) and two nonprofit groups asked for information on the meetings of the Vice President’s energy policy task force, and on numerous other occasions,\(^6\) 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.\(^7\) 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.\(^8\)

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


about the reasoning behind the President’s pardons;\textsuperscript{10} when the President’s aides declined to answer questions before the grand jury in the Monica Lewinsky inquiry;\textsuperscript{11} when the Attorney General challenged a House subpoena seeking reports on whether to appoint an independent counsel for alleged campaign finance abuses;\textsuperscript{12} 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;\textsuperscript{13} and when the White House denied access to the Deputy White House Counsel’s files after he committed suicide.\textsuperscript{14} 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);\textsuperscript{15} citing the need to promote candor as the primary basis for protecting presidential communications under the executive privilege.\textsuperscript{16} 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.”\textsuperscript{17} 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,\textsuperscript{18} both

\begin{footnotes}
\item[16] See id. at 708.
\item[17] 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.
\item[18] 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).
\end{footnotes}
inside and outside government, including jury and judicial deliberations, academic and medical peer review, police review boards, and the attorney-client and doctor-patient privileges.

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,

---


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

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.”26 Some scholars have expressly agreed with the Court’s reasoning.27 For example, Michael Stokes Paulsen, who acknowledges executive privilege but denies the role of the judiciary in defining the privilege’s scope,28 has emphasized the importance of “the confidentiality of presidential conversations with advisors . . . in order to enable the President to receive uninhibited, fully-informed advice.”29 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-
ficers of the executive branch believed that their confidential advice could eventually be disclosed, the quality of that advice would be seriously damaged.”30 Other scholars have recounted the Court’s recitation of the interest in encouraging candor, but have expressed no position on it.31 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.32

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.33 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.

30 Rozell, supra note 23, at 46–47.
31 See Breckenridge, supra note 9, at 103–04; Iraola, supra note 23, at 1573–74; Kitrosser, supra note 23, at 500.
32 See Prakash, supra note 23, at 1143, 1149–89.
33 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 advisers 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*,\(^{34}\) that assumes the substantiality of the President’s generalized or undifferentiated confidentiality interest in information disputes concerning his high-level deliberations.\(^{35}\) It argues instead for an approach—akin to the analysis suggested in the two *Nixon* cases of the Watergate era\(^{36}\) but largely overlooked by subsequent lower court and Department of Justice opinions\(^{37}\)—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.\(^{38}\) 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.\(^{39}\)

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


\(^{35}\) See id. at 385.


\(^{37}\) See infra notes 269 & 276 and accompanying text.

\(^{38}\) See infra Part III.A.

\(^{39}\) 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.\textsuperscript{40}

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 \textit{Cheney} altered the constitutional landscape established by the two \textit{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 \textit{Cheney} and the \textit{Nixon} cases. A brief conclusion follows.

\section{I. Toward Uncritical Acceptance of the Confidentiality Interest}

\subsection{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 \textit{Marbury v. Madison},\textsuperscript{41} concerning the alleged failure of the Secretary of State to deliver commissions of judicial appointments to their respective appointees.\textsuperscript{42} 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.\textsuperscript{43} When the Attorney General objected, arguing in part that

\begin{itemize}
  \item \textsuperscript{41} Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
  \item \textsuperscript{42} \textit{See id.} at 138–39.
  \item \textsuperscript{43} \textit{See id.} at 143.
\end{itemize}
“[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.” 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.”

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. 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].”

44 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.

45 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 Bercier, 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).

46 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.


to as the “presidential privilege”\textsuperscript{48} finds its primary justification in the candor rationale. As the \textit{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 decision making. 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.\textsuperscript{49}

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.”\textsuperscript{50}

The scope of the presidential privilege defined by \textit{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.’”\textsuperscript{51} A comparison to the deliberative process privilege, a common-law privilege protecting communications in all levels of the executive branch,\textsuperscript{52} 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.\textsuperscript{53} 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.\textsuperscript{54} By contrast, the presidential privilege shields all policy-related communications—both opinions and facts, and even those that follow decisions.\textsuperscript{55}


\textsuperscript{49} \textit{Nixon I}, 418 U.S. at 708.

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} \textit{Nixon II}, 433 U.S. at 449 (quoting \textit{Nixon I}, 418 U.S. at 711, 713, 708, respectively).


\textsuperscript{54} \textit{See Coastal States Gas Corp. v. Dep’t of Energy}, 617 F.2d 854, 866–67 (D.C. Cir. 1980).

\textsuperscript{55} \textit{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. 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. Despite acknowledging that the President’s confidentiality interest was “weighty indeed and entitled to great respect,” the Court nonetheless upheld the district court order. 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.” 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,” 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.”

Three years later, in *Nixon v. Administrator of General Services (Nixon II)*, the Court once again declined to accept the President’s claimed need for confidentiality at face value. At issue there was President Nixon’s contention that the Presidential Recordings and Materials Preservation Act, which directed the General Services Administrator to take custody of his Administration’s papers and tape recordings, impermissibly infringed on the presidential privilege. 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

---


57 See *Nixon I*, 418 U.S. at 686.

58 *Id.* at 712.

59 *Id.*


61 *Nixon I*, 418 U.S. at 712.


63 See *id.* at 455.


65 *Nixon II*, 433 U.S. at 429.
upon which effective discharge of [the President's] duties depends.” 66

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. 67 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. 68 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. 69

In sum, although the Court in the Nixon cases recognized the presidential privilege and “the very important interest” 70 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, 71 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. 72 Recently, how-

66 Id. at 449 (quoting Brief for the Appellees at 33, Nixon II, 433 U.S. 425 (No. 75-1605)).
67 Id. at 451.
68 Id. at 451–52.
69 See id. at 452–54.
72 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,* it considered again the President’s general confidentiality interest that underlies the privilege. 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. The plaintiffs argued that the task force had failed to comply with the Federal Advisory Committee Act (“FACA”), which imposes a variety of open-meeting and disclosure requirements on groups that advise executive branch officials. 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. The plaintiffs sought “declaratory relief and an injunction requiring [the defendants] to produce all materials allegedly subject to FACA’s requirements”—information concerning the substance of, and participants in, the task force’s meetings.

The Vice President moved to dismiss. 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. Because it

---


74 See id. at 383–89.
75 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.
77 5 U.S.C. app. 2 § 10; *see Cheney,* 542 U.S. at 373.
78 *See Cheney,* 542 U.S. at 374.
79 *Id.* The task force dissolved after suit was filed, but before discovery. *See id.* at 373, 375.
80 *See id.* at 387.
81 *See id.* at 374.
82 *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. After the district court declined to certify an interlocutory appeal, 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. 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. In a 7–2 decision, the Supreme Court vacated and remanded. 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

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.

83 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.


85 In re Cheney, 334 F.3d 1096, 1101 (D.C. Cir. 2003).

86 Id. at 1104–07.

87 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.\textsuperscript{88}

The Court placed substantial weight on the President’s confidentiality interest to justify its decision.\textsuperscript{89} At the outset, the Court credited the confidentiality interest as providing the urgency necessary to justify the invocation of the extraordinary remedy of mandamus.\textsuperscript{90} 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.\textsuperscript{91} 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.”\textsuperscript{92} 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.”\textsuperscript{93}

In response to the D.C. Circuit’s opinion, the Court focused largely on the inapplicability of the \textit{Nixon I} holding to the facts at issue in \textit{Cheney}.\textsuperscript{94} In particular, the Court stressed the differences between the need for evidence in criminal and civil cases.\textsuperscript{95} 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.”\textsuperscript{96} On the other hand, the Court added, civil discovery

\begin{itemize}
  \item \textsuperscript{88} \textit{Id.} at 391 (majority opinion).
  \item \textsuperscript{89} \textit{See id.} at 385.
  \item \textsuperscript{90} \textit{See id.}
  \item \textsuperscript{91} \textit{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.’” \textit{Id.} at 382.
  \item \textsuperscript{92} \textit{Id.} at 385.
  \item \textsuperscript{93} \textit{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 \textit{infra} text accompanying notes 104–90.
  \item \textsuperscript{94} \textit{See id.} at 383–89.
  \item \textsuperscript{95} \textit{See id.} at 383–84.
  \item \textsuperscript{96} \textit{Id.} at 384 (quoting United States v. Nixon (\textit{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 con-
straints on the prosecution of criminal cases that filter out insubstan-
tial legal claims and preclude overbroad subpoenas do not exist in the
civil context. Accordingly, Justice Kennedy reasoned, Nixon I did
not strike the appropriate balance for civil cases.

In distinguishing the facts of Cheney from Nixon I, the Court ap-
plied a Nixon I-like balancing test by weighing the need for disclosure
against the burden such disclosure would place on the executive. Yet,
like the Nixon cases, Cheney failed to assess, with any specific-
ity, 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. The Court spoke in gen-
eral terms about the lack of adequate safeguards to screen out frivo-
rous civil litigation and overbroad discovery requests against the
executive, 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 enti-
tled to mandamus relief to set aside the district court’s discovery order
though he had not asserted privilege or requested narrower discov-
ery. In holding that the Vice President could be so entitled, 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 re-
view. 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 ener-
gegetic performance of its constitutional duties.”

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.

97 See id. at 386–87.
98 See id. at 384.
99 See id. at 384–85.
100 See id. at 385.
101 See id. at 386–88.
102 See id. at 372, 378.
103 Id. at 390–91 (suggesting that the district court should have, sua sponte, narrowed the
discovery order).
104 See id. at 382.
105 See id.
Clinton v. Jones\textsuperscript{106} 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.\textsuperscript{107} 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,\textsuperscript{108} 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.\textsuperscript{109} 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.\textsuperscript{110} 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.\textsuperscript{111} 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.\textsuperscript{112}

\textbf{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.\textsuperscript{113} Put another way, when people need not worry about what the

\begin{thebibliography}{99}
\bibitem{107} See Cheney, 542 U.S. at 381–85 (citing Jones, 520 U.S. 681).
\bibitem{108} See Jones, 520 U.S. at 684.
\bibitem{109} See Cheney, 542 U.S. at 389–90.
\bibitem{110} See id. at 382–86.
\bibitem{111} See id.
\bibitem{112} 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).
\bibitem{113} See supra note 8. To be clear, the argument based on candor is concerned primarily
\end{thebibliography}
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.\textsuperscript{114}

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.\textsuperscript{115}

---

\textsuperscript{114} 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 \textit{infra} notes 197–98 and accompanying text.

\textsuperscript{115} 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 \textit{Wolfle v. United States}, 291 U.S. 7, 17 (1934); \textit{SEC v. Lavin}, 111 F.3d 921, 933 (D.C. Cir. 1997), (2) clergy and penitent, see \textit{Trammel v. United States}, 445 U.S. 40, 51 (1980), (3) doctors and patients, see \textit{id.}; \textit{Street v. Hedgepath}, 607 A.2d 1238, 1246 (D.C. 1992), and (4) attorneys and clients, \textit{Swidler & Berlin v. United States}, 524 U.S. 399, 403 (1998); \textit{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. \textit{Branzburg v. Hayes}, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting); \textit{In re Grand Jury Subpoena}, Judith Miller, 397 F.3d 964, 991 (D.C. Cir. 2005) (Tatel, J., concurring); \textit{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.

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, 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. 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...”

---

116 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.

secrets”—the subject of absolute privilege—fall into this category. 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.

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. 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. As the Administration plausibly argued, the investigation was then ongoing, and disclosures at the time would have derailed it.

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

119 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.
121 See id.
122 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.123 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.124 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.125 After the Board concluded that there had not been a violation, congressional committees sought a copy of its report.126 The President declined to provide it, invoking executing privilege and the need to avoid a chilling effect.127 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.128 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.


125 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.


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”).\(^{129}\) The GAO sought, among other things, the identities of the non-federal parties that attended task force meetings.\(^{130}\) 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.\(^{131}\)

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.\(^{132}\)

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,\(^{133}\) 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

---

130 See id.
131 See id. at 59–60.
133 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.\footnote{134 See Walker, 230 F. Supp. 2d at 59.}

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.

\textit{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.\footnote{135 Evidence suggests that live audiences have a greater impact on deliberants than do onlookers 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).} 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.\footnote{136 See Jon Elster, Arguing and Bargaining in Two Constituent Assemblies, 2 U. Pa. J.} Stressing secrecy’s role
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.”

The public assemblies differed significantly. Whereas the American discussions were free of moralizing cant, the latter were marked by it, “heavily tainted by rhetoric, demagoguery, and overbidding.”

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.

For fear of appearing uninformed and uncertain, commissioners refrain from requesting information or raising questions. Concerned about embarrassing others or themselves, they tend also to avoid critically examining or challenging the positions of others. Unwilling “to appear weak, indecisive, or unprincipled,”

\begin{footnotesize}
\begin{itemize}
\item[137] 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).
\item[138] See Elster, Arguing and Bargaining, supra note 136, at 411.
\item[139] Id.; Elster, Strategic Uses, supra note 137, at 251; see Elster, Constitution Making, supra note 136, at 111.
\item[141] 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.
\end{itemize}
\end{footnotesize}
they become resistant to rethinking or changing their initially expressed views.\(^\text{143}\) Instead, the meetings become “staged presentations,”\(^\text{144}\) with commissioners’ comments “aimed more at representatives of the media than a member’s colleagues.”\(^\text{145}\) The discussions are not only “more likely to be short, contrived, stilted, [and] scripted,”\(^\text{146}\) 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.’”\(^\text{147}\)

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.\(^\text{148}\) 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.\(^\text{149}\)

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.\(^\text{150}\) 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

\(^{143}\) Welborn, supra note 141, at 229; see Barrett, supra note 140, at 1211.

\(^{144}\) Welborn, supra note 141, at 229.

\(^{145}\) Johnson, supra note 140, at 25 (citing Welborn, supra note 141, at 228–32).


\(^{147}\) Barrett, supra note 140, at 1211.


\(^{149}\) 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.

\(^{150}\) See infra notes 151, 153 and accompanying text.
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.\textsuperscript{151} 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.\textsuperscript{152} Yet the immediate political significance of their statements surely recedes.\textsuperscript{153} Accordingly, the extent of chill will be substantially less when advisors expect disclosure to take place after, rather than during, a presidential administration.\textsuperscript{154}

\textit{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.\textsuperscript{155} 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.\textsuperscript{156} Prior to that decision, the FOMC published only “individual votes of committee members [and] summary minutes of meetings.”\textsuperscript{157} 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.\textsuperscript{158} By contrast,

\begin{footnotes}
\item \textsuperscript{151} See Barbara Koremenos, \textit{Open Covenants, Clandestinely Arrived At} 15 (unpublished manuscript, on file with author) (focusing on international treaty negotiations).
\item \textsuperscript{153} 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”).
\item \textsuperscript{154} For helpful discussions of secrecy’s temporal dimension, see Pablo da Silveira, \textit{Representation, Secrecy, and Accountability}, 12 J. INFO. ETHICS 8, 12–15 (2003); Dennis F. Thompson, \textit{Democratic Secrecy}, 114 Pol. Sci. Q. 181, 184–85 (1999).
\item \textsuperscript{156} See id. at 1, 4.
\item \textsuperscript{157} 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.
\item \textsuperscript{158} 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.\textsuperscript{159}

Summaries obviously vary significantly in the level of detail recounted. Transcripts, too, exhibit substantial variation in their specificity.\textsuperscript{160} 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.\textsuperscript{161} 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.\textsuperscript{162} 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

\begin{itemize}
\item \textsuperscript{159} See id. at 5.
\item \textsuperscript{160} Some transcripts limit themselves to spoken words, while others include a range of nonverbal 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.
\item \textsuperscript{161} C.f. 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).
\end{itemize}
The subject matters of the NEPDG’s meetings thus presumably concerned various topics relating to energy policy. 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. 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.

**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”) 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. FOIA authorizes parties to request agency records related to government decision making, subject to a variety of limitations. Though FOIA defines “agency” to include the Executive Office of the President, 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.”

---

163 Id. at 54 (quoting Complaint, Exhibit A at 2, Walker, 230 F. Supp. 2d 51 (No. 1:02cv00340)).
164 See id.
168 See 5 U.S.C. app. 2 § 10 (2000); supra Part I.B.
170 Id. § 552(f)(1).
Citizen v. U.S. Department of Justice,172 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.173 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.”174

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.175 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.176 By contrast, FOIA authorizes outsiders only to request government records after-the-fact.177 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.178 Also, unlike FACA’s open meeting requirements,179 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

---

173 See id. at 466–67.
174 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).
175 The comparative timing and details of disclosure would also lead FACA to have a greater chilling effect than FOIA.
178 See supra notes 176–77 and accompanying text.
179 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. Because complex and difficult deci-

---


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. 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. The norms and characteristics of some groups discourage full and frank communications. 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.


183 See supra Part II.A.2.

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.\footnote{See id.} 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.\footnote{See id.} Individuals become less concerned about the thoughts and reactions from outside onlookers, but more interested in the judgments and responses from fellow group members.\footnote{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.”).}

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.\footnote{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).} 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.\footnote{See Paul A. Kowert, Groupthink or Deadlock 147–48 (2002).} 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.\footnote{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).} 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
and his innermost circle of advisors were uninterested in considering views or perspectives different from their own.\footnote{See Richard A. Clarke, Against All Enemies: Inside America’s War on Terror 32, 244 (2004); David Kuo, Tempting Fate: 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, 151–53, 165–66, 327.}

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 discreetly 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.”\footnote{See id. at 52, 206–09.} 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.\footnote{See Suskind, supra note 148, at 117, 151–53, 165–66, 327.} 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.\footnote{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.” Nonetheless, because of the significance of publicly disclosed internal dissent for public opinion and presidential decision making, 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.

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 controversy 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.

195 Susskind, supra note 148, at 323.

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;197 and (3) the extent to which the decisions serve the public interest, broadly understood.198 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.199

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

197 I rely here on values traditionally associated with liberal democratic societies.
198 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).
199 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. 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.”

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, we—a polity committed to equal concern and respect for its citizens—would prefer the advisors to resist being candid. 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,

---


201 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.

202 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”).

203 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).

204 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: 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.\footnote{205}

Furthermore, as Elster’s concept of the “civilizing force of hypocrisy”\footnote{206} 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.\footnote{207} 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.\footnote{208} The speaker’s rhetoric might lead her to reevaluate and adjust her opinions on a matter.\footnote{209} 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.\footnote{210} 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.\footnote{211}

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 ignoring racist comments about the Rutgers women’s basketball team); Skelton, supra note 202, at B3.

\footnote{205} See Kang, supra note 203, at 1586.  
\footnote{206} See Elster, Strategic Uses, supra note 137, at 250 (emphasis omitted).  
\footnote{207} See id. at 244–45.  
\footnote{208} See id. at 250.  
\footnote{210} See Clarke, supra 191, at 30–33.  
\footnote{211} 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.
other group members, thereby reducing the substantive quality of the discourse.\textsuperscript{212}

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.”\textsuperscript{213} Yet, as Frederick Schauer has persuasively argued, that view rests on a mistaken assumption about the truth valence of the market.\textsuperscript{214} In many domains, there is reason to doubt whether truth will be expressed, or whether it will prevail over falsity.\textsuperscript{215} 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.\textsuperscript{216} Though few studies focus directly on the impact of confidentiality on decision making, their related findings, which I

\begin{itemize}
\item \textsuperscript{212} See infra Part II.B.2.
\item \textsuperscript{213} Frederick Schauer, Free Speech: A Philosophical Enquiry 16 (1982).
\item \textsuperscript{214} See id. at 23.
\item \textsuperscript{215} See id. at 21–23.
\item \textsuperscript{216} See infra notes 217–19.
\item \textsuperscript{217} 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.” Groupthink delineates a set of conditions and processes that leads groups toward an “extreme consensus-seeking” tendency and thereby interferes with critical thinking. Though unintentional and unacknowledged, the tendency causes “a deterioration of mental efficiency, reality testing, and moral judgment.” 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.” 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.
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.223

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.”224 Three factors tend to account for that phenomenon: reward, identification, and information.225 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.226 The last factor refers to the quality of information

223 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.


available to deliberators and, in particular, the limited “argument pools” within any group.\textsuperscript{227}

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.\textsuperscript{228} 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.\textsuperscript{229} 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;\textsuperscript{230} the argument pools thereby become even narrower or more limited.\textsuperscript{231} 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.\textsuperscript{232} They are more inclined to engage

\begin{itemize}
\item \textsuperscript{227} See Baker & Petty, supra note 225, at 5.
\item \textsuperscript{228} See supra notes 224–27 and accompanying text.
\item \textsuperscript{229} See Sunstein, Deliberative Trouble, supra note 224, at 74–75.
\item \textsuperscript{230} See Bok, supra note 115, at 25–26.
\item \textsuperscript{231} See id. at 85–96 (stressing the tendency of homogeneity to exacerbate group polarization, but not focusing on the significance of confidentiality per se).
\item \textsuperscript{232} 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. Most of these studies focus on individual rather than group decision making, 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.

One of the few studies examining the impact of accountability on group decision making supports this reasoning. 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. The researchers analyzed three decision-making conditions: individual accountability, collective accountability, and no accountability. The researchers found that collective accountability protected against groupthink more than no accountability, and that individual accountability provided the great-

---

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”).

---

233 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).


236 See id. at 105–11.

237 See id. at 100–01.

238 Id. at 101.
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.\(^{240}\) 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.\(^{241}\) 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.”\(^{242}\) Less obviously, Garrett and Vermeule point to decision making at the initial stage of overall budget allocation as an instance when congressional legislators

\(^{239}\) 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.

\(^{240}\) 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.


\(^{242}\) Id.
operate under a “partial veil of uncertainty.” 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.”

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. 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.” 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. 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.

243 See id. at 10, 13–14.
244 Id. at 13.
245 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 Pandem: Political Manipulation and the Loss of Democratic Responsiveness (2000) (arguing that polls influence efforts to sell policies but not the policies themselves).
246 Cf. supra note 243 and accompanying text.
For example, advisors will more likely refrain from discussing some types of information than other kinds.\textsuperscript{248} 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.\textsuperscript{249} 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.\textsuperscript{250}

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.\textsuperscript{251} 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.\textsuperscript{252} In diminishing individual accountability, confidentiality also encourages individuals to spend less cognitive resources in decision making.\textsuperscript{253} 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.\textsuperscript{254}

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.\textsuperscript{255} 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

\textsuperscript{248} See supra Part II.A.1.
\textsuperscript{249} See supra Part II.A.2.
\textsuperscript{250} See supra Part II.A.3.
\textsuperscript{251} See supra Part II.B.1.
\textsuperscript{252} See supra Part II.B.2.
\textsuperscript{253} See supra Part II.B.2.
\textsuperscript{254} See supra Part II.B.2.
\textsuperscript{255} 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. ²⁵⁶

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

²⁵⁶ 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.\textsuperscript{257} 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.\textsuperscript{258} 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 \textit{Cheney},\textsuperscript{259} and reinstates the spirit of

\textsuperscript{257} 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.

\textsuperscript{258} \textit{See supra} Part II.B.

the Nixon cases. 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. 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. 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. Because differentiating the President’s confidentiality interest will sometimes, though certainly not always, 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, 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
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. Though Nixon II analyzed, with more specificity, the confidentiality side of the balancing equation, courts and other legal actors applying the Nixon balancing have largely overlooked that fact.

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. 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, the same statute challenged in Nixon II—the courts have not analyzed with specificity the extent of the President’s confidentiality interest. 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. 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 and Sun Oil Co. v. United States, 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

268 See infra notes 269–84 and accompanying text.
270 See Freeman, 670 F.2d at 347–48, 355–56.
271 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.
272 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.
274 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.275

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.276 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 mechanistically, simply quoting Nixon I’s statements about the President’s need for candor.277

275 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.


277 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. 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.” The duty of Congress to explain, OLC added, “is established in the case law as well.” In the case law, according to OLC, a dispute’s resolution turns on the strength of Congress’s need for the sought-after information. 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. 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. 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.

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. Following either the differentiation or Nixon approach, a court would accord weight to the Vice President’s claim of interference with the Presi-
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.\textsuperscript{286} 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;\textsuperscript{287} 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”\textsuperscript{288}—provides a unique means of preserving confidentiality while countering 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.\textsuperscript{289} Recognizing that public scrutiny of the task force’s

\textsuperscript{286} See id. at 53–58.

\textsuperscript{287} See Nixon I, 418 U.S. at 706 (discussing in camera review).

\textsuperscript{288} Simone Chambers, Behind Closed Doors: Publicity, Secrecy, and the Quality of Deliberation, 12 J. Pol. Phil. 389, 408 (2004).

\textsuperscript{289} 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, 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. The President may submit explanatory

---

290 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.

materials in conjunction with that review, 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. 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, 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-

292 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).
293 See In re Sealed Case, 121 F.3d at 745.
294 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. 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. 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. 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

---

295 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).

296 See *supra* note 92 and accompanying text.

297 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. 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. As the constitutional text provides no guidance on the issue, and historical practice is, at best, inconclusive, 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.” 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

298 See supra note 217.
300 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.
301 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.\textsuperscript{302} 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.\textsuperscript{303} 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.\textsuperscript{304}

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.\textsuperscript{305} 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

\textsuperscript{302} 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.

\textsuperscript{303} 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.

\textsuperscript{304} 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.

\textsuperscript{305} See sources cited supra note 191. I thank Steve Yeazell for this point.
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.\textsuperscript{306} 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.\textsuperscript{307} 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.\textsuperscript{308} 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.\textsuperscript{309} 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.\textsuperscript{310}

\begin{flushright}
306 Along similar lines, there are significant differences between official and individual accounts of jury deliberations.
307 See supra note 257 and accompanying text.
308 By contrast, this process would not be the case for decisions that remained confidential.
\end{flushright}
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. 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. 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. As mentioned above, it covers opinions, not facts, and only pre-decisional deliberations. 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

311 The privilege is recognized at common law and codified as an exception to the FOIA. See 5 U.S.C. § 552(b)(5) (2000).
313 See supra notes 53–55 and accompanying text.
314 See supra notes 53–54 and accompanying text.
number of factors, including political balancing requirements for heads of some federal agencies;\textsuperscript{315} the higher representation of civil servants among agency, as opposed to White House, advisors;\textsuperscript{316} and practices of negotiated rulemaking that include non-governmental parties at the decision-making table.\textsuperscript{317} Moreover, unlike the President, federal agencies render at least their formal decisions through highly structured, substantially transparent processes.\textsuperscript{318} The Administrative Procedure Act,\textsuperscript{319} which applies to agencies but not the President, has notice and comment requirements, for example, that increase openness and counter some of the risks to decision making posed by confidentiality.\textsuperscript{320}

Some might further ask whether a differentiation approach ought to govern the adjudication of other privileges that find their primary, or at least substantial, justification in the interest in encouraging candor. For example, some might question whether courts ought to assess, on a case-by-case basis, the particularized need to protect the confidential deliberations underlying the publicly announced decisions of non-executive branch governmental bodies, such as congressional actors, the judiciary, or juries. Though it is beyond the scope of this paper to address each of those contexts in-depth, I note preliminarily, for illustrative purposes, some of the differences between the congressional and presidential contexts that might justify different approaches. First, compared with deliberations among congressional officials, presidential deliberations involve participants who are part of a hierarchical organization and are more likely to share similar world views. The greater diversity of perspectives and less extreme hierarchical organization of congressional deliberants help to ward off some of confidentiality’s adverse effects, such as exacerbating groupthink and group polarization tendencies, that threaten presidential decision making. Second, as compared to presidential deliberants, congres-
sional deliberants are more likely to have conflicting interests and constituencies, and thus have greater incentives to play to audiences and to talk past one another, than are presidential deliberants. Though some presidential advisors also have their own, independent constituencies that they seek to please, insofar as advisors’ efforts to cater to those interests interfere with their advice-giving functions, the President retains the authority to dismiss them at will and to secure others more committed to speaking in his interests. Confidentiality thus plays a more significant role in the congressional context in encouraging individuals to avoid unsolicited puffery or one-upmanship. Third, as discussed above concerning Elizabeth Garrett and Adrian Vermeule’s insight that legislators make some decisions under a partial veil of uncertainty, there are some important controls against confidential self-interested decision making present in the congressional, but not the presidential, context.

321 Cf. Griffin, supra note 23, at 38 (raising similar arguments about the pertinence of Elster’s observations on constitution making, see supra notes 136–39 and accompanying text, to executive deliberations, but focusing primarily on the absence of bargaining and compromise in presidential decision making).

322 Some advisors, particularly high-ranking Cabinet-level officials, harbor their own political ambitions. See, e.g., Steven Erlanger, Holbrooke Chosen to Be U.N. Envoy, Senior Officials Say, N.Y. TIMES, June 18, 1998, at A1 (mentioning that former U.N. Ambassador Bill Richardson will become Energy Secretary to build an important domestic platform in anticipation of becoming Vice President Al Gore’s running mate in the 2000 presidential race); Janet Hook, Congressional Newcomers, but Hardly Neophytes: House and Senate Freshmen Arrive with a Wealth of Experience, Including a Governor and Several Returning to Washington, L.A. TIMES, Nov. 13, 2002, at A20 (noting that Rahm Emmanuel, former Senior Advisor to the President for Policy and Strategy, was elected to Congress); Bill Lambrecht & Tim Poor, Thinking 2000: Ashcroft Considers a Quest for Presidential Nomination, S. ST. LOUIS POST-DISPATCH, July 30, 1997, at 1A. Also, many political appointee advisors receive their “seat at the table” in part because of the backing or support of particular interest groups. See Lou Cannon, Reagan’s Appointments Mess Decreed, WASH. POST, Mar. 1, 1981, at A1; Thomas L. Friedman, Behind Appointments, Quiet Warring, N.Y. TIMES, Dec. 13, 1992, at A36; Thomas L. Friedman, Clinton’s Cabinet Choices Put Him at Center, Balancing Competing Factions, N.Y. TIMES, Dec. 27, 1992, at A22; Martin Tolchin, Bush Prepares to Share the Fruits of a Victory, N.Y. TIMES, Nov. 11, 1988, at A22.

323 See generally Myers v. United States, 272 U.S. 52 (1926) (holding that the President has the exclusive power to remove certain executive officers).

324 To be clear, I do not mean to suggest here that confidentiality plays little role in the presidential context in reducing the likelihood of puffery. As discussed above, disclosure, and in particular open deliberations, sometimes encourages the President to prefer that his advisors engage in staged or rehearsed discussions. See supra Part II.A.2. My point here instead concerns unsolicited puffery. Whereas the President has the authority to demand that his advisors not engage in one-upmanship, congressional officials cannot as effectively demand that from each other.

325 See supra Part II.B.2.
The differentiation approach implicates not only other privileges, but also other constitutional doctrines. Like the presidential interest in confidentiality, the First Amendment right to anonymous speech rests, in significant part, on the idea that society should shield individuals from public scrutiny to encourage them to speak more freely and openly.\textsuperscript{326} Although in both contexts, public pressure sometimes limits or molds speech in desirable ways,\textsuperscript{327} it is constitutionally appropriate only in the anonymous speech context to undervalue those effects. The First Amendment calls for a strong presumption in favor of encouraging speech, with more limited concern for the quality of the speech actually engendered.\textsuperscript{328} In the presidential decision-making context, by contrast, when government decision making, rather than government censorship, is at stake, the interest deserving protection is the quality of the speech. Because it is unclear whether confidentiality results in better quality advice, and because there are strong countervailing constitutional interests in favor of disclosure,\textsuperscript{329} there is no basis for a presumption in favor of a generalized interest in presidential confidentiality.\textsuperscript{330}

C. Operationalizing Differentiation: The U.S. Attorney Firings

Finally, I turn briefly to a current controversy between Congress and President George W. Bush to illustrate the differentiation approach. At the time of this writing, the President has asserted executive privilege in response to congressional subpoenas seeking the testimony of two former White House advisors about his decision to dismiss nine federal prosecutors—seven of them on one day—in 2006.\textsuperscript{331} Congressional committees seek the advisors’ testimony to determine whether partisan politics motivated the dismissals—to investigate allegations that the President removed many of the U.S. attorneys because they either zealously pursued corruption charges

\textsuperscript{326} The Supreme Court has struck down several ordinances that required distributors of pamphlets to identify themselves as violating the First Amendment. See, e.g., Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 166–69 (2002); McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 357 (1995); Talley v. California, 362 U.S. 60, 64–65 (1960).


\textsuperscript{328} See, e.g., McIntyre, 514 U.S. at 346–47.

\textsuperscript{329} See supra Part III.A.

\textsuperscript{330} Cf. Lee, Persuasion, supra note 327, at 1023–31 (explaining why governments, as opposed to private parties, have a weaker interest in speaking anonymously).

\textsuperscript{331} See Eggen & Kane, supra note 1, at A1.
against Republican officials or declined to prosecute Democrats on baseless election-fraud charges. After receiving evidence from top Department of Justice officials corroborating these allegations and suggesting White House management of the firings, the committees requested testimony from several former and current White House advisors.

The President offered to make several top aides available to the committees for private, unsworn testimony, but the committees rejected the offer, choosing instead to issue subpoenas.

Were this case to enter the courts, the Nixon cases and Cheney together suggest a method of analyzing it distinct from the differentiation approach. In Nixon I, the Court expressly noted that its analysis centered on the need for evidence in a criminal case and had no application to information disputes between Congress and the Executive. In Cheney, the Court focused on the diminished need for information in civil, as opposed to criminal, suits and the relative lack of procedural safeguards in civil litigation preventing overbroad subpoenas. Following these cases, a court would concentrate on the significance of the congressional committee as the party seeking information. Assuming it concluded that it had jurisdiction to hear the case, the court would compare the nature of Congress’s need for information in such disputes, and the limits on Congress’s investigatory powers, to the needs and limits in criminal and ordinary civil cases. The case’s

332 See id.


334 See Eggen & Kane, supra note 1, at A1.


336 See Eggen & Kane, supra note 1, at A1.


339 See id. at 384–85.

340 The standards governing congressional standing are the subject of substantial disagreement. Former Chief Justice Rehnquist and four sitting Justices have suggested at least five different perspectives. See Raines v. Byrd, 521 U.S. 811, 829–30 (1997) (Rehnquist, C.J.); id. at 831–33 (Souter, J., concurring in the judgment); id. at 836 (Stevens, J., dissenting); id. at 839, 843 (Breyer, J., dissenting) (revealing four different perspectives on congressional standing); Morrison v. Olson, 487 U.S. 654, 708–09 (1988) (Scalia, J., dissenting) (suggesting that courts ought not to hear cases between Congress and the Executive). One court and one commentator have suggested that the methods by which Congress issues a subpoena or authorizes suit affects, or ought to affect, respectively, the standing determination. See Walker v. Cheney, 230 F. Supp. 2d 51, 68–69 (D.D.C. 2002); William P. Marshall, The Limits on Congress’s Authority to Investigate the President, 2004 U. ILL. L. REV. 781, 820–21.
resolution would turn on whether the court found Congress’s role more comparable to a criminal prosecutor or a private litigant.\textsuperscript{341}

By contrast, the differentiation approach calls on courts to analyze, with particularity, the strength of the President’s confidentiality interest.\textsuperscript{342} Illustrating that the differentiation approach does not always call for devaluing or deemphasizing the President’s confidentiality interest, a court applying the approach would conclude that the interest here is substantial. The prospect of providing sworn testimony before Congress and risking prosecution for false statements would have a serious chilling effect on the President’s advisors. Anticipating testifying during the course of the President’s administration, only about eighteen months following the deliberations, when the statements could be used to damage the sitting President’s political standing, would heighten that chill. Also, the sought-after testimony involves delicate personnel matters,\textsuperscript{343} subjects on which individuals are especially reluctant to discuss candidly absent an expectation of confidentiality. When individuals assess another’s job performance or her fitness for office, they must routinely discuss her shortcomings or weaknesses, and most people will understandably edit their assessments based on whether they expect their evaluations to remain confidential.\textsuperscript{344}

To be clear, the gravity of the President’s confidentiality interest would not dictate the outcome. A court would still have to balance the need for information against this weighty confidentiality interest.\textsuperscript{345} Though it is beyond this Article’s scope to detail the nature of that review, I would advocate a method of analysis comparable to the differentiation approach, which would assess the need for information by considering more than the simple fact that Congress was the party seeking information. The assessment would turn on the specifics of the investigation—here, Congress’s inquiry into whether the President or his advisors sought, through his appointments power, to impede investigations of political corruption by members of his own party and to interfere with the constitutional guarantee of free and fair elections. Moreover, the public has a heightened interest in ensuring the integ-

\textsuperscript{341} See Cheney, 542 U.S. at 384–85.
\textsuperscript{342} See supra Part III.A.
\textsuperscript{343} See Eggen & Kane, supra note 1, at A1.
\textsuperscript{344} My point here is not that the reasons underlying personnel decisions of government officials are, or ought to be, generally considered private information. It is instead that, without some assurances of confidentiality, many people will not speak candidly when evaluating others’ job performances or fitness for offices.
rity of the Attorney General’s office—as the office dedicated to the enforcement of law, and hence the rule of law.\textsuperscript{346} Therefore, if the court found Congress’s inquiry to rest on credible allegations, then the extraordinary significance of the investigation would outweigh the President’s substantial, though not absolute, interest in maintaining the confidentiality of his appointments deliberations.

\textit{Conclusion}

This Article has advanced two primary arguments. Most important, it has challenged the assumptions underlying the principal justification for protecting the confidentiality of presidential deliberations. The Article has argued that the need for confidentiality to encourage presidential advisors to provide candid counsel is contingent and variable. It has also contended that there is reason to doubt that confidentiality-induced candor will improve presidential decisions. Based on those arguments, the Article has proposed an approach to replace the extraordinary deference for the President’s generalized confidentiality interest manifest in the Supreme Court’s recent \textit{Cheney} decision. Setting forth an approach that differentiates among confidentiality claims, this Article argues that the constitutional weight accorded the President’s interest should depend on a context-specific analysis of the proposed disclosure. That analysis should consider the likelihood that that proposed disclosure would chill deliberations or affect the quality of decisions in ways distinct from chilling.

Inevitably the Article also raises questions about the relationship of confidentiality, candor, and decision making in other contexts. Does the interest in encouraging candor justify the confidentiality, for example, normally accorded jury and judicial deliberations, attorney-client and spousal communications, or university or medical peer review?\textsuperscript{347} And, if so, what are the considerations that make the candor justification more appropriate in some contexts than in others? In light of the many and varied issues those questions raise, addressing them remains for another day.\textsuperscript{348} In exploring the dynamics in play in the presidential context, this Article has called attention to our incomplete legal and commonsense assumptions about confidentiality, candor, and decision making, and sought to suggest that scrutinizing them is both necessary and worthwhile.

\textsuperscript{346} I thank Seana Shiffrin for suggesting this point to me.

\textsuperscript{347} See supra notes 19–22 and accompanying text.

\textsuperscript{348} See supra note 18 and accompanying text.