

## Vice Presidential Secrecy: A Study in Comparative Constitutional Privilege and Historical Development

Roy E. Brownell II

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## ARTICLES

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ROY E. BROWNELL II<sup>†</sup>

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## INTRODUCTION

It is generally accepted that Richard B. Cheney was the most powerful Vice President in American history.<sup>1</sup> His tenure marks the apogee of vice presidential influence, reflecting the gradual rise in importance of the office over the past several decades.<sup>2</sup>

<sup>1</sup> See, e.g., BRUCE P. MONTGOMERY, RICHARD B. CHENEY AND THE RISE OF THE IMPERIAL VICE PRESIDENCY x (2009) ("Cheney . . . far surpassed any of his predecessors in power and influence."); SHIRLEY ANNE WARSHAW, THE CO-PRESIDENCY OF BUSH AND CHENEY 1 (2009) ("Cheney . . . exerted more influence than any vice president in history . . .").

<sup>2</sup> It is undeniable that the stature of the vice presidency has increased dramatically since the nineteenth century. When exactly the turning point took place is less clear. The leading scholar on the vice presidency sums up matters aptly:

The metamorphosis of the vice presidency occurred over time. Although scholars differ on the length of the period, the key dates, and the weight to attach to particular events, it seems clear that the evolution began during the twentieth century and accelerated sometime after World War II. [In the first quarter of the twentieth century,] Vice presidents began to find some work in the *executive* branch. Wilson's vice president Thomas Marshall, and his successor, Calvin Coolidge, attended some cabinet meetings. . . . [With a brief pause during the Charles Dawes vice presidency, this custom] has continued since that time. [John Nance] Garner and Henry Wallace assumed some executive duties as legislative liaison, foreign emissary, and commission head. These involvements . . . symbolized a migration of the office to the executive branch. . . . The vice presidency of Richard M. Nixon first illustrated the modern American vice presidency [as he] . . . functioned essentially as a member of the executive branch.

One of the issues that arose at several junctures during Cheney's tenure was his determination to conduct his official activities confidentially. This prompted a series of clashes with members of Congress and outside groups as they tried to gain access to Cheney's internal deliberations.<sup>3</sup> These conflicts, several of which were litigated,<sup>4</sup> led many commentators to assert that Cheney was exercising what amounted to an illegitimate vice presidential privilege.<sup>5</sup>

While the President's exercise of executive privilege has been covered exhaustively in the academic literature,<sup>6</sup> the question of whether the Vice President enjoys his own constitutional privilege has never been fully explored by scholars.<sup>7</sup> This Article

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Joel K. Goldstein, *The Vice Presidency and the Twenty-Fifth Amendment: The Power of Reciprocal Relationships*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT* 165, 177–79 (Robert E. Gilbert ed., 2000); *see also infra* notes 309–15 and accompanying text.

<sup>3</sup> *See infra* Part VI.L.

<sup>4</sup> *See, e.g.,* *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004); *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002).

<sup>5</sup> *See infra* note 7 (providing a number of examples of such commentary).

<sup>6</sup> *See, e.g.,* RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974); ADAM CARLYLE BRECKENRIDGE, *THE EXECUTIVE PRIVILEGE* (1974); LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* (2004); DANIEL N. HOFFMAN, *GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS* (1981); PHILIP B. KURLAND, *WATERGATE AND THE CONSTITUTION* 34–74 (1978); MARK J. ROZELL, *EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY* (1st ed. 1994) [hereinafter ROZELL I]; Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974); Robert G. Dixon, Jr., *Congress, Shared Administration, and Executive Privilege*, in *CONGRESS AGAINST THE PRESIDENT* (Harvey C. Mansfield, Sr. ed., 1975); Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631 (1997); Gary J. Schmitt, *Executive Privilege: Presidential Power To Withhold Information from Congress*, in *THE PRESIDENCY IN THE CONSTITUTIONAL ORDER* (Joseph M. Bessette & Jeffrey Tulis eds., 1981); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987); Abraham D. Sofaer, *Book Review of Raoul Berger's EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH*, 88 HARV. L. REV. 281 (1974); *Constitutional Law—Executive Privilege—The President Does Not Have an Absolute Privilege To Withhold Evidence from a Grand Jury—Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973), 87 HARV. L. REV. 1557 (1974); *Judicial Review of Claims of Executive Privilege*, 88 HARV. L. REV. 50 (1974).

<sup>7</sup> The question has been briefly alluded to by a number of commentators. *See, e.g.,* *The Presidential Records Act Amendments of 2002: Hearing on H.R. 4187 Before the Subcomm. on Efficiency, Financial Management and Intergovernmental Relations, H. Comm. on Gov't Reform Concerning H.R. 4187*, 107th Cong. (2002), in *CONG. RESEARCH SERV., H.R. 4187, THE PRESIDENTIAL RECORDS ACT AMENDMENTS 2002*, at 6 [hereinafter Rosenberg Statement] (statement of Morton Rosenberg)

("Section 11 of E.O. 13,233 appears to provide that a former Vice-President may assert an independent claim of executive privilege to bar access to his materials under the PRA, and that such a claim will be treated exactly the same as a privilege by a former President . . ."); *The Implementation of the Presidential Records Act: Oversight Hearing Before the Subcomm. on Efficiency, Financial Management and Intergovernmental Relations, H. Comm. on Gov't Reform Concerning*, 107th Cong. (2001), in CONG. RESEARCH SERV., H.R. 4187, THE PRESIDENTIAL RECORDS ACT AMENDMENTS 2002, at 105 [hereinafter *PRA Hearing*] (testimony of Peter M. Shane) ("[The executive order states that] the Vice President shall be treated as the President [for purposes of executive privilege]. And if I may ask rhetorically, why in heaven's name would that be?"); *The Role of the Council on Competitiveness in Regulatory Review: Hearing on S. 1942 Before the S. Comm. on Gov't Affairs*, 102d Cong. 20, 24 (1991) [hereinafter *Council Hearings*] (testimony of Harold Bruff) ("How does the executive privilege apply to the vice presidency? . . . We do not want then to constrain executive privilege so much that the vice president is left attending funerals and cannot do anything useful at the center of the Federal Government."); WARSHAW, *supra* note 1, at 199 ("Extending executive privilege to the vice president . . . was a novel concept."); Vikram David Amar, *The Cheney Decision—A Missed Chance To Straighten out Some Muddled Issues*, 2004 CATO SUP. CT. REV. 185, 200 (stating that "the *Cheney* [v. *U.S. District Court*] ruling also missed a golden chance to explain how, or even why, executive privilege applies to the peculiar office of the vice presidency"); Hilary S. Cairnie & C. Ernest Edgar, IV, *An Imperfect Shield: How Private Parties Can Attack and Defeat the Executive Privilege for Deliberative Process in Government Procurement Litigation*, 28 PUB. CONT. L.J. 127, 144 (1999) ("Presidential deliberations are to be accorded the most (but not absolute) deference in terms of privilege. Presumably, the vice president would also be accorded this degree of deference. Because these are the only two constitutionally created offices in the Executive Branch, they enjoy an explicit constitutional recognition that does not apply to any other members of the Executive Branch."); Louis Klarevas, *The Law: Can You Sue the White House? Opening the Door for Separation of Powers Immunity in Cheney v. District Court*, 34 PRES. STUD. Q. 849, 865 (2004) ("[T]he opinion implies that the vice president should enjoy the right to invoke presidential privileges and immunities (at least in civil suits). . . . Should vice presidents seize on this language in the future, it is likely that they will argue that they are shielded from a variety of legal proceedings because of the unique rights and responsibilities conferred to them by the Constitution. The fact that the Supreme Court did not expressly distinguish the vice president from the president in its ruling bodes well for vice presidents."); Martha Joynt Kumar, *Executive Order 13233 Further Implementation of the Presidential Records Act*, 32 PRES. STUD. Q. 194, 205 (2002) ("The executive order implies a vice president may exercise executive privilege, an authority some question. . . . [I]t is unclear where his independent claim to executive privilege lies."); Bruce P. Montgomery, *Nixon's Ghost Haunts the Presidential Records Act: The Reagan and George W. Bush Administrations*, 32 PRES. STUD. Q. 789, 805 (2002) ("One of the extraordinary features of the Bush [Executive Order No. 13,233] . . . was that it manufactured a nonexistent, independent, constitutionally based privilege for vice presidents[,] . . . asserting a vice presidential claim of privilege that has no basis in the Constitution . . ."); Thomas O. Sargentich, *Normative Tensions in the Theory of Presidential Oversight of Agency Rulemaking*, 7 ADMIN. L.J. AM. U. 325, 328 (1993) ("The concept of executive privilege is based on Article II of the Constitution . . . . One should be especially careful to associate it directly with the President or the Vice President."); Jonathan Turley, *Presidential Papers and Popular Government: The Consequence of*

attempts to fill the void and answer the novel constitutional question: Does the Vice President have a constitutional privilege separate and distinct from that of the President? This work concludes that indeed the Vice President should be recognized as possessing a constitutional privilege when acting pursuant to the narrow duties assigned him by the Constitution.

Vice presidential privilege ("VPP") will be considered the assertion, by the Vice President himself, of his own constitutional right to withhold certain information from Congress, private litigants, and the public—a right independent from the President's constitutional authority and a right separate from the common-law deliberative process privilege that executive-branch

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*Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651, 676 n.153 (2003) (stating that in executive order 13,233 "[t]here is also a suggestion that the vice president can independently assert executive privilege, . . . [which is] an extremely controversial position. . . . Such a 'vice presidential privilege' represents a significant departure from existing case [law] and statutory authority. It would also dramatically expand the concept of executive privilege that the Court has struggled to confine within the constitutional framework. It is difficult to see any textual or original intent basis for a 'vice-presidential privilege.'"); Jeffrey P. Carlin, Note, *Walker v. Cheney: Politics, Posturing, and Executive Privilege*, 76 S. CAL. L. REV. 235, 269 (2002) ("A more complicated question is whether Vice President Cheney may assert the privilege on his own behalf."); Marcy Lynn Karin, Note, *Out of Sight, But Not Out of Mind: How Executive Order 13,233 Expands Executive Privilege While Simultaneously Preventing Access to Presidential Records*, 55 STAN. L. REV. 529, 554 (2002) ("Bush's Order is unambiguous in granting a former Vice President the authority to claim a vice-presidential privilege. While the President would have the authority to claim a privilege over a record of the Vice President, no precedent prior to this Order exists that expands to the Vice President a right to claim a privilege over a record of the Vice President, no precedent prior to this Order exists that expands to the Vice President a right to claim independently a privilege regardless of whether the President exerted one." (citations omitted)); Michael C. Dorf, *A Brief History of Executive Privilege, from George Washington Through Dick Cheney*, FIND LAW'S LEGAL COMMENTARY, Feb. 6, 2002, <http://writ.news.findlaw.com/dorf/20020206.html> ("Nor is it clear . . . that the Vice President can assert executive privilege."); Cass R. Sunstein, *The Polarization of Extremes*, CHRONICLE REV., Dec. 14, 2007, available at <http://www.law.uchicago.edu/news/sunstein121407> [hereinafter Sunstein] (last visited Oct. 8, 2010) (quoting an interview with Professor Sunstein discussing briefly the issue of a Vice President invoking executive privilege); Cass R. Sunstein, *Defining Executive Privilege*, BOSTON GLOBE, July 12, 2007, available at [http://www.boston.com/news/globe/editorial\\_opinion/oped/articles/2007/07/12/defining\\_executive\\_privilege](http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/07/12/defining_executive_privilege) [hereinafter *Defining Executive Privilege*] ("Is [executive privilege] . . . restricted to communications involving the president (and vice president) personally?"); see also MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 155 (2d ed. 2002) (1994) [hereinafter ROZELL II].



officials may invoke regarding certain predecisional matters.<sup>8</sup> As with executive privilege<sup>9</sup> and judicial privilege,<sup>10</sup> VPP includes within its ambit the authority to decline to appear in person before congressional committees.<sup>11</sup> As with limitations on executive privilege, VPP would prove more difficult to invoke successfully in the context of a criminal investigation, particularly outside the Vice President's legislative role. On a broader level, evaluation of VPP provides a useful vehicle for analyzing the unique status of the vice presidency within American constitutional law and government.

This Article will begin by providing proper context for discussion of VPP, reviewing as a structural matter the constitutional privileges enjoyed by other constitutional officers. As such, this segment will first demonstrate the premium that the Constitution places on encouraging effective decisionmaking. This emphasis is reflected in the authority of Presidents, members of Congress, and federal judges: (1) to collect the necessary information they need to make decisions—gathering information; (2) to reach decisions that will not leave them exposed to civil liability for their official actions—civil immunity; and (3) to deliberate over policy options in confidence—privilege. The lens will then narrow to focus on the third of these items, constitutional privileges writ large. This includes an overview of

<sup>8</sup> In this Article, mention of a vice presidential privilege will refer to a conception of the Vice President enjoying his own constitutional privilege but one distinct from vice presidential privilege as outlined in this piece.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Part IV.

<sup>11</sup> See, e.g., *infra* Part VI; cf. *Nixon v. Adm'r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 523 n.19 (1977) (Burger, C.J., dissenting) ("I see no distinction in Congress' seeking to compel the appearance and testimony of a former President and in, alternatively, seeking to compel the production of Presidential papers over the former President's objection."). The two-pronged rationale is that: (1) the very act of appearing would place the Vice President, a constitutional officer, in a position subservient to that of Congress; and (2) it would necessarily place him in the position of having to answer privileged questions. Cf. HAROLD C. RELYEA & TODD B. TATELMAN, CONG. RESEARCH SERV., PRESIDENTIAL ADVISERS' TESTIMONY BEFORE CONGRESSIONAL COMMITTEES: AN OVERVIEW 19 (2008).

It is quite likely that in the context of a House impeachment investigation the Vice President would be required to turn over even privileged materials. Cf. FISHER, *supra* note 6, at 49–50 (quoting authorities, such as Presidents Washington and Polk, who implied the existence of enhanced investigatory power pursuant to an impeachment investigation); *infra* note 262 (discussing the likely surrender of judicial materials to an impeachment investigation).

executive privilege,<sup>12</sup> legislative privilege,<sup>13</sup> and judicial privilege, respectively.<sup>14</sup> What these discussions reflect is that the

<sup>12</sup> For purposes of this Article, unless otherwise noted, “executive privilege” will be defined as “the right of presidents to withhold information from those entities that have compulsory power, particularly Congress and the judicial branch.” Mark J. Rozell, *Executive Privilege in an Era of Polarized Politics*, in EXECUTING THE CONSTITUTION: PUTTING THE PRESIDENT BACK INTO THE CONSTITUTION 91, 91 (Christopher S. Kelley ed., 2006). This definition is in keeping with others in the field. See, e.g., CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 108-17, at 554 (2002), available at <http://www.gpoaccess.gov/constitution/pdf2002/012.pdf> [hereinafter CRS] (“The doctrine of executive privilege defines the authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the government.”); DAVID E. KYVIG, THE AGE OF IMPEACHMENT: AMERICAN CONSTITUTIONAL CULTURE SINCE 1960, at 163 (2008) (stating that “executive privilege, [is] the right of the president to withhold information from Congress and the courts”); DAVID SADOFSKY, KNOWLEDGE AS POWER: POLITICAL AND LEGAL CONTROL OF INFORMATION 74 (1990) (“Executive privilege is the presidential right to maintain secrecy against otherwise binding discovery.”). As will be discussed below, executive privilege includes both constitutional and common-law privileges. See *infra* notes 123–31 and accompanying text. Unless otherwise stated, “executive privilege” refers to the constitutional executive privilege, known as presidential communications privilege and not the common-law privilege known as the deliberative process privilege.

<sup>13</sup> For purposes of this Article, “legislative privilege” will be defined as the constitutional right of members of the legislative branch to withhold information from those entities that have compulsory power. Cf. Rozell, *supra* note 12. In this regard, the term legislative privilege is used in a more narrow sense than in other contexts, which sometimes include freedom of speech during debate and privilege from civil arrest. See, e.g., JOSH CHAFETZ, DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 3 (2007) (defining the term as “those special rights that individual Members or Houses of the legislature possess in order to facilitate their legislative duties”); see also *id.* at 87–110, 134–43 (discussing other aspects of the broader definition). Legislative privilege in this piece has two subcategories. The first is what will be called “Speech or Debate privilege,” which is a legislative privilege that is linked at least in part to the Speech or Debate Clause or other text. See *infra* Part III.A. The second is what will be called the “generalized legislative privilege,” which is a legislative privilege that is not tied specifically to the Speech or Debate Clause or other text. See *infra* Part III.B. The latter can be justified instead on structural comparisons to executive privilege and judicial privilege, as well as to past practice. This definition does not include the authority of the Senate to enforce the confidentiality of its secret sessions. This authority is exercised by the chamber as a whole and not by individual members. Unlike an assertion of privilege based on the Speech or Debate Clause or the generalized legislative privilege—both of which are exercised at the discretion of the individual lawmaker, see *infra* note 180—the Vice President and all Senators are obligated to withhold information revealed in closed session until released from that obligation by the entire Senate. See MILDRED AMER, CONG. RESEARCH SERV., SECRET SESSIONS OF THE HOUSE AND SENATE 2–3 (2008) [hereinafter SECRET SESSIONS]. In this vein, the upper chamber may permit the

President, members of Congress, and federal judges have the benefit of a recognized privilege to protect the confidentiality of their internal deliberations as they carry out their constitutionally-assigned responsibilities. As a matter of constitutional structure and symmetry,<sup>15</sup> it would seem

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release of information by passing a resolution. *See id.* at 3. This authority is drawn from Article I, Section 5 of the Constitution, which permits Congress to keep its journals secret. *See* U.S. CONST. art. I, § 5. There is no judicial guidance on this provision. *See* CHAFETZ, *supra* at 13. That same section also authorizes each house of Congress to issue its own rules. *See* U.S. CONST. art. I, § 5. Based on these authorities, the Senate, from time to time, meets in secret session. *See* SECRET SESSIONS, *supra*, at 1–2. These sessions are authorized by Senate rules XX, XXI, XXIV, XXIX, and XXXI, *see id.* at 1, and may be chaired by the Vice President in his role as President of the Senate. The Vice President must ensure the confidentiality of these closed sessions. *See* RICHARD S. BETH, DANIEL STRICKLAND & PAUL DWYER, CONG. RESEARCH SERV., DUTIES AND RESPONSIBILITIES OF THE VICE PRESIDENT OF THE UNITED STATES 23 (1981). Thus, this confidentiality provision is not so much a privilege as an obligation placed on the Vice President.

Thus, in light of Senate rules and the Vice President's role as presiding officer, the Vice President would appear to be obligated to claim privilege over materials related to or communications engaged in during closed session. In this regard, Senate rules would seem to prevent the House from compelling the Vice President to turn over such Senate materials. *See* Letter from Kathryn L. Wheelbarger, Counsel to the Vice President, to Perry Apfelbaum, Chief of Staff and Counsel, Comm. on the Judiciary, House of Representatives 2 (Apr. 18, 2008) [hereinafter *April 18, 2008 Letter*] (on file with author); *cf.* Molly K. Hooper, *Young Cries Foul After Senate Calls for Investigation*, CQ TODAY, Apr. 23, 2008 (criticizing the U.S. Senate for a vote requesting an investigation into alleged wrongdoing in the House of Representatives, by contending that: "What the Senate did was unconstitutional . . . No other body can request an investigation on another body." (quoting Representative Don Young)); *infra* notes 402–03 and accompanying text. *But cf.* 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2665 (1907) (the Senate acquiescing to a House subpoena that the Senate turn over certain documents to the House).

Unlike arguments related to the Speech or Debate Clause or the generalized legislative privilege, the authority to withhold such information in secret session has been explicitly cited by the Vice President's office. During correspondence with the Senate Judiciary Committee over a subpoena it issued to the Vice President, Vice President Cheney's counsel noted that "the Vice President respects the legal privileges afforded by the Constitution to the Senate, such as preservation of the confidentiality of a session of the Senate with closed doors over which a Vice President may preside." Letter from Shannen W. Coffin, Counsel to the Vice President to the Honorable Patrick J. Leahy, Chairman, Comm. on the Judiciary 1–2 (Aug. 20, 2007) [hereinafter *August 20, 2007 Letter*] (on file with author).

<sup>14</sup> For purposes of this Article, "judicial privilege" will be defined as the constitutional right of federal judges to withhold information from those entities that have compulsory power. *Cf.* Rozell, *supra* note 12.

<sup>15</sup> Structural exegesis has proved an important means of interpreting aspects of separation of powers. *See* *Youngstown Sheet & Tube v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of

anomalous for the Vice President to be the only one of the nearly 1,400 constitutional officers *not* to hold such a privilege.<sup>16</sup> It should therefore follow that the Vice President possesses a comparable privilege to the extent he is carrying out his own constitutional responsibilities, however modest they may be. This is because the rationale for the Vice President requiring a

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any of its branches *based on isolated clauses, or even single Articles torn from context*. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice *will integrate the dispersed powers into a workable government*.” (emphasis added)). Absolute civil immunity for constitutional officers when carrying out their official duties provides an example of structural analysis when used in the context of separation of powers. In *Nixon v. Fitzgerald*, the Court noted that its “analysis must draw its evidence primarily from our constitutional heritage *and structure*.” 457 U.S. 731, 748 (1982) (emphasis added). The Court reasoned that since

the Speech and [sic] Debate Clause provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any similar grant of executive immunity. This argument is unpersuasive. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity . . . is well settled.

*Id.* at 750 n.31 (1982); *see also id.* at 747–48 (in considering questions of civil immunity, the Supreme Court “necessarily . . . has weighed concerns of public policy, especially as illuminated by our history *and the structure of our government*” (emphasis added)); *id.* at 750 n.31 (“[T]he most compelling arguments [in favor of presidential immunity] arise from . . . reliance on constitutional structure and judicial precedent . . .”); *infra* Part I.B.

Another example of the courts concluding that the Constitution grants each branch similar authority involves constitutional interpretation by the political branches. Although the judiciary is the ultimate arbiter of the Constitution, it is widely acknowledged that the political branches have their own parallel, if subordinate, authority to interpret the Constitution. This is particularly the case when the political branches interpret their own constitutional authority. *See, e.g., United States v. Nixon (Nixon I)*, 418 U.S. 681, 703 (1974) (“In the performance of assigned constitutional duties *each* branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.” (emphasis added)).

In the academic realm, the Vesting Clauses of Articles II and III have been analogized to one another. *See generally* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992). Regarding the merits of structural interpretation more broadly, *see, for example*, CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 22 (1969); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

<sup>16</sup> This number includes 1 President, 100 Senators, 435 Representatives, 9 Supreme Court Justices, 179 court of appeals judges, 9 international trade judges, and 678 district court judges. This total does not include bankruptcy judges or magistrate judges. *See* United States Courts, Judges & Judgeships, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Oct. 8, 2010).

constitutional privilege—to encourage maximum candor during his internal deliberations in order to promote effective decisionmaking—is the same as it is for other constitutional officers. While focusing on the Vice President and whether he holds his own privilege, it is hoped that this discussion of confidentiality among the three branches will add to the broader discourse on comparative constitutional privilege.<sup>17</sup>

This Article will then turn to an analysis of the vice presidency and its place in our constitutional system. The Vice President has a unique status under the Constitution: part legislative and part executive, with his exact location in the constitutional order varying depending on the duties he is performing at the time. The primary constitutional duties of the Vice President are to preside over the Senate and break ties, which are legislative duties; to prepare for and help make a determination of presidential inability,<sup>18</sup> and to prepare for succession, which are executive branch responsibilities.<sup>19</sup> In none of these roles is the Vice President legally—as opposed to politically—answerable to the President.

A historical analysis of investigations involving the vice presidency will follow. This discussion—the first of its kind in the academic literature—will review several case studies to determine whether any Vice President has asserted his own constitutional privilege. The vice presidencies of Daniel Tompkins, John C. Calhoun, Schuyler Colfax, Henry Wallace, Hubert Humphrey, Spiro Agnew, Gerald Ford, Nelson Rockefeller, George H.W. Bush, Dan Quayle, Al Gore, and Cheney will all be explored.<sup>20</sup>

<sup>17</sup> Other earlier comparative discussions include: *Nixon v. Sirica*, 487 F.2d 700, 730–51 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part); *Soucie v. David*, 448 F.2d 1067, 1080–84 (D.C. Cir. 1971) (Wilkey, J., concurring); Cox, *supra* note 6, at 1391–407.

<sup>18</sup> The terms “disability” and “inability” often have been used interchangeably in the context of the Twenty-Fifth Amendment. *See, e.g.*, JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 270 (1992). For the sake of simplicity and consistency, the expression “inability” will be used throughout this Article.

<sup>19</sup> For purposes of this Article, the Vice President’s responsibilities under the Twenty-Fifth Amendment will be termed “executive branch duties” or “executive branch responsibilities” to distinguish them from “executive duties” or “executive responsibilities,” which imply presidential responsibility under Article II.

<sup>20</sup> A Senate committee investigation of Senate aide Bobby Baker at times drew close to Lyndon Johnson late in his vice presidency and early in his presidency. *See, e.g.*, Cabell Phillips, *Senators To Push Inquiry on Baker*, N.Y. TIMES, Oct. 24, 1963,

Particular attention in this Part will be placed on Cheney's vice presidency, including an examination of *Walker v. Cheney*,<sup>21</sup> a federal district court decision involving the Vice President's dispute over information with the General Accounting Office ("GAO"),<sup>22</sup> and *Cheney v. U.S. District Court*,<sup>23</sup> a suit stemming from attempts by private litigants to secure similar information from the Vice President. While not involving executive privilege or VPP per se, both suits entailed closely related issues and culminated in the judiciary deferring to vice presidential concerns regarding confidentiality. They also implicitly recognized the Vice President's constitutional status as being roughly on par with that of the President. In addition, the Cheney segment will discuss a 2001 executive order implying the existence of a privilege for the Vice President and several other conflicts over information involving Cheney and congressional committees. It will also discuss Cheney's interaction with the 9/11 Commission.

Ultimately, this Article concludes that, while Vice Presidents have become embroiled in ever more frequent contests over information, VPP has not been officially invoked. Nonetheless, episodes involving Vice Presidents Humphrey, Agnew, Rockefeller, and Cheney all to varying degrees seem to have implicitly recognized that such a privilege exists; in this vein, they would appear to have "reserved the right" for future Vice Presidents to make such an assertion. At a broader level, the growing frequency of these clashes over the past several decades demonstrates the growing significance of the vice presidency over time and the position's greater involvement in the executive branch. Should this overall trend toward enhanced vice presidential power continue, it is quite possible that Vice Presidents could build on these proto-VPP precedents and actually invoke the doctrine.

Next, the Article will turn to evaluating potential arguments in favor of VPP and possible counterarguments against it. It will analyze constitutional structure as well as case law and past

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at 1. Ultimately, the investigation did not focus on potential links between Baker and Johnson. See generally BOBBY BAKER WITH LARRY L. KING, WHEELING AND DEALING: CONFESSIONS OF A CAPITOL HILL OPERATOR 175–96 (1978). The author would like to thank Joel Goldstein for raising this episode.

<sup>21</sup> 230 F. Supp. 2d 51 (D.D.C. 2002).

<sup>22</sup> GAO is now called the Government Accountability Office.

<sup>23</sup> 542 U.S. 367 (2004).

practice. While case law and past practice generally support VPP, theoretical arguments based on structural considerations are even more compelling, especially in light of other constitutional officers<sup>24</sup> having comparable constitutional privileges. After the pros and cons of VPP have been weighed, this Article concludes that the arguments in favor of a privilege of limited scope are more persuasive than those against recognition of such a power. The doctrine, however, is likely to exist only to the extent it involves the Vice President's narrow textual responsibilities: presiding over the Senate and breaking tie votes; preparing for and helping to make determinations about presidential inability; and preparing for succession. As such, VPP is a composite privilege reflecting both the Vice President's Article I duties and his responsibilities under the Twenty-Fifth Amendment.<sup>25</sup> For the Vice President to invoke a constitutional privilege beyond these narrow confines runs the risk of creating a vice presidential *executive* privilege, which would undermine the President's constitutional role as the head of the executive branch and the prevailing view that only the President may invoke executive privilege.

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<sup>24</sup> For purposes of this Article, "constitutional officer" refers to those holding positions of high authority in the federal government as provided in constitutional text. Accordingly, the term does not include positions such as presidential electors. Nor should it be confused with "principal" or "inferior" officers of the executive branch, which have been created by statute. See, e.g., Letter from Brian A. Benczkowski, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to Rep. Henry A. Waxman (Jan. 18, 2008) [hereinafter *Benczkowski Jan. 18, 2008 Letter*] (on file with author) (referring to the President and Vice President as "the two constitutional officers of the executive branch"); Memorandum from Walter Dellinger, Assistant Att'y Gen., Office of Legal Counsel, on Whether the Office of the Vice President Is an "Agency" for Purposes of the Freedom of Information Act to Todd J. Campbell, Counsel & Dir. of Admin., Office of the Vice President (Feb. 14, 1994), available at <http://www.usdoj.gov/olc/foiavp.htm> [hereinafter *FOIA Opinion*] (stating that "the Vice President is also a constitutional officer").

<sup>25</sup> A Vice President elect is also likely to enjoy a constitutional privilege under the Twentieth Amendment. See *infra* note 743.

## CONSTITUTIONAL STRUCTURE AND COMPARATIVE CONSTITUTIONAL PRIVILEGE

### I. THE CONSTITUTIONAL NORM OF ENCOURAGING EFFECTIVE DECISIONMAKING

On a broad structural level, the Constitution places a premium on encouraging effective governmental decisionmaking. There are three components to this constitutional norm. They are: (1) ensuring that constitutional officers can collect reliable and sufficient information with which to make their decisions—the gathering of information; (2) ensuring that constitutional officers can consider policy options without fear that they will be held civilly liable for the decisions they make—immunity from civil suit; and (3) ensuring that they may consider their decisionmaking options confidentially—privilege.<sup>26</sup> While the focus of this Article is on the latter aspect of this norm, a brief discussion of the other two elements provides a useful backdrop, explaining the rationale behind why the Vice President should enjoy a constitutional privilege like those exercised by his fellow constitutional officers.

#### A. *The Gathering of Information*

The structural need for constitutional officers to secure reliable information in their internal decisionmaking is manifested in all three branches. Regarding the President's authority to collect the information necessary for him to effectively perform his duties, under Article II he "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."<sup>27</sup> Moreover, Article I provides him

<sup>26</sup> Cf. Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J.L. & PUB. POL'Y 647, 728–29 (1999); Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. REV. 879, 881–82 (1985).

<sup>27</sup> U.S. CONST. art. II, § 2; see also Brief for the Petitioners at 29–30, *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004) (No. 03-475) [hereinafter *Cheney Supreme Court Brief*] ("The Opinion Clause . . . explicitly confirms the President's authority to gather information and opinions from his subordinates . . . . The Recommendations Clause (along with the State of the Union Clause) provides further textual evidence of the President's powers to gather information . . . .").



with ten days with which to familiarize himself with legislation in order to decide whether to sign a bill or veto it.<sup>28</sup> More generally, Justices of the Supreme Court have recognized the importance of the President being able to gather information as needed to render decisions.<sup>29</sup>

Members of Congress are also empowered to secure information with which to legislate. Two houses of Congress were created by the Framers in part to ensure that matters of public concern would be thoroughly considered before becoming law.<sup>30</sup> As the Supreme Court has noted

[t]he division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings . . . . Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.<sup>31</sup>

The expectation behind this "exhaustively considered" procedure was that full information about the legislation in question could

<sup>28</sup> See U.S. CONST. art. I, § 7, cl. 2; see also 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 448 (Jonathan Elliot ed., 2d ed. 1937) [hereafter 2 ELLIOT] ("The President, sir, will not be a stranger to our country, to our laws, or to our wishes . . . . [When considering whether to sign legislation] [h]e will have before him the fullest information of our situation; he will avail himself not only of records and official communications, foreign and domestic, but he will have also the advice of the executive officers in the different departments of the general government." (quoting James Wilson during the Pennsylvania Ratifying Debate)); Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 673 n.110 (1996) ("The Framers understood that, in weighing and wielding his veto pen, the President would often seek the 'information and opinions' of the executive underlings.").

<sup>29</sup> See *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 488–89 (1989) (Kennedy, J., concurring) (concluding that a statute that "would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution to nominate federal judges is enough to invalidate the Act"); see also *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 50 (D.D.C. 2002), *vacated on other grounds*, *Cheney*, 542 U.S. 367 ("While no clause of Article II expressly grants the President the power to acquire information or receive advice in confidence, the necessity of receiving confidential advice appears to flow from Article II. Several clauses of Article II reflect an understanding that the President will have access to information and the power to acquire it . . . ." (citations omitted)).

<sup>30</sup> See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 754–55 (1986) (Stevens, J., concurring) ("The division of Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings." (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983))).

<sup>31</sup> *Chadha*, 462 U.S. at 951.

come to light and be carefully weighed during congressional debate. This emphasis on encouraging good decisionmaking by gathering appropriate information is further manifested through Congress's investigative power. The Supreme Court has concluded that

[w]e are of the opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.<sup>32</sup>

Likewise, members of the judiciary possess authority to ensure that courts have sufficient information before them to make proper judgments. In *United States v. Nixon* (*Nixon I*), the Supreme Court noted:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, *it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.*<sup>33</sup>

The Vice President is also granted authority to secure the information he needs to carry out his constitutional duties under the Twenty-Fifth Amendment. Under Section 4, which governs situations involving presidential inability determinations, the Vice President, in conjunction with the Cabinet or other body created by Congress, has to make a “factual determination of whether or not inability exists. . . . It is assumed that such decision would be made only after adequate consultation with

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<sup>32</sup> *McGrain v. Daugherty*, 273 U.S. 135, 174–75 (1927).

<sup>33</sup> 418 U.S. 683, 709 (1974) (emphasis added).

medical experts who were intricately familiar with the President's physical and mental condition."<sup>34</sup>

Thus, it seems clear that the Constitution envisions that its officers must be able to properly gather the information they need to effectively carry out their responsibilities.

### B. Immunity Against Civil Suit for Official Actions

Constitutional protection of the decisionmaking function is also reflected in the granting to constitutional officers of absolute immunity from civil suit related to their official duties. In the case of civil immunity, the risk to effective decisionmaking is twofold: (1) the threat of litigation is thought to discourage certain policy options from being seriously considered;<sup>35</sup> and (2) discovery pursuant to a lawsuit may expose the internal deliberations themselves.<sup>36</sup>

For these reasons, the President benefits from absolute immunity from civil suit in the execution of his official duties—at least absent legislation to the contrary—so that he can make his

<sup>34</sup> S. REP. NO. 89-66, at 13 (1965); see also John D. Feerick et al., *Minority Opinion Regarding Recommendation IV*, in JAMES F. TOOLE ET AL., *DISABILITY IN U.S. PRESIDENTS: REPORT, RECOMMENDATIONS AND COMMENTARIES BY THE WORKING GROUP 26, 27* (1997) [hereinafter REPORT] (recommending that, under the Twenty-Fifth Amendment, "[c]onstitutional decision-makers will generally require medical advice from appropriate medical experts . . . regarding the President's condition in making decisions . . . [and] as to whether the President is able to discharge the powers and duties of his office. The legislative history surrounding the adoption of the Twenty-[F]ifth Amendment makes clear that its framers intended that constitutional decision-makers would solicit appropriate medical advice."); Senator Birch E. Bayh, Jr., *The Twenty-Fifth Amendment: Its History and Meaning*, in 1 PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 1, 14 (Kenneth W. Thompson ed., 1991) ("In the real world . . . nothing [would be done] . . . until the vice president has a chance to consult with a lot of folks as to whether something needs to be done."); Mortimer Caplin, *Revisiting the Twenty-Fifth Amendment*, in 2 PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT, *supra*, at 9, 22 (hypothesizing about a First Lady discussing the President's health with the Vice President and Cabinet during an inability inquiry under the Twenty-Fifth Amendment).

<sup>35</sup> See *Nixon v. Fitzgerald*, 457 U.S. 731, 752 n.32 (1982) ("Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties.").

<sup>36</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 826 (1982) (Burger, C.J., dissenting) ("[E]xposure to civil liability [for presidential aides] for official acts will result in constant judicial questioning, through judicial proceedings and pretrial discovery, into the inner workings of the Presidential Office beyond that necessary to maintain the traditional checks and balances of our constitutional structure.").

decisions undeterred by concerns about potential damage suits. It has been recognized that the threat of litigation “is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.”<sup>37</sup> In *Clinton v. Jones*, the Supreme Court similarly observed “we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability.”<sup>38</sup> Likewise, the Court concluded in *Ferri v. Ackerman*,

[t]he societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.<sup>39</sup>

Federal lawmakers are also shielded by absolute immunity from civil suit for their official actions. This is reflected in the Speech or Debate Clause, which ensures that “for any Speech or Debate in either House, [federal lawmakers] shall not be questioned in any other Place.”<sup>40</sup> This has been reinforced in the caselaw.<sup>41</sup> For example, in *Doe v. McMillan*, the Supreme Court held that parents could not bring an action for civil damages

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<sup>37</sup> *Nixon*, 457 U.S. at 752; *id.* at 763 (Burger, C.J., concurring) (noting that failure to provide civil immunity to the President for official acts “would also inevitably inhibit the processes of Executive Branch decisionmaking and impede the functioning of the Office of the President”); *id.* at 784 (White, J., dissenting) (“The Court’s response, until today, to this problem has been to apply the argument to individual functions, not offices, and to evaluate the effect of liability on governmental decisionmaking within that function in light of the substantive ends that are to be encouraged or discouraged.”); *cf.* *Butz v. Economou*, 438 U.S. 478, 527 (1978) (Rehnquist, J., concurring in part and dissenting in part) (stating in the context of immunity that “vexatious constitutional litigation will interfere with his [Cabinet Secretary’s] decisionmaking process”); *Clinton v. Jones*, 520 U.S. 681, 720 (1997) (Breyer, J., concurring) (observing that the majority opinion centers around the view that “a President’s fear of civil lawsuits based upon his official duties could distort his official decisionmaking”).

<sup>38</sup> 520 U.S. at 693.

<sup>39</sup> 444 U.S. 193, 203–04 (1979); *see also Nixon*, 457 U.S. at 752 n.32.

<sup>40</sup> U.S. CONST. art. I, § 6.

<sup>41</sup> *See, e.g., Doe v. McMillan*, 412 U.S. 306, 311–12 (1973).

against members of Congress and their employees for publishing information about the scholastic performance of their children.<sup>42</sup>

Judges are similarly protected by absolute immunity, albeit at common law. In *Randall v. Brigham*, the Supreme Court concluded that “it is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction.”<sup>43</sup> This rule has been reaffirmed on several occasions.<sup>44</sup>

While there is no case law directly on point,<sup>45</sup> dicta indicate that the Vice President would also be protected by a comparable immunity for his official acts. In *McCullough v. United States*,<sup>46</sup> a federal court upheld a magistrate judge’s report and recommendation “in its entirety.”<sup>47</sup> The magistrate judge’s opinion involved dismissal of a pro se suit against former Vice President Cheney, among others. The judge wrote that “[w]hile case law does not appear to extend the protection of absolute

<sup>42</sup> See *id.*

<sup>43</sup> 74 U.S. (7 Wall.) 523, 535 (1868).

<sup>44</sup> See, e.g., *Bradley v. Fisher*, 80 U.S. 335, 347 (1871) (noting that if a judge carries out “a judicial act,” then “the defendant cannot be subjected to responsibility for it in a civil action”); *Stump v. Sparkman*, 435 U.S. 349, 356 (1978) (“[C]ourts of superior or general jurisdiction are not liable to civil actions for their judicial acts . . .”).

<sup>45</sup> The question of vice presidential civil immunity for official acts was raised in *Wilson v. Libby*, but the court declined to address the question. See 535 F.3d 697, 713 n.3 (D.C. Cir. 2008) (“Because our decision, based on the grounds considered by the district court, results in the dismissal of all claims against the Vice President of the United States, we need not, and do not, consider his alternate claim for absolute Vice-Presidential immunity.”). For the limited literature on vice presidential immunity, see James D. Myers, Note, *Bringing the Vice President into the Fold: Executive Immunity and the Vice Presidency*, 50 B.C. L. REV. 897, 898 n.8 (2009); cf. Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995) (arguing that while “not a ‘Senator or Representative,’ strictly speaking,” the Arrest Clause would still protect the Vice President from civil incarceration). A comprehensive discussion of vice presidential immunity is beyond the scope of this Article. However, in addition to case law, persuasive structural considerations could also be marshalled in support of immunity. As with privilege, were the Vice President to be denied immunity he would stand alone in this regard among constitutional officers. It is, of course, highly doubtful that the Vice President would enjoy civil immunity for unofficial acts. See *Clinton v. Jones*, 520 U.S. 681, 693 (1997); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 7.3(f)(i)–(ii) (4th ed. 2007) (noting that both Theodore Roosevelt and Harry Truman were defendants in civil lawsuits while they were Vice President, both for actions that occurred before they took office); *infra* note 348.

<sup>46</sup> C/A No. 8:08-4137-GRA-WMC, 2009 WL 367371, at \*1 (D.S.C. Feb. 13, 2009).

<sup>47</sup> *Id.* at \*2.

immunity to the Vice President, Plaintiff named [the Vice President] . . . [in his] role as President of the Senate. Therefore, it is possible that Defendant Cheney may be protected by legislative immunity, or in the alternative, be entitled to qualified immunity.”<sup>48</sup> The judge cautioned, “[h]owever, [that] as the complaint is subject to dismissal on other grounds, a detailed discussion regarding the possible scope of former Vice President Cheney’s immunity is unnecessary.”<sup>49</sup>

A few weeks later, the same federal court in *Sykes v. Frank* dismissed a similar suit on largely the same grounds against several officials, including the former Vice President.<sup>50</sup> Again, the court upheld the magistrate’s report and recommendation “in its entirety.”<sup>51</sup> The magistrate judge noted that the “present action cannot proceed against Defendants Bush and Cheney because of the complete immunity enjoyed by the President and Vice-President of the United States in performing the duties of their respective offices.”<sup>52</sup> Citing *Nixon v. Fitzgerald*, the magistrate judge explained that “[a]lthough the *Nixon* court did not specifically mention the office of Vice-President, *it is clear* from the Court’s analysis that the rationale for absolute immunity applies to that office as well.”<sup>53</sup> Because the former Vice President was “protected by absolute immunity,” the suit was dismissed.<sup>54</sup> Thus, what dicta exist indicate that the Vice President would have the benefit of civil immunity.

This Article, of course, focuses on the third aspect of the emphasis the Constitution places on decisionmaking by constitutional officers: privilege. In particular, it considers whether a Vice President has a constitutional privilege. That the Vice President is granted the authority to gather the information he needs to fulfill his constitutional duties and that he is likely immune from civil suit for his official acts only serve to underscore the structural reasoning upon which VPP in large part rests: That, like any other constitutional officer, he must have his decisionmaking process protected.

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<sup>48</sup> *Id.* at \*4 n.4.

<sup>49</sup> *Id.*

<sup>50</sup> C/A No. 8:08-4049-GRA-BBH, 2009 WL 614806, at \*1 (D.S.C. Mar. 6, 2009).

<sup>51</sup> *See id.* at \*2.

<sup>52</sup> *Id.* at \*8.

<sup>53</sup> *Id.* at \*8 n.3 (emphasis added).

<sup>54</sup> *Id.* at \*8.

### C. Constitutional Privileges and Governmental Structure

#### 1. Separation of Powers and Constitutional Privileges

Constitutional officers in each of the three branches of the federal government have the benefit of a constitutional privilege against disclosure of their internal deliberations.<sup>55</sup> This is a concept which dates to the 1790s.<sup>56</sup> During the first decade under the Constitution, Representative Nathaniel Smith noted “that each department of Government ought to be the sole judge when to make any part of its proceedings public.”<sup>57</sup> This view was echoed in the early nineteenth century by Supreme Court Justice Thomas Johnson. He wrote to Thomas Jefferson that “I do verily believe that there is no Body of Men, legislative, judicial or executive, who could preserve the public Respect for a single year, if the public Eye were permitted always to look behind the Curtain.”<sup>58</sup> This view has prevailed up to the present day.<sup>59</sup>

For instance, the Supreme Court adopted the same rationale in *Nixon I*:

[T]he valid need for protection of communications between *high Government officials* and those who advise and assist them in

<sup>55</sup> See also *infra* Parts II–IV; see also, e.g., ROZELL II, *supra* note 7, at 51 (“[E]xecutive privilege can be defended on the basis of the accepted practices of secrecy in the other branches of government.”); Dixon, *supra* note 6, at 133 (“Executive privilege is a particular aspect of . . . government information policy . . . common to all three branches of the separation of powers system.”); Vikram David Amar, *Executive Privilege: Often Valuable To Protect the Presidency, But Misunderstood by President Bush in the Condoleezza Rice Case*, FINDLAW LEGAL COMMENTARY, Apr. 16, 2004, available at <http://writ.news.findlaw.com/amar/20040416.html> (“[T]he idea [executive privilege] . . . embodies is quite well accepted: the notion that each branch requires some internal privacy to deliberate free from the prying eyes and ears of the other two branches and of the American public.”).

<sup>56</sup> See HOFFMAN, *supra* note 6, at 155.

<sup>57</sup> *Id.*

<sup>58</sup> ALEXANDRA K. WIGDOR, *THE PERSONAL PAPERS OF SUPREME COURT JUSTICES: A DESCRIPTIVE GUIDE* 10 (1986).

<sup>59</sup> See, e.g., 9 CONG. REC. 680 (1879) (quoting a House Judiciary Committee study that determined the political branches lacked authority to compel production of documents from each other); see also Dixon, *supra* note 6, at 134; *cf.* *United States v. Morgan*, 313 U.S. 409, 422 (1941) (“We have explicitly held . . . that ‘it was not the function of the court to probe the mental processes of the Secretary [of Agriculture in arriving at his decision].’ Just as a judge cannot be subjected to such a scrutiny so the integrity of the administrative process must be equally respected. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of the courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.” (citations omitted)).

the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion . . . . Certain powers and privileges flow from the *nature of enumerated powers*; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings . . . .<sup>60</sup>

Thus, the reason for such a privilege is that for the President to perform his duties ably he must receive candid advice from his aides. It is thought that this type of counsel might not be forthcoming if internal deliberations are not protected from public view. The concern is that embarrassing revelations might limit a full airing of policy options or rationales, which could therefore compromise the decisionmaking process.<sup>61</sup> The Court in *Nixon I* explained that the privilege was not unique to the President but “is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”<sup>62</sup> In this regard, the justification for the President would be applicable to other constitutional officers who also need candid advice from their peers and subordinates to sharpen the decisionmaking processes of their respective institutions.

The years since *Nixon I* have witnessed the high court reaffirming this stance, that constitutional privileges are integral to constitutional officers optimally performing their duties. In *Nixon v. Administrator of General Services (Nixon II)*, the Supreme Court noted that *Nixon I* “recognized that there is a legitimate governmental interest in the confidentiality of

<sup>60</sup> 418 U.S. 683, 705–06 (1974) (emphasis added); *cf. id.* at 708 n.17 (“[G]overnment . . . needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning.” (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeis*, 40 F.R.D. 318, 325 (D.D.C. 1966)) (internal quotation marks omitted)). The *Nixon I* decision will be discussed in greater detail below. *See infra* Part II.B.1.

<sup>61</sup> *See infra* notes 79, 111, and 115 and accompanying text. In addition to the importance of promoting effective decisionmaking among constitutional officers, another justification provided in support of constitutional privilege is to preserve the independence of the three branches from each other. *See, e.g., Nixon v. Adm’r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 510–11 (1977) (Burger, C.J., dissenting) (“This independence of the three branches of Government, including control over the papers of each, lies at the heart of this Court’s broad holdings concerning the immunity of congressional papers from outside scrutiny. . . . [T]o preserve the constitutionally rooted independence of each branch of Government, each branch must be able to control its own papers.”). This same rationale is applicable in the case of VPP since it is important to preserve the independence of the vice presidency, especially in the context of determining presidential inability.

<sup>62</sup> 418 U.S. at 708.



communications between high Government officials.”<sup>63</sup> The Court elaborated that “[g]overnment confidentiality has been a concern from the time of the Constitutional Convention.”<sup>64</sup>

The view that all constitutional officers may exercise a privilege was made even more explicit by Chief Justice Warren Burger in his dissent in *Nixon II*. In this vein, Burger wove considerations of constitutional structure and symmetry into his reasoning by pegging the legitimacy of executive privilege to legislative privilege. The Chief Justice noted that “the President[’s] . . . power to control files, records, and papers of the office . . . are comparable to the internal workpapers of Members of the House and Senate.”<sup>65</sup> Burger reasoned further that

[t]he Constitution does not speak of Presidential papers, just as it does not speak of workpapers of Members of Congress or of judges. But there can be no room for doubt that, up to now, it has been the implied prerogative of the President as of Members of Congress and of judges to . . . provide unilaterally for disposition of his work papers. Control of Presidential papers is, obviously, a natural and necessary incident of the broad discretion vested in the President in order for him to discharge his duties.<sup>66</sup>

He concluded broadly that “to preserve the constitutionally rooted independence of each branch of Government, each branch must be able to control its own papers.”<sup>67</sup> Then-Justice William Rehnquist drew much the same conclusion. In his own dissent, Rehnquist wrote that “[p]rivileges, such as the executive privilege [are] embodied in the Constitution as a result of the separation of powers.”<sup>68</sup>

Three Supreme Court Justices followed the same reasoning in *Houchins v. KQED*, which involved whether journalists under the Constitution have a right to enter jails to report on prevailing conditions.<sup>69</sup> There again, the Justices quoted from *Nixon I* and acknowledged “the valid need for protection of communications between high Government officials and those who advise and

<sup>63</sup> 433 U.S. 425, 447 n.10 (1977). For further structural reasoning in this decision, see *id.* at 448. This decision is discussed in greater detail in Part II.B.2.a.

<sup>64</sup> 433 U.S. at 447 n.11.

<sup>65</sup> *Id.* at 514 (Burger, C.J., dissenting).

<sup>66</sup> *Id.* at 515 (citations omitted).

<sup>67</sup> *Id.* at 511.

<sup>68</sup> *Id.* at 545 n.1 (Rehnquist, J., dissenting).

<sup>69</sup> 438 U.S. 1 (1978).

assist them in the performance of their manifold duties.’”<sup>70</sup> In *University of Pennsylvania v. Equal Employment Opportunity Commission*, a case involving a college’s assertion of a constitutional and common-law privilege against revealing peer-review documents, the Court echoed on yet another occasion the language from *Nixon I*.<sup>71</sup> Writing for the Court, Justice Blackmun reasoned that “the privilege we recognized in *Nixon* was grounded in the separation of powers between the branches of the Federal Government.”<sup>72</sup>

Other prominent judicial opinions have also noted that a privilege is vital to the work performed by constitutional officers. In 1971, the issue of privilege arose in *Soucie v. David*.<sup>73</sup> This case involved whether an Office of Science and Technology report could be made public pursuant to the Freedom of Information Act.<sup>74</sup> In this case, Judge Malcolm Wilkey of the Court of Appeals for the District of Columbia Circuit filed a concurring opinion.<sup>75</sup> In it he emphasized that constitutional officers have a constitutional privilege. He wrote:

To put this question in perspective, it must be understood that the privilege against disclosure of the decision-making process is a tripartite privilege, because precisely the same privilege in conducting certain aspects of public business exists for the legislative and judicial branches as well as for the executive. It arises from two sources, one common law and other constitutional.<sup>76</sup>

Wilkey continued: “The constitutional part of the privilege [in question] arises from the principle of the separation of powers among the legislative, executive and judicial branches of our Government.”<sup>77</sup>

<sup>70</sup> *Id.* at 35 n.27 (Stevens, J., dissenting) (quoting *United States v. Nixon (Nixon I)*, 418 U.S. 683, 705 (1974)).

<sup>71</sup> 493 U.S. 182, 195 (1990) (“[T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.” (quoting *Nixon I*, 418 U.S. at 705–06) (internal quotation marks omitted)).

<sup>72</sup> *Id.*

<sup>73</sup> 448 F.2d 1067 (D.C. Cir. 1971).

<sup>74</sup> *See id.*

<sup>75</sup> *Id.* at 1080 (Wilkey, J., concurring).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1081. Wilkey relied on past practice to buttress his argument. *See id.* at 1082 (“These examples of [past] recognition by all three branches of a constitutional

Two years later in *Nixon v. Sirica*, which involved President Nixon's attempt to quash a subpoena *duces tecum* directing him to turn over audio recordings of White House conversations to the special prosecutor's office, Judge Wilkey filed a dissent.<sup>78</sup> Here, he applied the same reasoning as in his earlier opinion. Basing much of his argument on notions of constitutional structure and symmetry, he wrote that

public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires. . . . Government could not function if it was permissible to go behind judicial, legislative or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter.<sup>79</sup>

Wilkey noted that "the tripartite privilege has been asserted innumerable times in various alignments of conflict among the three Branches."<sup>80</sup> At still another juncture in his opinion, Wilkey returned to the notion of the "tripartite privilege," which he concluded was "universally derived from that principle of separation of powers."<sup>81</sup>

Thus, as the courts have noted repeatedly, and as the next three Parts will further demonstrate, each of the constitutional officers of each of the federal government's three branches may withhold certain materials from public view when exercising powers delegated to them under the Constitution. In this regard, the Constitution has been interpreted to encourage effective and well-informed decisionmaking by promoting candor when constitutional officers are discussing official matters with their peers and aides. If constitutional officers and their subordinates

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privilege to withhold certain documents under given circumstances . . . show the tripartite nature of the constitutional privilege.").

<sup>78</sup> 487 F.2d 700, 762 (D.C. Cir. 1973) (Wilkey, J., dissenting).

<sup>79</sup> *Id.* at 764.

<sup>80</sup> *Id.* at 770; *see also id.* at 773–74 ("Every President, beginning with Washington and Jefferson, has asserted that the privilege and the scope and applicability are for him alone to decide. That is precisely what Congress does when it either grants or withholds documents in response to the request of a court for evidence in a criminal case. This is what no doubt *this court* would do if confronted with a demand by a Congressional committee for any of our internal documents. . . . We would do so on the Constitutional ground of separation of powers.").

<sup>81</sup> *Id.* at 775.

believe their exchanges over policy matters are likely to be exposed, all concerned may sanitize their comments or decline to broach sensitive or novel options or rationales out of fear they will be revealed to the public. Were the confidentiality of internal proceedings to be breached, authorities have concluded that the quality of decisionmaking by constitutional officers would suffer accordingly.

## 2. Why the Vice President Should Be Treated Like Any Other Constitutional Officer

Since the President exercises executive privilege, since members of Congress exercise legislative privilege and since federal judges exercise judicial privilege—all while acting pursuant to their respective constitutional powers—then as a structural matter, it should almost certainly follow that the Vice President would be able to exercise his own privilege to the extent he is carrying out his own enumerated powers. These are: presiding over the Senate and breaking ties; preparing for and helping make determinations about presidential inability; and preparing for succession. Otherwise, the Vice President would be the *only* constitutional officer in the entire federal government who would exercise his constitutional duties *without* the benefit of a privilege.

The Vice President should not enjoy such a privilege based on abstract notions of constitutional tidiness, but because the rationale for him holding such a privilege is the same as has been applied by the courts to other constitutional officers. In carrying out his constitutional duties, the Vice President—like any constitutional officer—needs to be able to benefit from an effective decisionmaking process. This includes gathering the necessary data and opinions to make an informed decision; being civilly immune for official decisions made; and conducting internal deliberations in confidence in order to fully explore possible policy options and rationales. Otherwise, the quality of his decisionmaking would suffer and the public could be ill served. Much as it is vital that a lawmaker receive candid advice from his legislative aides on policy matters, so too the Vice President must receive unvarnished opinions from his staff as to his constitutional responsibilities, whether they involve: (1) parliamentary or legislative issues related to his presiding over, and voting in, the Senate; or (2) inability and succession

matters related to his responsibilities under the Twenty-Fifth Amendment. The rationale for the Vice President holding his own privilege reflects this same overarching constitutional norm of encouraging high-quality, candid internal dialogue on policy options and rationales.

Moreover, there is dicta in both *Cheney v. U.S. District Court*<sup>82</sup> and *Walker v. Cheney*<sup>83</sup> that point toward the Vice President being treated in the same manner as the President. Therefore, not only is the rationale underlying VPP the same as the rationale underlying privilege for any other constitutional officer, but the Vice President has been specifically compared to the President in a structural fashion by the courts. The fact that both of these judicial decisions treat the two offices the same in the context of asserting confidentiality interests makes this structural linkage all the more relevant. In this regard, the courts have already treated the Vice President in a manner similar to other constitutional officers when it comes to ensuring the confidentiality of deliberations.

For these reasons, the fact that all other constitutional officers have a constitutional privilege is highly relevant to the question of whether the Vice President can wield a comparable power.

## II. EXECUTIVE PRIVILEGE

The first of the constitutional privileges to be examined is the best known, that of executive privilege. For purposes of this Article, an examination into executive privilege is necessary for two reasons. First, it is important to discuss the legitimacy of executive privilege in order to demonstrate, by analogy, the legitimacy of VPP. If the President can invoke a constitutional privilege pursuant to his enumerated powers, then the Vice President would seem to be able to do the same since the underlying rationale is the same.

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<sup>82</sup> 542 U.S. 367, 382 (2004) (“[S]eparation-of-powers considerations should inform a court of appeals’ evaluation of a mandamus petition involving the President or the Vice President.”); see also *infra* Part VI.L.2.

<sup>83</sup> 230 F. Supp. 2d 51, 53 (D.D.C. 2002) (“[F]undamental separation of powers concerns relating to the restricted role of Article III courts . . . ordain the outcome here . . . . The parties agree that no court has ever before granted [what is sought here] . . . an order that the President (or Vice President) must produce information to Congress . . . .”); see also *infra* Part VI.L.1.

Second, a discussion of executive privilege is needed to demonstrate what VPP is *not*: it is not vice presidential *executive* privilege. As will be shown below, the President and executive branch lawyers do not appear to have ever contended that the Vice President may exercise executive privilege. Only the President, or a former President, has such authority. That, however, does not prevent the Vice President from exercising his own privilege, which reflects his own unique constitutional position.

#### A. *Constitutional Structure*

The authority of the President to withhold materials from the public and other branches is not to be found in the text of the Constitution. Nonetheless, there are several constitutional clauses that serve as potential bases for executive privilege. They include the Vesting Clause, the Opinion Clause, and the clauses governing the President's military and diplomatic powers. At the end of the day, the Supreme Court has not explicitly relied on any of them in justifying executive privilege.

At first blush, the Vesting Clause would appear to be the most likely candidate for providing authority for the President to withhold information from Congress, the courts, and the public.<sup>84</sup> An argument could be put forward that the clause provides the President with some degree of implied authority,<sup>85</sup> particularly in foreign and military affairs.<sup>86</sup> Unlike Article I, which provides Congress with "[a]ll legislative Powers *herein granted*,"<sup>87</sup> Article II begins by stating more generally and without apparent limitation that the "executive Power shall be vested in a President of the United States of America."<sup>88</sup> Thus, an argument can be made that the powers in Article II are unenumerated,

<sup>84</sup> See, e.g., ROZELL II, *supra* note 7, at 24–26; Viet D. Dinh, Book Review, 13 CONST. COMMENT. 346, 348 (1996) (reviewing MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY (1994)); cf. *In re Sealed Case*, 121 F.3d 729, 748 (D.C. Cir. 1997).

<sup>85</sup> See *Myers v. United States*, 272 U.S. 52, 137–38 (1926). But see *Humphrey's Ex'r v. United States*, 295 U.S. 602, 632 (1935).

<sup>86</sup> See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234, 355 (2001). The argument that the Vesting Clause is a repository of foreign affairs powers is not airtight, however. See, e.g., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 546, 687–88 (2004).

<sup>87</sup> U.S. CONST. art. I, § 1 (emphasis added).

<sup>88</sup> See *id.* art. II, § 1, cl. 1.

much like those of Article III.<sup>89</sup> It would seem to follow that the unstated but clearly recognized<sup>90</sup> authority of executive privilege could well flow from this clause.

In addition to the Vesting Clause, those asserting executive privilege can point to the President's power to obtain opinions from executive branch officials.<sup>91</sup> As noted above, Article II, Section 2 states that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."<sup>92</sup> The argument could be made that, since the President may request opinions from other executive officers, it is implicit that such advice as a general matter may not be provided to others and must remain confidential. However, it is by no means clear that, simply because the President may ask for information from his Cabinet officers, Congress or the public therefore may not have access to the same data, particularly since Congress exercises a long-recognized power to investigate the executive branch.<sup>93</sup>

Case law has also made particular reference to the President's authority to withhold information in defense and foreign affairs.<sup>94</sup> Thus, other textual grounds for executive privilege could be found in the President's constitutional responsibilities as Commander in Chief<sup>95</sup> and Chief Diplomat.<sup>96</sup>

<sup>89</sup> See generally Calabresi & Rhodes, *supra* note 15.

<sup>90</sup> See *infra* Part II.B.

<sup>91</sup> Cf. Akhil Reed Amar, *Cheney, Enron, and the Constitution*, TIME, Feb. 2, 2002, available at <http://www.time.com/time/nation/article/0,8599,198829,00.html>.

<sup>92</sup> See U.S. CONST. art. II, § 2, cl. 1.

<sup>93</sup> See, e.g., *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations . . . is broad . . . . It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.").

<sup>94</sup> See, e.g., *United States v. Nixon (Nixon I)*, 418 U.S. 683, 706, 707, 710, 715 (1974).

<sup>95</sup> See U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ."); see also *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."). But cf. BERGER, *supra* note 6, at 115–16, 161–62 (discussing and ultimately dismissing the view that the Commander in Chief Clause provides the President with authority to protect information from disclosure).

It is usually acknowledged that both of these roles require some degree of secrecy, which justifies the President withholding certain information in these areas.<sup>97</sup>

While the Vesting Clause, the Opinion Clause, the Commander in Chief Clause, and Article II's diplomatic clauses would each appear to provide some possible textual support for executive privilege, the Supreme Court has never embraced any of these propositions. In fact, the Court in *Nixon I* concluded that "[n]owhere in the Constitution . . . is there *any* explicit reference to a privilege of confidentiality, yet to the extent this interest [in confidentiality] relates to the effective discharge of a President's powers, it is constitutionally based."<sup>98</sup> Instead, it will be recalled that the Court expressly tied the privilege to "the nature of enumerated powers,"<sup>99</sup> reasoning that "the protection of the confidentiality of Presidential communications has . . . constitutional underpinnings."<sup>100</sup> Thus, according to the Supreme Court, executive privilege is implied from the President's exercise of his constitutional powers, not explicit from specific textual grants.

In binding executive privilege to the exercise of enumerated powers, the Supreme Court clearly tied executive privilege to broader structural features in the Constitution. If, in fact, authority for executive privilege is drawn from structural considerations rather than an individual clause or clauses as laid out in *Nixon I*, then it would seem to bolster the case for VPP

<sup>96</sup> See, e.g., U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and consent of the Senate, shall appoint Ambassadors . . ."). The term "Chief Diplomat" is Clinton Rossiter's. See CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* 25 (2d ed. 1960).

<sup>97</sup> But see BERGER, *supra* note 6, at 115–16, 161–62. Exactly what the President can withhold from Congress in the realm of foreign and defense affairs is uncertain as Congress can make compelling claims to information in this context. See, e.g., *id.* at 108–16, 124–33; FISHER, *supra* note 6, at 10–11, 13–14, 30–39.

<sup>98</sup> *Nixon I*, 418 U.S. at 711 (emphasis added); see also *In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488, 1519 (11th Cir. 1986) ("The Court [in *Nixon I*] discerned the constitutional foundation for the executive privilege—notwithstanding the lack of any express provision—in the constitutional scheme of separation of powers and in the very nature of a President's duties . . . the same must be true of the judiciary.").

<sup>99</sup> See *Nixon I*, 418 U.S. at 705.

<sup>100</sup> *Id.* at 705–06.



since VPP has no express textual basis and instead relies on the same type of structural reasoning.<sup>101</sup>

*B. Judicial Interpretation of the Doctrine*

Until the Nixon administration, the doctrine of executive privilege had yet to be fully recognized by the Supreme Court, even though the need for executive branch secrecy had been long recognized in other quarters.<sup>102</sup> In 1974, historical practice was enshrined in legal doctrine in *Nixon I*. Since that decision, the federal courts have had several other occasions to further consider the matter. These rulings provide little in the way of unambiguous support for VPP, but the overall tenor of these decisions is more favorable than not. Were VPP to be litigated today, there is no comparable series of historical precedents for VPP to rely upon in the way the executive branch did for executive privilege—though Vice Presidents have hinted that they do have such authority.<sup>103</sup> Nonetheless, the underlying reasoning of these executive privilege decisions—particularly that of *Nixon I*—provides support for VPP in that the rationale broadly links constitutional privilege to the exercise of enumerated constitutional powers.

1. *United States v. Nixon (Nixon I)*

In *Nixon I*, the Supreme Court, for the first time, was confronted squarely with an assertion of executive privilege.<sup>104</sup> In that much heralded decision, President Nixon attempted to quash a subpoena *duces tecum* issued by a federal district court requiring him to surrender a number of audio recordings and other materials to the Office of the Special Prosecutor, which was investigating the Watergate controversy.<sup>105</sup> These tapes and papers reflected certain discussions held between Nixon and several White House staff members.<sup>106</sup> Nixon asserted executive privilege over the tapes, arguing that the privilege was absolute and that his decision to keep the materials secret was

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<sup>101</sup> See, e.g., *infra* Part VIII.A.

<sup>102</sup> See, e.g., HOFFMAN, *supra* note 6, at 9, 117, 128.

<sup>103</sup> See *infra* Part VI.E–F, VI.L.

<sup>104</sup> 418 U.S. 683, 703.

<sup>105</sup> See *id.* at 686.

<sup>106</sup> See *id.*

unreviewable by the courts.<sup>107</sup> The Special Prosecutor's Office countered that it had an overriding need for the materials since they involved a judicial proceeding related to potential criminal matters.<sup>108</sup>

The Court ruled unanimously<sup>109</sup> that the tapes had to be turned over to the special prosecutor since the materials were linked directly to criminal proceedings, a vital Article III function. While the decision led to the demise of Nixon's presidency, the Court enhanced the office as an institution by formally recognizing a qualified executive privilege.<sup>110</sup> The Court, speaking through Chief Justice Burger, stated:

Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process . . . . [T]he confidentiality of Presidential communications has . . . constitutional underpinnings. . . . The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.<sup>111</sup>

The Court placed some emphasis on the particular need for protection of military and diplomatic secrets. It stated that the "need for confidentiality . . . [regarding conversations about] foreign statesmen is too obvious to call for further treatment."<sup>112</sup> At the same time, the Court limited its holding to the criminal context.<sup>113</sup>

<sup>107</sup> *See id.* at 692–93.

<sup>108</sup> *See id.* at 689, 711–12.

<sup>109</sup> Justice Rehnquist recused himself, making it an 8–0 decision. *See id.* at 716.

<sup>110</sup> *See, e.g., ROZELL II, supra* note 7, at 71; Miller, *supra* note 6, at 638.

<sup>111</sup> *Nixon I*, 418 U.S. at 705–06, 708; *see also id.* at 706 ("The President's need for complete candor and objectivity from advisers calls for great deference from the courts.").

<sup>112</sup> *Id.* at 715; *see also id.* at 706 (recognizing the unique importance of preserving "military, diplomatic, or sensitive national security secrets").

<sup>113</sup> *See* 418 U.S. at 712 n.19 ("We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials."). The Court did not explain whether invocation of executive privilege in the context of a civil suit or a congressional investigation might involve different standards. Dictum from a subsequent decision indicates that the President enjoys greater leeway to withhold

In its decision, the Court coupled pragmatic concerns with the doctrine of separation of powers.<sup>114</sup> Reasoning that the President's need for candid advice from his advisers justified the withholding of certain information from the public, the Court explained that a "President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."<sup>115</sup>

At no point did the Court leave room for a Vice President to exercise executive privilege; references in the decision were made only to the "President's powers" and "the Chief Executive," omitting the Vice President altogether. The Court's approach in this regard tracked the legal position of President Nixon,<sup>116</sup> which did not embrace anyone but the President invoking executive privilege. Of course, *VPP is not a subset of executive privilege*. It entails the Vice President's own privilege reflecting his own unique constitutional role in American government.

## 2. Post-*Nixon I* Jurisprudence

In the years following *Nixon I*, courts have had occasion to decide a number of other cases involving executive privilege. None of these decisions expressly considered whether a Vice President has the benefit of such a power. Nevertheless, their net effect is generally supportive of the notion of VPP.

### a. Nixon v. Administrator of General Services (Nixon II)

Following his resignation, Nixon claimed custody over his presidential records as part of an agreement he had worked out with the General Services Administration; this included Watergate-related tapes and papers. Congress responded by

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materials in the context of a civil suit than in a criminal matter. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 384 (2004).

<sup>114</sup> *See, e.g., ROZELL II, supra* note 7, at 47–48.

<sup>115</sup> *Nixon I*, 418 U.S. at 708.

<sup>116</sup> During the *Nixon I* litigation, counsel for the President asserted that "executive privilege; in this case, [is] more accurately described as *presidential* privilege. Unless this is so, the full panoply of power embodied in the executive power, would be, in reality, greatly diluted, a concept at odds with the intent of the Framers of the Constitution." Brief for the Respondent, Cross-Petitioner, Richard M. Nixon, President of the United States, *Nixon I*, 418 U.S. 683 (Nos. 73-1766 & 73-1834), *reprinted in UNITED STATES V. NIXON, THE PRESIDENT BEFORE THE SUPREME COURT* 320, 350–51 (Leon Friedman ed., 1974) [hereinafter *Nixon Brief*] (emphasis added).

passing a statute to overturn this agreement and to address to its satisfaction the disposition of Nixon's presidential materials. In *Nixon II*,<sup>117</sup> the Supreme Court held that former Presidents may invoke executive privilege under certain scenarios, but with respect to Nixon, the Court ruled the statutory scheme in question did not compromise the confidentiality considerations raised by the former President.<sup>118</sup> Thus, the Court concluded that invocation of executive privilege was not limited to sitting Presidents but also included former Presidents.<sup>119</sup> That said, a former President's interest in preserving confidentiality, the Court reasoned, fades over time.<sup>120</sup>

In this regard, the Court provided another hint of daylight for VPP. Since former Presidents, in addition to sitting Presidents, enjoy authority to invoke a constitutional privilege to protect their past deliberations, the decision broadens even further the range of individuals who may invoke constitutional privileges. If an individual who no longer even serves in an official capacity may invoke a constitutional privilege, by extension should not a *sitting* constitutional officer—the Vice President—be all the more able to do so?<sup>121</sup>

Lest it be overlooked, the Court also relied in part on structural reasoning in supporting its decision.<sup>122</sup>

b. In re Sealed Case (Espy)

In 1997, the D.C. Circuit issued an important ruling involving executive privilege in *In re Sealed Case*.<sup>123</sup> In that decision, involving an independent counsel office's investigation of Secretary of Agriculture Mike Espy, the court decided that the independent counsel could have access to materials stemming from a White House Counsel Office's investigation of the secretary.<sup>124</sup> The court did not accept the President's invocation of executive privilege in this instance, but it did further refine

<sup>117</sup> 433 U.S. 425 (1977).

<sup>118</sup> *See id.* at 446–55.

<sup>119</sup> *See id.* at 439.

<sup>120</sup> *See id.* at 451.

<sup>121</sup> *Cf. infra* Part VI.L.3 (discussing a 2001 executive order—since repealed—that seemed to recognize authority for a Vice President or former Vice President to invoke a constitutional privilege).

<sup>122</sup> *Nixon II*, 433 U.S. at 447–48.

<sup>123</sup> 121 F.3d 729 (D.C. Cir. 1997).

<sup>124</sup> *See id.* at 734.

the doctrine. The court reasoned that the authority to withhold information was divided between the “presidential communications privilege” and the “deliberative process privilege.”<sup>125</sup> Presidential communications privilege, the court explained, is a constitutional principle involving materials prepared by the President’s closest advisers,<sup>126</sup> involving “final and post-decisional materials as well as pre-deliberative ones.”<sup>127</sup> This privilege, the court concluded, is nonetheless a qualified one.<sup>128</sup> Thus, by reiterating the uniqueness of the President’s constitutional role when discussing the constitutional *presidential* communications privilege, *In re Sealed Case* does not envision executive privilege extending far enough to permit the Vice President to invoke this doctrine.

“Deliberative process privilege,” on the other hand, is akin to a common-law privilege.<sup>129</sup> It “protects the deliberations and decisionmaking process of executive officials generally”<sup>130</sup> and is limited to pre-decisional materials.<sup>131</sup> By acknowledging a deliberative process privilege, the court appeared to recognize a broadening of the scope of executive privilege to include communications outside of those directly involving the President even if the court cautioned that deliberative process privilege was easier to overcome. That apparent expansion of executive privilege to include the deliberative process undertaken by executive branch officials does not involve the question of VPP, however. VPP concerns whether the Vice President holds his own *constitutional* privilege, not whether he may hold a common law privilege akin to that of a Cabinet secretary.

<sup>125</sup> See *id.* at 737–40, 742–57.

<sup>126</sup> See *id.* at 752 (“[C]ommunications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President. . . . In particular, the privilege should not extend to staff outside the White House in executive branch agencies.”).

<sup>127</sup> *Id.* at 745.

<sup>128</sup> See *id.*

<sup>129</sup> In this regard, the court indicated that such a privilege “allows the government to withhold documents and other materials that would reveal ‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’ . . . [I]t originated as a common law privilege . . . [and requires that] the material[s] must be predecisional and . . . deliberative.” *Id.* at 737. The “privilege is a qualified [one] . . . and can be overcome by a sufficient showing of need.” *Id.*

<sup>130</sup> *Id.* at 735.

<sup>131</sup> See *id.* at 745.

c. *In re Sealed Case* (Secret Service)

In yet another decision formally titled *In re Sealed Case* and again involving privilege during the Clinton administration, the courts had occasion to evaluate the merits of a purported “protective function privilege.” The question in this case centered around whether a “protective function privilege” could be invoked by the Secretary of Treasury owing to the Secretary’s oversight of the secret service detail protecting the President.<sup>132</sup> The Clinton administration asserted that this privilege could be invoked independently of the President and, once asserted, would shield secret service agents from testifying about any presidential conversations and activities they had seen or overheard.<sup>133</sup>

The D.C. Circuit rejected this claim.<sup>134</sup> In dismissing this novel assertion of privilege, the court followed reasoning that *prima facie* would seem to cast some doubt on the notion of VPP. The court stated that “the efficacy of the privilege is undermined by its being vested in the Secretary of the Treasury and not in the President, whose conduct the proposed privilege is supposed to influence; we know of *no other privilege that works that way*.”<sup>135</sup> By clearly rejecting the notion that another executive branch official could assert this privilege, the D.C. Circuit appeared to undercut the notion that the Vice President could exercise a privilege independent from that of the President.

While eliminating the notion of vice presidential executive privilege, the court’s reasoning does not undercut VPP. VPP, after all, is not a subset of executive privilege. It is the Vice President’s privilege based on the Vice President’s constitutional powers. The Secretary is not a constitutional officer. Further, unlike the Secretary, the Vice President is not exclusively a part of the executive branch. The latter’s invocation of VPP would stem from the Constitution, not from presidential delegation, statute, or common law. Further, the Secretary had argued that he had to protect the communications of a constitutional officer—the President; VPP involves the constitutional officer protecting his own conversations.

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<sup>132</sup> See *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998).

<sup>133</sup> See *id.* at 1077.

<sup>134</sup> See *id.* at 1078–79.

<sup>135</sup> See *id.* at 1077 (emphasis added).

### C. *Executive Privilege Policies*

Although little hint of executive privilege can be gleaned from the Constitutional Convention, the debates over ratification, as well as early practice, indicate that it was generally understood in the late eighteenth century that the President could withhold certain information from the public and even from Congress, particularly in the realm of foreign and military affairs.<sup>136</sup> Nowhere does it seem that there was any indication that the Vice President might have similar needs.

Past practice<sup>137</sup> indicates that what is now called executive privilege was not an alien concept during the early years of the Constitution. Ultimately, during the 1790s, an implicit recognition of the authority of the President to withhold certain information from Congress<sup>138</sup> and the public was established; at the same time, Congress's parallel authority to investigate the executive branch was also acknowledged.<sup>139</sup>

<sup>136</sup> See, e.g., THE FEDERALIST NO. 70, at 356 (Alexander Hamilton) (Garry Wills ed., 1982); HOFFMAN, *supra* note 6, at 9, 30, 32–33, 117, 128; THE FEDERALIST NO. 64, at 327 (John Jay) (Garry Wills ed., 1982). Such sentiments were not uniform among the Framers, however. See 2 ELLIOT, *supra* note 28, at 480 (quoting James Wilson during the Pennsylvania ratifying convention); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 385 (Max Farrand & David Matteson eds., rev. ed. 1966) (quoting Charles Pinckney in the U.S. Senate in 1800); cf. ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 396–97 n.212 (1976).

The Vice President plays no constitutional role of his own in foreign or military affairs. He, however, may have responsibilities in these areas delegated to him by the President and delegated to him by statute, but those are by definition not reflective of his own constitutional authority. See, e.g., 3 U.S.C. § 106 (2006). See generally PAUL KENGOR, WREATH LAYER OR POLICY PLAYER?: THE VICE PRESIDENT'S ROLE IN FOREIGN POLICY (2000); JACK LECHT, THE VICE PRESIDENCY IN FOREIGN POLICY (2009).

<sup>137</sup> Custom is often accorded great respect by the courts in determining the constitutionality of an action. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (“[T]raditional ways of conducting government . . . give meaning’ to the Constitution.” (quoting *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring))); *Steel Seizure*, 343 U.S. 579, 610–11 (1952) (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

<sup>138</sup> See, e.g., HOFFMAN, *supra* note 6, at 9, 117, 128; SOFAER, *supra* note 136, at 81–88.

<sup>139</sup> See, e.g., FISHER, *supra* note 6, at 10–11, 13–14, 30–39.

It is worth noting that on occasion President Washington requested advice on policy matters from Vice President John Adams.<sup>140</sup> During one of these consultations, the question of secrecy arose, but it was Washington, not Adams, who raised the issue. The President wrote to the Vice President that “I would thank you for giving the papers herewith sent a perusal . . . . None but the heads of department [sic] are privy to these papers, which I pray may be returned this evening or in the morning.”<sup>141</sup> There seems no acknowledgement that the Vice President himself enjoyed any right of confidentiality over the documents.<sup>142</sup>

Later in his administration, Washington became embroiled in a conflict over information with the House regarding documents related to the Jay Treaty. During a subsequent debate over whether treaty materials should be disclosed to the House of Representatives, Vice President Adams acknowledged to his wife the lower chamber’s authority to call for the documents. He wrote:

I cannot deny the Right of the H. to ask for Papers, nor to express their opinions upon the Merits of a Treaty. My Ideas are very high of the Rights and Powers of the H. of R. These Powers may be abused and in this instance there is great danger that they will be.<sup>143</sup>

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<sup>140</sup> See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 240 n.10 (1997) (noting that President Washington consulted with Vice President Adams on at least three occasions).

<sup>141</sup> Letter from George Washington, President, U.S., to John Adams, Vice President, U.S. (Jan. 8, 1794), in 8 *THE WORKS OF JOHN ADAMS* 515 (Charles Francis Adams ed., 1853). The documents likely discussed the actions of French envoy Edmond Charles Genet’s attempts to recruit U.S. citizens for a filibustering operation in Florida. See *id.* at 515 n.2.

<sup>142</sup> Indeed, the definitive work on governmental secrecy in the Federalist period makes no reference to either Vice President Adams or Vice President Jefferson raising a question of vice presidential privilege. See LINDA DUDIK GUERRERO, *JOHN ADAMS’ VICE PRESIDENCY, 1789–1797: THE NEGLECTED MAN IN THE FORGOTTEN OFFICE* 104 (1982). Harry C. Thompson, *The Second Place in Rome: John Adams as Vice President*, 10 *PRES. STUD. Q.* 171 (1980). See generally HOFFMAN, *supra* note 6.

<sup>143</sup> Letter from John Adams, Vice President, U.S., to Abigail Adams, wife (July 19, 1796), available at <http://www.masshist.org/digitaladams/aea/cfm/doc.cfm?id=L17960419ja>. At least early in his career, Adams seemed to be favorably disposed toward limited secrecy in government. See, e.g., BRUCE P. MONTGOMERY, *THE BUSH-CHENEY ADMINISTRATION’S ASSAULT ON OPEN GOVERNMENT* xii (2008) (“Liberty . . . cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge . . . and a desire to know; but besides this, they have a right, an indisputable, undeniable, indefensible,



It seems doubtful Adams would have felt the President would have had to turn over such sensitive materials to the House, but at the same time, he would not have had to do the same should a comparable issue have arisen involving vice presidential authority.

Of course, Vice President Adams spent the overwhelming portion of his time presiding over the Senate, which was the predominant role for the officeholder at the time. For the first five years of the Senate's existence, its proceedings were closed to the general public.<sup>144</sup> In this respect, the Vice President participated in secret deliberations but cannot be said to have exercised what amounted to a vice presidential privilege.<sup>145</sup> His successor, Thomas Jefferson, however, played a minor role in matters involving Senate secrecy. He voted to break a tie and defeat a proposed Senate rule that would have imposed secrecy obligations on Senators when debating treaties.<sup>146</sup> Again, this action seems inconsistent with Vice Presidents having their own privilege.

As far as the development of executive privilege, precedents beginning in the Washington administration were built upon over time. Gradually, assertions of the executive branch's perceived need to withhold information became a more common occurrence. Following the New Deal and World War II, as the federal bureaucracy grew larger and as the amount of information collected by the national government increased, the need for policies regularizing disclosure of executive branch information became an increasingly pressing matter. During this time, Presidents began issuing formal policies on executive privilege. What is particularly noteworthy is that none of these policies makes any reference to the Vice President possessing executive privilege. Instead, the policies almost uniformly reflect that the power to invoke executive privilege lies with the President alone.

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divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers.' " (quoting Adams in 1765)).

<sup>144</sup> See, e.g., ROY SWANSTROM, *THE UNITED STATES SENATE: 1787-1801: A DISSERTATION ON THE FIRST FOURTEEN YEARS OF THE UPPER LEGISLATIVE BODY* 238 (1988).

<sup>145</sup> Some have speculated that Adams may have contributed to the Senate's decision during its early years to conduct its business in private. See HOFFMAN, *supra* note 6, at 56-57. Compare *id.*, with note 143 and accompanying text.

<sup>146</sup> See HOFFMAN, *supra* note 6, at 214-15.

In response to a congressional inquiry on his policy regarding executive privilege, President Kennedy wrote that the doctrine “can be invoked only by the president and will not be used without specific presidential approval.”<sup>147</sup> President Johnson, consistent with the example of his predecessor, stated that during his administration “the claim of ‘executive privilege’ will continue to be made only by the president.”<sup>148</sup> In an internal memorandum dated March 24, 1969, his successor, President Nixon wrote in similar fashion: “Executive privilege will not be used without specific Presidential approval.”<sup>149</sup> President Nixon replied to a House inquiry on April 7, 1969, by commenting: “Under this Administration, executive privilege will not be asserted without specific Presidential approval.”<sup>150</sup> Professor Mark Rozell notes, however, that both the Kennedy and Johnson administrations acted counter to their stated guidance in this regard.<sup>151</sup> President Nixon also seems to have violated his own policy in this respect.<sup>152</sup> Notably, none of these anomalies involved the Vice President.<sup>153</sup>

<sup>147</sup> ROZELL I, *supra* note 6, at 47.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 64.

<sup>150</sup> *Id.*; see also *Executive Privilege: The Withholding of Information by the Executive*, Hearing Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 92d Cong. 438 (1971) [hereinafter *Executive Privilege Hearing*] (“Senator ERVIN. . . . ‘It is your view that the question of invoking the executive privilege is a question to be answered by the President himself rather than by some subordinate in the executive branch of the Government?’ Mr. REHNQUIST. ‘Unquestionably.’” (quoting an exchange between Senator Sam Ervin and then-Assistant Attorney General William H. Rehnquist)).

<sup>151</sup> See, e.g., ROZELL I, *supra* note 6, at 46–48; cf. STAFF OF SUBCOMM. ON SEPARATION OF POWERS OF THE S. COMM. ON THE JUDICIARY, 93D CONG., REFUSALS BY THE EXECUTIVE BRANCH TO PROVIDE INFORMATION TO THE CONGRESS: 1964–1973 (1974) [hereinafter REFUSALS].

<sup>152</sup> See, e.g., ROZELL I, *supra* note 6, at 66–67. For instance, Secretary of Defense Melvin Laird declined to provide the Senate Foreign Relations Committee with the “Pentagon Papers.” See JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 194 (1976). Efforts to withhold information by those in the Nixon administration other than the President led to several ultimately unsuccessful efforts to legislate that only the President could invoke executive privilege. See ROZELL II, *supra* note 7, at 58.

<sup>153</sup> See REFUSALS, *supra* note 151, at 17–52. President Johnson’s Vice President, Hubert Humphrey, and Nixon’s Vice President, Spiro Agnew, both made serious soundings about the Vice President enjoying a constitutional privilege but both stopped short of making formal invocations. See *infra* Part VI.E–F.

While inquiries were made of President Ford about his views on executive privilege, he apparently did not reply.<sup>154</sup> President Carter seemed to adopt Ford's approach and did not formally communicate his executive privilege policy to Congress.<sup>155</sup> Carter's staff, however, made informal representations, the substance of which mirrored the formal policies issued by Kennedy, Johnson, and Nixon<sup>156</sup>: "[O]nly the president is authorized to invoke a claim of 'executive privilege.'"<sup>157</sup> In 1980, White House counsel Lloyd Cutler laid out internal guidance on the invocation of executive privilege within the executive office of the President.<sup>158</sup> That document indicated that the President alone could waive executive privilege regarding materials sought by outside parties.<sup>159</sup>

Reagan's posture with respect to the ultimate authority regarding invocation of executive privilege was little different from those of Carter, Nixon, Johnson, and Kennedy. Anytime the doctrine was to be asserted, the President would make the decision and Congress would be notified "that the claim of executive privilege is being made with the specific approval of the president."<sup>160</sup>

President George H.W. Bush never replied to congressional inquiries regarding his stance on executive privilege.<sup>161</sup> Nonetheless, practice during his presidency seems to have reaffirmed the policies of his predecessors. During the Bush administration, the Department of Education ("ED") became embroiled in a conflict with a congressional committee over documents.<sup>162</sup> Without the President's blessing, the DOJ urged the ED to invoke executive privilege on its own.<sup>163</sup> The administration blinked in the face of strong political pressure and backed away from asserting privilege.<sup>164</sup> The ED precedent for the need for the President to provide his personal approval for

<sup>154</sup> See ROZELL I, *supra* note 6, at 85.

<sup>155</sup> See *id.* at 98–99.

<sup>156</sup> See *id.*

<sup>157</sup> *Id.* at 99.

<sup>158</sup> See *id.* at 100–01.

<sup>159</sup> See *id.* at 101.

<sup>160</sup> ROZELL II, *supra* note 7, at 95.

<sup>161</sup> See *id.* at 108.

<sup>162</sup> See *id.* at 113–14.

<sup>163</sup> See *id.* at 114.

<sup>164</sup> See *id.* at 114–15.

executive privilege was further underscored when President Bush later asserted executive privilege himself over materials involved with a Navy aircraft system.<sup>165</sup>

The Clinton administration adopted a policy on the invocation of executive privilege that was very much in keeping with those of earlier administrations. Clinton's White House counsel stated in a memorandum: "Executive privilege belongs to the President, not individual departments or agencies."<sup>166</sup>

Clinton's successor, George W. Bush, never issued a formal policy on the doctrine. His administration claimed privilege on a handful of occasions and at times came close to invoking a vice presidential privilege of sorts but never actually did so.<sup>167</sup>

In sum, no presidential policy statement has ever acknowledged that a Vice President may invoke executive privilege. Moreover, as a matter of practice, no President has ever deviated from his own executive privilege policy to permit the Vice President to make such a claim. That has been the case even as Vice Presidents have steadily gained in stature and influence during the past several decades. Perhaps it also warrants mention that Presidents Johnson, Nixon, Ford, and George H.W. Bush were all former Vice Presidents and presumably were somewhat sensitized to the needs of the position. None of them as President made any special allowances for the Vice President to invoke executive privilege.

#### *D. Prominent Authorities on the Exclusiveness of the President Invoking Executive Privilege*

The preceding discussion reflects that the longstanding executive branch position has been that only the President, or former President, may invoke executive privilege. This conclusion is one that has been embraced in lower courts, in the halls of Congress and by prominent commentators.

No less than Chief Justice John Marshall, while riding circuit, implied that executive privilege must be invoked by the President himself.<sup>168</sup> In *United States v. Burr*, he wrote:

<sup>165</sup> See *id.* at 115–16.

<sup>166</sup> See *id.* at 124.

<sup>167</sup> See *infra* Part VI.L; cf. *infra* Part VI.L.3 (discussing an executive order that implied a form of vice presidential privilege).

<sup>168</sup> See *United States v. Burr*, 25 F. Cas. 187, 191–92 (C.C.D. Va. 1807). The view that only the President may invoke executive privilege has not been embraced with

[M]uch reliance must be placed on the declaration of the president; and I do think that a privilege does exist to withhold private letters of a certain description. The reason is this: Letters to the president in his private character, are often written to him in consequence of his public character, and may relate to public concerns. Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view. . . . The president may *himself* state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons.<sup>169</sup>

Marshall went on to state: "The propriety of withholding it [the document] must be decided by himself [the President], *not by another for him*."<sup>170</sup>

The former Chief Judge of the D.C. Circuit, George MacKinnon, espoused the same view in a concurring opinion in a case on executive privilege.<sup>171</sup> In *Senate Select Committee v. Nixon*, he wrote that "the President, *as distinct from the executive establishment generally*, possesses a constitutionally founded privilege enabling him to protect the confidentiality of conferences with his advisors."<sup>172</sup> Three decades later, the D.C. Circuit in *Judicial Watch v. Department of Justice* observed that "[u]nlike the deliberative process privilege, which is a general privilege that applies to all executive branch officials, the presidential communications privilege is specific to the President."<sup>173</sup>

In the early 1970s, during debate over executive privilege, members of Congress expressed misgivings about executive branch officials other than the President exercising what

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respect to military secrets or state secrets privilege within government agencies. *Cf.* *United States v. Reynolds*, 345 U.S. 1, 10–11 n.26 (1953). In these instances, department or agency heads may invoke this nonconstitutional privilege. *See id.* at 4 (quoting the Air Force's determination that release of information would not be in the public interest).

<sup>169</sup> *Burr*, 25 F. Cas. at 192 (emphasis added).

<sup>170</sup> *Id.* (emphasis added).

<sup>171</sup> *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 733 (D.C. Cir. 1974) (MacKinnon, C.J., concurring); *see also In re Cheney*, 334 F.3d 1096, 1117 (D.C. Cir. 2003) (Randolph, J., dissenting) ("If executive privilege is to be asserted, it therefore appears that the President must make the decision."), *vacated and remanded by Cheney v. U.S. Dist. Court*, 542 U.S. 367, 293 (2004).

<sup>172</sup> 498 F.2d at 733 (emphasis added).

<sup>173</sup> 365 F.3d 1108, 1113–14 (D.C. Cir. 2004).

amounted to executive privilege.<sup>174</sup> For example, Representative William S. Moorhead concluded that a “witness such as Dr. Kissinger does not personally have an executive privilege. It is only the President who enjoys and can invoke this privilege.”<sup>175</sup>

Commentators have expressed the same view. Professor Adam Carlyle Breckenridge, in his thoughtful book on the subject, aptly concluded that “executive privilege should be invoked only personally by a president. It should be called the Executive privilege—with a capital E—and not be used as a recourse to privilege generally.”<sup>176</sup> Professor Breckenridge asserted that Presidents could withhold information for certain reasons “but presumably *only* if asserted personally by the president on a case-by-case basis.”<sup>177</sup> Professor Rozell, perhaps the preeminent authority in the field of executive privilege, echoes Breckenridge’s views. He has written that “the common standard for years has been that presidents alone have the authority to either assert executive privilege or direct an administration official to do so.”<sup>178</sup>

As noted throughout this subsection, the view that only the President may assert executive privilege has been borne out by executive privilege policies through the years. The Supreme Court has seen fit to extend this principle only to former Presidents. If only the President, or former President, may invoke executive privilege, then by definition that would preclude the Vice President from exercising the same privilege, preventing him from exercising a constitutional privilege with respect to his

<sup>174</sup> See ROZELL I, *supra* note 6, at 67.

<sup>175</sup> BRECKENRIDGE, *supra* note 6, at 97. Legislative opposition to having executive branch officials other than the President invoke what amounted to executive privilege can be traced back to the 1790s. See HOFFMAN, *supra* note 6, at 122–23.

<sup>176</sup> BRECKENRIDGE, *supra* note 6, at 155. Other authorities have taken a similar view. See, e.g., REFUSALS, *supra* note 151, at 7 (“[T]he only person who can invoke Executive privilege in the formal sense of the word is the President of the United States.” (quoting William Bundy)); HAROLD J. KRENT, PRESIDENTIAL POWERS 183 (2005) (“[T]he president personally must invoke executive privilege—the decision cannot be delegated.”); KURLAND, *supra* note 6, at 42 (“It was generally agreed at the 1971 [Senate Judiciary Subcommittee] hearings [on executive privilege] . . . that, whatever the scope of executive privilege . . . it was a privilege personal to the President and could be asserted only by him.”); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 776 n.40 (3d ed. 2000) (“[T]he asserted privilege is the President’s and could be invoked only by him.”); *supra* note 12.

<sup>177</sup> BRECKENRIDGE, *supra* note 6, at 57 (emphasis added).

<sup>178</sup> ROZELL II, *supra* note 7, at 155.

executive branch activities as delegated to him by the President or by statute. Such a restriction would not, of course, limit the Vice President in exercising a privilege so long as it concerns his own constitutional powers.

### III. LEGISLATIVE PRIVILEGE

Much as the President as a constitutional officer may invoke a privilege to protect the confidentiality of his communications when exercising his duties, members of the legislative branch may do the same.<sup>179</sup> The authority of the President and federal lawmakers to invoke such a privilege would seem to reinforce the structural notion that the Vice President in his admittedly limited constitutional duties would be able to invoke his own privilege. Moreover, the Vice President himself should be able to assert legislative privilege to the extent he is carrying out his legislative branch duties.<sup>180</sup>

<sup>179</sup> For authorities discussing the confidentiality of intra-legislative branch communication, see, for example, Amar, *supra* note 91 ("Senators must be free to talk candidly with colleagues and staff in cloakrooms."); Jennifer Yachnin, *Hurdles Confront Visclosky Probe*, ROLL CALL, June 2, 2009 ("Those probing the Congressman will not be able to get close to his discussion about legislation or appropriations.") (quoting former House general counsel Charles Tiefer); *id.* ("One thing I think is pretty clear is the internal deliberations about earmarks inside the Congress, between the staff and the Member or the committee and the Member, I think are clearly protected.") (quoting former House general counsel Stanley Brand)). *But cf.* *United States v. Myers*, 692 F.2d 823, 860 (2d Cir. 1982) ("[Former Representative] Thompson claims that the Speech or Debate Clause bars the introduction into evidence of his private conversations with Congressman Murtha on the floor of the House of Representatives, in which he invited Murtha to join the ranks of those accepting bribes. One would think that a Congressman, even when grasping for objections to a criminal conviction, would understand that the Speech or Debate Clause accords immunity to what is said on the House floor in the course of the legislative process not to whispered solicitations to commit a crime." (citations omitted)). For a historical treatment of legislative privilege, see generally Cox, *supra* note 6, at 1393–95; David Kaye, *Congressional Papers and Judicial Subpoenas*, 23 UCLA L. REV. 57 (1975).

<sup>180</sup> The Vice President may exercise legislative privilege—as opposed to executive privilege—because the former privilege is not unique to a single constitutional officer. Any member of Congress may invoke the privilege. Moreover, it is not contingent upon approval of either or both houses of Congress. *See United States v. Brewster*, 408 U.S. 501, 507 (1972) ("[T]he Speech or Debate Clause . . . [was written] to protect the integrity of the legislative process by insuring the independence of *individual* legislators." (emphasis added)); *id.* at 524 ("[T]he purpose of the Speech or Debate Clause is to protect the individual legislator."); *Gravel v. United States*, 408 U.S. 606, 621–22 (1972) ("[T]he privilege applicable . . . is viewed, as it must be, as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf."); *In re Grand Jury*

Whereas executive privilege is not spelled out clearly in constitutional text, legislative privilege has a plausible textual basis: the Speech or Debate Clause.<sup>181</sup> Not only does the Speech or Debate Clause supply potential textual support for members of Congress to exercise a constitutional privilege, but courts have also applied structural considerations and past practice to the question of whether there is a privilege for lawmakers. In so doing the courts recognized what in this Article will be called “generalized legislative privilege.”<sup>182</sup>

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Investigation, 587 F.2d 589, 593 (3d Cir. 1978) (noting that the Speech or Debate “privilege, although of great institutional interest to the House as a whole, is also personal to each member”); *see also* Coffin v. Coffin, 4 Mass. 1, 27 (1808) (“[T]he privilege secured by it is not so much the privilege of the House as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house . . . . [The lawmaker] derives [the privilege] from the will of the people, expressed in the constitution . . . Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house or by an act of the legislature.”); Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1169–70 (1973) (“[T]he privilege is guaranteed to each member [of Congress] personally, and its constitutional protection is not subject to collective discretion.”). On the other hand, the Vice President may *not* exercise executive privilege since that authority is unique to the President and only the President may assert it. *See supra* Part II.C–D.

<sup>181</sup> *See, e.g.*, David Kaye, *Congressional Papers, Judicial Subpoenas, and the Constitution*, 24 UCLA L. REV. 523, 579 (1977) (“Where speech or debate would be brought into question by compliance with a subpoena, the Constitution leaves it to Congress to decide whether secrecy is in the public interest.”); *id.* at 572 (“[T]he speech or debate clause privileges Congress from judicial discovery of those papers that document or describe ‘legitimate legislative activity.’”); Note, *Evidentiary Implications of the Speech or Debate Clause*, 88 YALE L.J. 1280, 1286 n.30 (1979) (“The speech or debate clause’s evidentiary privilege insulates the legislative process by providing both a limited guarantee of confidentiality and an exclusionary rule.”). Other constitutional provisions such as the Arrest Clause, the Publication Clause, and Congress’s authority over its own rules could also be read as supplying authority to Congress to withhold documents from the other branches. *See* Kaye, *supra*, at 525–46. These textual provisions, however, are much more difficult to link to legislative privilege, as defined in this Article. For example, the privilege of freedom from arrest has been construed narrowly by the courts. *See, e.g.*, *Brewster*, 408 U.S. at 520–21. One noted authority in the area of legislative privilege has rejected not only the Arrest Clause as a legitimate basis for legislative privilege but also the Publication Clause. *See* Kaye, *supra*, at 526–46. Congress’s constitutional power to make its own internal rules gives each body authority to compel its members to keep information secret. Execution of this aspect of legislative confidentiality is unlike that derived from the Speech or Debate Clause privilege or the generalized legislative privilege, since rulemaking authority is contingent on actions taken by the chamber as a whole whereas the latter two privileges are invoked by individual members. *See supra* note 180.

<sup>182</sup> *See infra* Part III.B.



A. *The Speech or Debate Clause as a Constitutional Privilege*

The Constitution provides that regarding "Senators and Representatives . . . for any Speech or Debate in either House, they shall not be questioned in any other Place."<sup>183</sup> Courts have interpreted the clause broadly to include an absolute constitutional privilege permitting members of Congress to withhold certain information from the public.<sup>184</sup>

The intent behind the Speech or Debate Clause was to protect the House and Senate from encroachment by the other branches.<sup>185</sup> The Supreme Court has noted that "the privilege has been recognized as an important protection of the independence and integrity of the legislature."<sup>186</sup> While the "heart of the Clause is speech or debate in either House," other legislative actions may receive the Clause's protection if they constitute "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."<sup>187</sup>

That said, in *United States v. Brewster*, involving whether an investigation could be made into activities peripheral to the legislative function, the Court cautioned that the provision was "not written into the Constitution simply for the personal or

<sup>183</sup> U.S. CONST. art. I, § 6.

<sup>184</sup> See, e.g., *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995) ("permit[ting] Congress to insist on the confidentiality of [its] investigative files"); *United States v. Ehrlichman*, 389 F. Supp. 95, 97–98 (D.D.C. 1974) ("[S]ince the requested transcript [of the committee hearing] would reveal the deliberative and communicative processes by which Members participate in committee and House proceedings . . . judicial efforts to compel production of that document would, under the present circumstances, also violate the Speech and [sic] Debate Clause . . . . That provision clearly prohibits the Court from forcing the Chairman of the Subcommittee or the Speaker to . . . be required to produce at trial the official record of that testimony or to put the issue to a vote of the full House." (internal quotations omitted) (internal citations omitted)); cf. *Minpeco S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859–61 (D.C. Cir. 1988); Kaye, *supra* note 181, at 552 n.130. But see *In re Grand Jury Investigation*, 587 F.2d at 597.

<sup>185</sup> See *United States v. Johnson*, 383 U.S. 169, 181 (1966) (stating that the purpose of the Clause was to "prevent intimidation of legislators by the executive and accountability before a possibly hostile judiciary").

<sup>186</sup> *Id.* at 178.

<sup>187</sup> *Gravel v. United States*, 408 U.S. 606, 624–25 (1972).

private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.”<sup>188</sup> While the scope of the Clause “does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs,”<sup>189</sup> the Court elsewhere has indicated it does restrict investigation into “[c]ommittee reports, resolutions, and the act of voting . . . [as well as] ‘things generally done in a session of the House by one of its members in relation to the business before it.’”<sup>190</sup> Acts of voting would certainly implicate the Vice President’s legislative duties since he has the authority to break tie votes in the Senate.

In *United States v. Johnson*,<sup>191</sup> the issue arose as to whether the government could ask a former member of Congress to discuss a speech he gave on the House floor and the motivation behind it. The Court concluded that “such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch . . . violates the express language of the Constitution.”<sup>192</sup> Moreover, as in *Nixon II*, the Court in *Johnson* interpreted the Constitution in such a manner as to permit a former constitutional officer to invoke a privilege. As noted earlier, if a former constitutional officer may invoke such a privilege, it would seem *a fortiori* that a sitting constitutional officer—the Vice President—ought to be able to do the same.

In his dissenting opinion in *Nixon II*, Chief Justice Burger tied the Speech or Debate Clause to a constitutional privilege. He reasoned that

[t]he Constitution . . . expressly grants immunity to Members of Congress as to any “Speech or Debate in either House . . .”; yet the Court has refused to confine that Clause literally “to words spoken in debate.” . . . Congressional papers . . . have been held protected by the Clause in order “to prevent intimidation (of legislators) by the executive and accountability before a possibly hostile judiciary.”<sup>193</sup>

<sup>188</sup> 408 U.S. 501, 507 (1972).

<sup>189</sup> *Id.* at 528.

<sup>190</sup> *Powell v. McCormack*, 395 U.S. 486, 502 (1969) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881)).

<sup>191</sup> 383 U.S. 169.

<sup>192</sup> *Id.* at 177.

<sup>193</sup> *Nixon v. Adm’r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 511 (1977) (Burger, C.J., dissenting) (citation omitted).

The Chief Justice noted that “[d]espite the Constitution’s silence as to the papers of the Legislative Branch, this Court [has] had no difficulty holding those papers to be protected from control by other branches.”<sup>194</sup> In addition to relying on the Speech or Debate Clause to support legislative privilege, Burger also noted the importance of structural comparisons to the privileges enjoyed by the magisterial branches of government. He wrote that the “independence of the three branches of Government, including control over the papers of each, lies at the heart of this Court’s broad holdings concerning the immunity of congressional papers from outside scrutiny.”<sup>195</sup>

In *Nixon v. Sirica*,<sup>196</sup> in a per curiam opinion, the D.C. Circuit also endorsed the Speech or Debate Clause as conferring a constitutional privilege. As with Burger’s dissenting opinion in *Nixon II*, the court in *Sirica* reinforced its position on legislative privilege by placing it in the context of the privileges relied upon by the other branches. The court stated that “[executive] privilege, intended to protect the effectiveness of the executive decision-making process, is analogous to that between a congressman and his aides under the Speech and [sic] Debate Clause; to that among judges, and between judges and their law clerks.”<sup>197</sup>

The very next year, in considering whether a Senate committee’s subpoena *duces tecum* could overcome a presidential assertion of privilege, the D.C. Circuit again analogized executive privilege to the privilege under the Speech or Debate Clause. In *Senate Select Committee v. Nixon*, the court quoted *Sirica* with approval: “We recognized this great public interest, analogizing the privilege, on the basis of its purpose, ‘to that between a congressman and his aides under the Speech and [sic] Debate Clause; to that among judges, and between judges and their law clerks’ . . . .”<sup>198</sup>

In *United States v. Liddy*,<sup>199</sup> the issue of a constitutional privilege derived from the Speech or Debate Clause arose in a more concrete fashion. In this case, a former Nixon aide tried to

<sup>194</sup> *Id.* at 515 n.9.

<sup>195</sup> *Id.* at 510–11.

<sup>196</sup> 487 F.2d 700 (D.C. Cir. 1973) (per curiam).

<sup>197</sup> *Id.* at 717.

<sup>198</sup> 498 F.2d 725, 729 (D.C. Cir. 1974) (quoting *Sirica*, 487 F.2d at 717).

<sup>199</sup> 542 F.2d 76 (D.C. Cir. 1976).

subpoena the testimony of witnesses who had appeared during an executive session of the House Armed Services Committee.<sup>200</sup> The House refused to provide the materials.<sup>201</sup> In response, the lower court concluded that it could not direct the House committee to provide the documents.<sup>202</sup> On appeal, the D.C. Circuit took pains to avoid the privilege issue. It wrote that “[w]e need not . . . indulge in any discussion as to whether . . . [the congressman’s] response constituted a claim of privilege under . . . Art. I, Sec. 5, Cl. 3 and under the Speech or Debate Clause . . . or under the House Rules which prohibit production of executive session testimony except upon affirmative vote of the Committee or the House.”<sup>203</sup> The court noted that the “specter of an academic discussion giving rise to a possible future conflict between co-equal branches of the government is both unappealing and inappropriate under the existing circumstances.”<sup>204</sup> Instead, the court determined that the House’s failure to produce the subpoenaed documents was not prejudicial to the aide’s defense.<sup>205</sup>

Of particular note regarding Speech or Debate privilege is the 2007 D.C. Circuit decision, *United States v. Rayburn House Office Building*.<sup>206</sup> In this case, the Federal Bureau of Investigation (“FBI”) executed a search warrant for the office of Representative William Jefferson without providing advance notice to him or other congressional authorities.<sup>207</sup> The FBI intended to use the nonprivileged materials seized during the effort to prosecute Jefferson for bribery and racketeering.<sup>208</sup> The lawmaker challenged the constitutionality of the raid, asserting that the Speech or Debate Clause not only provides an exclusionary rule with respect to evidence related to legislative duties, but also that such materials should be considered confidential and not reviewable by the executive branch.<sup>209</sup>

<sup>200</sup> *See id.* at 82.

<sup>201</sup> *See id.*

<sup>202</sup> *See id.* at 82 n.19 (quoting district court Judge Gesell, who stated that “further proceeding to enforce the subpoenas would be futile”).

<sup>203</sup> *Id.* at 82–83.

<sup>204</sup> *Id.* at 83.

<sup>205</sup> *See id.*

<sup>206</sup> 497 F.3d 654 (D.C. Cir. 2007).

<sup>207</sup> *See id.* at 657.

<sup>208</sup> *See id.* at 658.

<sup>209</sup> *See id.* at 655.

While Jefferson's argument with respect to confidentiality was not accepted at the district court level,<sup>210</sup> it was embraced on appeal by the D.C. Circuit even though the matter involved a criminal investigation. The court—often considered the second highest judicial tribunal in the land—concluded that “[o]ur precedent establishes that the testimonial privilege under the [Speech or Debate] Clause extends to non-disclosure of written legislative materials.”<sup>211</sup> The court reasoned that

exchanges between a Member of Congress and the Member's staff or among Members of Congress on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity. This chill runs counter to the Clause's purpose of protecting against disruption of the legislative process.<sup>212</sup>

Based on that premise, the court ordered Jefferson's legislative papers returned to him<sup>213</sup> and concluded that the privilege involved was absolute.<sup>214</sup> The Supreme Court denied certiorari, permitting the D.C. Circuit decision to stand.<sup>215</sup>

In reaching its decision, the D.C. Circuit adopted the same reasoning for Speech or Debate privilege as the Supreme Court had applied earlier in *Nixon I* with respect to executive privilege: Candor must be encouraged among constitutional officers and their staffs, and that can only be achieved by preserving the confidentiality of their deliberations.<sup>216</sup> *Rayburn* would seem to

<sup>210</sup> See *In re Search of the Rayburn House Office Bldg.*, 432 F. Supp. 2d 100, 112 (D.D.C. 2006).

<sup>211</sup> *Rayburn*, 497 F.3d at 655; see also *id.* at 664 (“The Speech or Debate Clause protects against the compelled disclosure of privileged documents to agents of the Executive.”).

<sup>212</sup> *Id.* at 661; see also *Gravel v. United States*, 408 U.S. 606, 628–29 (1972) (“Because the Speech or Debate Clause privilege applies both to Senator and aide, it appear [sic] to us that paragraph one of the [lower court's] order, alone, would afford ample protection for the privilege if it forbade questioning any witness . . . concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator.”).

<sup>213</sup> See *Rayburn*, 497 F.3d at 666; see also *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995) (“A party is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen.”).

<sup>214</sup> See *Rayburn*, 497 F.3d at 660 (“The bar on compelled disclosure is absolute.”).

<sup>215</sup> See *United States v. Rayburn House Office Bldg.*, 522 U.S. 1295 (2008).

<sup>216</sup> For similar reasoning, see *In re Grand Jury Subpoenas*, 571 F.3d 1200, 1208 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (“In some respects, the Speech or

protect from inquiry lawmakers' conversations with staff, internal memoranda, and draft documents as they relate to legislative activities. Such a conclusion can be read to provide support for VPP to the extent the Vice President is carrying out his legislative duties.<sup>217</sup>

*B. Support for the Generalized Legislative Privilege*

In addition to justifying a constitutional privilege for members of Congress based on the Speech or Debate Clause, federal judges have also endorsed such authority for lawmakers on other grounds. In these opinions, judges have concluded that there exists what in this Article is called the generalized legislative privilege;<sup>218</sup> that is to say, members of Congress may claim a constitutional privilege based on structural comparisons to executive privilege and judicial privilege<sup>219</sup> or based on past practice.

In his opinion in *Sirica*,<sup>220</sup> Judge MacKinnon reasoned that generalized legislative privilege should be recognized. While concurring in part and dissenting in part, he wrote that

the House or the Senate itself judges and controls the extent to which its members and documents should be produced in courts and before grand juries in response to subpoenas. Congress since 1787 has claimed that it has the absolute privilege to decide itself whether its members or employees should respond to subpoenas and to determine the extent of their response. As

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Debate Clause is a counterpart to the executive privileges that constitute an essential part of the President's 'executive power' under Article II.").

<sup>217</sup> See *infra* Part VII.A.1.

<sup>218</sup> See *Common Cause v. Bailer*, Civ. No. 1887-73 (D.D.C. 1973), Order of July 30, 1975, in REP. OF THE J. COMM'N ON CONG. OPERATIONS, COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS, 94TH CONG. 209, 211 (Comm. Print 1976) ("[w]e can agree that a privilege for Senatorial documents exists"); *Calley v. Callaway*, 519 F.2d 184, 220 (5th Cir. 1975) (concluding that, despite the House's failure to release information from an executive session of a House committee to Lieutenant Calley, he was not deprived of his rights); cf. Kaye, *supra* note 179, at 76 ("[Congress] has come to . . . occasionally treat[] matters relating to executive sessions as inviolate."). But cf. *United States v. Cooper*, 4 U.S. (4 Dall.) 341, 25 F. Cas. 626, 626 (C.C.D. Pa. 1800) (denying that there is "any privilege to exempt members of Congress from the service, or the obligations, of a subpoena, in such cases"). For a discussion of these and related cases, see generally Kaye, *supra* note 181.

<sup>219</sup> See *supra* Part I.C.1.

<sup>220</sup> *Nixon v. Sirica*, 487 F.2d 700, 729 (MacKinnon, J., concurring in part and dissenting in part).

far as I have been able to discover, that practice has never been successfully challenged.<sup>221</sup>

In the same case, Judge Wilkey agreed with Judge MacKinnon on the legitimacy of the generalized legislative privilege, also basing his conclusion on past practice.<sup>222</sup> In his dissent in *Sirica*, Judge Wilkey wrote that “the Legislative Branch has never acceded to a demand of the Judicial Branch for papers in any case without an assertion and preservation of Congressional privilege.”<sup>223</sup> He continued by asserting that “similar precedents [as to access to congressional documents] in both Houses are ancient, numerous, and established beyond question in the Legislative Branch.”<sup>224</sup> To buttress his argument, he quoted with approval the words of long-serving Senator John Stennis: “I know of no case where the court has ever made the Senate or the House surrender records from its files, or where the Executive has made the Legislative Branch surrender records from its files—and I do not think either of them could. . . . [T]he rule works three ways.”<sup>225</sup>

In a 1977 Second Circuit case, *Herbert v. Lando*,<sup>226</sup> Judge Thomas Meskill issued a dissent, the merits of which were later upheld by the Supreme Court. In so doing, he discussed legislative privilege within the context of governmental structure. He wrote that his colleague’s concurring opinion

<sup>221</sup> *Id.* at 739–40.

<sup>222</sup> For Judge Wilkey’s reasoning that legislative privilege can also be justified based on constitutional structure, see *supra* notes 75–81 and accompanying text.

<sup>223</sup> *Sirica*, 487 F.2d at 772 (D.C. Cir. 1973) (Wilkey, J., dissenting); see also *Soucie v. David*, 448 F.2d 1067, 1081–82 (D.C. Cir. 1971) (Wilkey, J., concurring) (“While the constitutional privilege has been asserted most frequently in our history by the executive against the demands of the legislature, yet the Congress itself has always recognized a privilege for its own private papers and deliberations. Not only is there no provision or procedure for a demand by a private citizen for access to any papers deemed confidential, but no court subpoena is complied with by the Congress or its committees without a vote of the house concerned.”).

<sup>224</sup> *Sirica*, 487 F.2d at 772–73.

<sup>225</sup> *Id.* at 773. Other prominent lawmakers have echoed Senator Stennis’s views. See, e.g., 108 CONG. REC. 3627 (1962) (statement of Sen. McClellan) (noting that the Senate may exercise a constitutional privilege since it is part of “a separate and distinct branch of Government”); Kaye, *supra* note 181, at 573 n.212 (“[T]he Constitution created the Congress as an independent branch of the government, separate from and equal to the executive and judicial branches. As a separate branch, it is our belief that only the Congress can direct the disclosure of legislative records.” (quoting Rep. Hebert)).

<sup>226</sup> See 568 F.2d 974, 996 (2d Cir. 1977) (Meskill, J., dissenting), *rev’d*, 441 U.S. 153 (1979).

“appears to convert the fourth estate into an institution not unlike an unofficial fourth branch of government. This fourth branch is given a special privilege presumably for the same reasons that the three official branches are given executive, congressional and judicial privileges.”<sup>227</sup>

Although the Supreme Court has never directly addressed the issue of lawmaker confidentiality—neither Speech or Debate nor generalized legislative privilege—lower federal courts, including the D.C. Circuit, have repeatedly recognized the legitimacy of such a privilege. Admittedly, none of the cases discussed above mentions anything directly about the Vice President holding the same or similar privilege. Nonetheless, the existence of legislative privilege reinforces the notion of VPP on two counts: (1) by analogy since he too is a constitutional officer; and (2) by virtue of his acting legislatively within the Senate when he presides over the upper chamber and votes to break ties.<sup>228</sup>

### C. *Political Practice and Legislative Privilege*

Legislative privilege is also supported by custom. For example, the Senate or the House must pass a unicameral resolution before the chamber in question can provide committee information to executive branch investigators or to the courts.<sup>229</sup>

<sup>227</sup> *Id.*

<sup>228</sup> See *infra* Part VII.A.1.

<sup>229</sup> For examples of such assertions of legislative privilege, see S. RES. 333, 110th Cong., 153 CONG. REC. S12,156 (daily ed. Sept. 26, 2007) (enacted) (“Whereas, by the privileges of the Senate of the United States and Rule XI of the Standing Rules of the Senate, no evidence under the control or in the possession of the Senate can, by administrative or judicial process, be taken from such control or possession but by permission of the Senate . . . That the Chairman and Ranking Minority Member of the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs, acting jointly, are authorized to provide to federal or state law enforcement or regulatory agencies and officials records of the Subcommittee’s investigation into abusive practices by the credit counseling industry.”); S. RES. 411, 108th Cong., 150 CONG. REC. S8,485 (daily ed. July 20, 2004) (enacted) (stating that under the privileges of the Senate and Senate Rule XI “no evidence under the control or in the possession of the Senate may, by the judicial or administrative process, be taken from such control or possession but by permission of the Senate . . . Resolved That the Chairman and Vice Chairman of the Senate Select Committee on Intelligence, acting jointly, are authorized to provide to the United States Department of Justice, under appropriate security procedures, copies of Committee documents sought in connection with its investigation into the involvement of U.S. government officials in the counter-narcotics air interdiction program in Peru.”); S. RES. 338, 93d Cong., 120 CONG. REC. 18,940 (1974) (enacted)



There are also examples of one house of Congress declining outright to release legislative materials to the judiciary. Since the Supreme Court places a premium on past practice when considering the constitutionality of an action, these political precedents are useful in evaluating the lawfulness of VPP.<sup>230</sup>

In 1876, members of a House committee involved with the impeachment of Secretary of War William Belknap were directed by a District of Columbia court to produce "all papers, documents, records, checks, and contracts in [their] possession."<sup>231</sup> The matter was debated on the House floor and a resolution ultimately passed the chamber ordering the committee to ignore the court's instructions. It read that "the said committee and members thereof are hereby directed to disregard said mandate."<sup>232</sup>

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("[N]o evidence under the control and in the possession of the Senate of the United States can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession, but by its permission. . . . [But this resolution hereby authorizes the committee staff member in question] to furnish an affidavit [to Special Prosecutor Leon Jaworski about certain legislative activities, subject to various limitations]."); S. RES. 338, 93d Cong., 120 CONG. REC. 18,940 (1974) (enacted); S. RES. 307, 87th Cong., 108 CONG. REC. 3,626 (1962) (enacted) ("Senator John L. McClellan is granted leave in his discretion to appear at the place and before the court named in the subpoena duces tecum before mentioned, but shall not take with him any papers or documents on file in his office or under his control or in his possession as chairman of [a Senate subcommittee]."). For an extensive listing, see Senate Office of Legal Counsel, List of Resolutions Relating to Office or Senate Litigation Resolutions—Chronological Listing (as of Feb. 20, 2009) (on file with author).

On the House side, see, for example, 116 CONG. REC. 37,652 (1970) ("The rules and practices of the House . . . indicate that no official of the House may, either voluntarily or in obedience to a subpoena duces tecum, produce such records without the consent of the House being first obtained." (quoting a Letter to the Speaker of the House from the House clerk); H.R. Res. 255 & 256, 87th Cong., 107 CONG. REC. 5851–52 (1961) (enacted) (not permitting disclosure of "confidential papers, documents, or files"); H.R. Res. 177, 87th Cong., 107 CONG. REC. 2481 (1961) (enacted) ("[I]n no circumstances shall any minutes or transcripts of executive sessions, or any evidence of witnesses in respect thereto, be disclosed or copied."). For a historical discussion of Congress's efforts to secure its own documents, see generally Kaye, *supra* note 179.

The executive branch has also recognized the legitimacy of legislative privilege. See, e.g., Nixon Brief, *supra* note 116, at 357–59 (acknowledging the lawfulness of legislative privilege); *infra* note 294 and accompanying text.

<sup>230</sup> See, e.g., *supra* note 137; see also *supra* notes 221–25 and accompanying text (detailing judicial reliance on the past practice of legislative privilege).

<sup>231</sup> 3 HINDS', *supra* note 13, § 2661, at 1111–12.

<sup>232</sup> *Id.* § 2661, at 1112. During the debate, Representative Otho Singleton argued forcefully that "the members of a committee cannot be compelled to disclose what

Fifty years later, Representative Fiorello LaGuardia was subpoenaed to appear before a federal grand jury.<sup>233</sup> LaGuardia attempted to put the question of whether he should honor the subpoena to the full House for its consideration.<sup>234</sup> The chamber took no action, apparently declining the lawmaker's request that he be allowed to appear before the tribunal.<sup>235</sup>

In 1929, Senator Coleman Blease was subpoenaed by the Supreme Court of the District of Columbia to appear before a grand jury.<sup>236</sup> The Senator stated that he would disobey the subpoena.<sup>237</sup> Without conceding the legal question, the judge admitted there was little the court could do to compel Blease's appearance.<sup>238</sup>

Thus, political practice involving Congress's firm control over its own internal documents and records bolsters the argument in favor of legislative privilege.

#### D. Conclusion

In *Rayburn*, the court was faced squarely with the question of whether a legislative privilege derived from the Speech or Debate Clause exists with respect to the confidentiality of internal congressional documents. The D.C. Circuit ruled that the clause does in fact provide members of Congress with such a privilege, protecting the confidentiality of lawmakers' interaction with their aides. In this regard, *Rayburn* builds on dicta from opinions such as Chief Justice Burger's dissents in *Nixon II* and *New York Times* and D.C. Circuit opinions such as *Sirica* and *Senate Select Committee*. Additional support for a privilege for members of Congress is found in judicial opinions such as Judge MacKinnon's opinion in *Sirica*, Judge Wilkey's concurrence in *Soucie* and dissent in *Sirica*, and Judge Meskill's dissent in *Herbert*. Portions of the latter four opinions support the notion of legislative privilege for reasons other than the Speech or Debate

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took place in the committee-room." 4 CONG. REC. 1527 (1876); see also *id.* at 1522, 1528 (members referring to committee secrecy).

<sup>233</sup> See 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 586, at 825 (1935) [hereinafter CANNON'S].

<sup>234</sup> See *id.*

<sup>235</sup> See *id.*

<sup>236</sup> See *id.* § 588, at 828; see also 72 CONG. REC. 109 (1929).

<sup>237</sup> See CANNON'S, *supra* note 233, § 588, at 828.

<sup>238</sup> See *id.* § 588, at 829 ("Unless the gentlemen see fit to obey the subpoenas, this court at the present time has no power to compel them to do so.").

Clause. Finally, the concept of legislative privilege is buttressed by past congressional practice and the acquiescence of the judiciary in such episodes.

That constitutional officers under Article I may invoke a privilege to withhold information from the public and the courts would appear to provide two-pronged support for VPP. First, when acting as part of the legislative branch, the Vice President may draw on a legislative privilege when carrying out his Article I duties.<sup>239</sup> Second, since his fellow constitutional officers may exercise such a privilege, by analogy, the case for the Vice President having his own constitutional privilege is bolstered accordingly.

#### IV. JUDICIAL PRIVILEGE

Much as the President and members of Congress each may invoke a privilege to withhold certain information from public view when exercising their own constitutional authority, so too can federal judges.<sup>240</sup> Because the notion of federal judges having authority to preserve internal confidentiality seems widely acknowledged, further support is lent to the structural argument that the Vice President as a constitutional officer himself enjoys a right of confidentiality in carrying out his own constitutional powers.

##### A. *The Vesting Clause of Article III*

As with executive privilege, judicial privilege lacks explicit textual support. Section 1 of Article III of the Constitution appears the most plausible textual provision in support of judicial privilege. It provides that the “judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>241</sup> That language mirrors that of Section 1 of Article II, which states without apparent restriction, that the

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<sup>239</sup> See *infra* Part VII.A.1.

<sup>240</sup> It would seem doubtful that non-Article III judges would enjoy judicial privilege. This is because the authority exercised by, for example, an Article I judge is delegated legislative authority, not Article III constitutional authority. See *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (“These [Article I] courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited.”). The author would like to thank Fred Karem for raising this issue.

<sup>241</sup> U.S. CONST. art. III, § 1.

“executive Power shall be vested in a President of the United States of America.”<sup>242</sup> As discussed earlier,<sup>243</sup> the Vesting Clause of Article II has been viewed by some as a textual basis for executive privilege. Like that of Article II, the Vesting Clause of Article III is similarly free from express language of limitation<sup>244</sup> and would seem by analogy to provide the judiciary with similar implied powers, perhaps even those of judicial privilege. However, none of the case law or other authority involving judicial privilege seems to link the privilege to Article III’s Vesting Clause. Thus, as with executive privilege, one must look elsewhere for its constitutional justification. In this regard, judicial privilege—like executive privilege—is best supported by structural considerations.<sup>245</sup>

### B. *Judicial Treatment of Judicial Privilege*

There are numerous judicial opinions that have implicitly recognized the principle of judicial privilege, relying on constitutional structure and symmetry—to the extent a developed rationale was provided.<sup>246</sup> The first is *In re Certain Complaints Under Investigation by an Investigating Committee of*

<sup>242</sup> *Id.* art. II, § 1.

<sup>243</sup> See *supra* Part II.A.

<sup>244</sup> See Calabresi & Rhodes, *supra* note 15, at 1175–76.

<sup>245</sup> See, e.g., *supra* Parts II–III.

<sup>246</sup> See Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 22 GA. L. REV. 89, 125 (1987) (“Clearly, the judiciary has long believed in its privilege to protect the confidentiality of its internal decision-making process, even from the other branches of government.”); *id.* at 120 (“[I]nsofar as is determinable, every court that has considered the question as a matter of dicta has concluded that conversations and records of federal judges and their immediate staff concerning the manner in which a judge conducts the judicial office are protected from compelled disclosure.”); see also *Goetz v. Crosson*, 41 F.3d 800, 805 (2d Cir. 1994) (“The inner workings of administrative decision making processes are almost never subject to discovery. Clearly, the inner workings of decision making by courts are kept in even greater confidence.” (citations omitted)); Catz & Lange, *supra*, at 117 (“My relationship with my law clerks is a close and confidential one. If I cannot speak freely to them, they cannot do their job for me. And I could not speak freely to them if I thought that my questions, soul-searching, and opinions would be made matters of public record . . . .” (quoting an anonymous judge) (internal quotation marks omitted)); cf. *Executive Privilege, Secrecy in Gov’t, Freedom of Info.: Hearings Before the Subcomm. on Intergovernmental Relations of the Comm. on Gov’t Operations and the Subcomms. on Separation of Powers and Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 93d Cong. 333–42 (1973) (discussing the possible existence of a “Judicial Conference Privilege”).

Like legislative privilege, judicial privilege has been under examined in the academic literature. One notable exception is Catz & Lange, *supra*, at 120–43.

*the Judicial Council of the Eleventh Circuit.*<sup>247</sup> This decision involved a federal judge, Alcee Hastings, and his employees who challenged the lawfulness of a subpoena *duces tecum* issued to them to provide documents pertaining to their work in chambers.<sup>248</sup> The subpoena was issued by a judicial council created by statute to investigate alleged wrongdoing in the federal judiciary.<sup>249</sup> Among the arguments made by Hastings and his employees was that they could not reveal such material since doing so would violate judicial privilege.<sup>250</sup>

While the court rejected the assertion of privilege in this instance, it supported the notion of judicial privilege in general. Citing *Sirica*, *Senate Select Committee*, and Judge Wilkey's concurrence in *Soucie*, the court commented that "[a]lthough we have found no case in which a judicial privilege protecting the confidentiality of judicial communications has been applied, the probable existence of such a privilege has often been noted."<sup>251</sup>

The Eleventh Circuit also analogized judicial privilege to that of executive privilege. Highlighting the familiar argument of the need to encourage candor in internal governmental decisionmaking, the court concluded that the "Supreme Court's reasons for finding a qualified privilege protecting confidential Presidential communications in *United States v. Nixon* support the existence of a similar judicial privilege."<sup>252</sup> The court continued by explaining that since *Nixon I* "discerned the constitutional foundation for the executive privilege— notwithstanding the lack of any express provision—in the constitutional scheme of separation of powers and in the very nature of a President's duties . . . the same must be true of the judiciary."<sup>253</sup> The court observed further that

[j]udges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties. The judiciary, no less than the executive, is supreme within its own area of constitutionally assigned duties. Confidentiality helps protect judges'

<sup>247</sup> See 783 F.2d 1488 (11th Cir. 1986). For discussion of the case, see Catz & Lange, *supra* note 246, at 128–43.

<sup>248</sup> See *In re Certain Complaints*, 783 F.2d at 1491–92.

<sup>249</sup> See *id.* at 1491.

<sup>250</sup> See *id.* at 1517–25.

<sup>251</sup> *Id.* at 1518.

<sup>252</sup> *Id.* at 1519 (citation omitted).

<sup>253</sup> *Id.*

independent reasoning . . . . We conclude, therefore, that there exists a privilege (albeit a qualified one) protecting confidential communications among judges and their staffs in the performance of their judicial duties.<sup>254</sup>

What is noteworthy for purposes of this Article is that the court's reasoning in justifying judicial privilege—analagizing it to executive privilege—reflects this Article's main argument supporting VPP.

Despite its recognition of judicial privilege in *In re Certain Complaints*, the court was careful to limit it “only to communications among judges and others relating to official judicial business such as . . . the framing and researching of opinions, orders, and rulings.”<sup>255</sup> The court concluded that as a qualified privilege it could be overridden by a proper showing of need by the council.<sup>256</sup> In this instance, the court determined that the council's interest overcame the judge's desire for confidentiality.<sup>257</sup>

A second decision that has relevance to the subject of judicial privilege is *United States v. Mendoza*.<sup>258</sup> In that case, a federal district court reviewed the constitutionality of the Feeney Amendment, a congressional reporting requirement mandating that the DOJ report to Congress when individual judges departed from the federal sentencing guidelines.<sup>259</sup> The court ruled that this reporting requirement was unlawful.<sup>260</sup> It reasoned that the “judiciary must provide a defense against attempts to usurp judicial independence through inappropriate controls and the dissemination of information that fosters distrust, misunderstanding, and apathy towards the function of the court.”<sup>261</sup> While not explicitly asserting a judicial privilege, the court, by striking down this congressional reporting requirement, seemed to be staking out the constitutional position that the

<sup>254</sup> *Id.* at 1519–20.

<sup>255</sup> *Id.* at 1520.

<sup>256</sup> *See id.* at 1521.

<sup>257</sup> *See id.* at 1525.

<sup>258</sup> No. 03-CR-730-ALL, 2004 WL 1191118, at \*3 (C.D. Cal. Jan. 12, 2004); *see also* ELIZABETH B. BAZAN & MORTON ROSENBERG, CONG. RESEARCH SERV., CONGRESSIONAL OVERSIGHT OF JUDGES AND JUSTICES 2–3, 30–33 (2005).

<sup>259</sup> *See Mendoza*, 2004 WL 1191118, at \*1–2.

<sup>260</sup> *See id.* at \*6–7; BAZAN & ROSENBERG, *supra* note 258; *see also* Douglas A. Kelley, *Minnesota Federal Judge Caught in Constitutional Crossfire*, 27 HAMLINE L. REV. 427, 450–51 (2004).

<sup>261</sup> *Mendoza*, 2004 WL 1191118, at \*3.

judicial branch may not be compelled by Congress to provide certain information about the execution of its duties.<sup>262</sup> In this regard, the opinion seems to recognize judicial privilege without explicitly saying so.

In addition to these two decisions, there are also a fair amount of dicta supporting the view that federal judges may protect the confidentiality of their internal deliberations. In *Nixon I*, the Court drew a comparison between executive privilege and judicial privilege. It reasoned that

[t]he expectation of a President to the confidentiality of his conversations and correspondence, *like the claim of confidentiality of judicial deliberations*, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.<sup>263</sup>

Chief Justice Burger, in dissent in *New York Times Co. v. United States*, even more forcefully asserted the existence of judicial privilege. He wrote that:

With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the

<sup>262</sup> Impeachment proceedings would presumably be an exception to this rule. House committee subpoenas issued to the judiciary as part of impeachment efforts against sitting judges are generally thought to be permissible. See BAZAN & ROSENBERG, *supra* note 258, at 18–19; see also KYVIG, *supra* note 12, at 101 (quoting Supreme Court Justice William Douglas who, prior to a hearing on his potential impeachment, permitted a House Judiciary subcommittee full access to all documents in his possession, “whether [they] concern[] Court records, correspondence files, financial matters or otherwise” (emphasis added)); cf. 14 ANNALS OF CONG. 262–67 (1805) (reflecting Chief Justice Marshall’s testimony during the impeachment trial of Justice Chase); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 81, 84–85 (1999).

It is also possible that judges could have judicial materials subpoenaed as part of their Senate confirmation hearings for higher judicial office. See BAZAN & ROSENBERG, *supra* note 258, at 7.

<sup>263</sup> *United States v. Nixon* (*Nixon I*), 418 U.S. 683, 708 (1974) (emphasis added).

confidentiality of its internal operations by whatever judicial measures may be required.<sup>264</sup>

On the other side of the ideological spectrum, Justice William Douglas also implicitly recognized the legitimate need for secrecy in judicial deliberations. In his dissent in *Gravel v. United States*, Douglas wrote that “there may be situations and occasions in which the right to know must yield to other compelling and overriding interests. . . . [M]any deliberations in Government are kept confidential such as . . . our own Conferences, despite the fact that the breadth of public knowledge is thereby diminished.”<sup>265</sup>

Justice John Paul Stevens, in an opinion involving a denial of a certiorari petition, expressed similar views. He wrote that

[t]here are those who believe that these [Supreme Court] Conferences should be conducted entirely in public or, at the very least, that the votes on all Conference matters should be publicly recorded. The traditional view, which I happen to share, is that confidentiality makes a valuable contribution to the full and frank exchange of views during the decisional process; such confidentiality is especially valuable in the exercise of the kind of discretion that must be employed in processing the thousands of certiorari petitions that are reviewed each year. In my judgment, the importance of preserving the tradition of confidentiality outweighs the minimal educational value of these opinions.<sup>266</sup>

Justice Abe Fortas took a similar view. During his nomination hearing to serve as Chief Justice, Fortas explained to the Senate Judiciary Committee why he felt he could not discuss the background behind his judicial work. He explained that “‘members of the Congress shall not be called to answer in any other place for their votes or statements on the floor. And I think that probably it is true that the correlative of that applies to the Court.’”<sup>267</sup>

<sup>264</sup> 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting).

<sup>265</sup> *Gravel v. United States*, 408 U.S. 606, 642 n.10 (1972) (Douglas, J., dissenting).

<sup>266</sup> *Singleton v. Comm’r*, 439 U.S. 940, 945 (1978).

<sup>267</sup> *Hearings on Nomination of Abe Fortas, of Tenn., To Be Chief Justice of the U.S. and Nomination of Homer Thornberry, of Tex., To Be Associate Justice of the Supreme Court of the U.S., Before S. Comm. on the Judiciary*, 90th Cong. 121–22 (1968) [hereinafter *Fortas Hearings*]; see also *id.* at 100–01 (“Just as a Senator or a Congressman may not be called upon by courts to explain or justify his votes as a representative of the people, or his speeches on the floor of Congress, so a Justice of



Judge MacKinnon of the D.C. Circuit, while concurring in part and dissenting in part in *Sirica*, also evaluated judicial privilege from a structural perspective. He wrote that, much as Congress can restrict information from being made public, the judiciary can do the same.<sup>268</sup> He reasoned that the “judicial branch of our government claims a similar privilege [to that exercised by the Congress], grounded on an assertion of independence from the other branches.”<sup>269</sup> MacKinnon noted that “the judicial branch asserts the same immunity from being compelled to respond to congressional subpoenas that past Presidents have asserted.”<sup>270</sup> He concluded that its “source is rooted in history and gains added force from the constitutional separation of powers of the three departments of government.”<sup>271</sup>

In sum, while the Supreme Court has never decided the issue on the merits, judicial privilege has been recognized—implicitly or otherwise—in several notable judicial opinions.

### C. *Political Practice and Judicial Privilege*

In addition to court opinions and dicta supporting judicial privilege, there is also political precedent that favors the exercise of this authority.<sup>272</sup> On more than one occasion members of the federal judiciary have had conflicts with congressional committees about whether they must testify.<sup>273</sup> In these

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the Supreme Court may not be required, by the Senate or a Senate committee, to explain or justify his votes on decisions by the Court or his judicial opinions.” (quoting Sen. Gore); James A. Thorpe, *The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee*, 18 J. PUB. L. 371, 389–95 (1969). For more on Fortas’s testimony, see MARK SILVERSTEIN, JUDICIAL CHOICES: THE POLITICS OF SUPREME COURT CONFIRMATIONS 22–24 (2d ed. 2007). When Fortas declined to discuss his conversations with President Johnson on executive branch matters, concerns over judicial and executive privilege seemed to converge. See *Fortas Hearings*, *supra*, at 167–68; see also SILVERSTEIN, *supra*, at 24.

<sup>268</sup> See *Nixon v. Sirica*, 487 F.2d 700, 739–40 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part).

<sup>269</sup> *Id.* at 740.

<sup>270</sup> *Id.* at 741.

<sup>271</sup> *Id.* at 740.

<sup>272</sup> As noted above, past practice is an important indicator of constitutionality. See *supra* note 137; cf. WIGDOR, *supra* note 58, at 1036 (“[T]he tradition of judicial secrecy . . . was firmly established by the Marshall Court.”).

<sup>273</sup> Sitting judges who have been nominated to higher positions within the federal judiciary routinely testify before the Senate Judiciary Committee. This was not always so. Then Judge Sherman Minton of the Seventh Circuit declined to appear at a Senate Judiciary Committee hearing following his nomination by President Truman to serve on the Supreme Court. See HENRY J. ABRAHAM,

instances, judges have asserted what amounts to a judicial privilege.

In 1953, a House Judiciary subcommittee invited Supreme Court Justice Tom Clark to make an appearance to discuss issues involving the DOJ during his service as Attorney General.<sup>274</sup> This effort to have a sitting Supreme Court Justice testify before a congressional committee was thought to be unprecedented.<sup>275</sup> Clark refused to appear.<sup>276</sup> In so doing, he noted to the panel that the “invitation involves a high principle of great importance, the preservation of the independence of three branches of Government. As with the Executive and Legislative Branches, our constitutional system makes the Judiciary completely independent . . . [, which] is necessary for the proper

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JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 36 (5th ed. 2008). He argued that it was improper for him to appear as a sitting judge. *See id.* Ultimately, the committee ignored the slight, and Minton was confirmed by the Senate. *See id.*; *see also* Thorpe, *supra* note 267, at 378–84; *Text of Minton Letter to Senate Group*, N.Y. TIMES, Oct. 4, 1949, at 24.

Supreme Court Justices will also often appear voluntarily before the appropriations committees to defend the annual budget request for the federal judiciary, but rarely do so in other contexts. *See, e.g.*, Letter from William Rehnquist, Chief Justice, U.S. Supreme Court, to Sen. Joseph Lieberman, June 7, 1993, in SUSAN LOW BLOCH ET AL., *INSIDE THE SUPREME COURT: THE INSTITUTION AND ITS PROCEDURES* 1047 (2d. 2008) (declining to testify at a Senate hearing on the disposition of judicial papers and raising separation of powers concerns about proposed legislation to govern preservation of judicial materials). There is also precedent for former Justices appearing before congressional committees to discuss extrajudicial, governmental activities. *See Hearings Before the Joint Comm. on the Investigation of the Pearl Harbor Attack* (pt. 7), 79th Cong. 3259–303 (1946) (congressional testimony provided by former Justice Owen Roberts in his capacity as a former member of an investigative commission); *see also* Peter Alan Bell, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587, 592 & n.27 (1970).

Sitting Supreme Court Justices have testified in court regarding criminal matters. For example, Justices Felix Frankfurter and Stanley Reed appeared in federal court at the perjury trial of Alger Hiss. *See* William R. Conklin, *Frankfurter, Reed Testify to Loyalty, Integrity of Hiss*, N.Y. TIMES, June 23, 1949, at 1. Reed was served with a subpoena, while Frankfurter “deemed it an unnecessary formality to be formally served with a subpoena.” A “Duty” To Testify, Says Frankfurter, N.Y. TIMES, July 21, 1949, at 7; *see also* Dennis v. Sparks, 449 U.S. 24, 31 (1980) (“Neither are we aware of any rule generally exempting a judge from the normal obligation to respond as a witness when he has information material to a criminal or civil proceeding.”).

<sup>274</sup> *See* Harold B. Hinton, *House Unit Invites Clark To Testify*, N.Y. TIMES, June 16, 1953, at 14.

<sup>275</sup> *See id.*; *see also* BAZAN & ROSENBERG, *supra* note 258, at 3. *But cf.* 14 ANNALS OF CONG. 262–67 (1805) (testimony of C.J. Marshall).

<sup>276</sup> *See* Harold B. Hinton, *Justice Clark Rejects Bid to House Inquiry*, N.Y. TIMES, June 18, 1953, at 1.

administration of justice.”<sup>277</sup> Although somewhat underdeveloped, his argument—by noting the shared interest of each of the three branches in their own independence—seemed to reflect structural considerations. Following Justice Clark’s refusal to appear, the committee decided not to pursue the matter further even though it involved issues that preceded his tenure on the Court.<sup>278</sup>

In November of the same year, the House Committee on Un-American Activities (“HUAC”) went a step further and issued a subpoena to Justice Clark.<sup>279</sup> Here again, the Justice declined. This time, Clark made public his reasons for refusing to appear. In this regard, his arguments largely mirrored those offered earlier to the House Judiciary subcommittee. Clark wrote that

I have your subpoena dated Nov. 10, 1953, calling upon me to appear before your committee . . . . As you know, the independence of the three branches of our Government is the cardinal principle on which our constitutional system is founded. This complete independence of the judiciary is necessary to the proper administration of justice. In order to discharge this high trust, judges must be kept free from the strife of public controversy. . . . For this reason, as much as I wish to cooperate with the legislative branch of the Government, I must forego an appearance before the committee. However . . . you may rest assured that such written questions as you and your committee may wish to send me will receive my serious consideration subject only to my duties under the Constitution.<sup>280</sup>

The committee chose not to pursue contempt proceedings against Justice Clark.<sup>281</sup>

<sup>277</sup> *Id.* at 33.

<sup>278</sup> See *Decision Put off on Calling Clark*, N.Y. TIMES, June 19, 1953, at 16 (“[T]here was every indication that considerable difference of opinion existed over both the legality and the advisability of directing Mr. Clark to appear.”); see also *House Group Bars a Clark Subpoena*, N.Y. TIMES, June 24, 1953, at 19.

<sup>279</sup> See W.H. Lawrence, *Velde Unit ‘Invites’ Brownell and He Promises To Testify*, N.Y. TIMES, Nov. 13, 1953, at 1.

<sup>280</sup> *Clark’s Letter*, N.Y. TIMES, Nov. 14, 1953, at 9 (letter from Associate Justice Tom C. Clark to Rep. Harold Velde).

<sup>281</sup> See W.H. Lawrence, *Senators To Hear Brownell Tuesday*, N.Y. TIMES, Nov. 14, 1953, at 1. In a 1956 speech, Justice Clark again asserted the importance of judicial independence, emphasizing the value of deliberating in private. Were it otherwise, he explained, “the whole process of decision [would be] destroyed.” Arthur Selwyn Miller & D.S. Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 BUFF. L. REV. 799, 805 (1973).

Also in 1953, a group of federal district court judges opposed a House committee subpoena issued to one of its members, Judge Louis E. Goodman.<sup>282</sup> In a statement to the committee, the judges noted that the “Constitution does not contemplate that such matters be reviewed by the Legislative Branch . . . . [W]e know of no instance, in our history where a committee such as yours, has summoned a member of the Federal Judiciary.”<sup>283</sup> Goodman appeared before the subcommittee but refused to answer questions specifically involving his judicial duties.<sup>284</sup>

In 1973, Senator Ted Stevens contacted the Chief Judge of the D.C. Circuit, David Bazelon, inquiring about which judges had recused themselves in litigation involving the Alaska pipeline. Senator Stevens wrote: “I have been told one or more judges have disqualified themselves in the trans-Alaska pipeline case currently under advisement. Kindly advise me of their identities and reasons if this is the case. I would appreciate a reply in writing as soon as possible. Thank you very much.”<sup>285</sup>

Judge Bazelon declined Senator Stevens’s request. He wrote:

In re your telegram of February 5, 1973 inquiring as to whether 1 or more judges have disqualified themselves in the trans Atlantic [sic] pipeline cases currently under advisement and in which you request their identities and reasons if this is the case. The opinion, when issued, will reveal the names of the judges who have participated therein. With great respect, we believe that further reply to your inquiry would not be appropriate with cordial wishes.<sup>286</sup>

In 2002, a federal judge voluntarily appeared before a congressional committee to offer his views about federal sentencing guidelines.<sup>287</sup> The judge’s remarks at the hearing

<sup>282</sup> See Statement of the Judges of the U.S. Dist. Court for the N. Dist. of Cal., Made to the Subcomm. of the Comm. of the House of Representative To Investigate the Dep’t of Justice of the U.S., 14 F.R.D. 335 (1953).

<sup>283</sup> *Id.* at 336. The hearing involved concerns regarding a recent grand jury inquiry into controversies under the Truman administration. See, e.g., Lawrence E. Davies, *U.S. Judge Rejects Queries at Inquiry, Tells House Unit Replies Would Make Judiciary “Subservient to Legislative Branch,”* N.Y. TIMES, June 2, 1953, at 22.

<sup>284</sup> See Hinton, *supra* note 274, at 14. Two of Goodman’s colleagues on the bench also testified. See Davies, *supra* note 283.

<sup>285</sup> *Nixon v. Sirica*, 487 F.2d 700, 742 (D.C. Cir. 1973) (per curiam) (MacKinnon, J., concurring in part and dissenting in part) (quoting Senator Stevens’s letter).

<sup>286</sup> *Id.* (quoting Chief Judge Bazelon’s response to Senator Stevens’s letter).

<sup>287</sup> See Kelley, *supra* note 260, at 430–32.

contained some controversial assertions about the guidelines, and the committee subsequently asked that he submit materials to back up his statements.<sup>288</sup> To the chagrin of the committee, the judge declined to produce several sentencing documents.<sup>289</sup> The committee responded by intimating it might subpoena the judge's materials.<sup>290</sup> Ultimately, the documents seem to have been given to the panel.<sup>291</sup> At the time of the controversy, Chief Justice Rehnquist publicly expressed concern about the investigation, stating that "efforts to obtain information may not threaten judicial independence or the established principle that a judge's judicial acts cannot serve as a basis for his removal from office."<sup>292</sup>

These political precedents involving the judiciary and Congress underscore that a judicial privilege exists. They are further supported in that the executive branch has also recognized this privilege over the years. For example, in one of its briefs during executive privilege litigation during the Watergate era, executive branch lawyers noted:

It has always been recognized that judges must be able to confer with their colleagues, and with their law clerks, in circumstances of absolute confidentiality. Justice Brennan has written that Supreme Court conferences are held in "absolute secrecy" for "obvious reasons." Justice Frankfurter has said that the "secrecy that envelops the Court's work" is "essential to the effective functioning of the Court."<sup>293</sup>

While serving as Assistant Attorney General for the Office of Legal Counsel ("OLC"), Rehnquist acknowledged the legality of judicial privilege. In testimony before Congress, he stated: "The President is entitled to undivided and faithful advice from his subordinates, just as Senators and Representatives are entitled to the same sort of advice from their legislative and

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<sup>288</sup> *See id.* at 432.

<sup>289</sup> *See id.*

<sup>290</sup> *See id.* at 434.

<sup>291</sup> *See id.* at 439–40.

<sup>292</sup> *Id.* at 441; *see also id.* at 442 (quoting Chief Justice Rehnquist). In 2009, a controversy arose following the Senate Judiciary Committee's request of a sitting court of appeals judge to appear before the panel to discuss matters involving his tenure in the executive branch. *See* Carrie Johnson, *Judge Invited To Testify About Role in Interrogation Memos*, WASH. POST, Apr. 30, 2009, at A7.

<sup>293</sup> *Nixon v. Sirica*, 487 F.2d 700, 740 (D.C. Cir. 1973) (*per curiam*) (MacKinnon, J., concurring in part and dissenting in part) (citing with approval a brief submitted by the President).

administrative assistants, and judges to the same sort of advice from their law clerks.”<sup>294</sup>

#### D. Conclusion

As with the President and members of Congress, federal judges enjoy a constitutional privilege. This is because the Constitution places a premium on encouraging effective decisionmaking by its constitutional officers. It would be inconsistent with constitutional norms for the Vice President to lack a privilege of his own. This anomaly would seem particularly striking when considered in light of judicial privilege. One would assume that the Vice President, as an elected official who owes his job to the electorate, would have a greater need for having his sensitive deliberations shielded from disclosure than a life-tenured judge. After all, while a judge may experience temporary discomfort from disclosure of his deliberations, he would not stand to be driven from office based on such revelations, provided his conduct was not impeachable. A Vice President, on the other hand, could have his political future jeopardized by such revelations and therefore without a privilege may become unduly cautious in his decisionmaking. Thus, one would assume judicial decisionmaking would be less susceptible to harm in light of disclosures or potential disclosures than would that of the Vice President.

<sup>294</sup> *Executive Privilege Hearing*, *supra* note 150, at 425 (statement of Assistant Att’y Gen. William H. Rehnquist).

Academic opinion also seems to come down in favor of judicial privilege. *See* Amar, *supra* note 91 (“Senators must be free to talk candidly with colleagues and staff in cloakrooms; judges need similar freedom to converse with each other in judicial conferences and with clerks in closed chambers.”); Catz & Lange, *supra* note 246, at 117–19 (“The element of confidentiality between a judge and those who aid her in chambers is essential . . . to the execution of the judicial office. . . . [T]he principle of separation of powers requires the availability of the judicial privilege in order to protect courts from improper interference from other branches.”); Alan K. Ota, *House Leaders Wary of Being Too Helpful*, CQ TODAY, May 18, 2006, at 42 (“If Congress sought records from the White House or from the chief justice . . . the requests would be denied.” (quoting former congressional committee counsel William Canfield)); *cf.* DAVID M. O’BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 123–24 (8th ed. 2008) (“Isolation from the Capitol and the close proximity of the justices’ chambers within the Court promote secrecy, to a degree that is remarkable . . . . The norm of secrecy conditions the employment of the justices’ staff . . . .”); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 298–304 (1993) (discussing the elaborate efforts undertaken by the Supreme Court to preserve confidentiality when deliberating on the first *Brown v. Board of Education* decision). *But see generally* Miller & Sastri, *supra* note 281.

HISTORICAL DEVELOPMENT:  
THE VICE PRESIDENCY, INVESTIGATIONS, AND OPPORTUNITIES  
FOR ASSERTION OF PRIVILEGE

V. THE VICE PRESIDENT AND THE CONSTITUTION

A. *The Framers and the Evolving Role of the Vice President*

What the Framers of the Constitution had in mind about the role of the Vice President is in no small part a matter of conjecture.<sup>295</sup> They were largely silent about their handiwork. One author described the Framers' treatment of the Vice President as "a hasty postscript,"<sup>296</sup> as formulation of the office was not undertaken until late in the Constitutional Convention.<sup>297</sup> A few generalizations, however, can be hazarded. First, since the Framers did not anticipate political parties, they set up a system whereby a member of the electoral college would vote for two candidates for President, with the caveat that only one could hail from the same state as the elector. This precaution thereby prevented each state from voting only for its "favorite son."<sup>298</sup> Of the top two Presidential candidates, the one with the majority of electoral votes would become President.<sup>299</sup> The Vice President would be the person with the second-most electoral votes. The Twelfth Amendment modified this arrangement after the election of 1800 almost made Aaron Burr—the clear vice presidential candidate for the Jeffersonian party—President instead of Vice President.

<sup>295</sup> See, e.g., JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* 4 (1982).

<sup>296</sup> EDGAR WIGGINS WAUGH, *SECOND CONSUL: THE VICE PRESIDENCY: OUR GREATEST POLITICAL PROBLEM* 25 (1956).

<sup>297</sup> See, e.g., Joel K. Goldstein, *An Overview of the Vice-Presidency*, 45 *FORDHAM L. REV.* 786, 789 (1977). For example, neither the Virginia Plan nor the New Jersey Plan included a means of succession for the executive. See RUTH SILVA, *PRESIDENTIAL SUCCESSION* 4 (1951). Hamilton and Charles Pinckney, on the other hand, drafted plans that addressed the issue. See *id.*

<sup>298</sup> See Goldstein, *supra* note 297. In this same vein, Joel Goldstein has argued that the Framers established the vice presidency to increase the likelihood that capable Presidents would be elected. See Joel K. Goldstein, *The New Constitutional Vice-Presidency*, 30 *WAKE FOREST L. REV.* 505, 512–13 (1995).

<sup>299</sup> See Goldstein, *supra* note 297.

Second, the Framers were concerned about presidential succession. Preliminary versions of the charter had the Chief Justice or an executive council filling in for the fallen executive.<sup>300</sup> Other ideas included having the President of the Senate so serving—at that point during the constitutional drafting there was no Vice President.<sup>301</sup>

Third, there was the question about who would preside over the Senate.<sup>302</sup> This involved two related issues, one being concern that, if the presiding officer was a Senator, he could not cast a vote and one state would have diminished representation.<sup>303</sup> The other was that since the Constitution provided for two Senators per state, the body's membership would always be evenly numbered. Therefore, the Framers were concerned that the Senate could become regularly deadlocked and be unable to make decisions.<sup>304</sup> The result was that the Vice President was tasked with presiding over the Senate, presumably to allow all the Senators to have a vote and to permit ties to be broken, thus alleviating these concerns.<sup>305</sup>

The net result of the Framers' actions is that vice presidential power flows very little from constitutional grants but largely from formal and informal delegations from the President<sup>306</sup> and Congress.<sup>307</sup> In fact, throughout most of U.S.

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<sup>300</sup> *See id.*

<sup>301</sup> *See id.*

<sup>302</sup> *See id.*

<sup>303</sup> *See id.*

<sup>304</sup> *See id.*

<sup>305</sup> *See id.*

<sup>306</sup> *See, e.g., FOIA Opinion, supra* note 24, at 10 (“[T]he Vice President and his staff do not have ‘substantial independent authority in the exercise of specific functions,’ . . . but rather have the *sole* function of advising and assisting the President. The Vice President has no constitutional or statutory responsibilities as an executive branch officer . . .” (citations omitted) (emphasis added)); *cf.* 3 U.S.C. § 106 (2006) (authorizing funds to the Vice President “[i]n order to enable the Vice President to provide assistance to the President in connection with the performance of functions *specifically assigned to the Vice President by the President* in the discharge of executive duties and responsibilities” (emphasis added)); *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993) (“[D]espite the Vice President’s rank, we do not believe his status as Chairman [of the interagency group] lent the Task Force any authority independent of the President.”); PAUL C. LIGHT, *VICE-PRESIDENTIAL POWER: ADVICE AND INFLUENCE IN THE WHITE HOUSE* 5 (1984) (contending that “Vice-Presidents must function on the basis of ever-changing customs and practices, with no constitutional mandate in the policy process”); David Nather, *A Power Surge Under Scrutiny*, CQ WEEKLY, June 17, 2007, at 1734, 1738 (the Vice President’s “power depends almost entirely on how much a president is willing to hand over”).



history under the Constitution, Vice Presidents played only a minor role in the executive branch. Owing to their responsibility to preside over the Senate, they were long thought to be more a part of the legislative branch than the executive.<sup>308</sup> Seldom did they receive important assignments from the President.

Beginning in the early 1920s, however, Vice Presidents began to participate in Cabinet deliberations.<sup>309</sup> President Franklin Roosevelt's Vice President, John Nance Garner, not only sat in on Cabinet meetings, but represented the President on a foreign visit.<sup>310</sup> By the time of U.S. entry into World War II, Vice Presidents had begun to enjoy much greater executive branch responsibility as the President and Congress delegated ever increasing authority to them.<sup>311</sup> In this regard, Franklin Roosevelt's second Vice President, Henry Wallace, was the first to be delegated serious, formal authority within the executive

<sup>307</sup> For example, Congress included the Vice President on the National Security Council ("NSC") when it was modified in 1949. *See* 50 U.S.C. § 402 (2006); *see also* Harold C. Relyea, *The Law: The Executive Office of the Vice President: Constitutional and Legal Considerations*, 40 PRES. STUD. Q. 327, 329 (2010) [hereinafter *The Executive Office*]. Before the NSC assignment, he was slated by statute in the mid-nineteenth century to serve on the Board of Regents of the Smithsonian. *See, e.g.,* HAROLD C. RELYEA, CONG. RESEARCH SERV., *THE VICE PRESIDENCY: EVOLUTION OF THE MODERN OFFICE: 1933–2001*, at 1–2 (2001); *see also* Relyea, *supra*, at 328–29 (listing other commissions upon which the Vice President served).

<sup>308</sup> *See, e.g.,* IRVING G. WILLIAMS, *THE AMERICAN VICE-PRESIDENCY: NEW LOOK* 3–4 (1954) ("The presiding officer's role has been the main item of a Vice President's constitutional work, and in general the standard by which he has been judged competent or not."); H.B. Learned, *Some Aspects of the Vice-Presidency*, 8 AM. POL. SCI. REV. SUPP. 162, 170 (1913) ("[T]he [vice presidential] office as constitutionally limited to legislative functions . . . [was an] assumption, although unacknowledged, [that] . . . has probably guided most of [Jefferson's] successors."); Reylea, *supra* note 307, at 328 ("Throughout the nineteenth century, the vice presidency was regarded as a legislative position, the primary duty being to preside over deliberations of the Senate."); *infra* note 323 (quoting Adams and Jefferson).

<sup>309</sup> *See infra* note 670. Vice President Marshall sat in on Cabinet meetings while President Wilson was in Europe at the Versailles peace conference, but Vice President Coolidge was the first to attend such gatherings as a matter of course. *See, e.g.,* GOLDSTEIN, *supra* note 295, at 136. The latter's Vice President, Charles Dawes, refused to do so, but the practice was revived a few years later during Charles Curtis's tenure. *See* 1 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 229 n.2 (1960 ed.); *Hoover Aims To Reform Machinery for Enforcing Dry Law and Many Others*, N.Y. TIMES, Mar. 9, 1929, at 1.

<sup>310</sup> *See, e.g.,* *The Executive Office*, *supra* note 307, at 329.

<sup>311</sup> Beginning in earnest with Wallace, the "constitutional aspect of his functions [were placed below] . . . his extraconstitutional ones." WILLIAMS, *supra* note 308, at 37.

branch.<sup>312</sup> Roosevelt appointed him head of the Economic Defense Board—later re-christened the Board of Economic Warfare (“BEW”).<sup>313</sup>

Gradually, this growing executive branch responsibility was matched by less emphasis on the Vice President’s legislative duties. This political trend was underscored as a constitutional matter by the Twenty-Fifth Amendment in 1967, which acknowledged the enhanced executive branch role played by the Vice President<sup>314</sup> and simultaneously raised his stature within the national government.<sup>315</sup> Because of this history, it is not surprising that the issue of Vice Presidents withholding information arose infrequently in the first century and a quarter under the Constitution. As the vice presidency has evolved in the past several decades to become more of an executive branch institution and undertaken more substantive duties, occupants of the office have inevitably and increasingly found themselves entangled in conflicts over access to information.

#### *B. The Vice President’s Enumerated Powers*

Under the Constitution, the Vice President is granted no powers other than the authority to: (1) preside over the Senate,<sup>316</sup> except in the case of presidential impeachment<sup>317</sup>—a power

<sup>312</sup> See, e.g., MICHAEL DORMAN, *THE SECOND MAN: THE CHANGING ROLE OF THE VICE PRESIDENCY* 152–53 (1968).

<sup>313</sup> See *id.* at 152.

<sup>314</sup> See, e.g., 111 CONG. REC. 7937 (1965) (statement of Rep. Celler) (“The Vice President is part of the official family of the President . . . . He is essential, I would say, in present-day government.”); 110 CONG. REC. 22,993–94 (1964) (statement of Sen. Fong) (“The Vice-Presidential office under our system of government is tied very closely with the Presidency.”); Amar, *supra* note 7, at 207 (concluding that the Twenty-Fifth Amendment “formally concretizes an evolving importance of the vice presidency to the executive branch”); Goldstein, *supra* note 2, at 181 (“Bayh and his colleagues viewed the vice president as part of the executive branch.”).

<sup>315</sup> See, e.g., Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 870 (2005) (“Structurally, constitutional amendments have changed the face of the office [of vice president] and catapulted the Vice Presidency into the pantheon of American domestic and foreign influence.”); Goldstein, *supra* note 297, at 792 (“The legislative history of the twenty-fifth amendment overflows with assertions of the significance of the [vice presidential] office. Indeed, that amendment both recognized the growth of the Vice-Presidency in section two and *contributed to its prominence* in sections three and four.” (emphasis added)).

<sup>316</sup> See U.S. CONST. art. I, § 3, cl. 4.

<sup>317</sup> See *id.* cl. 6.

which is typically ceremonial;<sup>318</sup> (2) vote to break ties as the Senate's presiding officer;<sup>319</sup> (3) open certified listings of presidential electors and—presumably—be involved in the counting, a responsibility that no longer entails substantive authority;<sup>320</sup> (4) succeed the President should he die;<sup>321</sup> and (5) fill in for the President should he become unable to fulfill his duties,

<sup>318</sup> This was not always so. Early Senate rules and customs left the Vice President with considerable authority as far as maintaining order in the upper chamber. See MARK O. HATFIELD, VICE PRESIDENTS OF THE UNITED STATES 1789–1993, S. Doc. No. 104-26, at xvi (1997) [hereinafter HATFIELD]; see also JULES WITCOVER, CRAP SHOOT: ROLLING THE DICE ON THE VICE PRESIDENCY 19 (1992) (likening Vice President Adams to a “majority leader” during his tenure as presiding officer); Michael Nelson, *Background Paper*, in A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE PRESIDENCY 62 (Michael Nelson rapporteur, 1988) [hereinafter TASK FORCE] (“The first vice president, John Adams, operated in a manner not unlike a modern Senate majority leader, helping to shape the Senate’s agenda and organizing and intervening in debate.”); Memorandum from Nicholas deB. Katzenbach, Assistant Att’y Gen., Office of Legal Counsel, to the Vice President 3 (Mar. 9, 1961) [hereinafter Katzenbach Memo] (“John Adams . . . originally conceived of his Constitutional duties in the Chair of the Senate as tantamount to leadership . . . [and he] played a decisive part in its work during the first few years of its existence.”); Oliver P. Field, *The Vice-Presidency of the United States*, 56 AM. L. REV. 365, 376 (1922) (“Adams was an important figure in the Senate during these first sessions.”); cf. 1 HAYNES, *supra* note 309, at 220 (“Early Presidents of the Senate [such as Adams and Burr] assumed some responsibility for the members’ procedure in debate.”).

<sup>319</sup> See U.S. CONST. art. I, § 3, cl. 4. In reality, the power to break ties is less than it appears, as a tie vote means the matter under consideration automatically fails. See, e.g., 1 HAYNES, *supra* note 309, at 232–33; WILLIAMS, *supra* note 308, at 39. That said, the Vice President appears to be able to break ties even in a contested vice presidential election decided by the Senate. See William Josephson, *Senate Election of the Vice President and the House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597, 618–20 (2009).

<sup>320</sup> See U.S. CONST. amend. XII (“The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”). That the counting of the votes is in the passive voice raises some question as to whom the Framers entrusted this authority. See Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 552, 608, 636 (2004). In the early years under the Constitution, tabulating electoral votes placed some discretion in the hands of the Vice President. See WILLIAMS, *supra* note 308, at 5. Both Adams and Jefferson made decisions regarding whether a handful of votes should be counted and Congress acquiesced. See *id.*; see also Ackerman & Fontana, *supra*, at 553–54 (“Without the decisive use of his power as President of the Senate, Jefferson might never have become President of the United States.”). In the years since, Congress has appeared to occupy the field. See *id.* at 636, 640–42; see also 3 U.S.C. §§ 12–18 (2006) (defining in statute the Vice President’s duties).

<sup>321</sup> See U.S. CONST. amend. XXV, § 1; see also *id.* amend. XX, § 3 (detailing procedures for the Vice President elect to become President upon death of the President elect).

and help make a determination as to the President's inability should there be uncertainty in this regard.<sup>322</sup> The only other constitutional clauses related to the Vice President concern election and selection procedure.

For purposes of this Article, there are three distinctive features about the vice presidency under the Constitution. First, the Vice President is not assigned to a single branch of the federal government, even though as a practical matter almost all of his time is spent completing tasks assigned by the President.<sup>323</sup> Article I, Section 3 provides that the

<sup>322</sup> See *id.* amend. XXV, §§ 3–4.

<sup>323</sup> There are four potential answers to the question: to which branch—or branches—does the Vice President belong? They are: (1) that he is solely a part of the legislative branch; (2) that he is a solely a part of the executive branch; (3) that he is a part of neither; and (4) that he is a part of both the executive and legislative branches with his exact location depending on the function he is performing at the time—consequently he would be either evenly split between the two branches, primarily legislative or primarily executive. In light of the clear textual commitment of the Vice President to preside over the Senate and at the same time the fact that modern Vice Presidents spend almost all of their time on executive branch matters, the fourth of these positions is the most persuasive. Thus, the Vice President is primarily—but not exclusively—an executive branch official since that is where he spends most of his time.

With regard to the first position—that the Vice President is solely a part of the legislative branch—there is some judicial dicta to support it. See *FDIC v. Hurwitz*, 384 F. Supp. 2d 1039, 1098 (S.D. Tex. 2005) (“The Vice President of the United States is an officer of the legislative branch. His official function is to preside in the Senate.”), *rev’d in part sub nom. on other grounds*, *FDIC v. Maxxam*, 523 F.3d 566 (5th Cir. 2008); *Moore v. U.S. House of Representatives*, 733 F.2d 946, 958 (D.C. Cir. 1984) (“[I]t is impossible to say that we intrude upon the prerogatives of the Legislative Branch less severely when we resolve, for example, an internal dispute regarding the provision that ‘[t]he Vice President of the United States shall be President of the Senate,’ than we do when we resolve an internal dispute regarding the provision that ‘[n]either House, during the Session of Congress shall, without the Consent of the other, adjourn for more than three days’ . . . .” (citations omitted)); *cf.* *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (“[I]n the impeachment of a President the presiding officer of the ultimate tribunal is *not* a member of the Legislative Branch, but the Chief Justice of the United States.” (emphasis added)). Moreover, many prominent early authorities viewed the Vice President to be solely part of the legislative branch. For instance, the first Vice President, John Adams, wrote in 1790 that the Vice President was “totally detached from the executive authority and confined to the legislative.” HATFIELD, *supra* note 318, at 7. The second Vice President, Thomas Jefferson, concurred. See *infra* notes 657–58 and accompanying text. This view, while likely valid in the 1790s, now confronts the reality that the modern Vice President spends little time presiding over the Senate and most of his energies on executive branch duties. Moreover, it overlooks that he is elected alongside the President and can only be removed during his term through impeachment, a mode of removal reserved for executive and judicial branch officials.

Neither does it account for the Twenty-Fifth Amendment, which both recognized and formalized the Vice President's executive branch role. *See, e.g., supra* note 314.

The second position—that the Vice President is solely a part of the executive branch—is supported by an even greater body of dicta. *See* *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 385 (2004) (“The discovery requests are directed to the Vice President . . . . The Executive Branch, at its highest level, is seeking the aid of the courts to protect its constitutional prerogatives . . . . [S]pecial considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communication are implicated.” (emphasis added)); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 508 (1977) (Burger, C.J., dissenting) (“[E]xecutive power was vested in the President; no other offices in the Executive Branch, other than the Presidency and Vice Presidency, were mandated by the Constitution. Only two Executive Branch offices, therefore, are creatures of the constitution; all other departments and agencies . . . are creatures of the Congress . . . .”); *Wilson v. Libby*, 535 F.3d 697, 701 (D.C. Cir. 2008) (“Defendants are the United States and four Executive Branch officials—Vice President Richard B. Cheney [among others].”), *cert. denied*, 129 S. Ct. 2825 (2009); *Williams v. United States*, 240 F.3d 1019, 1046 (Fed. Cir. 2001) (“It is worth noting that the ‘high-level’ officials to which the Commission’s recommendations are addressed includes [sic] the Vice President and 833 other Executive Branch positions . . . .” (emphasis added)); *United States v. Oakar*, 111 F.3d 146, 148 n.1 (D.C. Cir. 1997) (“The President, Vice President, and other Executive Branch officials file their disclosure reports with the Director of the Office of Government Ethics. . . . Members of the Senate file their disclosure statements with the Secretary of the Senate . . . .” (emphasis added)); *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993) (“The Vice President is the only senior official in the executive branch totally protected from the President’s removal power.” (emphasis added)); *New York v. Reilly*, 969 F.2d 1147, 1150 n.3 (D.C. Cir. 1992) (“The Council [on Competitiveness] . . . is chaired by the Vice President and its members include other executive branch officials.” (emphasis added)); *Sykes v. Frank*, No. 8:08-4049-GRA-BHH, 2009 WL 614806, at \*8 (D.S.C. Mar. 6, 2009) (“[T]he former President and Vice President of the United States [are] officials in the executive branch of the federal government.”); *Walker v. Cheney*, 230 F. Supp. 2d 51, 74–75 (D.D.C. 2002) (“This rigorous standing assessment may seem overly protective of the Vice President, and hence of the Executive Branch, at the expense of the statutory responsibilities of the Comptroller General and the constitutional obligations of Congress.”).

This position, however, overlooks the Vice President's most clearly assigned constitutional duty, which is to preside over the Senate. It also ignores his role in presiding over the counting of electoral votes, *see, e.g., Ackerman & Fontana, supra* note 320, at 552, as well as a host of other structural factors that imply he should not be considered exclusively part of the executive branch. For example, unlike the President, the Vice President is not term limited; he can have his salary lowered; he can participate in the consideration of constitutional amendments; he can vote on unicameral resolutions; and he can vote on matters involving internal Senate organization.

Third, some have apparently taken the view that the Vice President, as a constitutional matter, belongs to neither the legislative nor the executive branch. *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT 162 (Johns Hopkins Univ. Press 1981) (1885) (“[The Vice President's] position is one of anomalous insignificance and curious uncertainty. Apparently he is not, strictly speaking, a part of the legislature,—he is clearly not a member,—yet neither is he an officer of the executive. It is one of the remarkable things about him, that it is hard to find in

sketching the government any proper place to discuss him. He comes in most naturally along with the Senate to which he is tacked; but he does not come in there for any great consideration. He is simply a judicial officer set to moderate the proceedings . . . . So long as he is Vice-President, he is inseparable officially from the Senate . . . .”). Such a view clearly does violence to constitutional text, which admits of only three branches of government. *See, e.g.*, U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1; *United States v. Nixon (Nixon I)*, 418 U.S. 683, 707 (1974) (“In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system . . . .”).

Finally, with respect to the fourth position—that the Vice President is a part of both political branches—there is dictum that is supportive. *See Estate of Rockefeller v. Comm’r*, 83 T.C. 368, 376 (1984) (“[T]he office of Vice President is a unique position . . . . The Vice President stands by to succeed the President in case of death, resignation, or removal from office. He holds the position of President of the Senate, and serves as alter ego for the President of the United States on many occasions. In addition, the Vice President has, in recent years, carried a heavy load of responsibilities in the administration of the executive branch of the Government.” (citations omitted)). Moreover, numerous authorities shared this view even before the advent of the modern vice presidency. *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 639 (Max Farrand ed., rev. ed. 1966) [hereinafter 2 FARRAND] (quoting George Mason as stating that the holder of the vice presidency is a “dangerous . . . officer . . . who . . . is made president of the Senate, thereby dangerously blending the executive and legislative powers”); *id.* at 536–37 (“We might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President & vice-president makes it absolutely improper.”). Authorities in more recent times have also adopted this view. *See, e.g.*, Memorandum from William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, to the Honorable Edward L. Morgan, Deputy Counsel to the President 2 (Feb. 7, 1969) (on file with author) (“The Vice President, of course, occupies a unique position under the Constitution. For some purposes, he is an officer of the Legislative Branch, and his status in the Executive Branch is not altogether clear. . . . [H]is status may be characterized as Legislative or Executive depending on the context . . . .”). The view that the Vice President is part of both branches—his exact locus varying according to the duties he is carrying out at the time—largely reconciles the first two positions discussed above. More importantly, it reflects the reality that the Vice President plays constitutional roles in both political branches.

One potential counter to the fourth position is Article I, Section 6, Clause 2, which prohibits members of Congress from serving in the executive branch or from receiving tasks delegated by the executive branch. *See, e.g.*, Glenn Harlan Reynolds, *Is Dick Cheney Unconstitutional?*, 102 NW. U. L. REV. 1539, 1542 (2008). The argument would be that this prohibition precludes the Vice President from serving in both branches. *See* PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 228 n.60 (2009). Such a position is likely to fail for several reasons. First, it presumes that the Vice President is a member of Congress, which he clearly is not—he is part of the legislative branch but not a member. *See, e.g.*, Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1720, 1731–34 (1988); Letter from Harold F. Reis, Acting Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to the Honorable Walter Jenkins, Admin. Assistant, Office of the Vice President 4 (July 24, 1962) [hereinafter Reis Letter] (“[T]he Vice President has a unique status in the

Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided. The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.<sup>324</sup>

Thus, the Vice President's most tangible constitutional assignment involves the legislative branch where he has the authority to preside over the Senate and to break ties.

At the same time, the Vice President's term of office is obviously linked to the President under Article II and not to the Senate under Article I.<sup>325</sup> A similar pattern of vice presidential selection is followed under the Twenty-Fifth Amendment, whereby the President nominates the Vice President, not

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legislative branch."); Letter from Laurence H. Silberman, Acting Att'y Gen., U.S. Dep't of Justice, to the Honorable Howard W. Cannon, Chairman, Comm. on Rules and Admin., U.S. Senate 6 (Sept. 20, 1974) (on file with author) ("Considered as a whole, [the Constitution] indicate[s] that the Vice President has a unique status in the Legislative branch, but not the status of a 'Member' of the Congress within the meaning of the Constitution."); *infra* Part VII.A.1.b. Second, his status as part of both legislative and executive branches is part of the text of the Constitution. See U.S. CONST. art. I, § 3, cls. 4–5; *id.* amend. XII; *id.* amend. XXV. In order to reconcile these provisions, rather than read one or more of them completely out of the Constitution, the better view is to interpret Article I, the Twelfth Amendment and the Twenty-Fifth Amendment as placing the Vice President in both branches and having Article I, Section 6, preclude lawmakers—but not the Vice President—from serving in the executive branch.

For more on the question of which branch the Vice President belongs to, see the author's forthcoming article, "Constitutional Chameleon: The Vice President's Place in Both the Executive and Legislative Branches." See also Myers, *supra* note 45, at 906–11; Todd Garvey, Note, *A Constitutional Anomaly: Safeguarding Confidential National Security Information Within the Enigma That Is the American Vice Presidency*, 17 WM. & MARY BILL RTS. J. 565 (2008); Aryn Subhawong, Comment, *A Realistic Look at the Vice Presidency: Why Dick Cheney Is an "Entity Within the Executive Branch,"* 53 ST. LOUIS U. L.J. 281 (2008).

<sup>324</sup> U.S. CONST. art. I, § 3, cls. 4–5.

<sup>325</sup> See *id.* art. II, § 1, cl. 1 ("The . . . President of the United States of America . . . shall hold his Office during the Term of four Years . . . together with the Vice President, chosen for the same Term . . ."). The term is further defined by the Twentieth Amendment. See *id.* amend. XX, § 1 ("The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January . . ."). The Vice President's election is also linked to that of the President under the Twelfth Amendment—which amended Article II in this regard—and not to that of the Senate under Article I. See *id.* amend. XII. Likewise, his qualifications reflect those of the President, not those of Senators. See *id.* The author would like to thank Joel Goldstein for many keen observations in this area.

Congress.<sup>326</sup> Removal of the Vice President is governed by Article II,<sup>327</sup> not by Article I as it is for federal lawmakers.<sup>328</sup> Similarly, when determining presidential inability, the Vice President must consult with the President's Cabinet,<sup>329</sup> which again implies a vice presidential bond with the executive branch.<sup>330</sup> While the Vice President's duties under the Twenty-Fifth Amendment involve the executive branch, they do not implicate constitutional executive power as defined under Article II. And, of course, the Vice President takes over for the President as head of the executive branch should the latter office become vacant.<sup>331</sup>

Second, as a legal matter, the President may not remove the Vice President from office during his term, rendering him independent from the President from a constitutional standpoint.<sup>332</sup> Removal, of course, is one of the primary means at the President's disposal to control the executive branch. Thus, the Vice President's status is unlike that of a Cabinet secretary who can be both relieved from office by the President and expelled through the impeachment process.<sup>333</sup> The Vice President can be removed only through the latter mechanism.<sup>334</sup> Late in his first term, the President may, of course, select

<sup>326</sup> See *id.* amend. XXV, § 2 ("Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.").

<sup>327</sup> See *id.* art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

<sup>328</sup> See *id.* art. I, § 5, cl. 2 ("Each House may . . . , with the Concurrence of two thirds, expel a Member.").

<sup>329</sup> "Cabinet" will be used in this Article to denote the "principal officers of the executive departments." See *Freytag v. Comm'r*, 501 U.S. 868, 886–87 & 887 n.4 (1991); see also Scott E. Gant, *Presidential Inability and the Twenty-Fifth Amendment's Unexplored Removal Provisions*, 1999 L. REV. MICH. ST. U. DET. C.L. 791, 794 n.12.

<sup>330</sup> See U.S. CONST. amend. XXV, § 4.

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

*Id.*

<sup>331</sup> See *id.* § 1.

<sup>332</sup> See, e.g., *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993).

<sup>333</sup> See, e.g., *Myers v. United States*, 272 U.S. 52 (1926).

<sup>334</sup> See U.S. CONST. art. II, § 4.



another running mate. That does not constitute removal from office, however, since the sitting Vice President legally may complete his four-year term. Therefore, the Vice President is independent of the President as a constitutional matter.<sup>335</sup> This vice presidential independence is underscored by the fact that Section 4 of the Twenty-Fifth Amendment, which governs the making of a presidential inability determination, anticipates that the Vice President may be pitted directly against the President in such a scenario.<sup>336</sup>

Third, there is essentially no case law discussing the constitutional power of the Vice President.<sup>337</sup> Thus, analysis of vice presidential authority relies heavily on constitutional structure on one hand and past practice and opinion on the other.

#### VI. INVESTIGATIONS INVOLVING VICE PRESIDENTS AND OPPORTUNITIES FOR ASSERTION OF PRIVILEGE

It bears noting up front that no Vice President has ever formally invoked VPP. That said, former Vice President Cheney took positions that came close to or alluded to the possibility of such a doctrine.<sup>338</sup> Vice Presidents prior to Cheney made similar

<sup>335</sup> See *infra* notes 652–97 and accompanying text.

<sup>336</sup> See, e.g., Friedman, *supra* note 323, at 1727 n.101 (“[T]o make a disability determination stick against an unwilling president, he would have to be opposed not only by the vice-president but also by two-thirds of each house and, unless Congress designates a different group, a majority of the department heads.”); Goldstein, *supra* note 2, at 190 (“Transfer under Section 4 [of the Twenty-Fifth Amendment] comes without presidential sanction. Section 4 authorizes involuntary transfer of power to the vice president under a range of circumstances.”). While Cabinet officers are also included in the inability determination process under current law, their role can be revoked by statute. The Vice President is the one actor in the process who may not be replaced.

<sup>337</sup> See generally CRS, *supra* note 12, at 123–24, 457, 1654, 2087, 2103–04, 2109–11.

<sup>338</sup> Aside from written positions tied to disputes over access to information, public statements from Vice President Cheney’s office at times seemed to assert a form of vice presidential privilege. See, e.g., Dana Milbank & Justin Blum, *Document Says Oil Chiefs Met with Cheney Task Force*, WASH. POST, Nov. 16, 2005, at A1 (quoting the Vice President’s spokeswoman who referred to “the constitutional right of the president *and vice president* to obtain information in confidentiality” (emphasis added)); LOU DUBOSE & JAKE BERNSTEIN, VICE: DICK CHENEY AND THE HIJACKING OF THE AMERICAN PRESIDENCY 12 (2006) (“I’m a duly elected constitutional officer. The idea that any member of Congress can demand from me a list of everybody I meet with and what they say strikes me as—as inappropriate, and not in keeping with the Constitution.” (quoting Vice President Cheney) (internal quotation marks omitted)).

assertions but, like him, never officially took steps to back up their intimations of privilege. The history of the office not only reflects a number of instances of Vice Presidents implying they held a privilege of nondisclosure, but it also demonstrates that no congressional committee has ever successfully compelled the Vice President's appearance.<sup>339</sup>

<sup>339</sup> No President has ever been forced to appear before a congressional committee although some have done so voluntarily. See *Sitting Presidents and Vice Presidents Who Have Testified Before Congressional Committees*, prepared by the Senate Historical Office and Senate Library, 2004, available at [www.senate.gov/artandhistory/resources/pdf/PresidentsTestify.pdf](http://www.senate.gov/artandhistory/resources/pdf/PresidentsTestify.pdf) [hereinafter *Sitting Presidents and Vice Presidents Who Have Testified*] (noting that Presidents Lincoln, Wilson, and Ford testified voluntarily as sitting Presidents); cf. *Clinton v. Jones*, 520 U.S. 681, 692 n.14 (1997) (“[N]o sitting President has ever testified, or been ordered to testify, in open court.” (emphasis added)). Despite never having been asked to testify before the Senate Watergate Committee, Nixon preemptively announced he would not make an appearance. See ROTUNDA & NOWAK, *supra* note 45, at 949–50. Truman, as a former President, declined to appear before the House Committee on Un-American Activities in 1953 when subpoenaed. See *id.* at 949–51. On the other side of the ledger, former Presidents John Quincy Adams and John Tyler complied to varying degrees with subpoenas issued by select committees in 1846 about their use of secret funds while in office. See *id.* at 948–49. Theodore Roosevelt appeared voluntarily before a House investigative committee in 1911 and did the same before a Senate panel in 1912. See Senate Historical Office & the Senate Library, *Former Presidents Who Have Testified Before Congressional Committees*, 2004. Truman made an appearance before the Senate Foreign Relations Committee in 1955 to discuss the U.N. charter and Ford testified on the U.S. Constitution's bicentennial in 1983. See *id.*

On a related note, several former Vice Presidents have appeared voluntarily before congressional committees to testify about public policy concerns. Henry Wallace appeared before the Senate Commerce Committee under unique circumstances in January 1945. His term as Vice President had just concluded and President Roosevelt had nominated him to serve as Secretary of Commerce. Wallace's appearance before the panel served essentially as a confirmation hearing. See John H. Crider, *Wallace To Accept If Post Is Divided, Urges Sift of RFC*, N.Y. TIMES, Jan. 26, 1945, at 1. His actions as Vice President, however, were only indirectly raised in the hearing and none of the discussion delved into Wallace's decisionmaking while in that position. See *Hearings on S. 375 Before the S. Comm. on Commerce*, 79th Cong. 71–134 (1945) (providing a transcript of Wallace's appearance and questioning before the committee). Following Senate confirmation as secretary, Wallace testified on a number of occasions before various congressional committees. See, e.g., Frederick R. Barkley, *Employment Bill Urged by Wallace*, N.Y. TIMES, Oct. 31, 1945, at 15; *Wallace Clashes on Tariff Policy*, N.Y. TIMES, Apr. 18, 1945, at 40. In 1964, Richard Nixon testified before a Senate Judiciary subcommittee about presidential succession and inability. See, e.g., *Nixon Asks Speed on Vice President*, N.Y. TIMES, Mar. 6, 1964, at 1. Walter Mondale testified before the Senate Government Affairs Committee in favor of campaign finance reform in 1997. See David E. Rosenbaum, *Pair of Elder Statesmen Urge That Soft Money Be Outlawed*, N.Y. TIMES, Oct. 1, 1997, at A20. He also appeared before the Senate Rules Committee in 1988 to talk about reforming the presidential nomination process. See *Mondale Urges Primary*

Should the broad trend toward greater vice presidential responsibility in the executive branch continue and should Vice Presidents continue to play an increasingly prominent role in public affairs, it is possible, if not likely, that future Vice Presidents could build upon these earlier “not-quite VPP” assertions and actually invoke a constitutional privilege of their own.<sup>340</sup> This Part will review the history of investigations involving Vice Presidents and examine to what extent, if at all, Vice Presidents have raised their own confidentiality concerns. Because of the importance of past practice in constitutional interpretation,<sup>341</sup> this Part will inform discussion over whether VPP should be recognized.

Since Vice Presidents have only within the past several decades become involved in the day-to-day activities of the executive branch, much of the political precedent regarding demands for information from them has been tied to perceived impropriety and less to policy disputes.<sup>342</sup> As Vice Presidents over time have assumed greater duties within the executive branch, these demands for information have become more related to policy matters and increasingly relevant to the inquiry at hand. Prior to the vice presidency of Richard Cheney, several Vice Presidents had become entangled in conflicts that involved congressional or judicial requests for information. They include Vice Presidents Tompkins, Calhoun, Colfax, Wallace, Humphrey, Agnew, Ford, Rockefeller, Bush, Quayle, and Gore.<sup>343</sup>

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*Plan*, N.Y. TIMES, June 9, 1988, at B10. In 2009, Al Gore testified before committees in both houses about climate change. *See, e.g., Gore Testifies on Climate Change on Capitol Hill*, NPR (Jan. 28, 2009), <http://www.npr.org/templates/story/story.php?storyId=99952240>; *Gore Testifies on Climate Change*, UNITED PRESS INT'L (Apr. 24, 2009), [http://www.upi.com/Top\\_News/2009/04/24/Gore-testifies-on-climate-change/UPI-50791240603208](http://www.upi.com/Top_News/2009/04/24/Gore-testifies-on-climate-change/UPI-50791240603208).

<sup>340</sup> *See infra* note 834.

<sup>341</sup> *See supra* note 137.

<sup>342</sup> *See* David Nather, *How Cheney Has Used His Clout*, CQ WEEKLY, June 11, 2007, at 1739 (“There hasn’t been much [congressional] oversight [of the Vice President] because there hasn’t been a lot to oversee.” (quoting Professor Andrew Rudalevige)); *see id.* (“[U]ntil Dick Cheney, the vice presidency had been somewhat shielded from congressional scrutiny because the notion of a vice president being involved in anything worth Congress’ attention was laughable.”).

<sup>343</sup> While Vice President, Aaron Burr was indicted in New Jersey for criminal homicide following his shooting of Alexander Hamilton in their infamous duel. *See, e.g.,* ROGER G. KENNEDY, BURR, HAMILTON, AND JEFFERSON: A STUDY IN CHARACTER 187 (2000). In the ensuing investigation, there does not seem to have been any dispute over access to materials in the Vice President’s possession, however. Even had there been, it is difficult to see how the materials could have

A. *Daniel Tompkins*

Daniel Tompkins is a largely forgotten Vice President, having served with President James Monroe from 1817 to 1825. Prior to his tenure as Vice President, he had been Governor of New York, holding office during the War of 1812. In the whirl of events associated with the conflict, Tompkins had used his own personal funds to help advance the military effort.<sup>344</sup> During this time, he carelessly blended his own assets with public funds—both state and federal—and emerged from the governorship in dire financial straits.<sup>345</sup> As a result, Tompkins spent a good part of his vice presidency trying to recoup what both the federal and state governments owed him.<sup>346</sup> In so doing he became enmeshed in litigation in the federal courts<sup>347</sup> and cooperated with

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been tied to Burr's official duties. Nor were any analogous issues of immunity apparently raised. See Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CON. L.Q. 7, 22–24 (1992). For a discussion of the legal proceedings, see *id.* at 22–25. Burr later became embroiled in a clash over documents in the possession of President Jefferson. The third Vice President was out of office when he was put on trial for treason for his part in an apparent filibustering campaign. Burr requested the court issue a subpoena *duces tecum* to the President in order to introduce letters Burr claimed would support his innocence. This touched off a constitutional confrontation over whether Jefferson could be compelled to produce such documents. For a discussion, see, for example, BERGER, *supra* note 6, at 187–94; John C. Yoo, *The First Claim: The Burr Trial*, *United States v. Nixon*, and *Presidential Power*, 83 MINN. L. REV. 1435 (1999); see also LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* 212–21 (2006).

In the resulting case, *United States v. Burr*, Chief Justice John Marshall, riding circuit, concluded that the President needed to turn over the materials. See F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d). Jefferson wound up largely complying, providing partially redacted materials. See BERGER, *supra* note 6, at 191 n.157. With respect to VPP, there does not appear to have been any consideration of vice presidential prerogatives since the documents in question were drafted following Burr's departure from office. Moreover, Burr was advocating for the documents to be released, not withheld. Nonetheless, the Burr-Jefferson episode does provide a unique example of a President and his former Vice President taking conflicting positions about disclosure of information.

<sup>344</sup> See, e.g., Gaspare J. Saladino, *Daniel D. Tompkins*, in VICE PRESIDENTS: A BIOGRAPHICAL DICTIONARY 52, 56 (L. Edward Purcell ed., 3d ed. 1998).

<sup>345</sup> See *id.*

<sup>346</sup> See *id.*

<sup>347</sup> See RAY W. IRWIN, DANIEL D. TOMPKINS, GOVERNOR OF NEW YORK AND VICE PRESIDENT OF THE UNITED STATES 285–94 (1968).

investigations conducted by both congressional and state legislative committees.<sup>348</sup>

In Tompkins's first term as Vice President, the New York legislature, led by then state Senator Martin Van Buren, began an investigation into the accounts during Tompkins's governorship.<sup>349</sup> Ultimately, the legislature took action to resolve Tompkins's financial matters to the extent they involved state monies.<sup>350</sup>

In 1822, suit was brought in federal court against Tompkins involving his financial situation.<sup>351</sup> The Vice President in fact made a personal appearance in court to defend himself.<sup>352</sup> In the end, he was vindicated and used his legal victory to try to secure the federal funds he felt Congress owed him.<sup>353</sup> Both houses of Congress established committees to look into the merits of the Vice President's claims.<sup>354</sup> There does not seem to be anything in the historical record indicating that Tompkins failed to cooperate with the two committees—indeed it was in his interest to do so.

The events surrounding the Tompkins litigation and legislative investigations are instructive, but they yield little affirmative evidence to indicate a Vice President possesses a constitutional privilege. That said, it seems clear that it would have been counterproductive for Tompkins to assert such a privilege since he was actively encouraging all of these investigations as part of a broader effort to redeem himself financially. Moreover, none of the materials provided by Tompkins was tied to his official duties as Vice President, all of

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<sup>348</sup> See *id.* at 231, 250–53, 295–97. His financial situation grew so desperate there is evidence he was jailed for his debts during his tenure as Vice President. See *id.* at 297–98. John Quincy Adams noted at the time that he had heard rumors to this effect. See 6 MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 216–17 (Charles Francis Adams ed., 1874–77, rep. 1969) (noting that a friend had passed “through the city of New York [and he had] heard that [Vice President Tompkins] was in prison for ten thousand dollars at the suit of Peter Jay Munro. It was for money that Munro had been compelled to pay as bondsman or endorser for Tompkins; but he understood it was probable the affair would be adjusted.”). If this rumor was true, then perhaps the Vice President would not enjoy the protections from civil arrest that lawmakers enjoy.

<sup>349</sup> See IRWIN, *supra* note 347, at 250–53.

<sup>350</sup> See *id.* at 262–63.

<sup>351</sup> See *id.* at 286–87.

<sup>352</sup> See *id.* at 287–88.

<sup>353</sup> See *id.* at 293–94.

<sup>354</sup> See *id.* at 295–97; see also 40 ANNALS OF CONG. 253, 259–60, 543, 906–10 (1823).

them predating his tenure. Thus, the Tompkins precedent sheds only a little light on the question of VPP.

*B. John C. Calhoun*

In 1826, while serving with President John Quincy Adams, Vice President John C. Calhoun was accused of benefiting from a contract awarded during his tenure as Secretary of War.<sup>355</sup> Not only did Calhoun submit to a House Select Committee investigation into the matter,<sup>356</sup> he requested the inquiry in the first place. Hoping the investigation would clear his name, Calhoun wrote:

[T]he conduct of public servants is a fair subject of the closest scrutiny and the freest remarks . . . . [W]hen such attacks assume the character of impeachable offense and become, in some degree, official by being placed among the public records, an officer thus assailed . . . can look for refuge only to the hall of the immediate Representatives of the People.<sup>357</sup>

During the investigation, Calhoun refused to sit in the President's chair.<sup>358</sup> He stated that a "sense of propriety forbids me from resuming my station till the House has disposed of this subject."<sup>359</sup>

In its proceedings, the committee does not appear to have subpoenaed Calhoun or materials directly from him.<sup>360</sup> The committee members "immediately after they assembled . . . informed the Vice President of their being organized, and of their readiness to receive any communication which he might see fit to make."<sup>361</sup> Instead of appearing in person, Calhoun sent a personal representative, George McDuffie. The committee noted that "Mr. McDuffie, as the friend and representative of the Vice President, was admitted before the committee, and attended throughout the examination which

<sup>355</sup> See, e.g., RICHARD M. COHEN & JULES WITCOVER, A HEARTBEAT AWAY: THE INVESTIGATION AND RESIGNATION OF VICE PRESIDENT SPIRO T. AGNEW 255 (1974).

<sup>356</sup> See *id.*

<sup>357</sup> *Id.*

<sup>358</sup> See HATFIELD, *supra* note 318, at 93.

<sup>359</sup> *Id.*

<sup>360</sup> In fact, the committee permitted witnesses to be subpoenaed at the request of Calhoun's representative. See 3 REG. DEB. 1127–29 (1827).

<sup>361</sup> See *id.* at 1123.

followed.”<sup>362</sup> In effect, McDuffie provided what amounted to Calhoun’s testimony.<sup>363</sup>

Through McDuffie, Calhoun registered a number of protests as to how the committee proceedings were being conducted, though his concerns did not involve matters of constitutional privilege.<sup>364</sup> Calhoun was forthcoming to the committee and was ultimately exculpated.<sup>365</sup>

Thus, in this second instance of an investigation involving a Vice President, there was no claim of privilege cited. Calhoun did not appear before the committee in person, however, and the panel does not seem to have insisted upon it. This apparent deference could have been a reflection of his status as Vice President. As with the example of Tompkins, the question underlying the Calhoun investigation did not involve his vice presidential duties, therefore, this precedent carries less weight than it might appear at first blush.

### C. Schuyler Colfax

Toward the end of his term as Ulysses Grant’s first Vice President, Schuyler Colfax became embroiled in the infamous Credit Mobilier financial scandal, which shook the nation in the early 1870s.<sup>366</sup> A House Select Committee was established to investigate the matter and, on December 16, 1872, Colfax voluntarily made an appearance before the committee.<sup>367</sup> A few months later, on January 6, 1873, Colfax appeared again on his own volition, but this time he testified under oath about his involvement in the affair.<sup>368</sup> Nor was that his last appearance before the committee.<sup>369</sup> The Vice President returned repeatedly

<sup>362</sup> *Id.*

<sup>363</sup> *See, e.g., id.* at 1127–35.

<sup>364</sup> *See, e.g., id.* at 1127–32.

<sup>365</sup> *See* COHEN & WITCOVER, *supra* note 355, at 255–56.

<sup>366</sup> *See Sitting Presidents and Vice Presidents Who Have Testified, supra* note 339. Vice President elect Henry Wilson was also investigated by the committee for his role in the scandal. *See, e.g.,* RICHARD H. ABBOTT, COBBLER IN CONGRESS: THE LIFE OF HENRY WILSON, 1812–1875, at 247–48 (1972); ERNEST MCKAY, HENRY WILSON: PRACTICAL RADICAL, A PORTRAIT OF A POLITICIAN 232–33 (1971). Obviously, this investigation had nothing to do with his impending official duties.

<sup>367</sup> *See* 1 REP. OF COMMS. OF HOUSE OF REP. 42d Cong. 81 (1873) [hereinafter HOUSE REPORT].

<sup>368</sup> *See id.*

<sup>369</sup> *See id.* at 481 (characterizing Colfax’s appearance on February 11, 1873 as his being “recalled at his own instance”).

in an attempt to clear his name after evidence came to light about his apparently inappropriate financial ties to Credit Mobilier prior to his vice presidency.<sup>370</sup>

While it does not appear that Colfax raised an issue of privilege during his testimony, it has been contended by his biographer that the committee investigating the scandal recognized that it could not compel his appearance.<sup>371</sup> Colfax, however, seemed to implicitly concede that the committee might have been able to force his attendance. He stated during his testimony that “I wish to say that, if any further testimony should be desired of me, I shall be ready to respond to the invitation of the committee at any time, *without the formality of a summons*.”<sup>372</sup>

Colfax later addressed the upper chamber on the matter and then requested that a Senate committee be established specifically to look into his conduct.<sup>373</sup> The Senate, however, declined Colfax’s request.<sup>374</sup> Meanwhile, the House considered impeachment proceedings, but ultimately chose not to pursue them,<sup>375</sup> perhaps in part because the alleged malfeasance took place prior to his vice presidency.<sup>376</sup> If Colfax’s biographer is correct—that the House committee believed it lacked the authority to compel the attendance of the Vice President—then the Colfax example could be read to provide support for VPP. The historical record on this question seems less clear cut, however; in fact, Colfax himself raised the possibility of being formally summoned to the committee. As with the Tompkins and Calhoun examples, the action for which Colfax was being investigated did not involve either his duties as Vice President or his actions while serving in the position; therefore, again, the precedential value of the episode should not be overstated.

<sup>370</sup> See, e.g., PRESIDENTIAL SUCCESSION: FORD, ROCKEFELLER & THE 25TH AMENDMENT 36 n.\*\* (Lester A. Sobel ed., 1975) [hereinafter SOBEL].

<sup>371</sup> See WILLARD H. SMITH, SCHUYLER COLFAX: THE CHANGING FORTUNES OF A POLITICAL IDOL 376 (1952) (“[A]s Vice-President, the . . . committee had no jurisdiction over him, [so] he appeared voluntarily . . . on January 7.”). There is no citation supporting the author’s assertion to this effect.

<sup>372</sup> HOUSE REPORT, *supra* note 367, at 84 (emphasis added).

<sup>373</sup> See SMITH, *supra* note 371, at 398.

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

<sup>375</sup> See e.g., *id.* at 398–99.

<sup>376</sup> See *id.*



#### D. Henry Wallace

Franklin D. Roosevelt's second Vice President was Henry Wallace, who served in the post from 1941 to 1945. During this period, Roosevelt delegated hitherto unprecedented authority to his Vice President. The most prominent of these delegations was for Wallace to serve as the head of the BEW. In this vein, Wallace was entrusted with policymaking authority to secure the necessary goods from abroad to support the American war effort.<sup>377</sup> Two problems existed with this delegation: (1) it conflicted with existing authority enjoyed by the Departments of State and Commerce, both of which had strong allies on Capitol Hill;<sup>378</sup> and (2) it involved Wallace who, as one of the most prominent liberals in the Roosevelt administration, was widely distrusted by conservatives in Congress.<sup>379</sup> Because of these concerns, one FBI investigation was undertaken that involved Wallace's personnel at the BEW and two congressional investigations directly involving Wallace were only narrowly averted.

Martin Dies was a conservative Democratic congressman from Texas who chaired the HUAC in the 1940s. Dies detested Wallace and the liberals that the Vice President used to staff the BEW.<sup>380</sup> In March 1942, in an open letter addressed to Wallace, Dies accused thirty-five BEW staffers of links to Communist-run organizations.<sup>381</sup> Dies focused in particular on Maurice Parmelee, who had written a book on nudism. "[T]here is no place in such an agency for an outstanding advocate of nudism," Dies thundered.<sup>382</sup> Wallace counterattacked Dies in the press<sup>383</sup> but nonetheless agreed to have the FBI look into the officials cited in Dies's letter.<sup>384</sup> Every one of the BEW staffers was later

<sup>377</sup> See, e.g., EDWARD L. SCHAPSMEIER & FREDERICK H. SCHAPSMEIER, *PROPHET IN POLITICS: HENRY A. WALLACE AND THE WAR YEARS, 1940-1965*, at 20 (1970).

<sup>378</sup> See, e.g., NORMAN D. MARKOWITZ, *THE RISE AND FALL OF THE PEOPLE'S CENTURY: HENRY A. WALLACE AND AMERICAN LIBERALISM, 1941-1948*, at 66-74 (1973).

<sup>379</sup> See e.g., SCHAPSMEIER & SCHAPSMEIER, *supra* note 377, at 50-52, 55-71.

<sup>380</sup> See, e.g., HOWARD B. SCHONBERGER, *AFTERMATH OF WAR: AMERICANS AND THE REMAKING OF JAPAN, 1945-1952*, at 94 (Lawrence S. Kaplan ed., 1989).

<sup>381</sup> See WALTER GOODMAN, *THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES* 131 (1968); see also SCHAPSMEIER & SCHAPSMEIER, *supra* note 377, at 51-52.

<sup>382</sup> See GOODMAN, *supra* note 381, at 132.

<sup>383</sup> See *Wallace Hits Dies as Aiding the Axis*, N.Y. TIMES, Mar. 30, 1942, at 1.

<sup>384</sup> See GOODMAN, *supra* note 381, at 132.

vindicated by the Bureau;<sup>385</sup> yet, at least one other BEW employee was subpoenaed to appear before the HUAC.<sup>386</sup> While this investigation involved staff under Wallace, it never involved the Vice President himself.

Wallace's bureaucratic tensions within the Roosevelt administration were played out in Congress in another context as the Secretary of Commerce Jesse Jones and his allies combated the BEW's undertakings.<sup>387</sup> Wallace and Jones exchanged angry accusations in the media over the alleged inefficiency of the other's agency, leading committee chairmen sympathetic to the conservative secretary to begin to inquire during hearings into the executive branch discord.<sup>388</sup> One such hearing of the Joint Committee on Reduction of Nonessential Federal Expenditures involved the voluntary testimony of Milo Perkins, the BEW's executive secretary and a close aide to Wallace.<sup>389</sup> Another involved Perkins's appearance before the Senate Appropriations Committee.<sup>390</sup>

During the latter hearing, the committee requested of Perkins complete lists of participants in the meetings of the BEW, all of which were chaired by the Vice President.<sup>391</sup> These materials were provided to the committee.<sup>392</sup> Perkins was asked about who had the authority at the BEW to issue certain directives. He answered, "[i]n the last analysis, the Vice President has power to issue a directive to the R.F.C. on the programming and developing of foreign materials and he has power to delegate that authority to key men within B.E.W."<sup>393</sup> The subsequent criticism directed at Perkins during the

<sup>385</sup> See *id.* at 133.

<sup>386</sup> See SCHONBERGER, *supra* note 380, at 94; see also, e.g., *Hearings on H.R. 282 Before the Special Committee on Un-American Activities, U.S. House of Representatives*, 78th Cong. 3467–80 (1943) (testimony of the BEW's Thomas Bisson).

<sup>387</sup> See SCHAPSMEIER & SCHAPSMEIER, *supra* note 377, at 55–71.

<sup>388</sup> See *id.* at 67.

<sup>389</sup> See *id.* at 62–65; see also *Hearings Before the Joint Comm. on Reduction of Nonessential Federal Expenditures*, 78th Cong. 2341–66 (1943).

<sup>390</sup> See, e.g., *National War Agencies Appropriation Bill for 1944: Hearings on H.R. 2968 Before the S. Subcomm. of the Comm. on Appropriations*, 78th Cong. 27–44 (1943) (involving a close questioning of the BEW's executive director about the composition of board meetings and the role of the Vice President in board decisionmaking).

<sup>391</sup> See *id.* at 28–38.

<sup>392</sup> See *id.*

<sup>393</sup> *Id.* at 41.

Appropriations Committee hearing prompted Wallace to submit a statement for placement in the committee record.<sup>394</sup> At no time in the hearing, however, did Perkins raise the issue of privilege.

The Wallace-Jones accusations reached such a fevered pitch there were serious discussions in both houses about congressional committee investigations devoted solely to the allegations.<sup>395</sup> Republican Senator Styles Bridges thought that the Vice President and the Secretary should testify in front of a Senate committee in tandem due to the "very serious charges regarding the conduct of the war."<sup>396</sup> Bridges argued that

we have just witnessed the picture of two outstanding figures in this country, one the Vice President of the United States, head of the B.E.W., and the other the Secretary of Commerce . . . each one directing accusations against the other and challenging the other . . . . I think the American public is entitled to know, who is right and who is wrong, and when the investigation shall have been completed, steps should be taken to correct the condition.<sup>397</sup>

Bridges noted that both men "indicated a desire to have a congressional investigation of those very serious charges which concern the successful conduct of the war."<sup>398</sup> The GOP Senator pursued an inquiry by urging adoption of a resolution.<sup>399</sup> Interestingly, Bridges's resolution made no special allowances for the Vice President's stature.<sup>400</sup> The resolution was referred to the Senate Banking Committee, where it never reemerged.<sup>401</sup>

The Wallace-Jones tension aroused a similar reaction from House Republicans. Representative Richard Wigglesworth also pursued an investigation, but his effort was defeated in the House Rules Committee on a party-line vote.<sup>402</sup> During the

<sup>394</sup> See *id.* at 359–62.

<sup>395</sup> See SCHAPSMEIER & SCHAPSMEIER, *supra* note 377, at 66–67.

<sup>396</sup> *Id.* at 6.

<sup>397</sup> 89 CONG. REC. 7254–55 (1943) (statement of Sen. Bridges).

<sup>398</sup> *Id.* at 6934.

<sup>399</sup> See *id.*

<sup>400</sup> See *id.* at 6934–35 (referring S. Res. 165 to committee).

<sup>401</sup> The White House busily worked behind the scenes to scuttle the investigation and the relevant Senate committee chairman evinced little enthusiasm for such an effort. See, e.g., C.P. Trussell, *Won't Investigate BEW-RFC Dispute*, N.Y. TIMES, July 7, 1943, at 10; see also Arthur Krock, *In the Nation: Sometimes "Easy Does It," But Not in Wartime*, N.Y. TIMES, July 13, 1943, at 20.

<sup>402</sup> See 89 CONG. REC. 7357 (1943) (statement of Rep. Wigglesworth); see also *id.* at 7398 (statement of Rep. Fish); *id.* at 7400 (statements of Reps. Hoffman and Wadsworth). Jones testified before the Rules Committee in favor of an inquiry. See

hearing, constitutional concerns were apparently raised about the House investigating the Vice President due to his role as President of the Senate.<sup>403</sup> This line of argumentation is noteworthy with respect to VPP in that it reflects an appreciation that the Vice President qua President of the Senate is likely immune from investigation by the House, at least outside of an impeachment inquiry.

By this point, the conflict had caused Roosevelt sufficient embarrassment that he felt compelled to resolve the matter once and for all.<sup>404</sup> He dissolved the BEW and reassigned its responsibilities and employees to a new entity not under Wallace's control.<sup>405</sup> At the same time he removed authority from Jones as well.<sup>406</sup> This reorganization and White House pressure assured no congressional investigation was undertaken.<sup>407</sup>

Wallace's run-ins with Congress reflect the tensions that occur when a Vice President assumes an active policymaking role within the executive branch. As would later prove to be the case with Vice Presidents Humphrey, Rockefeller, Bush, Quayle, and Cheney, Congress will take an interest in the activities of the Vice President if he becomes a major player in policy decisions. In the case of Wallace, the agency under his care came under scrutiny from the Congress, and despite his status as a constitutional officer there was even talk of his appearing before a congressional committee to answer questions. Wallace's actions, of course, involved authority delegated to him by Roosevelt and not his own constitutional power.

### *E. Hubert Humphrey*

In early 1966, following a tour of Asia, Vice President Humphrey was asked to testify publicly before the Senate Foreign Relations Committee to discuss his trip.<sup>408</sup> Humphrey refused, stating that "I do not believe it is desirable for the Vice

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*Inquiry "Welcome," Jones Tells Fish*, N.Y. TIMES, July 3, 1943, at 26. As with the Bridges resolution, the Wigglesworth measure made no allowances for or references to the Vice President's status. See H.R. Res. 277, 78th Cong. (1945).

<sup>403</sup> See Trussell, *supra* note 401.

<sup>404</sup> See SCHAPSMEIER & SCHAPSMEIER, *supra* note 377, at 68–71.

<sup>405</sup> See *id.* at 71.

<sup>406</sup> See *Mr. Wallace and Mr. Jones*, N.Y. TIMES, July 17, 1943, at 12.

<sup>407</sup> See MARKOWITZ, *supra* note 378, at 72–73; Krock, *supra* note 401.

<sup>408</sup> See *Fulbright Is "Surprised" Humphrey Won't Testify*, N.Y. TIMES, Feb. 19, 1966, at 11 [hereinafter *Humphrey Won't Testify*].

President of the United States to testify.”<sup>409</sup> Humphrey defended his position by using a familiar structural argument: “The President does not testify and the Vice President has a role in government that I think precludes his formal testimony before a committee.”<sup>410</sup> The Vice President expressed concern that doing so would “violate a long-established precedent.”<sup>411</sup> The Committee Chairman, J. William Fulbright, feigned surprise at Humphrey’s stance.<sup>412</sup>

Meanwhile, another Committee member, Senator Wayne Morse, thought it would have been politically wise for Humphrey to have appeared before the Committee but defended the Vice President’s decision on constitutional grounds.<sup>413</sup> Morse contended that Humphrey could exercise an “executive privilege” akin to that of the President, which permitted the Vice President to refuse to appear.<sup>414</sup> Undeterred, on February 25, Fulbright

<sup>409</sup> *Id.*; see also Robert C. Albright & Bryce Nelson, *Fulbright Sees Continued Viet Probe; Hartke, Church Hit Johnson Policy*, WASH. POST, Feb. 22, 1966, at A1. Years later, Fulbright attempted to get Vice President Agnew to testify before his panel following the latter’s completion of an Asian tour. See SEYMOUR K. FREIDIN, *A SENSE OF THE SENATE* 197 (1972). Noted constitutional authority Senator Sam Ervin questioned the legality of such a gambit, however. See *id.* Fulbright’s efforts in regard to Agnew’s testifying seem to have been less serious than with respect to Humphrey as there do not appear to be any references to the invitation in the major newspapers at the time.

<sup>410</sup> *Humphrey Will Refuse Testimony at Hearing*, WASH. POST, Feb. 18, 1966, at A9.

<sup>411</sup> *Id.* A Vice President voluntarily testifying before a congressional committee was not without precedent, however. As noted above, Vice President Colfax testified before a House select committee. See *supra* Part VI.C. Vice President Lyndon Johnson appeared before the Senate Foreign Relations Committee in closed session to brief members on a trip to Asia he had taken in 1961. See *The Proceedings in Washington*, N.Y. TIMES, May 26, 1961, at 13. Johnson also appeared before the House Committee on Foreign Affairs under similar circumstances. See *Washington Proceedings*, N.Y. TIMES, June 6, 1961, at 12. The Johnson precedent regarding the Senate panel was cited by Fulbright during his committee’s conflict with Humphrey as a way to convince the Vice President to make an appearance. See Robert C. Albright, *Humphrey Declines New Bid To Testify*, WASH. POST, Feb. 26, 1966, at A8. Johnson’s appearance had been characterized at the time as “informal and private,” however, and did not involve Johnson appearing against his will. See *Humphrey Agrees to Private Session*, WASH. POST, Mar. 2, 1966, at A7 [hereinafter *Humphrey Agrees*]. To the contrary, it had been undertaken at Vice President Johnson’s behest. See Albright & Nelson, *supra* note 409, at A9. Interestingly, during the Humphrey controversy, President Johnson declined to release the testimony he had delivered to the committee five years before as Vice President. See *Humphrey Agrees*, *supra*.

<sup>412</sup> See *Humphrey Will Refuse Testimony at Hearing*, *supra* note 410.

<sup>413</sup> See *id.*

<sup>414</sup> See *id.*

pressed ahead, sending Humphrey a formal “invitation” to appear before his committee, this time in closed session.<sup>415</sup> When asked why he would not testify before the committee when Lyndon Johnson as Vice President had made an informal appearance a few years before, Humphrey remarked, “That’s his privilege. My name is Hubert Humphrey.”<sup>416</sup> He further noted, “as Vice President, I ought to examine the precedents. You can’t tell where this will start—or stop.”<sup>417</sup> A compromise was finally reached whereby Humphrey briefed committee members in the Senate Majority Leader’s office—as opposed to the committee room; he did so in a private setting, not in an open hearing, and the meeting included Senators who were not on the committee.<sup>418</sup>

Humphrey’s refusal to appear formally before the committee in open session is one of the most compelling political precedents for VPP prior to the Cheney vice presidency. At a minimum, he seemed to believe that his status as a constitutional officer precluded his being forced to appear before the committee. In this context, he also equated his office with the presidency. Thus, he raised constitutional concerns about testifying, although he did not fully develop them or at least did not express them publicly. The Vice President’s arguments also seem to have been grudgingly accepted by Fulbright since the latter made serious concessions to coax Humphrey to appear before his panel. Moreover, Senator Morse spelled out even more explicitly than Humphrey that the Vice President holds a constitutional privilege similar to the President’s and could therefore decline to appear. That said, Humphrey never made a formal claim of privilege and later appeared before the committee as part of a compromise. In addition, Humphrey testified about a diplomatic mission he had carried out under the President’s authority,<sup>419</sup> not

<sup>415</sup> See Letter from Sen. J.W. Fulbright to Vice President Hubert Humphrey (Feb. 25, 1966) (on file with author); see also Albright, *supra* note 411, at A1.

<sup>416</sup> Don Irwin, *Humphrey Balks at Bid by Fulbright Group: But Vice President Doesn’t Flatly Reject Request To Discuss Recent Far East Tour*, L.A. TIMES, Feb. 26, 1966, at 10.

<sup>417</sup> *Id.*

<sup>418</sup> See E.W. Kenworthy, *Senators Hear Vice President Defend War Policy*, N.Y. TIMES, Mar. 3, 1966, at 16; see also Bryce Nelson, *Humphrey Faces Fulbright Unit—And Can Smile*, WASH. POST, Mar. 3, 1966, at A15; *Humphrey Agrees*, *supra* note 411.

<sup>419</sup> *Told of Asia Loans, Fulbright Aide Says*, WASH. POST, Feb. 17, 1966, at A18 (noting that the President granted authority to the Vice President on the trip).

his own. So while the precedent provides a useful parallel to VPP, it is not completely "on all fours."

#### F. *Spiro Agnew*

President Nixon's Vice President, Spiro Agnew, became embroiled in a scandal that forced him to resign from office. In 1973, Agnew left the vice presidency after pleading no contest to income tax evasion.<sup>420</sup> During the investigation surrounding the charges, which stemmed from his acceptance of bribes prior to and during his vice presidency, Agnew offered mixed signals regarding a potential constitutional privilege but ultimately did not formally make an assertion. Interestingly, the President's office and the DOJ appeared to doubt the legitimacy of such an invocation.

In early August 1973, federal officials approached Agnew and told him he was under investigation. Officials requested personal documents from him,<sup>421</sup> the lion's share of which involved actions prior to his vice presidency.<sup>422</sup> Initially, Agnew's attorneys raised the question of whether the Vice President had to provide the materials, which consisted of his financial records.<sup>423</sup> It was thought at the time that his lawyers would urge Agnew to claim a constitutional privilege to withhold these papers.<sup>424</sup> When asked whether he would release the materials, Agnew conceded that he was not a "profound constitutional scholar";<sup>425</sup> however, he made clear that he would not "blindly follow" the recommendation of his attorneys either.<sup>426</sup>

Agnew's potential assertion of a constitutional privilege with regard to his financial records was met with skepticism among opinion makers. A contributor to the *New York Times* commented:

<sup>420</sup> See, e.g., KYVIG, *supra* note 12, at 137–38.

<sup>421</sup> See *A Chronology of Events in Agnew Case*, N.Y. TIMES, Oct. 11, 1973, at 34.

<sup>422</sup> See Warren Weaver, Jr., *Agnew Suddenly Shares in Nixon Legal Dilemma*, N.Y. TIMES, Aug. 9, 1973, at 1, 20. The documents requested were from 1967, two years before his vice presidency, to August 1973. See Ben A. Franklin, *Agnew Granted Extension on Turning over Records*, N.Y. TIMES, Aug. 10, 1973, at 1.

<sup>423</sup> See Edward Walsh & Richard M. Cohen, *Agnew Lawyers Study Stand on Executive Privilege*, WASH. POST, Aug. 12, 1973, at B1.

<sup>424</sup> See *id.*

<sup>425</sup> Weaver, *supra* note 422.

<sup>426</sup> Walsh & Cohen, *supra* note 423.

[F]or Mr. Agnew to contend in court that he was entitled to invoke the doctrine of executive privilege to keep confidential his personal records, he would presumably have to demonstrate that he was inextricably involved at the highest level in executive branch decisions . . . . The Vice President's position is considerably different from the President's, however, in that the grand jury inquiry in which he is involved deals largely with events during his service [in state government].<sup>427</sup>

Not long afterward, Agnew wrote the U.S. Attorney in charge of his case. In the letter, the Vice President indicated he would turn over all his financial records to investigators.<sup>428</sup> He declined, however, to turn over any official, vice presidential papers to the DOJ, asserting that

[i]n your letter . . . you request that I make certain of my personal records available to you. I am prepared to do so immediately. . . . You understand that, by making these records available to you, I do not acknowledge that you or any grand jury have any right to records of the Vice President. Nor do I acknowledge the propriety of any grand jury investigation of possible wrongdoing on the part of the Vice President so long as he occupies that office. These are difficult Constitutional questions which need not at this moment be confronted.<sup>429</sup>

Agnew's statement in this regard clearly reflects the view that the Vice President does possess a constitutional privilege of some sort. That said, his pronouncement is somewhat less than meets the eye since investigators were in fact not seeking his official records.

At the time, one observer raised the question of whether a precedent was actually being set:

There were several important sidelights on questions that have held the center stage during the Watergate case and have reappeared in the Vice President's case. One is the question of executive privilege [sic] . . . . Mr. Agnew's aides said his records—financial and tax papers—are personal and not Vice

<sup>427</sup> See Weaver, *supra* note 422, at 20.

<sup>428</sup> See Agnew Reply to Letter from Beall, WASH. POST, Aug. 15, 1973, at A8 [hereinafter Agnew Reply].

<sup>429</sup> *Id.* (emphasis added). Agnew's decision to cooperate with prosecutors and not invoke a privilege was applauded at the time, in large part because it was a departure from Nixon's aggressive use of executive privilege. See *The Vice President and the Investigation*, WASH. POST, Aug. 8, 1973, at A18 ("It appears that [Agnew] does not choose to wrap himself in dubious interpretations of the Constitution, or in privileges questionably extracted from it.").



Presidential, thus avoiding a constitutional confrontation over the question. Because there is so much unplowed legal ground in the matter, it was not clear if any precedents were being set by the Vice President's action.<sup>430</sup>

Even though Nixon thought Agnew should not turn over his records,<sup>431</sup> it became clear that the President's lawyers were not prepared to go so far as to assist Agnew with respect to claiming executive privilege. They declined "to let Agnew share the legal shelter [the President] had constructed for himself"<sup>432</sup> for Watergate. Apparently an attempt at a "joint legal strategy" between the President and the Vice President as to executive privilege was shot down by the White House.<sup>433</sup>

Contemporary DOJ analysis about whether the Vice President enjoyed immunity from the criminal justice process while in office was equally unhelpful to Agnew. An internal memorandum on the question of immunity briefly touched on the Vice President and executive privilege. The memorandum concluded that

[w]e based the President's immunity from criminal proceedings essentially on two grounds. First, that the person who controls criminal prosecutions as the head of the Executive branch, controls part of the evidence *as holder of the power of Executive privilege*, and is vested with the pardoning power under Article II, section 2, clause 1 of the Constitution . . . . *This set of considerations obviously is not applicable to the Vice President.*<sup>434</sup>

<sup>430</sup> Anthony Ripley, *Agnew; Waiting To See If the Shoe Drops*, N.Y. TIMES, Aug. 19, 1973, at 178.

<sup>431</sup> Apparently, Nixon vigorously opposed Agnew's compliance with the document request because it differed from his own less accommodating legal position during the Watergate investigations. See Christopher Lydon, *Aides Hint Agnew Will Cooperate*, N.Y. TIMES, Aug. 14, 1973, at 1, 21.

<sup>432</sup> COHEN & WITCOVER, *supra* note 355, at 204.

<sup>433</sup> See *id.* at 203–04; see also Christopher Lydon, *Nixon's Support of Agnew Falls Short, In View of Vice President's Associates*, N.Y. TIMES, Aug. 24, 1973, at 13.

<sup>434</sup> Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, Regarding the Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office 34 (Sept. 24, 1973) [hereinafter Dixon Memo] (emphasis added). The Solicitor General filed a memorandum with the court consistent with the OLC opinion. See CRS, *supra* note 12, at 603. The DOJ's position in 1973 regarding a Vice President's immunity from criminal process was reaffirmed a quarter century later. See Memorandum from Randolph D. Moss, Assistant Att'y Gen., Office of Legal Counsel, A Sitting President's Amenability to Indictment and Criminal Prosecution (Oct. 16, 2000) ("[W]e conclude that the determinations made by the Department in

Thus, in part because the Vice President is not the holder of executive privilege, the DOJ reasoned he should not be shielded with criminal immunity. The Department also concluded in the context of the investigation that

[t]he prosecution . . . would be severely hampered by the withholding from the grand jury of those elements of the alleged conspiracy linked to the Vice President. As a result the activities of the alleged co-conspirators could not be fully disclosed and evaluated, which might redound unfairly to their benefit. At the same time, the Vice President might be unfairly linked by innuendo or incomplete disclosure of facts to the alleged conspiracy. In short any resultant delay in the proceedings would benefit the co-conspirators, hamper the prosecution, and postpone a possible exoneration of the Vice President.<sup>435</sup>

Clearly, the Department was not of the view that the Vice President had recourse to executive privilege, at least in a criminal proceeding. Even if the DOJ's reasoning is accepted as valid, such a conclusion would not preclude the Vice President from exercising a privilege pursuant to his own constitutional duties in the context of a civil lawsuit or a congressional investigation.

Of perhaps even more interest was that the White House offered to help the DOJ secure logs of meetings Agnew had conducted and to help determine whether the Vice President had his own internal taping system.<sup>436</sup> If Agnew believed he had his own recognized constitutional privilege, at least with regard to his executive branch duties as delegated by the President or by statute, President Nixon's lawyers seemed to disagree since they presumably would have felt constrained from making the DOJ such an offer.

In late September, following the surrender of his personal records, Agnew pursued a new gambit. He attempted to mimic

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1973 . . . remain sound and that subsequent developments in the law validate both the analytical framework applied and the conclusions reached at that time."); *cf.* Memorandum from Randolph D. Moss, Assistant Att'y Gen., Office of Legal Counsel, Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate (Aug. 18, 2000). For an argument in favor of a sitting Vice President having immunity from the criminal justice process prior to impeachment, see Alexander M. Bickel, *The Constitutional Tangle*, NEW REPUBLIC, Oct. 6, 1973, at 14–15.

<sup>435</sup> Dixon Memo, *supra* note 434, at 41.

<sup>436</sup> See COHEN & WITCOVER, *supra* note 355, at 177–78.

the Calhoun precedent and asked Speaker Carl Albert that a House committee look into the matter.<sup>437</sup> In so doing, he acted without seeking the approval of the President, reflecting in no small part the constitutional independence of the Vice President.<sup>438</sup> Agnew's letter to Speaker Albert seeking an investigation gave little hint that he might possess a constitutional privilege, at least in this context. The Vice President quoted Calhoun: "In claiming the investigation of the House, I am sensible that, under our free and happy institutions, the conduct of public servants is a fair subject of the closest scrutiny . . . ." <sup>439</sup> In fact, he acknowledged the House's authority to investigate his conduct and to have access to his personal records, writing, "the House [is] the only proper agency to investigate the conduct of a president or vice president."<sup>440</sup> He promised he would "of course, cooperate fully [with the House] . . . . I have directed my counsel to deliver forthwith to the clerk of the House all of my original records of which copies have previously been furnished to the United States attorney."<sup>441</sup> The House leadership, however, declined to permit such an investigation.<sup>442</sup>

In sum, Agnew's example provides further support for VPP, but that support is not unqualified. While his private lawyers wrote to the U.S. attorney hinting at a vice presidential privilege of some sort, and while Agnew expressly reserved the right to control his own official papers, the Vice President never actually invoked the privilege because no official records were ever implicated in the investigation. At the same time, the DOJ in its analysis of the related question of immunity expressed skepticism about a vice presidential executive privilege claim, at least in the context of a criminal probe. Similarly, White House

<sup>437</sup> See *id.* at 255.

<sup>438</sup> See *id.* at 253. See generally *infra* notes 652–97 and accompanying text (regarding the Vice President's constitutional independence). Underscoring this point, Agnew during a press conference noted that "I think the Vice President of the United States should stand on his own two feet . . . . It really isn't that important what a President says." See Lou Cannon, *Offers To Let Prosecutors Interview Him*, WASH. POST, Aug. 15, 1973, at A1. Lou Cannon analyzed the situation as such: "Agnew[] . . . continued a policy of newly asserted vice presidential independence from the White House . . . ." See *id.*

<sup>439</sup> SOBEL, *supra* note 370, at 37.

<sup>440</sup> *Id.*

<sup>441</sup> *Id.*

<sup>442</sup> See, e.g., COHEN & WITCOVER, *supra* note 355, at 256–57.

lawyers offered to help secure vice presidential records for the prosecutors. Agnew even indicated he would subject himself to a House investigation. Finally, the Vice President volunteered to be interviewed by the DOJ and hinted he might appear before a grand jury.<sup>443</sup> None of these factors would seem to be wholly consistent with the Vice President possessing a constitutional privilege.

### G. Gerald Ford

A few weeks after his elevation from the vice presidency to the Oval Office in 1974, Gerald Ford pardoned his predecessor, Richard Nixon. This prompted an outcry, as many suspected Ford had cut a deal whereby, in exchange for the presidency, Ford had agreed to grant clemency to his predecessor. Resolutions of inquiry were introduced in the House of Representatives.<sup>444</sup> To quell the torrent of criticism, Ford hit upon the idea of testifying before a House Judiciary subcommittee. As Representative Wiley Mayne confirmed with the President during the hearing:

[T]he Chairman and others in their questioning have established very clearly that [your] appearance here today is an entirely voluntary one on your part, that it was your idea, that you had not been requested by the committee to come in person, that we had indicated that it would be entirely satisfactory as far as we were concerned, if some assistant appeared instead.<sup>445</sup>

Instead of claiming executive privilege or VPP and qualifying the scope of his examination, Ford freely testified in open session regarding specific conversations he had had while Vice President.<sup>446</sup>

President Ford stated in his testimony before the subcommittee that "I shall proceed to explain as fully as I can in

<sup>443</sup> See *id.* at 172. The former Vice President ultimately became embroiled in litigation over privilege, but it was attorney-client privilege and not a constitutional claim. See *Agnew v. State*, 446 A.2d 425 (Md. 1982).

<sup>444</sup> Two resolutions were introduced in the House in an attempt to establish a House investigatory committee but neither was adopted. See SOBEL, *supra* note 370, at 36.

<sup>445</sup> *Pardon of Richard M. Nixon and Related Matters: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 105 (1974) [hereinafter *Pardon Hearings*].

<sup>446</sup> For what it is worth, Ford asserted that no precedent should attach to his appearance. Of course, like it or not, a precedent is a precedent.

my present answers the facts and the circumstances covered by the present resolutions of inquiry. I shall start with an explanation of these events which were the first to occur . . . before I became President.”<sup>447</sup> Ford noted that one of the House resolutions sought “information about certain conversations that may have occurred over a period that includes when I was a Member of Congress or the Vice President. In that entire period no references or discussions on a possible pardon for then President Nixon occurred until August 1 and 2, 1974.”<sup>448</sup> In his statement, the President proceeded to go into detail about conversations he had had with Nixon’s Chief of Staff, Alexander Haig, while Ford had served as Vice President. During these talks the two men discussed a number of issues related to a potential presidential succession, one of the central components of VPP.<sup>449</sup>

Ford told the committee:

[General Haig] came to my office about 3:30 p.m. [on August 1] for a meeting that was to last for approximately three-quarters of an hour.

. . . .

Based on what he had learned of the conversation on the [soon-to-be released Nixon] tape, he wanted to know whether I was prepared to assume the Presidency within a very short period of time, and whether I would be willing to make recommendations to the President as to what course he should now follow.

. . . .

General Haig asked for my assessment of the whole situation. He wanted my thoughts about the timing of a resignation, if that decision were to be made, and about how to do it and accomplish an orderly change of the administration. We discussed what scheduling problems there might be and what the early organizational problems would be.

. . . .

On the resignation issue, there were put forth a number of options which General Haig reviewed with me. As I recall his conversation, various possible options being considered included: (1) The President temporarily step aside under the

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<sup>447</sup> *Pardon Hearings*, *supra* note 445, at 93.

<sup>448</sup> *Id.*

<sup>449</sup> *See id.* at 93–95. For more on these conversations and related deliberations, see BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 325–27, 332–35, 399–401 (1976); BOB WOODWARD, *SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE* 3–14 (1999); FEERICK, *supra* note 18, at 156–60.

25th Amendment. (2) Delaying resignation until further along the impeachment process. (3) Trying first to settle for a censure vote as a means of avoiding either impeachment or a need to resign. (4) The question of whether the President could pardon himself. (5) Pardoning various Watergate defendants, then himself, followed by resignation. (6) A pardon to the President himself, should he resign. I told General Haig I had to have some time to think.

....

[The next day I called] General Haig . . . and told him I wanted him to understand that I had no intention of recommending what President Nixon should do about resigning or not resigning, and that nothing we had talked about the previous afternoon should be given any consideration in whatever decision the President might make. General Haig told me he was in full agreement with this position.<sup>450</sup>

Following his opening statement, Ford then answered questions from members on an assortment of conversations he had had, including two that had taken place while he was still Vice President. From a strictly legal standpoint, if there ever was a golden opportunity to assert VPP it would have been here.<sup>451</sup> A former Vice President was getting asked about highly sensitive conversations he had had involving his constitutional duty to prepare for succession, and Ford answered the questions without invoking VPP—or traditional executive privilege for that matter.<sup>452</sup>

President Ford's exchange with Representative Don Edwards is instructive in this vein:

Mr. EDWARDS. . . . you indicate that there were some general discussions with General Haig and [Nixon's attorney] before the resignation about the pardon power in general.

Did they have any reason to carry a message to then President Nixon that this pardon power could possibly be used on his behalf if he resigned?

President FORD. None whatsoever. Categorically no.

<sup>450</sup> *Pardon Hearings*, *supra* note 445, at 93–95.

<sup>451</sup> Of course, as a political matter, it would have been exceedingly difficult for Ford to make such a claim because of the political pressure he faced following the pardon and because of the defeat of Nixon's Watergate-related claim of executive privilege just weeks before in the Supreme Court.

<sup>452</sup> *See supra* Part VII.A.2 (discussing the constitutional basis for invocation of VPP in the context of succession and presidential inability).

Mr. EDWARDS. Then why, Mr. President, were there those general discussions about [sic] pardon?

President FORD. Well, as I indicated in my prepared statement, General Haig came to me first to apprise me of the dramatic change in the situation. And as I indicated in the prepared statement, he told me that I should be prepared to assume the Presidency very quickly, and wanted to know whether I was ready to do that.

Second, he indicated that in the White House, among the President's advisors, there were many options being discussed as to what course of action the President should take . . . .<sup>453</sup>

Ford's exchange with Representative David Dennis also delved into the details of his vice presidential conversations:

Mr. DENNIS. . . . Mr. President, on page 7 of your statement where you were talking about your first or your second interview with General Haig on the afternoon of August 1, you stated that "I describe this meeting because at one point it did include references to a possible pardon for Mr. Nixon." I take it that you have spelled out what those references were over on pages 9, where the options are spelled out, and 10, where you state that you inquired as to what was the President's pardoning power, is that correct?

President FORD. Yes. It is spelled out in the itemed instances, 1 through 6, eight various options involving a pardon.

Mr. DENNIS. And does that include everything that was said at that time on the subject of pardon, substantially?

President FORD. Yes, sir.<sup>454</sup>

While most of the questioning by the subcommittee involved issues related to the Nixon pardon which took place after Ford had become President, as Ford's exchanges with Representatives Edwards and Dennis reflect, he was asked about preparation for succession while Vice President as well. Even though Ford appeared voluntarily before the subcommittee, it is difficult to maintain that this episode does not weigh against VPP's existence.<sup>455</sup>

<sup>453</sup> *Pardon Hearings*, *supra* note 445, at 102.

<sup>454</sup> *Id.* at 103.

<sup>455</sup> At the same time, Ford's appearance argues against the existence of executive privilege as well, but few would doubt that doctrine's legitimacy and the authority of the President to decline to appear before a congressional committee.

*H. Nelson Rockefeller*

The vice presidency of Nelson Rockefeller provides three episodes that inform notions of VPP. The first instance involved his role as head of an executive branch body investigating the intelligence community. The second and third instances involved the Vice President providing testimony in court and to state investigative panels about actions he took while Governor of New York.

*1. The Rockefeller Commission*

In late 1974, following media disclosure of controversial intelligence activities carried out within the U.S. by the federal government, there was a great hue and cry for a thorough review of how the intelligence community had conducted itself.<sup>456</sup> In response, in early 1975, President Ford appointed a commission led by Vice President Rockefeller to investigate the intelligence community's activities.

The Rockefeller Commission was established by executive order pursuant to the President's power under the Constitution and various unspecified federal statutes. President Ford declared that "by virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States, I hereby order" establishment of the Commission.<sup>457</sup> There is no reference to vice presidential authority in the directive.<sup>458</sup> The order clearly reflects that Vice President Rockefeller was acting pursuant to a delegation from the President.

Not long after the Commission began its work, committees in both houses of Congress undertook similar investigations. In the Senate, this effort was led by a select committee chaired by Senator Frank Church. During the Senate inquiry, the Church Committee requested information that had come into the possession of the Rockefeller Commission. The leadership of the Committee met with the Vice President in May 1975,<sup>459</sup> urging him to provide the committee with the necessary documents. Rockefeller politely declined, stating that "of course, I can't—not

<sup>456</sup> See, e.g., LOCH K. JOHNSON, A SEASON OF INQUIRY: THE SENATE INTELLIGENCE INVESTIGATION 9 (1985).

<sup>457</sup> Exec. Order No. 11,828, 40 Fed. Reg. 1219 (Jan. 4, 1975).

<sup>458</sup> See *id.*

<sup>459</sup> See JOHNSON, *supra* note 456, at 41.



until we've finished our work and the president approves it."<sup>460</sup> It appeared to the author of the history of the Church Committee that the Vice President believed that "[s]ince the president had appointed the commission in the first place, he ultimately would have to decide which of its materials could be transferred to Congress."<sup>461</sup>

While Rockefeller did not explicitly claim a privilege over the materials, he did refuse to produce the documents. If the Vice President enjoyed his own constitutional privilege over executive branch functions delegated to him by the President, Rockefeller certainly could have asserted such a power at this time. Instead, the Vice President made clear that the ultimate authority over the materials in question lay with the President and not with him. Rockefeller's failure to invoke a privilege is of only modest precedential value, however, because the authority being exercised by the Vice President was not his own.

## 2. Testifying as to Actions While Governor

Despite his status as Vice President, Rockefeller testified on several occasions before state entities as to actions he had taken while Governor.<sup>462</sup> One instance involved matters stemming from Rockefeller's role in the Attica prison riot of 1971.<sup>463</sup> In a 1975 murder trial stemming from the riot, the defendants attempted to subpoena Rockefeller, who had since become Vice President.<sup>464</sup> Notably, during his argument to try to convince the court that Rockefeller should be compelled to appear, defense counsel contended that any assertion of "executive privilege" by the Vice President would be illegitimate.<sup>465</sup> Rockefeller's lawyer, however, specifically declined to invoke a constitutional privilege.<sup>466</sup> The court was informed by Rockefeller's counsel that

<sup>460</sup> *Id.* at 41–42 (internal quotation marks omitted).

<sup>461</sup> *Id.* at 42; *see also* Mary Perot Nichols, *Frank Church: The Hottest Liberal Dark Horse*, VILLAGE VOICE, June 2, 1975, at 7.

<sup>462</sup> As noted earlier, Vice President Tompkins also cooperated with a state Senate investigative body looking into activities during his term as New York Governor. *See* IRWIN, *supra* note 347, at 231, 250–53.

<sup>463</sup> *See* Michael T. Kaufman, *Defense in Attica Trial Moves To Subpoena Rockefeller as Witness*, N.Y. TIMES, Mar. 8, 1975, at 15.

<sup>464</sup> *See id.*

<sup>465</sup> *See* Michael T. Kaufman, *Lawyer Defends Rockefeller Against Testifying on Attica*, N.Y. TIMES, Mar. 15, 1975, at 19.

<sup>466</sup> *Id.*

“what is not at issue is any claim of privilege or immunity.”<sup>467</sup> Counsel for the Vice President contended that no subpoena was necessary because the Vice President’s testimony would have constituted inadmissible hearsay.<sup>468</sup> The state court judge ruled against subpoenaing Rockefeller, but he did not base his ruling on constitutional privilege; instead, the judge accepted the view of Rockefeller’s lawyers that his testimony would have amounted to inadmissible hearsay.<sup>469</sup> The judge explained that “the present or former governmental position of the prospective witness matters not one whit.”<sup>470</sup> While a vice presidential privilege was not invoked by Rockefeller, what stands out is that defense counsel anticipated that the Vice President might claim such a privilege and therefore the attorney prepared accordingly. Clearly, a vice presidential privilege was viewed as very much within the realm of possible legal arguments.

Although excused from testifying in this particular instance, Rockefeller did in fact testify in other fora that same year to discuss his role in the Attica riot. For instance, Rockefeller appeared in front of a grand jury on the matter.<sup>471</sup> In so doing, Rockefeller testified voluntarily.<sup>472</sup> His spokesperson said, “they asked if he would help out and cooperate, and he said yes.”<sup>473</sup> In addition, the Vice President testified before a state investigative body looking into the affair.<sup>474</sup>

Also in 1975, two New York investigative commissions requested that Rockefeller appear and discuss matters relating to the administration of state nursing homes and urban development financing during his tenure as Governor.<sup>475</sup> The question was immediately raised whether Rockefeller could be compelled to testify if he declined their requests. For his part,

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<sup>467</sup> *Id.*

<sup>468</sup> *See id.*

<sup>469</sup> *See* Michael T. Kaufman, *Attica Defense Loses on Rockefeller*, N.Y. TIMES, Mar. 22, 1975, at 63.

<sup>470</sup> *Id.*

<sup>471</sup> *See* Tom Goldstein, *Rockefeller Due at Attica Hearing: Vice President To Testify Before Jury Tomorrow*, N.Y. TIMES, Aug. 28, 1975, at 39 [hereinafter *Rockefeller Due*].

<sup>472</sup> *See* Tom Goldstein, *Rockefeller Testifies on Attica for 3 Hours Before Grand Jury*, N.Y. TIMES, Aug. 30, 1975, at 16.

<sup>473</sup> *Rockefeller Due*, *supra* note 471.

<sup>474</sup> *See id.*

<sup>475</sup> *See e.g.*, Edith Evans Asbury, *Moreland Panel Seeks Rockefeller*, N.Y. TIMES, July 25, 1975, at 1.

the nursing home commission chairman replied that the panel would “cross that bridge when we come to it.”<sup>476</sup> The chairman indicated that the panel’s legal analysis had concluded that it could indeed subpoena the Vice President for information relating to his time as Governor but could not take the same steps regarding his actions as Vice President.<sup>477</sup> The conclusion of the nursing home commission chairman—that his panel could not force Rockefeller to appear to discuss his actions as Vice President—dovetails with the prevailing view that congressional committees may not compel a Vice President’s attendance.<sup>478</sup> As in the Attica criminal proceedings, the party trying to require Rockefeller’s attendance recognized his status as a constitutional officer and conducted research to determine if, in fact, he could be forced to appear. If a vice presidential privilege were an absurd notion—truly beyond the pale as a legal matter—the commission presumably would not have even thought to conduct such research. In the end, Rockefeller testified voluntarily before both commissions about his actions while Governor.<sup>479</sup>

At first blush, these episodes involving Vice President Rockefeller testifying before state bodies could be seen to counsel against VPP. After all, if a Vice President can appear before a state panel, it could be argued that *a fortiori* he can be brought before a federal entity. Four important caveats must be kept in mind, however, when considering Rockefeller’s testimony before these state bodies. First, these appearances dealt with matters that occurred prior to his tenure as Vice President and were therefore unrelated to his duties in that capacity. Second, the matters involved state, not federal, issues. Under the American system of federalism, national and state authorities are often viewed as separate and distinct sovereigns. Because the Vice President’s legal status falls under the federal government, theoretically he might not benefit from a privilege under state law. Third, Rockefeller seems to have testified voluntarily in

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<sup>476</sup> *Id.*

<sup>477</sup> *See id.*

<sup>478</sup> Issues of federalism almost certainly also came into play in the commission’s conclusion that it, as a state body, could not force the Vice President to discuss national issues.

<sup>479</sup> *See* Frank J. Prial, *Rockefeller Knew of Nursing Abuse: Tells Inquiry State Budget Restrictions Hampered Audits and Inspections*, N.Y. TIMES, Aug. 29, 1975, at 1; Edith Evans Asbury, *Rockefeller Backs U.D.C.: Says Audit Will Praise It*, N.Y. TIMES, Dec. 4, 1975, at 45.

these instances and was not forced to appear. Finally, as outlined above, the underlying assumptions by both defense counsel in the Attica case and by the state investigative commission were that there was at least a chance Rockefeller might claim a vice presidential privilege of some sort. Had the prospect of such a privilege been wholly novel or outlandish neither party would presumably have bothered to pursue the matter or even thought to look into it.

### I. *George H.W. Bush*

During his vice presidency, George H.W. Bush was asked to provide information to Independent Counsel Lawrence Walsh and a congressional investigative committee about his alleged role in the Iran-Contra affair.<sup>480</sup> Apparently, at no time did Bush assert his own constitutional privilege.<sup>481</sup>

<sup>480</sup> Two congressional investigations looked into the 1980 "October Surprise" controversy. These panels examined, among other things, whether in 1980 then vice presidential candidate George H.W. Bush tried to convince the revolutionary Iranian regime to continue to hold the U.S. hostages until the American election had taken place, thus, precluding the Carter administration from unveiling an "October Surprise." See, e.g., Freedman, *supra* note 343, at 8–9 n.3. The Senate Committee on Foreign Relations reviewed the matter. See SPECIAL COUNSEL TO SENATOR TERRY SANFORD AND SENATOR JAMES M. JEFFORDS OF THE COMM. ON FOREIGN RELATIONS, 102D CONG., THE "OCTOBER SURPRISE" ALLEGATIONS AND THE CIRCUMSTANCES SURROUNDING THE RELEASE OF THE AMERICAN HOSTAGES HELD IN IRAN (Comm. Print 1992). While the investigation interviewed members of the secret service detailed to then vice presidential candidate Bush, it did not interview Bush himself who was President at the time. See *id.* at 10, 78. The House looked into the matter more thoroughly, but it did not discuss the matter with Bush either. See H.R. REP. NO. 102-1102, at 172–73, 180 n.278 (1993). Bush flatly rejected these charges. See, e.g., Neil A. Lewis, *Panel Rejects Theory Bush Met With Iranians in Paris in '80*, N.Y. TIMES, July 2, 1992, at A16. These investigations obviously implicated the actions of a vice presidential candidate and not a sitting Vice President or even a Vice President elect.

<sup>481</sup> See Charles Tiefer, *The Specially Investigated President*, 5 U. CHI. L. SCH. ROUNDTABLE: J. INTERDISC. LEGAL. STUD. 143, 171 n.134 (1998). See generally MORTON ROSENBERG, CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 30 (2007) (making no reference to such an invocation).

In *United States v. Poindexter*, a criminal proceeding stemming from the Iran-Contra affair, the court held that there was no compelling need for the defendant to review Bush's vice presidential records. See 725 F. Supp. 13, 21, 30 (D.D.C. 1989). The court's rationale did not go to the question of the Vice President's constitutional status, but instead centered around: (1) the defendant's inability to "point to a Vice Presidential authorization of his activities as a defense"; (2) the Vice President's records providing no new evidence; and (3) deference to Bush in his capacity at the time as President. See *id.* at 30.

The Vice President was not at the center of the congressional Iran-Contra hearings.<sup>482</sup> Perhaps for this reason during the course of the congressional investigation, in the words of one of the senior committee counsels, Bush “never submitted to interviewing or questioning by the” committee.<sup>483</sup> Bush aides, however, did testify before the joint investigative panel.<sup>484</sup> During their testimony, Bush staff members shared with the committee their recollection of discussions they had had with the Vice President.<sup>485</sup> Far from claiming a constitutional privilege, the Office of the Counsel to the Vice President issued the following statement: “The Office of the Vice President has completed a comprehensive review of its files and records and has transmitted or made available *all* documents related to the Iran-Contra investigations to the Independent Counsel and the Congressional Committees investigating the Iran-Contra matter.”<sup>486</sup>

As the Vice President’s counsel noted, information related to presidential and vice presidential communications were also made available to the independent counsel.<sup>487</sup> In fact, Vice President Bush was deposed by the independent counsel’s office on January 11, 1988<sup>488</sup> and interviewed by the FBI on December 12, 1986.<sup>489</sup> Instead of trying to limit the scope of inquiry through a claim of constitutional privilege, the Vice President told his staff to “just give them everything.”<sup>490</sup> While White House counsel did invoke attorney-client privilege on behalf of

<sup>482</sup> See WILLIAM S. COHEN & GEORGE J. MITCHELL, *MEN OF ZEAL: A CANDID INSIDE STORY OF THE IRAN-CONTRA HEARINGS* 264 (1988) (“The Committee did not focus on the role of Vice President George Bush.”). The chairman of the Iran-Contra Committee, Senator Dan Inouye, did not support subpoenaing the Vice President and trying to compel him to appear before the panel. See Steven V. Roberts, *Reagan Would Turn over “Excerpts” from Notes*, N.Y. TIMES, Feb. 3, 1987, at A14.

<sup>483</sup> CHARLES TIEFER, *THE SEMI-SOVEREIGN PRESIDENCY: THE BUSH ADMINISTRATION’S STRATEGY FOR GOVERNING WITHOUT CONGRESS* 170 n.12 (1994).

<sup>484</sup> See CONGRESSIONAL QUARTERLY, *THE IRAN-CONTRA PUZZLE* 143–44 (1988).

<sup>485</sup> See *id.*

<sup>486</sup> *Id.* at D-20.

<sup>487</sup> See, e.g., LAWRENCE E. WALSH, *IRAN-CONTRA: THE FINAL REPORT* 443 (1994).

<sup>488</sup> See *id.* at 473.

<sup>489</sup> *Id.* After his 1992 pardons of Iran-Contra figures, Bush declined an additional interview unless it was restricted to questions of document production. See *id.* at 474. The independent counsel decided against pursuing a grand jury subpoena since Walsh “did not believe there was an appropriate likelihood of a criminal prosecution.” *Id.*

<sup>490</sup> *Id.* at 476.

Bush regarding some Iran-Contra matters,<sup>491</sup> that is of course a nonconstitutional privilege. Moreover, the privilege was not asserted by the Vice President himself, but by the President's aides.<sup>492</sup>

In sum, there seems to be little indication that Bush believed he enjoyed a vice presidential privilege.<sup>493</sup> It should nevertheless be remembered that Bush's role in the Iran-Contra affair involved delegated responsibilities and not his own constitutional duties.

### *J. Dan Quayle*

During the George H.W. Bush administration, Vice President Dan Quayle was charged by the President with heading up the Council on Competitiveness, which reviewed agency regulations before they were issued.<sup>494</sup> This undertaking raised hackles from many in Congress who felt that this was an effort to evade legislative oversight.<sup>495</sup> The Council was involved in a number of controversial regulatory decisions that prompted several congressional inquiries.<sup>496</sup> Many members believed the Council was watering down the effect of federal statutes by promulgating rules that lowered environmental, safety, and health standards.<sup>497</sup>

At one point, seven different committees were looking into the Council's efforts.<sup>498</sup> The House Subcommittee on Health and the Environment held a series of such proceedings involving the

<sup>491</sup> See *id.* at 479 n.65; Tiefer, *supra* note 481. Bush invoked attorney-client privilege over some materials while former President but not apparently as Vice President. See WALSH, *supra* note 487, at 477.

<sup>492</sup> See *id.*

<sup>493</sup> Interestingly, Vice President Bush did on at least one occasion make a statement about the privileged nature of his conversations; he stated that "who I talk to about what, again is privileged." Dick Kirschten, *George Bush—Keeping His Profile Low So He Can Keep His Influence High*, NAT. J., June 20, 1981, at 1096, 1097. Presumably, given the context of the interview, Bush was referring to the privacy of his conversations being governed by presidential communications privilege since Bush, as Vice President, would have been considered a presidential adviser. But it is at least conceivable he could have been alluding to his own privilege.

<sup>494</sup> See TIEFER, *supra* note 483, at 61–88.

<sup>495</sup> See *id.*

<sup>496</sup> See, e.g., *id.* at 61.

<sup>497</sup> See, e.g., *id.* at 68–85.

<sup>498</sup> See *id.* at 61.

Council.<sup>499</sup> For a hearing in March 1991, the subcommittee invited the Council's staff to appear.<sup>500</sup> This request was denied.<sup>501</sup> At another hearing in May, the same panel requested that Quayle himself appear, but the Vice President declined the offer. Chairman Henry Waxman explained that "[w]e asked Mr. Quayle to come . . . or to send a representative to today's hearing to tell the subcommittee about the Council . . . but he declined to do so."<sup>502</sup> In November, the panel again unsuccessfully sought to have Quayle testify.<sup>503</sup> During the hearing Waxman observed that

[t]he subcommittee invited Vice President Quayle to appear this morning and to discuss the activities of the council. In particular, we seek his testimony on the council's procedures and how they are consistent [with federal statutes] . . . . Unfortunately, the Vice President has once again refused to publicly answer questions regarding the council and its activities.<sup>504</sup>

At the time there was little reason to think that Waxman actually expected Quayle would attend. A *Washington Post* reporter opined that the "request was an empty one, as the White House has a policy of allowing only administration employees subject to Senate confirmation to appear before Capitol Hill committees, a category Quayle does not fall into."<sup>505</sup>

Efforts by Representative David Skaggs, the chairman of a House Appropriations subcommittee, to secure similar information from the Vice President's group were equally unavailing. In response to his request for certain documents, the counsel for the Vice President, John Howard, contended that "our initial response [to congressional inquiries about communication

<sup>499</sup> See generally *Clean Air Act Implementation: Hearings Before the Subcomm. on Health and the Env't of the H. Comm. on Energy and Commerce* (pt. 1), 102d Cong. (1991) [hereinafter *Clean Air Hearings*].

<sup>500</sup> See *id.* at 2 ("We asked Mr. Quayle to send a representative to today's hearing to tell the subcommittee about the council and its actions, but he refused to do so." (quoting subcommittee chairman Waxman)).

<sup>501</sup> See *id.*; see also TIEFER, *supra* note 483, at 69–70.

<sup>502</sup> *Clean Air Hearings*, *supra* note 499, at 203; see also TIEFER, *supra* note 483, at 74–76.

<sup>503</sup> See *Clean Air Act Implementation: Hearings Before the Subcomm. on Health and the Env't of the H. Comm. on Energy and Commerce* (pt. 2), 102d Cong. 2 (1992).

<sup>504</sup> *Id.*

<sup>505</sup> Dana Priest, *Competitiveness Council Under Scrutiny; Critics Charge Panel Lets Industry Exert Back-Door Influence on Implementing Laws*, WASH. POST, Nov. 26, 1991, at A19.

between the Council and outside parties] indicated Executive Branch confidentiality interests . . . [such as those that] are protected by separation of powers principles.”<sup>506</sup> He emphasized that “[r]equiring disclosure of all communications received by the Council . . . would substantially impair the ability of the President and his principal advisors to receive confidential advice from private citizens.”<sup>507</sup> With regard to communication among the Council and various regulatory agencies, Howard argued that “[r]equiring disclosure of all written communication by the Council or its staff would severely encroach upon the President’s constitutional authority to protect the confidentiality of Executive Branch deliberations.”<sup>508</sup> Notably, Howard made no reference to vice presidential power in his correspondence. The Quayle Council’s approach was summarized by Skaggs: “The Council refuses to testify before Congress. The Council refuses to provide Congress with requested information on its activities . . . . [It] won’t even answer questions submitted to it by congressional committees . . . .”<sup>509</sup>

The Senate Committee on Governmental Affairs also tried to have Quayle testify at a hearing that fall. The panel contacted the Vice President to request his appearance at an October hearing and was denied.<sup>510</sup> Chairman John Glenn discussed his efforts to get the Vice President to appear: “[W]e did invite the administration to testify today. We asked the Vice President, [and] the Council staff . . . .”<sup>511</sup> Glenn, however, realized that the Vice President would not attend.<sup>512</sup> Moreover, the chairman acknowledged the Vice President’s authority to receive advice in confidence even if he did not believe the circumstances were warranted in the case at hand, stating “I . . . believe the President and the Vice President require some protection so that advice and the development of administration policy can take place free of public scrutiny . . . . [Nonetheless,] I do not believe

<sup>506</sup> 138 CONG. REC. H8014, H8016–17 (1992) (statement of Rep. Skaggs) (quoting Letter from John L. Howard, Counsel to the Vice President, to Rep. David Skaggs (Aug. 3, 1992)).

<sup>507</sup> *Id.* at H8017.

<sup>508</sup> *Id.*

<sup>509</sup> TIEFER, *supra* note 483, at 86.

<sup>510</sup> See *Council Hearings*, *supra* note 7, at 4 (opening statement of Sen. John Glenn).

<sup>511</sup> *Id.*

<sup>512</sup> *Id.*



that either executive privilege or respect for the deliberative process should be used [in this situation]."<sup>513</sup> In this regard, Glenn seemed to echo Senator Morse's views from a quarter century earlier about the Vice President enjoying some measure of his own privilege.

Glenn tried again to get the Vice President to appear at a hearing that next month.<sup>514</sup> The head of White House legislative affairs responded to Glenn's request:

Thank you for your letter to the Vice President dated November 12 requesting that he or his designee testify before your committee tomorrow on the subject of regulatory review.

Unfortunately, due to longstanding tradition, and in accordance with the doctrine of separation of powers, neither the Vice President nor his staff will be able to testify, because they participate in the deliberative process through which Executive policy is developed.<sup>515</sup>

Again, even as the committee request was denied, no reference was made to the Vice President holding his own privilege. Senator Glenn appeared resigned to the Vice President's refusal to testify. "We asked the Vice President, the Council staff [and] Council members . . . [to appear but they] . . . declined to attend today . . . ."<sup>516</sup>

During its tenure, the Council put forward a number of proposals involving the manner in which the Food and Drug Administration ("FDA") reviewed pharmaceuticals.<sup>517</sup> As a result, a House Government Operations subcommittee looked into the Council's interaction with the FDA.<sup>518</sup> The FDA, however, declined to give the panel the information it desired.<sup>519</sup> At the behest of the Vice President's Council staff, the FDA declined to hand over certain materials.<sup>520</sup> In so doing, the FDA

<sup>513</sup> *Id.*

<sup>514</sup> *See id.* at 341.

<sup>515</sup> *Id.* (Letter from Frederick C. McClure, Assistant to the President for Legislative Affairs, to John Glenn, Chairman, Senate Comm. on Governmental Affairs (Nov. 14, 1991)).

<sup>516</sup> *Id.* at 4.

<sup>517</sup> *See* ROZELL II, *supra* note 7, at 116.

<sup>518</sup> *See id.*

<sup>519</sup> *See id.*

<sup>520</sup> *See* TIEFER, *supra* note 483, at 81–83.

cited the importance of protecting internal communications.<sup>521</sup> The subcommittee responded by subpoenaing the materials.<sup>522</sup>

In the midst of this conflict, with an eye toward the FDA potentially invoking executive privilege, the subcommittee noted that the President alone had the authority to make such an assertion.<sup>523</sup> Once the issue came to a head, the administration refused to formally invoke executive privilege and the information was provided to the committee.<sup>524</sup>

For purposes of VPP, the Quayle Council experience is notable in two ways. First, it reflects a tacit appreciation by congressional committees that they could not compel the attendance of the Vice President at their hearings. Senator Glenn himself conceded that the Vice President seemed to enjoy some measure of privilege. Second, in its dispute over access to documents, the Vice President's office made no independent assertion of privilege, relying instead on the President to determine whether such invocation was warranted.<sup>525</sup> This was done presumably because the actions taken by the Vice President were not part of his own constitutional duties.

#### K. *Al Gore*

Vice President Al Gore became embroiled in a controversy over whether he had committed violations of federal campaign finance laws. Several investigations ensued, two of which involved questions of whether the Vice President would testify in person: one inquiry was conducted by the FBI and the other undertaken by a Senate committee.<sup>526</sup>

<sup>521</sup> See ROZELL II, *supra* note 7, at 116.

<sup>522</sup> See *id.*

<sup>523</sup> See *id.*

<sup>524</sup> See *id.*; see also TIEFER, *supra* note 483, at 82.

<sup>525</sup> During the Clinton administration, a similar episode took place, although Vice President Gore was less directly involved. See Memorandum to the President from Janet Reno, Att'y Gen., U.S. Dep't of Justice, Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs With Respect to Haiti (Sept. 20, 1996) ("The Counsel to the President and the National Security Adviser recommend that you assert executive privilege with respect to . . . documents [that] . . . constitute confidential communications from NSC or State Department officials to the President or the Vice President." (emphasis added)). What stands out for purposes of this Article is that the Attorney General's memorandum to President Clinton recommended that he claim executive privilege for the documents even though some of them involved the Vice President.

<sup>526</sup> A House committee looked into the Clinton administration's campaign finance activity as well but does not appear to have pursued having Vice President

As part of its investigation into campaign finance activity, the FBI in November 1997<sup>527</sup> and in April 2000 interviewed Gore at length.<sup>528</sup> If the Vice President raised any concerns about constitutional privilege, there appears to be no public record of them. His attorney certainly did not indicate as much.<sup>529</sup>

In 1997, a special panel of the Senate Committee on Government Affairs also pursued an investigation into, among other matters, Gore's fundraising activities.<sup>530</sup> Over the course of its inquiry, the idea of Gore appearing before the committee was broached by at least two Senators on the committee, one of whom twice raised the question in public. In July 1997, Senator Arlen Specter suggested that "the Vice President ought to give consideration to coming in himself [to appear before the committee], and the President."<sup>531</sup> The White House responded to this request in ambiguous fashion: "Consistent with the doctrine of separation of powers, the White House will continue . . . to respond to requests from the committee for information necessary for it to complete its investigation."<sup>532</sup>

In September 1997, Specter again noted that "it really may well be [Gore] has to come before the committee."<sup>533</sup> He proposed that the Vice President might want to appear voluntarily: "I think Vice President Gore may be able to save his own political standing if he does that . . . [although the committee is not]

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Gore testify. See Francis X. Clines, *House Ready To Step in on Fund-Raising Cases*, N.Y. TIMES, SEP. 16, 1997, at A20.

<sup>527</sup> See John M. Broder, *Justice Dept. Investigators Question Clinton and Gore on '96 Fund-Raising*, N.Y. TIMES, Nov. 13, 1997, at A20.

<sup>528</sup> See David Johnston & Don Van Natta, Jr., *The 2000 Campaign: The Overview; an Angered Gore Defended '96 Role to Investigator*, N.Y. TIMES, June 24, 2000, at A1.

<sup>529</sup> See Broder, *supra* note 527 ("The F.B.I. asked all the questions they wanted to ask, and the Vice President answered every one of them." (quoting James Neal, Gore's attorney) (internal quotation marks omitted)). Gore, along with Clinton, also provided transcripts of his FBI interview to the House Committee on Government Reform and Oversight. See *infra* note 612 and accompanying text.

<sup>530</sup> In the interest of full disclosure, the author worked as a law clerk on the Senate committee at the time but did not work on issues directly involving the Vice President.

<sup>531</sup> Eric Schmitt, *Clinton and Gore are Urged To Testify on Fund-Raising*, N.Y. TIMES, July 7, 1997, at B8.

<sup>532</sup> *Id.*

<sup>533</sup> Thomas B. Edsall, *Senator Calls on Gore To Offer Hill Testimony; Specter Suggests Vice President Respond to "Mounting Evidence,"* WASH. POST, Sept. 8, 1997, at A4.

prepared to call Vice President Gore at this stage.”<sup>534</sup> The Vice President’s spokesperson indicated that Gore was not considering an appearance in front of the committee and had not been asked to testify.<sup>535</sup> When questioned if Gore would accept the committee’s offer if asked, the spokesperson indicated she would not speculate on the matter.<sup>536</sup>

That next month, Senator Bob Smith proved to be even more adamant than Specter, arguing that both the President and Vice President should be subpoenaed by the committee.<sup>537</sup> Smith continued, if “they say that’s a separation of powers issue, then so be it.”<sup>538</sup> The committee did not wind up calling the Vice President to testify although it did subpoena Gore’s former Chief of Staff, Jack Quinn.<sup>539</sup> Former Deputy Chief of Staff David Strauss also appeared before the panel.<sup>540</sup>

The Gore episode reinforces the notion that the Vice President may not be compelled to appear before a congressional committee. While other Vice Presidents, such as Tompkins, Calhoun, Colfax, Humphrey, and Agnew found it in their political interests to attempt to cooperate with congressional panels—and in Colfax’s case appear in person—there is little to indicate they could have been forced to testify against their will. The Gore example, like several before it, is not quite on “all fours” with regard to VPP because the question at issue did not involve the Vice President’s official duties and the committee never formally tried to compel him to appear. Nonetheless, like many of the other examples, the outcome reflects a healthy appreciation of the status of the Vice President as a constitutional officer.

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<sup>534</sup> *Id.*

<sup>535</sup> *See id.*

<sup>536</sup> *See id.*

<sup>537</sup> *See* David Johnston, *Campaign Finance: The Overview; Clinton Lawyer Is Subpoenaed on Tape Delay*, N.Y. TIMES, Oct. 8, 1997, at A1.

<sup>538</sup> *Id.*

<sup>539</sup> Quinn also testified in front of the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters. *See* RELYEA & TATELMAN, *supra* note 11, at 16–17.

<sup>540</sup> *See* Eric Schmitt, *Former Aide and Republicans Debate What Gore Knew*, N.Y. TIMES, Sept. 6, 1997, at 12.

*L. Richard B. Cheney*

It is generally accepted that Cheney was the nation's most powerful Vice President.<sup>541</sup> Therefore, it is not surprising that he became embroiled in more disputes over information than any of his predecessors.<sup>542</sup> The incidents involved: (1) two lawsuits over access to materials from an energy task force headed by Cheney; (2) an executive order that alluded to the possibility of a vice presidential privilege; (3) three congressional committee subpoenas issued to the Vice President's office; and (4) the 9/11 Commission.

<sup>541</sup> See, e.g., Nather, *supra* note 342, at 1734 ("[H]is status as the most powerful vice president in history isn't seriously debated anymore."); *supra* note 1. Prior to Cheney, Gore had generally been considered the most influential occupant of the office. See, e.g., KENGOR, *supra* note 136, at 214–15, 224.

<sup>542</sup> In addition to the conflicts discussed in this section, suit was brought against Vice President Cheney to compel his office to maintain its internal records. The litigation involved statutory interpretation of the Presidential Records Act and did not allege the withholding of information by the Vice President. Hence, a substantive discussion of the decision is outside the scope of this article. See *Citizens for Responsibility & Ethics in Wash. v. Cheney*, 593 F. Supp. 2d 194, 198–99 (D.D.C. 2009).

Cheney's staff also was involved in at least one internal, executive branch clash over information. Cheney's office and the National Archives crossed swords over whether the Vice President had to comply with an executive order purporting to give the Archives authority to review the way the Vice President's office dealt with classified materials. See Scott Shane, *Agency Is Target in Cheney Fight on Secrecy Data*, N.Y. TIMES, June 22, 2007, at A1; Letter from J. William Leonard, Dir., Info. Sec. Oversight Office, Nat'l Archives & Records Admin., to Alberto Gonzales, Att'y Gen., U.S. Dep't of Justice (Jan. 9, 2007) (on file with author); Letter from J. William Leonard, Dir., Info. Sec. Oversight Office, Nat'l Archives & Records Admin., to David S. Addington, Assistant to the President and Chief of Staff to the Vice President (Aug. 23, 2006) (on file with author); Letter from J. William Leonard, Dir., Info. Sec. Oversight Office, Nat'l Archives & Records Admin., to David S. Addington, Assistant to the President and Chief of Staff to the Vice President (June 8, 2006) (on file with author). Cheney's office refused to comply with the Archives' interpretation of the executive order that governs classified material, arguing—among other things—that the Vice President was not part of the executive branch. See Shane, *supra*.

In yet another vein, Cheney received criticism for keeping confidential his travel expenses. See Christopher Lee, *Vice President's Office Keeps Travel Expenses Under Wraps*, WASH. POST, Nov. 29, 2005, at A19.

Nonetheless, Cheney indicated his willingness to testify during the criminal trial of his former Chief of Staff, I. Lewis Libby, Jr. See David Johnston, *Defense in C.I.A. Leak Case Will Call Cheney To Testify*, N.Y. TIMES, Dec. 20, 2006, at A23. Ultimately, he did not have to appear. See Neil A. Lewis & Scott Shane, *Libby and Cheney Will Not Testify, Says the Defense*, N.Y. TIMES, Feb. 14, 2007, at A1.

1. *Walker v. Cheney*

In 2001, President Bush created the National Energy Policy Development Group ("NEPDG") to assemble data and put forward policy options regarding national energy policy.<sup>543</sup> In so doing, he delegated authority to Cheney to lead the task force.<sup>544</sup> After questions arose about meetings of the NEPDG, two strands of litigation followed. First, a pair of House members requested that GAO investigate the NEPDG, which resulted in a lawsuit.<sup>545</sup> Second, several private parties brought suit demanding similar information. Although neither suit was decided on constitutional grounds, neither of the resulting decisions repudiated the executive branch's legal position either; both were concluded in favor of Cheney as a practical matter. In this limited regard, the results of Cheney's conflicts over information do provide support for the notion of VPP since they reflect judicial deference to the asserted needs of the Vice President for confidentiality.

In its investigation of NEPDG, the GAO requested a number of documents from the Vice President's office, many of which the Vice President refused to turn over<sup>546</sup> based on arguments that smacked of executive privilege. After being rebuffed in its requests for documents by the Vice President, the GAO filed suit in federal court<sup>547</sup> to acquire some of the materials in question. In making its argument before the court, the GAO argued that the "Vice President's constitutional arguments . . . are an ill-founded proxy for an assertion of privilege that the Executive has declined to make."<sup>548</sup> GAO claimed further that Cheney's stance involved "the same language and reasoning as assertions of

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<sup>543</sup> See *Walker v. Cheney*, 230 F. Supp. 2d 51, 53–55 (D.D.C. 2002).

<sup>544</sup> See *id.* at 53, 55.

<sup>545</sup> Neither lawmaker thought that the Vice President had the authority to exercise executive privilege, believing the power to be the President's alone. See FISHER, *supra* note 6, at 187.

<sup>546</sup> President Bush himself ultimately made the decision to continue to contest the GAO's efforts to secure the documents in question. See STEPHEN F. HAYES, CHENEY: THE UNTOLD STORY OF AMERICA'S MOST POWERFUL AND CONTROVERSIAL VICE PRESIDENT 324 (2007); CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 99–100 (2007).

<sup>547</sup> David Walker was Comptroller General and the head of GAO. See *Walker*, 230 F. Supp. 2d at 53.

<sup>548</sup> *Id.* at 61.

Executive Privilege.”<sup>549</sup> Professor Rozell agreed with GAO when he described the Vice President's position as an

exercise of a form of executive privilege by a sitting vice president, even though the common standard for years has been that presidents alone have the authority to either assert executive privilege or direct an administration official to do so. Although Cheney did not use the words *executive privilege* in refusing access to information, he used legal language and justifications identical to an actual claim of executive privilege.<sup>550</sup>

The administration, countered that an “intent to allow suit against a unique constitutional officer should not be lightly inferred.”<sup>551</sup> It elaborated by contending that the “President and Vice President are constitutionally created officials with unique statuses, responsibilities, and positions in our constitutional structure.”<sup>552</sup> In this way, the administration seemed to blend the offices and powers of the President and the Vice President together, focusing more on the status of the Vice President than his actual constitutional authority. Yet, the administration and Cheney stopped short of claiming executive privilege or a vice presidential privilege outright.<sup>553</sup>

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<sup>549</sup> Mark J. Rozell, *Executive Privilege in the Bush Administration*, in CONSIDERING THE BUSH PRESIDENCY 125, 131 & n.35 (Gary L. Gregg II & Mark J. Rozell eds., 2004) [hereinafter Gregg II & Rozell] (quoting Letter from David M. Walker, Comptroller Gen. of the U.S., U.S. Gen. Accounting Office, to J. Dennis Hastert, Speaker of the House of Representatives (Aug. 17, 2001) (internal quotation marks omitted)); see also Eric Weiner, *What Is Executive Privilege, Anyway?*, NPR, June 22, 2007, <http://www.npr.org/templates/story/story.php?storyId=11527747> (“[T]he Bush Administration invoked the spirit, if the not [sic] letter, of executive privilege when it argued that Vice President Dick Cheney need not disclose what was discussed during his Taskforce on Energy meetings.”).

<sup>550</sup> ROZELL II, *supra* note 7. For similar commentary on the administration's legal posture in this respect, see MONTGOMERY, *supra* note 143, at 75 (observing that in the GAO litigation, “the White House carefully refrained from invoking a claim of executive privilege in the case, its lawyers contended that Cheney was covered under the same executive privilege as the president. This assertion was a highly questionable, if not revealing, supposition since the Constitution does not vest executive authority in the vice president, but rather relegates his office to legislative matters.”); see also *id.* at 84.

<sup>551</sup> Defendant's Memorandum of Points and Authorities in Reply to Plaintiff's Opposition to Motion To Dismiss at 13, *Walker*, 230 F. Supp. 2d 51 (No. 1:02cv340JDB) [hereinafter *Cheney GAO Brief*].

<sup>552</sup> *Id.*

<sup>553</sup> See generally *id.*

The U.S. District Court for the District of Columbia dismissed the GAO's suit for lack of standing and the GAO declined to appeal. Relying heavily on *Raines v. Byrd*,<sup>554</sup> the court through Judge John Bates concluded that Congress had not fully exercised its own powers in trying to acquire the disputed materials.<sup>555</sup> The court placed emphasis on the fact that not a single committee had asserted its need for the information, let alone both houses of Congress.<sup>556</sup> The court, therefore, did not believe it needed to reach the constitutional or statutory merits of the dispute.<sup>557</sup> Interestingly, Judge Bates did make an allusion to the President and Vice President being somewhat interchangeable, seeming to accept in some measure the executive branch's formulation of the two offices.<sup>558</sup> Judge Bates wrote that "no court has ever before granted [what is sought here] . . . an order that the President (or Vice President) must produce information to Congress."<sup>559</sup> The parenthetical reference to the Vice President could be read to imply that his and the President's respective powers in this realm are closely related and perhaps coextensive.

That language would not prove anomalous as it would be echoed later in *Committee on the Judiciary v. Miers*, involving whether White House aides could be compelled to appear before a congressional committee.<sup>560</sup> It would appear again to a lesser extent in *Citizens for Responsibility & Ethics in Washington v.*

<sup>554</sup> 521 U.S. 811 (1997).

<sup>555</sup> See *Walker*, 230 F. Supp. 2d at 63–65, 68.

<sup>556</sup> See *id.* at 68.

<sup>557</sup> See *id.* at 74–75.

<sup>558</sup> Judicial precedent involving the Freedom of Information Act ("FOIA") has also treated the Vice President like the President. See *Schwartz v. U.S. Dep't of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) ("Offices within the White House whose functions are limited to advising and assisting the President do not come within the definition of an 'agency' within the meaning of FOIA or the Privacy Act. This includes the Office of the President (and by analogy the Office of the Vice President) and undoubtedly the President and Vice President themselves.").

<sup>559</sup> *Walker*, 230 F. Supp. 2d at 53; see also *id.* at 74–75 (stating that the decision's outcome "may seem overly protective of the Vice President, and hence of the Executive Branch").

<sup>560</sup> See 558 F. Supp. 2d 53 (D.D.C. 2008). The court concluded that White House staff must respond to the committee subpoena; however, it qualified its holding. See *id.* at 55, 99. Speaking again through Judge Bates, the court cautioned that it "has no occasion to address whether the President can be subject to compelled congressional process. Similarly there is no need to address here whether the Vice President could be subject to compelled congressional process." *Id.* at 106.



*U.S. Department of Justice*<sup>561</sup> and *Citizens for Responsibility & Ethics in Washington v. Department of Homeland Security*.<sup>562</sup> Dicta in each of these opinions treat the President and Vice President in similar fashion, thus reaffirming the structural reasoning undergirding VPP. If the President and Vice President are on the same constitutional plane, then it would make sense for the Vice President to enjoy his own constitutional privilege when carrying out his own constitutional powers.

Though not decided on the merits, as a practical matter, the Vice President “won” and the GAO and Congress “lost” the case.<sup>563</sup> The result of the decision, if not the legal holding, was that the Vice President was permitted to withhold the documents from the GAO and preserve the President’s and his confidentiality. Moreover, the court tacitly embraced the executive branch’s assertions that vice presidential authority is somewhat analogous to that of the President in the context of withholding information. Thus, the overall thrust of the decision—when coupled with its practical result—lends a fair measure of support for the notion of VPP. Such support, of course, should not be overstated because the facts of the case did not entail the Vice President exercising his own constitutional power, but delegated presidential authority—not unlike earlier examples involving Vice Presidents Wallace, Humphrey, Rockefeller, and Quayle. Thus, the case’s bearing on the Vice President’s constitutional authority to withhold documents is not entirely on point.

<sup>561</sup> See 658 F. Supp. 2d 217, 238 (D.D.C. 2009) (regarding whether Vice President Cheney’s interview with the FBI in the Valerie Plame Wilson matter constituted a waiver of privilege, the court wrote that “Vice President Cheney’s statements [to the FBI] qualified as an inter-agency disclosure, *his* failure to formally invoke any executive privileges did not preclude the White House’s future reliance on those privileges.” (emphasis added)).

<sup>562</sup> See 532 F.3d 860, 866 (D.C. Cir. 2008) (“Moreover, a profound difference exists between subpoenas and discovery requests in civil or criminal cases against the President or Vice President and routine FOIA cases involving records that may or may not touch on presidential or vice presidential activities.”).

<sup>563</sup> See, e.g., DUBOSE & BERNSTEIN, *supra* note 338, at 14 (concluding that *Walker v. Cheney* “was a decisive win for the vice president. He never revealed his list of contacts, and his constitutional power was expanded.”); MONTGOMERY, *supra* note 143, at 86 (concluding that the GAO decision “marked a significant legal triumph for the Bush White House”).

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

In *Cheney v. U.S. District Court*, a number of private litigants sued for access to many of the same materials as the GAO.<sup>564</sup> Unlike the GAO litigation, which did not proceed beyond the district court level, *Cheney* was decided by the Supreme Court.

In this case, the federal trial court issued discovery orders to the Vice President instructing him to turn over materials related to the NEPDG.<sup>565</sup> The question before the Supreme Court was to what extent a federal appeals court may, through a “writ of mandamus . . . modify or dissolve the orders when . . . enforcement might . . . impinge upon the *President’s* constitutional prerogatives.”<sup>566</sup> At another juncture, the Court emphasized its concern not to “impinge upon the *President’s* constitutional prerogatives.”<sup>567</sup> Notably, there is no mention in the opinion of the Vice President’s constitutional powers. In fact, during oral argument, Solicitor General Ted Olson was quick to point out that the authority at issue was in fact the President’s alone.<sup>568</sup>

The Supreme Court held in favor of the Bush administration. Although not a success regarding the Vice President’s constitutional powers per se, the decision was a victory nonetheless in that again Cheney, as the President’s proxy, did not have to surrender the information in question, once more preserving the President’s and Vice President’s confidentiality.<sup>569</sup>

<sup>564</sup> 542 U.S. 367 (2004).

<sup>565</sup> *See id.* at 372.

<sup>566</sup> *Id.* at 372–73 (emphasis added).

<sup>567</sup> *Id.* at 373 (emphasis added).

<sup>568</sup> *See* Transcript of Oral Argument at 2, *Cheney*, 542 U.S. 367 (No. 03-472) (“[T]he Vice President is acting as the subordinate and surrogate for the President here. This is the President’s authority.” (quoting Solicitor General Olson)); *see also Cheney Supreme Court Brief*, *supra* note 27, at 44 (“[T]he President is in many respects the real party in interest.”); *cf. id.* at 43 (“[I]t serves no purpose to require the President or Vice President to assert privilege claims before permitting an interlocutory appeal.” (emphasis added)). Nonetheless, the government did emphasize the status of the Vice President. *See id.* at 38–39 (“The decisions below impose intrusive and distracting discovery obligations on the Vice President himself.” (emphasis added)).

<sup>569</sup> *See, e.g.,* Shannen W. Coffin, *An Examination of Cheney v. U.S. District Court—A Win for Executive Authority*, FEDERALIST SOCIETY WHITE PAPERS, June 2004, <http://fedsoc.server326.com/Publications/White%20Papers/ch Cheney.pdf> (contending that “the decision of the Supreme Court . . . is a major victory for the Executive”).

It merits mention that Sierra Club, one of the chief litigants seeking the NEPDG documents, conceded in its brief before the Supreme Court that significant hurdles stood in the way of deposing the Vice President himself in a civil suit. The group acknowledged that “the Vice President . . . could not be deposed, either as a party or as a third party witness, unless respondents made a substantial showing of need to the district court.”<sup>570</sup> The Court itself also recognized the Vice President’s unique status, reasoning that “[w]here the Vice President not a party in the case, the argument that the Court of Appeals [erred] . . . might present different considerations.”<sup>571</sup> Quoting the Court’s immunity decision in *Nixon v. Fitzgerald*, it reasoned that Cheney’s “‘constitutional responsibilities and status [were] . . . factors counseling judicial deference and restraint.’”<sup>572</sup> Adoption of the “constitutional responsibilities” language by the Court seemed once again to hearken back to *Nixon*’s embrace of the “enumerated powers” formula.

At other junctures, the decision seemed to eliminate any distinction between the President and Vice President, not unlike the district court’s treatment of the two offices in *Walker v. Cheney*.<sup>573</sup> For instance, the Court stated that “separation-of-

<sup>570</sup> Brief of Respondent Sierra Club at 39, *Cheney*, 542 U.S. 364 (No. 03-475).

<sup>571</sup> *Cheney*, 542 U.S. at 381; *cf. id.* at 385 (“This is not a routine discovery dispute. The discovery requests are directed to the Vice President and other senior Government officials . . .”).

<sup>572</sup> *Id.* at 385 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)); Myers, *supra* note 45, at 910.

<sup>573</sup> See Amar, *supra* note 7 (“The *Cheney* Court repeatedly and reflexively lumps the vice presidency together with the presidency, and talks as if executive privilege concepts necessarily play out identically for both offices.”); Myers, *supra* note 45, at 911 (“By explicitly linking the President and Vice President and suggesting that the involvement of either office in the lawsuit raised similar separation of powers questions, the Court . . . demonstrated its willingness to view the two offices in similar terms.”); *see also* Klarevas, *supra* note 7.

In public discourse, Vice President Cheney often blended the two offices himself. Regarding the outcome of the GAO litigation, Cheney stated that “I think it restored some of the legitimate authority of the executive branch, the president *and* the vice president, to be able to conduct *their* business.” Keith Koffler, *Cheney’s Words Show He Counts Self Part of Government’s Executive Branch*, CONGRESS DAILY, June 29, 2007 (emphasis added); *see* SAVAGE, *supra* note 546, at 100 (“What’s at stake here is whether a member of Congress can demand that I give him notes of all my meetings and a list of everybody I met with. We don’t think that he has that authority.” (quoting Vice President Cheney) (emphasis added) (internal quotation marks omitted)); Shane Harris, *Legacy of Strength, or Weakness?*, NAT’L J., Jan. 28, 2008, at 34, available at <http://news.nationaljournal.com/articles/bush/legacy.htm> (“The president is bound and determined to defend those principles and to pass on this

powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President."<sup>574</sup> Elsewhere, the Court commented that

[t]he discovery requests are directed to the Vice President . . . .  
The Executive Branch, *at its highest level*, is seeking the aid of

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office, *his and mine*, to future generations in better shape than *we* found it." (quoting Vice President Cheney) (emphasis added) (internal quotation marks omitted)); Bruce P. Montgomery, *Congressional Oversight: Vice President Richard B. Cheney's Executive Branch Triumph*, 120 POL. SCI. Q. 581, 592 (2006) ("[The issue] at stake here is the ability of the president and vice president to solicit advice from anybody they want in confidence . . . without having to make it available to a member of Congress." (quoting Vice President Cheney) (internal quotation marks omitted)).

What I object to . . . and what the president's [sic] objected to, and what we've told the GAO we don't do, is make it impossible for me or future vice presidents to ever have a conversation in confidence with anybody without having, ultimately, to tell a member of Congress what we talked about and what was said. You just cannot accept that proposition without putting a chill over the ability of the president and the vice president to receive unvarnished advice.

DUBOSE & BERNSTEIN, *supra* note 338, at 12 (quoting Vice President Cheney) (internal quotation marks omitted).

The important thing here, Campbell, to understand is what we're focused on are those things that relate to my role as Vice President; that as Vice President I'm the constitutional officer provided for in the Constitution. And the General Accounting Office has authority over statutory agencies, but not over constitutional officers. That's not the way their statute is set up. And that it's important here to protect the ability of the President and the Vice President to get unvarnished advice from any source we want.

. . . .

You have an obligation, I believe, in these offices to defend the office against the unlawful or unconstitutional or unreasonable encroachment by the other branches of government. The way the Constitution is set up specifically provides for separation of powers. And to create a precedent where future vice presidents, for example, would be in a situation where anytime they meet with somebody, they have to call Henry Waxman and tell them who they met with, what the subject was that was discussed, giving him notes of the meetings that were taken—now, the Congressman does not have the constitutional right to insist that the President or the Vice President provide him with that information, any more than I can demand of the Congressman, look, you've got to tell me everybody you talked to before you cast that vote. That's silly. That's not the way the government works.

Interview by Campbell Brown with Richard B. Cheney, 46th Vice President of the United States, in Wash., D.C. (Jan. 28, 2002), *available at* <http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20020128.html>. President Bush at times did the same. *See* MONTGOMERY, *supra* note 143, at 77 ("[W]hen the GAO overstepped its bounds to try to get advice given to *the vice president* and me, *we* resisted." (emphasis added) (quoting President Bush) (internal quotation marks omitted)).

<sup>574</sup> *Cheney*, 542 U.S. at 382.

the courts to protect its constitutional prerogatives. As we have already noted, special considerations control when the Executive Branch's interests in maintaining the autonomy of *its* office and safeguarding the confidentiality of *its* communications are implicated.<sup>575</sup>

In yet another part of the opinion, the majority noted "that all courts should be mindful of the burdens imposed on the Executive Branch in any future proceedings. Special considerations applicable to the President and the Vice President suggest" the need for judicial awareness of these concerns.<sup>576</sup>

The Court's equation of the Vice President with the President clearly underscores the structural argument that is a central feature of VPP. If the President lawfully may exercise a constitutional privilege, and if the Vice President should be treated the same as the President as the Supreme Court repeatedly implies—in the context of withholding documents no less—then it stands to reason that the Vice President should benefit from his own constitutional privilege. That is certainly more logical than the other potential corollary, which is that if the President and Vice President are conjoined, then the Vice President should be able to exercise a constitutional privilege that is automatically part of the President's authority.<sup>577</sup>

While not deciding any constitutional questions, *Cheney* left behind notable dicta that recognized the constitutional importance of the Vice President and at the same time protected his asserted confidentiality interests. In the context of nondisclosure of documents, this judicial acknowledgement of the Vice President's constitutional role supports the existence of VPP. Thus, the undeniable tenor of the decision, if not its exact holding, favors the Vice President possessing authority to shield materials and communications from outside parties.

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<sup>575</sup> *Id.* at 385 (emphasis added).

<sup>576</sup> *Id.* at 391–92. In ruling in favor of the Vice President, the Court justified its decision in part by citing case law involving questions of *presidential* civil immunity. See *id.* at 385–86, 388 (quoting *Clinton v. Jones*, 520 U.S. 681 (1997) and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)); Myers, *supra* note 45, at 910–11 (discussing the Court's expansion of the case law on presidential civil immunity to include the Vice President).

<sup>577</sup> This argument will be examined and dismissed below. See *infra* Part VII.B.

### 3. Executive Order 13,233 Regarding Presidential and Vice Presidential Records

On November 1, 2001, the Bush administration issued Executive Order No. 13,233.<sup>578</sup> This directive, which addressed implementation of the Presidential Records Act,<sup>579</sup> referred at some length to privileges held by sitting Presidents and former Presidents. Included among these privileges was that of executive privilege. The order stated that it “shall also apply with respect to any such records that are subject to any *constitutionally based* privilege that the former Vice President may be entitled to invoke . . . references in this order to a former President shall be deemed also to be references to the relevant former Vice President.”<sup>580</sup> It appeared to qualify that authorization, however, by declining to permit a Vice President or a former Vice President to assert “any constitutional privilege of a President or former President except as authorized by that President or former President.”<sup>581</sup>

During a hearing on the executive order before the House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, Professor Peter Shane discussed this aspect of the executive order. Shane, one of the leading authorities on separation of powers, expressed skepticism about the rule:

[The order states that] the Vice President shall be treated as the President. And if I may ask rhetorically, why in heaven's name would that be?

The Vice President's privileges, such as they are, could only be part and parcel of the privilege that protects the Presidency. I don't read into the Constitution—I know of no authority that suggests there's independent executive privilege to protect the Office of the Vice Presidency. As a Presidential advisor, Vice Presidents are undoubtedly protected in their communications

<sup>578</sup> Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 1, 2001), *revoked by* Exec. Order No. 13,489, 74 Fed. Reg. 4669 (Jan. 21, 2009) [hereinafter Executive Order]. At least one other executive order provided Vice President Cheney with enhanced authority in the area of information control: the power to declassify documents. *See* Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003), *revoked by* Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009). For discussion, see Byron York, *The Little-Noticed Order that Gave Dick Cheney New Power*, NAT'L REV. ONLINE, Feb. 16, 2006, <http://www.nationalreview.com/york/york200602160841.asp>.

<sup>579</sup> *See* 44 U.S.C. §§ 2201–07 (2006).

<sup>580</sup> Executive Order, *supra* note 578, § 11(a) (emphasis added).

<sup>581</sup> *Id.* § 11(b); *see also* SHANE, *supra* note 323, at 131.

in order to protect the Presidency, but I would imagine that huge quantities of what Vice Presidents read and deliberate upon are no more protected by executive privilege than, say, the records of the Federal Energy Regulatory Commission . . . .

. . . .

Constitutionally, my intuition is—and I use the word “intuition” because there’s not a lot of law on this subject, but my intuition is that only a President can assert executive privilege.<sup>582</sup>

Although the subcommittee did not devote significant attention to the specific question of whether the Vice President enjoyed his own privilege, Shane’s doubt as to the constitutional privilege alluded to in the order seemed to be shared by some committee members and other witnesses at the hearing.<sup>583</sup> In particular, the view that the President and Vice President should be treated the same with respect to executive privilege was challenged with some vigor. This concern was warranted since the order appeared to be based on a muddled concept of vice presidential *executive* privilege rather than a constitutional privilege belonging entirely to the Vice President. This represents a crucial internal flaw with the order. It seemed to allow for a vice presidential privilege subject to the President’s approval. A true constitutional privilege for the Vice President would need to be exercised independently from the President. In fact, if a Vice President has recourse to his own constitutional privilege, he would need to prevail over the President in case of a conflict or in effect the privilege would not be his own.

The committee subsequently marked up legislation to overturn the executive order,<sup>584</sup> including a provision taking aim

<sup>582</sup> *PRA Hearing*, *supra* note 7, at 105. The administration contended that the order did not break any new ground as to privileges. See Mike Allen & George Lardner Jr., *A Veto over Presidential Papers; Order Lets Sitting or Former President Block Release*, WASH. POST, Nov. 2, 2001, at A1 (quoting the White House Counsel: the directive “simply implemented an orderly process to deal with this information” (internal quotation marks omitted)).

<sup>583</sup> See *PRA Hearing*, *supra* note 7, at 396 (“President Bush’s Executive order even appears to establish a process for extending executive privilege to former Vice Presidents . . . . No court has ever recognized such a right for Vice Presidents.” (statement of Rep. Waxman)); see also *id.* at 449 (statement of Morton Rosenberg).

<sup>584</sup> See H.R. 4187, 107th Cong. (2002). H.R. 1255 in the 110th Congress reflected a similar attempt to rescind the executive order. See H.R. REP. NO. 110-44, at 4–5 (2007) (“[T]he bill clarifies that the incumbent and former presidents must make privilege claims personally. The bill would make clear that the right to claim executive privilege is personal to current and former presidents and cannot be bequeathed to assistants, relatives, or descendants. And finally, the bill . . . restores

specifically at the vice presidential provision. The bill purported to “clarif[y] that authority to claim executive privilege is personal to a former or incumbent President and cannot be delegated to their representatives . . . . [It] clarifies that a former or incumbent Vice President cannot claim presidential privileges . . . . [T]hese provisions are consistent with current theory and practice concerning executive privilege.”<sup>585</sup>

The bill, however, was never enacted. Moreover, the drafters of the legislation seemed trapped in the same preconception that whatever “constitutionally based privilege” the Vice President might invoke must be executive privilege.

While the executive order rightly noted the possibility of a constitutional privilege for the Vice President, the rationale behind it was confused. Moreover, the privilege was never asserted under the directive. It merely laid down a marker for future invocation.<sup>586</sup> The directive seemed to build in part on the holding of *Nixon II*, which recognized a privilege for former Presidents. As it did in the two lawsuits involving efforts to claim documents from Vice President Cheney, the executive order appeared to treat the President and Vice President in a similar fashion.<sup>587</sup> To that end the executive order reaffirmed the structural argument made in this Article. In early 2009, however, the issue was rendered moot when the Obama

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the long-standing understanding that the right to assert executive privilege over presidential records is a right held *only* by presidents.” (emphasis added)).

<sup>585</sup> H.R. REP. NO. 107-790, at 10 (2002). The committee’s bill was not inconsistent with VPP. It will be recalled that VPP is not a presidential privilege or executive privilege but one rooted in the Vice President’s own constitutional powers.

<sup>586</sup> In litigation over the order, a federal court noted without comment that these provisions had yet to be exercised. *See* Am. Historical Ass’n v. Nat’l Archives & Records Admin., 516 F. Supp. 2d 90, 104 (D.D.C. 2007). In this court challenge to the executive order, plaintiffs questioned the constitutionality of a vice presidential constitutional privilege as alluded to in the order. *See id.* at 99 (noting the argument that “there is no constitutional basis for a vice presidential executive privilege”). The court declined the opportunity to discuss the constitutional question and decided the case on statutory grounds. *See id.* at 107 n.11 (“[T]he Court need not reach the question of whether assertion of privilege by representatives of former presidents or former vice presidents is a constitutionally-based privilege . . . .”); *id.* at 110 (“[T]he Court shall assume without deciding that a former president . . . and a former vice president have some authority to invoke executive privilege.”). It is perhaps worth noting that the concept of a vice presidential privilege was not dismissed out of hand by the court.

<sup>587</sup> *See infra* Part VII.B for discussion on this topic.



administration repealed the order, presumably reflecting skepticism of the vice presidential provision, among others.<sup>588</sup>

#### 4. Senate Judiciary Committee Subpoena Issued to the Vice President

In an attempt to gain information about the Bush administration's warrantless electronic surveillance program, the Senate Judiciary Committee issued a subpoena *duces tecum* to the Vice President's office on June 27, 2007.<sup>589</sup> The Vice President's office responded to the Judiciary Committee on August 20, 2007. In its letter, the Vice President's counsel wrote,

[t]he Office of the Vice President reserves all legal privileges applicable to the vice presidency, such as the attorney-client privilege and the deliberative process privilege.

....

In the performance of executive functions in support of the President, the Vice President respects the legal privileges afforded by the Constitution to the presidency, such as the Executive Privilege protecting among other things national security secrets and policy deliberations. Similarly, in the performance of legislative functions, the Vice President respects the legal privileges afforded by the Constitution to the Senate, such as preservation of the confidentiality of a session of the Senate with closed doors over which a Vice President may preside.

....

[The Vice President does not interpret the subpoena to involve records created] in the performance of his legislative functions.<sup>590</sup>

Notably, the letter does not formally assert that the Vice President has his own constitutional privilege. It actually seems to abjure such a power, observing that the Vice President respects both executive privilege as "afforded by the Constitution to the presidency" and legislative privileges "afforded by the

<sup>588</sup> See Exec. Order No. 13,489, 74 Fed. Reg. 4669 (Jan. 21, 2009). The 2001 order was controversial for a host of reasons unrelated to the vice presidency. See generally Rosenberg Statement, *supra* note 7.

<sup>589</sup> An attempt to have the Senate Committee on Homeland Security and Government Affairs issue a subpoena to Vice President Cheney was undertaken, but without success. See Alexander Bolton, *For Collins, Forgiveness May Be Tough*, THE HILL, Nov. 24, 2008, <http://thehill.com/homenews/news/17169-for-collins-forgiveness-may-be-tough>.

<sup>590</sup> See August 20, 2007 Letter, *supra* note 13.

Constitution to the Senate.”<sup>591</sup> Thus, a constitutional presidential privilege and a Senate privilege are recognized but not VPP. In this vein, the letter only comments that the Vice President may benefit from the deliberative process privilege. That, of course, is a common-law privilege involving communication for the benefit of the President; it is not a constitutional privilege tied to the Vice President’s unique powers.

The end result was that the White House appeared to ignore the subpoenas, and the Senate did not pursue contempt proceedings against the Vice President or his staff.<sup>592</sup>

#### 5. House Judiciary Committee Subpoena Issued to Vice President Cheney’s Chief of Staff

In April 2008, Vice President Cheney’s office and the House Judiciary Committee became embroiled in a controversy over whether Cheney’s Chief of Staff, David Addington, should appear before the panel to testify as to his role in the formulation of the Bush administration’s legal policy during the War on Terror.<sup>593</sup> In a letter dated April 18, 2008, the counsel to the Vice President argued against Addington having to appear before the body. In the letter, the Vice President’s office made three assertions that have some bearing on VPP. First, unlike the communication the year before to the Senate Judiciary Committee, this letter could be read to imply a vice presidential privilege:

[S]eparate from any question of immunity from testimony [are] . . . questions of privilege [that] may arise with respect to information sought by questions, such as with respect to privileges protecting state secrets, attorney-client communications, deliberations, and communications *among Presidents, Vice Presidents, and their advisers . . . .* [A] principal function of [the Chief of Staff to the Vice

<sup>591</sup> *Id.*

<sup>592</sup> See Elana Schor, *White House Lets Leahy’s Deadline Pass*, THE HILL, Aug. 20, 2007, <http://thehill.com/homenews/news/12845-white-house-lets-leahys-deadline-pass>.

<sup>593</sup> See, e.g., Keith Perine, *House Judiciary Asks Former Administration Advisors To Testify on Torture*, CQ TODAY, May 6, 2008, <http://www.cqpolitics.com/wmspage.cfm?docID=news-000002717900>.

*President] . . . is engaging in privileged communications, such as the giving of privileged advice.*<sup>594</sup>

It is unclear from the letter whether the privilege alluded to involves the Vice President *himself* enjoying a constitutional privilege or merely that his conversations with his Chief of Staff are covered by the *President's* communications privilege since the Vice President provides confidential advice to the President. If the Vice President's office meant to include only the latter, the correspondence needed only to state that "deliberations, and communications among Presidents and their advisers" are protected. Inclusion of "Vice Presidents" in that phrase would seem redundant since Vice Presidents would almost certainly be categorized as presidential advisers<sup>595</sup> and covered by presidential communications privilege. Inclusion of "Vice Presidents" in that passage of the letter could, therefore, be read to reflect subtle advocacy of a constitutional vice presidential privilege.

Second, the Vice President's counsel asserted the independence of the Vice President's staff from that of the President. She noted that the "Chief of Staff to the Vice President is an employee of the Vice President, and not the President, and therefore is not in a position to speak on behalf of the President."<sup>596</sup> This assertion properly reflects the constitutional independence of the Vice President.<sup>597</sup> Moreover, taken together with the aforementioned reference to privilege, the letter would seem to reinforce that Cheney's office was advocating that the Vice President holds his own privilege. If "a principal function" of the Vice President's Chief of Staff is to engage in privileged communication and if the "Chief of Staff to the Vice President is an employee of the Vice President, and not the President," then it would seem to follow that the Chief of

<sup>594</sup> *April 18, 2008 Letter*, *supra* note 13, at 2 (emphasis added). The Vice President's office also questioned the authority of Congress to investigate the Vice President since "Congress lacks the constitutional power to regulate by a law what a Vice President communicates in the performance of the Vice President's official duties, or what a Vice President recommends that a President communicate in the President's performance of official duties." *Id.* at 1.

<sup>595</sup> See *Schwartz v. U.S. Dep't of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000); Executive Order, *supra* note 578, § 11(b); LIGHT, *supra* note 306, at 1 (contending that "Vice-Presidents have finally joined that small group of White House aides who act as senior advisers to the President").

<sup>596</sup> *April 18, 2008 Letter*, *supra* note 13, at 1.

<sup>597</sup> See *infra* notes 652–97 and accompanying text.

Staff's advice is privileged *because* that communication is itself given to the Chief of Staff's employer, the Vice President, a constitutional officer who is not legally answerable to the President.<sup>598</sup>

Finally, the letter separates the Vice President's role in the Senate from that of the executive branch. The letter notes that an "inquiry by a House Committee concerning the Senate functions of the Vice President would not, in any event, be appropriate."<sup>599</sup> While not asserting privilege outright with respect to the House committee, this reference seems to lay down a marker for future invocation of VPP if a House request were ever made for Senate-related documents involving the Vice President.

The House Judiciary Committee responded to the April 18 letter first with a letter of its own dated April 28<sup>600</sup> and a few days later with a subpoena *ad testificum*.<sup>601</sup> In the committee's letter, the chairman challenged some of the assertions made in the Vice President's correspondence but avoided the privilege

<sup>598</sup> An alternate reading could be that the Chief of Staff's advice to the Vice President is privileged because the Vice President's advice to the President is protected; such presidential conversations are privileged even if they are with the constitutionally independent Vice President. This interpretation seems somewhat less likely given the emphasis placed on to whom the Chief of Staff is answerable, the manner in which the Vice President is mentioned in the letter and the fact the Vice President is not removable by the President.

<sup>599</sup> *April 18, 2008 Letter*, *supra* note 13, at 2. Presumably the Constitution's grant of rulemaking authority to each house would prevent the respective chambers from compelling the production of documents from each other. For example, if the Senate conducted business in secret session pursuant to Senate rule, it would seem that a House investigation could not compel the Senate to produce the materials if the upper chamber resisted. Similarly, it would appear unlikely that one body could compel materials from the other if those documents fell within the latter chamber's exclusive constitutional responsibilities. For instance, it would appear doubtful that the Senate could investigate and compel material from a House impeachment inquiry since the House has the exclusive authority to impeach officials. Similarly, it is questionable whether a House investigation could compel material from the Senate as it involves the Senate's advice and consent function in considering executive branch or judicial nominations. *See supra* notes 402–03 (noting the House Rules Committee members' concern about a House committee investigating the President of the Senate); *cf.* Hooper, *supra* note 13 (quoting Rep. Young). *But cf.* 3 HINDS', *supra* note 13, § 2665, at 1115–16.

<sup>600</sup> *See* Letter from John Conyers, Jr., Chairman of the House Comm. on the Judiciary, to David S. Addington, Chief of Staff to the Vice President (Apr. 28, 2008) [hereinafter *April 28, 2008 Letter*].

<sup>601</sup> *See* Letter and Subpoena from John Conyers, Jr., Chairman of the House Comm. on the Judiciary, to David S. Addington, Chief of Staff to the Vice President (May 7, 2008).

question. The Committee noted that “many relevant questions exist that do not implicate executive privilege.”<sup>602</sup> The letter focused instead on the closely related question of immunity. Chairman Conyers noted that:

Vice Presidential staff have previously testified before Congress and I am aware of no authority—and counsel’s letter cites none—for the proposition that such staff could be immune from testimony before Congress. While the issue of the immunity of senior advisors to the President is currently under litigation, there has been no suggestion that such immunity, even if recognized, would reach to the Vice President’s office, an entity that, as you well know, is constitutionally quite different from the Office of the President.<sup>603</sup>

Similarly, Conyers dismissed as a canard the assertion made about the Vice President’s Senate duties. He stated that “concern that ‘inquiry by a House Committee concerning the Senate functions of the Vice President would not, in any event, be appropriate’ seems especially out of place given the subject matter of the proposed hearing and the nature of the invitation to you.”<sup>604</sup> Thus, if the committee read the Vice President’s letter as advocating a constitutional privilege, it chose to ignore it. Instead, the committee focused on how the Vice President is constitutionally distinct from the President with regard to the related issue of immunity and whether Cheney’s staff could appear before the committee.

At the end of the day, in response to the subpoena, the Vice President’s office agreed that Addington could appear before the committee subject to certain stipulations. These included that “the Committee does not seek information relating to Vice Presidential communications or to Vice Presidential recommendations to the President,”<sup>605</sup> that “the Committee does

<sup>602</sup> See *April 28, 2008 Letter*, *supra* note 600, at 4.

<sup>603</sup> *Id.* As noted by Conyers, vice presidential staff members have testified before committees of Congress on several occasions. For example, Vice President Bush had several aides testify before the Iran-Contra Committee. See *supra* notes 484–85 and accompanying text. Vice President Gore’s former Chief of Staff and former Deputy Chief of Staff both testified before a Senate investigative committee. See *supra* notes 539–40 and accompanying text. Finally, Gore’s Chief of Staff appeared before a Senate panel looking into the Whitewater matter and Vice President Wallace’s BEW staff testified at several hearings. See *supra* notes 389–95 and 539.

<sup>604</sup> *April 28, 2008 Letter*, *supra* note 600, at 4 n.11.

<sup>605</sup> Letter from Kathryn L. Wheelbarger, Counsel to the Vice President, to Perry Appelbaum, Chief of Staff and Counsel, Comm. on the Judiciary 1 (May 1, 2008).

not seek information relating to the Senate functions of the Vice Presidency . . . [, and that] applicable legal privileges may be invoked in response to questions.”<sup>606</sup> Again, the separate references to “Vice Presidential communications” and “Vice Presidential recommendations to the President” seem to reflect the Cheney office’s awareness that communications made to the Vice President himself as an independent constitutional officer might themselves be privileged, not merely communications from the Vice President to the President. The latter’s use of the disjunctive “or” to separate “Vice Presidential communications” and “Vice Presidential recommendations to the President” seems to bear this out.

The Vice President’s counsel was also careful to note that

[t]he Office of the Vice President remains of the view that the courts, to protect the institution of the Vice Presidency under the Constitution from encroachment by committees of Congress, would recognize that a chief of staff or counsel to the Vice President is immune from compulsion to appear before committees of Congress to testify concerning official duties performed for the Vice President.<sup>607</sup>

Yet again, Cheney’s counsel asserted concern over the vice presidency being undermined by the committee’s actions. Clearly, the Vice President’s counsel viewed the vice presidency as a separate institution with equities distinct from those of the President. Despite these concerns, Addington appeared before the committee on June 26, 2008.<sup>608</sup>

## 6. The Valerie Plame Wilson Matter

Valerie Plame Wilson was a Central Intelligence Agency officer whose identity was leaked to the press. The ensuing investigation over the circumstances involving the disclosure of her identity was conducted by a DOJ special counsel. During this inquiry, Vice President Cheney was questioned under oath.<sup>609</sup> Cheney did not seem to oppose his being questioned by

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<sup>606</sup> *Id.* at 2.

<sup>607</sup> *Id.* at 1–2.

<sup>608</sup> See Dan Eggen, *Bush Policy Authors Defend Their Actions*, WASH. POST, June 27, 2008, at A2; Dana Milbank, *When Anonymity Fails, Be Nasty, Brutish and Short*, WASH. POST, June 27, 2008, at A3.

<sup>609</sup> See ROTUNDA & NOWAK, *supra* note 45, at 945 n.25.

the FBI.<sup>610</sup> His agreeing to this interview was in keeping with *Nixon I*, which held that broad claims of executive privilege must defer to the particularized need of the criminal justice process.<sup>611</sup>

The fallout from this investigation embroiled Vice President Cheney in yet another conflict over information with a congressional panel, this time with the House Committee on Oversight and Government Reform. The Committee sought copies of reports of the FBI interviews with President Bush and the Vice President that had been compiled during the special counsel's investigation.<sup>612</sup> For over a year, the committee and the DOJ—including the special counsel's office—exchanged letters over whether the executive branch would comply with the Committee's request.<sup>613</sup> The matter was followed by a Committee

<sup>610</sup> See *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 658 F. Supp. 2d 217, 221–22 (D.D.C. 2009) (noting the “voluntary” nature of the interview).

<sup>611</sup> See *United States v. Nixon (Nixon I)*, 418 U.S. 683, 713 (1974) (“The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”); see also ROTUNDA & NOWAK, *supra* note 45, at 945–60 (discussing presidential cooperation—compelled or otherwise—in other criminal contexts).

<sup>612</sup> See Letter from Rep. Henry A. Waxman, Chairman, House Comm. on Oversight and Gov't Reform, to Patrick J. Fitzgerald, Special Counsel, U.S. Dep't of Justice (July 16, 2007) [hereinafter *Waxman, July 16, 2007 Letter*] (on file with author); Letter from Patrick J. Fitzgerald, Special Counsel, U.S. Dep't of Justice, to Rep. Henry Waxman, Chairman, Comm. on Oversight and Gov't Reform (Aug. 16, 2007) [hereinafter *Fitzgerald, Aug. 16, 2007 Letter*] (on file with author).

Chairman Waxman noted that FBI interviews with President Clinton and Vice President Gore had been turned over to the Committee. See Letter from Rep. Henry A. Waxman, Chairman, the House Comm. on Oversight and Gov't Reform, to Michael Mukasey, Att'y Gen., U.S. Dep't of Justice (Dec. 3, 2007) [hereinafter *Waxman, Dec. 3, 2007 Letter*] (on file with author).

Following the inauguration of President Barack Obama, private parties secured much of this information through FOIA litigation. See *Citizens for Responsibility & Ethics in Wash.*, 658 F. Supp. 2d at 217.

<sup>613</sup> See, e.g., *Waxman, July 16, 2007 Letter*, *supra* note 612; *Fitzgerald, Aug. 16, 2007 Letter*, *supra* note 612; *Waxman, Dec. 3, 2007 Letter*, *supra* note 612; Letter from Rep. Henry A. Waxman, Chairman, the House Comm. on Oversight and Gov't Reform, to Michael Mukasey, Att'y Gen., U.S. Dep't of Justice (Dec. 18, 2007) (on file with author); Letter from Patrick J. Fitzgerald, Special Counsel, U.S. Dep't of Justice, to Rep. Henry A. Waxman, Chairman, House Comm. on Oversight and Gov't Reform (Jan. 18, 2008) (on file with author); *Benczkowski Letter*, *supra* note 24; Letter from Rep. Henry A. Waxman, Chairman, House Comm. on Oversight and Gov't Reform, to Michael B. Mukasey, Att'y Gen. (June 3, 2008) (on file with author); Letter from Keith B. Nelson, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to Rep. Henry A. Waxman, Chairman, House Comm. on Oversight and Gov't Reform (June 11, 2008) [hereinafter *Nelson, June 11, 2008 Letter*] (on file with author); Letter from Patrick J. Fitzgerald, Office of Special Counsel, U.S. Dep't of

subpoena *duces tecum* and culminated in an assertion of executive privilege, a claim made by the President. For purposes of this Article, the exchange of letters includes important references by the executive branch to vice presidential authority; in the end, however, it was the President and not the Vice President who invoked the constitutional privilege.

Throughout the correspondence, the DOJ combined the President and Vice President together as had been done in the NEPDG litigation. In a letter dated January 18, 2008, the Department offered reports of the FBI interviews in redacted form.<sup>614</sup> In explaining its decision to omit portions of the report, the Department noted the status of “the President and the Vice President, the two constitutional officers of the executive branch, [which] raises serious separation of powers and heightened confidentiality concerns . . . . The limited redactions concern . . . presidential and *vice presidential* communications . . . .”<sup>615</sup> As noted earlier, reference to both the President and Vice President together implies an equal constitutional status. Similarly, inclusion of “vice presidential communications” is of note since “presidential communications” would seem to subsume the former and render it redundant, at least to the extent such exchanges involve executive branch communication—excepting those made pursuant to the Twenty-Fifth Amendment.<sup>616</sup>

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Justice, to Rep. Henry A. Waxman, Chairman, House Comm. on Oversight and Gov't Reform (June 18, 2008) (on file with author); Letter from Keith B. Nelson, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to Rep. Henry A. Waxman, Chairman, House Comm. on Oversight and Gov't Reform (June 24, 2008) [hereinafter *Nelson, June 24, 2008 Letter*] (on file with author); Letter from Rep. Henry A. Waxman, Chairman, House Comm. on Oversight and Gov't Reform, to Patrick J. Fitzgerald, Special Counsel, U.S. Dep't of Justice (June 27, 2008) (on file with author); Letter from Patrick J. Fitzgerald, Special Counsel, U.S. Dep't of Justice, to Rep. Henry A. Waxman, Chairman, House Comm. on Oversight and Gov't Reform (July 3, 2008) (on file with author); Letter from Rep. Henry A. Waxman, Chairman, House Comm. on Oversight and Gov't Reform, to Michael B. Mukasey, Att'y Gen. (July 8, 2008) [hereinafter *Waxman, July 8, 2008 Letter*] (on file with author).

<sup>614</sup> *Benczkowski Letter*, *supra* note 24, at 1.

<sup>615</sup> *Id.* (emphasis added). The phrase “the President and Vice President, the two constitutional officers of the Executive Branch, raises serious separation of powers and heightened confidentiality concerns,” appears more than once in the correspondence. *See Nelson June 11, 2008 Letter*, *supra* note 613, at 1.

<sup>616</sup> *See infra* Part VII.A.2.



In a June 24, 2008 letter, the Department maintained its position that it would not provide unredacted FBI reports to the Committee but elaborated on its reasoning:

[With respect to] the President and Vice President[,] . . . the confidentiality interests relating to those documents are of a greater constitutional magnitude. The President and the Vice President are the two nationally elected constitutional officers under our Government. The President heads the Executive Branch and, as the Congress has by law recognized, the Vice President often advises and assists the President in the President's performance of his executive duties. It is settled as a matter of constitutional law, reflected in court decisions, and congressional and Executive Branch practice, that the communications of the President *and the Vice President with their staffs* relating to official Executive Branch activities lie at the absolute core of executive privilege. . . . Congressional access to those reports would intrude into . . . areas of presidential decision-making.<sup>617</sup>

On July 8, 2008, the Committee responded to the June 24 letter from the Department. The panel relented on pursuing the President's FBI report and instead honed in on the Vice President's.<sup>618</sup> The Committee also focused on the implied reference in the Department's letter to the Vice President enjoying his own privilege.

Vice President Cheney's attorneys have consistently maintained that he is not an "entity within the executive branch." Whether this unusual claim is accurate or not, *I am aware of no freestanding vice presidential communications privilege*, let alone one that covers voluntary and unrestricted conversations with a special counsel investigating wrongdoing. There certainly was no such understanding when our Committee sought the FBI interview report of an interview with Vice President Gore. The Justice Department produced the interview to the Committee despite the fact that it contained discussion of official White House business.<sup>619</sup>

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<sup>617</sup> Nelson, *June 24, 2008 Letter*, *supra* note 613, at 2 (emphasis added).

<sup>618</sup> Waxman, *July 8, 2008 Letter*, *supra* note 613, at 1.

<sup>619</sup> *Id.* at 2 (emphasis added). For coverage of Cheney's assertion that he was not part of the executive branch, see, for example, Dana Milbank, *The Cheese Stands Alone*, WASH. POST, June 26, 2007, at A2 (quoting a letter from Cheney staff asserting that, in the context of an executive order, the Vice President should not be considered "an entity within the executive branch").

The Committee maintained that it was “seeking information which the President and Vice President previously disclosed to the FBI without asserting privilege of any kind—executive or otherwise.”<sup>620</sup> Moreover, the committee asserted that it was

not aware of any precedent in which executive privilege has been asserted over communications between a vice president and his staff about vice presidential decisionmaking. Courts have carved out a presidential communications privilege, but they have limited it quite narrowly to communications had directly with the President or certain advisers directly on his behalf about presidential decisionmaking. . . . If the Vice President is indeed outside the executive branch, as he seems to contend, it is hard to understand what basis there could be for asserting executive branch confidentiality interests in his communications.<sup>621</sup>

The panel, therefore, aimed squarely at whether the Vice President possessed his own privilege, seizing on the apparent inconsistency of the Office of the Vice President’s previous statement that he was outside the executive branch and the implications of the DOJ’s letter, which seemed to state that the Vice President holds his own executive privilege.<sup>622</sup> In so doing, the Committee raised a legitimate criticism of the DOJ’s legal position. But the answer to the panel’s question should not have been that the Vice President does not benefit from his own constitutional privilege.<sup>623</sup> A fuller exploration of the legal questions would have concluded that the Vice President may claim his own constitutional privilege to the degree the activity falls within his own areas of constitutional authority. On the other hand, his communications involving issues of presidential decisionmaking would be covered by the President’s executive privilege, more specifically by presidential communications privilege should the President assert it.

Once the matter was brought to a head, the President responded by invoking executive privilege. In a letter to the Committee, the DOJ indicated it was

disappointed that the Committee has not been satisfied by our substantial accommodations of the Committee’s needs and has

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<sup>620</sup> *Id.* at 7.

<sup>621</sup> *Id.* at 7–8.

<sup>622</sup> See Milbank, *supra* note 619.

<sup>623</sup> See *infra* Part VII.A.

scheduled a meeting to consider citing the Attorney General for contempt of Congress if the Department does not produce the Vice President's interview report.... Accordingly, the Attorney General has requested that the President assert executive privilege with respect to these documents, and the President has done so.<sup>624</sup>

What stands out is that Bush—not Cheney—asserted the privilege over records involving the Vice President.

## 7. The 9/11 Commission

The example of the National Commission on Terrorist Attacks upon the United States (the “9/11 Commission” or “Commission”) and its interaction with Vice President Cheney provides a somewhat ambiguous precedent. The 9/11 Commission was a body established by statute<sup>625</sup> and was granted subpoena power. By its own terms it was “established in the legislative branch” of the government.<sup>626</sup> Of course, such a legislative assertion is not dispositive; that no members of Congress served on the Commission could lead one to conclude that the body was more akin to an independent agency or an executive branch body in which members are prohibited from serving.<sup>627</sup> Nonetheless, it could be persuasively argued that

<sup>624</sup> Letter from Keith B. Nelson, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, to Rep. Henry A. Waxman, Chairman, Comm. on Oversight and Gov’t Reform 1 (July 16, 2008); *see also* Letter from Michael B. Mukasey, Att’y Gen., U.S. Dep’t of Justice, to the President 1 (July 15, 2008) [hereinafter *Mukasey Recommendation Letter*] (“I am writing to request that you assert executive privilege with respect to Department of Justice documents subpoenaed by the Committee on Government Reform of the House of Representatives.... The documents include Federal Bureau of Investigation (“FBI”) reports of the Special Counsel’s interviews with the Vice President... [and] notes taken by the Deputy National Security Advisor during conversations with the Vice President and senior White House officials.... Many of the subpoenaed materials reflect frank and candid deliberations among senior presidential advisers, including the Vice President....”); *id.* at 2 (“The only reports the Department has not expressed a willingness to make available for review are those for the interviews of you and the Vice President, because of heightened separation of powers concerns.”); *id.* (“[I]t is my considered legal judgment that it would be legally permissible *for you* to assert executive privilege with respect to the subpoenaed documents....” (emphasis added)). For similar action taken by President Clinton to protect communications involving Vice President Gore, *see supra* note 525.

<sup>625</sup> *See* Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383 (2002).

<sup>626</sup> *Id.* § 601.

<sup>627</sup> *See* U.S. CONST. art. I, § 6, cl. 2.

since the Commission was created by statute and Senate and House leaders placed all but one Commission member on the panel, the entity was more like a congressional committee than an independent outside body.<sup>628</sup>

One of the major questions confronting the Commission was the extent to which it could question the President and Vice President. The two men ultimately agreed to appear jointly for an interview before the body. In this regard, the panel got what it wanted: to question the President and Vice President. Their questioning, however, was subject to a number of significant limitations: it was neither conducted under oath,<sup>629</sup> nor was it recorded.<sup>630</sup>

In light of past practice,<sup>631</sup> there is little reason to think that the 9/11 Commission could have legally compelled the President and Vice President to testify.<sup>632</sup> After all, neither was subpoenaed; they both appeared voluntarily. Further, that the President and Vice President appeared together would seem to reflect the heightened status they both share as constitutional officers. Notably, the Vice President was not treated with lesser deference than the President. In addition, few would seriously argue that because the President appeared before the 9/11 Commission that a congressional committee could compel *his* attendance at a hearing.<sup>633</sup> Using the same precedent to try to establish the principle that the Vice President must appear at a congressional hearing is equally dubious. This is especially so in light of *Walker*, *Cheney*, and related decisions, which essentially equate the constitutional stature of the Vice President with that of the President. Finally, even though the Vice President appeared before the 9/11 Commission under restricted circumstances, as will be demonstrated in the next Section, members of Congress still seemed to recognize the futility of

<sup>628</sup> See RELYEA & TATELMAN, *supra* note 11, at 28 n.139.

<sup>629</sup> See David Gregory et al., *9/11 Commission Finishes Bush, Cheney Session; Bush Chastises Ashcroft in Private Statements at the White House*, Apr. 29, 2004, <http://www.msnbc.msn.com/id/4862296>.

<sup>630</sup> See, e.g., Elisabeth Bumiller & Philip Shenon, *Bush-Cheney 9/11 Interview Won't Be Formally Recorded*, N.Y. TIMES, Apr. 28, 2004, at A18.

<sup>631</sup> See *supra* note 339.

<sup>632</sup> See generally Part VI.

<sup>633</sup> If in fact the Commission was part of the legislative branch, it seems doubtful it could exercise authority that a congressional committee with its own subpoena power could not.

trying to force Cheney to appear before an actual congressional committee.

#### 8. Congressional Committees and Vice President Cheney

An element of both executive privilege and judicial privilege is the qualified right of constitutional officers to resist being compelled to appear before congressional committees to discuss their official duties. During the Cheney vice presidency, many influential members of Congress with leadership roles on key congressional oversight panels openly doubted whether the Vice President himself could be forced to appear before them.<sup>634</sup> These members were hardly apologists for Cheney. For example, Senator Carl Levin, Chairman of the Homeland Security and Government Affairs Permanent Subcommittee on Investigation, stated “[w]e can’t get [Vice President Cheney] in front of us.”<sup>635</sup> Waxman, then Chairman of the House Government Reform Committee, concluded that trying to compel the Vice President to answer questions as to his official duties would be “problematic.”<sup>636</sup>

Other prominent members of Congress who share Levin’s and Waxman’s views of aggressive congressional oversight, expressed implicit agreement with their position. Regarding a probe by a Senate panel into pre-Iraq War intelligence, Senator John McCain stated:

In general, I think everyone should be interviewed that was involved . . . . The president of the United States and the vice president of the United States have a special status, and you’ve got to be concerned about the executive-congressional relationship. I think certainly Cabinet secretaries who are confirmable by the Senate should be interviewed.<sup>637</sup>

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<sup>634</sup> See Nather, *supra* note 306, at 1740–41 (“[T]here are limits on what Congress can do. It can’t subpoena him, lawmakers say, because that would instantly set off a constitutional struggle over separation of powers.”). For a brief argument to the contrary, see Jonathan Strong, *Letter to the Editor, Even if Cheney View Is Valid, Congress Can Subpoena Him*, THE HILL, Sept. 21, 2007, at 16.

<sup>635</sup> Nather, *supra* note 306, at 1741.

<sup>636</sup> See *id.*

<sup>637</sup> Alexander Bolton, *Dems Win McCain’s Backing*, THE HILL, Nov. 22, 2005, at 7 (quoting Sen. McCain) (internal quotation marks omitted). As noted earlier, a House impeachment investigation would likely be able to secure privileged documents from the Vice President if not compel his attendance. *Cf.* FISHER, *supra* note 6, at 49–50; *supra* note 262.

Thus, it would appear that there is a grudging acknowledgement that a congressional committee would be unable to legally compel a Vice President to appear before it. While Vice President Colfax made an appearance before a panel, he did so voluntarily. Vice President Humphrey refused to testify before the Senate Foreign Relations Committee in a public hearing, forcing the committee to agree to a closed-door meeting on neutral turf. Vice President Quayle refused several invitations to appear before committees to discuss the Council on Competitiveness. In 1997, members of a special Senate investigative panel made rumblings about compelling Vice President Gore to appear before it, but nothing came of the effort. Recent opinion—from lawmakers with a strong record of assertiveness in the area of congressional oversight—only reinforces the view that the Vice President may not be forced to testify before a congressional committee, underscoring the legitimacy of VPP.<sup>638</sup>

In short, events during the Cheney vice presidency provide support for the notion of VPP. In two court decisions there are dicta, particularly in the Supreme Court decision of *Cheney v. U.S. District Court*, that indicate that because of his “responsibilities and status[ ]” as a constitutional officer, the Vice President has a healthy leeway when he attempts to withhold information, even if he is only acting as the President’s proxy.<sup>639</sup> In the view of the Supreme Court, the Vice President’s authority

<sup>638</sup> Part of congressional deference in this regard could be the recognition that the Vice President is a presidential adviser and arguably beyond the compulsory power of Congress. This reasoning is somewhat strained since numerous presidential advisers who are not the Vice President have appeared before Congress unwillingly. See generally RELYEA & TATELMAN, *supra* note 11, at 16–17. That has not been the case, however, with the Vice President, who is after all a constitutional officer.

<sup>639</sup> In other contexts, courts have been similarly disinclined to force the Vice President’s office to divulge documents. See, e.g., *Judicial Watch, Inc. v. U.S. Dep’t of Energy*, 310 F. Supp. 2d 271, 298 n.8 (D.D.C. 2004), *aff’d in part and rev’d in part*, 412 F.3d 125 (D.C. Cir. 2005); *Meyer v. Bush*, 981 F.2d 1288, 1298 (D.C. Cir. 1993) (ruling that a task force chaired by the Vice President was not subject to FOIA); *Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 55 (D.D.C. 2002) (concluding that the Vice President was not subject to FOIA), *vacated*, 542 U.S. 367 (2004). FOIA suits brought during the Cheney vice presidency were successful, however, with respect to securing his visitor logs; those records being kept by the secret service and not the Vice President’s office. See *Citizens for Responsibility & Ethics in Wash. v. Dep’t of Homeland Security*, 527 F. Supp. 2d 76, 93 (D.D.C. 2007); *Wash. Post v. Dep’t of Homeland Security*, 459 F. Supp. 2d 61 (D.D.C. 2006).

appears to be linked with and comparable to that of the President. Moreover, *Committee on Judiciary v. Miers* left behind a similar dictum, this time in a case explicitly involving constitutional privilege.<sup>640</sup> Two other court decisions hinted much the same. In the absence of any case law squarely on point, these dicta provide useful guideposts. Since the courts have indicated that the President and Vice President are of similar constitutional stature, and since the President holds his own constitutional privilege, it is all the more likely that the Vice President does as well.

During Cheney's tenure, an executive order involving presidential records also seemed to offer the potential for a constitutional privilege for the Vice President and former Vice Presidents. This directive stirred a fair amount of controversy and such a privilege was never asserted. While the order was not overturned by either the judiciary or by Congress, the Obama administration quickly rescinded it upon assuming office.

In its second-term struggles with congressional committees, the Vice President's office put forward positions that hinted at a constitutional vice presidential privilege. During these exchanges, one House committee explicitly called into question whether the Vice President holds such authority. Regarding the matter in question, ultimately it was the President, not the Vice President, who invoked a constitutional privilege to protect the disputed materials. Moreover, Cheney did permit his Chief of Staff to comply with a House committee subpoena and testify at an open hearing subject to a host of conditions. On the Senate side of the ledger, Cheney—under the aegis of the White House Counsel—appeared to ignore a Senate Judiciary Committee subpoena for documents.

Despite his unprecedented power and the unprecedented legal challenges facing him and his staff over access to information, Cheney never formally invoked a constitutional privilege. By litigating closely related issues, he did, however, go further than either Humphrey or Agnew, both of whom made public references to the Vice President possessing his own privilege. Taken in sum, the Cheney vice presidency provides more support for VPP than any other, even if the example of his vice presidency is not wholly dispositive.

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<sup>640</sup> 558 F. Supp. 2d 53 (D.D.C. 2008).

*M. Conclusion*

History reflects that Vice Presidents have increasingly become the target of investigations, many of which have led to conflicts over access to information. Several of these disputes, particularly those in the nineteenth century, entailed actions taken by Vice Presidents prior to their terms of office: Tompkins, Calhoun, Colfax, Agnew, and Rockefeller—the latter regarding his gubernatorial activities. Others involved a sitting Vice President that did not involve his official duties—Gore. Within the grouping of investigations involving pre-vice-presidential or nonofficial duties, Agnew stands out in that he indicated he did not believe prosecutors had a right to his vice presidential records. The Rockefeller vice presidency is also noteworthy. In Rockefeller's case, efforts were made to force him to testify at a criminal trial and before New York State investigative commissions. Those pursuing these efforts against Rockefeller were mindful of the Vice President raising his own constitutional privilege, reflecting that such an assertion was hardly outlandish. Other Vice Presidents have been investigated for their official acts. These include Wallace, Humphrey, Ford, Rockefeller—in his role as Commission chairman—Bush, Quayle, and Cheney. Of these vice presidential episodes, Humphrey and Cheney both implied that the Vice President may enjoy a constitutional privilege. While these near assertions of a vice presidential privilege reflect an appreciation of the growing stature of the Vice President in American political life, there appears never to have been a Vice President who has formally invoked such a doctrine. That said, as the Vice President continues to play a significant role in national governance, an assertion of privilege is increasingly likely.

That Vice Presidents have never invoked a privilege, despite their having had opportunities to have done so, certainly would seem to go a long way toward disproving the existence of VPP. As the Supreme Court noted in another separation of powers context, such “prolonged reticence would be amazing if such [action] were not understood to be constitutionally proscribed.”<sup>641</sup> That said, none of the examples discussed above involved the Vice President's role as presiding officer of the Senate and only one involved his preparation for succession to the presidency—

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<sup>641</sup> *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 212 (1995).



Ford. Furthermore, no Vice President has ever appeared before a congressional committee against his will. Calhoun asked to be investigated by the House but never appeared in person before the relevant committee. Colfax raised the issue of his being subpoenaed by a congressional panel but appeared voluntarily. Moreover, Colfax's biographer asserts that the committee in question concluded it lacked authority to force his attendance. Humphrey declined to appear in an open session of the Senate Foreign Relations Committee and Senator Fulbright, the committee chairman, had to make major concessions before Humphrey agreed to appear behind closed doors. Vice President Bush's aides testified before a congressional committee but not Bush himself. Vice President Quayle declined to appear in front of several congressional panels. Similarly, efforts to bring Gore before a comparable Senate investigative panel were never vigorously pursued.

Cheney's disputes over information spilled over into the courts where, as a practical matter, his position was vindicated and his confidentiality interests preserved even though the matters at hand involved presidentially delegated authority. An executive order and conflicts with several congressional committees also highlighted questions as to the Vice President's authority to withhold information. Even seasoned members of Congress wound up publicly conceding that they could not compel Cheney to appear before their committees.<sup>642</sup> At the end of the day, while an outright assertion of VPP would be without precedent, such an invocation would not be without pedigree.

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<sup>642</sup> See *supra* Part VI.L.8.

ARGUMENTATION: DOES A CONSTITUTIONAL PRIVILEGE EXIST  
FOR THE VICE PRESIDENT?

VII. POTENTIAL ARGUMENTS IN FAVOR OF VICE PRESIDENTIAL  
PRIVILEGE (VPP)

The previous discussion of past practice and case law offers a fair measure of support for the notion of VPP. Nonetheless, there remain much more compelling theoretical arguments in its favor. One could imagine some of the positions discussed below being asserted by a future Vice President were he to invoke such a privilege.<sup>643</sup>

A. *The Vice President as a Constitutional Officer Enjoys an Implied Privilege*

As a constitutional officer, a strong argument can be made that the Vice President may lawfully claim his own privilege. The logic should be familiar: Since the President enjoys his own privilege under Article II,<sup>644</sup> since members of Congress have a legislative privilege under Article I,<sup>645</sup> and since members of the federal judiciary possess a privilege under Article III,<sup>646</sup> the Vice President should also be entitled to his own constitutional privilege because he, like his colleagues, needs to receive candid advice from his aides to encourage effective decisionmaking. Otherwise, the Vice President would be the only one of the approximately 1,400 constitutional officers *not* to benefit from such a privilege when carrying out his duties. His deliberations would be uniquely lacking in confidentiality, his decisionmaking uniquely vulnerable to compromise. This singular omission would appear particularly striking given the exalted status the Vice President has come to enjoy in American government.<sup>647</sup>

<sup>643</sup> The focus of this Article has been on whether the Vice President enjoys a *constitutionally* based privilege to withhold certain material from the public, the Congress, and the courts. As such, it has focused on whether he enjoys an analogue to the constitutionally based presidential communications privilege and not whether he enjoys a vice presidential equivalent of the *common law* deliberative process privilege.

<sup>644</sup> See *supra* Part II.

<sup>645</sup> See *supra* Part III.

<sup>646</sup> See *supra* Part IV.

<sup>647</sup> See, e.g., JODY BAUMGARTNER, *THE AMERICAN VICE PRESIDENCY* RECONSIDERED ix (2006); Albert, *supra* note 315.

To the extent the Vice President is carrying out his own constitutional responsibilities, his deliberations would be cloaked in privilege, and he could prevent certain conversations and documents from facing outside scrutiny. The scope would no doubt be narrow since the Vice President has no meaningful<sup>648</sup> constitutional duties other than presiding over the Senate, breaking tie votes,<sup>649</sup> preparing for and helping to make determinations about presidential inability, and preparing for succession.<sup>650</sup> His bifurcated privilege, involving both legislative and executive branch activities, would thus reflect that the "Vice-President[t's] . . . prestige [is] derived from two entirely different sources."<sup>651</sup>

# 1. President of the Senate

## a. *The Vice President Has His Own Generalized Legislative Privilege as a Constitutional Officer Presiding over the Senate*

In exercising his constitutional duties in the Senate, the Vice President is, as a strictly legal matter, independent from the President.<sup>652</sup> Article I, Section 3 of the Constitution provides that

<sup>648</sup> As noted earlier, the Vice President's role in counting electors has come to be essentially a ministerial duty. *See supra* text accompanying note 320.

<sup>649</sup> *See* U.S. CONST. art. I, § 3.

<sup>650</sup> *See id.* amend. XXV, §§ 3–4.

<sup>651</sup> *Cf.* 1 HAYNES, *supra* note 309, at 229; LIGHT, *supra* note 306, at 7 ("In theory, the Vice-President's position as the only constitutional officer with both legislative and executive roots could be a source of power.").

<sup>652</sup> *See, e.g.,* Memorandum from Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Kenneth A. Lazarus, Assoc. Counsel to the President, Regarding the Applicability of 3 C.F.R. Part 100 to the President and Vice President 3 (Dec. 16, 1974) ("With regard to the Vice President there is even a constitutional question whether the President can direct him to abide by prescribed standards of conduct. The Vice Presidential Office is an independent constitutional office, and the Vice President is independently elected. Just as the President cannot remove the Vice President, it would seem he may not dictate his standards of conduct."); LOUIS CLINTON HATCH & EARL L. SHOUP, A HISTORY OF THE VICE-PRESIDENCY OF THE UNITED STATES 11 (Earl L. Shoup ed., Greenwood Press 1970) (1934)) ("there is attached to the Vice-Presidency another office by nature wholly independent, that of President of the Senate"); *cf.* CURRIE, *supra* note 140, at 240 n.9 ("The nation has chosen Jefferson [to be Vice President], and commanded him to a certain station. The President, therefore, has no right to command him to another or to take him off from that." (quoting President John Adams)); TASK FORCE, *supra* note 318, at 64 ("The vice president . . . is constitutionally independent. . . . [T]he president cannot command the vice president to do or not do anything, nor can the president fire the vice president."); HATFIELD, *supra* note 318, at 328 (quoting Vice President James Sherman's refusal to assist President Taft in his legislative efforts:

the "Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided."<sup>653</sup> This is a grant of power to the Vice President.<sup>654</sup> That the Vice President's role as President of the Senate appears in Article I would seem to reflect that in this capacity, he acts as a

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"You will have to act on your own account. I am to be Vice President and acting as a messenger boy is not part of the duties as Vice President."); JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 220 (1965) (contending that the "Vice President, not being technically in the Executive branch of government, was not subject to presidential orders" (quoting President Eisenhower)); LIGHT, *supra* note 306, at 119 ("the President cannot compel activity" out of the Vice President); SIDNEY M. MILKIS & MICHAEL NELSON, THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT, 1776–1993, at 420 (1994) ("[T]he vice president is a constitutionally independent official whom the president cannot command or remove, at least not in the usual sense . . ."); Thomas E. Cronin, *Rethinking the Vice-Presidency*, in RETHINKING THE PRESIDENCY 324, 324 (Thomas E. Cronin ed., 1982) ("[T]echnically a vice-president is neither a part of the executive branch nor subject to the direction of the president."); ALLAN P. SINDLER, UNCHOSEN PRESIDENTS: THE VICE PRESIDENT AND OTHER FRUSTRATIONS OF PRESIDENTIAL SUCCESSION 29 (1976) ("The formal position of the vice-president, who technically is neither a part of the executive branch nor subject to the direction of the president, underscores the anomaly of that office."); *Onslow to Patrick Henry*, in REPORTS AND PUBLIC LETTERS OF JOHN C. CALHOUN 322, 336 (Richard K. Cralle ed., 1855) (quoting Vice President Calhoun discussing the possibility of "the Vice-President [as presiding officer] choos[ing] to pursue a course independent of the will of the Executive"); Tench Coxe, *An American Citizen I*, INDEPENDENT GAZETTEER (Phila.), Sept. 26, 1787, in 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST, ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 20, 23 (1993) ("[O]ur vice-president, who is chosen *by the people* through the electors and the senate, *is not at all dependent on the president*, but may exercise equal powers on some occasions."). As a practical matter, of course, the modern Vice President is politically reliant on the President for the duties he is assigned. Until President Roosevelt broke the tradition in 1940, vice presidential candidates were generally selected by party conventions and not by presidential candidates. *See, e.g.*, Goldstein, *supra* note 2, at 178–79. As presidential candidates have come to select vice presidential candidates largely by themselves, Vice Presidents have become more beholden politically to the President. *See id.* at 179. In large part because of this reason, in the modern era there have been fewer public breaks between Presidents and Vice Presidents.

<sup>653</sup> U.S. CONST. art. I, § 3.

<sup>654</sup> *See* J. Michael Medina, *The American Vice-Presidency: Toward a More Utilized Institution*, 13 GEO. MASON L. REV. 77, 94 (1990) ("The one constitutional power accorded the Vice-President was and is the tie-breaking vote."); *cf.* Danforth v. Cason, 507 S.W.2d 405, 411–13 (Mo. 1974) ("The position of the lieutenant governor [of Missouri] is in many ways similar to that of the vice president of the United States. . . . [T]he designation of the lieutenant governor as president of the senate . . . is a . . . grant of authority . . .").

participant in the legislative branch and not the executive branch<sup>655</sup> and that in this regard he is his own man.

Vice presidential independence manifested itself early on. In 1794, Vice President Adams refused a request by President Washington to negotiate a treaty with Great Britain regarding commercial affairs. Adams declined because he asserted that under the Constitution he was duty bound to serve as President of the Senate.<sup>656</sup> Jefferson, as Vice President elect, rebuffed a similar overture by President elect Adams in 1797, this time over a potential diplomatic mission to France.<sup>657</sup> Jefferson argued that the proposed mission was beyond the scope of his constitutional responsibilities.<sup>658</sup>

These rebuffs of the President occurred in part because under the original text of the Constitution there was little indication that the Vice President should comply with the President's wishes even as a political matter.<sup>659</sup> Prior to the adoption of the Twelfth Amendment, the Vice President was simply the runner-up to the President in electoral votes. This led to Adams serving as President with his opponent in the 1796 presidential race, Jefferson, holding office as Vice President. Jefferson, therefore, was in no way beholden to Adams for his position, either legally or politically. By having electors vote separately for President and Vice President,<sup>660</sup> thus permitting

<sup>655</sup> See *supra* note 323; cf. *Brown v. Owen*, 206 P.3d 310 (Wash. 2009) ("While serving as the presiding officer of the senate, the lieutenant governor is an officer of the legislative branch."). The question could be raised: when the President exercises his veto power under Article I, why would he not be considered part of the legislative branch as well? Cf. *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193–94 (5th Cir. 1981) (concluding that a mayor exercising veto power is entitled to legislative immunity). The major difference is that the Vice President is explicitly placed within the legislative branch as President of the Senate. While reviewing bills for approval, the President is exercising legislative power under Article I but is not part of the legislative branch. This is like the Senate's role in considering treaties and appointments. The Senate is exercising executive power under Article II, but the upper chamber is not part of the executive branch while doing so. The Vice President, while presiding over the Senate or breaking ties, is both exercising legislative power and is in the legislative branch while taking such action. This distinction is reflected by the Vice President's ability to participate in debate and vote on measures that are not presented to the President. See *infra* note 673.

<sup>656</sup> See WILLIAMS, *supra* note 308, at 24.

<sup>657</sup> See *id.*

<sup>658</sup> See, e.g., DONALD YOUNG, *AMERICAN ROULETTE: THE HISTORY AND DILEMMA OF THE VICE PRESIDENCY* 12 (1966).

<sup>659</sup> See, e.g., Amar, *supra* note 7.

<sup>660</sup> See U.S. CONST. amend. XII.

party tickets to get elected instead of two potentially opposing candidates, the Twelfth Amendment essentially acknowledged the existence of political parties.<sup>661</sup> The amendment, however, changed nothing as far as the Vice President's *legal* independence from the President.

This independence is illustrated by the President's inability to remove the Vice President from office.<sup>662</sup> This is unlike Cabinet-level officials, who serve at the pleasure of the chief executive. If they defy the President, they face the specter of removal from office.<sup>663</sup> The authority to remove officials is, of course, pivotal in the President's responsibility over the executive branch. It is self evident that the basis for the independence of independent agencies is that limitations can be placed on presidential removal of the heads of these entities.<sup>664</sup>

Underscoring the Vice President's status as an independent constitutional actor is that, until well into the twentieth century, officeholders largely viewed themselves as part of the legislative branch,<sup>665</sup> rather than the executive branch. As has been outlined by the Senate Historical Office, the vice presidency "[d]uring the nineteenth century . . . remained essentially a

<sup>661</sup> See, e.g., GOLDSTEIN, *supra* note 295, at 6–7.

<sup>662</sup> See, e.g., *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993); Amar, *supra* note 7 ("[T]he Constitution's text does not give the president the power to remove a vice president . . ."); Clinton Rossiter, *The Reform of the Vice-Presidency*, 63 POL. SCI. Q. 383, 401 (1948) ("For four years, at least, the Vice-President is as irremovable as the Chief Justice . . ."). He may be removed only through the impeachment process, which takes place outside of the executive branch.

<sup>663</sup> See, e.g., *Myers v. United States*, 272 U.S. 52 (1926); see also Rossiter, *supra* note 663 (contrasting a Cabinet office with the vice presidency, which is "in no way subject to . . . presidential supervision and dominance which the power of removal logically engenders").

<sup>664</sup> See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 739 (1986) (Stevens, J., concurring) ("In upholding the congressional limitations on the President's power of removal [in *Humphrey's Executor*], the Court stressed the independence of the [Federal Trade] Commission from the President."); see also EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1957*, at 89–95 (4th rev. ed. 1957).

<sup>665</sup> See, e.g., RELYEA, *supra* note 307, at 1 (following adoption of the Constitution "the Vice President soon came to be regarded as a legislative branch official"); FEERICK, *supra* note 18, at 32 ("Vice Presidents in the nineteenth century rarely were given any executive responsibilities."); Manu Raju, *Quiet End to Cheney's Senate Era*, THE HILL, Nov. 19, 2008, <http://thehill.com/homenews/news/17119-quiet-end-to-cheney-senate-era> (quoting Senate historian Don Ritchie who noted that in the nineteenth century "99 percent" of a Vice President's work involved his presiding over the Senate); WAUGH, *supra* note 296, at 151 (writing in 1956 that "the Vice President is only a potential executive officer").

legislative position.”<sup>666</sup> As Vice President, Adams wrote in 1790 that his position was “totally detached from the executive authority and confined to the legislative.”<sup>667</sup> With respect to the foreign policy charted by the Washington administration, Adams asserted he had “no constitutional vote.”<sup>668</sup> The second Vice President concurred. Jefferson wrote that while Vice President he viewed the “office as constitutionally confined to legislative functions, and that [he] could not take any part whatever in executive consultations, even were it proposed.”<sup>669</sup> This interpretation of the Vice President as a participant in the legislative branch almost certainly contributed to the officeholder being largely excluded from regular attendance at Cabinet proceedings until the third decade of the twentieth century.<sup>670</sup> Indeed, even midway through the twentieth century Vice

<sup>666</sup> HATFIELD, *supra* note 318, at xix.

<sup>667</sup> *Id.* at 7.

<sup>668</sup> *Id.* at 10.

<sup>669</sup> Charles O. Paullin, *The Vice-President and the Cabinet*, 29 AM. HIST. REV. 496, 497 (1924) (citation omitted).

<sup>670</sup> Not until Coolidge did Vice Presidents attend Cabinet sessions as a matter of course, *see, e.g.*, HATFIELD, *supra* note 318, at 352, and even afterward his successor balked at doing so. *See, e.g.*, GOLDSTEIN, *supra* note 295, at 136. In 1791, Washington undertook a tour of the southern states. He instructed his cabinet that while he was away they should consult with Adams if any major developments occurred. In this respect, Adams may have been the only Vice President to attend such meetings before Marshall in the late 1910s. *See* H. B. Learned, *Some Aspects of the Vice-Presidency*, 7 POL. SCI. REV. 162, 174–75 (1913) (“I can discover no evidence that reveals a single instance of the vice-president in attendance at cabinet sessions . . . . It is possible that instances of admitting the vice-president on occasions to a gathering of the cabinet may have occurred, and may some day appear in stray records. But it is certain that from 1789 to 1912 no custom in the matter has been established.”); *see also* AUGUSTUS B. WOODWARD, *THE PRESIDENCY OF THE UNITED STATES* 9 (1825) (“Perhaps [the Vice President’s] constitutional function of being prolocutor of the Senate was deemed incompatible with his being a member of the Cabinet. His attendance would frequently be inconvenient, and his possessing a voice in the deliberations of the Senate might render it indelicate. That any dissatisfaction arose from this course being pursued, either at the time of its adoption, or subsequently, has never been manifested.”); Memorandum from Nicholas deB. Katzenbach, Assistant Att’y Gen., Office of Legal Counsel on the Constitutionality of the Vice President’s Service as Chairman of the Nat’l Aeronautics & Space Council to the Vice President 1–2 (Apr. 18, 1961), *available at* <http://www.fas.org/irp/agency/doj/olc/041861.pdf>. As late as 1916, one lawmaker thought a constitutional amendment necessary for the Vice President to participate in such gatherings. *See* Lucius Wilmerding, *The Vice Presidency*, 68 POL. SCI. Q. 17, 33 (1953).

President Alben Barkley viewed himself as a legislative official.<sup>671</sup>

History confirms that, when the Vice President is acting in his legislative branch capacity, the President does not have the legal authority to instruct him how to do his job. For instance, Presidents cannot order Vice Presidents to cast their vote a certain way.<sup>672</sup> After all, in this capacity, Vice Presidents are acting as part of the legislative branch, not the executive branch.<sup>673</sup> For example, Vice President Aaron Burr's deciding vote kept the Jefferson-led Republicans from rescinding the Judiciary Act of 1801.<sup>674</sup> Vice President George Clinton broke a tie that stymied reauthorization of the U.S. National Bank, a position distinctly at odds with the views of President James Madison.<sup>675</sup> Vice President Calhoun voted against legislation President John Quincy Adams supported to build a canal between the Illinois River and Lake Michigan.<sup>676</sup> Calhoun also voted against a tariff bill the Adams administration favored.<sup>677</sup>

<sup>671</sup> See, e.g., HATFIELD, *supra* note 318, at 423, 427.

<sup>672</sup> See, e.g., Cronin, *supra* note 652, at 329 (contending that "participation by the Vice-President in Senate voting [may be], either in support of his own views or the President's" (quoting James F. Byrnes, former Supreme Court Justice and Senator) (internal quotation marks omitted)).

<sup>673</sup> This is further reflected in that the Vice President's role in breaking tie votes appears to extend to consideration of constitutional amendments. See HATFIELD, *supra* note 318, at 391; WILLIAMS, *supra* note 308, at 40–41; cf. *Coleman v. Miller*, 307 U.S. 433, 446–47 (1939). This is unlike the role of the President, who plays no formal role in the adoption of constitutional amendments. See *Hollingsworth v. Virginia*, 3 U.S. 378, 382 (1798); see also Henry Barrett Learned, *Casting Votes of the Vice-Presidents, 1789–1915*, 20 AM. HIST. REV. 571, 575–76 (1915); cf. 47 CONG. REC. 1949–59 (1911). Similarly, the Vice President can vote on matters involving internal Senate organization that are also not presented to the President for his consideration. See Learned, *supra*, at 572 (discussing Vice President Calhoun's and Vice President Fillmore's votes to confirm Senate officers); *id.* at 572–73 (noting Vice President Wheeler's vote related to whether an individual could be seated as a Senator); *infra* notes 872–73 and accompanying text (noting Vice President Arthur's and Vice President Cheney's votes to decide which party would be in the Senate majority).

<sup>674</sup> See HATFIELD, *supra* note 318, at 37–38; YOUNG, *supra* note 658, at 14. It should be remembered that, with the exception of Burr's episode regarding the Judiciary Act, all of the examples discussed in this segment entail actions following the Twelfth Amendment, which tied the Vice President's political fortunes more closely to those of the President.

<sup>675</sup> See HATFIELD, *supra* note 318, at 57; IRVING G. WILLIAMS, *THE RISE OF THE VICE PRESIDENCY* 34 (1956).

<sup>676</sup> See MERRILL D. PETERSON, *THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN* 157 (1987).

<sup>677</sup> See *id.* at 153–54 (labeling Calhoun's action as "an anti-administration vote").



As Andrew Jackson's Vice President, Calhoun<sup>678</sup> voted against one of the President's most highly prized nominees, Martin Van Buren, to be minister to Great Britain.<sup>679</sup> Vice President Millard Fillmore informed President Zachary Taylor that he would be supportive of the Compromise of 1850 if he had to break a tie; this was counter to the President's stance.<sup>680</sup> President Taylor died before Fillmore could take such action.

Vice Presidents can also use their legislative perch as presiding officer to undercut presidential priorities in ways other than through tie breaking votes. Jefferson worked to frustrate the Adams administration in a number of areas.<sup>681</sup> As John Quincy Adams's Vice President, Calhoun worked to defeat U.S. participation in the Panama Congress.<sup>682</sup> He also purposely placed anti-administration Senators on a key committee.<sup>683</sup> Chester Arthur publicly opposed President James Garfield's nominee for Secretary of the Treasury.<sup>684</sup> In 1891, Levi Morton proved unhelpful to President Benjamin Harrison during consideration of civil rights legislation.<sup>685</sup> While debating whether to rescind the Sherman Silver Purchase Act in 1893, Adlai Stevenson likewise did no favors for President Grover Cleveland.<sup>686</sup> Charles Fairbanks worked to scuttle President Theodore Roosevelt's Square Deal legislative agenda in the Senate.<sup>687</sup> James Sherman was brazenly insubordinate to President William Howard Taft about a request the President made of him.<sup>688</sup> Charles Dawes undercut President Calvin

<sup>678</sup> Calhoun is one of only two men to have served as Vice President for two different Presidents. The other is George Clinton, who served under both Presidents Jefferson and Madison.

<sup>679</sup> See, e.g., WAUGH, *supra* note 296, at 66.

<sup>680</sup> See HATCH & SHOUP, *supra* note 652, at 35.

<sup>681</sup> See, e.g., SWANSTROM, *supra* note 144, at 256–57.

<sup>682</sup> See PETERSON, *supra* note 676, at 138–39.

<sup>683</sup> See HATFIELD, *supra* note 318, at 89; see also PETERSON, *supra* note 676, at 136. In addition, Calhoun stymied President Jackson's nomination of Henry Baldwin to be Secretary of the Treasury. See ABRAHAM, *supra* note 273, at 79. The Vice President tried to do the same with respect to his appointment to serve on the Supreme Court but ultimately fell short. See *id.*

<sup>684</sup> See, e.g., HATFIELD, *supra* note 318, at 254.

<sup>685</sup> See *id.* at 273.

<sup>686</sup> See *id.* at 281–82.

<sup>687</sup> See DORMAN, *supra* note 312, at 96; HATFIELD, *supra* note 318, at 320.

<sup>688</sup> See e.g., HATFIELD, *supra* note 318, at 325.

Coolidge's Senate strategy on a pivotal farm bill<sup>689</sup> and on banking legislation.<sup>690</sup> John Nance Garner did much the same during the late 1930s with respect to New Deal policies advocated by President Franklin Roosevelt.<sup>691</sup>

Even today—though the office is “a predominantly executive post”<sup>692</sup>—Vice Presidents at times still stake out public positions independent from the President based on their legislative role. For instance, Vice President Cheney broke with the Bush administration on litigation involving the Second Amendment.<sup>693</sup> Taking an approach different from that of the Bush Justice Department, Cheney signed an *amicus curiae* brief submitted to the Supreme Court by members of Congress.<sup>694</sup> He did so solely in his capacity as “President of the United States Senate.”<sup>695</sup> Similarly, Cheney staked out his own position on changing Senate rules to end the filibustering of judicial nominees, the so-called “nuclear option.” While President Bush had indicated he would not get involved in internal Senate matters, Cheney stated publicly that in his capacity as President of the Senate he would interpret Senate rules to prohibit such filibustering.<sup>696</sup> When Bush's Chief of Staff, Andrew Card, was asked whether Cheney's views reflected the Bush administration's policy in this regard,

<sup>689</sup> See *id.* at 359, 366; Irving G. Williams, *Senators, Rules, and Vice-Presidents*, in 5 THOUGHT PATTERNS 21, 26 (Arpad F. Kovacs ed., 1957).

<sup>690</sup> See James R. Garner, Office of the Vice President of the United States 185–86 (unpublished Ph.D. dissertation, University of Iowa) (June 1934) (on file with the St. John's Law Review).

<sup>691</sup> See JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL 135–37, 167–68, 231–32, 292, 295, 331 (1967).

<sup>692</sup> HATFIELD, *supra* note 318, at xxi.

<sup>693</sup> See Robert Barnes, *Cheney Joins Congress in Opposing D.C. Gun Ban*, WASH. POST, Feb. 9, 2008, at A1 (stating that Cheney's position “is at odds with the one put forward by the administration”).

<sup>694</sup> See *id.*

<sup>695</sup> See Brief for Amici Curiae, 55 Members of United States Senate, the President of the United States Senate and 250 Members of United States House of Representatives in Support of Respondent, at App. 1a, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07–290). Underscoring his legislative role, Cheney not only presided over the Senate from time to time but also frequently attended Senate Republican lunch meetings. See DUBOSE & BERNSTEIN, *supra* note 338, at 192.

<sup>696</sup> See David D. Kirkpatrick, *Cheney Enters Filibuster Fight, Backing Change in Senate Rules*, N.Y. TIMES, Apr. 23, 2005, at A1.

he responded that Cheney was speaking in his capacity “as the president of the Senate” and not on behalf of the President.<sup>697</sup>

These examples all reflect the constitutional independence enjoyed by the Vice President while serving in the Senate. Since the Vice President is not answerable to the President as he presides over the upper chamber—while carrying out his duties in the chair the Vice President is by definition not acting as part of the executive branch—he could not turn to the President to exercise executive privilege on his behalf.<sup>698</sup> In his capacity as Senate President, and to conform with the structural imperatives of the Constitution providing each constitutional officer a privilege when executing his or her enumerated duties, the Vice President would need to invoke an Article I privilege: either the generalized legislative privilege<sup>699</sup> or the Speech or Debate privilege.<sup>700</sup>

The question then is, what are the Vice President’s legislative duties, the preparation and execution of which would be shielded by the generalized legislative privilege or the Speech or Debate privilege? In addition to voting, Vice Presidents carry out a few other modest legislative responsibilities depending on the state of Senate rules and practice. On occasion they have spoken from the Chair. *Riddick’s Senate Procedure* indicates that while the “Vice President should not participate in debate[,] . . . on different occasions he has made long statements

<sup>697</sup> Transcript of Meet the Press, May 1, 2005, <http://www.msnbc.msn.com/id/7698687/print/1/displaymode/1098/>. In another assertion of vice presidential independence, Cheney openly broke with President Bush on the issue of gay rights. See, e.g., *Cheney at Odds with Bush on Gay Marriage*, Aug. 25, 2004, available at <http://www.msnbc.msn.com/id/5817720/>. In August 2004, the Vice President stated that he did not agree with President Bush’s view about the need for a constitutional amendment prohibiting same-sex marriage. See *id.* “[M]y own preference,” Cheney indicated, “is as I’ve stated, but the president makes policy for the administration. He’s made it clear that he does, in fact, support a constitutional amendment on this issue.” See *id.* For more on vice presidential independence, see Garner, *supra* note 689, at 181 (the Vice President is “not unnaturally thrown into a sort of antagonism with the Administration—an antagonism sure to be stimulated by the coterie . . . disappointed in efforts to secure favor with the President” (quoting 2 JAMES BLAINE, *TWENTY YEARS OF CONGRESS* 57 (1886)) (internal quotation marks omitted)).

<sup>698</sup> The Vice President, of course, cannot claim executive privilege on his own. See *supra* Part II.

<sup>699</sup> See *supra* Part III.B.

<sup>700</sup> See *supra* Part III.A.

from the chair.”<sup>701</sup> To do so today, the Vice President needs the unanimous consent of the Senate.<sup>702</sup> In the 1790s, Vice President Adams, however, was known to participate in debate with some frequency.<sup>703</sup> At the end of his term, Vice President Burr gave one of the most memorable addresses in the history of the Senate.<sup>704</sup>

As presiding officer, the Vice President must also ensure that regular order and decorum are observed both on the floor and in the Senate gallery, may make parliamentary rulings not involving constitutional matters, and may recognize individual members so they can address the Senate.<sup>705</sup> In addition, from time to time Vice Presidents have exercised other powers under Senate rules. Calhoun, for example, took full advantage of Senate rules at the time to make committee assignments.<sup>706</sup> Finally, from the outset, Vice Presidents have lobbied lawmakers.<sup>707</sup>

Thus, it seems clear that the Vice President qua presiding officer is very much his own man from a constitutional standpoint, and this is because in such a capacity the Vice

<sup>701</sup> RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 1391 (1992) [hereinafter RIDDICK'S].

<sup>702</sup> See *id.* at 1391-92.

<sup>703</sup> See, e.g., DAVID MCCULLOUGH, JOHN ADAMS 401-02, 407 (2001).

<sup>704</sup> See ROBERT C. BYRD, THE SENATE, 1789-1989, ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 48 (Mary Sharon Hall ed., 1988).

<sup>705</sup> See RIDDICK'S, *supra* note 701, at 1025. The power to recognize speakers carries with it some authority as it did when Vice President Rockefeller, in attempting to defeat a filibuster, refused to recognize opponents of his effort. See, e.g., HATFIELD, *supra* note 318, at 510-11. Before the rise of modern Senate party leadership and the expansion of the office's executive branch role, the Vice President appears to have had even more authority in this vein. As Coolidge reflected on his role as presiding officer: "the President of the Senate can and does exercise a good deal of influence over its deliberations. The Constitution gives him the power to preside, which is the power to recognize whom he will. That often means that he decides what business is to be taken up and who is to have the floor for debate at any specific time." See CALVIN COOLIDGE, THE AUTOBIOGRAPHY OF CALVIN COOLIDGE 162 (3d ed. 1984) (1929).

<sup>706</sup> See HATFIELD, *supra* note 318, at 87-89; Gerald Gamm & Steven S. Smith, *Last Among Equals: The Senate's Presiding Officer*, in ESTEEMED COLLEAGUES: CIVILITY AND DELIBERATION IN THE U.S. SENATE 105, 112-13 (Burdett A. Loomis ed., 2000) (noting that the presiding officer enjoyed the power to make committee assignments from 1823 to 1825, 1829 to 1832, and 1837 to 1844).

<sup>707</sup> See HATCH & SHOUP, *supra* note 652, 101-02; see also HATFIELD, *supra* note 318, at 389 (discussing how Vice President Garner would reach out to members on the floor). For a discussion of vice presidential lobbying, see GOLDSTEIN, *supra* note 295, at 177-84.

President is acting as a part of the legislative branch. In carrying out his own independent legislative functions—which, as discussed above, involve casting tie breaking votes, ruling on parliamentary procedure, recognizing Senators to speak, and occasionally speaking himself—the Vice President is in no way interfering with the President's Article II authority to administer the executive branch. Nor would the Vice President be exercising a legislative privilege in a manner inconsistent with Senate practice if he acted on his own since that privilege may be asserted by individual members of the body.<sup>708</sup>

The Vice President's consultations with aides on parliamentary procedure and tactics would therefore have the benefit of privilege. The same could be said to the extent he is consulting with subordinates on any remarks he may make from the chair or how to vote when the Senate is deadlocked. As is the case with lawmakers, discussions of this kind are sensitive, requiring candid exchanges between the Vice President and his staff. Perhaps only slightly less compelling for purposes of privilege would be any conversations and documents exchanged between the Vice President and his aides on legislative strategy, such as how to lobby Senators. These materials could be privileged since they involve the Vice President in his legislative role.<sup>709</sup> In this setting, the Vice President—at least in the modern era—would tend to be fulfilling the President's legislative agenda, but that is not constitutionally prescribed. As has been discussed earlier, Vice Presidents have actively worked against presidential legislative agendas in the past, and as a constitutional matter, are independent in this sphere.

Therefore, as a matter of constitutional structure and symmetry, to the extent the Vice President is carrying out his own independent constitutional duty to preside over the Senate and break ties, he would seem likely to enjoy the generalized legislative privilege based on structure and past practice. Of course, given the limited amount of time the modern Vice

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<sup>708</sup> See *supra* note 180 and accompanying text.

<sup>709</sup> Since the Vice President plays no constitutional role with respect to the House, it is less certain if his internal communications regarding legislative strategy involving the House of Representatives would be privileged. In such an instance, he may be acting more as an agent of the President than a constitutional officer of the Senate. Interestingly, Cheney maintained an office on the House side of the Capitol as well as the traditional one on the Senate side.

President spends presiding over the Senate,<sup>710</sup> such a privilege would no doubt shield only a minor portion of the Vice President's conversations and only a small amount of the material prepared for his review. But that does not mean the privilege would not exist.

*b. The Vice President and the Speech or Debate Clause*

Much as the Vice President qua presiding officer of the Senate would seem to have recourse to the generalized legislative privilege during the execution of his Senate responsibilities, so too would it appear that the Vice President may enjoy similar protection of his internal deliberations under the Speech or Debate Clause of the Constitution.<sup>711</sup>

To the extent the Vice President is fulfilling his duties under Article I to preside over the Senate and break ties, he would be considered part of the legislative branch<sup>712</sup> and fall within the ambit of the Speech or Debate Clause. Accordingly, he could exercise a privilege akin to that outlined in *Rayburn*. OLC has in fact alluded to the Vice President benefitting from protection under the Speech or Debate Clause. OLC has written that “[w]ith respect to [the Vice President’s] responsibility as tie breaker [in the Senate] his immunity from criminal prosecution should be analogized to that of Members of Congress under

<sup>710</sup> One has to go back to Barkley to find a Vice President devoting a significant portion of his work day to his Senate duties. On average, the Kentuckian sat in the chair about half of the time. See MARTIN B. GOLD, *SENATE PROCEDURE AND PRACTICE* 13 (2d ed. 2004). Nixon estimated that he spent only five to ten percent of his time presiding over the Senate. See, e.g., GOLDSTEIN, *supra* note 295, at 142. Agnew devoted about the same amount of time to his legislative duties. See *id.* Vice President Humphrey estimated that he dedicated approximately one third of his schedule to Senate activities. See Paul T. David, *The Vice Presidency: Its Institutional Evolution and Contemporary Status*, 29 J. POL. 721, 744 n.105 (1967). Walter Mondale spent only eighteen hours in the chair during his initial twelve months as Vice President. See GOLDSTEIN, *supra* note 295, at 142.

<sup>711</sup> Cf. Myers, *supra* note 45, at 936–40 (conceding that the Speech or Debate Clause could provide the Vice President with some degree of civil immunity); Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 17 n.40 (1998).

<sup>712</sup> See, e.g., Reis Letter, *supra* note 323, at 3 (“[The Vice President] is . . . made an officer of the Senate and given a right to vote in certain circumstances. It would reasonably follow that he is ‘in the legislative branch.’ . . . [In fact], it seems difficult to conceive that an officer whose only constitutional function, when the President is capable of exercising the Executive power, is to preside over the Senate and to vote . . . is not ‘in the legislative branch.’”); cf. *supra* note 323 and accompanying text.

Article I, section 6, clause 1 of the Constitution.”<sup>713</sup> Such a privilege, of course, would not extend beyond the confines of legislative activity.<sup>714</sup>

While largely convincing, such an argument is admittedly not airtight. There are three concerns with the Vice President being shielded by the Speech or Debate Clause that are less apparent than with his invoking the generalized legislative privilege, which is based on structure and past practice and not, strictly speaking, constitutional text. First, Article I, Section 6 applies to “Senators and Representatives.”<sup>715</sup> It is by no means assured that the Vice President would be considered a “Senator” for purposes of this clause.<sup>716</sup> He is not elected from and does not represent a state and serves on no committee. He cannot speak on the floor without the Senate’s permission. Most significantly perhaps, he cannot introduce legislation or amendments and cannot vote in most circumstances. Finally, OLC has concluded that he is not a lawmaker, observing that he is subject to impeachment, as are other executive branch officials.<sup>717</sup> As such,

<sup>713</sup> Dixon Memo, *supra* note 434, at 36; *cf.* Amar, *supra* note 711 (“[T]he Vice President must obviously be immune from a libel suit for things he says in the Senate, even though he is not, strictly speaking, a Senator covered by the words of the Article I speech clause . . .”).

<sup>714</sup> The Speech or Debate Clause is only interpreted to include duties that relate to legislative functions. *See, e.g.,* Hutchinson v. Proxmire, 443 U.S. 111, 126–36 (1979) (concluding that Speech or Debate Clause protection does not extend to press releases and newsletters); *see also* Myers, *supra* note 45, at 938 n.315.

<sup>715</sup> U.S. CONST. art. I, § 6. An argument could be made that if the Incompatibility Clause does not apply to the Vice President because he is not a member of Congress, *cf. supra* note 323, then why should he be treated as a member for legislative privilege purposes? There are three reasons. First, the courts have long construed the Speech or Debate Clause broadly, *see infra* notes 718–19 and accompanying text, while they have let stand the political branches’ narrow interpretation of the Incompatibility Clause. *See, e.g.,* Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974). Second, it reflects explicit text, which restricts only “Members” of Congress from serving in the executive branch and which expressly provides that the Vice President is President of the Senate. Finally, even were the Speech or Debate Clause to be viewed as not providing support for VPP, the generalized legislative privilege would still do so.

<sup>716</sup> *But cf.* WILLIAMS, *supra* note 308, at 31 (“[T]he Vice President is, insofar as he is able, a ‘Senator’ for his party.”); Garvey, *supra* note 323, at 582–83 (“It would be logically inconsistent not to consider an individual with the authority to vote in a legislative body a ‘member’ of that body . . . . Confined to a strictly textual analysis, the Constitution clearly perceives the Vice President as a legislative officer.”).

<sup>717</sup> *See, e.g.,* Katzenbach Memo, *supra* note 318, at 10–11 (“Despite his position as President of the Senate, he is certainly not one of its members. Nor can he be convincingly described as a third member of the Legislative Branch alongside the two Houses of Congress. His office was created by Article II of the Constitution

the Vice President may not be expelled from the chamber like a Senator.

However, the Court has not interpreted those covered by the Speech or Debate Clause narrowly. The Supreme Court in *Gravel v. United States* reasoned that “[i]t is true that the Clause itself mentions only ‘Senators and Representatives,’ but prior cases have plainly not taken a literalistic approach in applying the privilege.”<sup>718</sup> As a general matter, the courts have interpreted the Speech or Debate Clause to include congressional staff. Staff members obviously are not constitutional officers. They are not elected, they do not vote, they do not speak on the floor, they do not preside over the body—as does the Vice President—yet the Supreme Court in *Gravel* concluded they are shielded by privilege as their members’ alter ego.<sup>719</sup> Since staff members are afforded protection under the Speech or Debate Clause—even if their privilege is derivative from the members they serve—it would seem the Vice President as the constitutional President of the Senate would enjoy no less a privilege.

Moreover, from a textual standpoint, the use of the term “of” in the President of the Senate Clause makes clear that the Vice President is considered part of the Senate, even if he is not a

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dealing with the Executive Branch, and section 4 of that Article makes him, just as the President, subject to impeachment by the Legislative Branch.”).

<sup>718</sup> 408 U.S. 606, 617 (1972); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 823 (1982) (Burger, C.J., dissenting) (“It is hardly an overstatement to say that [when applying the Speech or Debate Clause to congressional aides] we thus avoided a ‘literalistic approach’ . . . and instead looked to the structure of the Constitution and the evolution of the function of the Legislative Branch.”); *Gravel*, 408 U.S. at 617 (“The Clause . . . speaks only of ‘Speech or Debate,’ but the Court’s consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view.”); *id.* at 624 (“Prior cases have read the Speech or Debate Clause ‘broadly to effectuate its purposes’ . . . .” (quoting *United States v. Johnson*, 383 U.S. 169, 180 (1966)); *United States v. Brewster*, 408 U.S. 501, 509 (1972) (concluding that past precedent ensured that “the Clause is to be read broadly to include anything ‘generally done in a session of the House by one of its members in relation to the business before it’” (quoting *Kilbourn v. Thompson*, 103 U.S. 168 (1881)); *United States v. Johnson*, 383 U.S. 169, 180 (1966) (“*Kilbourn* and *Tenney* indicate that the legislative privilege will be read broadly to effectuate its purposes . . . .”).

<sup>719</sup> See 408 U.S. at 618 (“[T]he Speech or Debate Clause applies not only to a Member, but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.”).



Senator himself.<sup>720</sup> Thus, while the Vice President is not a Senator, constitutional text and case law would seem to favor the Vice President having a measure of protection under the Speech or Debate Clause. The Vice President has also been treated as part of the legislative branch in a number of statutory schemes.<sup>721</sup> It would be consistent with past legislative treatment of the Vice President for him to be shielded by the Speech or Debate Clause.

<sup>720</sup> In this context, the term “of” is typically interpreted to relate to an object that is part of a larger entity. *See, e.g.*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 860 (11th ed. 2007) (defining “of” as “a function word to indicate the component material, *parts*, or elements or the contents . . . used as a function word to indicate belonging or a possessive relationship” (emphasis added)); RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1342 (2d ed. 1987) (“to indicate material, component parts, substance, or contents . . . possession, connection, or association”). Use of the term “of” in other areas of the Constitution clearly reflects the view that the Vice President should be considered part of the Senate and therefore part of the legislative branch. *Cf. Amar, supra* note 15, at 791–92 (discussing use of the Constitution as a dictionary). He is “Vice President of the United States [and] shall be President of the Senate.” U.S. CONST. art. I, § 3, cl. 5. There is little doubt that the first “of” in the clause denotes that the Vice President must be part of, and not separate from, the United States. This is underscored by the constitutional requirement that the President, and thus the Vice President, must have been born in the United States and therefore be “of” the United States. *See id.* art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.”); *id.* amend. XII (“no person constitutionally ineligible to the office of President shall be eligible to that of Vice President”).

Moreover, following Article I’s provision that the “Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided,” the Constitution states that the “Senate shall chuse their *other* Officers.” *See id.* § 3, cls. 4–5. The use of the term “other” is instructive. It clearly demonstrates that the Vice President as the President of the Senate is himself a Senate officer. It is difficult to argue that the Vice President is a Senate officer but is not part of the Senate. After all, this constitutional language mimics that governing the House. That language provides that the “House of Representatives shall chuse their Speaker and other Officers.” *Id.* § 2, cl. 5.

On the other hand, it could be argued Article I provides that the “Senate of the United States shall be composed of two Senators from each State,” *Id.* art. I, § 3, cl. 1, and that such a formulation leaves no room for the Vice President. However, the context of that provision almost assuredly implies actual membership in the body and not the issue of broader affiliation with the chamber. Senate staff members who number in the thousands are certainly “of” the Senate even if they are not senators. *See Gravel*, 408 U.S. at 616–18.

<sup>721</sup> *See, e.g.*, 5 U.S.C. § 2106 (2006) (“For purposes of this title, ‘Member of Congress’ means the Vice President, a member of the Senate or the House of Representatives.”); An Act Making Appropriations for the Legislative Branch for the Fiscal Year Ending September 30, 2010, and for Other Purposes, Pub. L. No. 111-68, tit. I, 123 Stat. 2023, 2023–24 (2009) (providing funds for vice presidential expense allowances and staff salaries); *see also Cheney GAO Brief, supra* note 551, at 16–17.

Further, the Supreme Court in its jurisprudence involving immunity from civil liability for official actions has concluded that non-lawmakers still enjoy legislative immunity when they are carrying out legislative functions. As noted above, immunity from civil liability is closely linked to questions of constitutional privilege as to both rationale and effect.<sup>722</sup> Both are key pillars in the broad constitutional emphasis placed on encouraging effective constitutional decisionmaking. The two concepts are also tied in that both involve exceptions to “ordinary legal processes.”<sup>723</sup> Moreover, the Supreme Court itself utilized reasoning from its civil immunity cases when deciding *Cheney v. U.S. District Court*, which of course involved matters related closely to privilege.<sup>724</sup>

In *Supreme Court of Virginia v. Consumers Union*,<sup>725</sup> the U.S. Supreme Court followed reasoning that provides additional support for the Vice President possessing a Speech or Debate privilege. In that case, the U.S. Supreme Court ruled that, when carrying out legislative activities, the Virginia Supreme Court should be granted legislative immunity.<sup>726</sup> The Vice President could make a convincing parallel argument that, if the judiciary—as a separate branch of state government—is entitled to legislative immunity when acting legislatively, the Vice President at the federal level should have the same treatment when he is acting in a legislative capacity.<sup>727</sup> The Vice President’s case would actually be on much firmer ground than the state court’s in *Consumers Union* since, unlike the court, the Vice President in fact is part of the legislative branch, at least some of the time.<sup>728</sup>

The Supreme Court has also concluded in other contexts that certain actions are legislative by their very nature and are

<sup>722</sup> See *supra* Part I.B.

<sup>723</sup> See Amar, *supra* note 7, at 192; see also *supra* Part I.

<sup>724</sup> 542 U.S. 367, 385–86, 388 (2004). The Court cited both *Clinton v. Jones* and *Nixon v. Fitzgerald* in arriving at its conclusion. See *id.*; see also Myers, *supra* note 45, at 910–12 & 912 n.104.

<sup>725</sup> 446 U.S. 719 (1980).

<sup>726</sup> See *id.* at 731.

<sup>727</sup> The author would like to thank a Senate staff colleague for directing him to this case. See also *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 406 (1979) (concluding that “to the extent [a regional commission is] . . . acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity”).

<sup>728</sup> See discussion *supra* note 323.

therefore entitled to the absolute immunity that accompanies such action. The Court in *Bogan v. Scott-Harris*,<sup>729</sup> which centered around the question of immunity for local officials involved in legislative actions, concluded that “acts of voting . . . [are] quintessentially legislative.”<sup>730</sup> The Court was unconcerned about which branch of government the local official belonged to: “Petitioner[s] . . . signing into law an ordinance . . . [is] formally legislative, even though he [is] . . . an executive official. *We have recognized that officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions.*”<sup>731</sup> The Court concluded that “[w]hether an act is legislative turns on the nature of the act.”<sup>732</sup> Since officials altogether *outside* of the legislative branch are entitled to legislative immunity when they perform legislative acts,<sup>733</sup> it would seem all but certain that the Vice President would enjoy legislative immunity in his capacity as President of the Senate<sup>734</sup> because he is performing legislative acts *within* the legislative branch. Since the Vice President would seem to have legislative immunity when acting in a lawmaking capacity, it would stand to reason that he would also have legislative privilege since the two concepts are so closely intertwined.<sup>735</sup>

<sup>729</sup> 523 U.S. 44 (1998).

<sup>730</sup> *Id.* at 55.

<sup>731</sup> *Id.* (emphasis added).

<sup>732</sup> *Id.* at 54.

<sup>733</sup> See also *Bryan v. City of Madison*, 213 F.3d 267, 272 (5th Cir. 2000) (“Legislative immunity protects officials fulfilling legislative functions even if they are not ‘legislators.’ ”); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1194 (5th Cir. 1981).

<sup>734</sup> See *Myers*, *supra* note 45, at 937–38 (“[T]he lack of an explicit textual basis for the Vice President’s legislative immunity claim would not necessarily be fatal, as . . . neither judicial nor executive immunity has a ‘specific textual basis.’ . . . *Bogan v. Scott-Harris* . . . extended . . . legislative immunity to a city mayor for participating in the budget process . . . . The willingness of the Court to blur the distinction between executive and legislative roles in *Bogan*, coupled with the Vice President’s constitutional function as President of the Senate, suggests that a grant of limited legislative immunity might not be as farfetched as originally presumed.”). The law in at least one state confirms this position. See *Jubelirer v. Singel*, 638 A.2d 352, 357 (Pa. Commw. Ct. 1994) (“[T]he Pennsylvania Supreme Court [has] indicated that the Lieutenant Governor, acting in his capacity as President of the Senate, would also be immunized from suit under the Speech and [sic] Debate Clause.” (internal citation omitted)).

<sup>735</sup> See *supra* Part I; cf. *Nixon v. Adm’r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 522 n.19 (1977) (Burger, C.J., dissenting) (“I see no distinction in Congress’ seeking to compel the appearance and testimony of a former President and in, alternatively,

As a further structural matter, it would seem anomalous for the presiding officer of the House—the Speaker—to enjoy Speech or Debate protection but not the presiding officer of the Senate.<sup>736</sup> It would appear all the more incongruous for the President of the Senate's replacement—the President pro tempore—to benefit from a privilege but not the President of the Senate himself. After all, they perform the exact same function. For these reasons, the view that the Vice President should not hold a Speech or Debate privilege because he is not a Senator is unpersuasive.

The second concern is that, since the Speech or Debate Clause was designed largely to defend the legislative branch from overweening executive power,<sup>737</sup> the protective rationale might not apply in the case of the Vice President who is a part of the executive branch the majority of the time.<sup>738</sup> This criticism is not without merit. Yet, under the Constitution, the Vice President is legally independent from the President; this is especially manifest regarding his Senate role. It could be argued, therefore, that the integrity of the Vice President's actions as presiding officer of the Senate would require protection from undue executive branch influence. The argument would be that not only is the independence of the vice presidential office preserved, but also the independence of the Senate's proceedings as a whole. To the extent the executive branch could, through its prosecutorial or coercive authority, arrest, detain, and otherwise harass lawmakers in an effort to get them to vote or act a certain way, the same hypothetical—however unlikely—could also be applied to the Vice President. In theory, the executive branch could similarly harass the Vice President into voting a certain way or carrying out his parliamentary duties in a particular fashion, thus undercutting the constitutional independence the clause was meant to preserve for the Senate and the legislative

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seeking to compel the production of Presidential papers over the former President's objection.”).

<sup>736</sup> There is no constitutional requirement that the Speaker be a House member. See U.S. CONST. art. I, § 2. In theory, a non-House member—perhaps even the Vice President—could serve as Speaker.

<sup>737</sup> See *United States v. Johnson*, 383 U.S. 169, 178 (1966) (“[T]he privilege has been recognized as an important protection of the independence and integrity of the legislature.”).

<sup>738</sup> The author would like to thank Louis Fisher for raising this point.

process as a whole. As a consequence, this second criticism also appears to fall short.

Third, it might prove difficult for the Vice President to claim the Speech or Debate Clause as protection from having to produce materials to the Senate. This is because congressional committees may thoroughly investigate their own membership and the Clause holds no protection in this respect. The ethics committees in both houses have the authority to subpoena documents from their members. For example, Senator Bob Packwood's diaries were subpoenaed by the Senate Ethics Committee, and such action was upheld by the Supreme Court.<sup>739</sup> Thus, the Vice President would have a difficult time relying on the Speech or Debate Clause to thwart a Senate committee demand for documents related to his Senate activities.<sup>740</sup> That said, the clause could still very likely protect the Vice President from having to submit legislative materials to a non-Senate investigation or pursuant to a civil suit. In this respect, he could assert Speech or Debate privilege in court against the executive branch or against outside parties in civil litigation. Therefore, this concern is less than meets the eye.

After weighing the arguments pro and con, the Vice President would seem to enjoy some measure of protection under the Speech or Debate Clause as well as under the generalized legislative privilege, although the latter argument is more persuasive. Such an assertion, however, would only shield the Vice President to the extent he was carrying out his duties to preside over the Senate and break ties—tasks that, as a practical matter, take up very little of a modern Vice President's time. The vast majority of documents and communications the modern Vice President has a hand in involve executive branch activity delegated to him by the President or by statute and would not seem to be covered. Thus, the opening for VPP to be exercised in this realm would be narrow.

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<sup>739</sup> See *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319 (1994).

<sup>740</sup> The Vice President could validly claim VPP to block materials sought by the Senate related to his duties under the Twenty-Fifth Amendment.

## 2. The Twenty-Fifth Amendment

Another component of VPP involves the Twenty-Fifth Amendment.<sup>741</sup> In this context, the Vice President possesses a privilege while: (1) preparing to fill in for the President with respect to presidential inability and when making an inability determination if the President's health is in question;<sup>742</sup> or (2) preparing to assume office on a permanent basis due to presidential death, resignation, removal, or vacancy.<sup>743</sup>

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<sup>741</sup> Cf. Amar, *supra* note 7, at 207 (emphasis added) ("All these changes brought by the Twenty-Fifth Amendment might have important consequences for the issue of executive privilege. By formalizing succession, by making the vice president part of (and indeed a leader of) the cabinet for purposes of determining presidential disability, and by making clear that the president gets to choose persons to fill vice presidential vacancies . . . the amendment strongly suggests that, today at least, the vice president is a full member of the president's executive team. This amendment . . . *might* provide a possible basis *today* for a somewhat broad claim of executive privilege on the part of the vice president." (emphasis added)); Goldstein, *supra* note 2, at 167 ("[T]he [Twenty-Fifth] Amendment assigns the office certain constitutional powers, duties, and privileges." (emphasis added)); Myers, *supra* note 45, at 934 n.290 (arguing that the Vice President's authority under the Twenty-Fifth Amendment might cloak him with absolute civil immunity for his official actions in this context).

If the Vice President enjoyed the constitutional authority to decide questions of inability prior to the Twenty-Fifth Amendment as many maintained, *see, e.g.*, Presidential Inability, 42 Op. Att'y Gen. 69, 87–88, 94 (1961); RICHARD H. HANSEN, THE YEAR WE HAD NO PRESIDENT 85 (1962); SILVA, *supra* note 297, at 102, then presumably he would have enjoyed a constitutional privilege as well. There are several examples of vice presidential communications about succession and inability that might have been privileged if the Vice President indeed had this constitutional authority before adoption of the amendment. These instances reflect Twenty-Fifth Amendment-type discussions. While Vice President Arthur never met with President Garfield following the shooting of the latter, *see* FEERICK, *supra* note 18, at 8, the Vice President did exchange letters with Secretary of State Blaine concerning the President's health. *See* FEERICK, *supra* note 652, at 122. The Garfield Cabinet also appears to have presented Arthur with a way forward regarding Garfield's inability, but it was never acted upon. *See also id.* at 137–38. A staffer of Vice President Marshall urged him to take steps to prepare himself to be President following Wilson's stroke in 1919, but Marshall took no action. *See* DORMAN, *supra* note 312, at 109. After President Eisenhower's heart attack in September 1955, Vice President Nixon met with senior executive branch officials, such as the Secretary of State, Secretary of the Treasury, the Acting Attorney General, and White House aides about how the executive branch would run during the President's incapacity. *See* FEERICK, *supra* note 18, at 17–18. Similar high-level discussions took place following Eisenhower's stroke two years later. *See id.* at 21–22.

<sup>742</sup> *See* U.S. CONST. amend. XXV, § 4.

<sup>743</sup> In addition, a Vice President elect is likely to enjoy a modest privilege under the Twentieth Amendment. This is based on the premise that there would seem to be an executive privilege for incoming Presidents, *cf.* Nixon v. Adm'r of Gen. Servs. (*Nixon II*), 433 U.S. 425 (1977) (recognizing executive privilege for former

The Twenty-Fifth Amendment maps out the procedure for determining presidential inability. It provides that

[w]henever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within

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Presidents), particularly following the vote of the electoral college. This would reflect the same reasoning undergirding any other constitutional privilege: the premium the Constitution places on encouraging effective decisionmaking.

Between election day and the inauguration, the President elect undertakes serious deliberations as to policy options and personnel appointments, which require a high degree of candid internal discussion. In this vein, it would also appear that there would need to be a vice presidential transition privilege. Any deliberations held by the Vice President elect about succession and presidential inability would need to be protected for the same reason as VPP. A unique aspect of the vice presidential transition privilege would seem to come into play during this period since the Vice President elect would presumably have some deliberations involving the Twentieth Amendment and how he might need to assume the presidency: (1) were tragedy to befall the President elect prior to inauguration; (2) were the President elect to fail to qualify as President; or (3) were the President elect not to secure sufficient electoral votes. *See* U.S. CONST. amend. XX, § 3.

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

*Id.* The author would like to thank Joel Goldstein for raising this question.

forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.<sup>744</sup>

Thus, the Twenty-Fifth Amendment expressly lays out an important role for the Vice President regarding whether a presidential inability exists, a role that should be considered among the Vice President's enumerated powers under the Constitution.<sup>745</sup> The Supreme Court has in fact noted in this context that "the Twenty-fifth Amendment . . . empowers the Vice President."<sup>746</sup> Or as Dean John Feerick, the leading authority on the Twenty-Fifth Amendment, has written, the "Amendment provides a broad *grant of power* and discretion to be used appropriately by the President, *Vice President*, and Cabinet."<sup>747</sup>

In this respect, it is important to recall what the Supreme Court stated in *Nixon I*: "Certain powers and privileges flow

<sup>744</sup> *Id.* amend. XXV, § 4.

<sup>745</sup> See, e.g., Goldstein, *supra* note 2, at 206 ("The text of the Amendment gives the vice president certain powers and duties—it makes him a potential decision-maker regarding presidential inability . . .").

<sup>746</sup> Freytag v. Comm'r, 501 U.S. 868, 886–87 (1991) (emphasis added).

<sup>747</sup> FEERICK, *supra* note 18, at xxiv (emphasis added); see also BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 188 (1968) ("[A]ll that Congress can do [under the Twenty-Fifth Amendment] is to affirm a decision that has already been made in the executive branch, because the majority of the Cabinet have already supported the Vice President." (quoting Attorney General Katzenbach) (internal quotation marks omitted)); Paul B. Stephan III, *History, Background and Outstanding Problems*, in 1 PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT, *supra* note 34, at 63, 78 ("Section Four at least now settles th[e] question [as to who has the authority to initiate action regarding a determination of inability]: The vice president *does* have the power." (quoting Paul Stephan)); TASK FORCE, *supra* note 318, at 38 (characterizing the inability provisions of the Twenty-Fifth Amendment as providing a "grant of power" to the Vice President even if Vice Presidents are chary to use it); Amar, *supra* note 7, at 207 (the Twenty-Fifth Amendment ensures that "the vice president [is] part of (and indeed a leader of) the cabinet for purposes of determining presidential disability"); Medina, *supra* note 654, at 95 n.97 ("One might also describe the Vice-President's originating initiative under the [T]wenty-[F]ifth [A]mendment to declare the President unable to fulfill his responsibilities as a constitutional power."); cf. Goldstein, *supra* note 2, at 192 ("The Amendment . . . mak[es] the vice president an indispensable decision-maker.").



from the nature of enumerated powers.”<sup>748</sup> In carrying out the inability provision, the Vice President and the Cabinet or a separate body must “transmit . . . [a] written declaration” to Congress as to the President’s inability. Before deciding whether to make such a declaration, the mechanism for determining presidential inability anticipates that the Vice President must consult with others—most likely Cabinet officers, White House staff, vice presidential staff, the First Lady, and medical authorities.<sup>749</sup> As Feerick points out, “the Amendment gives the Vice President and Cabinet (or such other body established by law) the primary role in the process and implicitly requires them to secure such information, medical and otherwise, as may be necessary to make an informed decision.”<sup>750</sup> He adds that “[t]hose closest to the President should be expected to cooperate with any Twenty-Fifth Amendment inquiry made by the Cabinet

<sup>748</sup> *United States v. Nixon (Nixon I)*, 418 U.S. 683, 705–06 (1974).

<sup>749</sup> See FEERICK, *supra* note 18, at 89–90 (“First, the President has to transmit his own conviction that he is well. Then the Vice President has to say, ‘No, I do not agree with you, you are not well.’ Then the Vice President has to have a talk with a majority of the members of the Cabinet.” (quoting Martin Taylor, who testified during consideration of the Twenty-Fifth Amendment)); see also S. REP. NO. 84-66, at 13 (1965) (“Section 4 . . . embraces the most difficult problem of inability—the factual determination of whether or not inability exists. . . . [T]he Vice President, if satisfied that the President is disabled shall, with the written approval of a majority of the heads of the executive departments, assume the discharge of the powers and duties of the Office as Acting President. . . . The combination of the judgment of the Vice President and a majority of the Cabinet members . . . would enable prompt action by the persons closest to the President. . . . It is assumed that such decision would be made only after adequate consultation with medical experts who were intricately familiar with the President’s physical and mental condition.”); H. REP. NO. 89-203, at 13 (1965); REPORT, *supra* note 34, at 21 (recommending that, under the Twenty-Fifth Amendment, “[c]onstitutional decision-makers will generally require medical advice from appropriate medical experts . . . regarding the President’s condition in making decisions . . . as to whether the President is able to discharge the powers and duties of his office. The legislative history surrounding the adoption of the Twenty-fifth Amendment makes clear that its framers intended that constitutional decision-makers would solicit appropriate medical advice.”); Bayh, *supra* note 34 (quoting former Senator Bayh, the sponsor of the amendment, in the context of what would be done if a president were suddenly incapacitated: “In the real world . . . nothing [would be done] . . . until the vice president has a chance to consult with a lot of folks as to whether something needs to be done.”); Caplin, *supra* note 34 (hypothesizing about a first lady attesting to the President’s health in front of the Vice President and Cabinet during an inability inquiry under the Twenty-Fifth Amendment); *supra* note 34; cf. Amar, *supra* note 7, at 207 (“In some ways, the vice president is treated in this process [under the Twenty-Fifth Amendment] as the head of the cabinet for assessing whether the president is disabled.”).

<sup>750</sup> FEERICK, *supra* note 18, at xxiv.

and Vice President.”<sup>751</sup> Keeping in mind the functional considerations laid out by the Supreme Court in *Nixon I*—which emphasize the need for candid exchanges among constitutional officers and their aides when carrying out constitutionally enumerated duties—it is difficult to imagine intra-governmental communication much more sensitive or requiring much more candor than questions as to the President’s ability to discharge his responsibilities.<sup>752</sup> Such information leaking out could have far-reaching ramifications for the nation.

It is generally acknowledged that the Vice President’s most vital constitutional function is to be ready to step into the shoes of the President if the latter is unable to fulfill his duties, if he is deceased, if he is removed, or if the office is left vacant. One could well imagine an instance where a sitting President was gravely ill and questions arose as to his ability to carry out his duties. Discussions about legal, logistical, public relations, or medical issues involved with the Vice President assuming power during an inability scenario—even if the inability were only temporary or even if the Vice President never had to actually assume power—would involve the Vice President fulfilling his express constitutional duty and would, as a functional matter, require great candor and secrecy.<sup>753</sup> In this context, advice and

<sup>751</sup> *Id.* at xxv.

<sup>752</sup> See, e.g., ROSE McDERMOTT, PRESIDENTIAL LEADERSHIP, ILLNESS, AND DECISION MAKING 209 (2008) (“[I]t is absolutely necessary for the vice president and Cabinet to obtain accurate and unbiased medical advice to determine whether the president is able to perform his or her duties [pursuant to the Twenty-Fifth Amendment].” (quoting former President Carter) (internal quotation marks omitted)); see also HERBERT L. ABRAMS, “THE PRESIDENT HAS BEEN SHOT”: CONFUSION, DISABILITY, AND THE 25TH AMENDMENT IN THE AFTERMATH OF THE ATTEMPTED ASSASSINATION OF RONALD REAGAN 180 (1992) (quoting then presidential aide Edwin Meese about certain actions taken immediately following the assassination attempt on President Reagan: “The concern was that the press not get wind of any actions that would raise questions as to whether the president was capable of acting.”); cf. REPORT, *supra* note 34, at 13 (recommending that any “contingency plan pertaining to presidential inability and continuity of government will contain highly sensitive information and should be classified”). Any alternate body created by Congress under the Twenty-Fifth Amendment to replace the Cabinet would similarly need to be taken into confidence by the Vice President. Cf. McDERMOTT, *supra*, at 217–18.

<sup>753</sup> With respect to how the formal declaration of inability might be drawn up under the amendment, Attorney General Herbert Brownell opined:

Undoubtedly the Justice Department would prepare the [inability declaration] papers, and the action would be taken at a joint meeting of the Vice President and the Cabinet members. *It might not even be a matter of*

communications sought and given within the Vice President's office could legitimately be claimed by the Vice President as covered by VPP.<sup>754</sup>

As a practical matter, if the Vice President were to assume power permanently under such a scenario, he could assert executive privilege as President and would not need to assert VPP.<sup>755</sup> If he merely served as acting President, however, he might need to assert VPP upon his return to the vice presidency if the President did not feel compelled to protect the Vice President's deliberations while acting as President or immediately beforehand.<sup>756</sup> The possibility of strained relations between the President and Vice President under a contested inability situation is likely to be fairly high.<sup>757</sup> It is therefore all the more important for the Vice President to be able to protect his own deliberations in this vein to ensure maximum candor from his advisers and those within the executive branch. He may

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*public knowledge as to who signed first* [the inability declaration]. That particular point would fade into insignificance in getting the group action. FEERICK, *supra* note 18, at 203 (emphasis added).

<sup>754</sup> Under the Twenty-Fifth Amendment, it could be argued that the Vice President would be unable to keep information from Congress in the context of an inability scenario since Congress is integral to the process of making a binding determination. See U.S. CONST. amend. XXV, § 4. Of course, the President may claim executive privilege over deliberations involving domestic policy even though Congress has primary constitutional authority in that realm. Nonetheless, if one accepts the premise as true, then the question could arise is there really much of a vice presidential privilege left? The answer is yes. First, VPP would certainly apply in any private civil suit that could be brought against the Vice President or others requesting materials about the inability determination process. Second, the initial determination of inability is made by the Vice President and the Cabinet and not Congress. The facts relied on by the Vice President and the Cabinet in this vein would surely need to be made available to the Congress as the legislature carries out its constitutional role of approving or disapproving the executive branch's initial judgment. Opinions expressed and the internal procedure followed in the making of this preliminary determination, however, would seem a much less likely candidate for full disclosure to Congress than the facts upon which such a decision was based. Third, the Vice President could still block materials that were requested by Congress as they concern his preparations for succession, as opposed to inability. Congress plays no direct role in the succession process, although the body indirectly can do so through confirmation of a new Vice President. The author would like to thank Joel Goldstein for posing this probing question.

<sup>755</sup> See, e.g., Goldstein, *supra* note 2, at 198 ("As a matter of constitutional law, a vice president acting as president under Section 3 or 4 has the same powers and duties as the chief executive does under whom he serves.").

<sup>756</sup> The question of whether a former acting President should have the benefit of executive privilege as a former President is beyond the scope of this Article.

<sup>757</sup> See *infra* note 795.

in some circumstances even need to protect this information from the President. In reality, Cabinet officials, as opposed to the Vice President and his staff, would likely feel more obligated to provide such materials to the returning President. Responsibility for deliberations, of course, is granted in large part to the Vice President by the Twenty-Fifth Amendment, not by the President, so he would not be “defying” the President in a legal sense by refusing to release documents to him. Nor would he be undermining the President’s Article II authority. If the two came into conflict over whether to release Twenty-Fifth Amendment documents, the Vice President would be well within his rights to refuse the President’s “instructions” to make the material public or to give the documents to the President himself.

If not technically serving as acting President during a time of formally recognized presidential inability or not taking direct steps toward that end under the Twenty-Fifth Amendment, the Vice President would likely be unable to enjoy privilege under the Twenty-Fifth Amendment.<sup>758</sup> In the context of informally filling in for the President, a Vice President could claim to be carrying out his constitutional duties under the implied authority of the Twenty-Fifth Amendment, although he could not do so legitimately. The amendment would not be triggered and any actions contrary to the President’s wishes in this setting would seem to run afoul of the President’s authority under Article II.

In addition to matters involving inability under the Twenty-Fifth Amendment, VPP could cover certain matters involving presidential succession. The Twenty-Fifth Amendment provides that “[i]n case of the removal of the President from office or of his death or resignation, the Vice President shall become President.”<sup>759</sup> Although a preparatory role for the Vice President regarding succession is not expressly laid out in the Twenty-Fifth Amendment—as is the language involving presidential inability—matters of presidential succession clearly reflect a major constitutional role for the Vice President. As former Vice President Cheney noted, the Vice President’s “basic role . . . is to worry about presidential succession. And [the Vice President’s]

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<sup>758</sup> See, e.g., ABRAMS, *supra* note 752, at 72.

<sup>759</sup> U.S. CONST. amend. XXV, § 1.

job, above all other things, is to be prepared to take over if something happens to the president."<sup>760</sup>

In this respect, preparations for immediate succession would seem to be cloaked by VPP. The functional need for high governmental officials to have the benefit of candor in their deliberations with their aides as spelled out in *Nixon I* would seem to be as present here as they would be regarding a determination of presidential inability. Sensitive matters involving protocol, timing, legal mechanics, communications, and political outreach would all need to be discussed confidentially by vice presidential staff. Individuals close to Vice President Ford, for example, began quietly undertaking transition plans in advance of Nixon stepping down.<sup>761</sup> Official efforts in this vein would seem to be privileged since the Vice President would be carrying out his constitutional responsibility to prepare for the presidency; but, at the same time, he would need to take action without information getting out that would make the Vice President look disloyal or presumptuous. The heightened sensitivity of these preparations reflects one of the fundamental dilemmas of succession and inability—that is, the unwillingness of Vice Presidents to take prudent steps in this direction out of fear of being viewed as overly ambitious.<sup>762</sup> This reticence was a concern that animated the framers of the Twenty-Fifth

<sup>760</sup> Paul Kengor, *Cheney and Vice Presidential Power*, in Gregg II & Rozell, *supra* note 549, at 168; see S. REP. No. 89-66, at 11 (1965) ("To stand by ready for the powers and duties of the Presidential office to devolve upon him at the time of death or inability of the President, is the principal constitutional function of the Vice President."); S. REP. No. 89-203, at 11 (1965); Dixon Memo, *supra* note 434, at 36 ("The principal responsibility of the Vice President is to be ready to serve as President or Acting President should the occasion arise, thereby avoiding any interruption in the continuity of the office of the President. This duty 'to stand and wait' is of the highest constitutional and institutional importance. Judicial proceedings which could interfere with readiness to serve therefore require careful scrutiny."); TASK FORCE, *supra* note 318, at 33 (noting that preparing for the presidency is the Vice President's "main constitutional role"); MARIE D. NATOLI, *AMERICAN PRINCE, AMERICAN PAUPER: THE CONTEMPORARY VICE PRESIDENCY IN PERSPECTIVE* 7 (1985) ("Most observers would suggest that the most crucial function of the office of Vice-President is to succeed to the Presidency."); see also Memorandum from Vice President-elect Walter F. Mondale to President-elect Jimmy Carter regarding the Role of the Vice President in the Carter Administration, Dec. 9, 1976, at 11 (on file with author) (The "most important constitutional obligation of the office [of Vice President] . . . is, being prepared to take over the Presidency should that be required.").

<sup>761</sup> See, e.g., GOLDSTEIN, *supra* note 295, at 211.

<sup>762</sup> See, e.g., FEERICK, *supra* note 18, at 9, 14, 20.

Amendment.<sup>763</sup> Acknowledgement of VPP would help somewhat to allay these fears.

Moreover, routine documents prepared for the Vice President's review about potential succession or presidential inability issues—even if a transition were not imminent—would also seem to fall within the privilege. In this case, memoranda about the mechanics of potential succession or related communications or political strategy papers would be extremely sensitive even if they were merely nonemergency contingency documents.<sup>764</sup> They would seem to fall within the Vice President's constitutional duties and would not appear to infringe on the President's Article II authority. Such materials would therefore likely be privileged.

Nonetheless, in the context of presidential succession, there are several drawbacks to relying upon the Twenty-Fifth Amendment for purposes of VPP. For one, it is unsupported by practice. Vice President Ford was essentially in this position during the last days of the Nixon administration.<sup>765</sup> He had meetings with White House Chief of Staff, Alexander Haig, in which delicate matters of succession were discussed. Far from declaring these conversations privileged, President Ford testified in open session about them before a House subcommittee.<sup>766</sup> Precedent, although limited, does not support this theory.

Furthermore, there is the practical difficulty of line drawing. The Vice President could claim that all or most of his daily activities are carried out with an eye toward succession. The Vice President could assert, for example, that even routine deliberations at the NSC are constitutionally privileged despite the fact he is both fulfilling a statutory duty and assisting the President. This is because, he could argue, being familiar with national security matters is vital to the Vice President's potential temporary or permanent succession to the Presidency. For the same reason, the Vice President could maintain that communication regarding *any* of the functions he is delegated by the President or by statute would also be subject to privilege.

<sup>763</sup> See, e.g., 111 CONG. REC. 7937 (1965) (statement of Rep. Celler).

<sup>764</sup> Under Presidents George H.W. Bush and Clinton, Twenty-Fifth Amendment contingency plans were in fact drawn up. See Goldstein, *supra* note 2, at 205.

<sup>765</sup> See *supra* Part VI.G.

<sup>766</sup> See *supra* notes 449–54 and accompanying text.

Because of the potential for overly expansive privilege claims, if an assertion of VPP stems from the Twenty-Fifth Amendment, a rule of construction wedding VPP's invocation to *immediate or specific* succession or presidential inability issues would seem to be in order. This makes sense since it closely follows the text of the Amendment.

At the same time, the Twenty-Fifth Amendment gives no indication that the Vice President *must* be intimately involved in presidential decisionmaking. While it important as a policy matter for him to be "plugged in" to what is going on in the executive branch in case something happens to the President, it is certainly not a constitutional requirement. Past practice before the Twenty-Fifth Amendment demonstrates that Vice Presidents often had at best episodic interaction with their Presidents.<sup>767</sup> Many Vice Presidents assumed the presidency with little knowledge of what their predecessor had been doing. Vice President Truman's ignorance about the construction of the atomic bomb is well known.<sup>768</sup> Even following the Twenty-Fifth Amendment, few would argue that the President is *required* to include the Vice President among his confidantes. For example, Nixon ensured that Agnew was not aware of major policy decisions.<sup>769</sup> At one point Nixon was queried about whether he had informed the Vice President in advance of his diplomatic efforts to reach out to communist China.<sup>770</sup> To this Nixon was "incredulous."<sup>771</sup> "Agnew? Agnew?" he replied. "Oh, of course not."<sup>772</sup> Thus, claiming that the Vice President's presidentially or statutorily delegated responsibilities are shielded by a constitutional privilege held by the Vice President is dubious

<sup>767</sup> See, e.g., BAUMGARTNER, *supra* note 647, at 22 (noting that Vice President Breckinridge did not meet alone with President Buchanan until three years had elapsed into their term).

<sup>768</sup> See, e.g., *id.* at 30; Goldstein, *supra* note 297, at 792; see also THOMAS H. NEALE, CONG. RESEARCH SERV., VICE PRESIDENTIAL VACANCIES: CONGRESSIONAL PROCEDURES IN THE FORD AND ROCKEFELLER NOMINATIONS 5 (1998) ("Vice President Thomas Marshall remained completely unprepared for potential succession to the presidency throughout the period [of Wilson's illness]" (citations omitted)).

<sup>769</sup> See e.g., John Robert Greene, "I'll Continue To Speak Out": Spiro T. Agnew as Vice President, in AT THE PRESIDENT'S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY 124, 127 (Timothy Walch ed., 1997).

<sup>770</sup> See Friedman, *supra* note 323, at 1710 n.31.

<sup>771</sup> *Id.*

<sup>772</sup> *Id.*

since there is no constitutional requirement for a Vice President to be “in the loop” with regard to executive branch policymaking; such decisions are the President’s alone.

Such a rule of construction is also necessary to prevent the Vice President through exercise of VPP from undercutting the President’s role as head of the executive branch under Article II. The Framers rejected a plural executive. Permitting the Vice President to invoke a privilege without the approval or even against the wishes of the President on matters within the President’s constitutional authority would undermine the President’s power under Article II.<sup>773</sup> As such it would run counter to the overwhelming tide of legal authority indicating that only the President may invoke executive privilege.<sup>774</sup> This narrow rule limiting VPP to immediate or specific inability or succession issues assures that the Vice President would be claiming privilege only over documents and communications within his own constitutional sphere, not the President’s. Finally, a narrow rule of construction is consistent with the traditional legal standard that burdens placed on fact finding in legal proceedings should be discouraged.<sup>775</sup>

The Vice President’s responsibilities under the Twenty-Fifth Amendment, much like those in the Senate, provide a path for the Vice President to claim his own privilege.<sup>776</sup> This would be a privilege he could lawfully invoke even if opposed by the President.

<sup>773</sup> See *infra* Part VIII.B.

<sup>774</sup> See *supra* Part II.C–D.

<sup>775</sup> See *infra* Part VIII.G.

<sup>776</sup> The question could arise: if the Vice President enjoys a privilege under the Twenty-Fifth Amendment when preparing for presidential succession, then would the Speaker as the third in line to the presidency also be entitled to such confidentiality if the President or Vice President were out of commission? See Turley, *supra* note 7, at 677 n.159. The answer would appear to be yes. In a situation in which the President dies and is succeeded by the Vice President, then prior to the confirmation of a new Vice President the Speaker would be the next in line to the presidency. To the extent the Speaker during this time makes preparations to potentially assume the presidency, he or she would seem to enjoy a privilege. As a practical matter, the Speaker’s internal deliberations on these matters with his or her aides would likely be covered by legislative privilege. The same would be true for the President pro tempore. It would not seem as likely for Cabinet secretaries in the line of succession since VPP, like all constitutional privileges, is predicated on its being invoked by a constitutional officer and Cabinet secretaries are mere creatures of statute. Cf. *id.*; see also *infra* note 890.



B. *The Vice President as the President's Vicar*

It could be argued that the Vice President is the President's vicar in that his acts are inherently the President's. In a passage in *Marbury v. Madison*, Chief Justice John Marshall wrote:

By the Constitution of the United States, the president is invested with certain political powers. . . . To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. *In such cases, their acts are his acts . . .*<sup>777</sup>

The implication from *Marbury* is that the President's actions encompass the actions of the executive branch, at least with respect to Cabinet secretaries. They are one and the same. Presumably, as the only other constitutional officer who serves in the executive branch—at least most of the time—the Vice President would be taking steps on the President's behalf in fulfilling delegated executive branch duties and his actions would enjoy the same vicarious treatment as that of a Cabinet secretary. The language in *Cheney v. U.S. District Court* combined the President and Vice President in such a manner on several occasions.<sup>778</sup> The district court in *Walker v. Cheney* took much the same approach, mixing the two offices.<sup>779</sup> The same court in *Committee on the Judiciary v. Miers* followed suit,<sup>780</sup> as did the courts on two other recent occasions.<sup>781</sup> While these expressions are mere dicta, they remain the only judicial pronouncements on the subject. With so little judicial reasoning to turn to, one naturally feels drawn toward these pronouncements.<sup>782</sup> Further, as the Bush administration argued in a somewhat different context in *Walker*, the President and

<sup>777</sup> 5 U.S. (1 Cranch) 137, 165–66 (1803) (emphasis added).

<sup>778</sup> See 542 U.S. 367, 391–92 (2004) (stating that “[s]pecial considerations [are] applicable to the President and the Vice President”); *supra* Part VI.L.2; see also Amar, *supra* note 7; Klarevas, *supra* note 7; Meyers, *supra* note 45, at 911.

<sup>779</sup> See 230 F. Supp. 2d 51, 53 (D.D.C. 2002) (“The parties agree that no court has ever before granted . . . an order that the President (or Vice President) must produce information to Congress . . .”); *id.* at 74–75; *supra* Part VI.L.1.

<sup>780</sup> 558 F. Supp. 2d 53, 55 (D.D.C. 2008).

<sup>781</sup> See *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Homeland Sec.*, 532 F.3d 860, 866 (D.C. Cir. 2008); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 658 F. Supp. 2d 217, 238 (D.D.C. 2009).

<sup>782</sup> See, e.g., *United States v. Dorcelly*, 454 F.3d 366, 375 (D.C. Cir. 2006) (“[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.” (quoting *Sierra Club v. Envtl. Prot. Agency*, 322 F.3d 718, 724 (D.C. Cir. 2003))).

Vice President are treated the same in certain statutory regimes and by the courts.<sup>783</sup> Such judicial and legislative opinion may, therefore, lend support to the “vicarious” position.

But, as Professor Vikram Amar asks, “does this merging of the two offices make sense for executive privilege purposes?”<sup>784</sup> The answer is no.<sup>785</sup> First, as will be recalled, the Vice President does not have to do what the President commands. He may not be removed by the President as a legal matter during his term of office as he himself is a constitutional officer. This is unlike Cabinet members, who can be removed by the President at any time. In fact, Vice Presidents have not infrequently fulfilled their constitutional duties in ways that run counter to the President’s policy positions,<sup>786</sup> undercutting the concept that the President and Vice President are one and the same for constitutional purposes. As noted earlier, on several occasions the Vice President has voted against the President in the Senate.<sup>787</sup> Moreover, the Twenty-Fifth Amendment inability provision actually anticipates the President and Vice President may end up on opposite sides of such a matter.<sup>788</sup>

Second, under the Constitution, the Vice President has fundamentally different roles from those of the President.<sup>789</sup> The

<sup>783</sup> See *Cheney GAO Brief*, *supra* note 551, at 16–17.

<sup>784</sup> Amar, *supra* note 7.

<sup>785</sup> See *supra* Parts II, VII.A. It could conceivably be argued that much as the Speech or Debate Clause treats a legislative aide as an alter ego of a member of Congress so too the Vice President is the President’s alter ego and should be entitled to the same privileges. See *Gravel v. United States*, 408 U.S. 606, 618 (1972). Of course, *Gravel* does not stand for the proposition that an aide may claim protection under the Speech or Debate Clause if the member for whom he or she works opposes such a claim. The same holds true for the President and Vice President. If the power being exercised has been delegated by the President, then he has the ultimate authority to determine whether the privilege may be exercised. See *supra* notes 546, 568. Moreover, the Vice President is not typically viewed as the President’s doppelganger. See, e.g., COHEN & MITCHELL, *supra* note 482, at 269 (“The Vice President of the United States is not the President’s partner or alter ego.”). He has his own unique constitutional responsibilities.

<sup>786</sup> See *supra* Part VII.A.1.a.

<sup>787</sup> See *supra* notes 672–80 and accompanying text.

<sup>788</sup> See, e.g., Goldstein, *supra* note 2, at 190 (“Transfer under Section 4 [of the Twenty-Fifth Amendment] comes without presidential sanction. Section 4 authorizes involuntary transfer of power to the vice president under a range of circumstances.”); see also Friedman, *supra* note 323, at 1727 n.101.

<sup>789</sup> See TASK FORCE, *supra* note 318, at 73 (“The vice presidency is not fully comparable to the presidency . . . . [Unlike the Vice President,] [s]ome of the president’s most important roles, for example, are grounded in the Constitution, a document that limits more than it empowers the vice president.”).

Vice President presides over the Senate, breaks tie votes, and must be prepared for succession and presidential inability. But on the other hand, the President heads up the executive branch, is Commander in Chief, is Chief Diplomat, nominates judges and executive branch officials, approves or vetoes legislation among other things. Because of these markedly different roles it is unclear that the Vice President should be automatically treated as interchangeable with the President.

Third, past executive branch policies demonstrate that the President alone should invoke executive privilege.<sup>790</sup> This is entirely logical since it would make no sense for the President—as head of the executive branch under Article II—to be legally forced to “invoke” executive privilege because his Vice President chose on his own to exercise such a power. In this way, the Vice President’s decision to invoke privilege would force the President’s hand because of their supposedly vicarious relationship. Such a construction would turn Article II completely on its head, permitting the Vice President, without serving as acting President, to make executive branch decisions without presidential approval or even contrary to the President’s wishes, essentially creating a plural executive. This not only runs counter to the rule that only the President may invoke executive privilege but also does violence to Article II and the clear intentions of the Framers.<sup>791</sup> Moreover, it clashes with the Twenty-Fifth Amendment, which went into painstaking detail about when the Vice President could actually exercise presidential authority.

Presumably, the courts in *Walker*, *Cheney*, *Miers*, and elsewhere merged the President and Vice President together because the Vice President was acting as the President’s authorized delegate. It will be recalled that during oral argument in *Cheney*, the DOJ expressly acknowledged that the Vice President was acting on behalf of the President.<sup>792</sup> Nonetheless, the courts’ language left behind not a little confusion.

<sup>790</sup> See *supra* Part II.C.

<sup>791</sup> As a practical matter, it seems unlikely a Vice President would assert VPP unless the President were unwilling to assert executive privilege—thus again exposing the nonvicarious nature of VPP.

<sup>792</sup> See *supra* note 568 and accompanying text.

While the vicarious argument holds some initial promise for Vice Presidents based on judicial dicta, closer examination reveals several fatal flaws. The courts' language, while rightly acknowledging the Vice President's stature as a constitutional officer, would seem to find a better home when limited to his narrow constitutional functions as opposed to authority delegated to him by the President.

*C. Fulfilling Duties Delegated by Statute or by the President*

The contention could be made that, to the extent the Vice President is carrying out one of his statutory duties, such as serving as a member of the NSC, he might have recourse to VPP. The argument would be that service on the NSC involves communications involving weighty military and diplomatic matters, the type of issues about which courts have often conceded the President may withhold information.<sup>793</sup> A similar position could be advanced that the Vice President could claim a privilege for a project that the President assigned him under the latter's own constitutional authority<sup>794</sup>—for example, if the President sent the Vice President abroad as a diplomatic envoy. In this capacity, the Vice President would be acting as an adviser to the President.

Again, this hypothetical would not go to the independent powers of the Vice President. Instead, it merely illustrates the executive privilege enjoyed by military and diplomatic advisers to the President, which ultimately radiates from the President himself under Article II. When it comes to questions involving constitutional privilege regarding the Vice President exercising authority delegated to him by the President, all roads lead back to the delegator. The constitutional power in question is the President's and by definition so is the privilege; the Vice President would not independently have such authority. The true test is when the President and Vice President oppose each other over whether to disclose a document. In such a scenario the legal variable is isolated. Unless the materials in question have a tight nexus to the Twenty-Fifth Amendment or involve the Vice President's legislative duties in the Senate, the

<sup>793</sup> See, e.g., *United States v. Nixon (Nixon I)*, 418 U.S. 683, 706, 707, 710, 715 (1974).

<sup>794</sup> Cf. *supra* Part VI.E.

President's decision in this regard must control. Otherwise, a plural executive could emerge.

*D. Potential Applications*

The previous two arguments in favor of a form of vice presidential privilege assume an autonomous Vice President wielding quasi-presidential power within the executive branch. In practice, the Vice President, however, has never been a co-President. His duties are almost exclusively delegated to him at the discretion of the President or Congress.

A few scenarios can be readily imagined where VPP could come into play. One context in which VPP could manifest itself would be where a President wished to distance himself from the Vice President for political purposes and the Vice President would feel compelled to invoke the privilege to protect himself. This may be particularly likely during a second term when the threat of being removed from the ticket is no longer a political concern to the Vice President. For this reason, a Vice President may be less worried about breaking with the President. A comparable situation almost played itself out with Vice President Agnew in 1973. Nixon and Agnew had just been reelected, the two men had divergent political interests at the time, and neither was much concerned about upsetting relations with the other. During the DOJ investigation of the Vice President, it will be remembered, the White House Counsel's office offered to secure vice presidential documents for federal investigators.

As noted above, another scenario could involve a disgruntled President returning to power following an inability determination by the Vice President.<sup>795</sup> The returning President could very well harbor ill-feelings toward the Vice President and try to embarrass him politically by either revealing or withholding materials from the public.

Yet another scenario might involve the results of an election in which no candidate received a majority of electoral votes, throwing the presidential race into the House of Representatives and the vice presidential race into the Senate. The outcome

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<sup>795</sup> See, e.g., Goldstein, *supra* note 2, at 191 ("The prospects for an acrimonious encounter with the president would, of course, be greatest when the proposed transfer encounters the president's opposition. But even when a transfer responds to a clear presidential disability . . . the chief executive might later complain that no pressing events mandated the transfer.").

could result in a situation where the country has a President from one party and a Vice President from another, not unlike the Adams-Jefferson pairing.<sup>796</sup> This could lead to a distrustful combination that might pit the President and the Vice President against one another in a contest over documents. One could well imagine the tension that might emerge from an attempted inability determination.

### *E. Conclusion*

The arguments in favor of a narrow VPP are convincing to the extent the Vice President is carrying out his constitutionally prescribed duties. Such a position is in concert with *Nixon I*'s rationale that "[c]ertain powers and privileges flow from the nature of enumerated powers."<sup>797</sup> When presiding over the Senate, the Vice President would seem to possess a narrow privilege relating to his legislative duties, which would stem from the generalized legislative privilege or the Speech or Debate Clause. He is also obligated to refuse to release information provided in any secret session of the Senate until released by the chamber. To the extent he takes action pursuant to immediate or specific succession or presidential inability matters, the Vice President's authority in this regard is expressly tied to the Twenty-Fifth Amendment. These authorities constitute the Vice President's enumerated powers, and, despite their modesty and that they straddle Articles I and II,<sup>798</sup> they should enjoy the same degree of confidentiality as the those of the President, federal lawmakers, or federal judges. This would be fully in accord with the premium the Constitution places on encouraging effective decisionmaking by constitutional officers.

Other arguments based on a merging of the presidency and vice presidency seem much less defensible. While judicial dicta have left the implication that the two offices are inseparable,

<sup>796</sup> The author would like to thank Joel Goldstein for raising this possibility.

<sup>797</sup> 418 U.S. 683, 706 (1974). It will be remembered that the Supreme Court has reiterated the rationale from *Nixon I* on numerous occasions. See *supra* Part II.B.2.

<sup>798</sup> The only other parallel situation under the Constitution would seem to be when the Chief Justice serves as presiding officer during an impeachment trial of the President before the Senate. In this capacity, the Chief Justice would likely enjoy a legislative privilege akin to that enjoyed by the Vice President when he acts as presiding officer. The Chief Justice also benefits from judicial privilege when carrying out his judicial duties. In this regard, the Chief Justice—like the Vice President—would enjoy privileges from two different branches.

they are in fact distinct. The President alone is in charge of the executive branch. On the other hand, the Vice President has unique responsibilities that involve both legislative and executive branch duties. To permit the Vice President to proceed beyond the powers granted him by Article I and the Twenty-Fifth Amendment and to assert his own executive privilege independent from the President would create a plural executive, an approach the Framers clearly rejected. The courts' dicta would, therefore, seem to rest more comfortably in the context of reinforcing the Vice President's constitutional powers and not his delegated duties, an approach that dovetails with VPP.

#### VIII. POTENTIAL COUNTERARGUMENTS AGAINST VPP

Even the prospect of a narrow VPP is likely to draw a number of counterarguments. They include that: (1) there is no express textual basis for VPP; (2) the Vice President should have no constitutional privilege because all executive power inheres in the President; (3) there is little judicial or historical precedent supporting VPP; (4) the President enjoys no implied powers so neither should the Vice President; (5) the Vice President's constitutional powers are too modest to require a privilege; (6) the Vice President does not occupy his own branch of government, therefore he does not have his own distinct privilege; (7) acknowledging that the Vice President has a privilege would be counter to the rule against creating new privileges; and (8) VPP is anti-Originalist. While these positions cannot be dismissed out of hand, in the end they are unpersuasive.

##### A. *There Is No Explicit Textual Grant Providing Support for VPP*

It could be contended that VPP does not exist because it cannot be traced to any express textual grant. The argument could be advanced that, since executive privilege arguably derives authority from Article II's Vesting Clause, legislative privilege arguably from the Speech or Debate Clause, and judicial privilege arguably from Article III's Vesting Clause, the Vice President—by contrast—cannot point to any single constitutional clause to support his privilege. Because the Vice President cannot rely on any express textual grant, he, unlike all

other constitutional officers, must lack a similar constitutional privilege.

This position is far less convincing than it may initially seem. After all, it is far from certain that executive and judicial privileges draw their support from the Vesting Clauses of Articles II and III.<sup>799</sup> Indeed, in the case of executive privilege, while lower courts and academic authorities have often tied the privilege to Article II's Vesting Clause,<sup>800</sup> the Supreme Court has never done so. In both *Nixon I* and *Nixon II*, the Court relied instead on broader structural features of the Constitution, rejecting an explicit textual tie.<sup>801</sup> The Court looked instead to the doctrine of separation of powers and concluded that constitutional privileges were implicitly linked to enumerated powers.<sup>802</sup>

An argument based on Article III's Vesting Clause faces the same hurdle. In the case law that has discussed judicial privilege, Article III's Vesting Clause has not been invoked.<sup>803</sup> As with executive privilege, the courts that have discussed the doctrine justified judicial privilege by looking to broader structural considerations in the Constitution.<sup>804</sup> The courts' reasoning in this regard has been by analogy since it is understood that both lawmakers and Presidents enjoy such authority. That approach—reasoning based on constitutional structure and symmetry—is of course exactly what undergirds

<sup>799</sup> See *supra* Parts II.A, IV.A.

<sup>800</sup> See *supra* note 84.

<sup>801</sup> See *United States v. Nixon (Nixon I)*, 418 U.S. 683, 711 (1974) (stating that “[n]owhere in the Constitution, as we have noted earlier, is there any explicit reference to a [presidential] privilege of confidentiality”); *Nixon v. Adm’r Gen. Servs. (Nixon II)*, 433 U.S. 425, 448 (1977) (citing two cases involving members of Congress to support reasoning regarding executive privilege); *Pub. Citizen v. Dep’t of Justice*, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring) (“[C]ontrol [of] the disposition of Presidential materials [is] . . . vital to the President’s ability to perform his assigned functions [but], is not given to exclusive Presidential control by any explicit provision in the Constitution itself.”).

<sup>802</sup> See, e.g., *In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488, 1519 (11th Cir. 1986) (“The Court [in *Nixon I*] discerned the constitutional foundation for the executive privilege—notwithstanding the lack of any express provision—in the constitutional scheme of separation of powers and in the very nature of a President’s duties . . . [T]he same must be true of the judiciary.”).

<sup>803</sup> See *supra* Part IV.A–B.

<sup>804</sup> See, e.g., *In re Certain Complaints*, 783 F.2d at 1519.



the argument in favor of VPP and is an approach that has been embraced in other separation-of-powers contexts.<sup>805</sup>

Even with regard to the Speech or Debate Clause itself, the text says nothing about protecting papers or confidential discussions with aides. At best, the text provides a somewhat less ambiguous nexus with privilege than the Vesting Clauses of Articles II and III. To the extent the Clause does lend support for privilege, it is because the Clause has been interpreted in an expansive fashion by the courts, not because the text of the provision commands it. As Chief Justice Burger wrote in dissent in *Nixon II*, “the Court has refused to confine that Clause literally ‘to words spoken in debate.’ . . . Congressional papers . . . have [also] been held protected by the Clause . . . .”<sup>806</sup> He reasoned further that “[d]espite the Constitution’s silence as to the papers of the Legislative Branch, this Court ha[s] had no difficulty holding those papers to be protected from control by other branches.”<sup>807</sup> And, of course, VPP itself is in part tied to the broad judicial construction given the Speech or Debate Clause.

Further, the generalized legislative privilege has been used to justify the confidentiality of individual lawmakers’ deliberations. In this context, the courts have turned to structural considerations to support this privilege, rather than text.

The unanimous Court in *Nixon I* rejected the argument that the lack of an explicit textual privilege for the President meant that none existed. This reasoning merits full quotation since it has a direct bearing on the existence of VPP. The Court stated:

The Special Prosecutor argues that there is no provision in the Constitution for a Presidential privilege as to the President’s communications corresponding to the privilege of Members of Congress under the Speech or Debate Clause. But the silence of the Constitution on this score is not dispositive.

The rule of constitutional interpretation announced in *McCulloch v. Maryland* . . . that that which was reasonably appropriate and relevant to the exercise of a granted power was

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<sup>805</sup> See *supra* note 15.

<sup>806</sup> *Nixon v. Adm’r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 511 (1977) (Burger, C.J., dissenting).

<sup>807</sup> *Id.* at 515 n.9.

to be considered as accompanying the grant, has been so *universally applied* that it suffices merely to state it.<sup>808</sup>

Thus, while VPP lacks express textual support, so does executive privilege, legislative privilege, and judicial privilege. All constitutional officers rely on constitutional structure for their privileges, the same basis that a Vice President would.

*B. The Vice President Enjoys No Constitutional Privilege Because All Executive Power Is Delegated to the President*

At first blush, one of the major dilemmas surrounding invocation of VPP would be that it appears to entail an implicit assertion that the executive branch is plural.<sup>809</sup> As noted above, Article II, Section 1 of the Constitution provides that “[t]he executive Power shall be vested in a President of the United States of America.” As one authority on the vice presidency concluded, the Vice President “is constitutionally prohibited from sharing the ‘executive Power.’”<sup>810</sup>

<sup>808</sup> United States v. Nixon (*Nixon I*), 418 U.S. 683, 705 n.16 (1974) (emphasis added) (quoting Marshall v. Gordon, 243 U.S. 521, 537 (1917)).

<sup>809</sup> See, e.g., David F. Forte, *Vice President*, in THE HERITAGE GUIDE TO THE CONSTITUTION 183, 183 (Edwin Meese III et al. eds., 2005) (stating that from the constitutional text “it is clear that the Vice President was not vested with any part of the constitutionally mandated executive power. There would be no plural executive.”).

<sup>810</sup> YOUNG, *supra* note 658, at 8; see also, e.g., TASK FORCE, *supra* note 318, at 64 (“The constitutional independence of the vice presidency, joined to the constitutional indivisibility of executive power, limits the range of responsibilities that the vice president can perform well in the executive branch.”); G. Homer Durham, *The Vice-Presidency*, 1 W. POL. Q. 311, 312 (1948) (“In vesting the executive power in Article II, the Constitution bestows no grant on the Vice-President.”); see also Katzenbach Memo, *supra* note 318 (“Legislation [which] might attempt to place power in the Vice President to be wielded independently of the President . . . would run afoul of Article II, section 1”); *id.* at 9 (“To the extent that legislation might attempt to place power in the Vice President to be wielded independently of the President, it no doubt would run afoul of Article II, section 1 of the Constitution, which provides flatly that ‘the executive power shall be vested in a President of the United States.’ Furthermore, since the Vice President is an elective officer in no way answerable or subordinate to the President, the practical difficulties which might arise from such legislation are as patent as the Constitutional problem.”); SILVA, *supra* note 297, at 170 (“[T]he Constitution vests executive power in the President and thus by implication forbids its exercise by anyone who is not actually a President.”); Reynolds, *supra* note 323, at 1542 n.14 (“I am aware of no argument to the effect that the Vesting Clause of Article II imbues the Vice President with any executive power, and of course such an argument would be plainly contrary to text. Nonetheless, in modern times the presence of some sort of ‘spillover’ executive authority in the Vice President seems sometimes to be assumed.”); Wilmerding, *supra* note 670, at 34 (“The whole idea of vesting in the office of the vice president any substantial part of the executive power

Over the years, the DOJ has maintained that the executive branch and the President are essentially one,<sup>811</sup> as reflected in the President's ability to remove high-ranking executive branch officials. It is beyond cavil that the Framers of the Constitution explicitly rejected notions of a plural executive. During the Constitutional Convention, for example, the New Jersey Plan provided for a multi-headed executive branch.<sup>812</sup> This approach was rejected by the Convention<sup>813</sup> and is reflected further by an earlier version of Article II, Section 1 which read that "the Executive Power of the United States shall be vested in a single

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is inconsistent with that clause of the Constitution which vests the executive power of the United States in a single person, the president, and with that other clause which makes the president responsible by requiring him to take care that the laws be faithfully executed. How is the president to be held responsible for the entire execution of the laws, if some of the laws are to be executed by an officer not subject to his direction or control?"); *cf.* *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993) ("[D]espite the Vice President's rank, we do not believe his status as Chairman [of the interagency group] lent the Task Force any authority independent of the President."); GEORGE BUSH, *LOOKING FORWARD* 227 (Victor Gold ed., 1987) ("It's fundamental that the country can only have one President at a time. On the day a disgruntled, self-serving Vice President declares civil war on the White House by publicly challenging a President, our system of government will be in serious trouble."); Cronin, *supra* note 652, at 335 ("You can't have two leaders of the Executive Branch at one time . . . ." (quoting Vice President Humphrey) (internal quotation marks omitted)).

Following his tenure as Vice President, Henry Wallace addressed Harvard Law School and stated that "[t]here should be no legislation nor any constitutional amendment giving the office of the Vice President more power. It is vital that the power of the Chief Executive should not be diminished in any way by law. So far as the law is concerned, one man should run the executive branch of the Government, not two." *See* YOUNG, *supra* note 658, at 321 (internal quotation marks omitted).

<sup>811</sup> *See, e.g.*, Authority of Agency Officials To Prohibit Employees from Providing Information to Congress, Op. O.L.C. (May 21, 2004), *available at* <http://www.justice.gov/olc/crsmemoresponses.htm>; Authority of the Special Counsel of the Merit Systems Protection Board To Litigate & Submit Legislation to Congress, 8 OP. O.L.C. 30, 31 (1984) (concluding that "Congress may not grant [a special counsel] the authority to submit legislative proposals directly to Congress without prior review and clearance by the President, or other appropriate authority, without raising serious separation of powers concerns"); Constitutionality of Statute Requiring Executive Agency To Report Directly to Congress, 6 OP. O.L.C. 632, 633 (1982) (stating that a legislative "requirement that subordinate officials within the Executive Branch submit reports directly to Congress, without any prior review by their superiors, would greatly impair the right of the President to exercise his constitutionally based right to control the Executive Branch").

<sup>812</sup> *See, e.g.*, CLINTON ROSSITER, 1787: THE GRAND CONVENTION 368 (2d ed. 1987) (quoting the New Jersey Plan, which would have "authorized [Congress] to elect a federal Executive to consist of [blank] persons").

<sup>813</sup> *See* Rossiter, *supra* note 662 (observing that "a plural executive . . . [was] long ago rejected by the framers of the Constitution").

person.”<sup>814</sup> In *The Federalist No. 70*, Alexander Hamilton defended the Constitution with its new executive. He noted that its unitary nature was a primary feature. He stated that the first ingredient that constitutes “energy in the executive” is unity.<sup>815</sup> As this rejection of a plural executive relates to the vice presidency, one commentator noted decades ago,

[t]he Vice President is an independent officer. He is in nowise responsible to the President or subordinate to him. . . . But to allow him authority for executive *action*—particularly should his acts not be subject to Presidential review and veto—would be a dangerous and doubtless unconstitutional intrusion into the domain of the chief executive.<sup>816</sup>

To the extent that the executive power—whatever the scope of this authority—is placed in the President, it would seem to follow that power over executive privilege would inhere in the President also. If the executive power resides in the President and therefore the power over executive privilege inheres in the President,<sup>817</sup> then how would the Vice President be able to invoke VPP?

<sup>814</sup> 2 FARRAND, *supra* note 323, at 171; *see also* Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953) (“The records of the Constitutional Convention make it clear that the purposes of this clause were simply to settle the question whether the executive branch should be plural or single and to give the executive a title.”).

<sup>815</sup> THE FEDERALIST NO. 70, *supra* note 136, at 355 (Alexander Hamilton); *see also id.* at 356 (“Decision, activity, secrecy, and dispatch will generally characterise the proceedings of one man [as in the case of the President].”).

<sup>816</sup> WAUGH, *supra* note 296, at 194. A hint at the practical problems involved with a plural executive is reflected in an incident during the vice presidency of Charles Curtis. Although generally a nondescript Vice President, in 1932, when confronted by hundreds of protestors on the Capitol Grounds, Curtis reportedly called out the Marines, two companies of which arrived at the Capitol. *See* HATFIELD, *supra* note 318, at 381. Although Curtis later denied having ordered the Marines to the grounds, *see* Fleta Campbell Springer, *Glassford and the Siege of Washington*, HARPER'S MONTHLY, Nov. 1932, at 641, Admiral Henry F. Butler, the leader of the Marine units, stated that he had “sent the Marines at the request of the Vice-President.” *Id.* at 650. This action led to considerable embarrassment to all involved. *See* HATFIELD, *supra* note 318, at 381.

Interestingly, Abraham Lincoln's first Vice President, Hannibal Hamlin, partook in military activity of a different sort during the Civil War. As Vice President, Hamlin volunteered for and drilled with a Maine Coast Guard unit for two months. *See* H. DRAPER HUNT, HANNIBAL HAMLIN OF MAINE: LINCOLN'S FIRST VICE-PRESIDENT 210–12 (1969); MARK SCROGGINS, HANNIBAL: THE LIFE OF ABRAHAM LINCOLN'S FIRST VICE PRESIDENT 210–12 (1994).

<sup>817</sup> *See supra* Part II.C–D.

Even though the Vesting Clause precludes the Vice President from enjoying executive power, that does not mean that VPP cannot exist. It will be recalled that VPP is not executive privilege or even a subset of executive privilege, it is a privilege incidental to the Vice President's unique constitutional powers. The Vice President exercises Article I authority as President of the Senate. In this capacity, he is exercising legislative power, not executive power. Moreover, the Vice President can take preparatory action in anticipation of succession, preparatory action in anticipation of presidential inability and steps to help determine presidential inability that derive authority from the Twenty-Fifth Amendment, not the Vesting Clause or any part of Article II.<sup>818</sup> As with any potentially competing constitutional clauses, Article II and the Twenty-Fifth Amendment must be read together.<sup>819</sup> To interpret the Twenty-Fifth Amendment so as not to read the Vice President out of the inability or succession processes altogether—which would be in clear contravention of the amendment's purposes—it must be viewed to permit the Vice President to carry out such functions independently from the President. Otherwise, the President could lawfully order the Vice President not to make an inability determination against him simply by virtue of his heading the executive branch. This would render Section 4 of the Twenty-Fifth Amendment a nullity. A circumscribed privilege involving the Vice President's limited powers would not hamper the President's recognized authority as the head of the executive branch and would be consistent with the purposes of the Twenty-Fifth Amendment.

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<sup>818</sup> See, e.g., Adam R.F. Gustafson, Note, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL'Y REV. 459, 476 (2009) ("The power Section 4 grants to the Vice President and the Cabinet . . . is an exception to the Constitution's otherwise nearly exclusive grant of executive power to the President.").

<sup>819</sup> See *Schick v. United States*, 195 U.S. 65, 68–69 (1904) ("If there be any conflict between these two [constitutional] provisions, the one found in the Amendments must control, under the well understood rule that the last expression of the will of the lawmaker prevails over an earlier one.").

C. *There Is Little Judicial or Historical Precedent Supporting VPP*

It could also be argued that the position favoring VPP relies on “arid logic” alone.<sup>820</sup> In this way, VPP has never been expressly litigated<sup>821</sup> because it has never been expressly invoked. Two hundred and twenty years of experience without exercise of such authority, at least with respect to the Vice President’s duties of presiding over the Senate, is no small reason to doubt its existence.<sup>822</sup> Thus, there is no judicial precedent directly on point, only tantalizing bits of dicta. While there is in fact little judicial or historical precedent to support VPP, at the same time, there is no judicial precedent to *counter* such an invocation and only one such historical instance.

While the courts are the ultimate interpreters of the Constitution, they are not the sole interpreters. Congress and the executive branch also render constitutional exegesis. This interpretation, known in some circles as “coordinate construction,”<sup>823</sup> is of particular interest when the branches interpret their respective powers.<sup>824</sup> Longstanding coordinate

<sup>820</sup> This expression is borrowed from Frank Easterbrook. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 922 (1990).

<sup>821</sup> See *supra* Part VI.L.1–2. On this basis it could be argued that VPP does not exist because there is no case law supporting the proposition. Cf. SHANE, *supra* note 323, at 131 (“Prior to the Bush [2002 executive] order . . . there is not a sentence in any statute or judicial opinion suggesting that there is any independent vice presidential privilege to protect vice presidential records.”). But, of course, that is the case with any legal matter that has never been litigated. By definition, there is no judicial decision on point. The opposite proposition is of course equally true: there is no case law that explicitly *rejects* VPP. And, as has been discussed above, there is in fact much analogous case law to support VPP, particularly *since* 2002. See *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008); *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002). Finally, such an argument overlooks the compelling structural and historical arguments in favor of VPP.

<sup>822</sup> Of course, legislative privilege has not been definitively resolved to this day. The Supreme Court has yet to rule on the merits of issue. See *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007). Neither has judicial privilege. Admittedly, unlike VPP, lower court opinions and dicta have made explicit reference to the existence of these other two privileges.

<sup>823</sup> See, e.g., LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 231–32 (1988).

<sup>824</sup> See *United States v. Nixon (Nixon I)*, 418 U.S. 683, 703 (1974) (“In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”); see also *Immigration & Naturalization Servs. v. Chadha*, 462 U.S. 919, 951 (1983) (“When any Branch [of

construction or constitutional custom is given great deference by the courts, particularly the closer the practice is to the origins of the Constitution.<sup>825</sup>

In questions of law such as VPP, which have no express textual link and which have never been decided judicially on the merits, one must rely even more heavily on custom.<sup>826</sup> History, however, is bereft of any formal assertions of privilege by Vice Presidents despite there having been opportunities for them to have done so. Vice Presidents Humphrey, Agnew, and Cheney all made references to the possible existence of such a privilege, and the matter was discussed during the Rockefeller vice presidency. Vice President Quayle successfully resisted efforts to appear before several congressional hearings although he did not explicitly justify his position on VPP grounds. It would seem late in the day for such a novel assertion to be made.<sup>827</sup>

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the federal government] acts, it is presumptively exercising the power the constitution has delegated to it.”).

<sup>825</sup> See *supra* note 137; see also *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412 (1928) (“This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs long acquiesced in fixes the construction to be given its provisions.”); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884) (“The construction placed upon the constitution . . . by the men who were contemporary with its formation . . . is of itself entitled to very great weight . . .”); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 621 (1842) (concluding that “contemporaneous expositions of” the Constitution by the Framers bolster long acquiescence in construction); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (“[I]t is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled.”).

<sup>826</sup> Cf. *Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 233 (1971) (testimony of William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, Dep’t of Justice) (with respect to the lawfulness of presidential impoundment, stating that “I think you pretty well have to go to the history and the congressional and executive precedents, there just being no very helpful cases”); EDWARD S. CORWIN, *ESSAYS IN CONSTITUTIONAL LAW* 263 (Robert G. McCloskey ed., 1957) (“[W]hen two departments both operate upon the same subject matter . . . [T]he question is what does the pertinent historical record show with regard to presidential action in the field of congressional power?”).

<sup>827</sup> See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995) (“[P]rolonged reticence would be amazing if such [action] . . . were not understood to be constitutionally proscribed.”).

While the absence of explicit political precedent for VPP would appear somewhat damning, that is not to say the doctrine could never be judicially recognized. First, the courts have not treated venerable political precedent as outcome determinative. For example, in *Immigration & Naturalization Services v. Chadha*,<sup>828</sup> the Supreme Court ruled the legislative veto unconstitutional despite its existence in scores of statutes over more than a half century. In *Powell v. McCormack*,<sup>829</sup> the Supreme Court struck down the House's decision to exclude a lawmaker despite longstanding political precedent to the contrary. Thus, past practice is not always dispositive.

Second, the absence of explicit precedent involving VPP is less than meets the eye. VPP involves very narrow circumstances, the type of which would occur only rarely. There is no precedent involving a court or a committee trying to compel a Vice President to appear to discuss his official duties. There seems never to have been a situation in which a Vice President's legislative materials were demanded by an outside body. There is only one occasion in which the Vice President's Twenty-Fifth Amendment actions regarding succession have been examined directly—Ford's appearance before a House subcommittee. And there has been no inability determination made in U.S. history, let alone an opportunity for assertion of privilege thereto. Thus, the parameters for such a precedent are so narrow that its absence is far less relevant than it otherwise might be.<sup>830</sup> As the D.C. Circuit noted in *In re Sealed Case* regarding claims of privilege, the "lack of such precedent is hardly surprising, however, in view of the novelty of the [current] demand for testimony: . . . [W]e do not regard the absence of precedent as weighing heavily against recognition of the privilege."<sup>831</sup>

And, of course, such an invocation, while never expressly made, would not be wholly lacking in pedigree. As alluded to above, references to a possible vice presidential privilege have occurred during four vice presidencies: Humphrey, Agnew,

<sup>828</sup> See 462 U.S. 919 (1983).

<sup>829</sup> 395 U.S. 486 (1969).

<sup>830</sup> For more on the application of political precedent in the context of separation of powers, see Michael J. Glennon, *The Use of Custom In Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984).

<sup>831</sup> 148 F.3d 1073, 1076 (D.C. Cir. 1998); cf. *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986) ("The Impeachment Clause of the Constitution can hardly be thought to be undermined because of nonuse.").



Rockefeller, and Cheney. Vice Presidents have also declined to testify at congressional hearings. These Vice Presidents could be seen as having reserved the right for a successor to invoke such a privilege. It will be remembered that, despite agreeing to provide personal records to federal investigators, Agnew announced that

I do not acknowledge that you or the grand jury have any right to records of the Vice President. Nor do I acknowledge the propriety of any grand jury investigation of possible wrongdoing on the part of the Vice President so long as he occupies that office. These are difficult constitutional questions which need not at this moment be confronted.<sup>832</sup>

Finally, the applicability of political precedent, or lack thereof, ought to reflect the constitutional and historical development of the vice presidential office itself. The Twenty-Fifth Amendment has only been in force for just over four decades, not two-hundred twenty years like the original text of the Constitution.<sup>833</sup> In this regard, a major pillar of VPP is actually comparatively youthful in constitutional terms. In addition, the references to a potential constitutional privilege being invoked by a Vice President all occurred during the past forty-five years and illustrate the heightened status of the office that has taken place in the past several decades. The increased activity of, and attention focused on, the Vice President only heighten the likelihood of a VPP scenario presenting itself. Some commentators readily expect that Vice Presidents will invoke their own privilege in the future.<sup>834</sup> Because of these

<sup>832</sup> *Agnew Reply*, *supra* note 428.

<sup>833</sup> Vice Presidents perhaps could or should have played a role in determining presidential inability before the Twenty-Fifth Amendment. That was never borne out in practice, however. *See* HANSEN, *supra* note 741, at 123–24 (“In the three major instances of temporary inability, Vice Presidents Arthur, Marshall, and Nixon made no attempt to determine disability, although at least Nixon had reason to believe the legal right was his.”). This failure was one reason why Section 4 of the Twenty-Fifth Amendment was added.

<sup>834</sup> *See* WARSHAW, *supra* note 1, at 242 (“[F]uture vice presidents will most likely seek the same protections for their conversations, asserting that they too have executive privilege. . . . The assertion of executive privilege for the vice president . . . may be one of the changes in the office that remains in future administrations.”); *see also* MONTGOMERY, *supra* note 143, at 112–13 (concluding that the *Cheney v. U.S. District Court* “opinion was notable for . . . laying the groundwork for future vice presidents to assert a distinct vice presidential immunity from legal proceedings under the Constitution’s separation of powers doctrine”); Klarevas, *supra* note 7, at 865 (“[T]he opinion implies that the vice president should enjoy the right to invoke presidential privileges and immunities (at least in civil

considerations, the scope for evaluating the lack of explicit political precedent ought to be narrowed accordingly.

For these reasons, this potential counterargument is much less than it first appears.

*D. The President Has No Implied Powers, Therefore, Neither Should the Vice President*

A fourth counterargument against VPP could also be made. It would proceed as follows: if the President does not enjoy implied powers,<sup>835</sup> then *a fortiori* the Vice President should not have such authority either. This argument would be based on the principle that the Constitution established a federal government of limited powers<sup>836</sup> and that this principle was underscored by the Tenth Amendment.<sup>837</sup> It could be bolstered by past debate involving whether the Vice President possesses implied powers. During the Calhoun vice presidency, a question arose over whether the Vice President *qua* President of the

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suits). . . . Should vice presidents seize on this language in the future, it is likely that they will argue that they are shielded from a variety of legal proceedings because of the unique rights and responsibilities conferred to them by the Constitution. The fact that the Supreme Court did not expressly distinguish the vice president from the president in its ruling bodes well for vice presidents.”); *cf.* Myers, *supra* note 45, at 909 (“*Cheney* . . . essentially extended the protection of executive privilege to the Vice President.”).

<sup>835</sup> See, e.g., *Anderson v. Dunn*, 19 U.S. 204, 225 (1821) (“[T]he genius and spirit of our institutions are hostile to the exercise of implied powers.”); see also 2 ELLIOT, *supra* note 28, at 540 (quoting Pennsylvania Chief Justice Thomas McKean at the state ratifying convention: “executive officers have no manner of authority, any of them, beyond what is by *positive* grant . . . delegated to them”); 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 464 (Jonathan Elliot ed., 1836) (“[Its powers] are enumerated. Is it not, then, fairly deducible that it has no power but what is expressly given to it—for if its powers were to be general, an enumeration would be needless.” (statement of Edmund Randolph at the Virginia Ratification Convention about the nature of the federal government)); *cf.* 1 ANNALS OF CONGRESS 483 (1789) (quoting Representative Thomas Hartley, who stated the President’s “powers, taken together, are not very numerous”).

<sup>836</sup> See *United States v. Lopez*, 518 U.S. 549, 552 (1995) (“We start with first principles. The Constitution creates a Federal Government of enumerated powers.”); THE FEDERALIST NO. 45, at 236 (James Madison) (Garry Wills ed., 1982) (“The powers delegated by the proposed Constitution to the Federal Government, are few and defined. . . . [They] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . .”).

<sup>837</sup> See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

Senate had the implied constitutional authority to call Senators to order. Calhoun argued that the Vice President "has no inherent power whatever."<sup>838</sup>

There is a fundamental flaw with this position, however. Each of the three branches undeniably *does* exercise implied powers, that is to say, powers not expressly delineated in the Constitution.<sup>839</sup> It has been long recognized that Congress has the implied authority to conduct investigations,<sup>840</sup> subpoena information,<sup>841</sup> and hold individuals in contempt.<sup>842</sup> The Senate has the authority to condition its approval of treaties.<sup>843</sup> The

<sup>838</sup> *Onslow*, *supra* note 652, at 327. Several members of the Senate disagreed with Calhoun, however. See 4 CONG. DEB. 278–341 (1828). In an abundance of caution, the Senate ultimately decided to clarify matters and expressly granted the Vice President this authority subject to overrule by the Senate as a whole. See *id.* at 340–41; HATCH & SHOUP, *supra* note 652, at 418.

<sup>839</sup> See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–07 (1819).

[In the Constitution,] there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described. Even the 10th Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people," thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one Government, or prohibited to the other, to depend on a fair construction of the whole instrument.

*Id.*

<sup>840</sup> See, e.g., *Watkins v. United States*, 354 U.S. 178, 187 (1957).

<sup>841</sup> See, e.g., *Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 505 (1975) ("The issuance of a subpoena pursuant to an authorized investigation is . . . an indispensable ingredient of lawmaking . . .").

<sup>842</sup> See, e.g., *Marshall v. Gordon*, 243 U.S. 521, 542 (1917). The Court stated that Congress's implied power to issue contempt citations

rests only upon the right of self-preservation; that is, the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is inherent legislative power to compel in order that legislative function may be performed.

*Id.*

<sup>843</sup> See, e.g., *Haver v. Yaker*, 76 U.S. 32, 35 (1869) ("In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration."); *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 182 (1901) (Brown, J., concurring) ("The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may

President has the authority to establish diplomatic relations with foreign governments,<sup>844</sup> settle international claims,<sup>845</sup> and enter into certain executive agreements without the approval of both houses of Congress or the Senate.<sup>846</sup> The judiciary can strike down laws it deems unconstitutional,<sup>847</sup> hold individuals in contempt,<sup>848</sup> and issue stays.<sup>849</sup>

More importantly for this inquiry, each of the three branches not only exercises some measure of implied power but also the specific implied power to control the confidentiality of its internal deliberations subject to judicial review.<sup>850</sup> As will be remembered, the Court in *Nixon I* stated,

[T]he valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. . . . Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.<sup>851</sup>

Chief Justice Burger was even more explicit in dissent three years earlier:

No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its

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refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty.”).

<sup>844</sup> See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 43 (2d ed. 1996).

<sup>845</sup> See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

<sup>846</sup> See, e.g., *Dames & Moore*, 453 U.S. at 654; *Pink*, 315 U.S. at 203; *Belmont*, 301 U.S. at 324.

<sup>847</sup> See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>848</sup> *Ex parte Robinson*, 86 U.S. 505, 510 (1874) (“The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.”).

<sup>849</sup> See *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket . . .”).

<sup>850</sup> See *supra* Parts II–IV.

<sup>851</sup> 418 U.S. 683, 705–06 (1974).

internal operations by whatever judicial measures may be required.<sup>852</sup>

Why would the Vice President, when exercising his own—admittedly narrow—enumerated powers, not benefit from the same privilege as all other constitutional officers? Why would his decisionmaking be deemed less important and less in need of confidential discussion? Indeed, the only way to read the Constitution in a consistent fashion is to recognize the Vice President's authority in this context.

Therefore, an argument against VPP based on the supposed lack of implied powers in the federal government is not compelling.

*E. Since the Vice President Does Not Occupy His Own Branch of Government, He Does Not Have His Own Distinct Privilege*

A fifth counterargument could be made that confidential deliberations are required to ensure candor within discreet *branches* of government. The Vice President is not a member solely of any one of the three branches, therefore, it could be contended he does not enjoy the protection of any of the three constitutional privileges: executive, legislative, or judicial. Put another way, the Vice President is already a constitutional anomaly; his lack of a constitutional privilege would merely reflect his unique status.<sup>853</sup> By extension, any vice presidential privilege, such as it exists, must be exercised subject to the approval of the head of the executive or legislative branch, depending on what functions the Vice President is carrying out at the time. Although this counterargument also has initial appeal, a closer examination reveals its flaws.

First, the Vice President has unique duties that are delegated to him by the Constitution, and they should not be

<sup>852</sup> N.Y. Times v. United States, 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting).

<sup>853</sup> This argument could be supported by other constitutional anomalies involving the Vice President. For example, while the Constitution provides an oath of office for the President, there is no vice presidential equivalent in the charter. See Medina, *supra* note 654, at 80. While the Chief Justice, as opposed to the Vice President, presides over the President's impeachment trial, no special provision exists regarding which officer would preside over a vice presidential impeachment trial. See, e.g., *id.* While Congress may not reduce the President's salary, see U.S. CONST. art. II, § 1, cl. 5, there is no prohibition against its doing so to the Vice President. See also *supra* note 789 and accompanying text.

confused with duties delegated to him by either Congress or the President. His constitutional duties are not subject to the ultimate means of executive branch or legislative branch control: removal. Congress or the Senate by itself cannot prevent the Vice President from chairing the upper chamber unless he is impeached by the House and removed through Senate conviction, and even then a new Vice President would eventually take his place.<sup>854</sup> The Senate can, and has, changed its rules to limit the discretion the Vice President has as President of the Senate but again it cannot keep him from presiding altogether. Similarly, the President cannot lawfully prevent the Vice President from playing a role in making a determination as to presidential inability or prevent him from succeeding to the presidency.<sup>855</sup> Nor can the President remove him from office. Thus, in carrying out his constitutional duties, the Vice President is not subordinated to the head of either the executive or legislative branch; neither should his privilege.<sup>856</sup>

Second, constitutional officers, not the branches writ large, hold constitutional privileges. As the Supreme Court in *Nixon I* stated and has been reaffirmed repeatedly,<sup>857</sup> constitutional privileges stem from “the valid need for protection of communication between *high Government officials* and those who advise and assist them in the performance of their manifold duties.”<sup>858</sup> Notably, the Court has also recognized that “high

<sup>854</sup> See, e.g., Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 CONST. COMMENT. 245, 245 (1997).

<sup>855</sup> As a practical matter, since the Twenty-Fifth Amendment, Vice Presidents have been excluded from making at least initial, informal determinations of presidential inability. For example, Vice President Bush did not make an initial determination as to President Reagan’s fitness following his surgeries; this was carried out by White House staff. See FEERICK, *supra* note 18, at xiii–xiv. As a constitutional matter, however, any formal determination as to the President’s ability to perform his duties must include the Vice President.

<sup>856</sup> It will be recalled that lawmakers’ invocation of privilege is not subject to approval of the parent chamber. See *supra* note 180.

<sup>857</sup> See *supra* notes 63–72 and accompanying text.

<sup>858</sup> *United States v. Nixon (Nixon I)*, 418 U.S. 683, 705 (1974) (emphasis added). The question could be raised whether “high Government officials” are in fact “constitutional officers.” It is difficult, however, to see how they could be anything but one and the same. The Court in *Nixon I* stated that “[c]ertain powers and privileges flow from the nature of enumerated powers . . . . The valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties . . . is too plain to require further discussion.” *Id. Nixon I* and its progeny therefore reason that constitutional privileges protect the enumerated powers of “high Government

Government officials," *not* branches, enjoy these privileges.<sup>859</sup> While executive privilege may only be claimed by the President as head of the executive branch, the same is not true of legislative and judicial privileges. These privileges reflect the dispersed power delegated by Articles I and III. These privileges, therefore, may be asserted by individual lawmakers and judges. That is to say a federal judge may invoke judicial privilege without first seeking the approval of the Chief Justice of the United States; although, if the matter were litigated, the Supreme Court could wind up reviewing the assertion.<sup>860</sup> A House member may do the same without seeking the approval of the Speaker.<sup>861</sup> Not only is the privilege to be exercised by high officials, but it is identified with enumerated powers under the Constitution.<sup>862</sup> The Vice President's enumerated powers just happen to include powers involving both the legislative and executive branches.

Thus, simply because the Vice President straddles two branches does not mean he lacks a constitutional privilege. Were such a rule to govern it could lead to absurd results. For instance, under this scenario, the Chief Justice would not be permitted to claim a judicial privilege because he straddles the judicial and legislative branches through his role as presiding officer during impeachment trials of the President. Yet all other federal judges would maintain such authority.<sup>863</sup>

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officials." At the same time, case law and past practice clearly indicate that only constitutional officers may invoke constitutional privileges. This is further reflected in the case law regarding executive privilege, which concludes that the doctrine can only be invoked by a current or former President. *See supra* Part II.C–D. Similarly, legislative privilege can only be asserted by current or former members of Congress or staff at the member's direction. *See supra* Part III. The same is likely true for judges and law clerks. *See supra* Part IV. Since only constitutional officers can make the decision to invoke constitutional privileges, the only way to reconcile the rationale in *Nixon I* with the case law and past practice that restrict who can assert constitutional privileges is to conclude that "constitutional officers" are in fact "high Government officials."

<sup>859</sup> *See Butz v. Economou*, 438 U.S. 478, 511 (1978) ("Judges have absolute immunity *not because of their particular location within the Government* but because of the special nature of their responsibilities." (emphasis added)).

<sup>860</sup> *See supra* Part IV.

<sup>861</sup> *See supra* note 180.

<sup>862</sup> *See Nixon I*, 418 U.S. at 705–06 ("Certain powers and privileges flow from the *nature of enumerated powers*; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings." (emphasis added)).

<sup>863</sup> In a similar context, the President still enjoys executive privilege over communication related to whether to veto legislation even though his responsibility

As has been often observed, the branches of the federal government are not hermetically sealed off from one another.<sup>864</sup> By design, constitutional duties transcend specific branches and articles. Accordingly, constitutional privileges flow from “enumerated powers,” not from concerns over which branch or article the constitutional officer happens to occupy.

*F. The Vice President’s Powers Are Too Modest To Require a Privilege*

The counterargument could be advanced that the Vice President’s powers are too unimportant to require a constitutional privilege.<sup>865</sup> It could be contended that since he only presides over the Senate and casts tie breaking votes—which as a practical matter he does infrequently and which involve only modest authority—and since succession and presidential inability matters take up little time, there is no need for the Vice President to have a privilege. To build on Vice President Rockefeller’s complaint, the “Vice-President has no responsibility and no power.”<sup>866</sup> Such an argument against VPP would be a variant of the legal maxim *de minimis non curat lex*,

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in this regard stems from Article I, not Article II. This is no different from members of the Senate who enjoy a legislative privilege when sitting in executive session considering treaties and nominations. *See also supra* note 655.

<sup>864</sup> *See* *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will *integrate the dispersed powers into a workable government*. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” (emphasis added)); *Springer v. Gov’t of the Phil. Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting) (“The great ordinances of the Constitution do not establish and divide fields of black and white.”).

<sup>865</sup> The office of Vice President has been denigrated from the beginning. Vice President Adams famously lamented, “[m]y country has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived or in his imagination conceived.” 1 HAYNES, *supra* note 309, at 230. In declining nomination to be Vice President, Daniel Webster stated, “I do not propose to be buried until I am dead.” MILKIS & NELSON, *supra* note 652, at 428. Woodrow Wilson observed that “the chief embarrassment in discussing this [vice presidential] office is that in explaining how little there is to be said about it one has evidently said all there is to say.” *See id.* at 431. Their comments and others like them generally predate the Twenty-Fifth Amendment and the beginning of the modern vice presidency. *See, e.g.,* Goldstein, *supra* note 298, at 508.

<sup>866</sup> Cronin, *supra* note 652, at 326 (internal quotation marks omitted).



the law does not concern itself with trifles. For two reasons such a counterargument is misplaced.

First, it is difficult to argue that issues of presidential inability and succession are unimportant. To the contrary, there are few more weighty governmental matters than ensuring the executive branch is led by an individual who is not laboring under an inability. Ensuring an orderly succession is equally important. Both of these concerns are especially vital in an age involving nuclear weaponry, terrorists with global reach and a host of other potential issues requiring instantaneous presidential attention. The importance of presidential inability and succession is reflected by the fact that a constitutional amendment was adopted expressly to resolve such matters.<sup>867</sup> Moreover, three times Congress has taken action by statute to attempt to improve the presidential succession process.<sup>868</sup> Simply because the Vice President may spend disproportionately little of his time on matters of presidential succession and inability does not mean that these are not vital governmental functions; it means only that the nation has had the good fortune to have been spared excessive experience with such matters since the adoption of the Twenty-Fifth Amendment.

Second, while the Vice President's role in the Senate is usually a modest one, at times it can be of supreme importance. During the first Congress, Vice President Adams's tiebreaking vote ensured that the President's authority to remove executive officers from their posts without Senate approval was recognized,<sup>869</sup> a constitutional interpretation later upheld in *Myers v. United States*. This congressional interpretation of the Constitution is credited with ensuring that Presidents have sufficient authority to control the executive branch.<sup>870</sup> Another vote cast by Adams may have averted war with Great Britain.<sup>871</sup>

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<sup>867</sup> See, e.g., GOLDSTEIN, *supra* note 2, at 205 ("[O]bviously, the new constitutional vision of the vice presidency that is embodied in the Twenty-Fifth Amendment gives the office an enhanced constitutional status. The Twenty-Fifth Amendment articulates an appreciation of the office as an essential institution, integral to the executive branch and crucial to solving problems of presidential succession and inability.").

<sup>868</sup> The Succession Acts were passed in 1792, 1886, and 1947.

<sup>869</sup> See 1 HAYNES, *supra* note 309, at 237.

<sup>870</sup> See, e.g., Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1492 (1997).

<sup>871</sup> See 1 HAYNES, *supra* note 309, at 237.

Vice President Arthur's deciding vote aided his party in gaining control of the Senate in 1881.<sup>872</sup> Similarly, Vice President Cheney's vote ensured Republican control of the Senate during the first part of the 107th Congress.<sup>873</sup> A Vice President has also participated in the constitutional amendment process through his voting power, an authority not even the President exercises.<sup>874</sup> At the same time, the authority to preside can be an influential position from the standpoint of Senate procedure. For instance, Vice Presidents have played a role in modifying or attempting to modify interpretations of Senate rules such as the filibuster.<sup>875</sup>

More broadly, an argument based on the premise that the vice presidency is an unimportant position overlooks the enhanced profile of the institution over the past several decades. There is no gainsaying that the office has risen immeasurably in stature to the point where it is among the most prized in the U.S. government.<sup>876</sup> For instance, there is little doubt that Vice Presidents Cheney, Gore, and Mondale all wielded significant authority during their tenure.

The high esteem in which the modern vice presidential office is held is reflected by its treatment in the courts. It will be remembered that in *Cheney v. U.S. District Court* the Supreme Court itself noted that "[w]ere the Vice President not a party in this case, the argument that the Court of Appeals [erred] . . . might present different considerations."<sup>877</sup> Further, the Court implicitly equated the Vice President with the President: "[S]eparation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President."<sup>878</sup> Elsewhere, the Court observed that

<sup>872</sup> See *id.* at 236.

<sup>873</sup> See, e.g., *Congress A to Z*, in CQ ENCYCLOPEDIA OF AMERICAN GOVERNMENT (D.R. Tarr & A. O'Connor eds., 2003), republished at CQPress.com, Historic Milestones in Congress (2005), [http://www.cqpress.com/incontext/constitution/docs/hist\\_milestones.html](http://www.cqpress.com/incontext/constitution/docs/hist_milestones.html).

<sup>874</sup> See, e.g., 1 HAYNES, *supra* note 309, at 238.

<sup>875</sup> See, e.g., HATFIELD, *supra* note 318, at 427–28, 442–43, 510–11, 523.

<sup>876</sup> See, e.g., BAUMGARTNER, *supra* note 647; GOLDSTEIN, *supra* note 295, at 10–13; Albert, *supra* note 315.

<sup>877</sup> 542 U.S. 367, 381 (2004).

<sup>878</sup> *Id.* at 382.

[t]he discovery requests are directed to the Vice President . . . . The Executive Branch, *at its highest level*, is seeking the aid of the courts to protect its constitutional prerogatives . . . . [S]pecial considerations control when the Executive Branch's interests in maintaining the autonomy of *its* office and safeguarding the confidentiality of its communication are implicated.<sup>879</sup>

The Court also noted in the decision that "constitutional responsibilities and status [are] factors counseling judicial deference and restraint."<sup>880</sup> In this regard, the Court's appreciation for the Vice President's prominence in the government played a role in its reaching the result it did. While the judicial equation of the office with the presidency is conceptually problematic, it certainly conveys the perceived importance of the modern day vice presidency.

Finally, there is no indication that the Constitution prioritizes one set of enumerated duties over another. Simply because certain clauses are not often triggered does not mean they are not important. The example of the impeachment power comes to mind. Certainly this power is not a small one even though it is infrequently invoked.<sup>881</sup>

Ultimately, the argument that the Vice President's duties are ostensibly modest should not be a compelling rationale for denying the office its own constitutional privilege.

### G. *The Rule Against Creating New Privileges*

Another counterargument against the existence of VPP is the legal principle that new privileges should not be fashioned unnecessarily. This view has been acknowledged by the courts on numerous occasions, including by the Supreme Court in *Nixon I*. There, the Court stated that "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."<sup>882</sup> The D.C. Circuit elaborated on this principle in *In re Sealed Case*, in which it noted the importance of transparency in

<sup>879</sup> *Id.* at 385 (emphasis added).

<sup>880</sup> *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

<sup>881</sup> See *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986).

<sup>882</sup> *United States v. Nixon (Nixon I)*, 418 U.S. 683, 710 (1974); see also Kaye, *supra* note 181, at 546 n.98 (listing further authorities).

government: “The argument for a narrow construction is particularly strong in cases like this one where the public’s ability to know how its government is being conducted is at stake.”<sup>883</sup>

During the Clinton administration, the courts showed little enthusiasm for embracing a novel form of executive branch privilege, the protective function privilege. As noted earlier, the Clinton administration asserted that this doctrine prevented secret service agents from testifying about the President and that the privilege was controlled by the Secretary of the Treasury—a position that was rejected by the D.C. Circuit. In this regard, the rule of construction has limited the efforts of Cabinet officers to invoke novel privileges.

Certainly, interpreting the Constitution to recognize that the Vice President has his own privilege would be counter to the legal doctrine against creating new privileges and against the democratic ideal of openness and governmental accountability. That said, this rule of construction has *not* been applied so strictly that it has prevented other constitutional officers from exercising their own privileges. Courts have held that Presidents<sup>884</sup> and federal lawmakers<sup>885</sup> enjoy their own authority in this regard. Federal judges would appear to as well.<sup>886</sup> Cabinet members, however, do not.<sup>887</sup> The distinction between constitutional officers on one hand—the President, Vice President, federal lawmakers, and federal judges—and nonconstitutional officers—Cabinet members—on the other would seem to be the path between these competing lines of judicial precedent that acknowledge constitutional privileges in some cases<sup>888</sup> but not others.<sup>889</sup> It also dovetails with *Nixon I*’s admonition that privileges be related to “enumerated constitutional powers,” which Cabinet officers do not exercise on

<sup>883</sup> 121 F.3d 729, 749 (D.C. Cir. 1997).

<sup>884</sup> See *supra* Part II.

<sup>885</sup> See *supra* Part III.

<sup>886</sup> See *supra* Part IV.

<sup>887</sup> See *In re Sealed Case*, 148 F.3d 1073, 1077 (D.C. Cir. 1998).

<sup>888</sup> See *United States v. Nixon (Nixon I)*, 418 U.S. 683, 708 (1974); *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660 (D.C. Cir. 2007); *In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir. 1986). *But cf.* Turley, *supra* note 7, at 677 n.159.

<sup>889</sup> See *In re Sealed Case*, 148 F.3d at 1077.

their own.<sup>890</sup> Thus, this approach would seem to permit Vice Presidents to exercise such a constitutional authority.

It also bears repeating that the argument in favor of VPP entails only a narrow privilege, encompassing as it does merely his authority to preside over the Senate and break ties, to prepare for and help make a determination about presidential inability, and to prepare for succession. As the rapporteur for the *Twentieth Century Fund Task Force on the Vice Presidency*, Professor Michael Nelson, has written, “[c]onstitutionally, the vice-presidency . . . [has] clear boundaries defining both the range of activities it can perform and the extent of influence in government it can achieve.”<sup>891</sup> These “clear boundaries” accordingly limit the scope of the privilege. In this respect, VPP would only reflect a minor “derogation of the search for truth”

<sup>890</sup> The argument could be made that, since Cabinet members are given an explicit role in determining presidential inability by the Twenty-Fifth Amendment, they too should be granted a constitutional privilege akin to that discussed in this Article. See Turley, *supra* note 7, at 677 n.159. The Vice President's status under the Twenty-Fifth Amendment is, of course, different from that of the Cabinet. First and foremost, despite the Twenty-Fifth Amendment, Cabinet secretaries remain creatures of statute, not the Constitution. See *Nixon v. Adm'r of Gen. Servs. (Nixon II)*, 433 U.S. 425, 508 (1977) (Burger, C.J., dissenting) (“[E]xecutive power was vested in the president; no other offices in the Executive Branch, other than the Presidency and Vice Presidency, were mandated by the Constitution. Only two Executive Branch offices, therefore, are creatures of the constitution; all other departments and agencies . . . are creatures of the congress . . .”). The vice presidency is a position established by the Constitution.

Second, aside from being a constitutional officer under Articles I and II, the Vice President is the indispensable man in the inability determination process. See 111 CONG. REC. S15,383 (1965) (“The Vice President must be a party to the decision.” (quoting amendment sponsor, Senator Bayh)); THOMAS H. NEALE, CONG. RESEARCH SERV., PRESIDENTIAL DISABILITY: AN OVERVIEW 5 (1999) (“[T]he Vice President is the indispensable actor in section 4: it cannot be invoked without his agreement.”). The Cabinet is empowered to participate in the inability determination process with the Vice President, but it may be replaced by another entity established by Congress. See 111 CONG. REC. S15,385 (“[I]f Congress specifies another body . . . it will do so because it wants another body to replace the Cabinet, which would have the primary responsibility until Congress prescribed [sic] another body.” (quoting amendment sponsor, Senator Bayh)). The Vice President, therefore, is distinct from the Cabinet in that he cannot be removed from the decisionmaking process. *Id.* at S15,379 (contending that the amendment makes it “crystal clear that the Vice President must be a party to any action declaring the President unable to perform his powers and duties” (quoting amendment sponsor, Senator Bayh)); *id.* at S15,383 (“The Vice President would have to act with either body.” (quoting Senator McCarthy)); *id.* (“The Vice President must make a separate determination with either the Cabinet or another body.” (quoting Senator Bayh)). For these reasons, Cabinet secretaries cannot be equated with the Vice President.

<sup>891</sup> TASK FORCE, *supra* note 318, at 62.

and would seem to properly balance the competing concerns of promoting intra-governmental candor with dissemination of information about the functioning of the vice presidency.

#### *H. VPP Represents an Anti-Originalist Position*

Finally, it could be posited that VPP represents a position that contradicts the views of the Framers.<sup>892</sup> Earlier discussion reflects that neither Adams nor Jefferson made any reference to the Vice President enjoying his own privilege.<sup>893</sup> In fact, both took positions that would seem inconsistent with VPP. While there may be some initial appeal to this counterargument to supporters of Originalism, this view suffers from two significant shortcomings.

First, the views of the original Framers carry much less weight with respect to the vice presidency than the presidency because the original clauses governing the Vice President have been amended on several occasions. As noted above, in 1804, the Twelfth Amendment changed the election process for the Vice President, making him politically subordinate to the President. In 1933, the Twentieth Amendment clarified the incoming Vice President's authority to become President should misfortune befall the incoming President. Finally, in 1967 through the Twenty-Fifth Amendment the Vice President's status was elevated by his explicit inclusion in the process for determining presidential inability. The amendment also clarified his standing following the death or resignation of the President or the occurrence of a presidential vacancy. Further, it acknowledged the increasing executive branch role the Vice President had come to play during the previous few decades and at the same time raised his constitutional stature.<sup>894</sup> Since the Twenty-Fifth Amendment is a major part of VPP, this aspect of the Vice President's privilege would not be governed by the Founding

<sup>892</sup> See DUBOSE & BERNSTEIN, *supra* note 338, at 13 (stating that Cheney's "privilege argument is so novel that its antecedents won't be found in any . . . foundational texts," such as *The Federalist Papers*); Turley, *supra* note 7. This counterargument, of course, presupposes that Originalism should govern separation of powers disputes, a view not all would share.

<sup>893</sup> See *supra* notes 140–46 and accompanying text.

<sup>894</sup> See, e.g., *supra* note 315.

Generation.<sup>895</sup> Thus, since the authority of the Vice President and his relationship to the President have been modified several times through the amendment process,<sup>896</sup> the views of the original Framers have less bearing than in other contexts.

Second, it merits noting that none of the early Vice Presidents appears to have been engaged in a contest for information while presiding over the Senate. In this regard, it is hard to say definitively that the other half of VPP would have been beyond the pale to the Framers. The views of the Founding Generation are therefore far from clear on this score. In sum, the argument that VPP is an anti-Originalist conception is unpersuasive.

#### CONCLUSION: WEIGHING THE MERITS OF VPP

Whether the Vice President holds his own constitutional privilege is a novel question; one that sheds light on both the growing power of the office and on the unique role the Vice President plays in American government. While constitutional text is silent on the explicit question, broader structural considerations counsel in favor of such an authority to the extent the Vice President is carrying out his own constitutionally assigned responsibilities to preside over the Senate and break ties, to prepare for and help make a determination about presidential inability, and to prepare for succession. Since the President, members of Congress, and federal judges each enjoy a constitutional privilege to shield their internal deliberations from outside scrutiny, logically so should the Vice President. This is because the Constitution has been interpreted to protect the quality of internal decisionmaking by constitutional officers. This includes ensuring that Presidents, national lawmakers, and federal judges can gather the information they need to make decisions properly; they can make decisions without fear they will incur civil liability for their official duties; and they can have candid discussions with their subordinates and among their peers. Although the Vice President's constitutional decisionmaking is limited to two narrow spheres, there is no reason it should not receive the same protection from outside

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<sup>895</sup> See Goldstein, *supra* note 2, at 167 (“[The Twenty-Fifth Amendment] articulates a new constitutional vision of the vice-presidential office, a far grander, more optimistic conception than the founders dared advance.” (citations omitted)).

<sup>896</sup> See Albert, *supra* note 315.

interference as that of any other constitutional officer. This is particularly so when compared to federal judges. Members of the judiciary would seem less in need of a privilege than the Vice President since they have life tenure.

VPP is, in effect, a composite of two separate constitutional privileges: (1) an Article I privilege, stemming from the Speech or Debate Clause and from structural and historical considerations; and (2) a Twenty-Fifth Amendment privilege.<sup>897</sup> The former part of VPP could only be invoked pursuant to the Vice President's presiding over the Senate and breaking ties and the latter only when matters involve immediate or specific questions of presidential succession or inability. Although obviously not a Senator, the Vice President under the Constitution is President "of" the Senate: a part of that body while chairing proceedings in the upper chamber. Thus, it would seem that in this capacity he could exercise the privileges that may attach to the legislative branch, especially since congressional staff enjoy such protection. In this respect, he may claim the benefit of some measure of absolute privilege radiating from the Speech or Debate Clause, or something akin to it, under the generalized legislative privilege. In addition, he would have to comply with Senate rules regarding nondisclosure of information revealed in secret sessions over which he presided, although enforcement of such confidentiality would be governed by the Senate as a whole and not by the Vice President.

With respect to the Vice President's preparation for succession or involuntary replacement of the President, a persuasive argument in favor of a qualified VPP could be made based upon the Twenty-Fifth Amendment. The President's authority under Article II cannot be read in isolation from the rest of the Constitution. It must be interpreted in light of the Twenty-Fifth Amendment.<sup>898</sup> To the extent the Vice President is preparing to immediately take the reins of power—either

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<sup>897</sup> These potential privileges, taken together, could also overlap. Conceivably, the Vice President could preside over the Senate while the body considers inability matters pursuant to the Twenty-Fifth Amendment. Both aspects of VPP, therefore, could involve the Vice President resisting civil discovery and a nonimpeachment House investigation.

<sup>898</sup> See, e.g., *Schick v. United States*, 195 U.S. 65, 68–69 (1904) ("If there be any conflict between these two [constitutional] provisions, the one found in the Amendments must control, under the well understood rule that the last expression of the will of the lawmaker prevails over an earlier one.").



permanently or temporarily—it would seem his relevant internal communications would be privileged based on his own constitutional authority, with his deliberations after assuming the presidency being governed by traditional executive privilege. Further, routine discussions among vice presidential aides specifically regarding presidential inability and succession would appear to be privileged as well. Invocation of such a privilege, like that of executive privilege, would of course be suspect in the context of a criminal investigation.

Past investigations involving the vice presidency reflect that occupants of the office have been presented with numerous opportunities to assert a constitutional privilege of some sort but have never formally done so. However, none of the past inquiries involved the Vice President's role in presiding over the Senate, only one entailed the Vice President's preparation for the presidency, and none involved presidential inability determinations. These episodes involved either allegations of malfeasance or maladministration unrelated to vice presidential duties (Tompkins, Calhoun, Colfax, Agnew, Rockefeller—as Governor—and Gore) or the exercise of authority delegated by the President (Wallace, Humphrey, Rockefeller, Bush, Quayle, and Cheney). On the other hand, generalized allusions to a vice presidential privilege were made during the tenures of Humphrey, Agnew, Rockefeller, and Cheney, all of which imply that such a power exists. In addition, no Vice President has ever been compelled to appear against his will before a congressional committee and Vice Presidents have successfully resisted such oversight efforts in the past (Humphrey, Quayle, and Gore). Thus, to some extent, these historical precedents can be read to support a vice presidential privilege.

Furthermore, dicta from the Supreme Court in *Cheney v. U.S. District Court* and from a lower court in *Walker v. Cheney* also buttress the position that the Vice President should be treated with some deference in contests over the release of information. The facts underlying the two former decisions are not completely on “all fours” as to vice presidential privilege but, by definition, unprecedented legal questions have no exact legal precedent. Dicta from these opinions therefore constitute the only judicial pronouncements closely related to VPP. While the two decisions tend to combine the President and Vice President together in an unsatisfying manner and do not involve an actual

assertion of constitutional privilege, the overall tenor of the opinions and of the dicta are unmistakable. The courts have therefore shown a healthy respect for the asserted needs of the Vice President to carry out his duties with a fair measure of confidentiality, even if he is only exercising presidentially delegated duties. There is little reason to think that the Vice President would receive any less deference from the courts if he were exercising his own constitutional powers and if he actually made a formal claim of constitutional privilege. The judicial equation of the President and Vice President also reflects the latter's constitutional status and further underscores the likelihood that a court would ultimately recognize a vice presidential privilege since the President obviously enjoys his own authority in this realm. Dicta from *Nixon I* and a host of other judicial opinions tying privilege to enumerated constitutional responsibilities provide further reinforcement for the notion of VPP. To varying degrees, structural arguments, case law, and history are all therefore supportive of such a doctrine.

The argument in favor of VPP, while persuasive, is not wholly unassailable, however. There are arguments against its existence that are not without some merit. Still, the better view is that the Vice President may withhold communications from outside parties if such materials relate to his narrow authority in the Senate and as potential successor to, or temporary replacement for, the President.

In sum, should the issue arise as to whether the Vice President may withhold materials, even if the President opposes his efforts, it would appear that the Vice President would indeed enjoy such a constitutional privilege, provided the matter in question falls within the latter's own areas of constitutional responsibility. This would seem to be the most acceptable outcome for a governmental structure premised in part on encouraging all its constitutional officers to have the benefit of an effective decisionmaking process. It would also be very much in keeping with the rising stature of the vice presidency in American government that has taken place over the past several decades.