
WALKER v. CHENEY: POLITICS, POSTURING, AND EXECUTIVE PRIVILEGE

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I. INTRODUCTION

On February 22, 2002 the General Accounting Office (“GAO”) filed an unprecedented lawsuit against Vice President Richard Cheney, seeking an injunction requiring him to produce certain records relating to the National Energy Policy Development Group (“NEPDG”), which he chaired at the behest of President George W. Bush.¹ For the first time in its eighty-one year history, the GAO has filed suit against a federal official in relation to records access.²

The suit is the result of a GAO inquiry begun at the request of Representatives Henry Waxman and John Dingell, who were concerned about the potential influence Enron and other special interest groups had over the NEPDG’s activities.³ The Vice President has so far refused to

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1. See generally Complaint for Declaratory and Injunctive Relief ¶ 1, at 1, *Walker v. Cheney* (D.C. Cir. filed Feb. 22, 2002) (No. 1:02cv00340) [hereinafter Complaint]. Oral argument took place on September 27, 2002.

2. Press Release, General Accounting Office, GAO Statement Concerning Litigation (February 22, 2002), available at <http://www.gao.gov/press/gaostatement0222.pdf>.

3. See, e.g., Letter from John D. Dingell, Ranking Member, Committee on Energy and Commerce, and Henry A. Waxman, Ranking Member, Committee on Government Reform, to David Walker, Comptroller General, General Accounting Office (Apr. 19, 2001), available at http://www.house.gov/commerce_democrats/press/107ltr41.htm [hereinafter April 19 letter]; Letter from Henry A. Waxman, Ranking Minority Member, Committee on Government Reform, to Richard

meaningfully acquiesce to any of the GAO's information requests or attempts at accommodation, and has argued that the GAO does not have the statutory authority to obtain the records requested.⁴ More significantly, he has hinted at—though not formally asserted—executive privilege, setting the stage for a legal showdown that could make its way to the Supreme Court.

A claim of executive privilege would be commensurate with the early actions of President Bush, whose administration has shown inclinations towards secrecy and appears bent on restoring the prerogatives of the executive branch.⁵ So far, the Bush administration has delayed release of former President Reagan's papers, limited public access to government documents, refused to share data relating to the 2000 Census, and most recently, shielded papers relating to controversial pardons granted by former President Clinton on his last day in office.⁶ The President has also asserted executive privilege twice, once in relation to documents concerning the fund-raising activities of former President Clinton and again regarding the alleged misuse of informants by federal law enforcement officials.⁷ Aside from the standoff between the Vice President and the GAO, the administration's early resistance towards information disclosure has angered legislators on both sides of the aisle, and even led one prominent Republican to consider charging the President with contempt of Congress.⁸

Accordingly, it would not be surprising if the Bush administration decides to fight the GAO lawsuit on executive privilege grounds. This requires examination of the confusing and controversial doctrine. While executive privilege has been asserted in some fashion by every President since George Washington,⁹ it was not officially validated by the Supreme

Cheney, Vice President of the United States 1–4 (Dec. 4, 2001), available at <http://news.corporate.findlaw.com/hdocs/doc/enron/wxmlntr2chnyl20401.pdf>.

4. See, e.g., Letter from Richard Cheney, Vice President of the United States, to the House of Representatives and the Senate (Aug. 2, 2001), available at http://www.house.gov/commerce_democrats/EnergyTaskForce/press/cheney.rsp.802.pdf [hereinafter August 2 letter].

5. See David L. Greene, *Stemming the Information Flow*, BALT. SUN, Feb. 26, 2002, at 2A.

6. Anne E. Kornblut, *Bush's Stance on Secrecy Draws a Number of Critics Papers, Pretzel Cited As Instances Lacking Disclosure*, BOSTON GLOBE, Feb. 11, 2002, at A3; David G. Savage, *White House Defends Its Shielding of Clinton's Pardon Papers*, L.A. TIMES, Aug. 28, 2002, at A14.

7. See Edwin Chen, *Bush Refuses to Turn Over Justice Records to Congress*, L.A. TIMES, Dec. 14, 2001, at A41.

8. See P. Mitchell Prothero, *Burton Threatens Bush with Contempt Charge*, UNITED PRESS INT'L, Feb. 14, 2002.

9. Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1070 (1999).

Court until 1974 in *United States v. Nixon*.¹⁰ Further, the constitutional boundaries of executive privilege in the context of legislative inquiry have yet to be judicially defined.¹¹ This Note will analyze the many facets of the dispute between the GAO and Vice President Cheney, including arguments over the GAO's statutory authority to conduct its investigation, threshold justiciability matters that may prevent the courts from granting jurisdiction, and most importantly, a potential claim of executive privilege.

Part II of this Note will review the doctrine of executive privilege and set forth its constitutional basis and practical rationales. To this end, a brief discussion of the landmark case of *United States v. Nixon* is included. Additionally, early historical examples of the presidential privilege are examined along with modern post-Watergate executive privilege trends.

Part III provides background information on the GAO and the NEPDG, as well as a chronology of relevant correspondence between the Vice President and the GAO leading up to the recent lawsuit. The parties' competing contentions over the GAO's statutory authority to compel the information in question are presented and analyzed, with the determination made that the GAO will probably prevail in this preliminary round of the contest.

In Part IV, the many issues germane to a claim of executive privilege in the current dispute will be explored, including justiciability, the applicability of the privilege to the Vice President, and the applicability of the privilege to conversations between presidential advisers and private citizens. Finally, this Note concludes that an executive privilege claim by the Bush administration will not hold up in court, despite the relatively weak showing of need proffered by the GAO, because the requested information does not significantly impinge on the President's ability to receive candid advice. This Note further posits, however, that the courts should avoid ruling on this matter, and instead let it resolve itself through the give-and-take of the political process.

10. See 418 U.S. 683, 703–05 (1974).

11. See, e.g., *id.* at 712 n.19 (limiting the opinion to the context of the President's assertion of privilege against a subpoena for relevant evidence in a criminal trial); *In re Sealed Case*, 121 F.3d 729, 753 (D.C. Cir. 1997) (limiting holding to the context of civil litigation).

II. EXECUTIVE PRIVILEGE

A. BACKGROUND

Executive privilege has been succinctly defined as “the right of the president and important executive branch officials to withhold information from Congress, the courts, and, ultimately, the public.”¹² The information withheld can be oral or written communications between the president and his advisers, and the privilege may be utilized in response to congressional requests for information or in the context of civil or criminal litigation. Arguments as to the scope and legitimacy of executive privilege have varied dramatically—one prominent scholar has even referred to it as a constitutional “myth,”¹³ in contrast to President Nixon’s claim that the privilege inhered in the president and he alone determined its reach.¹⁴ The privilege has been defended as a commonsense necessity for the executive branch, as President Eisenhower, who asserted executive privilege some forty-four times between 1955 and 1960,¹⁵ stated:

But when it comes to the conversations that take place between any responsible official and his advisers . . . expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody; and if they are, will wreck the Government.

There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis.¹⁶

Chief Justice Rehnquist, prior to sitting on the bench, stated simply that the “doctrine itself is an absolutely essential condition for the faithful discharge by the executive of his constitutional duties.”¹⁷ An effective counterpoint is provided, ironically, by President Nixon, speaking only months before the Watergate break-in: “When information which properly belongs to the public is systematically withheld by those in power, the

12. MARK J. ROZELL, *EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY*, at xi (1994).

13. RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH I* (1974).

14. *See Nixon*, 418 U.S. at 703.

15. Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1433 (1974).

16. *Id.* at 1386 (alteration in original) (quoting PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER, 1955, at 674 (1959)).

17. ROZELL, *supra* note 12, at 49.

people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies.”¹⁸

These views present the essential difficulties in dealing with the doctrine: It seems clear that the president should have a certain level of secrecy in carrying out his duties, while, on the other hand, openness and accountability operate at the core of democratic values. As former Watergate special prosecutor Archibald Cox has pointed out, the following three inferences each seem proper: (1) The judicial branch should have the power to obtain necessary evidence; (2) the legislative branch should also have the power to obtain necessary evidence; and (3) the executive should have the power to withhold evidence when disclosure would impede performance of his duties.¹⁹ Yet, in the context of an executive privilege dispute, one of these principles must yield—and the process of determining who should decide and on what basis lies at the center of the difficulty surrounding the privilege.²⁰

An obvious problem one first encounters when trying to understand the privilege is that it is not mentioned in the Constitution. The presidential grant of power in Article II contains no express authorization for an executive privilege.²¹ As such, the existence of a privilege, if there is one at all, must stem from inherent presidential powers—those powers not specifically enumerated but which flow from the express grant of power in Article II. In fact, executive privilege has been described as a “paradigmatic example of inherent Presidential power.”²² Since the time of the founding fathers, debate has raged over whether the language of Article II intended to limit the president to powers explicitly granted, with figures such as Alexander Hamilton and James Madison reaching opposite conclusions. Hamilton believed that since the limiting language in Article I restricting Congress to “All legislative Powers *herein granted*” was nowhere to be found at the beginning of Article II, the president possessed powers not specifically mentioned in the Constitution.²³ Madison disagreed, arguing that the opening sentence of Article II stating that “[t]he executive Power shall be vested in a President of the United States of America” was intended only to clarify that the presidency would be vested

18. *Id.* at 17.

19. Cox, *supra* note 15, at 1386–87.

20. *Id.* at 1387.

21. *See* U.S. CONST. art. II.

22. Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 872 (1983).

23. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 42 (1972).

in a single person.²⁴ This dispute showcases the difficulty in settling the debate over inherent powers and underscores the confusion that remains to the present day. As Justice Robert Jackson noted:

Just what our forefathers did envision . . . must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.²⁵

B. *UNITED STATES v. NIXON*

Notwithstanding the lack of an explicit mandate for executive privilege in the Constitution, every president since George Washington has exercised it in some fashion.²⁶ Its constitutionality was not considered, however, until *United States v. Nixon*.²⁷ The litigation resulted from President Nixon's refusal to produce tape recordings and documents relating to conversations with aides and advisers, in response to a subpoena *duces tecum* from the special prosecutor, on the grounds that they were confidential and privileged.²⁸

Nixon was crucial in providing legitimacy to executive privilege and setting forth its limitations as well. First, the decision was important in that it established the Court's role in determining whether executive privilege exists, in contravention of President Nixon's argument that the separation of powers doctrine precluded judicial review of such a claim.²⁹ In establishing its authority to decide the matter, the Court "reaffirmed the holding of *Marbury v. Madison*, that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"³⁰

Next, the Court recognized the constitutionality of executive privilege, stating "the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public

24. Chemerinsky, *supra* note 22, at 868.

25. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring). Discussion of the overall legitimacy of inherent powers is beyond the scope of this Note, though this issue is of critical importance in determining the validity of executive privilege and understanding its source.

26. Rozell, *supra* note 9, at 1070.

27. *See* 418 U.S. 683, 703 (1974).

28. *Id.* at 686–88, 703.

29. *See id.* at 703–05.

30. *Id.* at 703 (alteration in original) (internal citation omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

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.”³¹ Chief Justice Burger went on to explain that executive privilege, like other powers, “flow[s]” from enumerated powers, and thus has “constitutional underpinnings.”³² The Court held that presidential communications are “presumptively privileged”³³ and that the privilege is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”³⁴

After recognizing the existence of executive privilege, the Court proceeded to deny President Nixon’s claim on the grounds that a generalized argument of confidentiality was outweighed by a prosecutor’s specific need for relevant evidence in a criminal trial.³⁵ Such a need implicates the judiciary’s duties under Article III, and has due process implications as well.³⁶ Thus, *United States v. Nixon* stands for the proposition that the chief executive is entitled to a presumptive privilege with regard to presidential communications, which can be overcome when there are significant countervailing interests in favor of disclosure.³⁷ The Court also stated that the privilege is constitutionally based only to the extent that it “relates to the effective discharge of a President’s powers.”³⁸ It should be noted, however, that the Court expressly limits its decision to the context of criminal proceedings, and does not address civil litigation, congressional demands for information, or the president’s interest in preserving state secrets.³⁹

The form of executive privilege discussed in *Nixon* is referred to as the presidential communications privilege (or simply presidential privilege), which protects information that “reflect[s] presidential decisionmaking and deliberations . . . that the President believes should remain confidential.”⁴⁰ Such a privilege was first hinted at in *Marbury v. Madison*, when Chief Justice Marshall stated that a court’s intrusion “‘into the secrets of the cabinet’ would give the appearance of ‘intermeddl[ing]

31. *Id.* at 705.

32. *Id.* at 705–06.

33. *Id.* at 708 (quoting *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973)).

34. *Id.*

35. *See id.* at 712–13.

36. *See id.* at 712.

37. *See id.* at 713.

38. *Id.* at 711.

39. *See id.* at 712 n.19.

40. *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997). The term “Presidential communications” is used in *Nixon*. *See* 418 U.S. at 703.

with the prerogatives of the executive.”⁴¹ A related subset of executive privilege with roots in the common law is the deliberative process privilege, which provides protection for executive officials in relation to their deliberations and decisionmaking processes.⁴² The distinction between the two was explored at length in a recent, well-reasoned opinion by Judge Wald of the D.C. Circuit in a case concerning an executive privilege claim made by President Clinton.⁴³ Judge Wald suggested that the presidential privilege may shield disclosure of factual information in addition to information pertaining to advice.⁴⁴ Further, the showing necessary to overcome the presidential communications privilege is greater, and may require a “focused demonstration of need”—even given allegations of government misconduct that suffice to overcome a deliberative process privilege claim.⁴⁵

C. A BRIEF HISTORY OF EXECUTIVE PRIVILEGE

As previously noted, every president has exercised some form of what is now known as executive privilege, and recognition of the need for secrecy in government has existed in our nation since its inception.⁴⁶ In *Nixon*, the Court even drew upon the fact that the delegates at the 1787 Constitutional Convention met in secret to support the view that the Framers recognized the need for confidentiality in government.⁴⁷ The Framers understood that the president needed the ability to decide and act quickly, which secrecy afforded, as evidenced by Alexander Hamilton in the *Federalist Papers*: “*Decision, activity, secrecy, and dispatch* will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”⁴⁸ A brief review of some of the asserted claims is important not only in reinforcing

41. *Sealed Case*, 121 F.3d at 738 (alteration in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (Marshall, C.J.)).

42. *Id.* at 737.

43. *See id.* The case involved allegations that former Secretary of Agriculture Mike Espy received gifts from individuals and organizations with business before the U.S. Department of Agriculture. *Id.* at 734. President Clinton ordered an investigation of Espy, which was conducted by the White House Counsel, and the Grand Jury subpoenaed these documents. *Id.* at 735. A claim of executive privilege by President Clinton in response to the subpoena was at issue in this case. *Id.*

44. *See id.* at 745.

45. *Id.* at 746.

46. *See Rozell, supra* note 9, at 1070.

47. *See United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974).

48. THE FEDERALIST NO. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

the legitimacy of the doctrine, but also in viewing how disputes usually arise and how they are often settled.

1. The Early Assertions of Executive Privilege

The practice of the presidential administration of George Washington is especially instructive, as he held office directly after the drafting of the Constitution and set the tone for future administrations.⁴⁹ Washington himself wrote to James Madison: “As the first of everything, *in our situation will serve to establish a precedent*, it is devoutly wished on my part, that these precedents may be fixed on true principles.”⁵⁰

a. St. Clair Expedition

The first exercise of a presidential privilege occurred after a failed 1791 military expedition led by General St. Clair.⁵¹ The House established a committee that requested documents concerning the expedition from President Washington.⁵² Since this was the first request by a congressional committee for presidential materials, Washington convened his cabinet to discuss whether any harm would result from public disclosure of the documents, and whether he could rightfully refuse to supply the information.⁵³ According to Thomas Jefferson’s memoirs, Hamilton, General Knox, Edmund Randolph, Washington, and he decided at an April 2, 1792 cabinet meeting:

We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion.⁵⁴

Washington eventually complied with the request and turned over all of the papers sought, leading some to question the significance of this incident in establishing a privilege.⁵⁵ Yet to others, “this beginning of the executive privilege indicates . . . the president could refuse documents

49. ROZELL, *supra* note 12, at 32.

50. *Id.*

51. *Id.* at 33.

52. Mark J. Rozell, *Restoring Balance to the Debate Over Executive Privilege: A Response to Berger*, 8 WM. & MARY BILL RTS. J. 541, 556 (2000).

53. ROZELL, *supra* note 12, at 33.

54. *Id.*

55. See, e.g., BERGER, *supra* note 13, at 167; Cox, *supra* note 15, at 1391–92.

because of their secret nature, a category insisted upon by subsequent presidents ever since.”⁵⁶

b. Correspondence with France

Shortly after the St. Clair incident, in January 1794, the Senate requested that President Washington turn over correspondence between the United States and France.⁵⁷ Washington again held a cabinet meeting, and received advice from three cabinet members:

General Knox is of the opinion, that no part of the correspondence should be sent to the Senate. Colonel Hamilton, that the correct mode of proceeding is to do what General Knox advises; but the principle is safe, by excepting such parts as the president may choose to withhold. Mr. Randolph, that all correspondence proper, from its nature, to be communicated to the Senate, should be sent; but that what the president thinks is improper, should not be sent.⁵⁸

Accordingly, Washington provided the Senate with some portions of the correspondence, and withheld that which he felt would be contrary to the public interest to disclose.⁵⁹ The Senate did not challenge Washington. This would seem to be yet another early reinforcement of the concept of executive privilege, though it has been noted that “nothing would have prevented a majority from demanding the material, especially in confidence, or from using their power over foreign policy, funds and offices to pressure the President to divulge.”⁶⁰

c. Jay Treaty

In 1796, another confrontation between the Washington administration and Congress occurred following a settlement between the United States and Britain over issues pertaining to the American Revolution.⁶¹ Many considered the treaty, negotiated by John Jay, to be unfavorable to the United States, and the House passed a resolution requesting information from the President.⁶² Washington once again refused to comply, explaining:

56. ROZELL, *supra* note 12, at 34 (alteration in original).

57. Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 WM. & MARY BILL RTS. J. 583, 587 (2000).

58. ROZELL, *supra* note 12, at 34.

59. *Id.* at 35.

60. Abraham D. Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318, 1321 (1975).

61. ROZELL, *supra* note 12, at 35.

62. *Id.*

The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent. . . . [T]he boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office . . . forbids a compliance with your request.⁶³

This is a classic claim of executive privilege in relation to foreign affairs, where the privilege is generally considered to be strongest,⁶⁴ and also highlights the separation of powers rationale central to the doctrine. Even Madison noted on the House floor that “the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time.”⁶⁵

d. Burr Conspiracy

Another incident from the early years of the nation that sheds light on the executive privilege debate is the Aaron Burr conspiracy. The House requested of President Jefferson all relevant information except that which he felt was not in the public interest to be disclosed.⁶⁶ This evinces implicit congressional acknowledgment of executive privilege.

In a criminal case against Aaron Burr, Chief Justice John Marshall considered a presidential privilege and noted that although he could not “precisely lay down any general rule for such a case,” he was not “required to proceed against the president as against an ordinary individual.”⁶⁷ However, he reasoned, “But on objections being made by the president to the production of a paper, the court would not proceed further in the case

63. *Id.* (second alteration in original).

64. *See infra* note 223.

65. ROZELL, *supra* note 12, at 36.

66. BERGER, *supra* note 13, at 179.

67. *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694).

without such an affidavit as would clearly shew the paper to be *essential to the justice of the case*.”⁶⁸ In *Nixon*, the Supreme Court made several references to this case, which helped it establish the standard required to overcome the presumption in favor of executive privilege.⁶⁹

2. Executive Privilege in the Modern Era

President Eisenhower established the modern precedent for executive privilege, and the actual phrase “executive privilege” was first coined during his administration.⁷⁰ He used the privilege extensively, and was the first president to claim “explicitly an executive privilege based simply upon an undifferentiated interest in preserving the confidentiality of deliberations and advice throughout the Executive Branch.”⁷¹

President Nixon’s claim of executive privilege regarding the Watergate break-in is the most well known of all such assertions. His far-reaching claim is a clear example of an abuse of the privilege, and consequently has shaped the negative light in which many people see it. As Mark Rozell writes, “[F]or most people, the mere mention of executive privilege conjures up images of Watergate and President Richard Nixon’s attempt to use that doctrine to obstruct justice.”⁷² He notes three resulting effects of Nixon’s abuse of the doctrine: (1) presidential efforts to achieve the objective of executive privilege without citing the privilege as authority, (2) congressional attempts to demean any use by the president as attempts to conceal wrongdoing or deceive the public, and (3) the undermining of a doctrine that is a legitimate presidential power necessary for the president to carry out his duties.⁷³

The post-Watergate period is replete with examples of presidential attempts to avoid disclosure without mentioning “executive privilege.” The Associate Counsel to President Ford observed that “the unfavorable connotations of executive privilege and the present mood of Congress dictate a sharp break from traditional practice,” and recommended that in lieu of citing executive privilege the administration rely on exemptions from the Freedom of Information Act or assert different terms, such as “presidential,” “constitutional privilege,” or “confidential working

68. *Id.* (emphasis added).

69. *See United States v. Nixon*, 418 U.S. 683, 707–13 (1974).

70. Neil Kinkopf, *Executive Privilege: The Clinton Administration in the Courts*, 8 WM. & MARY BILL RTS. J. 631, 631 (2000).

71. Cox, *supra* note 15, at 1433.

72. Rozell, *supra* note 9, at 1069.

73. ROZELL, *supra* note 12, at 84.

papers.”⁷⁴ The Secretary of Commerce for President Carter suggested that although the only legal grounds for withholding certain information in a particular controversy was executive privilege, “because of the connotations this term has acquired since Watergate, it is preferable for us to couch our response in other terms, such as separation of powers.”⁷⁵ Another internal Carter administration memorandum stated, “[W]e hope to find a sound legal basis to answer the subpoena without using the term executive privilege.”⁷⁶ The first Bush administration withheld information under the guise of many different privileges, including “internal departmental deliberations” and “secret opinions policy.”⁷⁷ And President George W. Bush, for his part, has recently asserted “executive ‘prerogative’” in refusing to allow the Director of Homeland Security to testify before Congress.⁷⁸

In line with Rozell’s analysis, the current administration has failed to claim executive privilege in the current dispute, yet the President and Vice President have consistently used standard rationales behind the privilege to make their case against disclosure.⁷⁹ Also, as expected, the media has come down strongly against the withholding of information, decrying Cheney’s “stonewalling” and suggesting that he “has become blinded to the fact that democracy relies on open government.”⁸⁰ Some have said that “[i]t’s very similar to Nixon.”⁸¹ Members of Congress have voiced displeasure as well.⁸² One can imagine that recent alleged abuses of the doctrine by President Clinton (who received similar criticism) will only serve to fuel the negative connotation associated with privilege assertions

74. *Id.* at 87–88.

75. *Id.* at 102.

76. *Id.* at 105.

77. *Id.* at 125.

78. Nick Anderson, *Ridge’s Refusal to Testify Irks Lawmakers*, L.A. TIMES, Mar. 16, 2002, at A14.

79. *See, e.g.*, August 2 letter, *supra* note 4 (asserting that the NEPDG’s request for documents “would unconstitutionally interfere with the functioning of the Executive Branch”); David G. Savage, *GAO Goes to Court to Get Cheney Data*, L.A. TIMES, Feb. 23, 2002, at A12 (quoting Cheney’s rejection of routine document requests by the GAO as threatening “to intrude into the heart of executive deliberations”).

80. Editorial, *Cheney’s Stone Wall*, L.A. TIMES, Jan. 29, 2002, at B12.

81. Kornblut, *supra* note 6.

82. *See, e.g.*, Don Van Natta, Jr., *Agency Files Suit for Cheney Papers on Energy Policy*, N.Y. TIMES, Feb. 23, 2002, at A1 (quoting Representative Dingell, that “[i]t is unfortunate that the [V]ice [P]resident doesn’t believe the American people or Congress has a right to know who’s influencing public policy,” and quoting Representative Waxman, that “avoiding embarrassment isn’t a constitutional protection”).

invoked by President Bush and future chief executives, regardless of the legitimacy of any such claims.⁸³

It is accordingly against a mixed background that the current dispute between the GAO and Vice President Cheney takes place. On the one hand, we see that the president is presumptively entitled to an executive privilege. On the other hand, that presumption may be overcome by sufficient countervailing interests, and must withstand political pressure produced by the media and public opinion generally in favor of disclosure. Further complicating the present controversy is an argument over statutory interpretation concerning the GAO's lawful authority to obtain the information sought. The factual background of the matter and the statutory arguments are set forth below.

III. CIRCUMSTANCES SURROUNDING THE DISPUTE

A. BACKGROUND OF THE NEPDG AND GAO

1. NEPDG

The present standoff concerns an investigation by the GAO into the activities of the NEPDG, which was established through memorandum by President Bush on January 29, 2001.⁸⁴ The NEPDG's function, as stated in the memorandum, was to "gather information, deliberate, and, as specified . . . make recommendations to the President," with the ultimate goal of providing a "national energy policy designed to help the private sector, and [government at all levels,] promote dependable, affordable, and environmentally sound production and distribution of energy."⁸⁵ Such a report was issued by the NEPDG on May 16, 2001, approved by President Bush, and is now referred to as the National Energy Policy.⁸⁶ According to the memorandum, the group consisted of six executive cabinet officers (Treasury, Interior, Agriculture, Commerce, Transportation, and Energy),

83. See, e.g., Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, 60 MD. L. REV. 205 (2001) (arguing that President Clinton's failed assertions of executive privilege have damaged the vitality of the doctrine for future presidents).

84. See Memorandum from George W. Bush, President of the United States, to the Vice President, Secretary of Treasury, Secretary of Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Transportation, Secretary of Energy, Director of Federal Emergency Management Agency, Administrator of EPA, Assistant to President and Deputy Chief of Staff for Policy, Assistant to President for Economic Policy, Assistant to President for Intergovernmental Affairs 1 (Jan. 29, 2001) [hereinafter Memorandum] (on file with author).

85. *Id.* at 2.

86. August 2 letter, *supra* note 4.

two agency heads (Federal Emergency Management Agency and Environmental Protection Agency), three officers of the White House staff (Policy, Economic Policy, and Intergovernmental Affairs), as well as the Vice President himself, serving as chair.⁸⁷

2. GAO

The GAO was created by Congress in 1921 pursuant to the Budget and Accounting Act.⁸⁸ This Act transferred the responsibilities of auditing, accounting, and claims functions from the Treasury Department to the GAO, due to the disarray of the federal financial management after World War I.⁸⁹ From its creation, the GAO has served as an “independent and nonpartisan agency of the Congress, charged with studying the programs and expenditures of the federal government.”⁹⁰ As such, it is frequently referred to as a “congressional watchdog agency”⁹¹ or the “investigative arm of Congress.”⁹² According to its website, the GAO supports congressional oversight by “evaluating how well government policies and programs are working; auditing agency operations to determine whether federal funds are being spent . . . appropriately; investigating allegations of illegal and improper activities; and issuing legal decisions and opinions.”⁹³ The GAO is led by the Comptroller General of the United States,⁹⁴ who is currently David Walker. While the existence of statutory authority empowering the GAO to obtain the specific information it seeks is being challenged by the Bush administration, the notion that the GAO has rightfully been delegated the power by Congress to carry out its general duties is not disputed.

87. See Memorandum, *supra* note 84, at 1–2. The Memorandum also provides that the Vice President may invite the Chairman of the Federal Energy Regulatory Commission to participate, as well as the Secretary of State when international affairs are involved. See *id.* at 2. The specific membership of the NEPDG is important due to potential disclosure requirements mandated by the Federal Advisory Committee Act (“FACA”), 5 U.S.C. app. §§ 2–3 (2000). See *id.* § 2(b)(5). FACA exempts groups consisting wholly of full-time federal officers or employees. *Id.* § 3(2).

88. *The Background of the GAO*, General Accounting Office, at <http://www.gao.gov/about/history.html> (last visited Oct. 6, 2002) [hereinafter *Background of the GAO*]. See also 31 U.S.C. §§ 701–04, 711–20, 731–36, 751–55, 771–79, 781–83 (2000) (setting forth the GAO’s principle authorities and mandates).

89. *Background of the GAO*, *supra* note 88.

90. John W. Dean, *GAO v. Cheney Is Big-Time Stalling: The Vice President Can Win Only If We Have Another Bush v. Gore-like Ruling*, FindLaw, at <http://writ.news.findlaw.com/dean/20020201.html> (Feb. 1, 2002).

91. Savage, *supra* note 79.

92. Paul Courson, *GAO Files Unprecedented Suit Against Cheney*, CNN, at <http://www.cnn.com/2002/ALLPOLITICS/02/22/enron.gao.lawsuit/index.html> (Feb. 22, 2002).

93. *Background of the GAO*, *supra* note 88.

94. See 31 U.S.C. § 702(b) (2000).

B. CHRONOLOGY OF RELEVANT INTERACTIONS BETWEEN CHENEY AND
THE GAO

Although the confrontation between the White House and the GAO only began to generate extensive media coverage in early 2002, owing in large part to events surrounding the demise of Enron, it had actually been brewing for nearly a year prior to that point. In fact, the GAO's filing of its lawsuit against the Vice President on February 22, 2002, was the end result of interactions initiated on April 19, 2001. On that date, Representatives John Dingell and Henry Waxman sent one letter to the GAO, asking it to begin an investigation,⁹⁵ and another to the Executive Director of the NEPDG, asking questions and requesting records pertaining to the group's meetings.⁹⁶ In their letter to the Comptroller General, Dingell and Waxman expressed concern over the "conduct and composition" of the NEPDG and stated that the process of energy policy development needed "sunshine."⁹⁷ They went on to ask the GAO to investigate the NEPDG, and provided specific questions that the GAO should seek to have answered.⁹⁸

After a brief and unproductive exchange of information between the parties, the Vice President's Counsel wrote to the GAO's General Counsel on May 16, 2001, asking the Comptroller General to determine whether the proposed GAO inquiry was appropriate, in compliance with the law, a productive use of resources, and most importantly, for a statement of GAO's legal authority to conduct its proposed inquiry.⁹⁹

In response, the GAO's General Counsel wrote to the Vice President's Counsel on June 1, 2001 indicating that the GAO would proceed with the inquiry according to authority granted pursuant to 31 U.S.C. §§ 712, 716, and 717.¹⁰⁰

In a June 7 response, the Vice President's Counsel disputed the GAO's purported authority under 31 U.S.C. §§ 716 and 717, but conceded that § 712 provided the limited authority for an inquiry into the costs

95. See April 19 letter, *supra* note 3.

96. August 2 letter, *supra* note 4, app. 1 at 1.

97. April 19 letter, *supra* note 3.

98. See *id.* The questions are substantially similar to those formally requested by the GAO in its July 18, 2001 letter. See *infra* note 106 and accompanying text.

99. August 2 letter, *supra* note 4, app. 1 at 1.

100. *Id.* at 1–2.

incurred by the NEPDG.¹⁰¹ These arguments will be set forth below, but notably, the Vice President's Counsel outlined his first line of defense in the dispute—that the GAO did not possess the statutory authority to obtain the information requested. Nonetheless, the Vice President's Counsel observed that executive privilege might be applicable to the request notwithstanding the legality of the GAO's inquiry under the statutes.¹⁰²

Consistent with the Vice President's concession that the GAO possessed statutory authority to examine information related to costs, his counsel forwarded to the GAO seventy-seven pages of information ostensibly aiming to answer the GAO's question regarding direct and indirect costs incurred by the NEPDG.¹⁰³ The GAO, however, disputed the relevance of the documents.¹⁰⁴

In response to the Vice President's letter of June 7, the GAO's General Counsel wrote a letter dated June 22, articulating his belief that the GAO possessed broad authority to review pursuant to 31 U.S.C. §§ 712 and 717 and threatening that the GAO could issue a demand letter under § 716.¹⁰⁵ Intending to rebut the Vice President's assertions, the letter provided a detailed analysis of the statutes in question, which will be analyzed below.

On July 18, 2001 the Comptroller General issued a formal request (or demand letter) under 31 U.S.C. § 716(b) to Vice President Cheney seeking the following:

- 1) Your counsel identified nine meetings conducted by the National Energy Policy Development Group (NEPDG) in his May 4, 2001, letter to the Chairmen and Ranking Minority Members of the House Committee on Energy and Commerce and the House Committee on Government Reform (hereinafter May 4 letter). We request records

101. See Letter from David S. Addington, Counsel to the Vice President, to Anthony Gamboa, General Counsel, General Accounting Office 1–3 (Jun. 7, 2001), available at http://www.house.gov/commerce_democrats/press/gao.6-22-01.pdf [hereinafter June 7 letter].

102. See *id.* at 2–3.

103. August 2 letter, *supra* note 4, app. 1 at 2.

104. The Comptroller General acknowledged receipt of documents “purporting to relate to direct and indirect costs,” but said that the submission was “incomplete,” “not fully responsive,” and “virtually impossible to analyze.” Letter from David M. Walker, Comptroller General, General Accounting Office, to Richard B. Cheney, Vice President of the United States 8 (Aug. 17, 2001), available at http://www.house.gov/commerce_democrats/EnergyTaskForce/gaorpt-81701.pdf [hereinafter August 17 letter].

105. See Letter from Anthony H. Gamboa, General Counsel, General Accounting Office, to David S. Addington, Counsel to the Vice President of the United States 2 (June 22, 2001), available at http://www.house.gov/commerce_democrats/EnergyTaskForce/energytaskforce.shtml [hereinafter June 22 letter].

providing the names of the attendees for each meeting, their titles, and the office represented.

2) In the May 4 letter, your counsel indicated that six professional staff, referred to as the group support staff, were assigned to the Office of the Vice President to provide support to the NEPDG. We request records providing their names, titles, the office each individual represented, the date on which each individual began working for such office, and the responsibilities of the group support staff.

3) In the May 4 letter, your counsel indicated that various members of the group support staff met with many individuals to gather information relevant to the NEPDG work. We request records providing the following information with regard to each of these meetings: (a) the date and location, (b) any person present, including his or her name, title, and office or clients represented, (c) the purpose and agenda, (d) any information presented, (e) minutes or notes, and (f) how members of the NEPDG, group support staff, or others determined who would be invited to the meetings.

4) We request records providing the following information with regard to any meetings the Vice President as chair of the NEPDG had with individuals to gather information relevant to the NEPDG: (a) the date and location, (b) any person present, including his or her name, title, and office or clients represented, (c) the purpose and agenda, (d) any information presented, (e) minutes or notes, and (f) how the Vice President or others determined who would be invited to the meetings.

5) We request any records containing information about the direct and indirect costs incurred in the development of the National Energy Policy. To date, we have been given 77 pages of miscellaneous records purporting to relate to these direct and indirect costs. Because the relevance of many of these records is unclear, we continue to request all records responsive to our request, including any records that clarify the nature and purpose of the costs.¹⁰⁶

After conversations between the two sides yielded no accommodation, the Comptroller General submitted a “report” to Congress, the President, the Vice President, and other officials under 31 U.S.C. § 716(b), dated August 17, 2001.¹⁰⁷ Such a report may be filed by the Comptroller General if he is not given an opportunity to inspect records within twenty days after issuing a demand letter.¹⁰⁸ Twenty days after filing a report, the Comptroller General is permitted to bring a civil action in the District

106. August 2 letter, *supra* note 4, app. 1 at 3.

107. August 17 letter, *supra* note 104, at 1.

108. See 31 U.S.C. § 716(b)(1) (2000).

Court of the District of Columbia to obtain production of the sought records,¹⁰⁹ unless an exemption is invoked under 31 U.S.C. § 716(d)(1).¹¹⁰

Along with fulfilling statutory prerequisites to filing a civil action, the letter of August 17 further articulated the GAO's legal arguments in support of its right to the requested information, and formally limited the scope of the GAO's request.¹¹¹ Specifically, the GAO's formal request now exempted minutes and notes of the meetings along with any information presented by members of the public.¹¹² In explaining this exemption, the Comptroller General maintained that "[e]ven though we are legally entitled to this information, as a matter of comity, we are scaling back the records we are requesting to exclude these two items of information."¹¹³ Of course, the GAO made such a limitation with the understanding that these requests were susceptible to a much more plausible executive privilege claim than the remaining interrogatories.

At this point, in summer 2001, a suit by the GAO seemed imminent. The September 11 tragedy, however, delayed such action.¹¹⁴ Thereafter, the parties still could reach no compromise. By letter dated January 22, 2002, Senators Carl Levin, Joseph Lieberman, Ernest Hollings, and Byron Dorgan—all Chairmen of Senate Committees or Subcommittees—joined the previous Congressional request that the Comptroller General investigate the composition and workings of the NEPDG.¹¹⁵ On January 30, 2002, the Comptroller General announced his decision to initiate legal action against the Vice President¹¹⁶ and filed suit on February 22, 2002.¹¹⁷

109. *Id.* § 716(b)(2).

110. This section provides that the Comptroller General may not bring a civil action for records that are related to activities that the President designates as foreign intelligence or counterintelligence. *Id.* § 716(d)(1)(A).

111. See August 17 letter, *supra* note 104, at 2–10.

112. *Id.* at 2. The request now remains the same as provided above in the July 18 letter, with the exception that information in questions 3(d) and (e) and 4(d) and (e) of the July 18 letter is no longer sought. *Id.* at 2 n.2.

113. *Id.* at 2.

114. See Letter from David M. Walker, Comptroller General, General Accounting Office, to the House of Representatives and the Senate 2 (Jan. 30, 2002), available at <http://www.gao.gov/cgdecnepdg.pdf> [hereinafter January 30 letter]. The Comptroller General had delayed legal action to allow the government to focus its efforts on the terrorist threat. See *id.*

115. Complaint, *supra* note 1, ¶ 45, at 20–21.

116. *Id.* ¶¶ 48–49, at 22–23.

117. See generally *id.*

C. STATUTORY ARGUMENTS

1. Vice President Cheney's Contentions

In his August 2 letter to the House and Senate, Vice President Cheney articulated his reasons for refusing to turn over the information sought.¹¹⁸ This letter incorporates and expands upon arguments made by his counsel in a letter to the GAO dated June 7.¹¹⁹ His first sentence is instructive, as it notes that the actions taken by the Comptroller General “exceed his lawful authority and . . . if given effect, would unconstitutionally interfere with the functioning of the Executive Branch.”¹²⁰ Here, Cheney has outlined a two-pronged defense. He first argues that the GAO does not have the statutory authority to obtain the records. Second, although he does not explicitly claim executive privilege, he states its underlying rationale and therefore, in a sense, claims it implicitly. Cheney's first argument—that the GAO purports to act under a “misconstruction of the statutes”¹²¹—will be addressed here. While what follows is a tit-for-tat argument over statutory construction between the parties, it is clear from the correspondence to date that both understand that they are operating in the shadow of an executive privilege showdown.

The Comptroller General's authority under 31 U.S.C. § 717 authorizes him to “evaluate the results of a program or activity the Government carries out under existing law” on his own initiative, by request of either the House or Senate, or by request of a committee of Congress with jurisdiction over the program.¹²² From that language the Vice President construes two principal challenges to the GAO's current review.¹²³ First, he suggests that the language, “evaluate the results of a program or activity the Government carries out *under existing law*,” limits the Comptroller General to investigation of activities conducted pursuant to statutory authority as

118. See August 2 letter, *supra* note 4, app. 2.

119. Compare *id.*, with June 7 letter, *supra* note 101.

120. August 2 letter, *supra* note 4.

121. *Id.* app. 2.

122. 31 U.S.C. § 717(b)(1–3) (2000).

123. See August 2 letter, *supra* note 4, app. 2. The Vice President also made a third argument, suggesting that since the investigation was initiated by the request of two Ranking Minority Members of congressional committees, it does not satisfy the requirement in § 717(b)(3), under which the Comptroller General purported to act, that a request be made by the committee itself. See *id.* However, this argument appears to have been mooted by the January 22, 2002 letter of four Senators, all Committee or Subcommittee Chairmen, joining the request, since even the Vice President's stricter interpretation of the statute recognizes as legitimate the request of a committee chairman. See June 7 letter, *supra* note 101, at 2.

opposed to constitutional authority.¹²⁴ Accordingly, his argument proceeds, the GAO has no authority to investigate the activities of the NEPDG, which was created and subsequently conducted pursuant to the President's exercise of his constitutional powers. The exercise of such constitutional powers by the President, including his authority to

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," to "take Care that the Laws be faithfully executed," and with respect to Congress, to "recommend to their Consideration such Measures as he shall judge necessary and expedient,

then, is not reviewable by the Comptroller General.¹²⁵ The only authority cited for this proposition is a 1988 opinion by the Office of Legal Counsel of the Department of Justice.¹²⁶

Second, the Vice President maintains that the Comptroller General's investigation is not authorized because the statute's use of the term "results" in relation to programs mandates a look only at the final product, not on the process by which the "results" were reached.¹²⁷

31 U.S.C. § 712 provides that the Comptroller General shall "investigate all matters related to the receipt, disbursement, and use of public money."¹²⁸ The Vice President concedes that this section applies, "if at all," only to the Comptroller General's question regarding the costs associated with the NEPDG.¹²⁹ As mentioned above, Cheney sent a letter to the GAO with information related to costs. The Vice President contends, however, that no further inquiry beyond such cost information is conferred by the "narrow authority" of § 712.¹³⁰ His counsel stated that the authority given to the Comptroller General under § 712 is narrower than that granted under § 717, since the latter's grant of power to investigate the "results" of a government program or activity came into law after the former was already in existence, and, as such, was meant to grant a broader right of inquiry subject to the specific limitations of § 717.¹³¹

124. August 2 letter, *supra* note 4, app. 2 (emphasis added).

125. *Id.*

126. See June 7 letter, *supra* note 101, at 2. The OLC opinion stated "[w]e believe as a matter of statutory construction that the phrase 'program or activity . . . under existing law' must refer only to activities carried out pursuant to statute, and not activities carried out pursuant to the Executive's discharge of its own constitutional responsibilities." *Id.*

127. August 2 letter, *supra* note 4, app. 2.

128. 31 U.S.C. § 712(1) (2000).

129. August 2 letter, *supra* note 4, app. 2.

130. *Id.*

131. See June 7 letter, *supra* note 101, at 1-3.

31 U.S.C. § 716 sets forth the procedures by which the Comptroller General may seek information from agencies, including the issuance of a demand letter and statutory report, and also grants the authority to file a civil action.¹³² The Vice President argues that this section applies only when the Comptroller General has authority to act under § 712 or 717, and that § 716 grants no independent authority to investigate.¹³³ Thus, commensurate with his arguments above, no authority is granted to the Comptroller General to obtain the documents sought. Cheney further argues that “‘agency,’ as used in [§] 716 does not include the Vice President of the United States, who is a constitutional officer of the Government.”¹³⁴

In concluding his argument, Cheney lays the foundation for an executive privilege claim. He mentions the constitutional requirement of executive branch independence inherent in the doctrine of separation of powers, and the necessity of maintaining confidential communications so as to ensure receipt of candid advice essential for effective decisionmaking.¹³⁵ Further, in the expectation that his opponents might claim that the Vice President cannot be shielded by executive privilege, he cautions that “while the Vice President is the President of the Senate, he also has executive duties and responsibilities in support of the President, as the Congress has by law recognized.”¹³⁶ For these reasons, “if [the Comptroller General’s] misconstruction of the statutes were to prevail, his conduct would unconstitutionally interfere with the functioning of the Executive Branch.”¹³⁷ These comments of the Vice President, in tandem with those made earlier by his counsel,¹³⁸ make clear that although the administration’s initial response focuses on statutory construction, this dispute will ultimately focus on larger issues of constitutional law.

2. GAO’s Rebuttal

The GAO’s General Counsel addressed and rebutted each argument proffered by the Vice President’s Counsel in a detailed letter intending to

132. See 31 U.S.C. § 716(b) (2000).

133. See August 2 letter, *supra* note 4, app. 2.

134. *Id.*

135. *See id.*

136. *Id.*

137. *Id.*

138. In his June 7 letter, the Vice President’s Counsel cautioned that notwithstanding the propriety of an investigation under the statutes, “[c]onstitutional and other legal authorities and privileges, such as the constitutionally-based Executive privilege, may apply in particular situations that may arise in an investigation under § 712(1).” June 7 letter, *supra* note 101, at 3.

reinforce the GAO's "broad authority" under the relevant statutes to obtain the desired information.¹³⁹

The GAO's principal contention is that 31 U.S.C. § 712 grants it expansive authority to inquire into "all matters" related to the *use* of public money, not simply the costs of activities.¹⁴⁰ In fact, according to the GAO, "[t]his broad grant of authority contains only one limitation: that the subject of the inquiry involve the use of public money."¹⁴¹ Since the NEPDG was carried out with the use of appropriated funds, its activities fall within § 712 and are thus within the scope of GAO's audit authority. The GAO's General Counsel countered the Vice President's contention that § 717's new grant of authority limited the scope under § 712 by citing legislative history to support the notion that § 717 merely clarified authority already existing under the predecessor to 712:

[T]he Budget and Accounting Act of 1921 [at what is now Section 712] provides sufficiently broad and comprehensive authority to investigate ". . . all matters relating to the receipt, disbursement, and application of public funds[.]" This authority extends not only to accounting and financial auditing but also to administration, operations, and program evaluation. Succeeding legislation affecting GAO's authority generally has served to make mandatory, explicit, and emphatic the requirement for GAO to assess the efficiency, economy and effectiveness of program operation by the Executive Branch.¹⁴²

Thus, under this view, the GAO's authority under § 712 ought not be limited merely to information relating to the direct and indirect costs associated with the NEPDG, as the Vice President argues, but rather should extend to all issues that relate to public money, no matter how tenuous the connection.

Next, the GAO states that § 717(b)'s authorization to "evaluate the results of a program or activity the Government carries out under existing law" provides for inquiry into activities carried out under a statutory or purely constitutional basis.¹⁴³ This position is derived from a plain meaning interpretation of the term "existing law," which implies no limitation towards activities conducted under authority of the Constitution, which, "[a]fter all, . . . is the supreme law of the land."¹⁴⁴ Further, the

139. See June 22 letter, *supra* note 105, at 1.

140. *Id.* at 2–5.

141. *Id.* at 3.

142. *Id.* at 4–5 (alterations in original) (quoting S. REP. NO. 96-570, at 2 (1980)).

143. *Id.* at 5 (alteration in original) (quoting 31 U.S.C. § 717(b) (2000)).

144. *Id.* at 6.

legislative history evinces no desire by Congress to limit the scope of the law to statute-based activities, and the GAO notes that had Congress desired to limit their scope of inquiry so dramatically, they certainly would have noted that in the legislative history.¹⁴⁵ The letter goes on to list many reviews of White House programs and activities that the GAO has conducted in the past as additional support for its argument.¹⁴⁶

The Comptroller General's report addresses two arguments raised by Vice President Cheney in his letter of August 2 that were not included in his counsel's letter of June 7.¹⁴⁷ The first argument centered on the notion that § 717's grant to inquire into the "results" of agency programs and activities did not extend to the process through which they were reached. The Comptroller General asserts that the narrow "end results" view ascribed to the statute by Vice President Cheney would severely limit the scope of review the GAO has conducted in the past, and would be contrary to legislative history suggesting the section was created to "mak[e] more information available to Members and Committees of the Congress, and . . . provid[e] them a means of interpreting the information they have."¹⁴⁸ This legislative history, the GAO opines, could not be intended to limit from its purview review of agency processes and activities that are routinely the subject of Congressional oversight.¹⁴⁹

The second argument, that the term "agency" as used in 31 U.S.C. § 716 does not include the Vice President, is also countered. Agency is defined under the statute as "a department, agency, or instrumentality of the United States Government,"¹⁵⁰ "but does not include the legislative branch or the Supreme Court."¹⁵¹ The GAO notes that the information is being requested from the Vice President in his capacity as chair of the NEPDG, and that the NEPDG falls squarely within the reach of the statutory language.¹⁵² Also provided is legislative history stating that a key purpose

145. See *id.* at 6–7.

146. See *id.* at 8. For example, the GAO has previously reviewed the activities of the President's Task Force on Health Care Reform and the Presidential Commission on AIDS, as well as various aspects of White House operations. *Id.*

147. See August 17 letter, *supra* note 104, at 5–10.

148. *Id.* at 7 (alteration by ellipses in original) (quoting H.R. REP. NO. 91-1215, at 12–13 (1970), reprinted in 1970 U.S.C.C.A.N. 4417, 4428).

149. See *id.* at 7–8. For example, the GAO has recently reviewed the Tongass National Forest plan, the process used by NASA to contract for the design and delivery of the international space station propulsion module, and the process used by the Army Corps of Engineers in preparing an environmental impact statement for actions related to the Snake River dams. *Id.* at 7.

150. 31 U.S.C. § 717(a) (2000).

151. *Id.* § 701.

152. August 17 letter, *supra* note 104, at 8.

of the legislation was to help overcome access problems to agencies—including the White House—and noting that the President and his advisers were within the GAO’s purview.¹⁵³

3. Analysis of Statutory Claims

Review of the statutory claims presented by the parties makes it fairly clear that the Vice President should lose on these grounds, and raises the notion that this initial contest is intended for purposes of delay and perturbing the GAO. Indeed, one commentator with personal experience in orchestrating White House stalling tactics, John Dean, has suggested that this initial statutory contest will be followed by a second battle over executive privilege, with the purpose of getting the Bush administration past the 2004 presidential election prior to disclosure of any politically damaging information.¹⁵⁴ While this view may be a bit extreme, and of course hinges on the assumption that the administration is hiding damaging information, the following analysis corroborates the weakness of Cheney’s statutory claims.

The Vice President’s primary argument, that the GAO’s authority under 31 U.S.C. § 717(b) to investigate programs or activities carried out “under existing law” does not extend to activities conducted pursuant to the constitutional authority of the President, is untenable. As the GAO points out, absent any qualifying language to the contrary, the plain meaning of the phrase would “encompass[] all forms of federal law that authorize the government to conduct its activities, including the Constitution, statutes, and regulations, all as interpreted by the judiciary in applicable court decisions.”¹⁵⁵ This view should predominate, as there is no legislative history to suggest a contrary interpretation and the GAO has historically reviewed programs carried out solely under constitutional authority.¹⁵⁶

The contention that the inquiry is prohibited because it focuses on the process of the agency as opposed to the “results” is also unconvincing. The Comptroller General evinces much support in the intent of Congress and in the historical record to suggest that the GAO has authority to investigate agency processes.¹⁵⁷ This includes the fact that no presidential administration has challenged such authority on the part of the GAO and

153. *See id.* at 8–9.

154. *See* Dean, *supra* note 90. John Dean served as Counsel to President Nixon during the Watergate scandal.

155. June 22 letter, *supra* note 105, at 6.

156. *See id.* at 6–8.

157. *See* August 17 letter, *supra* note 104, at 6–8.

the large number of congressional requests that have been received for this type of review.¹⁵⁸ The Comptroller General notes alternatively that the NEPDG itself was the “result” of a government activity establishing it, so the inquiry is authorized under the plain meaning of the statute.¹⁵⁹ Indeed, the short shrift with which the Vice President has treated this argument suggests its value—his counsel did not even mention it and the Vice President only noted it in one sentence in his letter of August 2, 2001.¹⁶⁰

Another one-sentence argument presented in the Vice President’s August 2 letter suggests that he cannot be forced to turn over information under § 716(a) because he is not an “agency,” but rather, a constitutional officer of the Government. As the GAO points out, however, the NEPDG falls clearly within the definition of agency provided in 31 U.S.C. § 701, and the request was made to the Vice President in his capacity as its Chair.¹⁶¹ Legislative history suggesting the executive branch is within the scope of the GAO’s access rights and a prior determination by the Justice Department that the Council of Economic Advisers was within its purview bolster the GAO’s position.¹⁶² Further, Congress would not have provided the president with a provision under § 716 to avoid disclosure of sensitive information if the executive branch were beyond the GAO’s reach. While Cheney’s argument here, as it relates to statutory authorization, is not compelling, it hints at a broader argument with respect to constitutional issues of separation of powers. This will be discussed below in the context of executive privilege analysis.

Assuming the GAO’s inquiry into the NEPDG’s activities will be held proper under § 717, the dispute over the reach of § 712 is not critical. The Vice President’s most compelling argument here is that the ability to “investigate matters related to the ‘receipt, disbursement, and use of public money’” should be narrowly circumscribed to focus on information relating to costs.¹⁶³ The GAO’s interpretation of “all matters” as giving it vast power to investigate anything involving the use of public money seems to extend its reach too far. This could be resolved either way, however, as both parties present compelling legislative history to support their

158. *Id.* at 7. *See supra* note 149.

159. August 17 letter, *supra* note 104, at 6.

160. *See* August 2 letter, *supra* note 4, app. 2. *See also* June 7 letter, *supra* note 104, at 1–2.

161. *See supra* notes 150–53 and accompanying text.

162. August 17 letter, *supra* note 104, at 9.

163. August 2 letter, *supra* note 4, app. 2.

respective positions,¹⁶⁴ and the plain language is not dispositive. To the extent the Vice President's assertions with regard to § 717 hold up, this particular argument will assume great significance. Yet, the relevant statutes, when read in concert with one another, seem to grant the GAO the authority being debated here, and it is unlikely a court would rule in the alternative.

IV. EXECUTIVE PRIVILEGE ANALYSIS

After the GAO clears the preliminary statutory hurdles erected by the Vice President, the parties will square off on the central issue of the dispute: executive privilege. Of course, this assumes that the Bush administration will assert the privilege. So far, the Vice President has refused to publicly utter that politically charged phrase despite repeatedly citing the arguments behind the privilege as the rationale behind his refusal to turn over information to the GAO. This has come to be expected in the post-Nixon era, where presidents routinely avoid using the phrase for fear of conjuring up comparisons to the Watergate scandal.¹⁶⁵ In fact, everything about the unfolding of this controversy is typical of the usual pattern of disputes between Congress and the executive branch, with the notable exception that, thus far, the Vice President has refused to budge.

The Comptroller General has attempted to compromise with the Vice President, and has acknowledged that “[e]ven where the President has made a formal claim of Executive Privilege, which is not the case here, federal courts have held that the executive and legislative branches have a duty to attempt to reach a mutual accommodation.”¹⁶⁶ Along those lines and in the purported interest of “comity,” the Comptroller General has reduced his initial request for records by eliminating a demand for minutes and notes and the information presented by members of the public at NEPDG meetings.¹⁶⁷ The Comptroller General goes to great lengths in his August 17 demand letter to emphasize that he seeks only “factual and non-deliberative” information.¹⁶⁸ Such a limitation on the request would appear to address the Vice President's concerns about protecting confidentiality of

164. See *supra* note 126 and accompanying text (for legislative history supporting Cheney's position); *supra* note 105 and accompanying text (for conflicting legislative history supporting the GAO's position).

165. See *supra* notes 72–78 and accompanying text.

166. August 17 letter, *supra* note 104, at 5 & n.6 (citing *United States v. AT&T*, 567 F.2d 121, 130 (D.C. Cir. 1977), for support of the proposition. This case is discussed *infra* Part IV.A.2–3).

167. *Id.* at 2.

168. *E.g., id.* at 1, 4.

communications in the executive branch. Nonetheless, the Vice President has continued to suggest that, if provided, the requested information would undermine his ability to receive “unvarnished advice.”¹⁶⁹ For his part, the Comptroller General has conceded, “If [President Bush claims executive privilege], it’s a new ballgame. The GAO would have to reconsider whether to continue to go to court.”¹⁷⁰ Yet, it is hard to imagine the GAO backing down empty-handed at this late stage. Accordingly, the following discussion will analyze the many facets that underlie an executive privilege claim in the current struggle. Initially, justiciability issues will be addressed. Next, preliminary matters, including whether to apply the presidential communications or deliberative process privilege, the applicability of executive privilege to vice presidents, and the applicability of the privilege to conversations with private citizens, will be examined. Finally, the specific information Cheney is withholding will be viewed in the context of the appropriate balancing test.

A. JUSTICIABILITY

Commentators such as Professor Jesse Choper feel that:

The federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President vis-a-vis one another; rather, the ultimate constitutional issues of whether executive action (or inaction) violates the prerogatives of Congress . . . should be held to be nonjusticiable, their final resolution to be remitted to the interplay of the national political process.¹⁷¹

Specifically referring to executive privilege controversies between the legislative and executive branches, Archibald Cox expressed a similar view.¹⁷² Others, for differing reasons, prefer judicial involvement.¹⁷³

169. Jena Heath, *GAO-Cheney Fight Puzzles Scholars: Academics Question Vice President's Decision to Defy Congress*, AUSTIN AM. STATESMAN, Feb. 20, 2002, at A4. The Vice President said, “What’s really at stake here is the ability of the president and the vice president to solicit advice from anybody they want in confidence—get good, solid, unvarnished advice—without having to make it available to a member of Congress.” *Id.*

170. Edwin Chen & Henry Weinstein, *Cheney Faces Suit Over Energy Panel*, L.A. TIMES, Jan. 31, 2002, at A1.

171. Chemerinsky, *supra* note 22, at 896–97 (alteration in original) (quoting JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 263 (1980)).

172. See Cox, *supra* note 15, at 1432.

173. Compare Chemerinsky, *supra* note 22, at 897 (arguing that “[t]he Court’s refusal to consider challenges to executive power is an implicit decision in favor of broad inherent Presidential authority”), with Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 692 (1997) (arguing that judicial abstention “allow[s] Congress

Courts have certainly displayed a preference for negotiation between the two branches and resolution of their differences without judicial intervention,¹⁷⁴ and only rarely get entangled in their information access disputes.¹⁷⁵ Relevant to whether a court will grant jurisdiction to hear the present case are issues of standing, the political question doctrine, and a general reluctance by courts to intervene in these types of disputes. Each will be discussed in turn.

1. Standing

Article III's restriction of federal court jurisdiction to "cases and controversies" underlies the constitutionally-based requirement of standing.¹⁷⁶ Standing addresses the question of whether "a party has a sufficient *stake* in an otherwise justiciable controversy to obtain judicial resolution of that controversy."¹⁷⁷ The Supreme Court has identified the following three constitutional standing requirements: (1) The plaintiff must allege personal injury, (2) fairly traceable to the allegedly unlawful conduct of the defendant, that is (3) likely to be redressed by a favorable decision.¹⁷⁸ These all appear to be satisfied in the present case, as the Comptroller General purports to have been injured by the Vice President's failure to furnish information that he is statutorily entitled to receive,¹⁷⁹ and a court decision to produce the information would redress the injury.

In addition to the aforementioned constitutional requirements, the Court has also set forth prudential barriers to standing.¹⁸⁰ Those relevant to

effectively to adjudicate the dispute on Capitol Hill or in the media, or label as criminal . . . a privilege which the Supreme Court . . . [has] held to be presumptively valid," thus disadvantaging a president's ability to exercise a legitimate executive prerogative).

174. Mark P. Doherty, *Executive Privilege or Punishment? The Need to Define Legitimate Invocations and Conflict Resolution Techniques*, 19 N. ILL. U. L. REV. 801, 805 (1999).

175. See *In re Sealed Case*, 121 F.3d 729, 739 n.10 (D.C. Cir. 1997) (noting that the courts have only been drawn into executive-congressional disputes over access to information on three recent occasions: *United States v. House of Reps.*, 556 F. Supp. 150 (D.D.C. 1983), *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977), and *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974)).

176. Chemerinsky, *supra* note 22, at 900.

177. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 385 (3d ed. 2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972)).

178. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

179. Injury to statutory rights is sufficient for standing purposes. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 70 (3d ed. 1999). Of course, the GAO's statutory entitlement to the information is in dispute. See *supra* Part III.

180. CHERMERINSKY, *supra* note 179, at 63. Unlike constitutional standing requirements, which are derived from the Constitution, prudential standing requirements arise in circumstances where the Supreme Court feels prudence weighs against exercising judicial review.

our inquiry mandate that a party must assert his or her own rights before the court and that a party must “raise a claim within the zone of interests protected by the statute in question.”¹⁸¹ These too, should be satisfied since the Comptroller General is asserting his specific statute-based rights, as opposed to the generalized grievances of a third party.

Special standing considerations apply, however, when legislators attempt to file suit over executive branch infringement of their constitutional power.¹⁸² The state of law in this area is murky and Supreme Court review of such issues is in its relative infancy.¹⁸³ Generally, members of Congress have standing to sue in their lawmaking capacity only when “their votes have been completely nullified by allegedly illegal action in the sense that, but for that action, their ‘votes would have been sufficient to defeat (or enact) a specific legislative act’ which has gone into effect (or not gone into effect).”¹⁸⁴ Thus, presidential usurpation of legislative power may be unreviewable in the event that Congress could theoretically vote on the result of the action.¹⁸⁵

The applicability of these considerations to the Comptroller General is unclear, because he is not a legislator per se, but rather, is carrying out duties that have been delegated to him by Congress, and is acting on their behalf pursuant to statutory authority granted specifically to him.¹⁸⁶ He is thus asserting an injury to himself and to Congress. Were the restrictive congressional standing measures applied in the present case, they may prevent its being heard, due to Congress’ ability to vote against legislative measures recommended in the National Energy Policy.

Further complicating the standing analysis is the fact that one of the key values served by the standing doctrine—separation of powers¹⁸⁷—also lies at the core of executive privilege. This, coupled with the common criticism that standing decisions are often tied closely with a court’s views

181. *See id.*

182. *See Chemerinsky, supra note 22, at 902.*

183. *See TRIBE, supra note 177, at 456.*

184. *Id.* at 457–58 (quoting *Raines v. Byrd*, 521 U.S. 811, 823 (1997)).

185. Chemerinsky, *supra note 22, at 903.* In *Edwards v. Carter*, 445 F. Supp. 1279 (D.D.C. 1978), *aff’d*, 580 F.2d 1055 (D.C. Cir. 1978), sixty members of the House sued to challenge President Carter’s submission of the Panama Canal Zone treaties to only the Senate, in purported violation of Article Four, Section Three, Clause Two of the Constitution, which provides that “Congress shall have Power to dispose of the . . . Territory or other Property belonging to the United States.” *Id.* at 1280. Standing was denied on the grounds that they still had the ability to vote (on what, is unclear) and could not show a total “nullification of their official influence upon the legislative process.” *Id.* at 1286.

186. There appears to be a presumption in favor of standing when the legislature has officially designated someone to sue on its behalf. *See TRIBE, supra note 177, at 458.*

187. CHEMERINSKY, *supra note 179, at 57.*

on the merits,¹⁸⁸ could influence a court to deny standing based on its view of separation of powers. Additionally, to the extent the statutes in question grant the Comptroller General standing to sue in the present matter, they could be held to unconstitutionally interfere with the executive branch.

Yet, the apparent fulfillment of traditional constitutional and prudential standing requirements, coupled with the GAO's statutory authority to access the records in question, suggests that standing alone will not, and should not, prevent the courts from hearing this lawsuit. However, due to the unsettled nature of the law with respect to congressional standing and the complex separation of powers issues presented in the current case, the potential for a standing challenge does exist.

2. Political Question Doctrine

The court could also refuse to hear this case on the grounds that it is a nonjusticiable political question. *Baker v. Carr*¹⁸⁹ provides the classic summation of the political question doctrine:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁹⁰

In line with one prominent constitutional scholar's observation that this statement is "impossible for a court or commentator to apply,"¹⁹¹ it is difficult to guess how the political question doctrine will apply to the current case. We do know, however, that the simple fact that a case involves political questions or a political controversy does not result in nonjusticiability—nor does the mere existence of a conflict between the legislative and executive branches.¹⁹²

188. See, e.g., CHEMERINSKY, *supra* note 179, at 56–57.

189. 369 U.S. 186 (1962).

190. *Id.* at 217.

191. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 130 (2d ed. 2002).

192. *United States v. AT&T*, 567 F.2d 121, 126 (D.C. Cir. 1977).

It also seems clear that the principal reason for abstention on political question grounds is the specific commitment of the issue to another branch of government.¹⁹³ The present matter does not concern an issue where one branch has constitutional preeminence to resolve the outcome; instead, it involves a dispute over two co-equal branches with respect to the exercise of their inherent powers vis-à-vis one another. Accordingly, the courts will not hold the case to present a political question on this basis.

The absence of “‘judicially discoverable and manageable standards’” for balancing the conflicting assertions of constitutional powers by the parties, and thus a lack of judicial competence to decide the matter also implicates the political question doctrine.¹⁹⁴ Whether or not the dispute is susceptible to orderly judicial resolution is uncertain. Since courts have previously ruled on executive privilege, as well as cases between the executive and legislative branches,¹⁹⁵ it is clearly within their ostensible competence to hear the present case. Yet, implicit in this part of the doctrine is a fear by courts of intruding into the responsibilities of other branches,¹⁹⁶ and recognition of the difficulty of weighing competing claims of constitutional power¹⁹⁷ that make inter-branch disputes so difficult to resolve. As such, a determination here largely depends on the political and philosophical leanings of the given judge. Some feel that the judiciary should always abstain from these situations, while others feel that judicial involvement is essential.¹⁹⁸ Concern over judicial competence to decide these matters relates to the judiciary’s reluctance to rule on them for reasons aside from the political question doctrine, which shall be discussed below.

3. Judicial Reluctance to Decide Congressional-Executive Information Disputes

Even if this case is not deemed a nonjusticiable political question, the courts may nonetheless attempt to avoid ruling on it. Courts have said that “[w]hen constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted.”¹⁹⁹ A

193. *See id.*

194. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

195. *See id.* at 126 n.13 (listing judicially resolved disputes between the branches).

196. *See* *TRIBE*, *supra* note 177, at 366.

197. *See infra* note 203.

198. *See supra* notes 171–73 and accompanying text.

199. *United States v. House of Reps.*, 556 F. Supp. 150, 152 (D.D.C. 1983).

prominent district court case held that federal courts should avoid adjudication of congressional-executive information disputes until the officer asserting executive privilege is criminally prosecuted for contempt of Congress, at which time the privilege could be raised as a defense.²⁰⁰ Courts have also noted that the Framers expected that “a spirit of dynamic compromise” between the branches would effect efficient government,²⁰¹ and that “[j]udicial restraint is essential to maintain the delicate balance of powers among the branches established by the Constitution.”²⁰²

While the Comptroller General can plausibly argue that he has attempted to reach a compromise throughout this dispute, many courts would probably decide that there is still enough room for negotiation to avoid ruling on it, at least initially. As we saw in *United States v. AT&T*, the courts may well decide that judicial facilitation of negotiations between the parties is the best way to proceed.²⁰³ At the end of the day, any decision in favor of one branch’s claim of inherent constitutional power over another involves fuzzy, subjective reasoning that courts are often reluctant to engage in, for understandable reasons. Further, the politics underlying this lawsuit and the other options available to Congress to get what it wants should weigh in favor of judicial abstention.²⁰⁴

B. PRELIMINARY EXECUTIVE PRIVILEGE CONCERNS

1. Presidential Communication v. Deliberative Process

Assuming jurisdiction is granted, an issue requiring resolution at the outset is whether the claim of executive privilege will fall under the presidential communications or the deliberative process privilege.²⁰⁵ The Bush administration’s first step will be an assertion that the activities carried out by the NEPDG fall under the protection of the presidential communications privilege. Presumably, the GAO will argue to the contrary, suggesting that the requested material concerned meetings and conversations where the President was not directly involved. Thus, the

200. *See id.* at 153.

201. *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977).

202. *House of Reps.*, 556 F. Supp. at 152.

203. *See* 567 F.2d at 127. In this case the Justice Department brought suit to enjoin AT&T from complying with a subpoena issued in the course of an investigation into warrantless national security wiretaps. *See id.* at 122–23. The court initially encouraged further negotiation between the parties prior to ruling, observing that “[w]hat loomed as unmanageable, or at least elusive, was the process of weighing [the parties’ competing claims] to determine their relative magnitude.” *Id.* at 127.

204. *See* discussion *infra* Part IV.C.

205. *See supra* Part II.B (discussing the distinction between the two privileges).

question of how far down the line the presidential communications privilege attaches must be discussed. In considering this question in *In re Sealed Case*, the D.C. Circuit rejected the contention that the presidential communications privilege extends only to direct communications with the President, instead holding that it “cover[s] communications which do not themselves directly engage the President, provided the communications are either authored or received in response to a solicitation by presidential advisers in the course of gathering information and preparing recommendations on official matters for presentation to the President.”²⁰⁶

While the *Sealed Case* court was careful to limit its ruling to the context of a president’s ability to withhold evidence in a judicial proceeding,²⁰⁷ its reasoning should apply to the congressional-executive context as well. When considering the policy reasons against extending the presidential privilege beyond communication directly involving the president, the court ultimately determined that the privilege should be broad, largely in reliance on language from *Nixon* emphasizing the “President’s . . . need for confidentiality in the communications of his office,” and stating that a “president and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions.”²⁰⁸ These concerns are implicated regardless of who is seeking the information. To the extent a congressional request carries special weight due to constitutional responsibilities assigned to that branch, courts should take this into account when balancing the factors in favor of, and against, disclosure. Since the activities of the NEPDG were undertaken pursuant to a presidential memorandum and culminated with the presentation of the National Energy Policy to President Bush, the courts reviewing *Walker v. Cheney* should follow the sensible line of reasoning used in *Sealed Case* and hold that the presidential communications privilege will attach.

2. Applicability of Executive Privilege to the Vice President

The debate over applicability of executive privilege to the Vice President should be answered in the Bush administration’s favor as well. The vice president is constitutionally designated as president of the Senate, “not a member of the Cabinet or sub-cabinet, nor wholly part of the executive branch,”²⁰⁹ and executive privilege has never formally been

206. 121 F.3d 729, 757 (D.C. Cir. 1997).

207. *See id.* at 753.

208. *Id.* at 747 (quoting *United States v. Nixon*, 418 U.S. 683, 708, 712–13 (1974)).

209. Marcella S. Kreiter, *Executive Privilege on Trial*, UNITED PRESS INT’L, Feb. 25, 2002.

applied to the vice president.²¹⁰ Yet, it is hard to imagine a situation where a figure so integral to the executive branch could be left outside the protection of the privilege, especially in light of the expanded role vice presidents have taken on during the two most recent administrations. The historical record contains, for example, privilege assertions on behalf of cabinet secretaries and White House staff.²¹¹ It would be hard to reconcile the legitimacy of such assertions against a holding that a vice president—the second in command and, at least theoretically, the president’s closest assistant, elected alongside the president—is unprotected by the privilege.

A more complicated question is whether Vice President Cheney may assert the privilege on his own behalf. A former Air Force secretary did so successfully,²¹² and the Department of Education attempted to do so as well.²¹³ The Department of Education eventually acquiesced to a congressional subpoena for the information, owing in large part to pressure generated because the claim was not supported by the president.²¹⁴ Although these questions are interesting and remain largely unanswered,²¹⁵ they are not essential for our purposes, as there is no question that President Bush would assert the privilege on Cheney’s behalf, provided the administration chooses to pursue that course.

3. Applicability of Executive Privilege to Conversations with Private Citizens

The suggestion that communications between the Vice President, or other members of the NEPDG, and private sector individuals pertaining to the formulation of the National Energy Policy would lose executive privilege protection because such communications were outside the internal executive branch context²¹⁶ is antithetical to the policy behind the privilege and the reality of how government is conducted. At the core of the rationale behind executive privilege is the notion that a president be able to receive the good, candid advice necessary to perform his constitutional

210. See Interview by Robert Siegel, National Public Radio, with Cass Sunstein, Professor, University of Chicago (Jan. 28, 2002) [hereinafter Interview].

211. See ROZELL, *supra* note 12, at 94, 103–04, 115.

212. See *id.* at 67–68. When asked whether executive privilege was properly asserted, President Nixon replied: “In this case, as I understand it—and I did not approve this directly, but it was approved at my direction by those who have the responsibility within the White House—in this case it was a proper area” *Id.* at 68.

213. *Id.* at 132–33.

214. *Id.*

215. There is limited precedent for the proposition that executive privilege can only be claimed or approved by the president himself. See *id.*

216. See Interview, *supra* note 210.

duties. It should not matter who provides that advice, so long as it relates to official government matters.

In *Ass'n of American Physicians and Surgeons v. Clinton*, the D.C. Circuit noted presidents' traditional solicitation of advice from private citizens, such as President Johnson's "kitchen cabinets" discussing the Vietnam War, and suggested that a statute limiting a president's ability to obtain confidential advice from similar groups implicated Article II concerns.²¹⁷ Further support for this proposition is found in *Sealed Case*, where the court held that "the privilege must apply both to communications which these advisers solicited and received from others as well as those they authored themselves."²¹⁸ Accordingly, the fact that certain information sought by the GAO involves private citizens should not foreclose the use of executive privilege. Such a ruling would serve to dramatically limit the breadth of advice that presidents are able to call upon in confidence, and undermine the Supreme Court's recognition that the need for confidential communications "is too plain to require further discussion."²¹⁹

C. SUBSTANTIVE ANALYSIS OF COMPETING CLAIMS ON THE EXECUTIVE PRIVILEGE BALANCING TEST

Assuming that jurisdiction has been granted and the court has ruled in the Bush administration's favor with regard to the preliminary executive privilege issues discussed above, the competing arguments (for and against disclosure) of the parties must be scrutinized to ascertain whether the information will be protected. When the president claims executive privilege, the information sought is presumptively privileged, which "embodies a strong presumption, and not merely a lip-service reference."²²⁰ Yet, at the same time, courts have cautioned that the "privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected."²²¹ This requires a difficult balancing act, especially when the competing issues involve constitutional responsibilities of separate, co-equal branches of government. We are left with little in the

217. *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 908 & n.8, 910 (D.C. Cir. 1993).

218. *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997).

219. *United States v. Nixon*, 418 U.S. 683, 705 (1974).

220. *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 25 (D.D.C. 1998) (quoting *Dellums v. Powell*, 561 F.2d 242, 246 (D.C. Cir. 1977)).

221. *Sealed Case*, 121 F.3d at 752.

way of judicial guidelines in determining how to employ the balancing test and what showing is required to overcome a proper claim.²²²

The ultimate question is whether disclosure of the disputed information harms the President's ability to perform his Article II duties more than nondisclosure would impair Congress' ability to carry out its Article I responsibilities. Underlying this question is the fundamental issue of whether the public interest behind protecting the confidentiality of executive branch communications in this setting outweighs the public interest in disclosure of certain information pertaining to the NEPDG's formulation of the National Energy Policy.

Complicating the task is the fact that we begin with neither the paradigm case in favor of executive privilege—that of withholding information relating to foreign affairs or state secrets²²³—nor the paradigm case against—that of withholding information to conceal personal wrongdoing. Instead, we have two competing claims that are both relatively weak. Starting with the Vice President, it must be reiterated that what is actually being sought by the GAO is the names of persons present at each meeting as well as of persons with whom the Vice President or other members of the group conferred regarding the National Energy Policy, the purpose and agenda of each meeting, and the process by which the Vice President and the NEPDG determined with whom to meet.²²⁴

222. *Nixon* held only that the generalized interest in confidentiality did not outweigh the specific, demonstrated need of a prosecutor to subpoena evidence for a criminal trial. See *Nixon*, 418 U.S. at 713. The D.C. Circuit, in interpreting the above language from *Nixon*, held that to overcome a claim of presidential communications privilege against a grand jury subpoena, one must demonstrate specifically why it is likely that the evidence is important to the ongoing grand jury investigation and why the evidence is not available from another source. See *Sealed Case*, 121 F.3d at 754–55.

223. There is a general presumption that executive privilege is at its peak in the context of foreign affairs or military information. See, e.g., *Nixon*, 418 U.S. at 710 (“He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.”); ROZELL, *supra* note 12, at 5 (noting that the presumption in favor of executive privilege has always been strongest in areas of national security and foreign policy). But see Fisher, *supra* note 57, at 602–29 (acknowledging and disputing the contention that mere claim by an administration of national security established an unreviewable presidential power). The presumption is an extension of courts' traditional recognition of presidential supremacy in the realm of foreign affairs. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318–19 (1936) (holding that unenumerated powers in the realm of foreign affairs inhere in the federal government by virtue of its nationhood and national sovereignty, and that in this area the president alone has the power to speak or listen as a representative of the nation). See also LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 17–43 (1990) (providing a comprehensive examination of presidential powers with respect to foreign affairs).

224. Complaint, *supra* note 1, at 24. Specifically, the Complaint seeks:

(1) who was present at each of the meetings conducted by the NEPDG, including the names of the attendees, their titles, and the office represented; (2) with whom the Vice President as Chair and each of the NEPDG support staff met to gather information for the proposed

The first request, asking for a list of names of persons attending meetings as well as of those with whom the group met, is basic factual information that on its face does not implicate concerns about protecting private deliberations. Of course, there are situations, especially with regard to foreign affairs or covert operations, where such a list of contacts may require the utmost confidentiality. Here, we must ask whether the potential disclosure of names and nothing more, would cause persons advising the NEPDG to either temper the candor of their remarks, or abstain from providing advice altogether. It hardly seems reasonable to make such a suggestion—certainly not to the extent that the public interest is harmed.

The second request, demanding the purpose and agenda of each meeting, while still factual, presents a better case for protection. The *Sealed Case* court recognized that this type of factual information can threaten the confidentiality of communications, for “[i]f you know what information people seek, you can usually determine why they seek it.”²²⁵ While not intruding directly into the deliberations of the NEPDG, this information is related thereto and can provide one with the necessary information to make reasonable inferences as to what type of advice was being provided. The purpose and agenda of a meeting can be couched in broad terms, however, and at best, present minimal intrusion into the formulation of advice.

The third request, seeking the process by which the Vice President and the NEPDG determined with whom to meet, inquires directly into the decisionmaking of the group. This was an initial step in a process that led to consultations with individuals and ultimately culminated with the presentation of the National Energy Policy to President Bush. Yet, the extent to which disclosure of this information would “intrude into the heart of executive deliberations”²²⁶ and thereby impinge on the public interest in executive branch confidentiality, is questionable. Though this is a plausible claim, it is still susceptible to legitimate arguments in favor of disclosure.

national energy policy, including the name, title and office or clients represented; and the date, purpose, agenda, and location of the meetings; (3) how the Vice President, the members of the NEPDG, or others determined who would be invited to the meetings; and (4) the direct and indirect costs that were incurred in developing the proposed national energy policy.

Id. As the Vice President has conceded the GAO’s authority regarding the fourth request, it will not be discussed.

225. *Sealed Case*, 121 F.3d at 750–51 (alteration in original) (quoting *Ass’n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 910 (D.C. Cir. 1993)).

226. *Savage*, *supra* note 79 (quoting Vice President Cheney in May, 2001).

Against this backdrop, it must be determined whether the institutional interest of the GAO, and by extension Congress, presents a more compelling case for disclosure. Initially, one must question whether the requested information is really germane to the GAO's basic function as the government's accountant. Aside from questions of statutory access examined previously, it seems logical that the GAO's mission does not contemplate inquiry into the contacts of a group or the processes by which it decides to meet with them. Instead, it is reasonable to contend, as has the Vice President, that the GAO's purpose is to investigate information with a more direct relation to costs.

Further, while Congress has legitimate institutional interests in information concerning the enactment and oversight of energy policy, the necessity of the information sought is dubious. The National Energy Policy is publicly available, and certain legislators have already detailed what they believe to be Enron's undue influence on the policy based on materials already accessible to them.²²⁷ Moreover, the Vice President has detailed the specific meetings he and other members of the NEPDG had with Enron officials in response to concern that the administration may have had knowledge of, or conferred special benefits on Enron to help alleviate, its financial problems.²²⁸ Recent rulings requiring the Department of Energy and other agencies to turn over documents relating to the NEPDG also help paint a fairly accurate picture of those with whom the group was generally meeting.²²⁹ It is readily apparent that the NEPDG solicited and received advice from the energy industry while formulating its policy—and the release of further information should not shed any new light critical to the process.²³⁰ This, in the framework of judicial rulings

227. See *infra* note 234 and accompanying text.

228. See generally Letter from David S. Addington, Counsel to the Vice President, to Henry A. Waxman, Ranking Minority Member, Committee on Government Reform (Jan. 3, 2002), available at <http://news.corporate.findlaw.com/hdocs/docs/enron/hscmgvtrfrm011602rpt.pdf>.

229. In response to lawsuits filed by the Natural Resources Defense Council and Judicial Watch, under the Freedom of Information Act, the courts ordered the Energy Department and other agencies to release documents related to energy policy. Dana Milbank & Mike Allen, *Energy Contacts Disclosed*, WASH. POST, Mar. 26, 2002, at A1. Much of the information handed over in the documents was deleted due to a "deliberative process" exemption in the Freedom of Information Act. See Richard Simon & Elizabeth Shogren, *GOP Donors Lobbied Hard on Energy*, L.A. TIMES, Mar. 27, 2002, at A14. The release of documents has not calmed the debate between the Vice President and the GAO. See *id.*

230. See, e.g., Richard Simon & Elizabeth Shogren, *Bush Gets One-Two Punch on Energy*, L.A. TIMES, Mar. 28, 2002, at A22 (quoting Debbie Sease, Sierra Club national legislative director, "The Bush administration did develop an energy policy that was clearly written by the utility industry and oil and gas companies"); *Wasted Energy*, L.A. TIMES, Mar. 28, 2002, at B16 (observing that there is

requiring that material be essential to justice²³¹ and contain important evidence unavailable from another source²³² in order to overcome the president's presumptive privilege, hampers the GAO's ability to make the requisite showing of need.

Reasonable allegations of government misconduct would bolster the GAO's argument,²³³ but it has so far produced none, aside from suggesting that the Bush administration is in the pocket of big-business in general, and Enron in particular. Representative Waxman, a central instigator of the inquiry, has expressed concern that "special interests may have wielded significant influence over the formation of the White House energy plan" because at least seventeen policies in the National Energy Policy were "advocated by Enron or . . . benefitted Enron."²³⁴ Yet, the politically motivated and highly conclusory letter concedes no allegations of wrongdoing have been made.²³⁵ Though the argument that withholding is proper prior to allegations of misconduct, on the ground that there is no evidence of misconduct, is flawed in that it makes exposure of potential wrongdoing more difficult, allowing congressional investigators to overcome a claim of executive privilege upon the mere whim of potential unlawful or unethical behavior raises concern over unconstitutional interference with our separation of powers scheme.

Further militating against judicially warranted disclosure is the expanse of alternative weapons Congress has at its disposal. With control of the purse strings, it may refuse to fund portions of the National Energy Policy. To the extent that certain provisions of the National Energy Policy are recommendations for legislative action, Congress may refuse to vote in the administration's favor.²³⁶ Congress may subpoena members of the NEPDG, or even the Vice President, to testify before it, and cause the administration the embarrassment of having to assert multiple claims of executive privilege. Significant media skepticism towards presidential

nothing surprising or improper about the Secretary of Energy meeting with the energy industry while formulating energy plan).

231. See *United States v. Nixon*, 418 U.S. 683, 713 (1974).

232. See *In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997).

233. While allegations of government misconduct appear to negate the deliberative process privilege, the presidential communications privilege still requires at least some showing of need. See *id.* at 746.

234. Letter from Henry A. Waxman, Ranking Minority Member, Committee on Government Reform, to Richard Cheney, Vice President of the United States 1 (Jan. 16, 2002), available at <http://news.corporate.findlaw.com/hdocs/docs/enron/wxmnltr2chny011602.pdf>.

235. See *id.* at 2.

236. While the House has passed an energy bill, energy legislation is now before the Senate. See Simon & Shogren, *supra* note 230.

secrecy will also help Congress in the battle for public opinion, an integral part of the national political process that can ultimately lead to disclosure.

What we are left with is a politically charged atmosphere where neither party possesses a strong case in favor of, or against, disclosure. Indeed, each side seems to be operating with principle as its main argument. The GAO has dropped its request for the more probative information it originally sought, but fears that “forego[ing] further assertion of our access rights” would have deleterious effects on the principle that transparency is needed for good government and would also set precedent for records access denials.²³⁷ The Bush administration has from its inception displayed a pattern of trying to bolster executive prerogative in a number of areas, and continues to fight this case despite the potential political consequences, conceding that “[t]here is a principle here that we want to preserve The powers and prerogatives of the executive branch have been eroded, and we’re going to stop that.”²³⁸ In this light, the courts would be advised to avoid ruling on the matter and potentially crafting poor precedent in significant areas of constitutional law over a somewhat petty dispute susceptible to adequate resolution through the give-and-take of the political process. The unconvincing arguments presented by both sides suggest that judicial resolution of the controversy is simply unnecessary.

In the event the courts decide this case on the merits, the GAO is likely to prevail. Since there is no contention that the information itself, if divulged, would be contrary to the public interest, the Bush administration is relying solely on the public interest in protecting the confidentiality of executive branch communications. While this generalized argument on behalf of executive branch confidentiality is not without merit, the case of the Vice President is significantly diminished by the fact that information concerning the substance of important discussions is no longer sought. Such a general argument for confidentiality, absent a meaningful intrusion into the process by which the President receives candid advice, cannot, standing alone, withstand a statutorily authorized investigation, despite the GAO’s relatively weak showing of need for the information. The consequences of such a ruling would allow the executive branch to shield essentially all information from Congress and the public, including that which is factual, by placing activities under the direct purview of the vice president. The implications of such a ruling would be grave for

237. January 30 letter, *supra* note 114, at 2.

238. Edwin Chen, *As Questions Get Louder, Cheney Stays Silent*, L.A. TIMES, Jan. 18, 2002, at A26 (quoting Mary Matalin, a senior Cheney adviser).

democracy—certainly graver than those of allowing the limited disclosure contemplated in the GAO's complaint.

V. CONCLUSION

Information disputes between the executive and legislative branches are saddled with complex constitutional questions that should generally be left unanswered when possible. The standoff between the GAO and Vice President Cheney is particularly worthy of judicial nonintervention, principally due to the ability of the parties to resolve it through the political process and to its potential for creating poor precedent in an untested area of the law. Yet, to the extent courts decide to rule on it, openness and access to information should prevail over secrecy when the competing claims effectively cancel each other out and implicate no meaningful intrusion into the President's ability to receive candid advice.