

Executive Power and Governmental Attorney-Client Privilege: The Clinton Legacy

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I. INTRODUCTION

President Clinton was arguably the most investigated president in history. Although he escaped conviction by the Senate after his impeachment, and will not be criminally prosecuted for his conduct while in office, his critics have attributed this to his political skills and good fortune rather than to his innocence. Indeed, Kenneth Starr—the principal investigator—compiled an almost unblemished record of *legal* victories against the administration.¹ These victories by Starr have given rise to a new accusation against President Clinton: that in the course of desperately and ruthlessly attempting to obstruct lawful investigations into his and his administration's alleged wrongdoing, Clinton selfishly weakened the office of the presidency by generating adverse legal precedents that will come back to haunt his successors and impede the proper functioning of the government.²

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¹ See, e.g., William Neikirk and James Warren, *Jury Still Out on the Appointment of Robert Ray as the Independent Counsel Focuses; A Look Back at His Predecessor*, CHI. TRIB., Oct. 19, 1999, at 1 (“[Starr’s] been demonized on the public front but, if you look at the record, there was an amazing string of successes.” (quoting Professor Ronald Rotunda)); David Segal, *Time to Catch a Rising Starr?; The Legal Buzz: The Soon-to-Be-Former Independent Counsel Still Has That Winning Appeal*, WASH. POST, Aug. 30, 1999, at F13 (noting that Starr won every argument save one before the appellate courts). As Professor Stephen Gillers commented, “If anything, [Starr’s] reputation is enhanced by his repeated victories during the scandal, even as he was maligned in the press.” *Id.*

² See, e.g., Carl M. Cannon, *Judging Clinton: Clinton’s Legacy Depends on What’s Being Measured—The State of the Nation or the Stamp He left on the Office, the Political System, and the Country*, 32 NAT’L J., Jan. 1,

Even some of President Clinton's defenders appear to have accepted part of this critique. Pointing to two judicial decisions rejecting the administration's attempted assertions of a governmental attorney-client privilege, these supporters of the administration have raised alarms about the adverse effects on government that are likely to ensue. A former lawyer in the Clinton White House, for example, says:

As a result of these decisions, the president has to rely on his private lawyers for candid and confidential advice on matters that may implicate both personal *and* official interests. But his private lawyers are not representing the office of the presidency and can let personal interests overwhelm institutional interests in the absence of the lawyer responsible for protecting that interest. I think that's bad policy. It's bad for the country. It's bad for the institution.³

And a private lawyer who represented the White House in one of the attorney-client privilege cases went even farther:

In talking about these issues, I don't think we are giving much weight to the president's privacy interests and to the importance of having a sane president. Gradually, we have stripped away every element of privacy I worry that we are creating a set of rules that in the future, when a president is in a situation of tremendous pressure, will increase the pressure brought to bear upon him to the point where we've destabilized him as an individual. That's a very worrisome development that I see.⁴

2000, at 14, 23 ("The Presidency has been weakened, legally." (quoting House Impeachment Manager Lindsey Graham)); Jim Oliphant, *Losing Privilege: A Scandal-Scarred Legacy for Future Presidents—White House Counsel Without a Shield*, LEGAL TIMES, March 6, 2000, at 25 ("Now you have a president who has frittered away core executive privilege issues to address a personal crisis." (quoting Professor Jonathan Turley)).

³ *Lawyers' Roundtable: Attorney Client Privilege—Does it Pertain to the Government?*, WASH. LAW., Jan.-Feb. 1999, at 34, 37 (remarks of Jane Sherburne) (emphasis in original).

⁴ *Id.* at 49 (remarks of Andrew Frey).

Whether the blame is placed on President Clinton for pressing his legal claims, or on Starr and the courts for rejecting those claims, the conventional wisdom now seems to be that the institution of the presidency has been seriously damaged.⁵ If true, this conclusion implies that everyone who cares about the healthy functioning of government should be interested in finding ways to limit or undo the damage that has been done.

We think the conventional wisdom is wrong. The Clinton administration's extended and manifold experience with various Independent Counsel has indeed generated a significant body of decisional law analyzing various privileges in the governmental context. Two of the most noted decisions involve the attorney-client privilege, and it is true that the Clinton administration lost both cases.⁶ As a practical matter, however, these and other defeats⁷ do not represent the most important element of the Clinton administration's legal legacy with respect to the office of the presidency. In fact, the real threat to the healthy functioning of that institution arises from two decisions handed down well before President Clinton took office: *United States v. Nixon*⁸

⁵ See, e.g., Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, 60 MD. L. REV. 205, 205-06 (2001) ("In the course of the Clinton litigation, courts imposed a series of new and restrictive decisions It is somewhat ironic that the most enduring legacy of the Clinton administration may prove to be its effect on the law of executive privilege."); Akhil Reed Amar, *The Unimperial Presidency*, NEW REPUBLIC, Mar. 8, 1999, at 25 ("[T]he legal precedents sprouting from the Clinton scandals have done considerable damage to the presidency, leaving us with an office weaker in key respects than the one that the Founders envisioned."); Gregory C. Baumann, *Bill Clinton's Legal Losses Could Limit Powers of Future Chief Executives*, LEGAL TIMES, Aug. 17, 1998, at 1 ("[T]he courts have handed President Clinton a raft of precedents that legal scholars and presidential historians say will hem in future chief executives."); Naftali Bendavid, *Experts Fear Jones Case Ultimately Weakens Presidency*, CHI. TRIB., Nov. 16, 1998, at 3 ("Starr won most of [the battles over putatively confidential information], in the process sharply narrowing the privacy that is traditionally afforded the President."),

⁶ *In re Lindsey* (Grand Jury Testimony), 148 F.3d 1100 (D.C. Cir. 1998); *In re Grand Jury Subpoena*, 112 F.3d 910 (8th Cir. 1997).

⁷ The administration also lost a case involving its assertion of a "protective function" privilege covering the President's bodyguards, *In re Sealed Case No. 98-3069*, 148 F.3d 1073 (D.C. Cir. 1998), as well as other cases involving Independent Counsel Starr. *In re Sealed Case No. 99-3091* (Office of Independent Counsel Contempt Proceeding), 192 F.3d 995 (D.C. Cir. 1999) (ordering dismissal of contempt proceedings against Starr's office); *In re Sealed Case No. 98-3077*, 151 F.3d 1059 (D.C. Cir. 1998) (granting writ of mandamus forbidding district court to take certain steps in contempt proceedings arising from alleged violation of grand jury secrecy by Starr's office). President Clinton also saw his novel claim of immunity from civil litigation rejected in *Clinton v. Jones*, 520 U.S. 681 (1997).

⁸ 418 U.S. 683 (1974).

and *Morrison v. Olson*.⁹ And both of those decisions are *less* threatening now than they were when President Clinton took office. He has greatly reduced the relevance of *Morrison* by inducing the Congress to allow the Independent Counsel statute to lapse,¹⁰ and he has obtained from the D.C. Circuit an extremely important decision that aggressively interprets *Nixon* in a manner highly favorable to the presidency.

Part II of this Article analyzes the governmental attorney-client privilege decisions issued by the Eighth and D.C. Circuits in response to litigation arising from the Starr investigation. We argue that the courts reached the right result in each case, but that the analysis in each opinion went astray, perhaps because the courts asked the wrong question, or perhaps because of litigation mistakes by the defendants.

⁹ 487 U.S. 654 (1987). Among President Clinton's other accomplishments, he made Justice Scalia's dissent in this case respectable among people who had not previously noticed its wisdom. See, e.g., Theodore Olson, *The Law Liberals Finally Learned to Hate*, WALL ST. J., Feb. 24, 1999, at A18 ("It is amazing how many columnists, politicians and law professors disagreed with [Scalia when he dissented in *Morrison*] yet extol his wisdom now."); *Reinventing Independent Counsel*, WASH. POST, Jan. 18, 1998, at A24 ("Justice Scalia's [*Morrison*] dissent has proven prescient in a number of areas . . ."); Jeffrey Rosen, *Impeach Gore*, NEW REPUBLIC, Oct. 6, 1997, at 4 ("Like many people, I'm convinced by Justice Scalia's powerful dissenting opinion in *Morrison v. Olson*."); Cass R. Sunstein, *Repeal the Independent Counsel Act*, WASH. POST, Feb. 1, 1998, at C9 ("[I]t is not too soon to say that Justice Scalia has been vindicated: The Independent Counsel Act is a catastrophic failure, and it should be repealed as soon as possible."); THE SANTA ROSA PRESS DEMOCRAT, *Too Independent? More Limits Are Needed on Special Prosecutors' Power*, Feb. 5, 1998, at B4 ("Democrats seldom are fans of the decisions of conservative Supreme Court Justice Antonin Scalia. But his 1988 dissent in *Morrison v. Olson* is making more sense to people at all points of the political spectrum."); *Interview by Tim Russert with Paul Begala* (CNBC television broadcast, July 18, 1998, 1998 WL 7206007 ("I think some of the c-thoughtful [sic] conservative commentaries, such as Justice Scalia in the *Morrison* case, has now come to be true.")).

¹⁰ It is true, of course, that President Clinton himself approved a reauthorization of the Independent Counsel statute in 1994, saying:

I am pleased to sign into law S. 24, the reauthorization of the Independent Counsel Act. This law, originally passed in 1978, is a foundation stone for the trust between the Government and our citizens. It ensures that no matter what party controls the Congress or the executive branch, an independent, nonpartisan process will be in place to guarantee the integrity of public officials and ensure that no one is above the law.

Regrettably, this statute was permitted to lapse when its reauthorization became mired in a partisan dispute in the Congress. Opponents called it a tool of partisan attack against Republican Presidents and a waste of taxpayer funds. It was neither. In fact, the independent counsel statute has been in the past and is today a force for Government integrity and public confidence.

Statement on Signing the Independent Counsel Reauthorization Act of 1994, 30 WEEKLY COMP. PRES. DOC. 1383 (June 30, 1994).

After explaining how we think the issue should be analyzed, we turn in Part III to what we regard as the more important legal protector of intra-executive confidentiality: the constitutionally based executive privilege. That privilege provides a more secure and more appropriate, though in certain ways somewhat more limited, alternative to the common law attorney-client privilege. In a frequently overlooked decision arising from the Independent Counsel investigation of Mike Espy, the Clinton administration achieved a major victory for the office of the presidency, a victory that is probably more important than all of the administration's losses on related issues combined.

II. THE GOVERNMENTAL ATTORNEY-CLIENT PRIVILEGE

The confidentiality of attorney-client communications is an important hallmark of the professionalism of lawyers. The customary justification for protecting client confidences is that people are more likely to comply with the law and to participate appropriately in litigation if they obtain accurate legal advice, which they can get only if they are completely candid with their lawyers. But such candor would often be self-destructive unless the lawyer is forbidden to reveal client confidences. This restraint on lawyers, in turn, can have the desired effect only if courts are willing to refrain from forcing lawyers to reveal those confidences. Thus, judicial recognition of the attorney-client privilege rests on the theory that society gains more from facilitating the provision of accurate legal advice than it loses when the judicial system's search for truth is frustrated by invocation of the privilege.¹¹

The attorney-client privilege is hemmed in by limits and exceptions, as one would expect from the trade-offs that the privilege entails. One well-known example denies the privilege to communications between a lawyer and a client made in order to further a crime or fraud. This "crime-fraud" exception accords with the common-sense notion that

¹¹ See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1989). The Court concluded that:

[The] purpose [of the attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Id.

society does not benefit from anointing lawyers as privileged facilitators of wrongdoing.¹² The classic example is probably the lawyer who devises clever money laundering schemes for a criminal syndicate. Common sense, however, does not get one very far in defining the scope of the exception. Every lawyer who defends a guilty criminal defendant is in some sense helping that client to obstruct justice, yet nobody believes that the crime-fraud exception does or should apply in those circumstances. And what of the client who seeks a lawyer's assistance in avoiding being charged for crimes of which he is guilty? Does common sense tell us that the client is using the lawyer to further an ongoing criminal cover-up, or that the guilty client who has not been charged is analogous to the guilty criminal defendant?

As these examples suggest, identifying the socially optimal scope of the attorney-client privilege requires more than common sense. And the existing literature suggests that even the most sophisticated analysis will not easily produce a satisfying answer.¹³ Whatever the exact costs and benefits of the attorney-client privilege as it has been judicially defined, common sense certainly does tell us that the privilege creates tremendous special benefits for lawyers. Almost everyone who encounters legal difficulties needs assistance, and technical legal information may form only a small component of the needed advice. According to the old adage, a lawyer who represents himself has a fool for a client. This reflects the fact that a useful legal advisor often needs to act as the client's sounding board and to offer the detached perspective that even the most acute legal analyst usually cannot adopt

¹² *E.g.*, *Clark v. United States*, 289 U.S. 1, 15 (1933) ("The [attorney-client] privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told."); *In re Sealed Case Nos. 98-3052, 98-3053 & 98-3059*, 162 F.3d 670 (D.C. Cir. 1998) (crime-fraud exception applied to Monica Lewinsky's conversations with lawyer who drafted affidavit falsely denying sexual relationship between Lewinsky and President Clinton); *Alexander v. FBI*, 193 F.R.D. 1 (D.D.C. 2000) (crime-fraud exception applied to communications whose purpose was to assist President Clinton in violating Privacy Act of 1974 by releasing letters to him from Kathleen Willey), *mandamus denied sub nom. In re Executive Office of the President*, 215 F.3d 20 (D.C. Cir. 2000).

¹³ Compare Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565 (1989) (arguing that principal effect of privilege is to reduce risks of lawbreaking), with Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359 (1990) (arguing that privilege is designed to elicit from clients unfavorable information on which valid legal claims may depend). Compare also Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998) (arguing that confidentiality rules benefit lawyers while harming clients and society at large), with George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 292-97 (1998) (arguing that privilege helps prevent lawyers from exploiting their clients).

about his own affairs. The existence of the attorney-client privilege, and the absence of a privilege covering communications with most people outside the lawyers' guild, effectively gives lawyers a kind of monopoly on the provision of a wide range of advice to people with legal problems. This is quite lucrative, and disinterested observers could hardly be blamed for suspecting that the legal profession has not been looking solely to the public interest in fashioning the attorney-client privilege.

It therefore came as something of a refreshing surprise when the D.C. Circuit's *In re Lindsey* opinion offered the following statement about the governmental attorney-client privilege:

Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.¹⁴

In holding that a government lawyer may not invoke the ordinary common law attorney-client privilege to withhold information from a grand jury relating to a federal criminal investigation, the court seemed to be nobly renouncing the temptations of guild parochialism. The court's rhetorically refreshing sally is, however, intellectually unsatisfying. The theory underlying the attorney-client privilege is not that communications with lawyers are more important than other communications, but rather that they are different: candor between lawyers and clients is considered especially important to our society, and such candor would be especially threatened by the prospect of disclosure in the judicial process.¹⁵ Thus, for the court to point out the

¹⁴ *In re Lindsey* (Grand Jury Testimony), 148 F.3d 1100, 1114 (D.C. Cir. 1998).

¹⁵ See Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 505-07 (1998) [hereinafter Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*].

obvious fact that lawyers are not the most important officials in the government is a little like attacking the attorney-client privilege itself by noting that a client's children are normally more important to him than his lawyer. That is undoubtedly true, but it is irrelevant.

Notwithstanding this and other analytical deficiencies,¹⁶ the *Lindsey* court as well as the Eighth Circuit (which considered the same issue in *In re Grand Jury Subpoena*¹⁷) correctly refused to allow government lawyers to withhold information from Independent Counsel Starr. While the results were right, both courts went astray because they asked the wrong question.

The two cases arose on similar facts. *In re Grand Jury Subpoena* involved notes taken by White House lawyers during meetings they attended with Hillary Rodham Clinton and her private lawyers during intermissions from her appearance before a federal grand jury convened by Independent Counsel Starr. In response to a subpoena for these notes, the White House lawyers asserted attorney-client privilege, and the Office of Independent Counsel sought to compel their production. *In re Lindsey* arose from Deputy White House Counsel Bruce Lindsey's refusal, while testifying before another grand jury convened by Starr, to answer certain questions about his conversations with President Clinton. In the face of Lindsey's invocation of attorney-client privilege, the Independent Counsel sought to compel his testimony.

These cases were resolved, by the Eighth and D.C. Circuits respectively, in essentially the same way. Both courts began with Federal Rule of Evidence 501, which provides: "[T]he privilege of a witness, person, government, State, or political subdivision thereof [is] governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."¹⁸ Conceiving their task to be one of common law adjudication, the courts proceeded to frame the question in a manner that rendered the issue novel: whether there exists a governmental attorney-client privilege to withhold potentially relevant information from a federal grand jury.¹⁹

¹⁶ For a detailed critique, see *id.* at 494-512.

¹⁷ 112 F.3d 910 (8th Cir. 1997).

¹⁸ *Grand Jury Subpoena*, 112 F.3d at 915; *Lindsey*, 148 F.3d at 1104.

¹⁹ *Grand Jury Subpoena*, 112 F.3d at 915 ("We need not decide whether a governmental attorney-client privilege exists in other contexts, for it is enough to conclude that even if it does, the White House may not use the privilege to withhold potentially relevant information from a federal grand jury."); *Lindsey*, 148 F.3d at 1107 ("We therefore turn to the question whether an attorney-client

With that question before them, both courts engaged in a common law analysis informed by a grab bag of policy arguments, analogies, and inferences from various statutes and judicial decisions.²⁰ Majorities on both courts concluded that no such privilege was available in either case.

The analysis in both opinions is debatable, and dissenting judges on both panels drew different conclusions after looking at the same legal background. For our purposes here, the merits of the arguments deployed by the various judges are less important than whether they were arguing over the right issue. In one sense, of course, Rule 501 seems to invite exactly the kind of common law approach that the courts adopted. In these cases, however, the result was a set of opinions that are potentially unstable because they rest overtly on policy judgments that reflect no consensus and are unlikely to generate any consensus. This matters, especially because the decisions grew out of litigation that was extremely politicized. Future cases may have a different political complexion, and future judges may well discount the precedential value of the policy judgments on which *Lindsey* and *Grand Jury Subpoena* rest.

A. *The "Ownership" Approach to the Governmental Attorney-Client Privilege*

Rather than asking whether a governmental attorney-client privilege may be used to withhold information from a federal grand jury, the courts should have begun by acknowledging the existence of the privilege and then asked who controls it.²¹ The courts' common law approach inevitably turns in the end on a balancing of estimated costs and benefits. But no one knows how much damage would be done to the truth-seeking function of the legal system by recognition of the privilege. Nor does anyone know how much damage the judicial refusal to recognize the privilege will cause to the ability of the President and other officials to get sound legal advice. And even if plausible estimates could be made, it is far from obvious how the relative importance of these two competing goals should be valued.

privilege permits a government lawyer to withhold from a grand jury information relating to the commission of possible crimes by government officials and others.").

²⁰ See *Lindsey*, 148 F.3d at 1106-14; *Grand Jury Subpoena*, 112 F.3d at 915-23.

²¹ By way of contrast, the courts properly engaged in a Rule 501 analysis when they were asked to recognize a truly novel privilege involving information overheard by the President's bodyguards. See *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998). The task in that case (which also arose from the Clinton administration's response to the Starr investigation) was to decide whether to recognize a new privilege rather than to decide how a well-established privilege applies in the special context of an Independent Counsel investigation.

Of course, the same could be said of the attorney-client privilege itself. For better or worse, however, the judgment in favor of protecting client confidences has endured for centuries, and exceptions have been made only for circumstances where the balance appears very clearly to swing the other way. Consistent with that tradition, the Supreme Court recently held (in yet another case arising from the Starr investigation) that even the client's death will not justify a prosecutor's invasion of his confidences with his lawyer.²² The dissenting judges in *Grand Jury Subpoena* and *Lindsey* were at least acting within that same tradition when they adopted a skeptical response to the prosecutor's arguments. This is so because the practical effect of the Eighth and D.C. Circuit decisions is to create an exception to the general rule.²³ We may expect such skepticism to reemerge when future cases arise with fact patterns that generate less sympathy for the prosecutor's position. It is simply not true that stripping Presidents and other officials of their ability to get reliably confidential advice from government lawyers is a cost-free exercise. Nor is there any reason to assume that future prosecutors will refrain from abusing their new power to invade those confidences. So the new common law created by the Eighth and D.C. Circuits may eventually evolve in the other direction, creating undesirable inconsistency and uncertainty.

What is needed, if it can be found, is a more analytically rigorous approach that requires less in the way of policy judgments from the courts. Before exploring this possibility, we must first clear up a common confusion about the meaning of the term "client" in the executive branch context. Executive branch lawyers have the habit of referring to the agencies and people with whom they directly interact as their "clients." This obviously comes naturally to those employed in the general counsel's offices of the various agencies. Somewhat more surprisingly, it is also the practice in the Department of Justice. Even the litigators in the Solicitor General's office, who are notoriously prone to resist taking instructions from those with different views about the public

²² Swidler & Berlin v. United States, 524 U.S. 399 (1998).

²³ The Eighth Circuit purported to refrain from deciding whether there is such a thing as a governmental attorney-client privilege, and thus avoided having to acknowledge that it was creating an exception. See *Grand Jury Subpoena*, 112 F.3d at 915. But because the court held that the privilege was unavailable in this case even if it does exist, the court implicitly held that the creation of an exception was justified. See *id.*

interest,²⁴ habitually refer to bureaucrats in offices such as the Fish and Wildlife Service and the Labor Department's Wage and Hour Division as their "clients."

In our view, this is a healthy habit because it serves to remind government lawyers that their appropriate role is to provide legal services rather than to substitute their personal policy views for those of the officials who have actually been appointed to make policy. Healthy as the practice is, however, we sometimes need to recall that it depends on a metaphorical use of the term "client."

Consider, for example, a simple hypothetical involving the attorney-client privilege within the government. The Secretary of Commerce wants to take an executive of a foreign corporation that does a lot of business in the United States on the plane with him when he goes on a trade mission to the corporation's home nation. He asks the Department's general counsel for legal advice about the propriety of doing this, and after considering that advice takes the executive with him on the trip. If this decision provoked a civil lawsuit by a private party against the Department of Commerce, the general counsel's advice to the Secretary would obviously be privileged. Indeed, we are not aware of any judicial decision that even suggests that the privilege would be unavailable in these circumstances.²⁵ We think it just as obvious, however, that the President could decide to waive the privilege, and that he could do so over the objections of the Secretary.²⁶

Now suppose that the Justice Department began investigating the possibility that the Secretary had committed a crime by taking the private executive on the trade mission. We think it is clear that the

²⁴ See, e.g., LINCOLN CAPLAN, *THE TENTH JUSTICE* (1987); Roger Clegg, *The Thirty-Fifth Law Clerk*, 1987 DUKE L.J. 964 (1987).

²⁵ Cf. *Grand Jury Subpoena*, 112 F.3d at 929 (Kopf, J., dissenting) ("[T]he federal courts have consistently recognized that governmental entities have the attorney-client privilege." (citations omitted)). For example, documents that would come within the attorney-client privilege if applied to private parties have been held exempt from disclosure under the Freedom of Information Act's exemption for "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); See *Lindsey*, 158 F.3d at 1268; *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). This is not because that statute expressly creates or even mentions an attorney-client privilege, which it does not, but rather because the courts believe that Congress meant to leave the preexisting common law privilege intact when it enacted the FOIA. See *Lindsey*, 158 F.3d at 363; *Coastal States*, 617 F.2d at 862.

²⁶ See, e.g., *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922) (describing the Attorney General as "the hand of the president in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed" (citations omitted)).

Secretary could not assert the privilege against the Attorney General. The Secretary might well resist disclosing the information, but if the Attorney General remained adamant, the President would have to arbitrate the dispute. In resolving such a dispute between two cabinet officers, however, the President would not be deciding on the existence *vel non* of an attorney-client privilege. Rather, the President would simply be deciding which of his subordinates is going to get what he wants. Thus, what might look at first like a dispute over attorney-client privilege is really nothing of the sort. And it cannot be anything of the sort for the simple reason that the Secretary of Commerce is not the client of the Department's general counsel in anything except a metaphorical sense.

Who, then, is the client of an executive branch lawyer? There are two answers to this question that are reasonably plausible, and in most cases it makes little or no difference which answer one gives. First, one might say that the client is a legal fiction called "the government" or "the United States." Alternatively, one might say that the President, as the head of the executive branch, is the client. In most cases, it will not make much difference which answer one gives because the President, under either theory, can ultimately resolve all disputes among his subordinates.

There is, of course, at least one important circumstance in which the President does *not* get to resolve such disputes, and that is the circumstance that gave rise to the *Lindsey* and *Grand Jury Subpoena* cases. After *United States v. Nixon*²⁷ and *Morrison v. Olson*,²⁸ the President is no longer the unequivocal head, at all times and in all circumstances, of the executive branch of government.²⁹ It is therefore no longer obviously absurd to contemplate a spectacle in which one of the President's subordinates asserts the attorney-client privilege against another, or in which the President himself asserts the privilege against one of his own

²⁷ 418 U.S. 683 (1974).

²⁸ 487 U.S. 654 (1988).

²⁹ See *Morrison*, 487 U.S. at 670-97 (holding that Congress may statutorily provide for special prosecutors appointed by a court and insulated from presidential control); *Nixon*, 418 U.S. at 692-97 (finding that a prosecutor appointed by the President may litigate the President's decision to withhold materials from the prosecutor). These departures from the principle of the unitary executive were prefigured in earlier decisions permitting Congress to place legal limitations on the President's control of the heads of some executive agencies. See *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). We briefly examine the issue of attorney-client privilege in the "independent agency" context *infra* pp. 645-46.

subordinates. Nor is it immediately obvious how such disputes should be analyzed or resolved.

The best way to begin analyzing the issue is to ask, with respect to each dispute, who the client is. That is the approach taken by Michael Stokes Paulsen, who asks the right questions and provides a sophisticated answer.³⁰ Professor Paulsen begins by identifying the client in all these cases as the executive branch of the federal government, which he labels “USA, Inc.” in order to analogize it to a private corporation. He then argues that the law of attorney-client privilege for the executive branch is the same privilege law that applies generally to private corporations.

Upjohn v. United States,³¹ which is the leading privilege case in the corporate context, tells us that a broad attorney-client privilege exists for corporations, and that it belongs to the fictitious legal person, not to any particular corporate official. In ordinary circumstances, Paulsen argues, the President—as CEO of the government—controls the government’s privilege, and he can resolve all disputes within the government about when and where to assert the privilege. Paulsen then equates the extraordinary circumstance of an Independent Counsel investigation with the analogous corporate situation of a shareholders’ derivative suit. As the D.C. Circuit mentioned in the *Lindsey* case, corporate management is indeed sometimes precluded from asserting the attorney-client privilege in this kind of lawsuit.³² And the reason is that courts sometimes regard the plaintiffs in these cases as the better representatives of the corporation’s interests. Similarly, according to Paulsen, an Independent Counsel, when acting within his assigned jurisdiction, should ordinarily be regarded as the proper representative of the interests of “USA, Inc.”

Professor Paulsen’s argument is quite persuasive if one accepts his initial premise, namely that the client is the legal fiction usually referred to as “the executive branch,” which Paulsen calls “USA, Inc.” We believe, however, that the premise is incorrect. The Constitution tells us in straightforward terms that the executive power is vested in the President of the United States. Not in the “executive branch” or “USA, Inc.,” neither of which is mentioned anywhere in the Constitution. And certainly the President is not the CEO of the United States government,

³⁰ Paulsen, *Who “Owns” the Government’s Attorney-Client Privilege?*, *supra* note 15.

³¹ 449 U.S. 383 (1980).

³² *See* 148 F.3d at 1112.

which includes both the legislature and the judiciary. Paulsen provides no argument supporting his assumption that the privilege belongs to a legal fiction or his assignment of the privilege to a particular legal fiction that the Constitution does not expressly recognize.

What the Constitution tells us is that the whole executive power—whatever exactly that may be—is vested in the President, who is a natural person, not a legal fiction.³³ We believe it follows that in almost all cases involving government lawyers, the President is the ultimate, actual, or “true” client.³⁴ That does not mean that the President is entitled to use government lawyers for every private interest he may have, for Congress may restrict the scope of their duties by statute. And there may be cases where questions and difficulties will arise about the precise nature of the duties a government lawyer owes the President.³⁵ But these questions do not mean that lawyers are free to pick someone or something else as their client, and they do not support Paulsen’s claim that “USA, Inc.” is technically the client that government lawyers represent.

Our straightforward constitutional analysis obviously will not work in every instance after the *Nixon* and *Morrison* decisions. What those cases tell us is that a portion of the executive power that the Constitution vests in the President can be transferred by law to someone else. And the Independent Counsel statute effected a partial transfer of the executive power to various prosecutors appointed by the judiciary.³⁶ Although it is often said that the Independent Counsel stands in the shoes of the Attorney General,³⁷ it is in some ways more accurate to say that the

³³ U.S. CONST., art. II, § 1, cl. 1: “The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years”

³⁴ One exception arises when the government lawfully employs a lawyer to represent an individual in his personal capacity. In these cases, that individual is the client, just as the “patient” of a government physician is the individual he is paid to treat. The Constitution creates no bar to such personal legal representations, any more than it bars the government from hiring physicians to look after the personal medical needs of various individuals.

³⁵ Some of these questions are discussed in Nelson Lund, *The President as Client and the Ethics of the President’s Lawyers*, 61 LAW & CONTEMP. PROBS. 65 (1998).

³⁶ Until its recent lapse, Title VI of the Ethics in Government Act of 1978 was codified as amended and reenacted at 28 U.S.C. §§ 591-599.

³⁷ See, e.g., Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 660 (1998); Roscoe C. Howard, Jr., *Wearing a Bull’s Eye: Observations on the Differences Between Prosecuting for a United States Attorney’s Office and an Office of Independent Counsel*, 29 STETSON L. REV. 95, 110 (1999); William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197, 1247 (1999); Ronald K. Noble, *The Independent Counsel Versus The Attorney General in a Classified Information Procedures Act-Independent Counsel Statute Case*, 33 B.C. L. REV.

Independent Counsel stands in the shoes of the President. To the very considerable extent that the Independent Counsel exercises executive power independently of the President, he in effect becomes the President.³⁸ And to the extent that he acts as the President, he controls the government attorney-client privilege and the information that this privilege would protect from disclosure to outsiders.

Once the executive power is broken up and divided among different people, there has to be a mechanism for deciding who has which part of it. In our view, the real issue in the *Grand Jury Subpoena* and *Lindsey* cases was the identity of the person who possessed the executive power to control the disposition of the documents and information at issue in those cases. Was it Clinton or Starr?

The Independent Counsel statute appears to have given Starr the power to access those documents and information and to use them in his investigation because they were relevant to matters within his jurisdiction. *Morrison* decided that a statute may authorize the transfer of a portion of the President's law enforcement power to an independent prosecutor. To the extent that the statutorily authorized exercise of this power requires access to information held by government lawyers, it follows that control over the President's governmental attorney-client privilege must accompany that transfer. This does not imply that an Independent Counsel can discover the contents of all communications involving government lawyers, but only those involving matters within his jurisdiction and not otherwise forbidden to him by statute.³⁹ Under this standard, hard cases could arise, and the courts might need to make *in camera* inspections of some materials in order to determine whether a prosecutor is demanding

539, 563 (1992); Benjamin J. Priester et al., *The Independent Counsel Statute: A Legal History*, 62 LAW & CONTEMP. PROBS. 5, 60 (1999).

³⁸ As Judge Silberman pointedly noted when the Clinton administration sought to assert a novel "protective function" privilege covering the President's bodyguards, the Independent Counsel statute appears to imply that neither the Attorney General *nor any other government official* even has standing as such to oppose an Independent Counsel in litigation. *In re Sealed Case*, 146 F.3d 1031 (D.C. Cir. 1998) (Silberman, J., concurring in the denial of rehearing in banc).

³⁹ The statute has been construed to allow the Attorney General to prevent an Independent Counsel from using national security information in court. *See United States v. Fernandez*, 887 F.2d 465, 471 (4th Cir. 1989); *United States v. North*, 713 F. Supp. 1441, 1441 (D.D.C. 1989). Similar or greater statutory protections for attorney-client communications could be created.

information outside his jurisdiction.⁴⁰ But such hard cases could arise under any of the approaches that have been proposed.⁴¹

In our view, the only question should be whether the Independent Counsel is acting within his jurisdiction when he demands information that would be privileged against persons outside the government. If so, the Independent Counsel can have access to the information, just as the President himself can have access to the contents of confidential communications involving government lawyers from previous administrations. In privilege disputes between a President and an Independent Counsel, courts would only need to address the scope of the Independent Counsel's jurisdiction. The scope of jurisdiction is an issue that must frequently be addressed in many other contexts arising from Independent Counsel investigations,⁴² and the same legal analyses used in those contexts could be applied without modification to attorney-client privilege questions.

⁴⁰ Cf. *United States v. Zolin*, 491 U.S. 554 (1989) (discussing circumstances in which *in camera* review may be used to determine whether allegedly privileged attorney-client communications fall with the crime-fraud exception).

⁴¹ The chief difference between our approach and Professor Paulsen's is theoretical: he begins with *Upjohn* and the corporate analogy, while we begin with the Constitution. In many cases, our approach should yield the same results as his. But there is one difference between our approaches that could have practical significance. Courts applying the Paulsen approach would perform an exercise like the one that judges perform in shareholder derivative suits. In such suits, courts make a case-by-case determination about whether "good cause" exists for preventing the corporation's management from asserting the attorney-client privilege against the plaintiff shareholders. Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, *supra* note 15, at 515 (discussing and quoting the leading case on attorney-client privilege in shareholder derivative suits: *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970)). In making these case-by-case determinations, the courts use a large and indefinite number of factors, which add up to a highly fact-specific inquiry into whether the corporation is likely to be helped or harmed by a *particular* invocation of the attorney-client privilege. *See id.* Paulsen suggests that such inquiries need not proliferate in the government context because the statutory procedures under which Independent Counsel operate justify the creation of a presumption that these officials have "good cause" for assuming control of the privilege. This may make sense because Independent Counsel, unlike plaintiffs in shareholder derivative suits, are not self-appointed and are to some greater extent than private litigants subject to supervision by the Attorney General and the appointing court. But the creation of this presumption would require a departure from the corporate analogy, and it would raise a host of questions about the strength of the presumption and the factors that should be assessed in deciding whether it has been rebutted in particular cases.

⁴² *See, e.g.*, Order of the Division for the Purpose of Appointing Independent Counsels, Jan. 16, 1998, *reprinted in* APPENDICES TO THE REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 595(C) SUBMITTED BY THE OFFICE OF THE INDEPENDENT COUNSEL, SEPTEMBER 9, 1998, H.R. DOC. NO. 105-311, pt. 1, at 6-7 (1998); *In re Espy*, 145 F.3d 1365 (D.C. Cir. 1998); *In re Espy*, 80 F.3d 501 (D.C. Cir. 1996).

In addition to its advantages in the Independent Counsel context, our approach offers an analytically defensible answer to a theoretically important question with which the courts have not yet been confronted: whether the attorney-client privilege is available to officials at the so-called independent agencies (the heads of which have been statutorily insulated from the President's usual power of removal). Under the approach taken in *Lindsey* and *Grand Jury Subpoena*, the governmental attorney-client privilege simply does not apply in the context of grand jury demands for information. It would seem to follow that assertions of the privilege by independent agencies should be unavailing in all criminal investigations, whether the prosecutor is an Independent Counsel or a more typical government prosecutor such as a U.S. Attorney. This approach, however, would undermine the independence of the agencies by leaving the President with an extremely powerful weapon that he could deploy as an alternative to the removal power that Congress has taken away from him.

Under our approach, control over the governmental attorney-client privilege is always presumed to lie with the President, because it is part of the executive power vested in him by the Constitution, but that presumption can be rebutted by showing that a statute has lawfully transferred control of the privilege to someone else. The Independent Counsel statute fairly clearly effects such a transfer, but others may do so as well. One court held, for example, that the Postal Service (an independent agency) is authorized to bring suit against the Postal Rate Commission (another independent agency) even in defiance of a direct order from the President.⁴³ If the President is forbidden to prevent the prosecution of such suits, we believe it follows that he would also be forbidden to control the exercise of the attorney-client privilege by the Postal Service in such cases, and that he is probably forbidden to control its exercise by the governing board of the agency in other circumstances as well. A government agency's truly independent authority to litigate would in most circumstances necessarily entail the authority to assert (or waive) the governmental attorney-client privilege.⁴⁴

⁴³ See *Mail Order Ass'n of Am. v. United States Postal Serv.*, 986 F.2d 509, 527 (D.C. Cir. 1993).

⁴⁴ It is unclear whether or not Professor Paulsen's approach should allow officials at an independent agency to assert the privilege against a U.S. Attorney. Paulsen only discusses the representation of "U.S.A., Inc." and it is clear that the Secretary of Commerce could not assert the privilege against a U.S. Attorney. Commerce Department lawyers do not represent "Department of Commerce, Inc.," and the Secretary's recourse would be an appeal to the discretion of the Attorney General and ultimately the President. But does a lawyer employed at the Federal Trade

Whether one accepts our approach, or that adopted by the courts, there are obviously some serious practical problems that can and will arise for government lawyers. After *Lindsey* and *In re Grand Jury Subpoena* were decided, stories began circulating about agency lawyers who were afraid to take notes, along with jokes about agency lawyers giving *Miranda* warnings to their clients.⁴⁵ At least outside the independent agency context, this is theoretically a little silly because nobody except the President was ever really a client in the first place. In practice, though, it is not at all silly because there is a big difference between an attorney-client privilege controlled by the President and officials answerable to him, and an attorney-client privilege that is controlled by an Independent Counsel. But these problems are the inevitable consequence of the decision, made by Congress and acquiesced in by the Supreme Court, to take away some of the President's constitutional power and give it to someone else.

What should be done? We would prefer to see *Morrison v. Olson* reconsidered, as well as that part of the *Nixon* decision that allowed a subordinate executive official to challenge the President's decision to withhold confidential information (and the line of cases that governs independent agencies).⁴⁶ We are not likely to get our wish, and the next

Commission similarly represent "U.S.A., Inc.," or does he represent "FTC, Inc.?" The problem would seem to create a real difficulty for Paulsen's theory because it is not clear that a congressional decision to put constraints on the President's power to remove the head of an agency necessarily implies a decision to create an entity that is legally distinct in other respects from the agencies where the President's removal power remains intact. Such an inference would be particularly questionable in cases where a purportedly independent agency is located *within* an ordinary executive department. See, e.g., 25 U.S.C. § 2704 (establishing an independent agency called the National Indian Gaming Commission within the Department of the Interior).

⁴⁵ Cf. Walter Pincus, *No Clear Legal Answer: The Uncertain State of the Government Attorney-Client Privilege*, 4 GREEN BAG 2D 269, 269 (2001) ("As a matter of ethics and prudence [government attorneys] must warn every government employee who speaks to them, on official or private business, that the conversation cannot be held in confidence in the face of a grand jury subpoena.").

⁴⁶ Such reconsideration could take at least two different forms. The more obvious would be to confront the basic constitutional question head on, and to consider holding that the President's constitutional law enforcement authority cannot be transferred by statute to someone else. Alternatively, the Supreme Court might read its precedents as narrowly as possible and begin interpreting statutes whenever possible so as to avoid the remaining constitutional questions raised by statutory restrictions on the President's authority over law enforcement. Under this latter approach, which has been suggested by Professor Manning, the statutory provision allowing Independent Counsel to be removed for "good cause," for example, might be construed to permit the President to dismiss an Independent Counsel from office for refusing to obey the President's orders, at least on matters involving reasonably contestable legal judgments. See John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285

best alternative is for Congress to refrain from exercising the authority that the Supreme Court has given it over the distribution of the executive power. It now looks as though that is just what will happen. President Clinton himself no doubt concluded that he made a serious error when he advocated renewal of the Independent Counsel statute in 1993, and then signed the renewal into law. His successors will presumably not make the same mistake. More important, the Clinton administration's experiences soured congressional Democrats on the statute, and the wisdom of Justice Scalia's practical objections to it in his *Morrison* dissent suddenly became all the rage when this Democrat President was seriously threatened by Starr's investigation.⁴⁷ The statute has lapsed, and it is difficult to imagine that veto-proof congressional majorities will insist on reviving it any time soon. Whatever damage President Clinton otherwise did to the dignity of his office, he at least in this way provoked an important and healthy step toward the restoration of that office to its constitutionally appropriate position.

B. The Common-Law Source of the Governmental Attorney-Client Privilege

Although we have criticized the Eighth and D.C. Circuits for engaging in a Rule 501 balancing exercise, those courts were certainly correct to treat the privileges asserted in *Grand Jury Subpoena* and *Lindsey* as common law privileges. While it is conceivable that the documents

(1999). Thus, the Court might conclude that the President may forbid an Independent Counsel to contest his own assertions of privilege, so long as they are at least colorable (as they surely were in *Lindsey* and *Grand Jury Subpoena*). While such an interpretation of the statute may be possible, it is certainly very strained. Indeed, as Professor Kelley has pointed out, it would mean that Congress left Presidents free to do exactly what President Nixon did to Archibald Cox: fire a special prosecutor for demanding information relevant to an investigation of the President. See William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197, 1237 n. 175 (1999). Such an interpretation of the statute would therefore almost necessarily invite the inference that the Court wished to sow confusion and doubt about the continuing validity of *Nixon* and *Morrison*. In our view, this outcome would be better than treating those precedents as sacrosanct, but the difficulties involved in Professor Manning's suggested construction of the statute leads us to suspect that the better course would be for the Court to confront the constitutional issue directly.

⁴⁷ See, e.g., Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2268 n.3 (1998) (praising Justice Scalia for the warnings he gave in *Morrison*); Linda Greenhouse, *Blank Check: Elhius in Government: The Price of Good Intentions*, N.Y. TIMES, Feb. 1, 1998, § 4, at 1 ("After 10 years of mouldering on law library shelves, the Scalia dissent in *Morrison v. Olson* is being cited and passed around in liberal circles like samizdat."); Anthony Lewis, *Abroad at Home: Abuse of Power*, N.Y. TIMES, Feb. 2, 1998, at A23 (praising Justice Scalia's opinion); *Investigating the President: A National Town Meeting: The Reporters*, CNN Live Event/Special, Aug. 16, 1998 (Transcript # 98081601V54) (remarks of Greta Van Susteren) (praising Justice Scalia's opinion).

and information at issue might have been covered by the President's constitutionally-based executive privilege, the White House lawyers abandoned such claims in both cases.⁴⁸ We believe that the courts could have put their conclusions on a firmer and more legally principled basis if they had analyzed the issues in terms of the constitutional and statutory law relevant to the vesting of the executive power, but the fact remains that the attorney-client privilege itself is still a common law privilege. Congress has authorized its recognition as such, and indeed has expressly encouraged the federal courts to continue subjecting it to the evolutionary forces ordinarily applied by common law courts.

Just as Congress may authorize the recognition and evolution of a common law privilege, so it may *decline* to do so. To take an extreme hypothetical, Congress could simply abolish the attorney-client privilege in federal litigation, at least to the extent that the privilege is not required under the Fifth or Sixth Amendments. Or Congress could decide that private parties and their lawyers may continue to invoke the privilege, while explicitly abolishing the *governmental* attorney-client privilege. Or it could create any variety of restrictions and exceptions, which could be applied generally or applied only to government litigants.

Whatever Congress and the courts may decide about the future use of independent counsel and special prosecutors, the governmental attorney-client privilege is certainly at the mercy of Congress. While Congress may not be inclined to tamper with judicial decisions about the scope of this privilege, it clearly could do so if sufficiently provoked. But whatever happens to the common law attorney-client privilege, the President will retain his *constitutional* privilege to keep confidential certain communications with his subordinates, including his lawyers. And in light of the adverse decisions in *Lindsey* and *Grand Jury Subpoena*, future Presidents will find themselves even more interested in the scope of the constitutionally based executive privilege. Although President Clinton's executive privilege claims were abandoned in these two cases, another of the many investigations of his administration provided the occasion for new developments in the law of executive privilege. To those developments we now turn.

⁴⁸ See *Grand Jury Subpoena*, 112 F.3d at 914 (abandoning executive privilege claims in district court); *Lindsey*, 148 F.3d at 1103 (abandoning executive privilege claims on appeal).

III. EXECUTIVE PRIVILEGE

Like President Nixon before him, President Clinton was repeatedly battered by adverse judicial decisions arising from investigations of suspected misconduct in his administration. President Clinton's setbacks, however, unlike President Nixon's, have not necessarily weakened the presidency itself. The demise of the Independent Counsel statute, a side effect of the President's political near-death experience, has actually enhanced his office as a practical matter. Even within the realm of legal doctrine, however, the Clinton legacy may be a strengthened presidency. Some of the Clinton administration's most notable losses, including *Lindsey* and *Grand Jury Subpoena*, as well as the far-fetched plea for a new privilege covering presidential bodyguards, were decided on common law grounds. Even if the administration had prevailed in these cases, its victories would have rested on unstable ground. The administration's most important victory, however, secured new constitutional terrain for the presidency. That victory is immune from congressional reversal, and it may well have important implications in the day-to-day battles between the executive and the legislature, battles that at first seem far removed from the extraordinary spectacles generated by the Clinton scandals.

A. *The Espy Case*

In a decision that has not been much heralded, perhaps because it arose from an investigation by Donald Smaltz rather than Kenneth Starr, the District of Columbia Circuit greatly expanded the President's power of executive privilege. This is the doctrine at the heart of *United States v. Nixon*, and it is the legal weapon most often wielded by the executive branch to fend off unwanted inquiries.⁴⁹ The D.C. Circuit fashioned a broad executive privilege doctrine that will serve most of the purposes sought to be served by the Clinton administration's most aggressive (and now discredited) claims of governmental attorney-client privilege.

⁴⁹ The words "executive privilege" do not appear in the Constitution, and the constitutional basis for the privilege has been doubted by some commentators. See, e.g., RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143 (1999); William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS., Spring 1976, at 102. The Supreme Court, however, recognized the constitutional "underpinnings" of the privilege in *Nixon*, 418 U.S. at 705-06, and we treat that determination as settled for purposes of this article.

Indeed, the new power of executive privilege will in some ways go much farther in protecting executive branch confidentiality.

*In re Sealed Case*⁵⁰ offered an extended, and surprising, analysis of executive privilege. This case arose out of the Independent Counsel investigation into allegations against former Secretary of Agriculture Mike Espy. Espy was accused in early 1994 of improperly accepting gifts from individuals and companies subject to regulation by the Agriculture Department, and an Independent Counsel was appointed in September of that year. The White House thereafter released a report produced by the White House Counsel as part of the administration's own review of the allegations against Espy. Independent Counsel Smaltz issued a subpoena to obtain the documents underlying the White House report. The White House produced some documents in response to the subpoena, but asserted what it characterized as "executive/deliberative privilege" over 84 documents.⁵¹ When Smaltz filed a motion to compel production, the district court ruled in favor of the White House. The Independent Counsel appealed.

On appeal, the D.C. Circuit ruled almost entirely *against* the Independent Counsel, and in favor of executive branch confidentiality. That outcome is sufficiently striking in itself to be of note: *Nixon* had generally been viewed as requiring that, outside of the tightly limited national security and law enforcement contexts, claims of executive privilege must yield to the needs of the criminal justice system, particularly where the documents sought could implicate high-ranking government officials in wrongdoing.⁵² Although both of those factors

⁵⁰ *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) [hereinafter *Espy*].

⁵¹ Here, as in the cases arising from the Starr investigation, the Clinton administration was initially skittish about invoking "executive privilege," probably from fear that the term was too redolent of President Nixon. The term "executive/deliberative privilege" does not mean anything different, though it sounds slightly different. The administration apparently took quite seriously the dangers associated with "executive privilege," for the President and his spokesmen sometimes denied even knowing whether he had invoked it. See, e.g., House Impeachment Report, H. Doc. 105-316 (noting that several members of the impeachment committee concluded that President Clinton had falsely stated that he did not know whether his lawyers had invoked executive privilege on his behalf); Warren P. Strobel, *Clinton's News Strategy: Give Media Only Selected Drips*, WASH. TIMES, Mar. 7, 1998, at A4 (reporting that press secretary Mike McCurry "said he did not know whether Mr. Clinton had made an assertion of executive privilege, but if he did, 'I think the president would want the American people to be in a position to understand why he would make such an assertion.'"). In time, the Administration became more open in its assertions of executive privilege itself, without visible injury to the President's political fortunes.

⁵² E.g., Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1070 (1999) ("Executive privilege is an accepted doctrine when appropriately applied to

were present in the *Espy* investigation, the executive privilege claim was nonetheless sustained. The *Espy* court's decision was further remarkable because the White House conceded that the documents at issue had never been shown to the President.

The *Espy* court began by subdividing executive privilege into two categories, "deliberative process" and "presidential communications." The court spent little time on the "deliberative process" version of the privilege, noting briskly that the privilege is qualified and can be overcome by a sufficient showing of need, and that it is "routinely denied" in cases involving allegations of official misconduct.⁵³ So far, no surprise.

In addressing the "presidential communications" privilege, however, the court offered a lengthy historical overview, beginning with *Marbury v. Madison* and running through the several cases involving President Nixon. The *Espy* court's clear intention was to clarify what it viewed as two chief ambiguities in "presidential communications" doctrine: whether it applied only to communications that directly involved the President, and what the circumstances are in which a claim of presidential communications privilege can be overcome.⁵⁴

In *Nixon*, the Supreme Court had recognized a privilege for presidential communications, but the Court's discussion of that privilege can be interpreted to apply only to communications that actually involved the President.⁵⁵ Indeed, the very label "presidential

two circumstances: (1) certain national security needs and (2) protecting the privacy of White House deliberations when it is in the public interest to do so."); Mark J. Rozell, *Something to Hide: Clinton's Misuse of Executive Privilege*, 32 PS: POLITICAL SCIENCE AND POLITICS 550 (1999) ("In general, executive privilege is appropriate when it is invoked to withhold information in the interest of national security and to protect the contents of White House deliberations when it is in the public interest to do so."); Naftali Bendavid & Bruce Brown, *Quinn Left Mark in Executive Power Struggles*, LEGAL TIMES, Dec. 16, 1996, at 11 (under *Nixon*, "a legitimate law enforcement investigation takes precedence" over a claim of executive privilege). See also Sept. 28, 1994 Memorandum from Lloyd Cutler, Special Counsel to the President at 1 ("In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings."); Ruth Marcus, *Clinton Unlikely to Prevail on a Claim to Limit Testimony in Starr Probe, Some Specialists Say*, WASH. POST, Feb. 20, 1998, at A9 ("The lesson to me of *U.S. v. Nixon* is the independent counsel always wins unless it can be demonstrated as irrelevant to his jurisdiction.") (quoting former Counsel to the President A.B. Culvahouse).

⁵³ 121 F.3d at 737-38.

⁵⁴ *Id.* at 742.

⁵⁵ *Nixon*, 418 U.S. at 708 (noting "expectation of a President to the confidentiality of his conversations and correspondence" (emphasis added) and that "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies").

communications” strongly suggested that the Court contemplated a privilege that extended only to communications that involved the President personally. The Court’s subsequent decision in *Nixon v. Administrator of General Services* also pointed to the same narrow scope of the privilege.⁵⁶ Despite these clear signals, lawyers representing succeeding Presidents—pursuing the interest of the presidency as an institution—had seized on *Nixon*’s ambiguous reference to the President “and those who assist him” to argue that the privilege extended to non-presidential communications among presidential advisors.⁵⁷

Espy was the first case in which this claim was litigated, and the result was vindication of the broad reading of *Nixon*’s comments about the scope of the presidential communications privilege.⁵⁸ The magnitude of the President’s victory on this issue was somewhat obscured by the *Espy* court’s comment that “the privilege should not extend to staff outside the White House in executive branch agencies.”⁵⁹ But a careful analysis of the court’s definition of the privilege shows that this statement is somewhat misleading. The very next sentences declare:

[T]he privilege should apply only to communications authored or solicited and received by those members of an immediate White House advisor’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisors.⁶⁰

⁵⁶ 433 U.S. 425, 449 (1977) (privilege limited to communications “in performance of his [i.e., a President’s] responsibilities” (citing *Nixon*, 418 U.S. at 711)).

⁵⁷ *E.g.*, Confidentiality of the Attorney General’s Communications in Counseling the President, 6 Op. Off. Legal Counsel. 481, 485 (1982) (interpreting *Nixon* as sanctioning executive privilege extending to “Cabinet advisers [and] their aides”); *id.* at 489 (invoking “underlying rationale” of executive privilege to conclude that “it is not essential that the communication for which the privilege is claimed have been directed to or emanated from the President himself”).

⁵⁸ See 121 F.3d at 751-52. The D.C. Circuit had prefigured this conclusion in dicta in *Association of American Physicians and Surgeons v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993) (suggesting that privilege must logically extend to advisers’ meetings to consider advice to be given thereafter to the President).

⁵⁹ *Id.* at 752.

⁶⁰ *Id.*

This formulation may be cast in restrictive terms (the privilege “should apply *only*”), but in substance it is exceedingly broad. The privilege extends to agency staff involved in advising not only the President and the President’s advisers, but also even the *staff* of the President’s advisers, and to materials requested by that staff from others within the government. Memoranda prepared by the staff of the Department of Commerce for a Special Assistant to the President for Domestic Policy, for example, appear to be protected by the *Espy* court’s formulation of the presidential communications privilege. This very broad standard will cover much of the political decisionmaking in any administration.

The *Espy* court’s reference to revelations that would “pose a risk to the candor of [the President’s] advisors” is also significant because its wording closely tracks the *Nixon* Court’s statement that “we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.”⁶¹ But whereas the *Nixon* Court *rejected* concerns about candor en route to finding that executive privilege must yield to the claims of the criminal justice system, the *Espy* court *relied* upon such concerns to justify extending the presidential communications privilege throughout the White House and into the executive branch agencies. Indeed, *Espy*’s heavy emphasis on “candor” might be enough to bring even the President’s bodyguards within the privilege, on the theory that unless these agents are covered, presidential advisers will temper the candor of their advice whenever the agents are present.⁶²

The *Espy* court expanded the presidential communications privilege in another way as well. The court expressed its hope that the privilege “should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President.”⁶³ Whatever the *Espy* court was basing this hope on, it is unlikely that any court will second-guess a President’s

⁶¹ 418 U.S. at 712.

⁶² Although the D.C. Circuit rejected the administration’s proffered version of the Secret Service “protective function” privilege, it did so in a case where the President had explicitly declined to assert executive privilege. Thus, the administration was relying solely on the court’s power to recognize novel privileges under Federal Rule of Evidence 501. *See In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998). The court might have ruled differently if the President had been prepared to assert executive privilege in order to prevent Secret Service agents from testifying.

⁶³ 121 F.3d at 752.

assertion that certain materials are related to matters calling for his “direct decisionmaking.” It is the President, after all, who decides which executive matters call ultimately for direct decisionmaking by him. The courts would have little basis, and probably less appetite, for inquiries into the validity of a President’s assertions about his interest in most governmental operations, and this will effectively give the President the power to define the scope of the presidential communications privilege in any given case.

This is a power that the President would not have enjoyed had the *Espy* court adopted a more fact-bound, objective test. The leeway granted by the *Espy* court to the President may suggest a subtle recognition of the constitutional difficulties that lurk in judicial claims of supremacy in defining the contours of executive privilege. But whatever the court’s motivation may have been, this development strengthens the presidency in a very concrete manner.⁶⁴ Thus, for example, *Espy* noted that it was not addressing executive privilege as it applies to the executive branch’s struggles with Congress,⁶⁵ but the executive branch will almost inevitably seek to draw on the expansive language in the *Espy* opinion to limit or fend off congressional investigators. And precisely because there are so few judicial decisions analyzing executive privilege principles, this decision is likely to become a significant tool in struggles between Congress and the Executive.

Having greatly expanded the *scope* of the presidential communications privilege, the *Espy* court next considered the showing necessary to overcome the privilege. *Nixon* had already determined that executive privilege was not absolute, but could be overcome by a showing of need, at least in the context of a criminal prosecution:

⁶⁴ Professor Paulsen has forcefully argued that Presidents can and should assert the authority to disregard judicial decisions that improperly cabin such constitutionally based prerogatives as executive privilege. See Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337 (1999). As a theoretical matter, it is hard to maintain the proposition that Presidents must be obliged to obey outrageously usurpatious judicial decisions, just as it would be hard to maintain that courts should be obliged to enforce outrageously usurpatious statutes. And it may be that impeachment is the constitutionally appropriate mechanism for resolving truly serious disagreements between courts and Presidents about the meaning of the Constitution. See *id.* at 1398-1403. We believe, however, that both courts and Presidents should strive to avoid such collisions, not invite them. To the extent that *Espy* reduces the likelihood that a future President will have incentives to defy the courts in the name of constitutional principle, we think the interests of the judiciary, the presidency, and the nation are well served.

⁶⁵ 121 F.3d at 753.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.⁶⁶

As it had done on the scope issue, the *Espy* court expanded the principles announced in *Nixon*. The *Espy* court raised the bar for what constitutes specific need: the prosecutor must specifically demonstrate that “*each* discrete group of the subpoenaed materials *likely* contains *important* evidence [and] that this evidence is not available with due diligence elsewhere.”⁶⁷ Assuming that this demanding test is satisfied, the President may make a second submission to raise “more particularized claims of privilege.”⁶⁸ The court further held that the presidential communications privilege may still apply “even when there are allegations of misconduct by high level officials.”⁶⁹

Both aspects of the *Espy* court's analysis – the expanded scope of the privilege and the heightening of the “need” standard – were necessary for the court to reach its decision. The documents at issue had never been viewed by the President, so that only a broad presidential communications privilege would even apply to the documents. The documents were clearly relevant to an ongoing criminal investigation – precisely the setting in *Nixon* that persuaded the Supreme Court that the privilege must yield. By applying its heightened “need” standard, however, the D.C. Circuit could and did rule against the Independent Counsel on the ground that the evidence in many of the documents might be obtained by other means.⁷⁰

The *Espy* court thus fashioned an expanded presidential communications privilege, which covers more communications and

⁶⁶ 481 U.S. at 713.

⁶⁷ 121 F.3d at 754 (emphases added).

⁶⁸ *Id.* at 745.

⁶⁹ *Id.* at 746.

⁷⁰ See *id.* at 760-62 (holding that the “need” standard was satisfied only with respect to documents containing unique evidence relevant to whether Espy made criminally false statements to the White House itself).

more government officials, and is more difficult to overcome than other qualified privileges. Even though all of these elements could arguably be found to be lurking in earlier judicial opinions, those opinions could just as easily have been read to point in the opposite direction. The *Espy* court self-consciously resolved a variety of ambiguities and pulled its conclusions together in a way that greatly strengthened the executive privilege doctrine as a bulwark for executive branch confidentiality against criminal investigators.

The significance of the *Espy* case to the government attorney-client privilege discussion is plain: much of what is no longer protectable under the circumscribed government attorney-client privilege will now be covered by the executive privilege. For example, the *Lindsey* court concluded, consistent with the analysis presented in Part II above, that the government attorney-client privilege could not be asserted against the Independent Counsel. As a result, certain conversations that occurred in the White House involving Lindsey, one of President Clinton's top advisers, were appropriately subject to investigation by the grand jury. The *Lindsey* court addressed the concern that such an outcome would chill the President's legal defense to impeachment by noting that no claim of executive privilege was before the court. The Clinton Administration had decided not to appeal the adverse ruling on executive privilege below but the court nonetheless observed that "information gathered in preparation for impeachment proceedings and conversations regarding strategy are presumably covered by executive, not attorney-client, privilege."⁷¹ The court further noted that Lindsey "continues to be covered by the executive privilege to the same extent as the President's other advisers."⁷² Thus the *Lindsey* court emphatically left open the possibility that it would have ruled differently had the administration decided to fight the case on executive privilege grounds.

Executive privilege will not give the President precisely the same benefits that judicial recognition of the government attorney-client privilege against an Independent Counsel would have provided. First, executive privilege has come to be viewed as politically costly, due to the connotations of wrongdoing and excessive, self-interested secrecy arising from the Nixon cases. Since President Clinton asserted executive privilege in highly suspicious circumstances without any apparent injury

⁷¹ 158 F.3d at 1277.

⁷² *Id.* at 1278.

to his political popularity, however, future Presidents may find the taint of executive privilege to be somewhat attenuated. Second, executive privilege is a qualified privilege that can be overcome on a sufficient showing of need, unlike the attorney-client privilege, which is absolute when it applies. Nevertheless, as the *Espy* decision demonstrates, it may now be very difficult to defeat a claim of executive privilege, at least when the privilege claim can be characterized as falling within the very broad category of presidential communications.

Executive privilege also has distinct advantages over the government attorney-client privilege. First, it applies to many more people. The attorney-client privilege uniquely privileges conversations with lawyers, but executive privilege applies just as easily to policy advisers and spin doctors. This should help to spare future Presidents, as the well as the rest of us, from the unseemly practice of preferring people who happen to come with law degrees (and the attendant shield of attorney-client privilege) for politically sensitive roles in government.

In addition, executive privilege applies to many more subjects. The attorney-client privilege, although it is especially valuable because it is absolute, only applies when several criteria are met. Chief among these criteria is that a communication or document is covered only when it is related to giving or receiving *legal* advice. Executive privilege, by contrast, extends to policy discussions, and to all of the advice that the President receives in performing his myriad functions and fulfilling his numerous official roles. Indeed, as noted above, the *Lindsey* court suggested that the privilege even extends to the President's discussions with his political advisers about ways to avoid impeachment.

Executive privilege is also less easily waived than the attorney-client privilege. The *Espy* court, for example, held that the White House's disclosure of its own investigative report on Espy did not waive executive privilege, even though "voluntary disclosure of privileged material subject to the attorney-client privilege to unnecessary third parties in the attorney-client privilege context 'waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter.'"⁷³

For the President, executive privilege thus provides three main advantages over the attorney-client privilege. First, as a privilege judicially derived from the Constitution, it is more stable than common law privileges that are subject to limitation or obliteration by statute.

⁷³ 121 F.3d at 741 (citation omitted).

Second, it is broader in scope and less easily subject to waiver than the attorney-client privilege. And third, executive privilege more accurately serves the general interests in confidentiality and candor that Presidents need: although the attorney-client privilege was also developed to preserve confidentiality and candor, Presidents have an intense and exceptional need for confidential advice from many sources other than lawyers, and in many contexts not involving the giving or receiving of legal advice. These advantages should in practice far outweigh the limitation that some assertions of executive privilege—outside the context of national security and law enforcement—are qualified and defeasible.

B. Espy, Congress, and the GAO's Dispute with Vice President Cheney

There is also a fourth advantage, often overlooked. Although it is the litigated cases that garner the headlines, many of the most significant legal battles over executive privilege occur between the Executive and Congress. Congressional advisers have historically taken the position that the legislature need not respect the attorney-client privilege, on the theory that a common law privilege cannot restrict Congress in the exercise of its constitutional powers.⁷⁴ This doctrine makes a presidential assertion of attorney-client privilege against Congress at most a political appeal to basic notions of fairness, but one that lacks legal substance. Congress must, however, defer to a proper invocation of executive privilege because it is based in the Constitution. Now that the D.C. Circuit has expanded the privilege in the most contentious of contexts—the investigation by a grand jury of wrongdoing by high-ranking administration figures—future Presidents will unquestionably seek to apply that broader privilege in a great variety of disputes with Congress.

Beginning with George Washington, Presidents have consistently claimed that they may withhold some information from Congress, and they have had countless disputes with Congress about access to information that the Executive has preferred not to share. Neither the congressional right to conduct investigations, nor the Executive's right to resist disclosure of information to Congress, is expressly granted by the Constitution. Given the implicit nature of both rights, it should not be surprising that members of Congress have tended to have a

⁷⁴ *E.g.*, CONGRESSIONAL RESEARCH SERVICE, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY 43, 47 (1995).

somewhat different view of the constitutional allocation of power than Presidents and their lawyers have taken. Traditionally, these disputes have been settled through negotiation, compromise, and sometimes capitulation.⁷⁵

Courts have been very reluctant to intervene,⁷⁶ but they are not precluded from doing so, and the *Espy* decision heightens the chances that a litigated dispute between Congress and the President will be resolved in the President's favor. This may happen sooner rather than later.

The Comptroller General—acting in response to a request from Congressmen Dingell and Waxman—has recently demanded that Vice President Cheney disclose information about private meetings that he held while he was a member of the National Energy Policy Development Group (“NEPD Group”), which was entrusted by the President with the task of developing recommendations for a new energy policy. The Comptroller General's demand letter was quite comprehensive, for it embraced all meetings in which the Vice President participated, and it required a full account of every meeting, including “any information presented” as well as minutes or notes of the meeting.⁷⁷ The Vice President responded that the GAO lacks statutory authority to enforce these demands, and argued that the demands would exceed Congress' constitutional authority even if the GAO were acting pursuant to statutory authorization.⁷⁸ In response, the Comptroller General purported to withdraw his most intrusive inquiries, but he continued to seek a number of details about every meeting the Vice President and his support staff had, including the identity of everyone who attended every

⁷⁵ For a thorough analysis of the process of negotiation through which disputes over congressional access to information are ordinarily settled outside the judicial system, see Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109 (1996).

⁷⁶ See, e.g., *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384 (D.C. Cir. 1976).

⁷⁷ See Letter from the Comptroller General to the Vice President (July 18, 2001), *quoted in* Appendix 1 to Letter from the Vice President to the Senate (Aug. 2, 2001), *available at* http://www.house.gov/reform/min/inves_energy/energy_cheney_chrono.htm [hereinafter July 18, 2001 Comptroller General Letter].

⁷⁸ See Letter from the Vice President to the Senate (Aug. 2, 2001), *available at* http://www.house.gov/reform/min/inves_energy/energy_cheney_chrono.htm [hereinafter Aug. 2, 2001 Vice President Letter].

meeting, the agenda of the meeting, and the manner in which the Vice President or his staff decided who would be invited.⁷⁹

The Comptroller General stopped pursuing his demands in September 2001, but subsequently brought a lawsuit to compel the Vice President's compliance.⁸⁰ In this case, the court will be required to decide as a threshold matter whether the GAO's demand is authorized by the statute.

Two sources of authorization have been suggested. First, the GAO's organic statute authorizes the Comptroller General to "evaluate the results of a program or activity the Government carries out under existing law."⁸¹ A natural reading of the reference to programs or activities carried out "under existing law" suggests that these evaluations are meant to cover programs and activities established by Congress,

⁷⁹ See Letter from the Comptroller General to the Vice President 2 (Aug. 17, 2001), *available at* http://www.house.gov/reform/min/inves_energy/energy_cheney_chrono.htm.

⁸⁰ See Don Van Natta, Jr., *Agency Files Suit for Cheney Papers on Energy Policy*, N.Y. TIMES, Feb. 23, 2002, at A1; GAO Statement Concerning Litigation, Feb. 22, 2002, *available at* http://www.house.gov/commerce_democrats/EnergyTaskForce/gao-022202.pdf. See also Decision of the Comptroller General Concerning NEPDG Litigation (Jan. 30, 2002), *available at* <http://www.gao.gov/cghome.htm>; Letter from the Comptroller General to the Honorable Richard A. Gephardt (Jan. 30, 2002), *available at* http://www.house.gov/commerce_democrats/EnergyTaskForce/13002gaoltr.pdf. The lawsuit was brought pursuant to 31 U.S.C. § 716, which provides in part:

(b)(1) When an agency record is not made available to the Comptroller General within a reasonable time, the Comptroller General may make a written request to the head of the agency. The request shall state the authority for inspecting the records and the reason for the inspection. The head of the agency has 20 days after receiving the request to respond. The response shall describe the record withheld and the reason the record is being withheld. If the Comptroller General is not given an opportunity to inspect the record within the 20-day period, the Comptroller General may file a report with the President, the Director of the Office of Management and Budget, the Attorney General, the head of the agency, and Congress.

(2) Through an attorney the Comptroller General designates in writing, the Comptroller General may bring a civil action in the district court of the United States for the District of Columbia to require the head of the agency to produce a record—

(A) after 20 days after a report is filed under paragraph (1) of this subsection; and

(B) subject to subsection (d) of this section.

⁸¹ 31 U.S.C. § 717(b).

rather than activities conducted under the President's independent constitutional authority to develop recommendations for future action. Looked at in isolation, however, "existing law" could be construed to include the Constitution, which in this setting might enable this provision to cover the Vice President's "activities" in preparing policy recommendations for the President.

The statute also authorizes the GAO to investigate "all matters related to the receipt, disbursement, and use of public money."⁸² This statutory language is on its face so broad that it could conceivably cover any matter related in any way, no matter how remote or indirect, to the use of public money. Because the Vice President receives a salary from the Treasury, and because public funds were no doubt used in other ways in connection with the meetings that the GAO is purporting to investigate, the statute could thus be read to authorize an investigation of these meetings.

Assuming for the sake of argument that one of these broad interpretations was accepted, and that the statute therefore authorizes the GAO to evaluate or investigate the Vice President's work in the NEPD Group, the statute clearly does not purport to authorize the GAO to use any and all *means* to conduct its investigations or evaluations.⁸³ The Vice President did provide some records to the GAO,⁸⁴ and the real question is whether the statute purports to require that the President comply with the GAO's demands for additional records about the nature of specific meetings. Assuming that the administration litigates the case properly, the *Espy* decision makes it more likely that the courts will refuse to enforce the GAO's demands.

In our view, *Espy* is relevant to this case for the following reasons. The statute requires government "agencies" to supply information about their activities to the GAO, and the term "agency" is given a broad definition that includes every "department, agency, or instrumentality of the United States Government" other than the legislative branch or the Supreme Court.⁸⁵ The bare language of the statute could conceivably be

⁸² 31 U.S.C. § 712(1).

⁸³ The GAO, for example, could file a report based on available information, and note that some information was not available.

⁸⁴ See Aug. 2, 2001 Vice President Letter, *supra* note 77 (relating that the Vice President has provided the GAO with 77 pages of documents regarding the direct and indirect costs of the NEPD Group).

⁸⁵ 31 U.S.C. §§ 101, 701, 716. A slightly different definition of "agency" applies to evaluations of programs carried out under existing law. See *id.* § 717(a).

read to include the Vice President, either as such or in his role as a member of the NEPD Group, but it certainly need not be so interpreted. Under the interpretive principle adopted by the Supreme Court in *Franklin v. Massachusetts*, moreover, the statute should not be construed to cover the President, and probably not the Vice President either, because it does not expressly so provide.⁸⁶

In any event, the express-statement rule invoked in *Franklin v. Massachusetts* is related to a more general principle of statutory construction, under which ambiguous statutes should be interpreted so as to avoid serious constitutional questions.⁸⁷ And the constitutional questions raised by the GAO demand letter are very serious indeed.

The *Espy* opinion lends strong support to Cheney. Recall that the privilege extends to “communications authored or solicited and received by” high level presidential advisers and their staffs.⁸⁸ Vice President Cheney plainly qualifies under any description of a high-level adviser, and much of what the GAO demanded amounts to “communications authored or solicited and received by” him and his staff. Even after the GAO narrowed its demands, it continues to demand “*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 of clients represented, (c) the purpose and agenda, . . . and (f) how [members of the NEPDG, group support staff, the Vice President himself or others] determined who would be invited to the

⁸⁶ 505 U.S. 788, 800-01 (1992) (finding that the President is not an “agency” under the Administrative Procedure Act). The Court held that:

The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

See id. (citation omitted). Although the Vice President does not occupy the “unique” constitutional position of the President, he is the only other elected officer within the executive department. This suggests that “respect for the separation of powers” would appropriately lead the courts to extend the benefits of the *Franklin* express-statement rule to the Vice President as well.

⁸⁷ *See, e.g., Jones v. United States*, 529 U.S. 848, 857 (2000); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345 (1998); *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454-55 (1989); *Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

⁸⁸ 121 F.3d at 752.

meetings.”⁸⁹ These records would appear to be “communications” and they were presumably authored or received by the Vice President’s staff.

Notwithstanding the *Espy* court’s statement that the decision applies only in the context of judicial proceedings,⁹⁰ it would be surprising if the courts were to give the privilege a narrower scope in the context of a GAO inquiry into the President’s policy-development process than it has in the context of a serious criminal investigation. One reason for this is that Congress has much less need for judicial supervision over presidential claims of privilege than the courts themselves require.

Consider, for example, the first fairly serious confrontation between Congress and the Executive over access to confidential documents. In 1796, President Washington refused to provide the House of Representatives with documents relating to the negotiation of the Jay Treaty.⁹¹ The documents had previously been given to the Senate during the ratification process, and Washington appears to have concluded that the House, unlike the Senate, had no legitimate reason for examining them. In the course of the House debates, Congressman James Madison took a somewhat different view. He argued that the House must have a right to ask for whatever information it thought fit. He also contended, however, that the President must have a correlative right to refuse the request if he saw fit. Madison concluded that “[i]f the Executive conceived that, in relation to his own department, papers could not be safely communicated, he might, on that ground, refuse them, because he was the competent though a responsible judge within his own department.”⁹²

Madison’s point was subtle, and somewhat foreign to the legalistic cast of mind. In effect, he was saying that the President had to be free to exercise his own judgment within the sphere of his responsibility, but that he would also be obliged to accept the political consequences because the House would be equally free to exercise its own judgment within *its* proper sphere. And the House was not without power to impose some serious political consequences on President Washington. Shortly after these debates, the House held a vote on whether to

⁸⁹ July 18, 2001 Comptroller General Letter, *supra* note 76, at 3 (emphasis added).

⁹⁰ 121 F.3d at 753.

⁹¹ For a more detailed account of this incident, see Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 WM. & MARY BILL RTS. J. 583, 588-92 (2000).

⁹² 5 ANNALS OF CONG. 773 (1796).

appropriate funds to implement the Jay Treaty. Consistent with the principle he had formulated, Madison voted against the bill.

As it happened, the bill passed, and President Washington was thus the “victor” in this particular dispute. This was not, however, a victory that implied a “defeat” for Congress. The House simply decided that it did not want the documents badly enough to insist on getting them. During the ensuing two centuries, this has become the traditional way to resolve these disputes, with each party using its political leverage to bargain over the outcome. The outcomes of these negotiations have no doubt frequently left one or even both sides highly dissatisfied, but neither side has ever had to suffer a true “defeat” of the kind that occurs when a court decides that your opponent has a right to something you claim as your own.

Applied to the present case, Madison’s approach suggests that Congress might refuse to enact President Bush’s energy proposals if a majority of legislators believe they first need more information about the Vice President’s work in the NEPD Group. But that is not at all that is going on here. Neither House of Congress, nor even a congressional committee, has demanded any documents from the Vice President. Instead, the unelected Comptroller General is asking the courts to short-circuit the usual political process and declare that he is legally entitled to the documents.

Madison’s constitutional analysis suggests that the courts should decline this invitation, and *Espy* points toward the same conclusion. The GAO’s ambiguous organic statute can easily be interpreted so as to spare the courts from having to decide the constitutional question, and that is an invitation they are likely to accept. Alternatively, *Espy* would lend significant support to a constitutional holding that executive privilege properly can be invoked to protect the documents at issue from Congress.⁹³ Either decision would be an exceptionally important victory for the President in the executive privilege wars, and both decisions are substantially more likely as a result of the success that the Clinton administration had in the *Espy* case.

⁹³ This holding could result if Cheney were to lose on the statutory construction issue and the President invoked executive privilege (which he has not yet had the occasion to do).

CONCLUSION

The long saga of President Clinton's legal problems was notable for its countless ironies. It was the President himself, for example, who requested a special prosecutor to investigate Whitewater, and it was the President himself who advocated reauthorization of the Independent Counsel statute and signed the reauthorization into law. When Kenneth Starr's investigation began to bear fruit, a campaign was suddenly mounted to crown Justice Scalia as the great prophet of constitutional wisdom for his dissent in *Morrison v. Olson*. And when the specter of impeachment arose, we began to see originalist interpretations of the Constitution emerging from the most unexpected quarters.⁹⁴

Perhaps the greatest irony, however, is that President Clinton—who at times seemed destined to leave only disrepute in his wake—may actually have strengthened the office of the presidency. Although his administration lost an important pair of cases involving attorney-client privilege for government lawyers (as well as a case in which the administration sought recognition for a presidential body guard privilege), those losses are likely to have little enduring significance. Precisely because of the legal battering that the Clinton administration suffered at the hands of various Independent Counsel, that statutory device lost the political support that had kept it alive for many years. And with the demise of that statute, future Presidents should seldom if ever be faced with grand jury subpoenas from government officials purporting to represent the United States.

Even if such circumstances do arise again—as they did for President Nixon even before the Independent Counsel statute came into being—future Presidents will have their hands greatly strengthened by the D.C. Circuit's expansive new exposition of executive privilege. That constitutional privilege will serve many of the same purposes that would have been served by the common law attorney-client privilege, and much more besides. Perhaps most important, the D.C. Circuit decision that gave the Clinton administration one of its few legal victories will be available to future Presidents who seek to resist congressional investigations. To the extent that Congress poses a greater threat than

⁹⁴ E.g., Cass Sunstein, *Impeachment? The Framers Wouldn't Buy It*, WASH. POST, Oct. 4, 1998, at C3. Cf. John O. McGinnis, *Impeachable Defenses*, POL'Y REV., June/July 1999, at 27 (criticizing scholars who abandoned trendy academic interpretative theories in favor of the unfashionable originalist approach when the time came to argue that President Clinton should not be impeached or removed from office).

the judiciary to the *legitimate* interests of the Presidency, this may be among President Clinton's greatest legacies to the office he once held.