

The *Cheney* Decision—A Missed Chance to Straighten Out Some Muddled Issues

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The Supreme Court's ruling in *Cheney v. United States District Court for the District of Columbia*¹ was not really surprising; in some ways it was fully in keeping with this term's big theme—deciding not to decide. As predictable as it may have been, though, the Court's opinion in *Cheney* represents a missed opportunity for the Court to educate and clarify on two confusing subjects: so-called executive privileges and immunities, and the complex office of the vice presidency.

I. The *Cheney* Litigation and the Court's Decision to Remand

The *Cheney* litigation began when various public interest groups sued Vice President Richard Cheney and the National Energy Policy Development Group (NEPDG) that President Bush directed him to head. The plaintiffs, relying on the Federal Advisory Committee Act (FACA),² sought to obtain records of the group's meetings. FACA's disclosure requirements were enacted by Congress to enable the public "to monitor the 'numerous committees, boards, commissions, councils and similar groups [that] advise officers and agencies in the [] Federal Government,' and to prevent 'wasteful expenditure of public funds' that may result from their proliferation."³ Vice President Cheney and other defendants objected to disclosure of these records and moved to dismiss the case against them.⁴ Specifically, they pointed to an exception in the FACA itself, which states that the Act's public disclosure and other requirements need not be

¹124 S. Ct. 2576 (2004).

²5 U.S.C. App. § 2, pt. 1.

³124 S. Ct. at 2583 (internal citations omitted).

⁴*Id.* at 2582 (summarizing case history).

met if the commission in question is “composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government.”⁵ The *Cheney* defendants argued that since—under the president’s memorandum establishing the NEPDG to generate policy proposals—the task force was supposed to consist only of the vice president and “other officers of the Federal Government,” the FACA simply didn’t apply.⁶ They also asserted that applying FACA to the vice president under these circumstances would be problematic in any event under separation-of-powers/executive privilege-type doctrines.⁷

The plaintiffs responded that, regardless of the president’s intent to limit the NEPDG to government employees, the task force *in reality* had included private lobbyists and other outsiders who so regularly attended and fully participated in non-public meetings that these other persons were “de facto” members of the group, bringing it within the disclosure requirements of the FACA.⁸ After reviewing these arguments, the federal district court, applying earlier decisions from the U.S. Court of Appeals for the D.C. Circuit recognizing the likely existence of a “de facto membership” doctrine, declined to dismiss the *Cheney* lawsuit.⁹ Instead, the trial court allowed the plaintiffs to conduct some preliminary “discovery”—formal information sharing by the defendants—to enable the court to decide whether, in fact, non-federal employees had participated in the group’s proceedings in a manner that triggered the FACA.¹⁰ Ironically, as both the court of appeals and the Supreme Court later noted, the discovery approved by the district court actually entitled the plaintiffs to receive far *more* information than the defendants would be required to disclose under the FACA itself if the district court had concluded that the Act applied to the task force—the very question the court said it needed more information in order to

⁵ 5 U.S.C. App. § 3(2).

⁶ See, e.g., *Cheney*, 124 S. Ct. at 2582; see also *Judicial Watch, Inc. v. National Energy Policy Development Group*, 219 F. Supp. 2d 20, 44 (D.D.C. 2002).

⁷ *Judicial Watch*, 219 F. Supp. 2d at 67–68.

⁸ *Cheney*, 124 S. Ct. at 2582 (discussing *Judicial Watch* Complaint); *Judicial Watch*, 219 F. Supp. 2d at 43–44 (discussing plaintiffs’ allegations).

⁹ *Judicial Watch*, 219 F. Supp. 2d at 54–55.

¹⁰ *Id.* at 54.

resolve.¹¹ Nonetheless, the district court ordered the defendants to comply with the overly broad discovery requests made by the plaintiffs, and to assert objections only to specific information requests with which they did not want to comply.¹²

Having effectively lost in the trial court, the defendants then moved to the court of appeals. An ordinary appeal, however, was not possible. A case usually cannot be reviewed by an appellate court in the federal system until it reflects a “final judgment” by the district court—that is, a final resolution by the district court of *all* matters comprising the case.¹³ In the *Cheney* litigation, the district court’s discovery orders to the defendants did not end the district court’s involvement—but rather merely preceded the district court’s determination, still to come, of whether the FACA’s *de facto* membership doctrine applied to the NEDPG. The case was thus not ripe for ordinary appellate review. For that reason, defendants sought in the court of appeals the extraordinary remedy of “mandamus”—a special judicial order directed to a lower court (or other government official) to stop abusing official power or discretion. (The request for mandamus explains the unusual caption in this case, where the district court is itself seemingly being sued by Vice President Cheney; when mandamus is requested, the “defendant” in the action becomes the court or other government entity against whom the order of mandamus is sought.) To obtain mandamus, a party must establish that his right to relief is clear and indisputable, and that no less extraordinary a remedy would suffice.¹⁴

The court of appeals rejected the vice president’s bid for mandamus, concluding that to the extent the vice president and other defendants are constitutionally harmed by complying with the discovery orders, they can and should invoke “executive privilege” to refuse to comply with particular and specific information requests.¹⁵

¹¹ See, e.g., *Cheney*, 124 S. Ct. at 2585 (“The majority [of the appeal panel] acknowledged the scope of respondents’ requests is overly broad, because it seeks far more than the ‘limited items’ to which respondents would be entitled if the ‘district court ultimately determines that the NEPDG is subject to FACA.’”).

¹² Order Approving Discovery Plan at 2 (D.D.C. Aug. 2, 2002) (quoted at *Cheney*, 124 S. Ct. at 2585).

¹³ See, e.g., *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976).

¹⁴ *Kerr v. U.S. Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394, 403 (1976).

¹⁵ *In re Cheney*, 334 F.3d 1096, 1105 (D.C. Cir. 2003).

Such particularized objections would allow the defendants to protect their constitutional interests, and at the same time enable the district court to evaluate the defendants' actual and specific need for secrecy.¹⁶ After the court of appeals ruled, the defendants sought review in the Supreme Court, on the question whether the court of appeals should have directed a writ of mandamus telling the district court not to enforce the discovery orders. Separation of powers and executive privacy, the defendants argued, should have led the court of appeals to conclude that FACA cannot apply here, and that mandamus was appropriate.¹⁷

The Supreme Court ruling, handed down in June, did not really resolve these statutory and constitutional questions. Instead, the Court said that the court of appeals was wrong for thinking that specific and particularized invocations of executive privilege are always required before the executive branch's constitutional arguments should be heard.¹⁸ Accordingly, the high Court simply remanded the case to the court of appeals, although it did send some strong signals that on remand the lower courts should now be open and attentive to the arguments that Vice President Cheney was making about the need for secrecy. As the Court put it:

Contrary to the District Court's and the Court of Appeals' conclusions, [the] executive Branch [is not left with the sole option of] invok[ing] executive privilege while remaining otherwise powerless to modify a party's overly broad discovery requests All courts should be mindful of the burdens imposed on the executive Branch in any future proceedings. Special considerations applicable to the President and the Vice-President suggest that the courts should be sensitive to requests by the Government for [immediate] appeals to

¹⁶*Id.* at 1108 ("Petitioners have yet to invoke executive privilege, which is itself designed to protect the separation of powers, and the narrow discovery we expect the district court to allow may avoid the need for petitioners to even invoke the privilege.").

¹⁷Petition for Writ of Certiorari at 6, *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 124 S. Ct. 2576 (2004) (No. 03-475) ("These cases present fundamental separation-of-powers questions arising from the district court's orders compelling the Vice President and other close presidential advisers to comply with broad discovery requests by private parties.").

¹⁸*Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 124 S. Ct. 2576, 2592 (2004).

reexamine, for example, whether the [FACA really does] embod[y] the de facto membership doctrine.¹⁹

In other words, Advantage: Cheney. But the game is not completely over. Further proceedings will occur in the lower courts, and it is possible these courts won't fully take the Supreme Court's hint, in which case the litigation could make its way back to the high Court eventually.

II. *Cheney* in Context: Sending Signals, Rather Than Resolving Questions Finally, Was Par for the Course This Term

The failure to fully and finally resolve legal questions was quite common in cases this Supreme Court term. Consider, for example, *Vieth v. Jubelirer*²⁰—where plaintiffs had challenged the drawing of Pennsylvania's congressional districts on the ground that it was done in an excessively partisan way. In *Vieth*, the Court ruled only that there are no judicially manageable standards *at this time* to resolve such claims.²¹ Justice Kennedy's crucial fifth vote, accompanied by a separate concurring opinion he penned, held open the possibility that judicially administrable standards could in fact be developed later.²² In effect, then, the Court simply put off the question whether it will ever police overly zealous political gerrymandering.

The Court decided not to make a decision again in the well-publicized "one nation under God"/Pledge of Allegiance case—*Elk Grove Unified School District v. Newdow*.²³ In its opinion there, the Court held only that, under California law, Mr. Newdow's custodial arrangement with his daughter was so complicated as to make federal court adjudication of his constitutional claim imprudent.²⁴ As a result of this disposition, the Court was able to undo the thorny

¹⁹*Id.* at 2592–93.

²⁰124 S. Ct. 1769 (2004).

²¹*Id.* at 1792 ("for the time being . . . this matter is nonjusticiable").

²²*Id.* at 1796 (Kennedy, J., concurring) ("That no such standard has emerged in this case should not be taken to prove that none will emerge in the future.").

²³124 S. Ct. 2301 (2004).

²⁴*Id.* at 2312.

Ninth Circuit ruling that had invalidated the reference to God, without having to deal with the tricky Establishment Clause issue Mr. Newdow raised.

It is worth noting, however, that—just as in *Cheney*—various justices in *Newdow* did try to send some messages to the lower courts even though the majority of the Court issued no formal ruling of the merits. Four justices in particular—Justice Scalia who recused himself because he had expressed his views on the merits while the case was pending in the lower courts, and three other justices who wrote separately in *Newdow* to reject the father’s Establishment Clause challenge directly—have clearly indicated that they believe the phrase “one nation under God” poses no constitutional problem.²⁵ Future challengers to this aspect of the Pledge therefore will start with a 4–0 handicap. And that handicap, in turn, may (and should) influence how receptive lower courts are to any such challenges.

Even the cases handed down this term concerning the so-called “War on Terror” (cases that the Court had no choice but to take) were, doctrinally speaking, rather narrow and somewhat cryptic. To be sure, the justices definitely sent some messages to the administration and the rest of the world about the necessity and inevitability of judicial involvement. Nonetheless, one could argue that these rulings created as many legal questions as they answered. The *Hamdi* decision²⁶ held that U.S. citizen Yaser Hamdi, arrested in a combat zone abroad, was entitled to a hearing on his “enemy combatant” status in front of a neutral decisionmaker, according to fair procedures.²⁷ But the *Padilla* case,²⁸ which involved a U.S. citizen arrested in the U.S, was dismissed outright on technical jurisdictional grounds. (The Court held the New York venue was improper.)²⁹ Plainly, the *Hamdi* precedent will benefit Jose Padilla; he, too, ought now to have a process in which to challenge his “enemy combatant” status. But Padilla’s case also arguably raised additional questions—such as whether a U.S. citizen captured within the U.S. can *ever*

²⁵ *Id.* at 2312–33 (Rehnquist J., joined by O’Connor, J., and Thomas, J., concurring).

²⁶ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

²⁷ *Id.* at 2651–52.

²⁸ *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

²⁹ *Id.* at 2724.

be characterized as an enemy combatant—that, for now, remain unanswered.

Meanwhile, the cases brought by Guantanamo prisoners challenging the legality of their detention were decided, yet they too were resolved only on very narrow jurisdictional grounds. Specifically, the Court ruled that those being held in Guantanamo could contest the lawfulness of their imprisonment by seeking writs of habeas corpus from federal judges.³⁰ But the Court gave no real hint of what standards—procedural or substantive—should govern those habeas proceedings to come.

Perhaps it is not entirely surprising, or inappropriate, that incrementalism (and perhaps even avoidance) to some extent characterize the term that just ended. Last year's term, after all, was truly path-breaking, with cases like *Grutter*,³¹ the ruling upholding University of Michigan Law School's race-based affirmative action policy; *Lawrence*,³² the Texas case invalidating a criminal prohibition on gay sex; and *McConnell*,³³ the case rejecting a broad challenge to the Bipartisan Campaign Finance Reform Act. After a year of such doctrinal importance, the Court may have wanted to generate less law than it could have—to do less with its high-profile docket than it might have—this term, especially given the pendency of what will very likely be a contentious presidential election campaign.

However predictable (and understandable) the Court's reluctance to resolve many tough questions this year may be, it remains somewhat problematic. Take, for example, the *Newdow* ruling. I suspect I know *why* a majority of justices dodged the vexing Establishment Clause question there. Writing a coherent and *narrow* opinion either way—that is, either upholding or invalidating the reference to God—would be tough, and the Court is understandably reluctant to give either side in the battle over how much religion there can

³⁰See, e.g., *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

³¹*Grutter v. Bollinger*, 539 U.S. 306 (2003).

³²*Lawrence v. Texas*, 539 U.S. 558 (2003).

³³*McConnell v. FEC*, 540 U.S. 93 (2003). By characterizing *McConnell* as entirely a 2002–2003 term case, I'm cheating a bit. Technically, *McConnell* was argued during the 2002–2003 term (in September 2003, before the new term began in October), but decided in the 2003–2004 term, in December 2003. But *McConnell* really was a holdover from the 2002–2003 term, and since it was handed down before the election year of 2004, I consider it psychologically part of the earlier Court cycle.

be in public life too broad and powerful a weapon with which to bludgeon the other side. But the Court's reasoning in getting rid of the case was less than ideal—for it did not seem to accord full respect to California case law and the California judiciary. If Mr. Newdow's family law status in California was uncertain at all, the Court had another option: It could have certified state law questions to the California courts, and then decided whether to proceed after getting answers to those questions. ("Certification" is a process by which federal courts can request from states' highest courts answers to unclear questions of state law. It aims to preserve the role of each state's highest court as the ultimate arbiter of the law of its respective state.) Pursuing this option would, of course, have meant that the Establishment Clause issue might have been back before the justices after certification—a prospect I'm sure none of them relished.

III. The Missed Opportunities in the *Cheney* Case

The Court's failure to fully resolve the *Cheney* litigation is also unsatisfying, because there are two big legal topics that are at present very misunderstood, both of which would have benefited from the kind of sustained and meaningful analysis that a final ruling in the *Cheney* case might have required and provided.

A. *The Messed-Up Law of Executive Privilege and Immunity*

First is the huge question of executive privileges and immunities. There have been three landmark cases issued by the Supreme Court during the last generation over the extent to which the presidency and the executive branch should be immune from legal and judicial processes and orders that would require disclosure of executive information and/or consumption of executive time: the famous Nixon Tapes case, *United States v. Nixon*,³⁴ the so-called "Independent Counsel" case, *Morrison v. Olson*,³⁵ and Paula Jones's case against then-President Bill Clinton, *Clinton v. Jones*.³⁶ In each case, the president and his underlings made plausible arguments that the need for executive secrecy and autonomy militated against subjecting executive branch officials to ordinary legal processes. And—perhaps to avoid the impression in a post-Watergate world that the president

³⁴ 418 U.S. 683 (1974).

³⁵ 487 U.S. 654 (1988).

³⁶ 520 U.S. 681 (1997).

is above the law—the Supreme Court rejected all of these plausible claims of executive immunity or privilege, by an aggregate and whopping margin of 24–1 votes. The imperial presidency is surely dead.

But is the way it died something over which to rejoice, or grieve? Consider first the *Nixon* case. There, Richard Nixon refused to turn over White House tapes that recorded conversations between the president and various White House aides. The tapes were sought by the special Watergate prosecutor—Leon Jaworski—in order to prosecute some of the aides who had been indicted by Jaworski’s grand jury. President Nixon, arguing that the executive branch’s interest in confidentiality outweighed the need to obtain information that would incriminate, and facilitate prosecution of, the indicted defendants, balked at a lower court order. The Supreme Court unanimously rejected Nixon’s claim.³⁷ The Court did purport to recognize a limited privilege for private Oval Office communications, but concluded that this executive privilege had to be balanced against the judicial need for evidence.³⁸ According to the Court, when this free-form balance is performed, the necessity for confidentiality will ordinarily be outweighed (absent national security concerns) so long as the evidence sought for a criminal proceeding is specific, admissible, and relevant to a criminal proceeding.³⁹ Obviously, saying a privilege can be overcome so long as the information sought is specific, relevant and admissible means there is not much of a privilege. Indeed, if information is *not* specific or relevant or admissible, one often does not need a privilege in order to resist its disclosure.

In minimizing the president’s right to keep confidential conversations secret, the Court said a number of bizarre things. As one commentator (who happens to be my brother) has pointed out:

Chief Justice Warren Burger’s unanimous opinion began by inaptly analogizing the dispute to one “between two congressional committees.” Two committees are presumptively

³⁷*Nixon*, 418 U.S. at 713.

³⁸*Id.* at 706–13.

³⁹*Id.* at 712–13 (“A President’s acknowledged need for confidentiality in the communications of his office” must give way to the “constitutional need for production of relevant evidence in a criminal proceeding”; “[w]ithout access to specific facts a criminal prosecution may be totally frustrated.”).

coordinate authorities; Nixon and Jaworski were not. Constitutionally, Nixon was President and Jaworski was his inferior. Democratically, Nixon had been elected by the nation, and Jaworski had not even been confirmed by the Senate. Their dispute was more like one between the Senate and a staffer, or the Court and a law clerk.

...

... Next, Burger invoked a Nixon Administration regulation in which Nixon promised Jaworski a free hand in his investigation, and further promised not to fire Jaworski without the concurrence of various Congressional barons This regulation, said Burger, had “the force of law,” empowering executive inferior Jaworski to contest Chief Executive Nixon. Because of this “law,” Burger declared his Court free to decide who was right and ignore who was boss. But this regulation-as-law gambit was hard to maintain with a straight face: any truly legally binding regulation would have been flatly unconstitutional. As President Washington and Congressman Madison established at the Founding, the President alone decides whom to fire within the executive branch; Congress members can jawbone, but cannot legally obstruct any purely executive-branch removal

...

... Even if the regulation somehow counted as law, the Court also conceded that the Nixon Administration was free simply to rescind the regulation unilaterally—and then, Nixon could tell Jaworski what to do or where to go. But this concession by the Court raised obvious questions: Why were the Justices insisting that Nixon first rescind, and only then countermand Jaworski? Why wasn’t it enough that in their very courtroom, the President was clearly saying that he disagreed with his inferior about the proper discharge of executive-branch business?⁴⁰

Clearly, even if the *Nixon* case reached the right and just result—because Richard Nixon was an unindicted co-conspirator engaged in ongoing wrongdoing who thus should not have enjoyed the benefit of privileges that people not currently engaged in wrongdoing enjoy—the Court made a hash of the law of executive privacy and autonomy.

⁴⁰ Akhil Reed Amar, *Nixon’s Shadow*, 83 *Minn. L. Rev.* 1405, 1406–07 (1999).

The next major case in the grouping involved a challenge to the now infamous “Independent Counsel Act” passed after Watergate—the Act under which Ken Starr operated. In *Morrison v. Olson*,⁴¹ the Court rejected the idea that an unelected and essentially unremovable “independent” investigator (in that case Alexia Morrison) rooting around into the affairs of high-level executive officials could disrupt the ability of the president and the executive branch to discharge their constitutional and statutory obligations. In spite of the concerns raised by the president, seven justices voted to uphold the Act, reasoning that the effective functioning of the executive branch would not in practice be compromised by independent counsels operating in their midst.⁴² In reaching this result, “*Morrison* winked at the word ‘inferior’ [in the Constitution], slighted the fact that Article II vests all executive power in the President, and disregarded the objection that judges were performing plainly executive tasks. In each of these respects, *Morrison* followed *Nixon*.”⁴³ Only Justice Scalia dissented.⁴⁴

The last case in the trilogy is *Clinton v. Jones*.⁴⁵ There, President Bill Clinton argued that the civil damage lawsuit filed against him by Paula Jones for sexual harassment should have been delayed until after he left the Oval Office, on the ground that discovery and other aspects of civil litigation against him could distract him and his administration from fulfilling constitutional duties.⁴⁶ The Court, unanimous as it was in *Nixon*, rejected the president’s claim for executive immunity, reasoning that a wise and sound district court judge can manage discovery and other aspects of a civil lawsuit so as to prevent it from disrupting the affairs of the executive branch.⁴⁷ The Monica Lewinsky fiasco, which, it must always be remembered,

⁴¹ *Supra* note 35.

⁴² *Morrison v. Olson*, 487 U.S. 654, 695 (1988).

⁴³ Amar, *supra* note 40, at 1414.

⁴⁴ *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

⁴⁵ *Supra* note 36.

⁴⁶ *Clinton v. Jones*, 520 U.S. 681, 697–98 (1997).

⁴⁷ *Id.* at 707 (“potential” burdens on the president “are appropriate matters for the District Court to evaluate in its management of the case. . . . If and when that should occur, the court’s discretion would permit it to manage those actions in such fashion (including deferral of trial) that interference with the President’s duties would not occur.”).

came to light only as a byproduct of discovery conducted in the Paula Jones civil case, makes such a belief today look quite quaint.

That is where we were at before this term. The *Cheney* Court had important things to say that bear on each of these three seminal cases, but the *Cheney* majority opinion does not itself connect any of the dots, thus leaving all of us to speculate about where things stand today. Let us start with *Cheney's* effect on *Nixon*. The justices in *Cheney* did discuss the *Nixon* precedent at some length, reading that 1974 case narrowly.⁴⁸ Limiting a badly done earlier ruling is a good thing. But limiting it in a way that perpetuates the weaknesses of the earlier ruling is not such a good thing.

In essence, the *Cheney* Court said that *Nixon* was different because *Nixon*—unlike *Cheney*—involved a criminal proceeding.⁴⁹ It is certainly true that the *Nixon* opinion highlighted the criminal facets of Mr. Jaworski's investigation.⁵⁰ And "[t]he distinction [*Nixon* drew] between criminal and civil proceedings is not just a matter of formalism."⁵¹ A criminal proceeding, the Court noted in both *Nixon* and again in *Cheney*, is generally more important than a civil proceeding, and getting relevant information out on the table is crucial to reaching the right result in a criminal case.⁵² Thus, the importance of executive privilege in *Nixon* was outweighed by the need to obtain "every man's evidence."⁵³ That is not true here, where the FACA statute is completely civil in character: "Even if FACA embodies important congressional objectives, the only consequence from [plaintiffs'] inability to obtain the discovery they seek is that it would be more difficult for private complainants to vindicate Congress's policy objectives under the FACA."⁵⁴

But can the criminal nature of the *Nixon* case really explain the result in that dispute as easily as the *Cheney* Court suggests? I am

⁴⁸ *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 124 S. Ct. 2576, 2588–2593 (2004) (discussing *Nixon*).

⁴⁹ *Id.* at 2489 ("the need for information in the criminal context is much weightier" than in the civil context).

⁵⁰ *Id.* at 2589.

⁵¹ *Id.*

⁵² *Id.* (distinguishing *Nixon* based on the "'fundamental' and 'comprehensive' need for 'every man's evidence' in the criminal justice system").

⁵³ *Id.*

⁵⁴ *Id.*

doubtful, for a few reasons. First, the desire for “every man’s evidence” in criminal cases is usually implemented somewhat asymmetrically: A criminal defendant has a right to obtain and use all exculpatory evidence, but the government is rarely able to gather *all* possibly incriminating evidence. The Fifth Amendment’s protection against compelled self-incrimination is an example of this asymmetry—under current doctrine a defendant does not have to produce testimonial evidence, however relevant to the truth, that would hurt him.⁵⁵ This point seemed to have been lost on the Court in *Nixon* (and then again in *Cheney*); Chief Justice Burger in *Nixon* invoked both the Fifth and Sixth Amendments as bases for making President Nixon turn over the tapes,⁵⁶ but those amendments protect the accused, not the government, *which was seeking the incriminating information* in *Nixon*. Thus, notwithstanding the *Cheney* Court’s reasoning, the criminal character of the *Nixon* case should not have been a big plus in favor of Jaworski and against President Nixon.

Relatedly, throwing bad guys in jail is not the only important government interest. In *Nixon*, the president’s argument was that executive confidentiality would preserve the executive branch’s long-term ability to enforce laws. Executive branch officials often do unpleasant things in disposing of particular criminal cases—like cutting deals with guilty defendants, immunizing guilty witnesses, etc.—in the name of future and more important executive branch goals. President Nixon’s decision to keep White House conversations private might make prosecution of the Watergate criminals harder, but it might also enable future presidents to communicate with their staffs in a way that makes all law enforcement—including criminal law enforcement—more effective. So, again, it simply can’t be that *Nixon* should sensibly be read for the idea the executive privilege has little or no place in criminal cases.

Third, just as the *Cheney* Court overstates the case against executive privilege in the criminal context, it understates the case against executive privilege in some civil contexts. Take the FACA itself. Early in the opinion, the Court properly identifies FACA as a law designed to prevent waste and abuse of federal resources by public-private groups that may become captured by narrow rent-seeking

⁵⁵See, e.g., *Kastigar v. United States*, 406 U.S. 441 (1972).

⁵⁶*United States v. Nixon*, 418 U.S. 683, 709, 711 (1974).

interests.⁵⁷ Making sure that government-sponsored commissions in fact serve the public interest—making sure, in other words, that the people can police the government—can often be as important as making sure the government can police the people. So the interest on the “disclosure” side of the executive privilege balance is not weak simply because the statute under which disclosure is sought happens not to be criminal.⁵⁸ In the end, the Court would have done better to explain the *Nixon* case by reference to the person of Richard Nixon rather than to explain it exclusively by reference to a criminal/civil distinction. (In particular, as noted earlier, the Court might have justified ruling against Mr. Nixon by pointing out that he was himself engaged in ongoing criminal activity, and that therefore any privileges afforded persons who are not currently engaged in crime do not apply.)

With respect to the continued vitality and meaning of the other two seminal executive immunity/privilege cases—*Morrison* and *Jones*—the Court in *Cheney* also made important, albeit under-explained, remarks. For example, in further unpacking the criminal/civil dichotomy, the Court made the following assertion:

The observation in *Nixon* that production of confidential information would not disrupt the functioning of the executive Branch cannot be applied in a mechanistic fashion to civil litigation. In the criminal justice system, there are various constraints, albeit imperfect, to filter out insubstantial legal claims. The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations⁵⁹

Fair enough. This might even explain why Leon Jaworski—the prosecutor in the Nixon case—should have been given some slack; after all, as pointed out earlier, President Nixon technically could have fired him or cut off his funding if his actions really had been interfering with executive functions.

⁵⁷ *Cheney*, 124 S. Ct. at 2582.

⁵⁸ Indeed, the interest served by disclosure in *Cheney* was greater than the plaintiff’s interest at stake in *Jones*, which involved only private redress, not government accountability. And yet in *Jones* the president lost.

⁵⁹ *Cheney*, 124 S. Ct. at 2590.

But what about “independent” counsel Alexia Morrison or Ken Starr? They were not “publicly accountable,” nor subject to meaningful “budgetary considerations.”⁶⁰ Thankfully, the Independent Counsel Act has died a quiet legislative death. But should we take the language from *Cheney* to mean that the *Cheney* majority would no longer agree with the reasoning of the *Morrison* majority? One can hope so, but one would also have hoped that the Court would have been less vague and more elaborate here.

More explicit discussion of *Jones* would similarly have been helpful. The *Cheney* Court did observe, after talking about the accountability—and therefore trustworthiness—of prosecutors, that,

In contrast, there are no analogous checks in the civil discovery process here. Although under Federal Rule of Civil Procedure 11, sanctions are available, and private attorneys owe an obligation of candor to the judicial tribunal, these safeguards have proved insufficient to discourage filing of meritless claims against the Executive Branch. In view of the visibility of the Offices of the President and the Vice President and the effect of their actions on countless people, they are easily identifiable targets for suits for civil damages.⁶¹

Again, sounds reasonable. But where was this reasonableness in *Jones*? In *Jones*, the Court effectively said, trust district court judges—they will manage things nicely. Where is the trust for the district court judge in *Cheney*? Lest I be misunderstood, I do not think trusting the judicial process is necessarily the right answer to these questions. I simply see deep inconsistency between the reasoning of *Cheney* and *Jones* (just as there is inconsistency between *Cheney*'s analysis and *Morrison*'s.) Inconsistency itself is not bad—*Brown*'s inconsistency with *Plessy* was quite good. Unnoticed and unexplained inconsistency, on the other hand—the kind we have here—is a recipe for more doctrinal confusion.⁶²

⁶⁰Ken Starr's overall expenditures, for example, exceeded \$70 million. See Joshua Micah Marshall, “Kenneth Starr’s \$70 Million Bag Of Garbage,” posted at http://www.salon.com/politics/feature/2002/03/12/ray/index_np.html.

⁶¹*Cheney*, 124 S. Ct. at 2590 (internal quotations and citations omitted).

⁶²This doctrinal confusion might explain why the Bush administration's invocation of executive privilege has, at times, seemed quite screwy. See, e.g., Vikram David Amar, Executive Privilege: Often Valuable to Protect the Presidency, But Misunderstood by President Bush in the Condoleezza Rice Case, *Findlaw.com* (April 16, 2004), available at <http://writ.news.findlaw.com/amar/20040416.html>.

B. The Uncertain "Executive" Office of the Vice Presidency

In addition to complicating, rather than clarifying, the essence of executive privilege in the context of the three important decisions that precede it, the *Cheney* ruling also missed a golden chance to explain how, or even why, executive privilege applies to the peculiar office of the vice presidency (an office at issue in *Cheney* but not in any of the earlier cases.) The *Cheney* Court repeatedly and reflexively lumps the vice presidency together with the presidency, and talks as if executive privilege concepts necessarily play out identically for to both offices. For example, the Court states that "[w]ere the Vice President not a party in this case, the argument that the Court of Appeals [erred] might present different considerations."⁶³ In a similar vein is the Court's closing remark that there are "special considerations applicable to the President and Vice President."⁶⁴ And in the passage quoted above in connection with the *Jones* discussion, the Court lumps the offices of the president and vice president together as of particularly high "visibility." But does this merging of the two offices make sense for executive privilege purposes? Should veeps even be considered members of the executive team for executive privilege purposes? It turns out that the answer to this question is far more complicated than most would ever imagine.

When one looks first at the text of the original Constitution, one finds that the vice president is not formally given any executive responsibilities. The Constitution of 1787 specified only two real jobs for vice presidents. One is to wait around in case the president is unable to discharge his duties.⁶⁵ The other is to preside over the Senate in the meantime.⁶⁶ Neither one of these functions seems quintessentially executive. Indeed, the function of presiding over the Senate—and casting its tie-breaking vote—seems downright legislative. It is worth noting here as well that the Constitution's text does not give the president the power to remove a vice president, in the way that the constitutional power to appoint cabinet members and other executive officers has been construed to carry with it a presidential power to remove such persons.

⁶³*Cheney*, 124 S. Ct. at 2587.

⁶⁴*Id.* at 2593.

⁶⁵U.S. Const. art. II, § 1.

⁶⁶U.S. Const. art. I, § 3.

If we move from constitutional text to founding history, the question whether the vice president should be considered a high-level executive insider for executive privilege purposes gets even muddier. The primary reason for that is the clear (albeit little known) fact that both the Framers and later generations of Americans gave rather little thought to the vice presidency and its role in executive administration.⁶⁷

The very idea of a vice presidency was dreamed up in the closing days of the Philadelphia Convention of 1787, and its chief value was as one cog in an intricate electoral college contraption regulating presidential elections. Delegates worried that after George Washington left the political scene, each state might simply cast all its electoral votes for its own favorite son. But then this scattering of electoral votes would deny any one candidate a majority and thus throw every presidential election into Congress, in which case the executive might become overly dependent on the legislature.

The Philadelphia delegates' ingenious solution was to require each state to vote for two persons—one of whom must be an out-of-stater—with the top vote-getter winning the presidency.⁶⁸ This rule would give a boost to national candidates—respected statesmen who might be everyone's second choice after the local favorite son. Meanwhile, to discourage states from gaming the system by wasting their second (out-of-state) vote—thereby cycling back to a fractured world of favorite sons—the Framers created an office called the vice presidency and provided that this office would go to the runner-up

⁶⁷Many of the paragraphs that follow build on and borrow heavily from two earlier works that my brother Akhil Reed Amar and I have produced—Akhil Reed Amar and Vikram David Amar, *Constitutional Vices: Some Gaps in the System of Presidential Succession and Transfer of Executive Power*, Findlaw.com (July 26, 2003), available at <http://writ.news.findlaw.com/amar/20020726.html> and Akhil Reed Amar and Vik Amar, *President Quayle*, 78 Va. L. Rev. 913 (1992). Interested readers should consult each of these other two sources for more analysis.

⁶⁸U.S. Const. amend XII provides as follows:

The electors shall meet in their respective states and vote by ballot for President and Vice-President . . . [T]hey shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, . . . The person having the greatest number of votes for President, shall be the President. . . . The person having the greatest number of votes as Vice-President, shall be the Vice-President.

in the presidential race.⁶⁹ Thus states would have strong incentives to take their second (out-of-state) vote seriously.

When Elbridge Gerry (who, ironically enough, would one day serve as vice president) complained about this odd office and proposed eliminating it, another delegate candidly responded that “such an officer as the Vice President was not wanted. He was introduced only for the sake of a valuable mode of election which required two to be chosen at the same time.”⁷⁰ In light of this history, it is hardly surprising that the Founders’ Constitution neglected to specify certain critical details concerning the vice presidency and its relationship to the presidency itself and the rest of the executive branch.

The circumstances culminating in the passage of the Twelfth Amendment in 1804 serve to underscore the inherent ambiguity of the vice presidency as a member of the president’s team at the founding and in the early Republic. To understand the Twelfth Amendment, one must begin by recognizing that the original Constitution did not permit electors to specify their votes for the two offices of president and vice president separately—instead, each elector simply cast two votes.⁷¹ Of course, electoral collegians, and the states and parties whom they represented, did have strong views about which of the two persons voted for should occupy the presidency. But electors who wanted to elect a president and vice president of the same party were confronted with a dilemma: If all of the party’s electors named the same two individuals on the ballot, and if that party constituted a majority of electors at the electoral college, then a tie would result between the two top vote-getters. And under the terms of Article II of the Constitution, the election would then be resolved by the House of Representatives, where the party risked “inversion” of the two candidates. That is, the House might vault

⁶⁹See U.S. Const. art II, § 1, cl. 1–3:

The Electors shall meet in their respective States, and vote by Ballot for two Persons. . . . The Person having the greatest Number of Votes shall be the President, . . . and if there be more than one who . . . have an equal Number of Votes, then the House of Representatives shall immediately chuse [sic] by Ballot one of them for President. . . . In every Case, after the Choice of the President, the Person having the [next] greatest Number of Votes of the Electors shall be the Vice President.

⁷⁰See 2 The Records of the Federal Convention of 1787, at 537 (Max Farrand ed., 1937) (statement of delegate Williamson).

⁷¹U.S. Const. art. II, § 1, cl. 1–3.

a party's vice presidential candidate above the party's presidential candidate. This was especially possible because the party controlling the House was not necessarily going to be the same party that generated the top two presidential election vote-getters.

To avoid such possible inversion, early party leaders began "sloughing" votes off the party's vice presidential choice. Party bigwigs would convince a few electors from a few states to delete the party's preferred vice presidential candidate from the two-person ballots cast at the electoral college, naming someone else instead.⁷² By this device, a tie between the majority party's two top choices could be avoided. But this technique effectively created a window that allowed the minority party to elect its most popular, or presidential, candidate to the vice presidency by coming in second, ahead of the majority party's vice presidential choice.

This happened, in fact, in 1796. John Adams—a Federalist—finished first. But because Federalist electors sloughed off some votes for their preferred vice presidential choice, Thomas Pinckney (in order to avoid a Pinckney-Adams tie), Thomas Jefferson, a Republican, was able to finish second, ahead of Pinckney, and become Adams's vice president.⁷³

Significantly, the outcome of the 1796 election—where the vice president was not a member of the president's executive team but rather a member of the opposition party—did not stir up any real movement to amend the selection method set forth in Article II. The leaders at the time did not see the original Constitution's selection method's bias in favor of a "split party" White House as a major drawback.⁷⁴ Jefferson himself believed that the vice president would act only as a legislative and not as an executive agent.⁷⁵ Moreover, some who would later unsuccessfully oppose the Twelfth Amendment saw a great deal of virtue in having an intrabranched check within the White House. As Representative James Hillhouse of Connecticut would later urge, the president and vice president should be of different parties "to check and preserve in temper the over-heated

⁷²See Lolabel House, Twelfth Amendment of the Constitution of the United States 20–40 (1901) (unpublished Ph.D. dissertation, University of Pennsylvania).

⁷³*Id.* See also Jules Witcover, *Crapshoot: Rolling the Dice on the Vice Presidency* 5 (1992).

⁷⁴House, *supra* note 72, at 39 (citing draft amendments prepared by Jefferson).

⁷⁵Letter from Thomas Jefferson to James Madison (Jan. 22, 1797), in *The Writings of Thomas Jefferson* 108 (Paul L. Ford ed., 1896).

zeal of party. . . . If we cannot destroy party, we ought to place every check upon it.”⁷⁶

Real interest in constitutional reform would be stirred only after the election of 1800. In that year, the sloughing-off device failed to work, and a tie between the top two Republican candidates, Jefferson and Aaron Burr, resulted in the election being thrown into the House. Federalists, however, controlled the House, and threatened to make Burr president instead of Jefferson—largely to spite Jefferson—even though no Republican wanted Burr to be anything other than vice president. The intractable “inversion” problem—and not the possibility or likelihood of the president and vice president being of opposite teams—is what led to the Twelfth Amendment, the terms of which now require electors to designate separately votes for the president and the vice president.⁷⁷ As Gouverneur Morris from New York wrote in a letter in 1802, the primary “evil . . . in the [original] mode of selection” is the possibility that “at some time or other a person admirably fitted for the office of President might have an equal vote with one totally unqualified, and that, by the predominance of faction in the House of Representatives, the latter might be preferred.”⁷⁸ Indeed, as noted earlier, some political leaders thought the “split” White House tendency of Article II as originally drafted to be its main virtue. These leaders saw the loss of this tendency as a cost to be borne in order to remedy the inversion problem, rather than a benefit to be obtained as a result of the new amendment.

None of this is to say, however, that the Framers of the Twelfth Amendment did not recognize that it would enable one party—one team, if you will—to more easily capture both the presidency and the vice presidency. Clearly they did.⁷⁹ But recognizing the inevitable and being happy about it are entirely different things. So even after the Twelfth Amendment, the extent to which vice presidents should be seen as executive agents of the president, and thus beneficiaries of any executive privilege, would seem quite open.

That the Twelfth Amendment didn’t really clarify and improve the office of the vice president was not surprising. After all, the

⁷⁶House, *supra* note 72, at 50 (quoting Hillhouse’s speech).

⁷⁷*Id.* at 50–51; Witcover, *supra* note 73, at 25.

⁷⁸Witcover, *supra* note 73, at 24 (quoting an 1802 letter from Gouverneur Morris to the president of the New York Senate).

⁷⁹House, *supra* note 72, at 50.

Twelfth Amendment itself focused far more on selection of the president than on the number two slot. Indeed, critics predicted that the amendment would diminish the quality of future vice presidents, who would no longer be major presidential candidates in their own right, but merely second-fiddles to party leaders.⁸⁰ This criticism proved prescient. So long as presidents stayed healthy in office—as did the first eight presidents spanning the Constitution's first half century—the vice presidency received rather little attention.

In fact, for much of American history—around thirty-seven of the Constitution's first 180 years—the country did without a vice president entirely, yet few seemed to notice. The first vacancies occurred in James Madison's presidency, when his first term vice president George Clinton died in 1812 and his second term vice president Elbridge Gerry died in 1814. Under the Philadelphia Constitution, no mechanism existed to fill a vice presidential vacancy—yet another signal of the low status of the office in early America.

At critical moments in American history when presidents died or became disabled, the inattention to the vice presidency in the Founders' Constitution became more visible, and more problematic. In 1841, William Henry Harrison became the first chief executive to die in office, and Vice President John Tyler assumed the reins of power. A nice constitutional question then arose: Was Tyler merely the vice president acting as president, or did he instead actually become president upon Harrison's death?

The relevant constitutional text of Article II, section 1, could be read either way: "In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President . . ." ⁸¹ Did "the Same" mean the office itself, or merely the powers and duties of the office? If the former was the case, an ascending vice president was entitled to the honorific title of "president." (Formal titles mattered a great deal in the old days. George Washington had wanted to be addressed as "His High Mightiness, the President of the United States and Protector of their Liberties," but the First Congress ultimately opted for the less monarchical "Mister President.") ⁸² More important, if an ascending vice

⁸⁰ See, e.g., *supra* note 76 and accompanying text.

⁸¹ U.S. Const. art. II, § 1.

⁸² See Akhil Reed Amar, *America's Constitution: A Guided Tour* (forthcoming 2005).

president indeed became president rather than just assuming presidential powers and duties, he could claim a president's salary, which was both higher than a vice president's, and also immune from congressional tampering under the rules of Article II. In turn, such immunity would enable him to wield the veto pen and other executive powers with greater independence from the legislature than would be the case if he were beholden to Congress for his very bread.

Unsurprisingly, Tyler resolved the constitutional ambiguity in his own favor, claiming that he was indeed the president, and not simply the vice president acting as president.⁸³ Following Tyler, later vice presidents regularly proclaimed themselves presidents upon the deaths of their running mates, with Millard Fillmore replacing Zachary Taylor in 1850 and Andrew Johnson succeeding Abraham Lincoln in 1865.

The Twenty-Fifth Amendment, proposed and ratified after John Kennedy's assassination, fills many of the gaps left open by the Founders.⁸⁴ For starters, the amendment resolves the question John Tyler confronted by making clear that when the president dies or resigns or is removed from office, then—and only then—the vice president does in fact “become President.”⁸⁵ Otherwise, if the president is merely disabled (perhaps only temporarily) from exercising the powers and duties of his office, then the vice president may step in and “assume the powers and duties of the office as Acting President” without prejudice to the president's ability to resume his post if and when he has recovered from his disability.⁸⁶ That, by the way, is exactly what Dick Cheney did a few years back when George Bush was under anesthesia.

The amendment also provides a clearer framework for determining whether the president is in fact disabled, and for how long. This framework specifies the precise roles of the president, the vice president, the cabinet, and the Congress in resolving questions about

⁸³ *Id.*

⁸⁴ U.S. Const. amend. XXV.

⁸⁵ *Id.* § 1: “In the case of the removal of the President from office or of his death or resignation, the Vice President shall become President.”

⁸⁶ *Id.* § 4: “Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.”

possible disability.⁸⁷ In some ways, the vice president is treated in this process as the head of the cabinet for assessing whether the president is disabled. Yet another provision of the amendment allows a president, with congressional approval, to fill a vice presidential vacancy. Through this amendment, Richard Nixon named Gerald Ford to the vice presidency when Spiro Agnew left office in 1973; and Ford in turn appointed Nelson Rockefeller in 1974 when Ford himself became president upon Nixon's resignation.

All these changes brought by the Twenty-Fifth Amendment might have important consequences for the issue of executive privilege. By formalizing succession, by making the vice president part of (and indeed a leader of) the cabinet for purposes of determining presidential disability, and by making clear that the president gets to choose persons to fill vice presidential vacancies—making succession apostolic, if you will—the amendment strongly suggests that, today at least, the vice president is a full member of the president's executive team. This amendment, much more so than the Twelfth, then, formally concretizes an evolving importance of the vice presidency to the executive branch. As a result, it *might* provide a possible basis *today* for a somewhat broad claim of executive privilege on the part of the vice president.

IV. Conclusion

So there was much—concerning the executive privilege and the vice presidency's place within it—that the *Cheney* Court could and should have discussed; the analysis I have presented here has been designed to provoke questions rather than to definitively resolve them.⁸⁸ Less, it is said, is sometimes more. But here, at least, more would have been more, and would have been more helpful for us all.

⁸⁷ See generally *id.* § 4.

⁸⁸ There are other tricky aspects of the *Cheney* dispute that also warrant significant attention. For example, even if vice presidents do today ordinarily partake of executive privilege, what about the fact that the NEDPG was gathering data largely for *legislative* proposals, rather than executive actions? Also, what about the fact that the communications the vice president wants to shield may have involved persons not within the executive branch? In other words, does executive privilege apply with respect to communications between executive officials and persons outside the executive branch, or instead is it limited only to intra-executive communications? Cf. *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). These, and other thorny questions, remain to be resolved on remand.