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Neil Thomas Proto

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THE OPINION CLAUSE AND PRESIDENTIAL DECISION-MAKING

NEIL THOMAS PROTO*

The President's power to act is derived first and foremost from the Constitution. His exercise of that power, when challenged in a judicial rather than a political forum, may provoke a confrontation not only between him and his particular adversary but between the President and the other branches of government. Examples of this confrontation are necessarily rare, for the executive is no less cautious to strain its relations with the other branches than the judiciary is to resolve controversies on constitutional grounds when a "legal ground of less explosive potentialities is properly available."[1] The infrequency of such a confrontation, however, only dramatizes its significance; and regardless of the ultimate judicial resolution, an inquiry into the scope and nature of the power claimed by the President is essential for historical as well as legal purposes.

The purpose of this article is to inquire into the meaning of article II, section 2, clause 1 of the Constitution. This provision, referred to here as the "Opinion Clause," provides:

> The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective offices. . . .

It is, however, an inquiry undertaken in light of some important considerations which must be set forth at the outset.

The meaning of the Opinion Clause is relatively obscure. Indeed, although the Constitution has been the subject of interpretation for almost 200 years, there is an absence of dispositive judicial guidance. Certainly

* Attorney, Appellate Section, Land and Natural Resources Division, United States Department of Justice; M.A., 1969, School of Public and International Affairs, George Washington University; J.D., 1972, George Washington University.

The views expressed in this article are exclusively those of the author and do not necessarily reflect those of the Department of Justice.

1. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring).

Justice Jackson's reflection in *Youngstown Sheet & Tube Co. v. Sawyer*[2] is equally applicable to the inquiry undertaken here:

> A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question.[3]

This absence of judicial guidance requires, of course, that one look first to the Framers of the Constitution and their deliberations in Philadelphia in the Summer and Fall of 1787.[4] Fortunately, this task is, in one sense, somewhat less difficult than that confronting attorneys immediately after the Constitutional Convention. Since the founding of the Republic, legal commentators have fully explored the Constitution's provisions and have compiled and analyzed the writings and thoughts of the various notables of the times. But the Framers, no less than members of other more contemporary deliberative bodies, did not always reveal their intentions with absolute clarity. Consequently, a review of the Philadelphia debates provides only a foundation for further inquiry into the meaning of the Opinion Clause.

The absence of judicial guidance also presents another analytical dilemma: how to evaluate the political dimension of the decision-making process. A review of the debates at Philadelphia surrounding the inclusion of the Opinion Clause in the Constitution indicates the Framers were acutely sensitive to the distribution of power among the three branches of government and the significance of having a chief executive with a national rather than a regional constituency.[5] Moreover, the Presidency has, from the outset, been a "political" office. The President is always the titular, if not the real, head of his political party, and he is elected, in part, because of some professed philosophical or "political" perception of what he thinks ought to be done.

Additionally, the task of now assessing the meaning of the Opinion Clause occurs subsequent to numerous social and technological changes and in the context of notions concerning good government and sound social policy that are very different from those confronting the nation in its formative years. In attempting, therefore, to understand both the meaning of the Opinion Clause and the manner of its application to a particular

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2. 343 U.S. 579 (1952).
3. *Id.* at 634.
4. *See* J. ELLIOT, DEBATES ON THE FEDERALIST CONSTITUTION (2d ed. 1836); J. MADSION, DEBATES TO THE FEDERALIST CONVENTION (Int'l ed. 1920).
5. *See, e.g.*, J. MADISON, *supra* note 4, at 50 (Debates of June 2, 1787), 527 (Debates of September 7, 1787).

array of facts, it should be kept in mind that the tapestry of government is woven from both law and politics. This is particularly true when the decision-making process is activated at the request of the President of the United States.

In *North Dakota v. Andrus*,[6] the State of North Dakota sought to enjoin the transmission of a report prepared by the President's Water Resources Council to the President until an Environmental Impact Statement was prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969.[7] The Justice Department—on behalf of the President, the Director of the Office of Management and Budget (OMB), the Secretary of the Interior and the Chairman of the Council on Environmental Quality (CEQ)—contended that when the President requests an opinion in writing from his close advisers preliminary to making a presidential decision on federal water policy, that process cannot be interfered with or in any manner conditioned by either the legislative or judicial branches of government. It is protected fully by the Opinion Clause of the Constitution. Although the controversy was ultimately disposed of on other grounds, the facts and arguments presented in *North Dakota v. Andrus* provide a convenient framework for examining this provision of the Constitution.

With these considerations in mind, this article will: (1) review the facts and legal arguments presented in *North Dakota v. Andrus*, with particular reference to the Justice Department's explanation of the Opinion Clause and the manner in which the district court and court of appeals disposed of it; (2) examine the history of the Opinion Clause's inclusion in the Constitution in order to assess the Framer's intentions; (3) examine the political, administrative and legal notions behind the argument that the President's right to acquire information and advice in the course of executive decision-making is protected by the Opinion Clause; and (4) identify the possible limitations on the power and the protection the clause may provide the presidential decision-making process.

I. *NORTH DAKOTA V. ANDRUS*

In 1977 President Carter requested his Water Resources Council to prepare a report on future water resource policy matters for his consideration and study. After the Council began preparing the report without also preparing an Environmental Impact Statement (EIS), as required by section 102(2)(C) of the National Environmental Policy Act of 1969,[8] North Dakota filed suit to enjoin the report's transmission to the President until an EIS was prepared.

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6. 11 ENVIR. REP. (BNA) 1543 (D.N.D. March 10, 1978), *rev'd*, No. 78-1194 (8th Cir. March 21, 1978), stay denied by Justice Blackmun (March 23, 1978).

7. 42 U.S.C. § 4332(c) (1970).

8. *Id.*

The federal defendants first moved to dismiss the President as a party. This motion was granted by the district court. On behalf of the remaining defendants, the Government filed a motion to dismiss the complaint "for the reason that the court lacks jurisdiction to condition communications requested by the President from his closest advisors."[9] In its memorandum in support of the motion the Government contended that under the Opinion Clause the three officials preparing the report at the President's request were protected from the statutory requirement that an Environmental Impact Statement be prepared.

> At the heart of this case is an effort by the State of North Dakota to impose conditions on the uninhibited flow of information and advice between the President and his closest advisors and cabinet members when the President has requested such advice. However, both the drafters of the U.S. Constitution and the federal courts have recognized that neither Congress nor the courts can impose conditions on the President's right to such advice.
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> . . . .
>
> In a short list of enumerated Presidential powers, Article II, Section 2, Clause 1, the "Opinion Clause," provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices. . . ." The integrity of this prerogative is necessary for the effective functioning and independence of the Executive Branch.[10]

The district court denied the Government's motion to dismiss and granted injunctive relief in favor of North Dakota.[11] In doing so, the court characterized the President's proposal for policy reform—and implicitly his request for an "opinion in writing"—as a "proposal for major federal action significantly affecting the quality of the human environment."[12] Furthermore, the court characterized the response of the three federal officials to the President's request as "a recommendation or report on proposals for a major federal action significantly affecting the quality of the human environment." Consequently, the court concluded, an Environmental Impact Statement would have to be prepared and properly circulated prior to the report's submission to the President. However, the court's order did not rest on "legal" matters alone. It was also keenly aware of the "nonlegal" factors underlying the state's lawsuit. Following the oral argument on the motion to dismiss, the court stated:

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9. Memorandum in Support of Defendant's Motion to Dismiss, North Dakota v. Andrus, 11 ENVIR. REP. (BNA) 1543 (D.N.D. March 10, 1978), *rev'd*, No. 78-1194 (8th Cir. March 21, 1978), stay denied by Justice Blackmun (March 23, 1977).

10. *Id.* at 2-3.

11. 11 ENVIR. REP. (BNA) 1543 (D.N.D. March 10, 1978), *rev'd*, No. 78-1194 (8th Cir. March 21, 1978), stay denied by Justice Blackmun (March 23, 1977).

12. *Id.* at 1544.

> I, of course, have known the upper central states. I can remember from the time that Fort Peck was being considered, the dreams of the people . . . . [W]hen I consider the catastrophe that is being visited on the inland states by the failure of the Secretary of the Interior to give consideration to the impact of what is developing, I feel that there must be some remedy in the law, and the first step, of course, is information, and the environmental impact provision of the law would allow of that—the gathering of that information. I do not feel that it is fair to those who must bear the brunt of these changes that they shall not be allowed to be heard until such time as the President has made his final decision.[13]

The result of the district court's order was to preclude the President from reviewing the report *he* had requested until after the public, the Congress and the judiciary had reviewed it. This indeed was a constitutionally anamolous result. The district court certified the constitutional question pursuant to 28 U.S.C. section 1292(b), and the Government appealed.

On appeal, the Government again urged that the court lacked jurisdiction under the Constitution because the precise activity involved in the case was protected by the Opinion Clause.[14] In addition, it argued that the advisory and tentative nature of the report, and the fact that it would not be accompanied by any concrete instruments of implementation (such as proposed Executive Orders, draft legislation, or proposed amendments to agency rules and regulations) indicated that the policy review process was still in the "germination" stage. Consequently, an Environmental Impact Statement was not yet required.[15]

The Eighth Circuit Court of Appeals avoided the constitutional question raised in the Government's brief and decided the case on statutory grounds.[16] The court of appeals vacated the injunction on two grounds,

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13. Transcript of Hearing 42-43 (March 7, 1978), North Dakota v. Andrus, 11 ENVIR. REP. (BNA) 1543 (D.N.D. March 10, 1978), *rev'd*, No. 78-1194 (8th Cir. March 21, 1978), stay denied by Justice Blackmun (March 23, 1977).

14. The Government was cautious to add the following qualification:

> This Court does, of course, have the authority to determine whether the Executive's claim to a form of constitutionally protected activity is in fact provided for expressly or impliedly in the Constitution. Marbury v. Madison, 1 Cranch 137, 177 (1803); Baker v. Carr, 369 U.S. 186, 211 (1962). We do not claim independence from that kind of judicial review. *Cf.* United States v. Nixon, 418 U.S. 683, 703 (1974).

Brief for Appellants at 13-14, North Dakota v. Andrus, No. 78-1194 (8th Cir. March 21, 1978), stay denied by Justice Blackmun (March 23, 1978).

15. *Id.* at 25-32. The Government made clear, however, that "should a decision ultimately be made that the Secretary of Interior should formulate and propose legislation to Congress, an EIS would be prepared for the use of Congress as it considers the bill, provided, of course, that the bill would have a significant effect on the quality of the human environment." *Id.* at 26-27.

16. In declining to resolve the constitutional question the court followed the maxim that a constitutional determination should be avoided if a statutory one

having concluded that: (1) under the circumstances an EIS was not required in light of *Kleppe v. Sierra Club*,[17] and (2) the State of North Dakota had failed to show irreparable harm. Having decided the case on the basis of these findings the court deemed it unnecessary to reach the constitutional issue raised by the Government.[18] On March 23, 1978, Mr. Justice Blackmun denied North Dakota's application for a stay of the court of appeals mandate. The President now has the Report on Federal Water Policy he requested.

The manner in which the district court and court of appeals disposed of the controversy in *North Dakota v. Andrus* avoided direct confrontation with the meaning of the Opinion Clause urged by the Government. It was to no avail that the Government sought to interpose the Opinion Clause as a jurisdictional bar that must be examined prior to any assessment of the merits. The court of appeals made it clear that it had transposed the Government's *jurisdictional* constitutional contention into the more traditional constitutional mold (*i.e.*, the constitutional question should be reached only after the statutory question is resolved). The result is that the Opinion Clause remains largely unexplored by the judicial branch.

This article turns now to an inquiry into the meaning of the Opinion Clause, drawing, in part, upon the Government's argument in *North Dakota v. Andrus*, the experience of those responsible for the inclusion of the Opinion Clause in the Constitution, and the experience of writers and practitioners in law and government.

II. THE CONSTITUTIONAL CONVENTION

The Framers entered the city of Philadelphia with a variety of thoughts and notions concerning the structure of the federal government. None was

will suffice. *See generally* Rescue Army v. Municipal Court, 331 U.S. 549, 568-69 (1947). This traditional admonition is not without its critics. As Judge Friendly points out, this technique of statutory interpretation is unlikely to reflect congressional intent:

> It does not seem in any way obvious, as a matter of interpretation, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them. . . .
>
> Although questioning the doctrine of construction to avoid constitutional doubts is rather like challenging Holy Writ, the rule has always seemed to me to have almost as many dangers as advantages. . . . [I]t is one of those rules that courts apply when they want and conveniently forget when they don't—some, perhaps, would consider that to be a virtue. . . . [T]he rule of "construing" to avoid constitutional doubts should, in my view, be confined to cases where the doubt is exceedingly real. Otherwise this rule, whether it be denominated one of statutory interpretation or, more accurately, of constitutional adjudication—still more accurately, of constitutional nonadjudication—is likely to become one of evisceration and tergiversation.

H. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, BENCHMARKS 210-12 (1976).

17. 426 U.S. 390 (1976).

18. The court of appeals order was not reported.

more profound or perhaps more widely discussed than the concept usually attributed to the French nobleman and philosopher Montesquieu; namely, the separation of government into three branches—the executive, the legislature, and the judiciary.[19]

The separation of powers concept provides the essential political underpinning of the Constitution. By distributing the power of government among three branches, each with assigned functions, the Framers sought to avoid the disruptive consequence of concentrating it in one branch. The effective functioning of this form of governance requires that each separate "department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments."[20]

Yet, the "separateness" was never intended to be absolute. In designing our system of government, the Framers also intended that "checks and balances" be placed upon the exercise of power by each branch. As Mr. Justice Story explained:

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19. C. MONTESQUIEU, ON THE SPIRIT OF LAWS (1748). *See generally* 9 W. DURANT & A. DURANT, THE STORY OF CIVILIZATION 347-60 (1965), for an informative discussion of the origins of Montesquieu's ideas and the reaction to his SPIRIT OF LAWS.

While Montesquieu's notion concerning the tripartite separation of government provided the theoretical foundation for the Framers' discussions, Buckley v. Valeo, 424 U.S. 1, 120-21 (1976), it was largely the English and colonial experience that provided the *raison d'etre* for distributing the powers and duties of government among the three branches. As will be discussed below, the Framers relied explicitly on this experience during discussions at Philadelphia. *See also* Myers v. United States, 272 U.S. 52, 90-91, 100 (1926).

20. O'Donoghue v. United States, 289 U.S. 516, 530 (1933). *See also* Buckley v. Valeo, 424 U.S. 1, 120-24 (1976); United States v. Nixon, 418 U.S. 683 (1974); Hampton & Co. v. United States, 276 U.S. 394 (1928). In THE FEDERALIST No. 47, James Madison summarized the essential meaning of Montesquieu's concept:

> The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to execute them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be the *legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.

THE FEDERALIST No. 47 (J. Madison) at 338-39 (B. Wright ed. 1962).

> [W]hen we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree.[21]

It was within this general framework of a tripartite system of government that the Framers turned their attention to the powers of the executive.[22]

The decision to place the responsibility of the executive branch in a single person—the President—was not lightly made by the Framers. While some delegates may have contemplated, and even suggested, a "committee" executive,[23] the more serious proposals concerned the establishment of a "council" with authority commensurate with that of the President. This proposed system was, in part, based on the experience of various colonial governments, which used a Governor and Executive Council,[24] and the governments established subsequent to the revolution.[25] It reflected the concern of the Framers that in a republican form of government no one person should have the authority of a monarch.[26]

These proposals did not reach fruition. An executive consisting of a single person was finally established by the Constitutional Convention on July 26, 1787.[27] But the notion of formally designating more than one person as constituting the executive was the focus of considerable attention both before and after that date. Moreover, and of particular importance to this inquiry, efforts were made to define the relationship among these persons and to place separately formal responsibility in each for the operation of the executive's duties.

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21. Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 442 n.5 (1977) (*quoting* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION, 525 (5th ed. 1905)).

22. *See* Buckley v. Valeo, 424 U.S. 1, 124 (1976).

23. In many of the early colonial charters, particularly those for the northeastern states, committees of three, five, or seven persons were selected by "general consent" to govern the town. *See* W. KAVENAGH, FOUNDATIONS OF COLONIAL AMERICA 603 (1973).

24. E. GREEN, THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA 72-90 (1966).

25. In THE FEDERALIST No. 70, Hamilton notes that only New York and New Jersey, among the various states, had entrusted the executive authority to only one person. THE FEDERALIST No. 70 (A. Hamilton) at 452 (B. Wright ed. 1962).

26. *See* L. CALDWELL, THE ADMINISTRATIVE THEORIES OF HAMILTON AND JEFFERSON, THEIR CONTRIBUTION TO THOUGHT ON PUBLIC ADMINISTRATION 25, 151 (1944). This work relies heavily on the writings and correspondence of Hamilton and Jefferson. *See also* 1 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 379 (Luther Martin's Letter) (2d ed. 1836). Similar views are contained in THE FEDERALIST No. 70 (A. Hamilton).

27. J. ELLIOT, *supra* note 26, at 219 (Debates of July 26, 1787).

On June 2, 1787, Messrs. Rutledge and Pinkney of South Carolina moved the convention to specify "one person" as the executive.[28] Mr. Randolph of Virginia opposed a one person executive "with great earnestness" beause "the permanent temper of the people was adverse to the very semblance of Monarchy."[29] Messrs. Rutledge and Pinkney of South Carolina disagreed. They suggested that the reasons in favor of one person were "obvious and conclusive."[30] They received the support of Mr. Butler of South Carolina who "contended strongly for a single magistrate."[31]

The debate continued with apparent intensity on June 4, 1787, as the convention, sitting as a Committee of the Whole, resumed consideration of the Rutledge-Pinkney motion. Mr. Wilson of Pennsylvania, who supported the notion of a single executive, expressed his concern that "tranquility not less than vigor of the Gov[ernment] . . . would be favored by it."[32] He explained his concern to the convention:

> Among three equal members, he foresaw nothing but uncontrolled, continued, [and] violent animosities; which would . . . only interrupt the public administration. . . . If equal, the making them an odd number would not be a remedy. In Courts of Justice there are two sides only to a question. In the Legislative [and] Executive depart[ments] questions have commonly many sides. Each member therefore might espouse a separate one [and] no two agree.[33]

Mr. Sherman of Connecticut agreed but reminded Mr. Wilson "that in all states there was a Council of advice, without which the first magistrate could not act."[34] Wilson made clear, however, that he did not advocate the inclusion of a council, "which," he said, "oftener serves to cover, than prevent malpractices."[35] The proposal for a single executive was approved.[36]

On August 20, 1787, a proposition was made to establish a "council of State" in order to "assist the President in conducting public affairs."[37] This

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28. *See* J. MADISON, *supra* note 4, at 48 (Debates of June 2, 1787).
29. *Id.* at 49.
30. *Id.* at 48.
31. *Id.* at 49. Mr. Butler thought that one person would most likely "answer the purpose of the remote parts" of the country. He stated that if "one man should be appointed he would be responsible to the whole, and would be impartial to its interests. If three or more should be taken from as many districts, there would be a constant struggle for local advantages." Paradoxically, this concern for the "purpose of the remote parts" is not unlike the district court's concern in North Dakota v. Andrus for the "catastrophe that is being visited on the inland states" by the actions of the executive sitting in Washington. While Butler was confident a single magistrate would protect the "remote parts," the district court in *Andrus* seemed less confident. 11 ENVIR. REP. (BNA) at 1544.
32. J. MADISON, *supra* note 28, at 50.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 51.
37. J. ELLIOT, *supra* note 26, at 250 (Debates of August 20, 1787).

council was to be composed of the Secretaries of Domestic Affairs, Commerce and Finance, Foreign Affairs, War, Marine, State and the Chief Justice of the Supreme Court. It was contemplated that:

> [The] President may, from time to time, submit any matter to the discussion of the council of state; and he may require the written opinions of any one or more of the members; but he shall in all cases, exercise his own judgment, and either conform to such opinions, or not, as he may think proper. And every officer above mentioned shall be responsible for his opinion on the affairs relating to his particular department.[38]

Effectively, this would have made the President and his advisers independently accountable for such opinions, even though the President was not required to conform to those opinions. Thus, while supporting a single executive, the Framers had not yet reached the point of reposing sole accountability in the President for opinions and advice.

This proposal for a council of state was then modified by a special committee of the convention, and in its place a "Privy Council" was suggested "whose duty it shall be to advise [the President] in matters respecting the execution of his office, which he shall think proper to lay before them; but their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt."[39] Mr. Mason of Virginia supported this proposal.[40] He suggested that the Privy Council to the President be composed of six members, "two out of the Eastern, two out of the middle, and two out of the Southern quarters of the Union . . . ."[41] This proposal also failed. The convention's delegates rejected the proposition that the President's accountability be shared, and his relationship with the other officers in his department be defined by constitutional mandate. Instead, the convention decided on the language that presently constitutes the Opinion Clause: "[The President] may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices."[42]

Ultimately, what emerged from the convention was the notion that the President has singular and ultimate accountability for his own decisions, and that he would have the power, prior to making any formal proposals, to request the opinions in writing of his closest advisers in a manner that would best assist him in the execution of his duties. More importantly, the convention rejected proposals: (1) to designate the Chief Justice of the judicial branch as an ex officio member of the President's advisory body; (2) to require the President to have a particular institutional arrangement for gathering advice; and (3) to make the President's advisers independ-

38. *Id.* at 251 (Debates of August 20, 1787) (emphasis added).
39. *Id.* at 257 (Debates of August 22, 1787).
40. J. MADISON, *supra* note 28, at 527 (Debates of September 7, 1787).
41. *Id.*
42. J. ELLIOT, *supra* note 26, at 293 (Debates of September 7, 1787).

ently responsible for their respective opinions. The juxtaposition of the power the President was granted and the restrictions on that power which were rejected suggests that the Framers expressly granted the President a discrete sphere of *control* over the *process* by which he gathers the information necessary to make a decision; a process that—within the context of the separation of powers—cannot be interfered with by the other two branches of government.

But this assessment of what emerged from the convention, while instructive, does not, standing alone, provide a sufficient rationale for the meaning of the Opinion Clause suggested by the Government in *North Dakota v. Andrus*. In order to add the necessary clarity it is essential to examine some of the political, administrative and legal notions related to the "need . . . of any single Chief Executive to . . . draw upon the advice of others in exercising his political power [and] as an aid to intelligent and informed decision-making."[43] These notions, some of which were reflected in the debates in Philadelphia, demonstrate the importance, as a constitutional matter, of permitting the President to exercise his power to "require the opinion in writing" of his closest advisers without the imposition of judicial or legislative restraints.

III. NOTIONS OF POLITICS

There are two general, albeit related, notions which underlie the constitutional protection the Opinion Clause provides the President. These are: (1) the importance of assuring that matters of politics are integrated fully into the decision-making process; and (2) that the President be permitted to acquire the information and advice necessary to control and direct the actions of the executive branch, including the execution of the laws. These two notions are, in their effect on the quality of government, opposite sides of the same coin. This section will address only the notion of politics. The following section will address the notions of control and direction.

The President is a political person. He is nominated for office by a political party, however divergent its views, and he campaigns on the party's platform and on his own. In order to govern, the President must be conscious of his popularity and the relationship between his decisions and their effect on the constituencies that lent him support or whose support he seeks. At times, the President is obligated to make "political" judgments that are in the interest of the nation or a discrete segment of it; judgments that neither please his supporters nor gain him additional ones. These decisions and judgments are tempered by a variety of factors which the President must weigh and balance and which necessarily affect his assessment of what constitutes the "public interest" at a particular moment and in a particular context.

43. R. FENNO, JR., THE PRESIDENT'S CABINET 9 (1959).

As a matter of law, and certainly of politics, the President is required to make the actual decisions and to remain accountable for the consequences. However, the *process* of making the decision—gathering the facts, defining the problem, assessing the consequences, identifying alternatives—has always involved the use of Presidential advisers.[44] In this regard, Presidents since George Washington have gathered around them persons of wisdom, knowledgeable in the affairs of government or in matters of politics, whom they trust and may consult regularly and in confidence.[45] They may be cabinet officials,[46] special assistants, or some combination of persons brought together only for a special purpose[47] or as part of an ongoing institutional arrangement. Most importantly, however, is that "[f]rom the outset all [advisers and] heads of departments stood in quasi-political relation to the President."[48] Chief Justice Marshall, who had been Secretary of State and chief adviser to President Adams, acknowledged fully the "intimate political relation, subsisting between the President . . . and the heads of departments";[49] an appreciation that was also shared by Chief Justice Taft, himself a former chief executive, more than a hundred years later in *Myers v. United States*.[50] "[T]oday this relationship has become the dominant characteristic of the offices concerned."[51]

This political dimension of the decision-making process is a critical part of the President's request to his advisers for opinions and the timeliness and candor of their response. Both the President and his advisers must not only be able to assess fully the political consequences of their possible actions, but must also be receptive to the opinions and attitudes of those

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44. The Opinion Clause provides a modicum of protection to a *process* which occurs within the presidential office and not to a particular *institutional* arrangement (*e.g.*, President-Secretary of State, President-National Security Advisor). The fact that presidents have chosen a variety of mechanisms for institutionalizing the opinion-gathering process only substantiates the importance of focusing on the manner in which the opinion is requested and received rather than on the structural relationship between the President and his adviser.

45. *See generally* T. SORENSEN, DECISION MAKING IN THE WHITE HOUSE, THE OLIVE BRANCH OR THE ARROWS 57-77 (1963); R. NEUSTADT, PRESIDENTIAL POWER, THE POLITICS OF LEADERSHIP 152-80 (1960).

46. *See* R. FENNO, JR., *supra* note 43, at 9-50.

47. President Kennedy, for example, often relied upon a "task force" composed of individuals from divergent segments of the White House staff or from within the executive branch generally, rather than existing institutional arrangements. These groups would often disband after serving their purpose, or they might continue and expand in number. *See, e.g.*, R. HILSMAN, TO MOVE A NATION 27, 38 (1967); R. KENNEDY, THIRTEEN DAYS, A MEMOIR OF THE CUBAN MISSILE CRISIS 30-31 (1969).

48. Corwin, *Tenure of Office and the Removal Power*, 27 COLUM. L. REV. 353, 393 (1927).

49. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169 (1803).

50. 272 U.S. 52 (1926).

51. Corwin, *supra* note 48, at 393.

who look *uniquely to the President* to consider their interests. Moreover, the President must be free to consider the often subtle relationship between and among seemingly unrelated actions, and to bring *his own* political judgment to bear upon the determination of government policy. For this political process to operate fully—as it must if the President is to fulfill his constitutional obligations—the process of requesting opinions and advice should not be encumbered or conditioned by the other branches of government. To permit such interference would largely alter the balance of power. The President would not merely be subjected to a presumed commonality of interest with the judiciary and Congress but, in fact, would be wholly precluded from competing with the perceptions and values those branches reflect. The process of decision-making in the White House would become ineffectual, and the President and his advisers could no longer be held politically accountable for their decisions.

It is worth reiterating at this juncture that the Opinion Clause protects the freedom of the President to gather information prior to making a decision. It does not protect the actual implementation of the decision. As the Justice Department's reply brief stated in *North Dakota v. Andrus*:

> [The Framers] placed sole accountability in the President, and permitted him the prerogative to request opinions in writing, on matters political and governmental in nature, from his advisors concerning the most appropriate way to fulfill his own duties. This prerogative, only when exercised in the narrow confines of the "Opinion Clause," is protected from encumbrance by the Congress or this Court. Once the opinion is received and assessed by the President, any proposal (i.e., legislation, regulations) made by a subordinate, pursuant to a decision by the President, is fully subject to the imposition of conditions by the Congress and this Court.[52]

Thus, the notion of politics provides a rationale only for a limited sphere of unconditioned presidential decision-making. In his *Handbook on American Constitutional Law*, Henry Black recognized this distinction between seeking opinions and making a concrete proposal subsequent to a decision.[53] He noted that the President has often requested written opinions from his advisers, "not merely upon subjects relating to the duties of their several departments, but upon all questions of administrative policy, both domestic and foreign."[54] Once this process is completed, however, the actions of the President and his advisers assume a different posture:

> [W]hile the heads of the executive departments are under the direction and control of the President in respect to such duties as

52. Reply Brief for Appellant 6-7, North Dakota v. Andrus, No. 78-1194 (8th Cir. March 21, 1978), stay denied by Justice Blackmun (March 23, 1978) (footnotes omitted).

53. H. BLACK, HANDBOOK ON AMERICAN CONSTITUTIONAL LAW (3d ed. 1910).

54. *Id.* at 118.

> involve political action and the exercise of judgment and discretion, and cannot be controlled or coerced by congress or the courts, this principle must not be carried so far as to make them amenable only to the orders of the President in respect to the execution of specific duties imposed upon them by law. From the performance of such duties the President could not relieve them.[55]

In this regard, Black's commentary reflects a similar distinction made by Justice Marshall in *Marbury v. Madison*.[56] In *Marbury*, the Court fully acknowledged the narrow sphere of the President's activity in "the exercise of which he is to use his own discretion," with the aid of his advisers "who act by his authority, and in conformity with his orders."[57] However, this narrow sphere of constitutionally protected activity represented for Marshall only the *first phase* on the continuum of the decision-making process. He continued his analysis by stating that "when the legislature proceeds to impose on that [presidential adviser] other duties," those duties must be executed.[58] Marshall's conclusion from analyzing these two segments of the decision-making process is particularly important here. He recognized the restraint imposed upon the judiciary when reviewing the President's exercise of political power in the *first phase* of the decision-making process:

> By the Constitution of the United States, the President is vested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.
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> . . . [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a *constitutional or legal discretion*, nothing can be more perfectly clear then that their acts are only politically examinable.[59]

The "constitutional . . . discretion" involved here is that embodied in the Opinion Clause. It provides the decision-making process and its participants with the protection necessary to exercise their political judgment. Without that protection, the political processes of government, the President's ability to exercise his discretion, and the legitimacy of holding the President politically accountable for his actions, would suffer incalculable harm.

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55. *Id.* at 120 (emphasis added).
56. 5 U.S. (1 Cranch) 137 (1803).
57. *Id.* at 165.
58. *Id.*
59. *Id.* at 165-66 (emphasis added).

IV. NOTIONS OF CONTROL AND DIRECTION

The second notion underlying the constitutional protection the Opinion Clause provides the President is that the President must be permitted to acquire the information and advice necessary to control and direct the actions of the executive branch, including the execution of the laws. In this context, the Opinion Clause not only provides *protection* for the acquisition of such information and advice but also provides the President with the *affirmative* power to acquire it.

The President's control over the energy and resources of the executive branch is not to be assumed. While agencies and departments comprise a single structure, "where presidential word is law, or ought to be,"[60] the control of the vast machinery and processes of the executive branch has often eluded the chief executive. In his study of presidential power, Richard Neustadt explains why:

> Like our governmental structure as a whole, the executive establishment consists of separated institutions sharing powers. The President heads one of these; Cabinet officers, agency administrators, and military commanders head others. Below the department level, virtually independent bureau chiefs head many more. Under midcentury conditions, Federal operations spill across dividing lines on organization charts; almost every policy entangles many agencies; almost every program calls for interagency collaboration. Everything somehow involves the President. But operating agencies owe their existence least of all to one another and only in some part to him. Each has a separate statutory base; each has its statutes to administer; each deals with a different set of subcommittees at the Capitol. Each has its own peculiar set of clients, friends, and enemies outside the formal government. Each has a different set of specialized careerists inside its own bailiwick. Our Constitution gives the President the "take-care" clause and the appointive power. Our statutes give him central budgeting and a degree of personnel control. All agency administrators are responsible to him. But they *also* are responsible to Congress, to their clients, to their staffs, and to themselves. In short, they have five masters. Only after all of those do they owe loyalty to each other.[61]

Neustadt's study dealt with presidential power; its source and how to use it. It is clear, however, that the President's exercise of this power competes with the exercise of power by others both within and without the executive branch. In this context, Neustadt identified two of the constitutional powers available for the President's use in his effort to both compete with the other branches and to gain the mastery of his own—the "take-

60. R. NEUSTADT, *supra* note 45, at 39.
61. *Id.*

care" clause[62] and the appointment power.[63] Each of these powers, properly used, provides a means for leverage within the executive branch which the President may utilize to control and direct the actions of his administration. James A. Fairlie, in his study on presidential administration,[64] characterized the importance of these powers to the operation of government:

> Not only does the President exercise much influence over the personnel of the administration through his powers of nomination and removal, but he can also control and direct in large degree, the actions of the administrative officials. The constitutional provisions which authorize this power are those vesting the executive power in the President, and requiring him to take care that the laws are faithfully executed. But the principal means by which the President can make his control effective is the power of removal, the possibility of which will usually secure obedience to his orders, while if any official persists in disobedience his removal permits the appointment of some one who will carry out the President's wishes.[65]

It is not likely, of course, that during the Philadelphia convention the Framers focused with specificity on such notions as control and direction, although it is reasonable to presume that by vesting the obligation to execute the laws in one person the Framers intended to give the President the administrative powers necessary to fulfill his obligation. Moreover, while the Constitution does not, by its own terms, establish any departments or agencies within the executive branch, many of the Framers were members of the first Congress which, in 1789, established the Departments of Foreign Affairs,[66] War,[67] Treasury,[68] the Post Office,[69] and the Attorney General.[70] In a review of the statutes establishing these departments, in the general context of examining the relation of the President to the executive departments, Attorney General Caleb Cushing identified certain of the constitutional tools given the President to supervise and direct their actions. Not surprisingly, these tools included, *inter alia*, the power contained in the Opinion Clause:

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62. The President "shall take care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

63. The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States." U.S. CONST. art. II, § 2, cl. 2. The President's power to appoint and remove officers within the executive is the subject of United States v. Myers, 272 U.S. 52 (1926).

64. J. FAIRLIE, NATIONAL ADMINISTRATION OF THE UNITED STATES (1905).

65. *Id.* at 16.

66. Ch. 4, §§ 1-4, 1 Stat. 28 (1789).

67. Ch. 7, §§ 1-4, 1 Stat. 49 (1789).

68. Ch. 12, §§ 1-8, 1 Stat. 65 (1789).

69. Ch. 16, §§ 1-2, 1 Stat. 70 (1789).

70. Ch. 20, § 35, 1 Stat. 93 (1789).

> Now, by the explicit and emphatic language of the Constitution, *the executive power* is vested in the President of the United States, [who has] the duty of general direction and supervision. . . . [T]he Constitution provides for the subdivision of the executive powers, vested in the President, among administrative departments, using that term now in its narrower and ordinary sense. What those "executive departments" shall be, either in number or functions, the Constitution does not say, any further than to determine that certain appointments may be made by their "heads," respectively, and that the President may require in writing the advice of any such "head" or "principal officer in each of the Executive departments," for which reason those officers are sometimes characterized, and not improperly, as "constitutional advisers" of the President.[71]

The role of these "constitutional advisers" is essential, in Cushing's words, "when the President, in regard to some line of public policy to be adopted by him, or some general or superior direction, demands the written advice of the Heads of Department."[72] It thus becomes apparent that the Opinion Clause—like the "take care" and appointment power—provides the President with a potentially important tool for controlling and directing the energy and resources of the executive branch. Through its use, the President is able to assess the attitudes and perceptions of his advisers and, through them, the various heads of the subordinate bureaus. Moreover, in addition to its substantive content, a written expression of opinion enables the President to discern differences in agency positions or potential internal disagreements which may disrupt or impede his ability to fashion a coherent executive branch policy. Finally, the use of written opinions permits the President to assess what is acceptable within the vast machinery of government, and to determine whether his policy—no matter how coherent or politically necessary—will be effectively executed by those responsible. In this context the Opinion Clause is an affirmative power, to be relied upon by the President in gathering the information on matters of substance *and* process necessary to control and direct the energy and resources of the executive branch.

The question remains, however, whether the exercise of this affirmative power can be conditioned or encumbered by the other branches of government. Generally, the answer must be no. The President alone is constitutionally responsible for administering the executive branch and faithfully executing the laws of the nation. In performing these duties the President must be able to compete with the other branches of government, which are—as Neustadt suggests—already able to substantially influence the content and direction of executive policy beyond their own theoretical constitutional limits. The intrusion of the other branches into the adminis-

71. 7 OP. ATT'Y GEN. 453, 460 (1855).
72. *Id.* at 478.

tration of the executive must be minimized if the proper separation among the branches is to be maintained and the President permitted to consider freely the appropriate manner for fulfilling his own constitutional obligations. Thus, the Opinion Clause provides an essential mechanism for preserving the constitutionally prescribed separation.

As indicated at the outset of this article, there is little judicial guidance which focuses directly on the meaning of the Opinion Clause. It is essential, therefore, to be cautious about the weight attributed to matters of politics and administration when undertaking an inquiry into the "legal" meaning of a constitutional power. There are, however, certain notions of law which add credence to the political and administrative matters discussed thus far.

V. NOTIONS OF LAW

Judicial assessments of various executive powers provide "logical" support for the meaning of the Opinion Clause suggested in this article. These powers are the President's obligations to "take Care that the Laws be faithfully executed," his control over appointments, and the judicial protection accorded executive communications.

In *Myers v. United States*[73] the Supreme Court considered whether the President has, under the Constitution, the exclusive power to remove executive officers of the United States whom he has appointed by and with the consent of the Senate. Congress had directed that "Postmasters . . . shall be appointed and may be removed by the President by and with the advice and consent of the Senate."[74] Myers, a Postmaster, was removed at the direction of the President without the Senate's consent. In a lengthy opinion, Chief Justice Taft held that the President did have power to remove postmasters without the Senate's consent. The Chief Justice analyzed the President's power to execute the laws and to appoint officers in the context of the constitutional separation of power among the three branches of government and concluded that the removal power was essential to the President's effective exercise of his constitutional and statutory duties.

> The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. This field is a very large one. It is sometimes described as political.
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> In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in direc-

73. 272 U.S. 52 (1926).

74. *Id.* at 107.

> ting the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence in the intelligence, ability, judgment or loyalty of any one of them, he must have the power to remove him without delay. *To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action.*[75]

The purpose of the Opinion Clause is premised on the same practical and constitutional considerations. The President must be able to request opinions from his closest advisers and receive them without Congress imposing conditions on either the President's request or the timely transmission of the opinion.

The judicial determinations that, under certain circumstances, executive communications can be protected from disclosure are also instructive. These determinations arise pursuant to requests under rules of procedure and claims of privilege which are derived, in part, from the common law as well as the Constitution.[76] However, the rationale supporting the need for protection is, in part, that certain aspects of the executive decision-making process must be able to operate freely and without the potential for disclosure. It is judicial recognition of this rationale which is important here.

In *Kaiser Aluminum & Chemical Corp. v. United States*,[77] Kaiser filed a motion for the production of documents in order to acquire information from the General Services Administration (GSA), pertaining to GSA-Kaiser contracts, which was not otherwise available to Kaiser or to the public generally. GSA submitted all the information requested except for one document, a staff report concerning a particular GSA-Kaiser contract.[78] The Administrator of GSA, in a letter to the Attorney General, described the document and the reason for not disclosing it:

> The document . . . contains opinions that were rendered to the Liquidator of War Assets by a member of his staff concerning a proposed sale of aluminum plants. Those opinions do not necessarily reflect the views of, or represent the position ultimately taken by, the Liquidator of War Assets. A disclosure of the contents of documents of this nature would tend to discourage the staffs of Government agencies preparing such papers from giving complete and candid advice and could thereby impede effective administration of the functions of such agencies.[79]

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75. *Id.* at 132-34 (emphasis added) (citation omitted).
76. *See, e.g.*, United States v. Reynolds, 345 U.S. 1, 6 (1952).
77. 157 F. Supp. 939 (Ct. Cl. 1958).
78. *Id.* at 943.
79. *Id.* at 943 n.4.

The Court of Claims agreed with the Government's position. It characterized the document as "intra-office advice on policy,"[80] and analogized it to "the kind that a banker gets from economists and accountants on a borrower corporation and in the Federal Government the kind that every head of an agency or department must rely upon for aid in determining a course of action."[81] The court correctly recognized, however, that when a governmental rather than a private communication is involved the production of a document may be subordinate to the general welfare of the community; that is, the government "must retain privileges for the good of all."[82] The privilege is supported by the need for "open, frank discussion between subordinate and chief concerning administrative action."[83]

In *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*,[84] two West German corporations brought suit against an East German enterprise, and its American representatives, to establish the ownership of a trademark. In order to substantiate their contentions, the West German corporations sought to subpoena documents held by the Justice Department. The Government agreed to their submission, except for certain documents it considered protected by executive privilege. Consequently, the Government moved to modify the subpoena.[85]

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80. *Id.* at 945.

81. *Id.*

82. *Id.* at 946.

83. *Id.* It is also useful to note that the court relied on United States v. Morgan, 313 U.S. 409 (1940), to substantiate its conclusion. In *Morgan* the Secretary of Agriculture had issued an order, under the Packers and Stockyards Act, Ch. 64 §§ 2-408, 42 Stat. 159 (1921), setting maximum rates to be charged by market agencies for their services at the Kansas City Stockyards. The market agencies brought suit to set aside the order. At trial plaintiffs called the Secretary of Agriculture to testify as to the administrative processes he used in reaching his decision. The trial court ruled the Secretary's order invalid but was reversed on appeal by the Supreme Court. Writing for the majority, Justice Frankfurter noted that "the Secretary should never have been subjected to this examination." 313 U.S. at 422. The Court's dismay over the obligation of the Secretary to testify—and thus to subject the decision-making process to judicial and public purview—was, in part, premised on a "separation of powers" notion. The Court stated:

> Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.

Id. at 422 (citations omitted). This is an admonition to the judiciary to be conscious not only of the proper resolution of the specific controversy before it but also the broader, constitutionally protected independence of executive decision-making.

84. 40 F.R.D. 318 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

85. 313 U.S. at 322. The Attorney General, in an affidavit to the Court, described these privileged documents as "intra-departmental memoranda . . .

The court granted the Justice Department's motion. It first reviewed the history and rationale of the Government's claim of privilege in a manner similar to that undertaken by Judge Reed in *Kaiser Aluminum*[86] and then addressed with particularity the relationship between the rationale for the privilege and the nature of the decision-making process:

> Inextricably intertwined, both in purpose and objective, are these two principles. The rule immunizing intra-governmental advice safeguards free expression by eliminating the possibility of outside examination as an inhibiting factor, but expressions assisting the reaching of a decision are part of the decision-making process. Similarly, the so-called "mental process rule" impresses the stamp of secrecy more directly upon the decision than upon the advice, but it extends to all phases of the decision-making process, of which the advice is a part. Each rule complements the other, and in combination they operate to *preserve the integrity of the deliberative process itself. It is evident that to demand pre-decision data is at once to probe and imperil that process.*[87]

Certainly the court recognized that even the potential imposition of a condition of disclosure would "imperil" and inhibit the proper flow of "predecision" advice. This is not to suggest that all inhibitions on the flow and substantive content of information are anathema. Such an all-encompassing proposition has no support in law or in common sense, as will be discussed in the next section. However, the district court's discussion here, and in *Kaiser Aluminum*, suggests that there is a discrete juncture in the decision-making process when both law and common sense preclude judicial and congressional intervention. It is the juncture where the President requests an opinion in writing and his adviser is prepared to respond; that is, the juncture protected by the Opinion Clause.

VI. LIMITATIONS AND RELATED CONSIDERATIONS

The preceding sections have focused on the various reasons, political, administrative and legal in nature, for reading the Opinion Clause as a source of executive power vesting in the President the right to receive information and advice from his close advisers without interference from the judiciary or the Congress. There are, however, a number of considerations which, if fully examined, might limit the power and protection embodied in the Opinion Clause or, conversely, might add legal or practical weight to it. It is the purpose of this section to identify and explore briefly some of these considerations in order to suggest direction for further inquiry.

A. *The President or the Presidency*

In his Opinion as Attorney General, Caleb Cushing noted a particular

containing opinions, recommendations and deliberations pertaining to decisions the Department was required to make as to litigation." *Id.* at 323.

86. *See* text accompanying notes 77-83 *supra.*

87. 40 F.R.D. at 326 (emphasis added) (footnotes omitted).

reality about the President's duties, prevalent in 1855, and certainly applicable today:

> [T]he actual administration of all executive power cannot be performed personally by one man, — that this would be physically impossible, and that if it were attempted by the President, the utmost ability of that one man would be consumed in official details.[88]

Moreover, as Justice Jackson indicated in *Youngstown Sheet & Tube v. Sawyer* this reality may have a constitutionally cognizable dimension:

> The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is . . . . Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.[89]

The Opinion Clause, by its terms, identifies the President as the only person who "may require the Opinion, in writing, of the principal officer in each of the executive Departments." However, in light of the growing complexity of the President's responsibility, it is arguable that the protection and power embodied in the Opinion Clause may be effectively delegated to a presidential subordinate and, as a related matter, it may also be "waived" by the President or by a subordinate.[90] Obviously, these matters of delegation and waiver arise only with an expansive interpretation of the Opinion Clause. While such an interpretation may reflect current realities, it might also reflect "a distortion of the Framers' work," and does not seem supportable.[91]

While the Opinion Clause identifies the person giving the opinion as the "principal officer in each of the executive Departments," the history of the clause's inclusion in the Constitution suggests the Framers did not intend the "principal officer" to be *only* the head of a *department*. The Framers rejected various efforts to identify particular persons[92] and, of course, only the offices of the President and Vice-President were actually

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88. 7 OP. ATT'Y GEN. 453, 460 (1855).

89. 343 U.S. 579, 653 (1952).

90. In North Dakota v. Andrus, the State, relying on the decision in United States v. Nixon, 418 U.S. 683, 694-97 (1974), argued that the President and his advisers had waived the protection embodied in the Opinion Clause:

> [T]he President would be bound by the CEQ Guidelines since they were issued by his office. The Council on Environmental Quality is within the Executive Office of the President. 42 U.S.C. 4342. Therefore, assuming, arguendo, that the Constitution did confer authority for confidential communications under the "opinion clause" . . ., issuance of the CEQ Guidelines would constitute a waiver of confidentiality for one specific purpose: [the preparation of an environmental impact statement].

Appellee's Brief at 19, North Dakota v. Andrus, No. 78-1194 (8th Cir. March 21, 1978), stay denied by Justice Blackmun (March 23, 1978).

91. *See* Buckley v. Valeo, 424 U.S. 1, 134 (1977).

92. *See* text accompanying notes 37-42 *supra*.

established in article II of the Constitution. In *North Dakota v. Andrus*, the Government construed the term "principal officer" to be analogous to a "close adviser" and to include the Director of the Office of Management and Budget and the Chairman of the Council on Environmental Quality. Certainly, it is clear from the facts in *North Dakota v. Andrus*, that preparation of the Water Policy Report was actually undertaken by subordinates to these "close advisers," although under their guidance and direction. Thus, the protection provided by the Opinion Clause may properly be extended both vertically (below the "principal officer") into the executive branch, and laterally to various high-level (non-Secretarial) officials. However, the clause expressly provides that the opinion must be prepared at the President's request. An opinion prepared at the initiative of an adviser or his subordinate and submitted to the President is not protected. In this context, therefore, while the power and protection of the Opinion Clause necessarily encompass certain persons and processes involved in the administration of the presidency, it does so *only* when the President requests the opinion.

B. *Inherent Versus Express Power*

The Opinion Clause was included in the Constitution as an express power. However, the significance of this decision by the Framers has not always been obvious.

In *The Federalist No. 74*, Alexander Hamilton stated that the Opinion Clause was a "redundancy in the plan [for the executive], as the right for which it provides would result of itself from the office."[93] A similar view of the lack of necessity for the clause's inclusion was expressed by Mr. Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*.[94] In response to the Government's contention, that the "executive Power" conferred upon the President by article I, section 1 "constitutes a grant of all the executive powers of which the Government is capable," Mr. Justice Jackson stated: "If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones."[95] Among the "items" Justice Jackson identified was the Opinion Clause, which, he stated, "would seem to be inherent in the Executive if anything is."[96] Suggesting, however, that the President has certain "inherent" powers regardless of their inclusion in the Constitution merely begs the question: why was the power expressly included and what exactly is its meaning? Neither Hamilton nor Mr. Justice Jackson explored the question; Hamilton was more concerned with convincing the New York convention to ratify the Constitution,[97] and Mr. Justice Jackson's concern was in disputing the

93. THE FEDERALIST No. 74 (A. Hamilton) at 447 (B. Wright ed. 1962).
94. 343 U.S. 579 (1952).
95. *Id.* at 640-41 (footnotes omitted).
96. *Id.* at 641 n.9.
97. Hamilton's somewhat cryptic remark about the Opinion Clause was not an isolated incident. In reference to the President's power as commander-in-

government's broad claim to power. Moreover, it is apparent from a review of the majority opinions in *Youngstown Sheet & Tube Co. v. Sawyer*[98] (including Mr. Justice Jackson's) that a presidential claim based on an "inherent" power was neither viewed favorably nor subject to the same manner of scrutiny as a claim based on a power expressly enumerated.

It is true that the Constitution's silence on the existence of a power is not dispositive.[99] *Myers v. United States*[100] demonstrates that the President's power of removal, although not expressly included in the Constitution, is, under the appropriate circumstance, commensurate with the power of appointment.[101] But there is a profound difference, in the legal and psychological "mix" of a controversy affecting the judicial temperament, when the President's conduct can be directly correlated to an express constitutional power rather than to an "aggregate" of powers located within the general confines of article II. The conduct undertaken by the President and his advisers, challenged by the State of North Dakota in *North Dakota v. Andrus*, is directly correlated to the conduct described in the Opinion Clause. The Government did not rely upon any notion of "silent," "inherent," or "aggregate" powers and, in fact, expressly eschewed any such reliance.[102] Consequently, any judicial resolution of a

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chief, contained in the same section and clause as the Opinion Clause, Hamilton stated:

> The propriety of this provision is so evident in itself and it is at the same time so consonant to the precedents of the State constitutions in general, that little need be said to explain or explore it.

THE FEDERALIST No. 74 (A. Hamilton) at 473 (B. Wright ed. 1962). Apparently, as a political matter, Hamilton thought understatement and brevity the most effective methods of persuasion.

98. 343 U.S. 579 (1952).

99. United States v. Nixon, 418 U.S. 683, 705 n.16 (1974).

100. 272 U.S. 52 (1926). *See* text accompanying notes 73-75 *supra*.

101. *Cf.* Humphrey's Executor v. United States, 295 U.S. 602 (1935).

102. The Government stated in its reply brief:

> The [State of North Dakota's] response first enlarges and then distorts the precise, and constitutionally supportable, limits on the President's position. The United States relies on the "Opinion Clause," an enumerated power of the Presidency specifically identified in the Constitution, Article II, Section 2, Clause 1. The State, in complete disregard of the pre-1787 "Executive" experiences examined by the Framers and the particularized concern addressed to the same subject at the Philadelphia Convention, concludes that this provision in the Constitution is "mere surplusage" [relying, in part, on Hamilton's statement in THE FEDERALIST No. 74]. We decline, and we know this Court will decline, to treat the Constitution in such a cavalier fashion. Moreover, the State continues by then insisting that in order to resolve this controversy, the Court must examine the breadth of the President's "inherent powers," none of which are expressly identified in the Constitution. We have made no claim based on any such "notion." Consequently, most of the State's "arguments" are in fact addressed to its own con-

confrontation between the executive and legislative branches must deal directly with the executive's reliance on an expressed constitutional power. It is in this context of judicial review that the significance of the Opinion Clause as an *express power* becomes readily apparent.

C. *Balancing of Constitutional Rights and Powers*

The power and protection embodied in the Opinion Clause cannot be evaluated fully by assessing its terms alone.

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. . . . Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.[103]

Consequently, the meaning of the Opinion Clause, and the judicial manner of evaluating it, is dependent, in part, on the seemingly obvious fact that there are three branches of government.

The separation of powers concept was discussed in the introductory portion of Part II. As suggested there, the Framers devised a system of government that is composed of three "separate" branches, but with the particularized imposition of "checks and balances." This suggests, of course, that the independence claimed by the executive is not, by itself, dispositive of a disagreement with the other branches. It is necessary first to inquire into the powers available to Congress and the judiciary, and the manner in which the Supreme Court has assessed competing claims among the branches.[104] As the decisions in *Nixon v. Administrator of General Ser-*

> cocted notion of "inherent powers," and not to the precise, and clearly supportable, position of the President. These arguments, while interesting, are wholly irrelevant.

Appellant's Reply Brief at 4-5, North Dakota v. Andrus, No. 78-1194 (8th Cir. March 21, 1978), stay denied by Justice Blackmun (March 23, 1978) (citations omitted).

103. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

104. In United States v. Nixon, 418 U.S. 683, 703, 707 (1974), the Court reiterated the settled proposition that while each branch may initially interpret the nature of its constitutional powers the ultimate arbiter is the Supreme Court—a proposition acknowledged by the Government in North Dakota v. Andrus. *See* note 14 *infra*. While this proposition was once the basis for controversy, *see* Myers v. United States, 272 U.S. 52, 218 (1926) (McReynolds, J., dissenting), it is now a mere truism; an undeniable description of the Supreme Court's role under article III. But identifying who decides what powers each branch possesses adds little to the determination of what those powers are and whether they may be exercised independently of the other branches. Thus the Court's conclusion in United States v. Nixon concerning its role in constitutional adjudication, while critically important in dealing with the former President's claim, is only marginally relevant to the separation of powers discussion involved here.

vices[105] and *Buckley v. Valeo*[106] indicate, the Court has established subtle, but important, distinctions in reviewing presidential claims based on express rather than inherent powers.

In *Nixon v. Administrator of General Services*[107] the Court considered whether congressional enactment of the Presidential Recordings and Materials Preservation Act,[108] which directs the Administrator of the General Services Administration (GSA) to control the disposition of President Nixon's tape recorded conversations, violated the principle of separation of powers. Specifically, the former President contended that "Congress is without power to delegate to a subordinate officer of the Executive Branch the decision whether to disclose Presidential materials and to prescribe the terms that govern any disclosure. To do so . . . constitutes, without more, an impermissible interference by the Legislative Branch into matters inherently the business solely of the Executive Branch."[109] The President did not identify a particular provision in article II to support his proposition.

The manner in which the Court reviewed the President's claim is instructive. It stated:

> [I]n determining whether the [Presidential Recordings] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[110]

This places a substantial burden on the President. He must affirmatively demonstrate, as a factual matter, the "extent to which" an Act of Congress "disrupts" his ability to "accomplish" a "constitutionally assigned" function.[111] Once it is demonstrated to the court's satisfaction (presumably by a preponderance of the evidence) that the Act has the "potential for disrupting" such a "constitutionally assigned" function, the court then will determine whether the exercise of a congressional power to promote a particular objective justifies the *actual* disruption which, presumably, will occur.

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105. 433 U.S. 425 (1977).
106. 424 U.S. 1 (1976).
107. 433 U.S. 425 (1977).
108. Pub. L. No. 93-526, 88 Stat. 1695 (1974).
109. 433 U.S. at 440.
110. *Id.* at 443 (citation omitted).
111. The President must show that the Act, by displacing or disrupting his ability to exercise a power inherent in the President, would in turn disrupt his ability to accomplish a "constitutionally assigned" function, that is, a function expressly identified in the Constitution.

The former President was unable to meet the first part of the burden. Consequently, the Court made no particularized assessment of whether Congress, in fact, acted pursuant to an express constitutional power.[112] The burden on the President, in substantiating a claim based on an inherent constitutional power, is, indeed, exacting.

The Court's inquiry into a presidential claim based on an express constitutional power is perceptibly different. Generally, the initial burden placed on the President is substantially less, and an affirmative and stringent burden to substantiate the power of Congress is placed on the party advocating such a position. The Court then engages in an analysis of each claim in order to identify, with precision, which branch—acting alone—exercises the discrete but absolute control over the subject matter in dispute. This method of inquiry is apparent from a review of *Buckley v. Valeo*.[113]

In *Buckley v. Valeo*, plaintiffs brought suit to challenge on constitutional grounds various provisions of the Federal Election Campaign Act of 1971 and related provisions of the Internal Revenue Code of 1954, as amended in 1974.[114] The plaintiffs' claims were directed primarily to whether the Act's limitation on contributions and expenditures violated certain first amendment rights protecting the freedom of association and communication. The plaintiffs also challenged the method of choosing the members of the Federal Election Commission, which was composed of the Secretary of the Senate and the Clerk of the House, serving as ex officio members of the Commission without the right to vote, two members appointed by the President pro tempore of the Senate, two by the Speaker of the House, and two by the President. Each of the six voting members were confirmed by the majority of both Houses of Congress. The plaintiffs argued that this method of selection violated the "separation of powers" concept, because Congress had intruded upon a power left exclusively to the executive. The Supreme Court summarized the plaintiffs' argument in the following manner:

> Appellants urge that since Congress has given the Commission wide-ranging rulemaking and enforcement powers with respect to the substantive provisions of the Act, Congress is precluded under the principle of separation of powers from vesting in itself the authority to appoint those who will exercise such authority. Their

112. The Court stated that "[s]uch regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its automony. *Cf.* EPA v. Mink, 410 U.S. 73, 83 (1973); FAA v. Robertson, 422 U.S. 255 (1975)." 433 U.S. at 455 (footnotes omitted). However, neither *Mink* nor *Robertson* involved a particularized assessment of Congress' constitutional power to act; in fact, in *Robertson*, there were "no constitutional claims." 422 U.S. at 261.

113. 424 U.S. 1 (1976).

114. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), *as amended by* Pub. L. No. 93-443, 88 Stat. 1263 (1974).

argument is based on the language of Art. II, § 2, cl. 2, of the Constitution, which provides in pertinent part as follows:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Appellants' argument is that this provision is the exclusive method by which those charged with executing the laws of the United States may be chosen.[115]

The Commission, on the other hand, contended that the "Framers . . . , while mindful of the need for checks and balances among the three branches of the National Government, had no intention of denying to the Legislative Branch authority to appoint its own officers" pursuant to its substantive authority over elections and the Necessary and Proper Clause,[116] and the "'Inherent power of Congress' to appoint its own officers to perform functions necessary to that body as an institution."[117]

The Supreme Court agreed with the plaintiffs. After reviewing the separation of powers concept as understood by Montesquieu, the Framers, and its previous decisions,[118] the Court examined the debates at Philadelphia in 1787 to determine the meaning of the Appointment Clause. It concluded the appointment power could not be exercised by Congress notwithstanding Congress' express constitutional power to legislate in the substantive area of elections. The Court stated:

> [C]ongress has plenary authority in all areas in which it has substantive legislative jurisdiction so long as the exercise of that authority does not offend some other constitutional restriction. We see no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers.[119]

Moreover, the Court rejected the Commission's contention that "whatever shortcomings the provisions for the appointment of members of the Commission might have under Art. II, Congress had ample authority under the Necessary and Proper Clause of Art. I to effectuate this result."[120] This misperceives the question, the Court stated. "The proper inquiry when

115. 424 U.S. at 118.
116. *Id.* at 119.
117. *Id.* at 127.
118. *Id.* at 120-24.
119. *Id.* at 132 (citations omitted).
120. *Id.* at 134.

considering the Necessary and Proper Clause is not the authority of Congress to create an office or a commission, which is broad indeed, but rather its authority to provide that its own officers may make appointments to such office or commission."[121] Framed in this fashion, Congress has no more authority than under its substantive grants; it cannot "vest in itself, or its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so."[122]

Thus, in *Buckley v. Valeo*, the Supreme Court recognized that Congress could act pursuant to its own expressed constitutional powers "so long as the exercise of that authority [through the enactment of a statute] does not . . . offend well-established constitutional restrictions stemming from the separation of powers."[123] The "well-established constitutional restriction" was the affirmative grant of power given to the President in the Appointment Clause; a power more essential in its relation to the "executive power" than the implied power to remove officers once appointed sustained in *United States v. Myers*.[124] To permit Congress to enact legislation which would impede or preclude the executive from properly exercising its own expressed constitutional powers would dilute the separation of powers concept and leave the executive without any cognizable claim of independence. In the final analysis, the executive, when making a claim based on an expressed constitutional power, must make a *prima facie* showing of (1) the existence of a demonstrable parallel between its action and an expressed power contained in article II, and (2) the fact that an act of Congress may prevent or disrupt the executive from properly utilizing that expressed power.

The conduct of the President described in *North Dakota v. Andrus* was demonstrably correlated to the conduct described in the Opinion Clause. Moreover, for the court to have required the Water Resources Council to prepare an environmental impact statement would have prevented the President from properly utilizing the constitutionally assigned power contained in the Opinion Clause. The Government's reliance on the Opinion Clause in any future litigation will have to meet this same burden.[125]

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121. *Id.* at 134-35.

122. *Id.* at 135.

123. *Id.* at 132.

124. *Id.* at 135-36. *See also* discussion of Myers v. United States in text accompanying notes 73-75 *supra.*

125. While this portion of Part VI has focused on the constitutional relationship between the legislative and executive branches, the responsibility of the judicial branch under article III vis-à-vis the executive is also of importance. This responsibility is particularly pertinent in protecting the constitutional rights of individuals.

The Supreme Court has reviewed with "exacting scrutiny" legislative or executive action which trench on fundamental personal liberties, including first

VII. CONCLUSION

The propositions put forth in this article concerning the meaning of the Opinion Clause may seem novel. However, the novelty, as an historical matter, is more the consequence of jurisprudential inadvertence than an effort to breathe life into a power not otherwise existent. The Framers placed in article II the express power to request opinions in writing. This essay has attempted to define the nature and limit of that power.

Some may grasp the propositions contained here and suggest, in turn, that the Opinion Clause provides the executive with a previously unrecognized power to act vis-à-vis the other branches. The power and protection embodied in the Opinion Clause may provide the President with an important tool in mastering his own substantive and procedural tasks and in maintaining the proper balance among the branches. Beyond serving this purpose, however, the Opinion Clause should be invoked with great caution in the context of litigation.[126] It is essential for the executive—no less

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amendment association rights, Buckley v. Valeo, 424 U.S. 1, 64-65 (1976), speech, New York Times Co. v. United States, 403 U.S. 713, 714 (1971), and notions of privacy, Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 525-33 (1977) (Burger, C.J., dissenting). This exacting manner of review is also apparent in criminal proceedings.

In United States v. Nixon, 418 U.S. 683 (1974), the President's claim of privilege, premised on an inherent constitutional protection, was not sufficient to overcome "our historic commitment to the rule of law." *Id.* at 708. After "weighing" these matters, the Court concluded that presidential communications must be submitted to the district court because "the generalized interest in confidentiality, . . . cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 713.

126. Since its reliance on the Opinion Clause in North Dakota v. Andrus, the Justice Department has sought to protect the presidential decision-making process in two subsequent cases on the same constitutional basis.

In Alaska v. Carter, No. A78-291 Civil (D. Alaska Nov. 27, 1978), Alaska sought to require the Secretary of Interior to prepare an Environmental Impact Statement before he could respond to the President's request for advice concerning the designation of public lands as national monuments under the Antiquities Act, 16 U.S.C. § 431 (1906). The district court rejected this argument. Citing the Opinion Clause, the court stated:

> On November 16, 1978, the President requested Secretary Andrus to provide him with recommendations on the suitability of lands in Alaska for designation as national monuments under the Antiquities Act of 1906. For a court to require that an impact statement must be filed after the specified comment period before the President could receive the recommendations of the Secretary would raise serious constitutional questions . . . . Applying the impact statement process to such recommendations necessarily burden and inhibit "the policy of open, frank discussion between subordinate and chief concerning administrative action." For these reasons the court holds that any recommendations by the Secretary of Interior on the exercise of the President's power under the Antiquities Act, which recommendations have been requested by the President, do not come under the NEPA impact statement process.

Memorandum and Order, Alaska v. Carter, No. A78-291 Civil (D. Alaska Nov.

than the legislature and judiciary—to exercise its powers with reason and self-restraint, and to forego claims of power which will provoke constitutional "clashes between different branches of the government . . . if a legal [or political] ground of less explosive potentialities is properly available . . . ."[127] "[T]he long view of the immediate parties in interest [is to] find ready accommodation for differences."[128]

To those who must defend the President and his close advisers in a court of law, the propositions set forth in this article are particularly important. Certainly, the absence of dispositive judicial guidance concerning the meaning of the Opinion Clause accentuates the need for a deliberate and thorough inquiry in advance of litigation. It is endemic to the litigation process, however, that the demands of immediate issues leave little

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27, 1978) 7-8 (footnotes and citations omitted). No appeal was taken from this portion of the decision.

In Sierra Club v. Andrus, 581 F.2d 895 (D.C. Cir. 1978), *cert. granted*, 47 U.S.L.W. 3463 (1979), the Justice Department has sought review of the court of appeals decision requiring the Interior Department to prepare an EIS on its wildlife management programs prior to submitting its annual budget requests to the President's Office of Management and Budget. Although the court of appeals was not presented with an Opinion Clause argument, the Government raised it in its petition for certiorari:

> [C]onstitutional questions might be posed by congressional requirements that executive agencies and OMB expand the contents of budgetary materials they send the President by including environmental impact statements and that they make those statements public. The president has authority to receive information from departments and agencies, and from advisers within his Executive Office, free from congressional and judicial regulation. *See, e.g.*, Article II, Section 2, Clause 1 of the Constitution.

Petition for Writ of Certiorari, Andrus v. Sierra Club, No. 78-625 (Oct. 12, 1978), at 20 n.19, *cert. granted*, 47 U.S.L.W. 3463 (1979).

It is readily apparent in both cases that the integrity of the presidential decision-making process is directly affected by the imposition of an Environmental Impact Statement requirement. However, the substantive area of presidential decision-making which seems most amenable to the possible application of the Opinion Clause is the formulation of foreign, military and national security policy. Oftentimes the President's participation in these matters is direct and essential, and the need for timely, candid advice is vital to both the "quiet" formulation of a position and the imposition of the presidential perspective alone. *See, e.g.*, EPA v. Mink, 410 U.S. 73, 76-77, 83 (1973); Totten v. United States, 92 U.S. 105 (1875); Helkin v. Helms, No. 77-1922 (D.C. Cir. June 16, 1978); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 788, 796 (D.C. Cir.), *stay denied*, 404 U.S. 917 (1971). *See also* Washington Star, April 22, 1978 (Editorial) at A-10, col. 1; Washington Post, April 19, 1978, at A-13, col. 5. Moreover, there already exists a tradition of judicial restraint in each of these areas. *See, e.g.*, Helkin v. Helms, No. 77-1922, slip op. at 14 (D.C. Cir. June 16, 1978); Adams v. Vance, 570 F.2d 950, 955-57 (D.C. Cir. 1978); Mitchell v. Laird, 488 F.2d 611, 615-16 (D.C. Cir. 1973).

127. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring).

128. *Id.* at 614.

time to penetrate their deeper meaning or to explore the utility of their application in a variety of general factual settings. Such a luxury is, indeed, rare. But the result, oftentimes, is that choices made pragmatically to resolve specific questions may affect substantive government policy well beyond the four corners of a particular lawsuit. Here we are dealing with presidential decision-making, where matters of law and politics are closely entwined and controversy and expedition will necessarily temper the manner in which litigation is handled and legal issues are resolved. It is essential, therefore, that when possible matters of such an important and delicate nature be assessed fully in advance and the propriety of their use in future litigation examined and understood.

The Opinion Clause may, of course, retain its obscurity in the history of jurisprudence. As this article suggests, however, the Opinion Clause is of considerable significance in defining the breadth of power possessed by the nation's chief executive.