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THE DOCTRINE OF JUDICIAL PRIVILEGE: THE HISTORICAL AND CONSTITUTIONAL BASIS SUPPORTING A PRIVILEGE FOR THE FEDERAL JUDICIARY

Judicial privilege is an obscure doctrine of evidentiary law that promotes the confidentiality of judicial communications.[1] Courts have invoked the privilege to protect the communications between judges and their law clerks and to protect the substance of judicial deliberations.[2] Commentators have suggested that the privilege is unnecessary and unjustifiable within a democratic government.[3] The courts have acknowledged the legitimacy of judicial privilege, relying on tradition and the doctrine of separation of powers as

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1. *See* Nixon v. Sirica, 487 F.2d 700, 740 (D.C. Cir. 1973) (MacKinnon, J., concurring and dissenting). Although the judiciary claims a privilege protecting the confidentiality of judicial communications, little express authority exists that recognizes the existence of the privilege. *Id.* Despite the lack of express authority sustaining the privilege, both tradition and the doctrine of separation of powers support the legitimacy of judicial privilege. *Id.*

The common law principle of privilege creates an exception to the rule that every person has a duty to provide testimony that contributes to the development of all relevant facts at trial. 5 WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2285 (2d. ed. 1923); *see* United States v. Bryan, 339 U.S. 323, 331 (1950)(public interest in maintaining integrity of adversarial system demands that every person provide relevant evidence at trial, except persons who can invoke protection of constitutional, common law or statutory privilege).

Although the rules of privilege exclude from consideration competent legal evidence that could assist the fact finder's determination in a particular case, the rationale for the rules of privilege is the protection of significant interests and relationships that society considers to be justification for the exclusion of the evidence in open court. MCCORMICK ON EVIDENCE § 130 (E. Cleary ed. 1984); *see* Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)(privileges are justifiable only to extent that permitting exclusion of relevant evidence promotes public interest that transcends interest of promoting fact finder's objective). The executive branch of the federal government enjoys a privilege for information regarding state and military secrets. United States v. Nixon, 418 U.S. 683, 706 (1973). The interest in preserving national security justifies the exclusion of evidence that would jeopardize that interest. *Id.*

2. *See* United States v. Nixon, 418 U.S. 683, 708 (1973) (president's expectation of confidentiality of his communications is similar to claim of confidentiality protecting judicial deliberations); New York Times Co. v. United States, 403 U.S. 713, 752 n.3 (1971)(per curiam)(Burger, C.J., dissenting)(Supreme Court has inherent authority to protect confidentiality of deliberations and documents, despite lack of statutory provision conferring authority); Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973)(president's privilege safeguarding effectiveness of executive decision-making process is similar to privilege for communications among judges and between judges and their law clerks).

3. *See* Miller & Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 BUFFALO L. REV. 799, 806, 822 (1973) (secrecy of Supreme Court decision-making process is inconsistent with need for full disclosure in democratic government); Grossman, *Comments on "Secrecy and the Supreme Court,"* 22 BUFFALO L. REV. 831, 835 (1973)(full disclosure of judicial decision-making process is more in harmony with democratic principles).

authority for the privilege.[4] The courts, however, have not explained adequately the purpose or the scope of the privilege and have not demonstrated that express authority underlies the doctrine.[5] Despite the lack of express authority, both historical and constitutional foundations exist that strongly support the doctrine of judicial privilege.[6]

The accounts of delegates who participated in the Constitutional Convention of 1787 reveal that the doctrine of judicial privilege finds legitimacy in the delegates' struggle to define the judiciary's role within the new system of government.[7] The delegates recognized the need for a balanced govern-

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4. *See* Nixon v. Sirica, 487 F.2d 700, 740 (D.C. Cir. 1973)(MacKinnon, J., concurring and dissenting)(historical precedent and constitutional separation of powers among branches of government supports doctrine of judicial privilege); Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971)(Wilkey, J., concurring)(privilege for judicial communications is similar to executive and legislative privileges and finds support in Constitution and common law).

5. *See* New York Times Co. v. United States, 403 U.S. 713, 752 n.3 (1971)(Burger, C.J., dissenting)(Supreme Court has inherent power to protect confidentiality of Court communications, but no express authority confers power upon Supreme Court); Nixon v. Sirica 487 F.2d 700, 740 (MacKinnon, J., concurring and dissenting)(doctrine of judicial privilege receives universal acceptance but has little express support).

6. Soucie v. David, 448 F.2d 1067, 1080-81 (D.C. Cir. 1971)(Wilkey, J., concurring). The historical basis for judicial privilege arises from the need to preserve the confidentiality of the judicial decision-making process. *Id.*

The constitutional basis for judicial privilege stems from the doctrine of the separation of powers and the need to preserve the independent functioning of the judicial branch. *See* Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385-436 (1935) (explaining historical development of separation of powers and Framers' implementation of doctrine in federal government); *infra* note 7 and accompanying text (discussing Framers' conception of federal judiciary as being independent from executive and legislative branches); *infra* notes 36-41 and accompanying text (discussing judicial privilege as means to preserve independence of federal judiciary from legislative or executive interference).

7. *See* Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 671 (1980). The delegates who attended the Constitutional Convention contemplated the creation of a system of government that was revolutionary. *Id.* The delegates contemplated the formation of a government system in which co-equal branches shared the powers of government. *Id.* By dividing the powers of government among distinct branches, the delegates intended to forestall any one branch from usurping the powers of government and nullifying the civil and political rights that the Constitution protected. *Id.*

The delegates envisioned the federal judiciary as a safeguard of the framework of government that the Constitution embodies. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1576 (4th ed. 1873). The delegates foresaw the possibility that in a government in which the branches exercised limited powers, the branches of government might transgress the limits of their powers. *Id.* The delegates, therefore, entrusted to the judiciary the duty to check the transgressions of the executive and legislative powers and preserve the separation of powers that the Constitution requires. *Id.* In light of the judiciary's constitutional duty to maintain the balance of powers among the branches of the federal government, the delegates recognized the need to protect the judiciary from the other branches of government. *Id.* at § 1574. The delegates anticipated potential conflicts between the judiciary and the other branches of government, particularly in instances in which the judiciary and the legislature or the executive would disagree over the judiciary's interpretation of the Constitution. *Id.* To protect the judiciary from legislative or executive interference or reprisal that would threaten the effective functioning of the judicial branch, the delegates instituted constitutional provisions

ment that could unite the burgeoning nation economically and politically.[8] The Framers had learned, however, that a balanced government could not exist with a weak judiciary that could not act freely and without an apprehension of the political consequences of its acts.[9] The Framers had

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that would regulate removal of judges from the judiciary. *Id.* at §§ 1600, 1601; *see infra* notes 20-23 and accompanying text (discussing Framers' provision creating life tenure for federal judges and delegating to Congress power to remove federal judges only through impeachment proceedings).

Although the delegates did not provide in the Constitution an express provision for a judicial privilege, the privilege is legitimate because the privilege protects the judiciary from legislative or executive inquiry that would threaten judicial independence. *See infra* note 40 and accompanying text (judicial privilege is consistent with purpose of preserving doctrine of separation of powers).

8. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 52 (rev. ed. 1965). After the states became independent from Great Britain, the states, through ratification of the Articles of Confederation, formed a central government with limited powers. *Id.* The central government lacked an executive department and a federal judiciary. *Id.* The Congress, which consisted of only one House, could not levy direct taxes upon the states and could not regulate state commerce. *Id.* Under the Articles of Confederation, each state retained its sovereignty. *Id.*

In the absence of provisions for federal regulation of state commerce, each state enforced measures designed to protect the state's market against competition from other states. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 4.4 (2d ed. 1983). Each state, for example, imposed tariffs on competing goods from other states. *Id.* Moreover, states levied tariffs on out of state goods that crossed state lines. *Id.* Consequently, the discriminatory practices impeded the flow of interstate commerce. *Id.*

At the Constitutional Convention of 1787, the lack of federal control over the commercial activity of the states was a serious concern of the delegates. C. BEARD, *supra*, at 175. The delegates perceived that the inhibition of interstate commerce had impeded national economic development. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* at § 4.4. Furthermore, the delegates speculated that without provisions for federal regulation of international trade, each state, in pursuit of procuring favorable trade relations and strengthening economic alliances with other nations, would ignore all considerations of national comity. C. BEARD, *supra* at 186-87. Without federal control over international commerce, the delegates envisioned entanglements with foreign nations that would weaken the nation's ability to present a united front against nations that threatened the security of the United States. *Id.*

9. Kaufman, *supra* note 7, at 671. The perceived weaknesses in the development of the English judiciary strengthened the delegates' conviction of the need to ensure an independent judiciary. *Id.* From the inception of the court system in England, the King had exercised considerable control over the common law courts. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 194 (1931). The Crown claimed an absolute prerogative when the Crown sought to circumvent a burdensome common law rule or a statute. 2 W. HOLDSWORTH, *id.* at 445 (1936). Citizens could not challenge the King's acts. Kaufman, *supra* note 7, at 671. Judges, who held commissions *durante bene placito*, or at the pleasure of the King, were dependent upon the Crown for salaries and seldom challenged the King's rules. 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 34 (S. Thorne trans. 1968). The Crown's domination of the judiciary led ultimately to the dissolution of judicial authority in England by the end of the 17th century. Kaufman, *supra* note 7, at 671.

To secure the independence of the judiciary in England, Parliament passed the Act of Settlement (Act) in 1701. 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 234 (1927). The Act provided that judges hold commissions *quamdiu se bene gesserint*, or during good behavior, and that judges receive fixed salaries. *Id.* Moreover, the Act established that only an act of

seen from *Trevett v. Weeden*,[10] for example, that members of the Rhode Island judiciary were unable to protect a defendant's right to trial by jury without interference from the Rhode Island Assembly.[11] In *Trevett* the defendant, Weeden, was charged with the criminal offense of refusing to accept Rhode Island paper currency as payment for a debt.[12] Although the Rhode Island Constitution required a jury trial for all persons charged with commission of a criminal act, the Rhode Island General Assembly had provided legislation permitting judges to try summarily without a jury persons accused of refusing to accept Rhode Island currency.[13] At his trial Weeden alleged that the statute abrogating the right to jury trial violated the Rhode Island Constitution.[14] The judges hearing the case sustained Weeden's challenge to the constitutionality of the statute.[15]

After learning that the judges in *Trevett* had sustained Weeden's challenge, the Rhode Island General Assembly summoned the judges to appear before the Assembly to explain the judges' basis for the holding.[16] The judges complied with the Assembly's summons but objected to answering the Assembly's questions.[17] Consequently, the General Assembly sought to

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both Houses of Parliament could remove judges from office. *Id*; *see* Act of Settlement, 12 & 13 Will. 3, ch.2 (1701). The effect of the Act was to insulate judges from the pressures of the King and Parliament and to provide impartial administration of law. 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 234 (1927). Parliament also enacted legislation granting judges immunity from all causes of action that arose from any act that a judge performed in his official capacity. *Id.*

10. R. POUND, THE SPIRIT OF THE COMMON LAW 61-62 (1921) (citing *Trevett v. Weeden* (Providence 1787)).

11. *Id*; *see* Kaufman, *supra* note 7, at 685-86. The delegates to the Constitutional Convention of 1787 had convened shortly before the Rhode Island court heard the case of *Trevett v. Weeden*. Kaufman, *supra* note 7, at 685-86; *see infra* notes 12-19 and accompanying text (discussing *Trevett v. Weeden*). During the Convention, James Madison cited *Trevett* in support of his argument for measures that would protect the federal judiciary from abuses of legislative power. *Id*; *see* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 28 (M. Farrand ed. 1911) (discussing Madison's proposal for constitutional provision that would create council of revision to review constitutionality of legislative acts).

12. R. POUND, *supra* note 10, at 61-62. The commentary on the decision in *Trevett v. Weeden* explains that in 1787, the Rhode Island legislature issued 100,000 pounds of paper currency and authorized criminal sanctions against any person who refused to accept the bills in payment for articles offered for sale. *Id.* Weeden, a butcher, declined to accept the currency for the purchase of meat. Kaufman, *supra* note 7, at 685.

13. *Id.* The statute at issue in *Trevett v. Weeden*, criminalizing the refusal to accept Rhode Island paper currency, also denied persons found guilty of violating the statute the right to appeal the court's decision. *Id.*

14. *Id.* at 62.

15. *Id.*

16. *Id.*

17. *Id.* When the judges appeared before the Rhode Island General Assembly subsequent to the decision in *Trevett v. Weeden*, the judges explained that the state constitution provided that a person could not receive a prison sentence unless a jury had convicted the person of a criminal offense. *Id.* The judges maintained that unless the state legislature amended the constitution, the Assembly could not compel the judges to send a person to prison unless the person had received a jury trial. *Id.*

remove the judges from the bench, although the judges had not committed an act that would have warranted removal of the judges from office.[18] The General Assembly finally terminated the removal proceedings only because removal of judges required a trial on charges of criminal misconduct.[19]

As a consequence of the delegates' appreciation of the issues regarding judicial independence that the *Trevett* incident raised, the Framers discerned the need for measures that would insure a strong and independent federal judiciary, insulated from the influence of the other branches of government.[20] To satisfy the need for judicial independence, the Framers created procedural safeguards that prevented the executive or the legislature from removing judges capriciously or without good cause.[21] For example, in article III, section one of the United States Constitution, the Framers provided that federal judges, unlike state judges, would serve not at the discretion of an executive or legislative body but would serve for life, unless the judges had committed one of the offenses that the Framers considered as warranting removal.[22] Furthermore, the Framers furnished an additional protection against a capricious legislative removal of a federal judge by providing in article I of the United States Constitution that the House of

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18. *Id.* Following the Assembly's questioning of the judges concerning the judges' decision in *Trevett v. Weeden*, the Assembly voted to remove the judges from office. *Id.* The state constitution, however, required that the Assembly remove judges only through impeachment proceedings. *Id.*

19. Kaufman, *supra* note 7, at 685.

20. *See* 2 J. STORY, *supra* note 7, at 385-86 (judiciary must possess power to prevent legislative or executive branches of government from usurping power of other branches); *see also* THE FEDERALIST No. 78 (A. Hamilton) (discussing efficacy of government with separate branches and judiciary's role in maintaining balance of powers among branches of federal government).

21. *See infra* notes 22-23 and accompanying text (discussing tenure and impeachment provisions in United States Constitution regarding federal judges).

22. U.S. Const. art. III, § 1. Article III, § 1 of the United States Constitution provides that federal judges will hold office during good behavior. *Id.* One commentator noted that the constitutional provision guaranteeing life tenure for federal judges is similar to the tenure provision that Parliament had established for the English judiciary in 1701 by the Act of Settlement. Kaufman, *supra* note 7, at 686; *see supra* note 9 and accompanying text (explaining provision of Act of Settlement establishing life tenure for English judges). Through the tenure provision in the Act of Settlement, Parliament created an independent judiciary and insulated the judiciary from the improper influence of the Crown. Kaufman, *supra* note 7 at 686.

During the Constitutional Convention of 1787, all the various plans that the delegates had submitted for the establishment of a federal judiciary included the provision that federal judges were to hold office during good behavior. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1155 (1976). The delegates considered the provision to be an essential element in preserving judicial independence and in safeguarding civil and political liberties. *See* THE FEDERALIST No. 47 (J. Madison)(explaining purpose and significance of provision establishing life tenure for federal judges). In addition to the Framers' provision guaranteeing life tenure for federal judges, the Framers ensured that federal judges would forfeit the right to lifetime tenure only upon impeachment for treason, bribery or other "high Crimes and Misdemeanors." U.S. CONST. art. II, § 4.

Representatives and the Senate must conduct the impeachment process before removing a federal judge from office.[23]

The Framers' establishment of provisions ensuring judicial independence from the legislative and executive branches of the federal government represented a marked departure from the position of the judiciary during the colonial and post-Revolutionary periods in American history.[24] Unlike their contemporaries in England, judges in the American colonies did not receive fixed salaries.[25] Colonial judges instead had to rely upon the assemblies' good favor for judicial compensation.[26] The result of the payment arrangement was that the assemblies could induce compliance from judges by reducing judicial salaries.[27]

In addition to the assemblies' weakening of judicial independence by modifying judges' salaries to force judges to remain complacent, the norms regulating tenure for colonial judges further had diminished the integrity of colonial judges.[28] By the early 1700's, judges in England had begun to receive commissions to serve for life.[29] The government in England, however,

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23. U.S. CONST. art. I, § 2, cl. 5. The United States Constitution reserves the power of impeachment exclusively to the House of Representatives. *Id.* Only the Senate, however, may try impeachments. U.S. CONST. art. I, § 3, cl. 6.

24. *See* J. SCHMIDHAUSER, CONSTITUTIONAL LAW IN AMERICAN POLITICS 11 (1984). During the colonial era the Crown selected persons for judicial appointments primarily on the basis of the candidate's likelihood to support the legality of the Crown's policies in the colonies. *Id.* As a consequence, the majority of colonial judges were biased in favor of the Crown and were either incompetent or corrupt. *Id*; *see infra* notes 25-27 and accompanying text (explaining how lack of fixed salaries for colonial judges weakened judicial independence); *infra* notes 28-32 and accompanying text (explaining how absence of provision ensuring life tenure for colonial judges permitted arbitrary removal of judges and contributed to lack of judicial independence). After the colonies became independent states, state legislatures dominated state judiciaries and removed judges arbitrarily. *See infra* notes 33-35 and accompanying text (discussing ability of state legislatures to remove judges).

25. Kaufman, *supra* note 7, at 680-81. During the colonial period, colonial assemblies, as representatives of the people who contributed the revenues to support government administration, were responsible for appropriating judicial salaries. Black, *Massachusetts and the Judges: Judicial Independence in Perspective*, 3 LAW & HIST. REV. 101, 101-02 (1985). Traditionally, the assemblies made annual salary grants to judges for the services that judges had performed in the previous year. *Id.* at 102. Judicial salaries, therefore, were not stable and fluctuated from year to year. *Id.*

26. *Id.*

27. Black, *supra* note 25, at 102. Because colonial assemblies did not establish fixed salaries for judges, judges were in jeopardy of losing all or part of their compensation if the judges had incurred the disfavor of the assembly. *Id.* In 1726, for example, the New York Assembly reduced Chief Justice Morris' salary by 17% because Justice Morris' administration of the court system displeased the Assembly. Kaufman, *supra* note 7, at 680 n.52.

28. *See infra* notes 30-32 and accompanying text (discussing tenure policies for colonial judges, prohibiting issuance of commissions with fixed tenure); *see also* The Declaration of Independence para. 1 (U.S. 1776). One of the colonists' grievances listed in the Declaration of Independence was that the Crown had made the tenure of colonial judges completely dependent upon the King, who could dismiss the judges at his discretion. The Declaration of Independence para. 1 (U.S. 1776).

29. *See supra* note 9 and accompanying text (discussing Act of Settlement provision establishing life tenure for English judges).

had forbidden colonial judges from receiving commissions for any fixed tenure.[30] Because colonial judges held commissions without a fixed tenure, governors of the colonies could remove and replace the judges with little difficulty.[31] Consequently, when the colonial judges expressed dissatisfaction with the Crown's policies in the colonies, colonial governors simply removed the judges.[32]

Despite the American Revolution and subsequent independence from Great Britain, the judiciaries of the newly formed states lacked a satisfactory degree of independence from the state legislatures.[33] Most state constitutions limited the executive's ability to interfere with the operation of the judiciary, but the state legislatures in most states controlled the process of appointing and removing state judges.[34] The effect of the state legislatures' control over

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30. Kaufman, *supra* note 7, at 680-81. The Home Government in England resisted the colonial assemblies' demands for judges appointed with a fixed tenure because the Government feared that governors then would be unable to remove uncooperative or incompetent judges. *Id.* at 681. The Home Government also disallowed the provisions of two colonial assemblies, those of Pennsylvania and of North Carolina, that authorized appointments of judges with tenure for good behavior. *Id*; *see* Smith, *supra* note 22, at 1119-25 (discussing Home Government's disallowance of Pennsylvania Assembly's legislation that established for judges tenure during good behavior.); *id.* at 1139-42 (discussing Home Government's disallowance of North Carolina legislation providing life tenure for judges). The Privy Council in England considered both Pennsylvania and North Carolina acts as tending to increase judicial dependency on colonial assemblies. Kaufman, *supra* note 7, at 681. Subsequently, the Privy Council issued an order to all colonial governors, forbidding the governors to issue appointments with tenure for good behavior. *Id.*

31. Kaufman, *supra* note 7, at 681-82.

32. Smith, *supra* note 22, at 1104. Although few official documents indicate that colonial governors replaced judges arbitrarily, colonists' protests published in pamphlets and newsletters dating to the colonial era indicate that many colonists considered the removals arbitrary. *Id.* at 1114 n.60 and accompanying text. One noted account of an arbitrary removal stirred considerable controversy in New York and England. *Id.* In 1734, the governor of New York terminated the commission of Chief Justice Lewis Morris, because the governor objected to Morris' partisan views. *Id.* at 1115. Morris went to England and appealed to the Privy Council for reinstatement of his commission. *Id.* at 1116. Morris also argued for promulgated standards regulating removal of colonial judges and for a royal declaration prohibiting governors from removing colonial judges without the express consent of the Crown. *Id.* at 1116-17. The Privy Council denied Morris' appeal for reinstatement of his office. *Id.* at 1117. The Privy Council also rejected Morris' requests for established standards regulating removal of judges and for a royal declaration prohibiting removal of judges without express authorization from the King. *Id.*

33. *See infra* notes 34-35 and accompanying text (discussing predominance of legislature in state governments formed after American Revolution and legislatures' domination of state judiciaries).

34. J. SCHMIDHAUSER, *supra* note 24, at 13. After the American Revolution, the state legislatures emerged as the dominant political force within state governments, primarily because the legislatures' colonial counterparts, the assemblies, had been vocal opponents of the Crown's involvement in the colonies during the colonial period. *Id.* The legislatures provided rigid controls over the executive branch because, as former colonists, the legislators had resented the authority of the colonial governor and intended to preclude the executive from assuming a similar status within state government. *Id.*; *see* Kaufman, *supra* note 7, at 683 (most state

the judiciary was that a judge's assertion of judicial privilege often resulted in the legislatures' dismissal of the judge.[35]

Although the Framers' procedural safeguards protecting the federal judiciary from the powers of the legislative and executive branches of the federal government remedied the weaknesses that the Framers perceived in the colonial and early post-Revolution judiciary, more recent events indicate that the boundary between proper and improper interaction between the judiciary and the other branches of government is uncertain.[36] A recent example of the uncertainty regarding the proper extent and nature of interaction between the judiciary and the other branches of government is reflected in *The Statement of the Judges*.[37] In *The Statement of the Judges*, a House subcommittee investigating the Department of Justice issued a subpoena on May 30, 1953, to Judge Louis E. Goodman, a federal district judge, summoning him to appear at a subcommittee hearing and give testimony regarding judicial proceedings that had transpired in the Northern District of California.[38] Judge Goodman appeared at the hearing and delivered a letter that he and six other judges of the district had prepared.[39] In the letter the judges defended Judge Goodman's refusal to testify before the subcommittee by asserting that the subcommittee's questioning of a member of the federal judiciary would contravene the doctrine of separation of powers and would amount to an unlawful interference by the legislature in the functioning of the judiciary.[40] The letter indicated, however, that the

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constitutions provided little or no regulation of state legislatures).

The period immediately following the Revolution evinced a strong mistrust for state judges. J. SCHMIDHAUSER, *supra* note 24, at 13. Although most state constitutions commissioned judges with tenure during good behavior, state constitutions provided the legislatures and assemblies with broad discretion to remove state judges. *See* Smith, *supra* note 22, at 1153-55 (discussing provisions in various state constitutions permitting removal of state judges). Consequently, judges who challenged the constitutionality of legislative acts, for example, often risked dismissal by the state legislature or assembly. R. POUND, *supra* note 10, at 62.

35. R. POUND, *supra* note 10, at 62.

36. *See infra* notes 37-41 and accompanying text (discussing The Statement of the Judges, 14 F.R.D. 335 (N.D. Cal. 1953)). The most recent incident demonstrating the uncertainty regarding the propriety of a legislative inquiry into judicial activity occurred during the Senate confirmation hearings to consider Justice William Rehnquist for the position of Chief Justice of the United States Supreme Court. L.A. Daily J., Aug. 1, 1986, at 20, col. 3. Members of the Senate Judiciary Committee asked Justice Rehnquist to explain the basis for an opinion that he had written while he was an Associate Justice. *Id.* In response to the request, Justice Rehnquist maintained that the Senate Committee could not ask him to account for judicial acts. *Id.*

37. 14 F.R.D. 335 (N.D. Cal. 1953).

38. *Id.*

39. *Id.* at 335-36.

40. *Id.* In the letter to the House subcommittee investigating the Department of Justice, the judges of the United States District Court for the Northern District of California stated that the doctrine of separation of powers precluded the legislature or the executive from reviewing judicial acts. *Id.* The letter also noted that only the appropriate appellate tribunals could review the acts of federal courts. *Id.* at 336. The judges wrote that if the federal judiciary permitted the pressure of public opinion to influence its conduct, or permitted the

judges would not object to Judge Goodman's responding to "proper" questioning on matters other than the judicial proceedings.[41]

Although courts seldom have had to delineate the acceptable degree of legislative or executive inquiry into the affairs of the judiciary, judges have denoted specific areas of judicial activity that judges traditionally have considered privileged.[42] The judges who have indicated the significance of the areas of privileged judicial activity referred to the areas in discussing the scope of other governmental privileges.[43] In *New York Times Co. v. United States*,[44] for example, the dissent from the majority of the Supreme Court noted that the judicial and the executive branches of government possess similar powers to maintain the confidentiality of their functions.[45] In *New York Times Co.*, the petitioner had attempted to publish documents that exposed the United States government's involvement in the Viet Nam War.[46] The United States government asserted a claim of executive privilege and sought to enjoin publication of the documents.[47] The Supreme Court upheld the petitioner's first amendment right to publish the documents, despite the government's claim of executive privilege.[48]

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legislature or the executive to review judicial proceedings, the federal judiciary would compromise its duty to preserve the rights that the Constitution guarantees. *Id.*

41. *Id.* In *The Statement of the Judges*, the judges did not elaborate upon the distinction between a proper and an improper inquiry into judicial activity. *Id.*

42. *See* Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973) (indicating that communications among judges and between judges and their clerks are privileged); *infra* notes 49-51 and accompanying text (implying that documents and deliberations of Supreme Court are not reviewable by other branches of government); *infra* notes 58-66 and accompanying text (indicating that communications between judge and staff regarding merits of pending cases are privileged).

43. *See* Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973)(purpose of executive privilege is to safeguard effectiveness of executive decision-making process and is similar to privilege preserving integrity of judicial deliberations); *infra* note 51 and accompanying text (president's privilege for official communications is similar to Supreme Court's authority to protect confidentiality of Supreme Court documents and deliberations); *infra* notes 58-63 and accompanying text (each branch of government enjoys privilege to preserve confidentiality of decision-making process).

44. 403 U.S. 713 (1971)(per curiam).

45. New York Times Co. v. United States, 403 U.S. 713, 752 n.3 (1971)(Burger, C.J., dissenting); *see infra* notes 50-51 and accompanying text (discussing Chief Justice Burger's statement that Supreme Court and executive branch have similar authority to protect confidentiality of their respective operations).

46. *New York Times Co.*, 403 U.S. at 714. In *United States v. New York Times Co.*, the United States government initiated an action to enjoin the *New York Times* from publishing the contents of a classified document, "History of United States Decision Making Process on Viet Nam Policy." United States v. New York Times Co., 328 F. Supp. 324, 325 (1971).

47. *New York Times Co.*, 403 U.S. at 714. The district court in *United States v. New York Times Co.* denied the government's request for a preliminary injunction because the government had not shown that the publication of the classified documents would threaten national security. United States v. New York Times Co., 328 F.Supp. 324, 331 (1971). The United States Court of Appeals for the Second Circuit reversed the lower court decision. United States v. New York Times, Co. 444 F.2d 544, 544 (2d Cir. 1971)(per curiam).

48. *New York Times Co.*, 403 U.S. at 714.

In a footnote to Chief Justice Burger's dissent from the majority decision in *New York Times Co.*, the Chief Justice made a direct reference to the existence of a judicial privilege.[49] Burger analogized the executive privilege that protected the confidentiality of executive documents to the Supreme Court's power to protect the confidentiality of the Court's deliberations and internal documents.[50] Burger explained that although no statutory provision explicitly conferred upon the Court the power to secure the confidentiality of its internal documents and deliberations, the Court had an inherent power to maintain the confidentiality of the Court's operations.[51]

Since Burger's dissent in *New York Times Co.*, other federal judges have expounded on the notion of governmental privileges and have thus provided further support for judicial privilege.[52] In *Soucie v.David*,[53] for example, Judge Wilkey, concurring in the opinion of the United States Court of Appeals for the District of Columbia Circuit, explained that the judicial branch, as well as the other branches of the federal government, enjoys a privilege against disclosure of the decision-making processes.[54] In *Soucie*, the plaintiffs filed suit to compel the Office of Science and Technology, a federal agency, to release a report that contained an evaluation of the Supersonic Transport System (SST).[55] The district court in *Soucie* determined that the agency had prepared the report for the President's use in making a decision about the SST and that the privilege for intra-government communications protected the document from disclosure.[56] The District of Columbia Circuit in *Soucie*, however, reversed the district court's decision

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49. *Id.* at 752 n.3.

50. *Id.*

51. *Id.*

52. Environmental Protection Agency v. Mink, 410 U.S. 73, 89 (1973) (discussing privilege for government officials who formulate legal and political opinions); *see infra* notes 54-56 and accompanying text (explaining privilege for deliberative processes of government officials employed in decision-making capacity).

53. 448 F.2d 1067 (D.C. Cir. 1971).

54. *Id.* at 1080. In *Soucie v. David*, the privilege to which Judge Wilkey referred, commonly known as the deliberative process privilege, is a qualified privilege that protects the opinions, evaluations, or recommendations that government officials exchange during policy deliberation and decision-making. Randle, Deering, Turner & Newman, *Executive and Governmental Privileges*, in TESTIMONIAL PRIVILEGES 505-06 (S. Stone & R. Liebman, eds. 1983); *infra* 58-66 (discussing rationale of privilege relating to deliberative process).

55. *Soucie*, 448 F.2d at 1068. In *Soucie v. David*, President Nixon had requested the Office of Science and Technology (OST), to provide an evaluation of the Supersonic Transport Aircraft (SST). *Id.* The President had requested the evaluation for use in formulating an executive decision. *Id.*

After the OST had prepared the report and delivered it to the President, the plaintiffs, two citizens, filed suit under the Freedom of Information Act to compel disclosure of the document. *Id*; *see* Freedom Of Information Act, 5 U.S.C. § 552 (1982 & Supp. III 1985). The Freedom of Information Act requires all federal agencies to make available to the public adjudicatory opinions, nonpublished policies, and any records that the Act does not exempt from disclosure. Freedom Of Information Act, 5 U.S.C. § 552 (a)(1)-(3)(1982 & Supp. III 1985).

56. *Soucie*, 448 F.2d at 1070.

because the district court had determined incorrectly that the document was privileged.[57]

In Judge Wilkey's concurrence with the majority in *Soucie v. David*, Judge Wilkey indicated that each branch of the federal government enjoys a privilege protecting its decision-making process.[58] Judge Wilkey explained that the privilege facilitated the open exchange of ideas among persons responsible for formulating decisions.[59] Judge Wilkey stated that the federal government could not operate unless it could employ the doctrine of privilege to preserve the confidentiality of its communications.[60] Judge Wilkey reasoned that if federal government officials employed in decision-making capacities anticipated public disclosure of their confidential communications, the officials would withhold unpopular proposals for fear that the officials would endanger their own interests.[61] Judge Wilkey determined that by withholding possible proposals from consideration, government officials would jeopardize the integrity of the decision-making process and risk the implementation of unsound public policies.[62] Judge Wilkey noted that, consequently, a claim of privilege for each branch of government was necessary to free all persons involved in the decision-making process from the apprehension of voicing unpopular proposals.[63]

Although Judge Wilkey's discussion of privilege in *Soucie* did not focus specifically on judicial privilege, Judge Wilkey's discussion, nevertheless, is significant in developing the boundaries within which the judicial privilege should operate.[64] Judge Wilkey explained that the purpose of a privilege for judicial communications was to protect a judge's ability to consider fully the advice of persons who assist a judge in his decision-making function and who thus enhance the judge's decision-making capacity.[65] Judge Wilkey, therefore, provided a reasonable basis for concluding that the scope of judicial privilege should include communications between a judge and his

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57. *Soucie*, 448 F.2d at 1073. The court in *Soucie v. David* determined that the Office of Science and Technology was a federal agency subject to the disclosure requirements of the Freedom of Information Act. *Id*; *see supra* note 55 and accompanying text (explaining disclosure requirements of Freedom of Information Act). The court, therefore, determined that the plaintiffs in *Soucie* could compel disclosure of the agency report unless a statutory or constitutional privilege precluded disclosure of the document. *Soucie*, 448 F.2d at 1077.

58. *See id.* at 1081 (privilege to protect disclosure of government decision-making process is common to each co-equal branch and finds support in common law and Constitution).

59. *Id*; *see infra* notes 58-66 and accompanying text (deliberative process privilege protects against disclosure of remarks of persons involved in decision-making and thus encourages uninhibited communication).

60. *Soucie*, 448 F.2d at 1080-81.

61. *Id.*

62. *See id.* (unless government communications are privileged, advice that superiors receive from subordinates may not be as honest as promotion of public good necessitates).

63. *Id.* at 1081.

64. *See infra* notes 65-66 and accompanying text (explaining that privilege for judicial communications should protect process through which judges formulate decisions).

65. Soucie v. David, 448 F.2d 1067, 1080-81 (D.C. Cir. 1971)(Wilkey, J., concurring).

law clerks or other staff members with whom the judge discusses the merits of cases pending in the judge's court.[66]

The rationale supporting the legitimacy of privileges for government communications provided the basis for a recent Eleventh Circuit decision, *Williams v. Mercer*,[67] which explicitly acknowledged the existence of a qualified privilege that protects the confidentiality of communications between a federal judge and his staff.[68] In *Williams*, two federal district court judges of the Eleventh Circuit instituted disciplinary proceedings against federal district court Judge Alcee L. Hastings under the Judicial Councils Reform and Disability Act of 1980.[69] The two judges alleged that Hastings had engaged in conduct that was inconsistent with his position as a federal judge and that had diminished the integrity of the federal judiciary.[70] As

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66. *Id.*

67. 783 F.2d 1488 (11th Cir.), *cert. denied*, ___ U.S. ___, 106 S. Ct. 3273 (1986).

68. *Id.* at 1520; *see infra* notes 75-82 and accompanying text (explaining basis of court's finding of qualified privilege for judicial communications).

69. *Williams*, 783 F.2d at 1492; *see* Hastings v. Judicial Conference of the United States, 593 F. Supp. 1371, 1376 (D.D.C. 1984)(discussing events that led to disciplinary proceedings against Judge Hastings). On March 17, 1983, Chief Judge William Terrell Hodges, of the United States District Court for the Middle District of Florida, and Chief Judge Anthony A. Alaimo, Chief Judge of the United States District Court for the Southern District of Georgia, filed a complaint against Judge Alcee L. Hastings, United States District Judge for the Southern District of Florida, and requested that the Judicial Council of the Eleventh Circuit discipline Judge Hastings under provisions of the Judicial Councils Reform and Judicial Conduct and Disability Act (the Act). *Id.* at 1376 n.11; *see* 28 U.S.C. §§ 331, 332, 327(c), 604 (1982 & Supp. 1985). The Act's purpose, in part, is to provide the federal judiciary with the ability to discipline federal judges who have acted irresponsibly or unethically. *See* Hastings v. Judicial Conference of the United States, 593 F. Supp. at 1373 (discussing purpose of Act). The Act provides that anyone who believes that a federal judge has engaged in unethical conduct or is unable to discharge the duties of his office because of mental or physical disability can file a written complaint with the clerk of the court of appeals for the circuit in which the judge sits. 28 U.S.C. § 372 (c)(1)(1982). If the chief judge of the court of appeals accepts the complaint, he must appoint an investigating committee composed of an equal number of circuit and district court judges of that circuit to investigate the allegations in the complaint. 28 U.S.C. § 372(c)(4)(A)(1982).

Upon receipt of the investigating committee's report, the judicial council shall take whatever action is appropriate to assure the effective and expeditious administration of the courts within the circuit. 28 U.S.C. § 372(c)(6)(B)(1982 & Supp. 1985). The council can issue either a public or private censure, order that the judge not hear any new cases for a certain period of time, request that the judge retire voluntarily at full salary, or certify the disability of the judge. *Id.* The council, however, cannot remove any judge commissioned to hold office during good behavior. 28 U.S.C. § 372(c)(6)(B)(vii)(I)(1982).

70. *Williams*, 783 F.2d at 1492. In *Williams v. Mercer* the allegations in the complaint that the two judges filed against Judge Hastings in March 1983 stemmed from conduct that gave rise to Hastings' indictment on criminal charges of bribery in 1981. *Id.* In the indictment against Hastings, the grand jury charged that Judge Hastings had conspired to solicit funds in return for Judge Hastings' performance of an official judicial act. *Id.* Hastings moved to quash the indictment on the basis that only Congress could punish an active federal judge for misdemeanors and that the executive could not prosecute a judge for judicial acts. *See* Hastings v. Judicial Conference, 593 F. Supp. 1371, 1376 (D.D.C. 1984) (explaining Hastings' motion to quash indictment). The district court denied the motion. *Id.* The Eleventh Circuit affirmed

part of the proceedings against Judge Hastings, an investigating committee of the Eleventh Circuit issued subpoenas to Judge Hastings' present and former legal assistants, summoning the legal assistants to appear before the investigating committee.[71] The purpose of the legal assistants' appearance was to disclose the substance of confidential legal communications that had transpired between the judge and the legal assistants.[72] Judge Hastings' staff claimed a privilege to the substance of the communications and filed suit in the United States District Court for the District of Florida to enjoin enforcement of the subpoenas that the investigating committee had issued.[73] The United States District Court for the District of Florida dismissed the action for lack of subject matter jurisdiction, and Hastings and his staff appealed from the dismissal to the United States Court of Appeals for the Eleventh Circuit.[74]

In response to the contention of Judge Hastings and his staff that enforcement of the subpoenas would impair the effective functioning of the judiciary, the Eleventh Circuit concluded that a qualified privilege protected the subject matter of the communications between Judge Hastings and his staff.[75] The *Williams* court explained that absent an overriding need for confidential information which passes between a judge and his clerks, communications regarding a judge's performance of his official duties ordinarily should remain undisclosed to protect the integrity of the judicial decision-making process.[76] The *Williams* court reasoned that the conversa-

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the district court's decision to deny Judge Hastings' motion to quash. United States v. Hastings, 681 F.2d 706, 707 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983). Judge Hastings was tried on charges of bribery, but received an acquittal of the charges on February 4, 1983, because the prosecution had failed to establish Hastings' guilt beyond a reasonable doubt. *See* Hastings v. Judicial Conference, 593 F. Supp. at 1376 (discussing Judge Hastings' trial and acquittal of bribery charges).

One month after Judge Hastings' acquittal, Judge Hodges and Judge Alaimo filed a complaint with the Eleventh Circuit and initiated disciplinary proceedings against Judge Hastings. *Id.* at 1376. In the complaint, the judges alleged that Judge Hastings had solicited funds from lawyers and convicted federal offenders to help defray the cost of Judge Hastings' criminal defense. *Id.*

71. *Williams*, 783 F.2d at 1492-93; *see* 28 U.S.C. § 372(c)(4)(A)(1982). Under the Judicial Councils Reform and Judicial Conduct and Disability Act, the investigating committee must conduct as extensive an investigation as it considers necessary and must file a timely report with the circuit's judicial council, stating the findings of the committee and recommending action that the council should pursue. 28 U.S.C. § 372(c)(5)(1982). The investigating committee has full subpoena powers. *Id.* § 372(c)(9)(A)(1982).

72. *See Williams*, 783 F.2d at 1491. In *Williams v. Mercer*, the four staff members to receive the subpoenas were Betty Ann Williams, who was Judge Hastings' secretary, and Alan Ehrlich, Daniel Simons and Jeffrey Miller, former and present law clerks to Judge Hastings. *Id.* The investigating committee sought information from the staff members regarding a particular order that Judge Hastings had entered in October 1981, allegedly the result of a bribe. *Id.* at 1522. The committee also had served a subpoena- *duces tecum* upon Williams, directing her to produce the original copies of certain diaries and logs from Judge Hastings' chambers. *Id.* at 1520.

73. Williams v. Mercer, 610 F.Supp 169, 170 (D. Fla. 1985), *aff'd*, 783 F.2d 1488 (11th Cir. 1986), *cert. denied*, ____ U.S. ____, 106 S. Ct. 3273 (1986).

74. *Id.*

75. *Williams*, 783 F.2d at 1520.

76. *Id.* at 1519-20. In *Williams v. Mercer*, the Eleventh Circuit noted that judges depend

tions between a federal judge and his staff are part of a judge's core function.[77] The *Williams* court justified its recognition of a privilege for communications between a judge and his staff by explaining that the privilege prevented unnecessary intrusion into the substance of judicial communications that would disrupt a judge's ability to operate effectively.[78]

Although the Eleventh Circuit in *Williams* concluded that a qualified privilege exists that protects communications between a federal judge and his legal assistants, the Eleventh Circuit found that the information regarding Judge Hastings' alleged judicial misconduct warranted a limited intrusion into the confidentiality of the communications.[79] The *Williams* court explained that the investigating committee's grant of authority to aid in preserving the integrity of the federal judiciary justified an intrusion into the substance of the communications.[80] Furthermore, the *Williams* court noted that the confidential nature of the committee's proceedings mitigated the severity of the intrusion into Hastings' expectation of confidentiality and probably would not inhibit the free exchange of ideas between judges and clerks to the extent that Judge Hastings claimed.[81] The Eleventh Circuit, therefore, upheld the investigating committee's issuance of the subpoenas and issued an order to compel the staff members to appear at the committee's proceedings and to disclose the information.[82]

The Eleventh Circuit's reasoning behind establishing a qualified judicial privilege protecting the confidentiality of communications between a judge and his staff members finds support among Supreme Court decisions clarifying the scope of the legislative and the executive privileges.[83] In *Gravel*

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upon the frank and honest exchanges between themselves and their staff members to discharge effectively the judge's duties. *Id.* The *Williams* court noted that confidentiality of the conversations among judges and between judges and their staff helps to preserve a judge's independent reasoning from improper external influence. *Id.*

77. *Id.* at 1520-21. The Eleventh Circuit in *Williams v. Mercer* explained that a privilege for judicial communications extends to communications relating to official judicial activity, primarily the framing and researching of opinions, orders and rulings. *Id.* The *Williams* court stated that the privilege also extends to conversations between a judge and his staff that concern matters pending before the court. *Id.*

78. *Id.* at 1521.

79. *See id.*, 783 F.2d at 1522. In *Williams v. Mercer*, the investigating committee sought information regarding an order that Judge Hastings had entered in October 1981. *Id.* Judge Hastings allegedly had entered the order in return for a bribe. *Id.* Although Judge Hastings' staff members demonstrated that the investigating committee sought confidential information, the significance of the investigating committee's function was substantial. *Id.* at 1523. The *Williams* court reasoned that the investigating committee could not conduct an adequate investigation of the charges against Hastings unless the committee received testimony from Hastings' staff members regarding the order that Hastings entered. *Id.*

80. *Id.* at 1525. In *Williams v. Mercer*, the Eleventh Circuit weighed Judge Hastings' interest in preserving the confidentiality of conversations with his assistants against the investigating committee's need for the assistants' testimony. *Id.* The court found that the seriousness of the bribery allegation against Judge Hastings, as well as the investigating committee's inability to investigate thoroughly the allegation without the assistants' testimony outweighed Judge Hastings' interest in confidentiality. *Id.*

81. *Id.* at 1524-25.

82. *Id.* at 1525.

83. *See infra* notes 84-93 and accompanying text (discussing purpose and scope of

v. United States,[84] for example, the Supreme Court expounded upon the purpose of the privilege applicable to the communications between legislators and their aides.[85] In *Gravel*, a federal grand jury investigating possible criminal conduct regarding the release and publication of the Pentagon Papers issued a subpoena to an aide of United States Senator Mike Gravel, directing the aide to appear before the grand jury and to explain the aide's involvement in the publication of the documents.[86] Senator Gravel sought to quash the subpoena on the ground that the Speech and Debate Clause of the United States Constitution prohibited the questioning of an aide who assisted a Senator in performing legislative functions.[87] The United States District Court for the District of Massachusetts denied the motion to quash and the United States Court of Appeals for the First Circuit modified the decision of the district court.[88]

In addressing Senator Gravel's challenge to the enforceability of the subpoena, the Supreme Court in *Gravel* explained that the purpose of the legislative privilege embodied in the Speech and Debate Clause is to permit the legislature to perform its duties free from the threats of or intimidation by the executive branch.[89] The *Gravel* Court stated that because of the

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legislative privilege); *infra* notes 94-102 and accompanying text (discussing purpose and scope of privilege for President's communications with advisors).

84. 408 U.S. 606 (1972).

85. *See infra* notes 89-91 and accompanying text (discussing rationale for legislative privilege).

86. *Gravel*, 408 U.S. at 608. In *Gravel v. United States*, the grand jury investigated allegations that Senator Mike Gravel had arranged for private publication of classified documents regarding United States involvement in the Viet Nam War. *Id.* at 609. Senator Gravel, as Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, allegedly convened a meeting of the subcommittee members and read extensive portions of the documents to the subcommittee. *Id.* at 609. After the meeting of the subcommittee, Senator Gravel deposited the classified documents in the public record. *Id.* Leonard Rodberg, the aide whom the grand jury subpoenaed to testify, had assisted Senator Gravel in planning and conducting the Subcommittee meeting. *Id.* A few weeks after the meeting at which Senator Gravel read the documents, the press reported that Senator Gravel and his staff had arranged for the press to publish the classified documents. *Id.* at 609-10.

87. *Id.* at 608-09. In *United States v. Doe*, Senator Gravel's aide, Leonard Rodberg, filed suit in the United States District Court for the District of Massachusetts to quash the subpoena ordering him to testify at the grand jury proceeding. United States v. Doe, 332 F. Supp 930, 930 (D. Mass. 1971), *modified* 455 F.2d 753 (1st Cir. 1972). The district court permitted Senator Gravel to intervene in Rodberg's motion to quash. *Id.*; *see also* U.S. CONST. art. I, § 6, cl. 1 (Speech and Debate Clause of United States Constitution provides members of Congress with immunity from questioning concerning legislative acts).

88. United States v. Doe, 332 F.Supp. 930, 936 (D. Mass. 1971), *modified* 455 F.2d 753 (1st Cir. 1972). The district court in *Doe v. United States* denied Senator Gravel's motion to quash the subpoena issued to his aide because the court determined that arranging for private publication of the classified documents was not a legislative act and, therefore, not privileged. *Id.* at 936.

89. *Gravel*, 408 U.S. at 616. The Supreme Court in *Gravel v. United States* explained that the last sentence of the Speech and Debate Clause provides two privileges for members of Congress. *Id.* at 614. The Clause prohibits the arrest of a congressman for a civil offense while the congressman travels to or from the Congress while the House to which he belongs is in session. *Id.* The Clause also prohibits the questioning of a congressman about legislative

legislative privilege, the executive branch could not question a member of Congress about any act that is an integral part of the deliberative and communicative process through which members of Congress formulate and enact legislation.[90] The Court noted, moreover, that the executive branch could not interfere with the legislative process by requesting congressional aides to account for the aides' acts performed in assisting members of Congress, because congressional aides often perform acts vital to the functioning of the legislative process.[91] Although the Court in *Gravel* stated that the legislative privilege extended to congressmen and their aides, the Court indicated that the legislative privilege did not protect areas of legislative activity that were not crucial to the deliberative and communicative processes of formulating and enacting legislation.[92] Consequently, the Court in *Gravel* found that the grand jury properly could question Senator Gravel's aide about any activity performed on Senator Gravel's behalf that did not impugn a genuine legislative act.[93]

The *Williams* decision, acknowledging a qualified privilege for communications between a judge and his staff, also finds support in the Supreme Court's decision in *Nixon v. United States*,[94] in which the Court held that a qualified privilege existed for communications between the President and his aides.[95] In *Nixon*, a federal grand jury issued a third party subpoena *duces tecum* directing President Richard Nixon to produce certain tape recordings of conversations with presidential aides who were under indict-

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functions in any place other than the House to which he belongs. *Id.* at 615; *see* Kilbourn v. Thompson, 103 U.S. 168, 204 (1881) (Speech and Debate Clause protects members of Congress in performance of acts usually done in either House during sessions). The Speech and Debate Clause, however, does not shield a congressman from arrest for criminal offenses. *Gravel*, 408 U.S. at 614.

90. *Gravel*, 408 U.S. at 616. The Supreme Court in *Gravel v. United States* explained that the Speech and Debate Clause in Article I, § 6, cl.1. of the United States Constitution protects members of Congress from interference by the executive branch directly upon the legislative process. *Id.*; *see* United States v. Johnson, 383 U.S. 169, 181 (1966)(purpose of Speech and Debate Clause is to prevent executive branch from intimidating legislators).

91. *Gravel*, 408 U.S. at 616-17. In *Gravel v. United States*, the Supreme Court acknowledged that members of Congress are dependent upon their aides' assistance in performing legislative duties. *Id.* at 616. The significance of the aides' contribution to the effective functioning of the legislative branch warrants protection for aides from executive interference similar to the protection congressmen receive. *Id.* at 616-17.

92. *Gravel*, 408 U.S. at 625. In *Gravel v. United States*, the Supreme Court stated that the primary areas of legislative activity that the Speech and Debate Clause protects are speeches and debates in the Houses of Congress. *Id.* The *Gravel* Court explained that protection extends to areas beyond speech and debate only if the activity forms an integral part of the proceedings by which the members of Congress engage in the deliberation over and passage or rejection of proposed legislation. *Id.*

93. *Id.* at 628. The Supreme Court in *Gravel v. United States* indicated that Senator Gravel's arrangement for the publication of the classified documents was not a legislative act. *Id.* Because the aide had not assisted Senator Gravel in performing a legislative act, the aide did not enjoy protection under the Speech and Debate Clause of Article I, § 6, cl.1. of the United States Constitution. *Id.*

94. 418 U.S. 683 (1974).

95. *Id.* at 708.

ment for charges of conspiracy to obstruct justice.[96] The President moved to quash the subpoena *duces tecum*.[97] The President claimed that the executive privilege protected all communications between the President and his aides, including the tapes that the district court had ordered the President to produce.[98]

Despite the President's claim that an absolute privilege existed for all communications with his aides, the Supreme Court in *Nixon* rejected a finding of an absolute privilege for all presidential communications.[99] The *Nixon* Court recognized that indiscriminate intrusion into, and the resulting public disclosure of, the substance of the President's conversations with his advisors would impair the President's ability to solicit candid and honest assessments from his aides.[100] The *Nixon* Court found, however, that an absolute privilege would conflict with the intent of the Framers to form a balanced government and would burden unduly the administration of justice.[101] The *Nixon* Court thus determined that absent the need to protect

96. *Id.* at 686. In *Nixon v. United States*, a federal grand jury investigating possible criminal activity regarding the Watergate conspiracy returned indictments against seven aides of President Richard Nixon, charging the aides with conspiracy to defraud the United States and to obstruct justice. *Id* at 687. Each of the seven aides whom the grand jury named in the indictment had held a position either as a White House staff member or as a member of the Committee for the Re-election of the President. *Id.* at 687 n.3.

After the grand jury returned the indictments against the aides, the Watergate Special Prosecutor, Leon Jaworski, moved for a third-party subpoena *duces tecum* to compel the President to produce, for use at the criminal trial of the indicted defendants, sixty-four documents and tape recordings of the President's conversations with the aides about Watergate. *Id.* at 688. United States District Judge John Sirica granted the Special Prosecutor's motion.

The Special Prosecutor's motion for the subpoena *duces tecum* included sworn statements from one or more of the participants in the taped conversations that the conversations would reveal information regarding the aides' involvement in the Watergate conspiracy. *Id.* at 700.

97. *Id.* at 688.

98. *Id.* at 705. In *Nixon v. United States*, President Nixon proposed two arguments to support his motion to quash the subpoena duces tecum. *Id.* President Nixon claimed that the common law privilege for intragovernment communications protected President Nixon's conversations with persons who assisted him in performing his executive duties. *Id*; *see supra* note 54 and accompanying text (explaining scope of privilege for deliberative processes of government officials); *supra* notes 58-66 and accompanying text (explaining rationale for deliberative process privilege). The President also claimed that the doctrine of separation of powers precluded the judiciary from intruding into confidential conversations of the executive branch. *Nixon*, 418 U.S. at 706. The President asserted that the inquiry would interrupt performance of his constitutional duties and would threaten the independence of the executive branch. *Id.*

99. *Nixon*, 418 U.S. at 707; *see infra* notes 100-02 and accompanying text (explaining Supreme Court's holding that President had qualified privilege for communications between him and his aides).

100. *Nixon*, 418 U.S. at 708. The Supreme Court in *Nixon v. United States* indicated that the President's privilege in his communications rests on both the need to encourage candor in the advice that aides give to the President in formulating policies and the need to preserve the constitutional independence of the executive branch. *Id.* at 708. The *Nixon* Court also indicated that the doctrine of separation of powers supports both the general executive privilege for communications between government officials and the privilege for conversations between the President and those who assist him in performing the duties that the Constitution enumerates under Article II. *Id.*

101. *Id.* Although the Supreme Court in *Nixon v. United States* indicated that the

diplomatic or military secrets the President's "generalized interest" in the confidentiality of his discussions warranted only a qualified privilege that could be overcome upon a showing of substantial need for the information as evidence in a pending criminal trial.[102]

Although *Gravel* and *Nixon* support the *Williams* court's recognition of a qualified judicial privilege protecting the decision-making process of the judiciary, some commentators have advocated greater disclosure of the judicial decision-making process.[103] One commentator has noted that judicial decisions often have significant social consequences that affect substantive legal rights.[104] Within the last twenty years, for example, courts have had to resolve controversial and politically charged issues regarding capital punishment, abortion, and school desegregation.[105] Because of the significant political effects of judicial decisions, commentators object to the circumstance that published opinions represent the full extent to which judges must reveal the influences that shape their decisions.[106] Opponents of judicial confidentiality, arguing that the secrecy surrounding the judicial decision-making process is undemocratic, demand that judges provide the public with greater access to the process through which judges formulate judicial decisions.[107]

President's power is supreme within the areas that the Constitution specifies, the Court stated that the President's right to assert a privilege was secondary to preserving the Framers' intent to provide the framework for a workable government. *Id.* at 707; *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)(Jackson, J., concurring)(although Constitution allocates power among branches of government to preserve liberty, Constitution provides for integrated and workable government). The Court in *Nixon* further indicated that the recognition of an absolute privilege for Presidential communications would conflict with the primary constitutional duty of the judicial branch to ensure fair adjudication of criminal prosecutions and would burden unduly the administration of justice. *Nixon*, 418 U.S. at 707-08.

102. *Nixon*, 418 U.S. at 706. In *Nixon v. United States*, the Supreme Court determined that the President's interest in preserving the confidentiality of his communications with his aides warranted a qualified privilege. *Id.* The *Nixon* Court noted, however, that the privilege against disclosure of military or diplomatic secrets is absolute. *Id.*

103. *See* Miller & Sastri, *supra* note 3, at 802-06 (published opinions of Supreme Court rarely provide full and satisfactory explanation of reasoning for judicial decisions, and Supreme Court Justices, therefore, should provide more complete accounts of deliberations); Grossman, *supra* note 3, at 831 (greater access to judicial decision-making process would increase public confidence in judiciary).

104. Abramson, *Should a Clerk Ever Reveal Confidential Information?*, 63 JUDICATURE 361, 402 (1980).

105. *Id.* In addressing the issue regarding secrecy of the judicial decision-making process, one commentator has noted that appellate courts increasingly have had to resolve controversial issues that the executive and legislative branches have avoided because the issues were too politically sensitive. *Id.*

106. Miller & Sastri, *supra* note 3, at 800.

107. *Id.* at 822. Opponents of the confidential nature of the judicial decision-making process contend that, ideally, any government entity that espouses democratic principles should explain the basis for policies and decisions that affect citizens. *Id.* Only pressing interests in national security justify the withholding of information from the public. *Id.* Increased public access to the judicial decision-making process would increase the public's confidence in the integrity of the judiciary and would encourage judges to make careful and informed decisions. *Id.*

Maintaining the confidentiality of judicial communications is not necessarily inconsistent with the ideals of a democratic society, but rather facilitates a fair and impartial adjudication of complex issues.[108] In *Chandler v. Judicial Council of the Tenth Circuit*,[109] the Supreme Court asserted that a judge must observe impartiality at every stage of the decision-making process.[110] In *Chandler*, Judge Stephen S. Chandler, United States District Judge for the Western District of Oklahoma, challenged an order of the Judicial Council of the Tenth Circuit that temporarily prevented Judge Chandler from hearing new cases. [111] Judge Chandler argued that the Council's order was an impermissible infringement of his constitutionally guaranteed independence.[112] Although the Supreme Court in *Chandler* denied Judge Chandler's request for a writ of mandamus directed to the Council to stay the order, the *Chandler* Court indicated that an order which interfered with a judge's ability to make an impartial and independent decision regarding cases would be unconstitutional.[113]

In indicating that a judge must observe impartiality during the decision-making process, the *Chandler* Court suggested that the purpose of observing impartiality is to permit a judge to render decisions based on equitable principals and not the dictates of a majority.[114] Maintaining the confiden-

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108. *See infra* notes 115-18 and accompanying text (explaining that confidentiality of judicial communications preserves judicial impartiality); *infra* notes 124-32 and accompanying text (explaining that preserving confidentiality of communications between judges and assistants aids judges in formulating sound decisions).

109. 398 U.S. 74 (1969).

110. *Id.* at 84.

111. *Id.* at 75. In 1939, Congress passed legislation providing for the formation of a judicial council for each judicial circuit. 28 U.S.C. § 332 (1982 & Supp. 1985). Each judicial council, composed of the circuit judges for the particular circuit, must meet twice each year to attend to matters that affect the administration of the courts in the circuit. *Id.* The district judges of the circuit in which a judicial council presides must comply with the orders of the council. *Id.*

In *Chandler v. Judicial Council of the Tenth Circuit*, the Judicial Council for the Tenth Circuit, concerned that Judge Chandler had been a party defendant in both civil and criminal litigation for four years, issued an order pursuant to Title 28 U.S.C. §332 of the United States Code, prohibiting Judge Chandler from hearing new cases or pending cases until the Judicial Council superceded the order. *Chandler*, 398 U.S. at 77-78. The Council later amended the order to permit Judge Chandler to dispose of cases that he had begun to hear before the Judicial Council issued the order. *Id.* at 80. Upon receipt of the order, Judge Chandler filed a petition with the Supreme Court for a writ of prohibition or mandamus directed to the Council, as well as a stay of the Council's order. *Id.* at 79.

112. *Chandler*, 398 U.S. at 82. In *Chandler v. Judicial Council*, Judge Chandler asserted that any order of the Judicial Council that regulated Judge Chandler's ability to hear cases was an unconstitutional infringement of judicial independence and was a usurpation of the impeachment powers of Article I, § 3 of the United States Constitution. *Id.*

113. *Id.* at 87-88. The Supreme Court in *Chandler v. Judicial Council* denied Judge Chandler's request for relief because Judge Chandler had not sought relief from the Judicial Council or another tribunal, even when the Council had presented an opportunity for Judge Chandler to appeal to the Council for a modification of the Council's order. *Id.* at 87.

114. *Id.* at 84. Although the Supreme Court in *Chandler v. Judicial Council* did not decide whether the Judicial Council had exceeded its authority to regulate the administration

tiality of the judicial decision-making process fosters a judge's ability to make impartial decisions because confidentiality insulates judges from the pressure of public opinion and the temptation to make decisions consistent with shifts in public opinion.[115] Without a privilege protecting the substance of judicial communications, judges, anticipating public dissemination of the substance of judicial communications, would refrain from speaking frankly during deliberations or conversations with staff members for fear that the public would deride judges' positions that are unpopular.[116] Furthermore, a judge may refuse to change an opinion during subsequent deliberations once the judge's position becomes known to the public.[117]

Although opponents of judicial confidentiality argue that the need to preserve the confidentiality of the judicial system and to shield a judge from the pressures of public sentiment is groundless, commentators who favor closer public scrutiny of judges underestimate the potentially debilitating effect that public opinion could have on a judge's ability to remain impartial.[118] The guarantee of life tenure, for example, did not insulate United States District Court Judge Waties Waring from the coercive influence of racial segregationalists who opposed Judge Waring's views on segregation.[119] In 1951, Judge Waring, as a member of a three judge panel that entertained a challenge to South Carolina's segregation laws, dissented from the court's ruling that South Carolina's segregation laws were constitutional.[120] After the ruling, Judge Waring became the victim of intense

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of the courts by prohibiting Judge Chandler from hearing new cases, the Court indicated that preserving the independence of federal judges was imperative to the effective functioning of the judicial branch. *Id*; *see* Ferri v. Ackerman, 444 U.S. 193, 203 (1979) (society has strong interest in providing judges with ability to deal impartially with public).

115. *See* Howard, *Comment on "Secrecy and the Supreme Court,"* 22 BUFFALO L. REV. 837, 839-40 (1973) (secrecy of Supreme Court deliberations prevents leaks, fosters frank discussion, and helps preserve judicial independence); *infra* notes 124-32 and accompanying text (preserving confidentiality of communications between judges and their clerks encourages judges to discuss legal issues thoroughly and promotes integrity of judicial decision-making process).

116. Howard, *supra* note 115 at 839-40; *see* Tribe, *Trying California's Judges on Television: Open Government or Judicial Intimidation?*, 65 A.B.A.J. 1175, 1178 (1979) (without confidentiality, judges will avoid candid deliberation and exchange of unpopular ideas without which judicial decision-making process is ineffective).

117. *See* Howard, *supra* note 115, at 839-40. Supreme Court Justice Earl Warren noted that the Supreme Court managed to arrive at a unanimous decision in *Brown v. Board of Education* only because the Justices did not have to commit themselves to a decision until the Justices had deliberated informally for weeks before expressing their opinions to each other. *Id.*; *see* Brown v. Board of Education, 347 U.S. 483 (1954). One commentator has speculated that the Justices in *Brown* would have remained intransigent if they had had to cast their initial votes before deliberations. Howard, *supra*, at 839-40.

118. Tribe, *supra* note 116, at 1178 (judges could not provide impartial administration of law if judges' thought processes and deliberations were subject to public scrutiny).

119. *See* J. PELTASON, FIFTY-EIGHT LONELY MEN, 10 (1961) (discussing opposition against federal judges who issued or enforced orders to desegregate Southern schools during 1950's).

120. *Id.*

local abuse and received threats on his life.[121] As a consequence of the severe public reaction to Judge Waring's opinion, Judge Waring resigned his judicial commission shortly thereafter.[122] Because the prospect of an unfavorable public reaction to a judge's decision could influence a judge's ability to adjudicate impartially, the preservation of the confidentiality of the judicial decision-making process is justifiable. Confidentiality minimizes the possibility that judges will succumb to public pressure and abdicate judicial impartiality in favor of conformity to public opinion.

In addition to preserving the impartial interpretation of the law, confidentiality of judicial communications arguably increases the likelihood that a judge's decision is sound and carefully considered.[123] A judge and his law clerk usually develop a intimate working relationship that enhances a judge's decision-making process.[124] The interchange of ideas between a judge and his clerk helps a judge to clarify his understanding of the legal issues in a particular case.[125] Moreover, the interchange allows a judge to reveal to his clerk without apprehension both his perceptions regarding the merits of pending cases and the judge's uncertainties about the possible consequences of his decisions.[126] Judges rely on their clerks' ideas and insights in formulating decisions and expect clerks to maintain the confidentiality of communications regarding judicial decisions.[127]

The benefits that enure to the judicial decision-making process through the interchange of ideas between a judge and his clerk would dissipate unless the communications between a judge and his clerk remained confi-

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121. *Id.* After Judge Waties Waring had delivered his dissenting opinion that South Carolina's segregation laws were unconstitutional, Judge Waring's reputation was slandered and he and his family received threats of physical abuse. *Id.* Many judges who issued school desegregation orders in the South during the 1950's and 1960's often received threats from persons opposed to desegregation. *Id.* As a result, many judges sought police protection for themselves and their families. *Id.*

122. *Id.*

123. *See infra* notes 124-131 and accompanying notes (explaining that confidentiality of communications between judge and his assistants fosters uninhibited exchange of ideas and strengthens integrity of judicial decision-making process).

124. *See* Note, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230, 1242 (1981) (judge-clerk relationship is multifaceted and is analogous to teacher-pupil, employer-employee, and lawyer-lawyer relationships).

125. *Id.*

126. *Id.* at 1240.

127. *Id.* In November 1980 a student at the University of Pennsylvania Law School conducted a survey of 375 state and federal judges about the significance of the judge-clerk relationship and the importance of preserving the confidentiality of judge-clerk communications. *Id.* Approximately one-third of the judges who received the survey responded. *Id.* Although the response rate was not sufficient to warrant a statistical finding, 100% of the judges who responded to the survey indicated that a clerk had a duty to avoid disclosing information about pending cases that was not available from the public records. *Id.* Eighty percent of the judges indicated that a clerk's knowledge of specific wrong-doing involving the court justified the clerk's breach of his confidential relationship with a judge to reveal the impropriety. *Id.* Fifty-nine percent of the judges responded that a clerk should respond to a subpoena directing the clerk to reveal confidential information regarding judicial misconduct. *Id.*

dential.[128] One commentator has suggested that a judge conceivably would be more hesitant to expose his uncertainties and his personal prejudices to his clerk if the judge anticipated that his clerk might expose to persons outside the judge's chambers the substance of the judge's communications.[129] A judge, consequently, would retreat into greater isolation and would not engage his clerk in the decision-making process.[130] By withdrawing from the dialectic with his clerks and persons who assist a judge in formulating his thoughts, the judge would forgo the opportunity to clarify and to distill his reasoning for a judicial decision and therefore would forfeit the opportunity to strengthen the integrity of the judicial decision-making process.[131]

A privilege for judicial communications preserves judicial independence and protects the integrity of the judicial decision-making process.[132] The privilege insulates the judiciary from an improper intrusion into the function of the judicial branch.[133] Moreover, the privilege encourages the uninhibited exchange of ideas among persons who assist a judge in formulating decisions and thus enhances the judge's ability to make sound and prudent decisions.[134] Finally, the privilege shields judges from public scrutiny or the pressure of public opinion that would impair a judge's ability to render impartial decisions.[135]

The privilege for judicial communications, however, is not absolute and must yield if significant interests outweigh a judge's interest in confidentiality.[136] For example, the demonstrated need for evidence in a criminal prosecution or in an investigation of judicial misconduct warrants an intrusion into confidential judicial communications.[137] In considering whether to compel disclosure of judicial communications, courts should realize, however, that indiscriminate or unnecessary intrusions into the confidentiality

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128. *See id.* at 1263. In the survey of judges that a University of Pennsylvania law student conducted, over half of the respondents indicated that a clerk's breach of confidence would have a negative impact on the judges' relationship with their clerks. *Id.* at 1237. Many of the judges indicated that subsequent to learning about the breach of confidence, judges would limit severely the range and type of discussions that the judges would have with their clerks. *Id.*

129. *Id.* at 1238.

130. *Id.*

131. *Id.*

132. Williams v. Mercer, 783 F.2d 1488, 1520 (11th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 3273 (1986).

133. *Id.*

134. *See supra* notes 124-32 and accompanying text (explaining that privilege for communications between judge and clerk encourages judges and clerks to discuss legal issues candidly and thus fosters sound decision-making).

135. *See supra* notes 115-18 and accompanying text (explaining how privilege for substance of judicial communications protects judges from pressure of public opinion that would inhibit judges' ability to render impartial decisions).

136. *See supra* notes 75-80 (discussing rationale for holding that privilege for judicial communications is qualified and can be overcome).

137. *Williams v. Mercer*, 783 F.2d 1488, 1522 (11th Cir. 1986), *cert. denied*, ___ U.S. ___, 106 S. Ct. 3273 (1986).

of judicial communications may infringe upon a judge's independence and would inhibit the exchange of ideas between judges and persons who assist them in their official duties.[138]

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138. *Id.*