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Insights

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The United States uses more energy than any other nation today, or within human history. Our enormous economic engine is propelled by this energy, which derivatively influences the rest of the world. Rapid, large changes in energy prices can cause significant long- and short-term economic consequences. Obtaining and using this energy also carries with it the enormous burden of adverse environmental consequences, social issues, and geopolitical risk. We ostensibly want a sensible, sound energy policy to guide our public and private decisions. Yet, despite decades of repeated efforts, we have no coherent or even articulated comprehensive policy to guide our energy decisions. We just bumble along, relying on a vast mishmash of complex, uncoordinated, often conflicting, and usually confusing system of laws and regulations that erratically encourage market supply and irregularly discourage some negative externalities.

But to have a national energy policy that the country agrees on, one must be made. Creating one in a democracy is a messy, complex, and often contentious process. As with all major social issues, achieving a national consensus is extraordinarily difficult. On the other hand, creating a policy without public input or agreement and then unilaterally announcing it to be our national energy policy is a much more efficient, if less democratic approach to national policy-making. The most recent attempt at crafting an energy policy for the nation used this second, lower friction approach. It was the effort of what is commonly referred to as the "Cheney Energy Task Force," although officially it was the National Energy Policy Development Group (Energy Group), established by President Bush shortly after he took office in 2001 and chaired by Vice President Cheney. In conducting its work, the task force met only in private, consulted with private industry representatives in private, and deliberated in private. Five months later the Energy Group issued its report that announced its comprehensive energy policy, which would be the blueprint for all national energy policy and investment decisions; the policy has directed the administration's energy legislative agenda in Congress.

The policy was the product of an opaque process closed to public scrutiny, comment, or debate. Such is the constitutional prerogative of the President—to formulate his own policy without public input or judicial review. Long ago Justice Marshall noted that:

> . . . the president is invested 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

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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.

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

However, the discretion to form policy does not carry with it any absolute privilege that protects the confidentiality of deliberations between the President and the President's advisors. On the contrary, "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified privilege. . . " *United States v. Nixon*, 418 U.S. 683 (1974). More specifically, "[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets, . . . " executive claims of privilege must be balanced against the needs of other coequal branches of government. Translated to the formulation of an energy policy, the question can be asked: Does the Vice President, when chairing an energy policy task group at the behest of the President, have the constitutional or statutory power to refuse to disclose any information concerning the group's deliberations, documents and files, and consultations with private persons he or his staff met with during the course of the groups activities?

It has long been recognized by Congress that "sunshine" is the best disinfectant of policy infected by flawed thinking, mistaken assumptions, or simply poor judgment. Must the task force open itself to sunshine? Congress requires disclosure of policy advisory groups in federal agencies that contain private persons, and requires that agency policy development generally be open to public scrutiny. Federal Advisory Committee Act, 5 U.S.C. app. § 2, and Administrative Procedure Act, 5 U.S.C. §§ 551–706. These are the questions that underlie the dispute between Vice President Cheney and two public interest organizations—a conservative group, Judicial Watch, and an environmental group, Sierra Club—over discovery of documentation of consultation between the task force and private persons that was the subject of the Supreme Court's decision announced days before the end of the Court's 2003–2004 Term. *Cheney v. U.S. District Court for the District of Columbia*, 124 S. Ct. 2576,___U.S.___(2004).

Judicial Watch and Sierra Club challenged, under the Federal Advisory Committee Act (FACA), 5 U.S.C. app. § 2, both the secrecy of the meetings and the Vice President's refusal to disclose any information about the Energy Group's activities. The complaints alleged that the regular participation of nonfederal employees, including private energy industry lobbyists, was functionally indistinguishable from the involvement and role of formal members. Relying on *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir.1993), the complaints alleged that these private participants were *de facto* members, thereby removing the Energy Group from the FACA disclosure requirements exemption that would apply had the Energy Group been composed solely of federal government employees.

Vice President Cheney claimed that even if FACA required disclosure, any such inquiry is protected by presidential executive privilege both because he and the task force were acting at the behest of the President, and because as a constitutional officer, he is independently entitled to assert executive privilege under Article 2 of the Constitution. The public interest groups denied that executive privilege extended to these activities. The central, normative question behind this dispute—whether the proceedings should be transparent to promote public participation, a value essential to representative democratic governance—engulfed the context of the case, but was not a legal question for the Court to consider.

In its decision, the Court provided only cryptic guidance. It implicitly held that Vice President Cheney has no constitutional privilege as Vice President. It also reminded us that the President's privilege is not unbounded, and its assertion is always problematic: "Executive privilege is an extraordinary assertion of power 'not to be lightly invoked.' Once executive privilege is asserted, coequal branches of government are set on a collision course" with the judiciary being "forced into the difficult task of balancing the need for information . . . and the Executive's Article II prerogatives."

As to the specific disclosure dispute, the Court focused on the technical issue of whether it was appropriate for the court of appeals to hear Vice President Cheney's interlocutory challenge (in the form of a petition for a *writ of mandamus* to the district court) to the district court's order that (a) FACA could be enforced against the Vice President and other government members of the task force under the Mandamus Act, 28 U.S.C. § 1371, and against agency defendants under the Administrative Procedure Act, and (b) discovery would be permitted with respect to the task force's structure and membership and as to whether the *de facto* membership doctrine of *Association of American Physicians and Surgeons v. Clinton* applied.

The Supreme Court's central concern was whether the court of appeals was correct that it did not have the power to issue the "extraordinary writ of mandamus" on the Vice President's interlocutory appeal of the denial of his claim of executive privilege. According to the Court, were the Vice President not a party, the circuit court may have been correct denying interlocutory review. Instead, the Court noted, here the government alleged that the discovery orders "threatened 'substantial intrusions on the process by which those in close proximity to the President advise the President." According to the Court, although "the President is not above the law," the long recognized separation of powers principle "requires that a coequal branch of Government 'afford Presidential confidentiality the greatest protection consistent with the fair administration of justice'" and requires courts to consider "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its duties."

The court of appeals erred in denying the Vice President's mandamus petition without consideration of these separation-of-powers concerns. The court of appeals' mistake resulted from

its overreliance on *United States v. Nixon*, 418 U.S. 683, 709 (1974) (Court ordered President Nixon to give the White House Watergate tapes to the prosecution) because *Nixon* involved a criminal proceeding where "the need for information as much weightier" because of "the 'fundamental' and 'comprehensive' need for 'every man's evidence' in the criminal justice system." Thus, in a criminal proceeding "not only must the Executive Branch first assert privilege to resist disclosure, but privilege claims that shield information from a grand jury proceeding or criminal trial are not to be 'expansively construed.'" In contrast, the Court said, "[t]he need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena in *Nixon*;" ...[it] does not have the same 'constitutional dimensions.'"

The court of appeals' mistake was that it believed "that the assertion of executive privilege is a necessary precondition to the Government's separations-of-power [discovery] objections." As a result of its misreading *Nixon*, the Court of Appeals "prematurely terminated its inquiry . . . without . . . reaching the weighty separation-of-powers objections raised in the case, much less exercised its discretion to determine whether 'the writ is appropriate under the circumstances.'" Thus Justice Kennedy, writing for the seven-Justice majority, vacated the court of appeals order (but not the district court's order) and cryptically "remanded for further proceedings consistent with [the Court's] opinion."

Justice Stevens, concurring, would have vacated the district court discovery order, but would have returned the case to the court of appeals, which was the architect of the *de facto* member doctrine that motivated the discovery. Justices Thomas and Scalia, concurring in part and dissenting in part, would have vacated both orders because in their minds the underlying legal dispute was sufficiently contested that the district court could not find a "clear and undisputed right" of the public interest groups to the discovery, and so the district court's mandamus order to the Vice President was inappropriate. Justices Ginsburg and Souter, dissenting, believed that the court of appeals was correct in denying the Vice President's petition because the Vice President opposed all discovery below and did not participate in crafting a discovery order that might meet the needs of the parties. The government did not file specific objections to the discovery, nor did it "identify any particulars to support its assertion of executive privilege. . . . Instead, the Government urged the District Court to rule that Judicial Watch and Sierra Club could have no discovery at all." In the dissents' view, the Vice President's appeal was premature. As to the separation-of-powers claim, there was "[n]othing in the District Court's orders or the Court of Appeals decision . . . [that] suggests that either of those courts would refuse reasonably to accommodate separation-of-powers concerns."

So, what does this opinion teach about balancing executive privilege with the values of transparency in policy-making? First, it taught that courts should be specially "sensitive" to interlocutory appeals by the President and Vice President. Second, that this is a separation-of-powers dispute, in which the legitimate needs of coequal branches of government must be balanced: "A party's need for information is only one facet of the problem. An important factor weighing in the other direction is the burden imposed by discovery orders." Thus, courts must evaluate whether discovery orders constitute "an unwarranted impairment of another branch in the performance of its constitutional duties." This tension exists in both criminal and civil matters. Executive privilege is not so powerful that it always trumps civil discovery in federal courts, and in criminal contexts the need for truthful information is a constitutional value of great weight.

However, the hard problem—how to balance the legitimate interests of the executive branch with the legitimate needs of discovery to pursue violations of congressional mandates in federal courts—will be left to the district courts and courts of appeals as they apply the *Cheney* Court's generalized separation-of-powers principles. The underlying issue will then become an analysis of whether and to what degree the executive should be protected from "vexatious litigation that might distract it from the energetic performance of its duties." In making that judgment the lower courts will inevitably be forced to consider the normative importance of the substantive litigation to determine whether it is so slight as to be vexing or whether it is important enough to rise above being an irritating annoyance. It is here that the courts must find that Congress' underlying transparency values expressed in the statute and in the Constitution (for instance, the freedom of the press under Amendment I) are not mere annoyances, but are central to have a vital, sound democracy. Thus, separation of powers concerns—the declared policy and law from Congress, the functions of the executive, and the role of the judiciary—must reasonably be factored into how particular discovery orders are crafted. We must await future decisions in this case and others to learn what the contours of this field of competing forces will look like. However, in our democracy where the President and Vice President are accountable only to the people, one hopes that the executive will be held to a reasonable standard of transparency so that the people, when they vote, can knowledgably apply transparency's cleansing effects.

Mountaintop Mining and Nationwide Permit 21

Mark A. Ryan

On July 8, 2004, the Southern District Court of West Virginia ruled that the U.S. Army Corps of Engineers' (Corps) use of Nationwide Permit 21 (NWP 21) to allow streambeds to be filled with waste rock from mountain top coal mining was not authorized under Section 404(e) of the

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