An Examination of *Cheney v. U.S. District Court* – A Win for Executive Authority

By

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The Federalist Society
for Law and Public Policy Studies

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For a Supreme Court that takes a fairly expansive view of its own powers, the decision in *Cheney v. U.S. District Court* presents an interesting exercise in restraint. On the one hand, the Court (by 7-2 vote) excoriated both the plaintiffs and the lower courts for litigation run amok, concluding that wide-ranging discovery requests approved by the District Court against the Vice President and senior administration officials were "anything but appropriate" and that any form of discovery in this civil case against a sitting President raised serious constitutional questions, especially where the discovery requests were tantamount to relief on the merits of the case. But on the other, the Court's decision did not address the merits of the Vice President's claim that application of the Federal Advisory Committee Act under the circumstances of the case would amount to a violation of the separation of powers. Instead, it merely ruled that the D.C. Circuit had improperly dismissed the government's petition for writ of *mandamus* on the grounds that a claim of executive privilege was a prerequisite to appellate jurisdiction, remanding the case for further consideration to the Court of Appeals. Nevertheless, the decision, cast in terms of the *mandamus* jurisdiction of a Court of Appeals, is a substantial victory for executive authority.

A little context is required here. In the first days of the Bush Administration, the President assembled several of his senior advisers - including the Vice President, senior White House staff, and cabinet officers - and asked them to develop a comprehensive energy plan. That group met several times and also gathered input from the private sector, including - not surprisingly, given its task of developing a national energy plan - representatives from the energy industry. In May 2001, it presented a comprehensive plan to the President. That plan was released to the public at the time and formed the basis of the President's proposed energy legislation, which has since languished on Capitol Hill.

In late 2002, the Sierra Club and Judicial Watch brought separate suits against Vice President Cheney and the senior government officials that made up the National Energy Policy Development Group (NEPDG) under the Federal Advisory Committee Act (FACA), a 1970s-era blue ribbon committee statute that imposes substantial regulatory obligations on so-called "advisory committees" made up of non-governmental officials. Those suits, consolidated before U.S. District Court Judge Emmet Sullivan, claimed that the Vice President and other government officials violated FACA because, in conducting the business of the NEPDG, they met with several non-governmental officials who, as a result of their participation, became "*de facto*" members of the NEPDG. Because FACA applies to any federal advisory committee established or utilized by the President and made up of non-governmental officials, plaintiffs contended that the participation of *de facto* members required compliance with FACA. Thus, plaintiffs sought relief under FACA, including the disclosure of all of the documents of the NEPDG.

Plaintiffs' complaint alleged, based on nothing more than "information and belief" and a few press reports, that non-government officials were regular participants in the meetings of NEPDG, naming certain energy executives as "*de facto* members." This claim was contradicted by the Presidential order creating the NEPDG, which explicitly limited the membership of the

group to governmental officials. In response to the complaints, the government moved to dismiss, arguing that application of FACA to such a group of close Presidential advisers would violate the separation of powers and that, in any event, the plaintiffs could not state a cause of action against the Vice President under FACA, the Administrative Procedures Act, or the federal *mandamus* statute. The District Court denied defendants' motion to dismiss, reasoning that the serious separation of powers concerns raised by the defendants might be avoided entirely if, after what it called "tightly reined discovery," it was determined that the government had, in fact, complied with FACA.

Next, the government argued, in several submissions to the District Court, that any discovery in this case would raise separation of powers issues just as serious as application of FACA itself. Because the discovery proposed by the plaintiffs sought the details of each and every meeting, conversation, and communication that every member of the NEPDG and its staffers had within and without the government, the government filed a motion for a protective order, arguing that such discovery would impose substantial burdens on the Executive Branch. In separate objections, the government challenged the scope of discovery on overbreadth grounds. The District Court rejected the government motion for a protective order, reasoning that the government could still protect itself by a document-by-document assertion of executive privilege. Consequently, the court ordered the defendants either to produce documents responsive to plaintiffs' broad discovery requests or a detailed, document-by-document privilege log.

It was the series of orders culminating in the denial of the protective order that was the subject of the appeal to the D.C. Circuit. The Vice President and members of the NEPDG sought to appeal on two separate jurisdictional grounds. First, the Vice President argued that, given the unique constitutional role of the President and Vice President, he was permitted, under the rule of *United States v. Nixon*, 418 U.S. 683, to take an immediate appeal of an order of discovery without having to go into contempt first, like normal litigants. Second, arguing that they had no alternative avenue for relief from the discovery order of the District Court, defendants also filed a petition for writ of *mandamus*. The Court of Appeals, by a divided 2-1 vote, rejected both avenues for relief on similar grounds. First, with respect to the Vice President's reliance on *Nixon*, the court reasoned that *Nixon* required, as a prerequisite to appellate jurisdiction, the invocation and rejection of executive privilege. Because the District Court had left open that avenue for further proceedings below, a direct appeal did not lie under *Nixon*. Second, the court rejected the defendants' reliance on *mandamus* jurisdiction because there was an alternative avenue of relief available -- the same invocation of executive privilege followed by an appeal. Under the Court of Appeals ruling, the Vice President (and the President for that matter) were thus required not only to assert formally any and all claims of executive privilege before seeking to appeal, but were also required to do so with exceeding particularity. In the majority's view, if the District Court sustained a claim of privilege, the Executive is protected; if it rejects the claim, *mandamus* might well lie.

The government then sought *en banc* reconsideration of the panel decision, reasserting its argument that discovery imposes severe burdens that cannot be adequately protected by the doctrine of executive privilege and also challenging the D.C. Circuit's *de facto* membership doctrine -- announced in the Clinton Health Care Task Force decision, *AAPS v. Clinton*,

997 F.2d 898 (DC Cir. 1993) -- as inconsistent with both FACA's plain language and the separation of powers doctrine. By a 5-3 vote, the court denied reconsideration.

That set the stage for the Vice President's petition for *certiorari*. In the Supreme Court, the government challenged the D.C. Circuit's jurisdictional ruling, arguing that discovery was particularly inappropriate where it was tantamount to relief on the merits of a FACA violation and thus that jurisdiction must lie to correct the District Court's clear error. On the merits, the government also argued that application of FACA to the NEPDG would raise the most serious constitutional concerns that could be avoided if the Supreme Court would merely decide that the *de facto* membership doctrine was not consistent with FACA. Thus, the government asked for a reversal of the Court of Appeals' order denying the writ of *mandamus* and direction to the lower court to issue the writ.

In a 7-2 opinion authored by Justice Kennedy, the Court agreed with the Vice President that the Court of Appeals was incorrect to conclude that it had no authority to exercise *mandamus* jurisdiction on the ground that the assertion of executive privilege would fully protect the rights of the Vice President and members of the NEPDG. While framed in terms of *mandamus* jurisdiction, the opinion speaks to an extraordinarily broad conception of executive authority and judicial deference to that authority. The Court began its discussion of *mandamus* jurisdiction by noting that because the Vice President and his co-members of the NEPDG -- high ranking members of the Executive Branch -- were the subject of the discovery orders in the case, the case was much different than the ordinary *mandamus* case in the discovery phase of litigation. The Court cited Chief Justice Marshall for the proposition that "[i]n no case . . . would a court be required to proceed against the president as against an ordinary individual." Slip op. at 11. Thus, the Court reasoned that "the public interest requires that a coequal branch of Government 'afford Presidential confidentiality the greatest protection consistent with the fair administration of justice,' and give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." *Id.* at 11.

These separation of powers concerns are particularly strong, the Court reasoned, in the civil litigation context. Discovery against the President in a criminal case implicates core Article III considerations that may, in certain contexts, trump the Executive's concerns for confidentiality, given the centrality of the criminal process to the role of Article III courts. But the same concerns do not arise in the context of purely civil litigation: "The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena. . . ." *Id.* at 13. The Court reasoned that the "right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions.'" *Id.* Thus, withholding the information sought "in this case . . . does not hamper another branch's ability to perform its 'essential function in quite the same way" as doing so in a criminal subpoena context. *Id.* at 13-14. Especially here, where discovery was ordered not to remedy known violations of FACA, but simply to ascertain whether the statute applied in the first place, the need for such discovery is not central to the Court's Article III function or even Congress' Article I function (in adopting the statute).

At the same time, the burden on the Executive imposed by the broad discovery approved by the District Court weighs in favor of *mandamus* relief. "This is not a routine discovery dispute," *Id.* at 14, but rather one which seeks discovery from the "highest level" of the Executive Branch. In that context, "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* Thus, the Executive's "constitutional responsibilities and status [are] factors counseling judicial deference and restraint." *Id.* at 15. And the normal safeguards of civil litigation, such as Rule 11, are "insufficient to discourage the filing of meritless claims against the Executive Branch." *Id.* at 15.

Based principally on the breadth of the discovery requests at issue in this case, the Court rejected the lower court's reasoning that a line-by-line invocation of executive privilege was sufficient to protect the Article II interests at stake, concluding that "our precedent provides no support for the proposition that the Executive Branch 'shall bear the burden' of invoking executive privilege with sufficient specificity and of making particularized objections." *Id.* at 17. Indeed, as the Court had repeatedly concluded in the past, "Executive privilege is an extraordinary assertion of power 'not to be lightly invoked." *Id.* at 19. Thus, by forcing the government to assert the privilege as a prerequisite to appeal, the Court of Appeals created a situation in which "coequal branches of Government are set on a collision course." *Id.*

Given the Supreme Court's deferential approach to the government's assertions that discovery would encroach on executive prerogatives – and the open skepticism of several Justices during oral argument of the case of the appropriateness of the *de facto* membership doctrine relied upon by the lower courts -- it would not have been surprising for the Court to have reversed the D.C. Circuit's opinion and directed the issuance of the writ of *mandamus*. But despite seemingly putting all of the pieces of the *mandamus* puzzle together, the Court did not order issuance of the writ. Rather, the majority remanded to the Court of Appeals for consideration of whether the writ should issue. Because the Court of Appeals never got past the question of alternative remedies, the Supreme Court concluded that it "prematurely terminated its inquiry" and should, on remand, consider whether the writ is appropriate under the circumstances. In concluding, however, the Court hinted at how those questions should be resolved: "We note only that all courts should be mindful of the burdens imposed on the Executive Branch in any further proceedings." *Id.* at 21. And the Court seemed to suggest to the Court of Appeals that it take a second look at the viability of the *de facto* membership doctrine, a key issue raised by the government on the merits of the case: "Special considerations applicable to the President and the Vice President suggest that courts should be sensitive to requests by the Government for interlocutory appeals to reexamine, for example, whether the statute embodies the *de facto* membership doctrine." *Id.*

The majority opinion was joined in whole by the Chief Justice and Justices Stevens, O'Connor, and Breyer. Justice Thomas, joined by Justice Scalia, wrote separately to concur in the reasoning of the Court, but disagree with the result, noting that he would have gone the next step and ordered the writ to issue, thus effectively ending the case. Justice Stevens, in a two-page separate concurrence, reasoned that remand was appropriate because it was the D.C. Circuit that created the *de facto* membership doctrine, and it should be the D.C. Circuit to review that doctrine. Justice Ginsburg, joined by Justice Souter, dissented.

While the decision of the Supreme Court leaves work to be done in and by the lower courts in this case, it is a major victory for the Executive. The ground given away by the Clinton Administration in its frivolous assertion of Executive Privilege in the Paula Jones case has begun to be recovered by the Bush/Cheney Administration in its fight for the Executive's right to deliberate in confidence. Much more than simply a decision about the arcane rules of *mandamus* jurisdiction, the Supreme Court's decision is an appropriate recognition that civil discovery against a sitting President or Vice President has the potential for the wholesale distraction of the Executive from its constitutionally assigned duties and thus raises serious separation of powers concerns. And Presidents of all political stripes will benefit greatly from the decision in the future.

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