AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Executive Privilege

**Cheney v. United States District Court for the District of Columbia, 542 U.S. 367** (2004)

Shortly after taking office, President George W. Bush created the National Energy Policy Development Group (NEPDG), chaired by Vice President Dick Cheney, to develop the administration’s national energy policy. The NEPDG was composed entirely of high-level executive-branch officials. The NEPDG issued a report five months after its creation and disbanded. Afterward, two interest groups filed suit in federal district court against Cheney and the other members of the NEPDG contending the group had violated the Federal Advisory Committee Act of 1972 (FACA), part of the Watergate-era reforms. FACA imposed a variety of open meeting and disclosure requirements on “advisory committees” that included any nongovernmental employees. The interest groups contended that lobbyists regularly attended meetings of the NEPDG and were de facto members of the group. They also sought an injunction requiring the administration to produce all materials that would have been disclosed if FACA were applicable. Because FACA did not allow private lawsuits to enforce its terms, the district court allowed the suit to proceed against the vice president through a separate statute allowing for a writ of mandamus under limited circumstances.

Since the public record of NEPDG indicated only the official members of the group, the lawsuit began with a discovery motion seeking documents relating to the activities of the NEPDG. The administration responded by claiming that all documents were protected by executive privilege. In the context of a civil lawsuit against the vice president, the administration argued, and the Supreme Court ultimately agreed, that a claim to executive privilege could properly be quite broad. The district court approved the discovery request of the interest groups, which a divided circuit court affirmed on appeal. By a 7–2 vote, the Supreme Court reversed the lower courts. Although giving an immediate “victory” to Cheney and the administration, the Court did not directly rule on the administration’s argument that it was entitled to blanket immunity from discovery proceedings in this case. The justices instead encouraged the lower courts to narrow any discovery so as not to interfere with the functioning of the executive branch. The circuit court subsequently decided that FACA allowed the president to establish advisory groups, such as the NEPDG. In these groups government employees were the only “voting members,” even if nongovernment employees were also consulted during the process. In this way, the circuit court sought in part to avoid the separation-of-powers concerns identified by the Supreme Court. Given that ruling, no discovery was necessary, and the lawsuit was dismissed.

A key issue for the U.S. Supreme Court was whether to distinguish the claim of executive privilege in *U.S. v. Nixon* (1974). Should different standards apply for civil versus criminal proceedings in weighing claims of executive privilege?

JUSTICE KENNEDY delivered the opinion of the Court.

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The United States District Court for the District of Columbia entered discovery orders directing the Vice President and other senior officials in the Executive Branch to produce information about a task force established to give advice and make policy recommendations to the President. This case requires us to consider the circumstances under which a court of appeals may exercise its power to issue a writ of mandamus to modify or dissolve the orders when, by virtue of their overbreadth, enforcement might interfere with the officials in the discharge of their duties and impinge upon the President’s constitutional prerogatives.

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. . . It is well established that “a President’s communications and activities encompass a vastly wider range of sensitive material than would be true of any ‘ordinary individual.’ ” United States *v.* Nixon, 418 U.S. 683, 715 (1974). Chief Justice Marshall, sitting as a trial judge, recognized the unique position of the Executive Branch when he stated that “[i]n no case . . . would a court be required to proceed against the president as against an ordinary individual.” . . . As Nixon explained, these principles do not mean that the “President is above the law.” Rather, they simply acknowledge 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.

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The distinction Nixon drew between criminal and civil proceedings is not just a matter of formalism. As the Court explained, the need for information in the criminal context is much weightier because “our historic[al] commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that ‘the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.’ ” . . .

The Court also observed in Nixon that a “primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions.” Withholding materials from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks “conflict[s] with the function of the courts under Art. III.” Such an impairment of the “essential functions of [another] branch,” is impermissible. Withholding the information in this case, however, does not hamper another branch’s ability to perform its “essential functions” in quite the same way. The District Court ordered discovery here, not to remedy known statutory violations, but to ascertain whether FACA’s disclosure requirements even apply to the NEPDG in the first place. Even if FACA embodies important congressional objectives, the only consequence from respondents’ inability to obtain the discovery they seek is that it would be more difficult for private complainants to vindicate Congress’ policy objectives under FACA. . . .

A party’s need for information is only one facet of the problem. An important factor weighing in the opposite direction is the burden imposed by the discovery orders. This is not a routine discovery dispute. The discovery requests are directed to the Vice President and other senior Government officials who served on the NEPDG to give advice and make recommendations to the President. The Executive Branch, at its highest level, is seeking the aid of the courts to protect its constitutional prerogatives. As we have already noted, 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. . . .

Even when compared against United States *v.* ­Nixon’s criminal subpoenas, which did involve the President, the civil discovery here militates against respondents’ position. The observation in Nixon that production of confidential information would not disrupt the functioning of the Executive Branch cannot be applied in a mechanistic fashion to civil litigation. In the criminal justice system, there are various constraints, albeit imperfect, to filter out insubstantial legal claims. The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice. The rigors of the penal system are also mitigated by the responsible exercise of prosecutorial discretion. In contrast, there are no analogous checks in the civil discovery process here. . . .

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. . . Once executive privilege is asserted, coequal branches of the Government are set on a collision course. The Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive’s Article II prerogatives. This inquiry places courts in the awkward position of evaluating the Executive’s claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These “occasion[s] for constitutional confrontation between the two branches” should be avoided whenever possible. United States *v.* Nixon

In recognition of these concerns, there is sound precedent in the District of Columbia itself for district courts to explore other avenues, short of forcing the Executive to invoke privilege, when they are asked to enforce against the Executive Branch unnecessarily broad subpoenas. . . . [Here the Court indicated doctrines “to narrow, on its own, the scope of the subpoenas” so as to balance judicial and executive interests.]

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The judgment of the Court of Appeals for the District of Columbia is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

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. . . [G]ranting broad discovery in this case effectively prejudged the merits of respondents’ claim for mandamus relief—an outcome entirely inconsistent with the extraordinary nature of the writ. Under these circumstances, instead of requiring petitioners to object to particular discovery requests, the District Court should have required respondents to demonstrate that particular requests would tend to establish their theory of the case. . . .

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in part and dissenting in part.

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JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, dissenting.

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The discovery plan drawn by Judicial Watch and Sierra Club was indeed “unbounded in scope.” Initial approval of that plan by the District Court, however, was not given in stunning disregard of separation-of-powers concerns. In the order itself, the District Court invited “detailed and precise object[ions]” to any of the discovery requests, and instructed the Government to “identify and explain . . . invocations of privilege with particularity.” . . . Anticipating further proceedings concerning discovery, the District Court suggested that the Government could “submit [any privileged documents] under seal for the court’s consideration,” or that “the court [could] appoint the equivalent of a Special Master, maybe a retired judge,” to review allegedly privileged documents.

The Government did not file specific objections; nor did it supply particulars to support assertions of privilege. Instead, the Government urged the District Court to rule that Judicial Watch and the Sierra Club could have no discovery at all. . . .

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. . . [I]n remanding for consideration of discovery-tailoring measures, the Court apparently rejects [the] no-discovery position. Otherwise, a remand based on the overbreadth of the discovery requests would make no sense. Nothing in the record, however, intimates lower-court refusal to reduce discovery. . . . In accord with the Court of Appeals, I am “confident that [were it moved to do so] the district court here [would] protect petitioners’ legitimate interests and keep discovery within appropriate limits.” I would therefore affirm the judgment of the Court of Appeals.