US Supreme Court declines to order release of Cheney energy taskforce papers

John Andrews
29 June 2004

In a decision that bolsters the Bush administration's assertion of sweeping executive powers and frustrates the people's "right to know" about the operations of the government, the Supreme Court on June 24 voted 7-2 to order further review of Vice President Dick Cheney's refusal to comply with a lower court order that he provide information about the participation of energy industry executives and lobbyists in the Bush administration's energy task force.

The case was brought by two advocacy groups, the conservationist Sierra Club and the conservative Judicial Watch, to force Cheney, the head of the task force, to release all of the body's records. The task force met behind closed doors in 2001 and drew up the administration's pro-corporate energy policy.

Although the Supreme Court rejected Cheney's extreme claim that the "separation of powers" doctrine blocks any judicial inquiry into the energy task force, Cheney hailed the decision as "a significant victory" for the Bush administration.

The case is being sent back to the District of Columbia Court of Appeals with instructions that the questions to Cheney about the industry insiders on the task force be reviewed with "the high respect that is owed to the office of the Chief Executive."

While not eliminating altogether the chance that at least some of the energy task force records will eventually be released, the ruling guarantees that any final decision will be delayed until long after the November 2004 presidential election.

Tom Fitton, the Judicial Watch spokesperson, said, "There's been a stench of secrecy that permeates this administration, in large part because of this case." David Bookbinder, the Sierra Club's legal director, accused the Supreme Court of "ducking the issue by sending it back to the lower court." Bookbinder explained, "This ruling means that for now the public will remain in the dark about the Bush administration and energy industry executives' secret meetings about national energy policy."

Keeping the public in the dark until after the November election is the immediate benefit of the decision for Bush. It is believed that the task force records, if released, would confirm that the Bush energy policy was authored by industry officials and lobbyists. This could only further inflame an electorate already angry over rising fuel prices.

Additionally, there is evidence that the task force reviewed maps of Iraqi oilfields, pipelines and refineries, as well as contracts of foreign companies for Iraqi oilfield development. The publication of such evidence would underscore the fact that the Bush administration plotted war against Iraq well before 9/11, and that the primary motive was seizing control of the country's vast oil reserves.

The Supreme Court based its ruling on a contorted and constitutionally unfounded interpretation of the concept of "separation of powers"—an interpretation tailored to the ever-expanding and quasi-dictatorial powers of an executive branch that more and more openly rejects any serious oversight by Congress or the courts.

"Separation of powers" refers to a basic principle laid down by the US Constitution, which establishes three independent and co-equal branches of government: the legislative (Congress), executive (president) and judicial (federal courts). The Constitution underwrites the separate existence of each branch, and outlines the powers and privileges reserved to each of the three. At the same time, it allows each branch to exercise certain powers over the others, in what is known as a system of "checks and balances." An overriding consideration of the founders of the American republic who drafted the Constitution was to limit the power of any single branch of government—especially the executive branch—in order to minimize the danger of despotic rule.

The Bush administration has used—and abused—the doctrine of "separation of powers," especially since the September 11 terrorist attacks, to place the executive branch outside of any effective congressional or judicial oversight. The June 24 decision in *Cheney v. United States District Court*, while rejecting the most extreme claims of the Bush administration, nevertheless weakens congressional review of executive actions and sets a new precedent antagonistic to the public's right to know.

Within days of taking office in January of 2001, Bush appointed Cheney to head the National Energy Policy Development Group (NEPDG), a task force nominally composed of administration officials. NEPDG issued a report in May 2001 calling for a relaxation of environmental safeguards, including permission for oil companies to drill in the Arctic wilderness, and increased government subsidies and tax breaks for energy corporations. It closely adhered to the agenda of the big energy companies in favor of privatization and deregulation, and contained no serious proposals concerning energy conservation or such environmental questions as global warming.

Widespread criticism of the report's pro-industry bias was accompanied by media reports that energy company officials and lobbyists, including then-Enron Chairman Kenneth Lay—the largest contributor to Bush's 2000 election campaign—held extensive private meetings with NEPDG, and even wrote sections of the report.

To investigate the 2001 California energy crisis and the subsequent collapse of Enron, Congress directed its investigative arm, the General Accounting Office (GAO), to obtain the NEPDG records. Asserting that the principle of separation of powers blocked Congress from reviewing executive branch meetings with private individuals, Cheney refused the request. (See "Bush administration stonewalls on energy task force documents," http://www.wsws.org/articles/2001/sep2001/chen-s04.shtml).

In response, the GAO filed suit in federal district court. The case was assigned to US District Court Judge John Bates, previously an assistant to Whitewater Independent Counsel Kenneth Starr. Bush had shortly before appointed Bates to the bench.

Bates dismissed the GAO lawsuit in a clearly partisan ruling. Knuckling under to the Bush administration, the GAO declined to challenge Bates's decision in the appellate courts, without any significant protest from the

congressional Democrats.

At the same time, the Sierra Club and Judicial Watch filed their civil suits, citing the Federal Advisory Committee Act (FACA), which requires presidential advisory committees such as NEPDG to make their records public, unless the committees are "composed wholly of full-time officers or employees of the Federal Government." The plaintiffs argued that the industry representatives were "de-facto" NEPDG members, thus making NEPDG subject to FACA. The cases were assigned to US District Court Judge Emmet G. Sullivan, a Reagan appointee.

Sullivan delayed ruling on Cheney's novel argument that FACA violates the separation of powers because it "interferes with the President's constitutionally protected ability to receive confidential advice from his advisors, even when those advisors include private individuals." Instead, he ordered preliminary "discovery"—the pretrial exchange of information by parties to a lawsuit—"into the nature and number of the meetings at issue, the identities of the participants, the nature of the group's interaction with the President, the role of the Vice President... and the proximity of the NEPDG... to the President." With a fuller record, Sullivan said, he could rule on Cheney's claims arising from the separation of powers doctrine.

Sullivan slammed Cheney's assertion that the separation of powers doctrine blocked any court inquiry whatsoever into the role of private individuals in NEPDG. "The implications of the bright-line rule advocated by the government are stunning," Sullivan wrote. "Any action by Congress or the Judiciary that intrudes on the president's ability to recommend legislation to Congress or get advice from Cabinet members in any way would necessarily violate the Constitution. The Freedom of Information Act and other open government laws would therefore constitute an unconstitutional interference with Executive authority. Any action by a court or Congress that infringes on any other... power of the President, for example, the President's role as Commander in Chief of the armed forces and the national security concerns that derive from that role, would violate the Constitution. Any congressional or judicial ruling that infringes on the President's role in foreign affairs would violate the Constitution. Clearly, this is not the law. Such a ruling would eviscerate the understanding of checks and balances between the three branches of government on which our constitutional order depends," Sullivan concluded

The judge acknowledged that "although there is no specific privilege for protecting the confidentiality of Presidential communications or deliberations in the text of the Constitution... the President's need for complete candor and objectivity from advisors" allows for some "executive privilege" to protect certain high-level communications. Explaining that the scope of "executive privilege" may not include communications among lower-level officials and private individuals, Sullivan observed, "The question raised by the application of FACA to the NEPDG... is not whether the President's constitutionally protected ability to receive advice in confidence is undermined, but whether his advisors' ability to deliberate in confidence is constitutionally protected, and how far down the line that protection extends."

In ordering the case to proceed, Sullivan quoted from a Watergate-era appellate court decision: "Openness in government has always been thought crucial to ensuring that the people remain in control of their government... The very reason that presidential communications deserve special protection, namely the President's unique powers and profound responsibilities, is simultaneously the very reason why securing as much public knowledge of presidential actions as is consistent with the needs of governing is of paramount importance."

Sullivan underscored the "paramount importance" of this public right to know by quoting from an 1822 letter by James Madison, the fourth US president and the Constitution's principal draftsman: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

Cheney refused to respond to any of the discovery requests. Instead, he petitioned the Court of Appeals, claiming that for him to participate in discovery would violate the separation of powers. The appellate court rejected the petition, directing Cheney to respond to the discovery, while leaving him free to assert executive privilege objections to specific requests for information.

Cheney then petitioned the Supreme Court. Many commentators were surprised when the petition was granted, because Supreme Court review is generally limited to final decisions in exceptional cases, and this lawsuit was still in its preliminary stages.

The decision issued by the Court last week neither upholds Cheney's blanket claim of privilege nor orders him to respond to the discovery. Instead, Associate Justice Anthony Kennedy, writing for the majority, said that the lower courts should have forced the plaintiffs to narrow their discovery requests to avoid compelling Cheney to invoke executive privilege. He said the trial court and the District of Columbia Court of Appeals were wrong to allow the discovery to go forward, giving Cheney the option of either answering specific questions, or invoking executive privilege to avoid answering the inquiries.

Thus, Kennedy placed the onus not on Cheney and the Bush administration, who are insisting on their right to keep their closed-door deliberations with oil executives from the eyes of Congress and the public, but rather on the plaintiffs, who are opposing such government secrecy and asserting the democratic principle of the people's right to know.

Kennedy's ruling also flies in the face of the generally accepted procedure in civil litigation, where the party responding to discovery has the burden of raising objections.

Chief Justice William Rehnquist and Associate Justices John Paul Stevens, Sandra Day O'Connor, Stephen G. Breyer, Antonin Scalia and Clarence Thomas joined Kennedy's opinion.

Kennedy referred repeatedly to the "burden imposed by the discovery orders" on "the Vice President and other senior Government officials who served on the NEPDG to give advice and make recommendations to the President." Absent from the majority opinion is any recognition of the importance, from the standpoint of democratic rights, of the public's right to know.

Kennedy wrote, "This Court has held, on more than one occasion, that 'the high respect that is owed to the office of the Chief Executive... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.'" Ironically, the precedent quoted is *Clinton v. Jones*, the unanimous 1997 Supreme Court ruling that allowed Paula Jones—backed by a well-financed cabal of right-wing political operatives—to pursue her sexual harassment claim against Bill Clinton for alleged conduct years before he was elected president.

On the basis of this ruling, those who were conspiring to bring down the Clinton administration were able to have Clinton dragged into civil court to testify under oath about his relations not only with Jones, but with a series of other women, including Monica Lewinsky. Thus the Jones suit—which was ultimately thrown out of court by the trial judge on the grounds that it had no legal merit—became the linchpin for the legal witch-hunt spearheaded by Kenneth Starr and, in turn, Clinton's impeachment.

The brazen double standard of the Court in relation to the Bush administration, as compared to that of Clinton, found expression in Kennedy's injunction that the courts recognize "the paramount necessity of protecting the executive branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." At the time of the high court ruling on the Jones case, the same justices casually dismissed the argument of Clinton's lawyers that subjecting a sitting president to a civil suit having nothing to do with his official

functions would impair his ability to carry out his duties. Yet here, in a civil suit that goes to the most crucial principles of open government and democratic rights, and directly concerns the formation of policy by the president and vice president, the court holds forth against "vexatious litigation" and worries about "distracting" the executive branch.

The other precedent standing between the Supreme Court majority and the result it wanted to reach was *United States v. Nixon*, the 1974 Supreme Court decision upholding a court subpoena ordering Nixon to turn over White House tapes related to the Watergate scandal. Writing that the president was not "above the law," the Supreme Court ordered him to turn the tapes over to the special prosecutor. The resulting disclosures confirmed Nixon's personal involvement in the Watergate cover-up and led to his resignation under the threat of impeachment.

Kennedy dismissed the *Nixon* precedent on the flimsy basis that the court in that case was seeking information in relation to a criminal investigation, rather than a civil action.

The main difference between *Nixon* and *Cheney* is the historical contexts in which the cases arose. Thirty years ago the Supreme Court was concerned about the political ramifications of having an overtly criminal administration occupying the White House and asserting immunity from legal and Congressional challenges. Times have changed.

Associate Justice Ruth Bader Ginsburg authored a dissent that was joined by Associate Justice David Souter. It focused on the mechanics of pretrial discovery and the parameters for appellate review, rather than the constitutional issues raised by Judge Sullivan. Nevertheless, she felt strongly enough to take the unusual step of reading her dissent from the bench.

The corrupt and anti-democratic collusion between the government and big business that gave rise to the case in the first place found its crude and thuggish expression in the role of Associate Justice Antonin Scalia. The ideological leader of the court's extreme-right faction, Scalia did not write an opinion, but instead voted with the majority. He also joined the concurring opinion of Associate Justice Clarence Thomas, who gave full support to Cheney's assertion of immunity from any discovery—thus implicitly sanctioning the establishment of a presidential dictatorship.

Scalia had become the focus of considerable controversy after it was revealed that he had joined Cheney for a private duck-hunting trip after the Cheney case had been accepted for review by the Supreme Court. Despite having clearly violated federal laws barring judges from engaging in practices that create even the appearance of a conflict of interests, Scalia contemptuously rejected calls for him to remove himself from the case.

The duck-hunting outing in Louisiana in its own way crystallized the incestuous relations between top government officials, federal judges and corporate executives—especially, in the case of the Bush administration, with Big Oil executives. Cheney, the former CEO of energy industry giant Halliburton, was appointed to head the energy task force by Bush, the son of an oilman and a former oilman himself. The host of the Scalia-Cheney duck-hunting outing was himself a prominent Louisiana oilman.