EXECUTIVE EXCLUSION AND THE CLOISTERING OF THE CHENEY ENERGY TASK FORCE

ERIC DANNENMAIER*

This paper asks whether the exclusion of environmentalists by the Cheney Energy Task Force can be understood in First Amendment terms as a form of belief-based discrimination. The Task Force operated secretively in the early weeks of the Bush administration; it was counseled by industry but cloistered from those who would challenge the administration's production-based orthodoxy. Records made public six years after the Task Force disbanded show it met with environmental groups just once—late in its tenure after priorities were established—though it met early and often with industry representatives. Privileging the ideologically compatible is a Washington tradition and (in some circumstances) an executive branch prerogative which the author describes as "executive exclusion." Yet here the exclusion of environmentalists seemed motivated by more than mere policy differences; the record suggests they were shut out because of their identity and not just because of their ideas. The article explores that animus to ask how it should be seen within the framework of First Amendment protection for viewpoint and belief. The author finds the phenomenon does not fit neatly into a free speech analysis because the Cheney process was not a sufficiently public forum; nor does it fit a free exercise or establishment analysis because the beliefs and identity at issue cannot be understood as sufficiently analogous to religion to advance an establishment claim. Yet despite these doctrinal limitations the Cheney Task Force raises concerns about political exclusion and identity-based discrimination inconsistent with core democratic principles. While

* Associate Professor of Law, Indiana University—Indianapolis. Bretzfelder Fellow, Columbia Law School, 2006–07. J.D., Boston University; LL.M., Columbia University; M.St., Oxford University. The author wishes to thank Professor Kent Greenawalt of Columbia Law School and participants in his fall 2005 Church and State Seminar, along with Columbia Law Professor Mark Barenberg and participants in the spring 2007 Doctoral Workshop, for comments on early drafts.

the phenomenon appears at the edge of traditional First Amendment protection, the author concludes that it warrants further scrutiny and suggests that Congressional action to tighten the principal federal law on executive processes openness—the Federal Advisory Committee Act—offers a potential solution.

INTRODUCTION AND BACKGROUND

During his second week in office in 2001, President George W. Bush established the National Energy Policy Development Group (NEPDG)[1], chaired by Vice President Richard Cheney and directed to "develop a national energy policy designed to help the private sector, and, as necessary and appropriate, State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy for the future."[2] The core of the Task Force was composed of Cabinet-level government officials; it was chaired by the Vice President, and directed by a former congressional staff member.[3]

The Task Force operated largely out of public view for the next three months, and its deliberations remain shrouded in secrecy.[4] In 2007, more than six years after its Final Report, an unnamed former White House official leaked a list of Task Force participants to the *Washington Post*.[5] The list documented what had been pieced together through investigative reporting and

[1] Though this name was used in official documents and court pleadings, the NEPDG was more commonly known as the Cheney Energy Task Force or the Task Force and those terms are used here.

[2] NAT'L ENERGY POLICY DEV. GROUP, NATIONAL ENERGY POLICY: RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA'S FUTURE viii (2001), http://www.whitehouse.gov/energy/National-Energy-Policy.pdf [hereinafter TASK FORCE REPORT] (on file with New York University Environmental Law Journal). The Task Force was created on January 29, 2001, the same day Bush issued an Executive Order creating the White House Office of Faith-Based and Community Initiatives. *See* Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001).

[3] NAT'L ENERGY POLICY DEV. GROUP, *supra* note 2, at v.

[4] *See* discussion *infra* Part V.

[5] Michael Abramowitz & Steven Mufson, *Papers Detail Industry's Role in Cheney's Energy Report*, WASH. POST, July 18, 2007, at A1. Provided with a copy of the list, the White House still refused to comment. *Id.* The Post reported that Cheney spokeswoman Lea Anne McBride replied by e-mail that "[t]he vice president has respectfully but resolutely maintained the importance of protecting the ability of the president and vice president to receive candid advice on important national policy matters in confidence, a principle affirmed by the Supreme Court." *Id*.

speculation in preceding years: the Cheney Task Force was dominated by the energy industry. Its principal informants were industry partisans, either from energy production and marketing firms such as Exxon and Enron or energy trade associations and lobbyists, such as the American Petroleum Institute (API).[6] Task Force members and staff recorded dozens of meetings with more than three hundred people over the course of its three-month tenure.[7] Yet the record shows only a single meeting with environmental interest groups.[8] Thirteen environmental groups were invited to a session in early April—after Task Force work was largely complete.[9] It was clear to those present that the meeting was a courtesy or an afterthought, and no substantive discussions were held.[10] Environmentalists were effectively shut out. In formulating a National Energy Strategy, the Cheney Task Force met more often with foreign officials and foreign business interests (including a Venezuelan delegation, Canadian hydro and petroleum producer groups, and British Petroleum) than with U.S. environmental groups.[11] Whatever the intent of this policy, its discriminatory effect was clear.

The record shows that Task Force recommendations were greatly influenced, often directly drafted, by industry. Uncovered e-mails, for example, reveal API proposals and editorial suggestions adopted verbatim in Executive Orders.[12] No such

---

[6] *Id.*

[7] *Id.* While this number, provided by one participant, provides something of a baseline, it is difficult to gauge the true number of meetings that were held.

[8] *Id.*

[9] *Id.*; *See also Meetings with Vice President Cheney's Energy Task Force*, WASH. POST, July 18, 2007, http://www.washingtonpost.com/wp-srv/politics/documents/cheney_energy_task_force.html (last visited Jan. 25, 2008) [hereinafter *Task Force Meeting List*]. One participant in the April meeting (a communications officer from the Natural Resources Defense Council) had also joined a March 13 meeting of "energy efficiency" groups, which included the Maytag Corporation and the Association of Home Appliance Manufacturers. *Id.*

[10] Abramowitz & Mufson, *supra* note 5. Though the Friends of the Earth participant remarked on Cheney's absence, there is little public record of his direct personal involvement with the Task Force. The Vice President's only recorded meeting, outside of communications with government employees and members of Congress, was with Ken Lay, then Chairman of Enron. *Id*.

[11] *See Task Force Meeting List*, *supra* note 9.

[12] *See, e.g.*, E-mail from Jim Ford, Director of Federal Relations, API, to Joseph Kelliher, Senior Policy Advisor to the Secretary of Energy (Mar. 20, 2001), *available at* http://www.nrdc.org/air/energy/taskforce/images/doc121.jpg; *see also* Don Van Natta, Jr. & Neela Banerjee, *Review Shows Energy Industry's*

access was afforded to environmental groups. Three months after it was formed, in May 2001, the Cheney Energy Task Force issued a report entitled *National Energy Policy: Report of the National Energy Policy Development Group.*[13] The Task Force then disbanded.

The Task Force Report was denounced by environmental groups, seeing its policy recommendations for the first time, as a paean to the energy industry and a triumph for production over conservation interests.[14] Its recommendations emphasized supply and production strategies.[15] The Report proposed incentives for oil producers, the opening of federal lands and coastal areas for drilling, and the revival of a nuclear power industry moribund since the mid-1970s.[16] Conservation was an afterthought and the environment was just a medium for production. In subsequent years these recommendations were implemented within the Executive Branch through instruments ranging from agency directives to federal rules and Executive Orders.[17] The Task Force Report also formed the basis of national energy legislation proposed by the White House and approved by Congress largely along party lines.[18] Yet ironically this seminal national policy instrument that in principle called for balancing environmental and energy production interests was never vetted by representatives of groups devoted to upholding the environmental side of the

Recommendations to Bush Ended Up Being National Policy, N.Y. TIMES, Mar. 28, 2002, at A18. Ford is, and was at the time, the Director of the Federal Relations Department at API. *Id.* At the time, Kelliher was a Senior Policy Advisor to the Secretary of Energy (a core member of the Task Force). He was appointed Chairman of the Federal Energy Regulatory Commission by President Bush after the Task Force finished its work, in June 2001. *See* FERC, Chairman Joseph T. Kelliher, http://www.ferc.gov/about/com-mem/kelliher.asp (last visited Jan. 25, 2008).

[13] NAT'L ENERGY POLICY DEV. GROUP, *supra* note 2.

[14] *See* Abramowitz & Mufson, *supra* note 5.

[15] *See generally* NAT'L ENERGY POLICY DEV. GROUP, *supra* note 2.

[16] *Id.*

[17] *See*, *e.g.*, Exec. Order 13,221, 66 Fed. Reg. 149 (July 31, 2001).

[18] *See* Abramowitz & Mufson, *supra* note 5. The party line vote is important because it suggests that the principal meaningful opportunity for input in the process of designing the law was during its development by the White House. While legislative processes, in theory, offer an opportunity for public scrutiny and debate this is less true where the White House and Congress are controlled by the same party, especially where a popular president exercises a great deal of authority and discipline within his party, as President Bush did during the early years of his presidency.

equation.[19]

Some of those excluded from the Cheney process tried, but failed, to obtain basic facts about Task Force deliberations, or even to discover the identity of its broader membership. Environmental groups, along with politically conservative Judicial Watch, and the Government Accountability Office (GAO), each sued the Vice President to compel the disclosure of Task Force membership and proceedings (the first such suit in the history of the GAO).[20] They sued under the Federal Advisory Committee Act (FACA),[21] which imposes reporting and transparency requirements, but lost after the court found that the core task force membership was entirely cabinet-level and thus that the Task Force was an internal advisory committee not subject to the provisions of the Act.[22]

The inability of this legislative scheme to provide public access to critical federal decision-making processes presents the question of whether the exclusionary approach of the Cheney Task force is subject to some other form of review. If race or gender were at issue and one class had a disproportionate role in decision-making, it would be difficult to counter a claim of discrimination. One could argue that environmental groups were simply advancing political positions and policy ideas. They are not a suspect class, and their ideas were not excluded from a public forum; thus even clear discriminatory intent would appear beyond the reach of equal protection or free speech challenges.

The exclusion of environmentalists by the Task Force nevertheless appears problematic. While environmentalists are not a traditionally protected group, there is evidence that their exclusion turned more on their values and identity rather than

[19] Despite the ambiguity of the Vice President's transmittal letter (asserting that "we must modernize conservation" and calling for the "improvement" of the environment) the Task Force Report acknowledged the centrality of environmental concerns. The Task Force Report is subtitled "Reliable, Affordable, and Environmentally Sound Energy for America's Future;" the President's opening quote (something of a statement of principle) claims "I believe we can develop our natural resources and protect our environment;" and environmental concerns are referenced more than 290 times in the Report itself. *See* NAT'L ENERGY POLICY DEV. GROUP, *supra* note 1.

[20] Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d. 20 (D.D.C. 2002) (lawsuit filed by Judicial Watch and Sierra Club); Walker v. Cheney, 230 F. Supp. 2d. 51 (D.D.C. 2002) (lawsuit filed by David Walker, Comptroller General of the United States).

[21] Federal Advisory Committee Act, (FACA), 5 U.S.C. App. § 2 (2000).

[22] *See infra* Part V.

simply their political perspectives or policy position. Contemporaneous statements by the Vice President and his allies support this proposition, and the record suggests that seemingly hyperbolic suspicions of an "environmentalist religion" practiced by sectarian "zealots" exposed a genuine animus at work within the administration.[23]

The article does not set out to prove this proposition,[24] but to ask about the legal effect of such a claim by exploring limits on the executive's prerogative to exclude persons from policymaking under circumstances where belief forms the basis of exclusion. This inquiry is conducted within a First Amendment framework and contrasts viewpoint discrimination under the free speech clause with belief-based identity discrimination under the free exercise and establishment clauses.

The article offers in Part I a theory of "executive exclusion" as a corollary to the doctrine of executive privilege; it reasons that the executive's ability to include or exclude persons from high level policymaking processes is inherent in its constitutional role. This prerogative can be seen in the President's ability to select or reject key advisors, in essence to discriminate among persons and ideologies, in closely-held policy processes without external oversight. The article argues that such an executive exclusion prerogative—though never apparently named as such in jurisprudence or legal literature—is inherent in Presidential powers, but is not without limits.[25] The prerogative faces competing constitutional interests (including those protected by the First Amendment), and the justification for executive exclusion

[23] *See infra* Part IV.

[24] The White House has to date succeeded in keeping confidential almost all records of Task Force deliberations, even refusing to comment on or confirm the participant list leaked to the Washington Post. Abramowitz & Mufson, *supra* note 5. Were those records to be made public, the even deeper question of why the Task Force behaved as it did with respect to environmentalists would likely continue to defy proof.

[25] The idea of an "executive exclusion" privilege does not seem to have been recognized as such, but the principle operates at a practical level. In most cases, the ability of the executive to seek advice from those it wishes and exclude others would not raise any questions and would be seen as an inherent prerogative of presidential power; inherent in Article II powers, and necessary to fulfill Article II duties. This paper seeks to explore the proposition that there are some limits to this prerogative, at least as the advice function (seen here as a policymaking process) becomes less closely held and more public, or as the reason for exclusion trenches on other important constitutional principles.

weakens relative to those competing interests as the process moves away from closely-held executive deliberations to more public dialogue. In White House consultations between the President and senior advisors, for example, the interest in excluding persons on a peremptory basis is strongest—perhaps unassailable. But where the executive engages in a public review of policy alternatives, the interest in exclusion is at its weakest. The public's countervailing interest in participation is much stronger.

This article looks separately at two of these countervailing interests, questioning the executive's ability to exclude (as an Article II prerogative) where the exclusion is based on a person's viewpoint (under the free speech clause) or belief (under the free exercise and establishment clauses). Part II focuses on speech interests and explores the ability of the White House to exclude persons expressing unwelcome ideas from its policymaking processes. Part III examines the Establishment Clause and the exclusion of persons on the basis of belief. In each case, the executive's ability to exclude participants from truly internal discussions and closely-held processes is difficult to challenge despite competing constitutional protections in the speech and free exercise clauses of the First Amendment. Yet in each case as the executive process becomes more removed from the White House—less internal and more public—the competing First Amendment interests become more significant and the case for executive exclusion becomes less tenable.

Having examined the parameters and limits of executive exclusion, the article then turns in Part IV to the question of how the Cheney Task Force's exclusion of environmentalists should be assessed under an executive exclusion theory. The Cheney process was somewhere in the middle of the proximity continuum (not an Oval Office conversation on one hand; not an open public forum on the other), and a claim that environmentalists should not have been excluded because of their viewpoint is difficult to advance. While the Task Force engaged a broad array of actors and was in many ways a public process, it would still appear to be engaged in the kind of idea filtering that is expected of elected officials and their agents. But *identity* filtering is a different matter, and the article explores whether environmentalism might be seen in a constitutional sense as a protected belief or identity.

Environmentalism does not appear to fall into traditionally protected classes, yet the Vice President's rhetoric and that of his

ideological supporters was aimed at environmentalist's beliefs; they were likened to zealots practicing an "environmentalist religion" and their views on energy policy were dismissed by Mr. Cheney as "values" irrelevant to the formulation of national energy policy.[26] Part IV.A examines how religion has been defined through jurisprudence and by scholars, and Part IV.B asks whether environmentalism might be considered in some way analogous to a religion.

It may seem an odd proposition to ask whether those with environmental convictions may be seen as persons whose belief or identity is protected within the meaning of the First Amendment. But the history of the Cheney Task Force coupled with the attitudes espoused by the White House and its allies about environmentalists and their movement makes the question worth asking. Their public statements referring to the "environmental religion" or to the "values" driving environmental perspectives may simply be political hyperbole. But they may also reveal something more fundamental about how environmentalists were perceived within the Bush administration, and thus why environmental groups were *personae non gratae* in the Cheney Energy Task Force. In addition, an emerging public discourse about the environment and environmentalism, including recent moves by traditional Christian groups to describe "stewardship" as a core element of their beliefs,[27] suggests that the environment/belief question is only likely to increase in relevance. The article examines the extent to which underlying values, practices, and points of view common to those who consider themselves "environmentalists"—persons with an environmentalist "identity"—can be seen as analogous to persons with a religious identity in any sense that would have meaning under the First Amendment.

Part V returns to the history of the Cheney Task Force and its treatment of environmental groups, examining in greater detail the

---

[26] *See* discussion *infra* Part IV.

[27] *See, e.g.*, Fund for Christian Ecology, *A Scriptural Call for Environmental Stewardship*, http://www.christianecology.org/Stewardship.html (last visited Feb. 11, 2008); Susan Orr, *Environmental Awareness Taking Root In Conservative Christian Churches*, EVANSVILLE COURIER & PRESS, Sept. 15, 2007, at D1; Blaine Harden, *The Greening of Evangelicals: Christian Right Turns, Sometimes Warily, to Environmentalism*, WASH. POST, Feb. 6, 2005, at A01.

limits the White House placed on access to the Task Force, and the claims advanced by the administration and its allies regarding environmentalists.

The aritcle concludes that environmentalism, despite the rhetoric of the administration, is not (in its dominant form) fairly analogous to a religion. It may be seen as a set of values that inform a policy agenda and (for some) a lifestyle; yet while sharing some characteristics of religion, one cannot conclude on the basis of existing constitutional jurisprudence that environmentalism is a religion in a legal sense. In addition to jurisprudential challenges, such a conclusion would also raise serious political and practical issues if applied in the context of the executive exclusion analysis offered in the article. The exclusion of environmentalist perspectives from the Cheney process was problematic, and it is possible that a perceived environmentalist identity played a role in cloistering the Energy Task Force from representatives of environmental groups. Yet the article concludes that the solution remains legislative and not constitutional.

The phenomenon of filtering persons and ideas in high level executive processes warrants further scrutiny, perhaps through some theory of executive exclusion. But decisions about how proximate a process must be to the White House before it can be entirely closed at the executive's discretion should be evaluated in a legislative context. It may be that a revision of FACA would provide a vehicle for this evaluation without wading into deeper and less justiciable questions of the beliefs and identity of the president's closest advisors. It may also be that greater transparency in policy processes, at least those which move beyond the immediate confines of the White House, will allow the electoral process to reward or punish administrations that include or exclude on the basis of identity even where a constitutional claim would be difficult to make. This paper stops short of analyzing these alternatives and instead seeks to understand the constitutional dimensions and limits of identity- and belief-based discrimination in an evolving debate where belief and policy may be inevitably intertwined.

I. CLAIMING EXECUTIVE EXCLUSION

The question of whether there may be constitutional limits on the ability of the executive to exclude persons as *informal* policy advisors, or from *ad hoc* policymaking processes, does not appear

to have been addressed in literature or jurisprudence. The President's formal selection of executive branch officials and employees is another matter, and the discretion is considerable. The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for."[28] Congress may also vest the appointment of officials "in the President alone, in the Courts of Law, or in the Heads of Departments."[29] These "high officers" serve an advisory function on policy matters in the executive branch and, apart from Senate advice and consent, there is no apparent restriction on the President's ability to choose as advisors those persons he or she wishes.[30] In fact, while a specific presidential nomination may be rejected where the office requires Senate consent, nothing in the Constitution would prevent the President from appointing that same person to a senior advisory position not requiring such approval.

Moreover, there is no provision that would force the executive to consult or to hire any senior advisor against its will. The Senate may in some cases exercise a negative influence, but it may never (in legal, not political terms) exercise a positive influence. The same applies to the array of senior political appointees, presently over seven thousand, chosen for positions exempted from rules of "competitive service."[31] The remaining federal workforce has been subject to fair hiring practices that substantially limit executive discretion since Congress passed the Pendleton Civil

[28] U.S. CONST. art. II, § 2, cl. 2.

[29] *Id.*

[30] Admittedly the Senate advice and consent process can serve as a major political as well as substantive hurdle.

[31] *See* H.R. COMM. ON GOV'T REFORM, 108TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS iii (Comm. Print 2004). The categories of these exempted employees are "[1] Executive Schedule and salary-equivalent positions paid at the rates established for Levels I through V of the Executive Schedule; [2] Senior Executive Service "General" positions [i.e., those positions which may be filled by a career, noncareer, or limited appointment]; [3] Senior Foreign Service positions; [4] Schedule C positions excepted from the competitive service by the President, or by the Director, Office of Personnel Management, because of the confidential or policy-determining nature of the position duties; [and 5] Other [confidential or policy-determining] positions at the GS-14 and above level excepted from the competitive civil service by law because of the confidential or policy-determining nature of the position duties." *Id.*

Service Act in 1883.[32] Yet even the selection of these "Pendleton Act" appointees by the executive (senior policy advisors among them) remains a matter of considerable discretion.

Executive discretion would appear essentially unlimited with respect to the executive branch's use of "informal" policy advisors—private persons who are consulted without compensation on an array of questions.[33] No constitutional provision tells the executive who it can or cannot listen to, and there appears to be no jurisprudence that would suggest any limitation on the prerogative of the executive to seek advice—or refuse advice—from any person or quarter.

Of course, advice may always be proffered. The First Amendment protects any person in her right to "speak to" the government by exercising her freedom of speech or press. It also protects the right "to petition the Government for a redress of grievances."[34] But the executive may close its ears to such entreaties and certainly has no affirmative obligation to solicit them.

When the executive moves from informal policy advisors to more formal policy processes, however, it arguably enters a different territory—at least where those processes are open to persons outside of the executive branch. While discussions exclusively among executive officials can be seen as an internal executive process,[35] once the executive creates a forum within

[32] *See* Bryan A. Schneider, *Do Not Go Gentle into that Good Night: The Unquiet Death of Political Patronage*, 1992 WISC. L. REV. 511, 520–21 (1992). Federal hiring beyond those positions listed in the Plum Book is now subject to the provisions of the Civil Service Reform Act of 1978, as well as other statutes that limit discrimination and thus executive discretion, such as the Americans with Disabilities Act (ADA), and the Veterans Education and Employment Program Amendments of 1991. *See* Civil Service Reform Act of 1978, Pub L. No 95-454, 92 Stat. 1111 (codified in scattered sections of 5 U.S.C); 42 U.S.C. § 12132 (2000); 38 U.S.C. § 4314 (2000).

[33] Here one might ask about the distinction between those who actively seek to lobby the White House on matters of special interest and those who the White House seeks out as confidants. The distinction is unimportant for purposes of this article, which is focused on the discretion of the executive to filter these informal 'advisors' regardless of who initiates or seeks to benefit from the contact.

[34] U.S. CONST. amend. I.

[35] As the discussion below indicates, even wholly internal processes are not entirely privileged (communications, for example, can be subject to disclosure) yet there appear to be no recorded efforts to influence the identity of the participants in those processes.

which policy alternatives are discussed and debated among members of the public, the executive's prerogative to filter—to select actors and limit input—may be limited. Congress recognized as much when it passed FACA in 1972 and imposed transparency requirements on executive branch policy forums whose "membership" includes the public.[36] Advisory committees "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government" are exempt from the provisions of the Act,[37] but where private actors become part of the committee, the Act requires a greater degree of openness as "a strong safeguard of the public interest."[38] Under FACA, advisory committees must file a charter, announce upcoming meetings in the Federal Register, hold meetings in public, keep detailed minutes of each meeting, and disclose publicly documents related to committee work that might otherwise remain confidential.[39] In addition, each such committee must "be fairly balanced in terms of the points of view represented" and may "not be inappropriately influenced by the appointing authority or by any special interest."[40]

Unfortunately, the question of what constitutes "membership" under FACA remains somewhat uncertain, particularly after the FACA litigation concerning the Cheney Energy Task Force. The D.C. Circuit appeared to have created a "de facto" membership rule in earlier FACA litigation concerning the national health policy committee chaired by Hillary Clinton, holding that the regular participation of the non-government individuals made them de facto members of the committee.[41] But its en banc decision in the Cheney Task Force case closed the door on such an interpretation of the Act.[42] The Court reasoned that separation of powers concerns "strongly support[s]" a strict interpretation of the question of membership, and held that a committee "is composed wholly of federal officials if the President has given no one other

[36] Federal Advisory Committee Act, 5 U.S.C. App. §§ 1–16, (2000).

[37] *Id.*

[38] *See* H.R. REP. NO. 92-1017, at 10 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491, 3500.

[39] 5 U.S.C. App. §§ 9(c), 10(a)(1)–(2), (b)–(c), 11.

[40] *Id.* § 5(b)(2)–(3).

[41] *See* Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 915 (D.C. Cir. 1993).

[42] *In re* Cheney, 406 F.3d 723, 728 (D.C. Cir. 2005).

than a federal official a vote in or, if the committee acts by consensus, a veto over the committee's decisions."[43]

While FACA is an important congressional effort to assure a balanced and transparent executive policymaking process, the requirements of FACA do not reach all public forums created by the White House to advance policymaking. The D.C. Circuit emphasized separation of powers concerns in its narrow interpretation of FACA, and Justices Thomas and Scalia expressed similar concerns when the Supreme Court ruled on an interlocutory appeal of a discovery order earlier in the proceedings,[44] yet the question of balancing the executive's power against concerns of open government have been addressed under FACA only in the ordinary operation of executive branch committees. There may be a presumption favoring the executive prerogative in such cases, but FACA did not define what competing constitutional interests limit that prerogative.

A useful starting point for this broader constitutional inquiry into executive privilege is a review of the legal principles that have evolved to limit the executive's ability to protect communications from public disclosure even where the process and the forum itself are exclusively internal and governmental. While not perfectly analogous, these principles suggest there are limitations to the executive prerogative when public policy concerns are at stake.

There is a complex history of jurisprudence on the ability of the executive to protect internal communications from disclosure. Courts have recognized a doctrine of limited privilege that prevents disclosure of executive communications (including documents) in the context of civil and criminal proceedings and

[43] *Id.* Challenges to the Cheney Energy Task Force under FACA ultimately failed because the court defined the "committee" created within the meaning of the Act to be limited to the core membership of senior federal officials and did not look to the broader process of consultation with over three hundred actors beyond that core membership. *Id.*

[44] Cheney v. U.S. Dist. Court, 542 U.S. 367, 394–95 (2004) (Thomas, J., concurring in part and dissenting in part). The Supreme Court opinion in *Cheney* was limited to a discovery dispute that arose when the plaintiffs sought to obtain the identities of the persons consulted by the Task Force in order to assert that the "de facto" membership of the Task Force included persons beyond the executive branch (a jurisdictional requirement of FACA). *Id.* at 372–73. The Supreme Court held that the Vice President and other members of the Task Force were not required to assert executive privilege before separation of powers arguments could be considered by the lower courts. *Id.* at 390.

Congressional investigations.[45] Depending on the circumstances, the doctrine has been called by various names,[46] but it is most commonly referred to as a doctrine of "executive privilege" or "deliberative process privilege."

The doctrine has focused on process transparency (communications with presidential advisors) rather than process participants (the identity of presidential advisors), but it sets parameters that may be useful in the latter instance. The doctrine rests on constitutional claims about executive powers and separation of powers, and on instrumental claims that the executive branch must be able to receive unvarnished advice; in essence, that "secrecy is necessary to candor."[47] The D.C. Circuit has reasoned that "[t]he purpose of this privilege is to foster freedom of expression among governmental employees involved in decisionmaking and policy formulation,"[48] and other courts have emphasized the need for a "free flow of ideas among government officials"[49] and "open but protected channels of plain talk" within

[45] *See generally* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845 (1990)

[46] Wetlaufer provides a history and something of a taxonomy of evidentiary privileges afforded to the federal executive. *Id.* He explains that the doctrine protecting the executive from disclosing communications in civil proceedings, which he calls a "general deliberative privilege," has been called "executive privilege," "official information privilege," "pre-decisional privilege," the "advice" privilege, a privilege for "intra-governmental communications," "intra-governmental documents," and "intra-agency advisory opinions, recommendations, and deliberations," as well as a privilege for "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions are formulated." *Id.* at 845 n.1 (citations omitted). Wetlaufer distinguishes the "general deliberative privilege" from other forms of privilege available to the executive in judicial proceedings, which he describes as the "privilege protecting state, military and diplomatic secrets," the "privilege protecting the identity of certain voluntary informers," the "privilege protecting presidential deliberations," the "privilege protecting quasi-judicial deliberations of high executive officials," the "privilege protecting information related to ongoing criminal, civil and administrative investigations," the "privilege protecting information subject to a statutory prohibition against disclosure or publication," the "privilege protecting information that is or may once have been subject to protection under the . . . Housekeeping Act, 5 U.S.C. § 301 (1988)," the "planned transaction privilege," and the "privilege protecting information that has been communicated to the government under promises or expectations of confidentiality." *Id.* at 845–46 n.3 (citations omitted).

[47] *Id.* at 849–51.

[48] McClelland v. Andrus, 606 F.2d 1278, 1287 (D.C. Cir. 1979).

[49] *In re* Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 581 (E.D.N.Y.

government.[50]

In the seminal case on executive privilege, *United States v. Nixon*,[51] the President had asserted an unqualified privilege to protect White House communications from disclosure in an ongoing criminal investigation. In moving to quash a subpoena for records of internal White House communications, Nixon had claimed a "valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties."[52] The Court accepted this basis for a claim of privilege, finding "the importance of this confidentiality is too plain to require further discussion,"[53] and recognizing that the privilege rested on the doctrine of separation of powers, and the need for "the independence of the Executive Branch within its own sphere."[54] The Court also held that "[t]he President's need for complete candor and objectivity from advisers calls for great deference from the courts."[55]

The Court stated, however, that "when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises."[56] Finding that no military, diplomatic, or national security secrets were at stake, the Court held that President Nixon's desire to withhold White House communications could not rest on an unqualified executive privilege, but had to yield, on balance, to the "ends of criminal justice" and the "integrity of the judicial system."[57] Nixon was required to surrender transcripts of internal White House communications that took place solely among senior government officials.[58]

While the process participant issue does not appear to have been litigated, a President's interest in choosing advisors would seem equally as important as the interest in receiving "candid and objective" advice from those who are chosen. But *Nixon* tells us

1979).

[50] Carl Zeiss Stiftung v. V.E.B. Carl Zeis, Jena, 40 F.R.D. 318, 325 (D.D.C. 1966).

[51] 418 U.S. 683 (1974).

[52] *Id.* at 705.

[53] *Id.*

[54] *Id.* at 706.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 709.

[58] *Id.* at 714.

that acknowledging such a privilege does not mean it is unqualified. Where an important public interest is at stake, such as the functioning of the criminal justice system, limits on the presidential prerogative can be recognized. The Court gave us something of a balancing test that weighs the president's interest in confidentiality against the public interest asserted.[59]

Applied to executive advisors (as opposed to executive advice), the strength of the executive's interest is likely diminished as the advisors and the process itself become further removed from the executive branch. Once the executive has established a forum that includes informal advisors who are private actors, it is difficult to justify an expansive claim of privilege. There is no privilege of appointment since the participants in question are not appointees of the President or any other executive branch official. And the justification for executive privilege and deliberative process privilege is inapposite since it arises from the need for open communications "among governmental employees,"[60] and within government.[61] Here, the forum is already open to non-governmental actors and the line of confidentiality so important to the doctrine of privilege has already been crossed. This is not to say that the presidential prerogative is extinguished; only that it cannot be used to create a moving zone of privilege whenever the President seeks private actors' insights.

The scope and composition of the forum also matter. It would be difficult to challenge the ability of the president, or even a senior official, to consult a single private party or even a handful of non-governmental actors by arguing that the consultation became *de facto* public. This type of minimal and informal "outreach" does not really change the character of deliberative process from governmental to public. But forming a public-private task force that meets and exchanges correspondence and drafts policy declarations over the course of months and then issues a public report (in essence, the path of the Cheney Energy Task Force) is of a wholly different character. Here, the conversion from internal deliberations to public forum seems nearly complete.

Even where the governmental actor is the President, and not a

[59] *Id.* at 711–12.

[60] McClelland v. Andrus, 606 F.2d 1278, 1287 (D.C. Cir. 1979); *In re* Franklin Nat'l Bank Sec. Litig., 478 F.Supp. 577, 580–81 (E.D.N.Y. 1979).

[61] Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 325 (D.D.C. 1966).

broad-ranging task force, the interest in controlling the identity of informal government advisors would seem to vary with the character and scope of the forum. The point can be illustrated by reference to an example of a recent White House policy process—the Social Security town hall meetings.[62] In formulating a proposal to amend Social Security policy, the White House process began no doubt with internal discussions among senior officials and others close to the President. The public interest in participating in those meetings was comparatively low even as the executive's interest in deciding who would participate was comparatively high.

But there came a point when the President had fixed on a preliminary set of ideas, outlined those ideas in very general terms in his 2005 State of the Union address,[63] and embarked on a series of public meetings designed to "solicit ideas"[64] about Social Security. The President was asking participants in those meetings to serve, in a sense, as policy advisors.[65] Participants remained private actors, and were expected to express their private viewpoints, but they were treated as proxies for the broader public.

---

[62] *See* Press Release, The White House, President Participates in Social Security Conversation in Pennsylvania (Feb. 15, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050210-16.html; Associated Press Wire Release, Bush on Another Social Security Pitch (June 3, 2005) (on file with New York University Environmental Law Journal), *available at* http://www.aproundtable.org/news.cfm?news_ID=497&issuecode=taxes (describing his audience in Hopkinsville, Kentucky as "handpicked").

[63] Sheryl Gay Stolberg & Carl Hulse, *Cool Reception on Capitol Hill to Social Security Plan*, N.Y. TIMES, Feb. 4, 2005, at A14.

[64] While some cynics may have viewed the meetings as an effort to sell a policy that had already been formulated, if we are to take the White House at its word, the purpose was at least as formative as promotional. In describing the purpose of the town hall meetings, President Bush told a crowd at one of the meetings in Florida that the process was an open one, and that his purpose was to solicit ideas. He said: "All ideas are on the table except running up the payroll tax. And I don't care whether it's a Democrat idea, Republican idea, independent idea, I'm interested in ideas. And so I'm going to say, like I have been saying before to the United States Congress, bring them up. Let's see what you think we ought to do to solve the problem, and I'll work with you." Press Release, The White House, President Discusses Strengthening Social Security in Florida (Feb. 4, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050204-13.html (on file with New York University Environmental Law Journal).

[65] Again, one might argue that this was a marketing effort and not a policy process, but even a cynic who rejects the official White House position on these forums could still find some possibility of policy insights uncovered through the process.

In this type of forum it would seem clear that the balance shifts away from an absolute executive right to include or exclude participants based on its own subjective criteria.

In shaping such a dialogue, the White House (or its proxies) could choose to exclude potential assassins, terrorists, or others who might violently disrupt the meeting.[66] But it is less certain that the White House could exclude those with *ideas* that would disrupt the meeting, even if the idea holders would not be expected to behave violently. For example, excluding "senior citizens" over a certain age because the President simply doesn't "care what they have to say" would be suspect. This form of age-based discrimination would call for much greater judicial scrutiny.[67] Excluding the same group because the policy proposals to be discussed relate only to persons under age seventy might be seen as defensible, but at least in theory a defense would be called for.

Moving the process back to the White House (more proximate to the President), on the other hand, begins to strengthen the executive's claim to control the identity of participants. If the White House selects career civil servants and political appointees to participate in an inter-agency vetting process on Social Security policy, its discretion is less subject to challenge (although overt exclusion of protected classes remains a basis for strict scrutiny). If the process is entirely cabinet-level, executive interest in controlling participation is even greater.

In sum, if one applies the justifications for executive and deliberative process privilege to the executive's choice of participants in informal policy dialogue, it appears that the strength of any claim of privilege to select participants is weakened as the process moves into the public sphere. The more proximate and "internal" an advisory process, the greater an executive interest in selecting "those who advise and assist them in the performance of their manifold duties."[68] But the more public the forum, the more

[66] Here, security issues and traditional time, place, and manner arguments would suffice to justify exclusion.

[67] It is not the purpose of this paper to challenge this type of exclusion, although it does seem to raise free speech interests on its face. Because this paper is focused on a different class of cases, where religious beliefs rather than political expression is at stake, the viewpoint discrimination jurisprudence will be viewed that light alone. It is beyond the scope of this paper to ask whether the President exposes himself to the full range of political opinion whenever he or she enters a public or limited public forum.

[68] United States v. Nixon, 418 U.S. 683, 705 (1974).

constrained the executive interest in controlling participants.

If one accepts that the executive exclusion privilege is not absolute, and becomes less justifiable as the forum becomes more public, the question that arises is what competing interests limit the privilege in a public forum and (if at all) in a less public, more internal forum. It is clear that some competing constitutional interests can overcome the historically recognized documentary and testimonial executive privilege,[69] so the question remains what interest is sufficient to overcome the prerogative of executive exclusion.

In the following sections, the paper will explore two distinct kinds of interests that might be seen to compete with executive exclusion, each arising from First Amendment concerns and potentially overcoming the privilege at a different "distance" from the White House. The first is an interest in participating in the political process and offering alternative points of view. This traditional political interest will be addressed in Part II, which focuses on "viewpoint exclusion" from executive processes. The second is an interest in participating in the political process on the same grounds as other participants, regardless of one's religious beliefs or practices. The interest will be addressed in Part III, which examines "religious exclusion" from executive processes.[70]

II. VIEWPOINT EXCLUSION

Where a public forum has been created, the interest in expressing a policy viewpoint is particularly strong."[71] While viewpoint discrimination is unquestionably frowned upon, it is clear that the executive's constitutional role includes the ability to create selective, even ideologically discriminatory, internal forums as a means to shape and reinforce policies of its choosing. In most cases these policies will be exposed to public scrutiny and competing viewpoints as they are debated through the legislative process or administrative rulemaking, or as they are implemented through Executive Orders.[72] When the issue is policymaking, the

[69] *Id.*; *In re* Sealed Case, 116 F.3d 550, 558 (D.C. Cir. 1997).

[70] While this could also be addressed as a due process issue, the paper will focus only on the First Amendment implications of this type of exclusion.

[71] This analysis could also apply to a "limited public forum," but the differences, if any between the two types or forum are beyond the scope of this paper.

[72] The exceptions would typically involve national security.

remedy for cutting off or ignoring competing viewpoints at the executive level is the debate of legislative or regulatory rulemaking. Where the issue is policy implementation, the remedy is the ballot box.

In essence, the executive decision to exclude competing ideas from its policy processes serves a compelling interest in fulfilling its constitutional function and this makes the exclusion reasonable. This is the same interest recognized in executive privilege cases, and under circumstances where the process is a closely-held executive discourse limited to government officials it is difficult to see how the interest could be overcome. In fact, only chaos would result if the White House were forced to entertain competing viewpoints on all matters of policy under its consideration—at least when the consideration is essentially "internal." This is chaos that the Constitution plainly does not contemplate.

Yet the reach of this argument to policy processes that are removed from the White House and begin to look more like public forums is questionable. Returning to the Social Security example, if the American Association of Retired Persons (AARP) wishes to weigh in on an executive branch policy process it could hardly raise a First Amendment objection when it fails to receive an invitation to meet with the president's close advisors on mapping out a reform strategy. Such exclusion might be a political mistake (as the AARP carries notorious political weight) but it is not constitutionally deficient.

At the other end of the spectrum, if the executive branch sponsors a public meeting in Times Square in support of Social Security reform it could hardly exclude AARP members. In such a case, the administration has taken the debate into a public forum. "'[P]ublic places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums,'"[73] and in such forums the exclusion of competing viewpoints, even by the executive branch in pursuit of important policy goals, would be almost impossible to defend as constitutional. In such circumstances, the prerogative that the executive branch enjoys in fulfilling its constitutional duties to shape and implement national policies is substantially diluted by the nature of the forum, which has become more of a policy *marketing* process than a policy

[73] United States v. Grace, 461 U.S. 171, 177 (1983).

making or *implementing* process. While restricting participation for security reasons or space limitations would be permissible, restricting it for ideological reasons would seem impermissible.

Somewhere between the White House and Times Square, the quality of the public forum and the interest of the executive branch begin to shift and the question of ideological exclusion becomes more problematic. Internal executive branch policy debates can be seen as a nonpublic forum that can be opened to scrutiny only for compelling reasons,[74] while external public discourse over policy in which the executive branch is engaged can be seen as a public forum that can be closed only for compelling reasons. But between the two poles, it is not clear what test to apply. What if, for example, the White House sponsors a meeting to shape a new veterans' benefit reform proposal and invites only veterans? Here, the class or status of participants (veterans) might be seen as a proxy for policy ideology (favoring more benefits). What about the White House efforts to discuss Social Security reform through a series of "town hall meetings" around the country? While one might argue that these were *marketing* rather than *making* policy, the President's own representations about the nature of the events suggested that they were forums for the exchange of ideas about how policy reform might be designed.[75]

It might be possible to argue that these examples are a species of "limited public forum"[76] designed to address specific policy issues, but it is not clear how such a designation would change the analysis. While the forums might be limited to specific content, this limitation does not create a license to limit viewpoints.[77] While the government may be justified "in reserving [a forum] for certain groups or for the discussion of certain topics," this subject matter limitation creates no greater interest, or right to engage, in viewpoint discrimination.[78] Thus, despite some restrictions on

[74] *See* United States v. Nixon, 418 U.S. 683, 705–06.

[75] Press Release, The White House, President Discusses Strengthening Social Security in Florida, *supra* note 64.

[76] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 at n.7 (1982) ("A public forum may be created for a limited purpose such as use by certain groups, *e.g.*, *Widmar v. Vincent* (student groups), or for the discussion of certain subjects, *e.g.*, *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n* (school board business).").

[77] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2003).

[78] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

participants and topics, Supreme Court decisions regarding limited public forums apply the same viewpoint discrimination standards to those forums as to public forums.[79]

We are left with a very large doctrinal gray area between an internal, clearly non-public, executive process where the exclusion of viewpoints would seem almost unassailable, and an effort on the part of an administration to limit participation in clearly public places and open events on the basis of viewpoint. The question of excluding viewpoints within this area does not appear to have been litigated, but broad discretion has been given to the executive branch in the formulation of its policies and in the inherently political process of marketing those policies (the distinction between the two is often illusory in a democratic context where even a political marketing effort might influence the nature of a policy). It is likely that a suit to force access to one of the President's Social Security town hall meetings, for example, would fail on the grounds that the limitations imposed on participant viewpoints were necessary to the purpose of the forum, which was to support executive branch policymaking through a mix of cheerleading and substantive suggestions within a narrow ideological band. This might appear anathema to the idea of public discourse that underlies the theory of republican government, but one could plausibly argue that executive-driven processes are neither exclusively designed to promote discourse, nor the exclusive forum for discourse.[80]

In sum, while viewpoint discrimination is prohibited by the First Amendment in public spaces or processes, the internal processes of the executive branch are seen as outside the reach of the First Amendment because the process of governing in an electoral democracy assumes that elected leaders who are chosen

[79] *Cf.* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1753–54 (1987) (Post argues that the decision in *Perry*, for example, "imposes no first amendment constraints whatever on the government's ability to build discriminatory criteria into the very definition or purpose of the limited public forum, and thus as a practical matter the government remains as free to limit public access to a limited public forum as to a nonpublic forum.").

[80] Again, it should be noted that these conclusions hold only where the White House is directly involved in or driving a policy process. Clearly the APA and FACA (and probably Constitutional concerns) limit executive branch processes that occur within government agencies and/or engage private parties as core members of the policymaking process.

because of their ideological biases will carry those biases into their governments and—at least with respect to internal policymaking processes—are privileged to surround themselves with ideological mates. As the process leaves the White House, however, and policies are debated through the rulemaking process, the legislative process, and other types of "public" settings, this privilege must give way to competing concerns (such as free speech) contemplated in the Constitution.

III. BELIEF-BASED EXCLUSION

Even if one accepts that the executive branch has exceedingly broad latitude to engage in viewpoint discrimination in matters of policy formulation internal to the executive branch or within the gray area short of a public forum, an arguably different set of issues would be raised where the executive sought to exclude participants on the basis of religious belief or affiliation. The idea that the executive branch might exclude persons from policy dialogue on the grounds of religion—even in the closest White House quarters—seems repugnant from a moral and constitutional standpoint. Imagine, for example, a decision by any president to exclude Catholics from internal discussions about stem cell research[81] not because of point of view, but simply because of Catholicism. The idea, if it became public, would be considered reprehensible by most and would be widely condemned. Likewise, consider the response to a decision by the White House to hold consultations only with evangelical Christians, and no others, on an appointment to fill a vacant Supreme Court seat. The appointment is inherently within the presidential prerogative and is exposed to public debate in the process of Senate confirmation, so broader concerns about representative government could arguably be satisfied. But the idea remains anathema to our constitutional framework. Most would accept that the President might consult only members of his or her political party in such a matter (clearly viewpoint discrimination, but also a common political choice), yet a decision to consult only the members of a favored sect would

[81] Note that internal White House discussions on this matter could lead to a number of policy outcomes, some of which (like an executive order) could have immediate effect and others (like a decision to propose legislation) would be subject to further public and political processes.

seem beyond the pale.[82]

Apart from moral and political questions, however, would executive exclusion on the basis of religion be seen as constitutionally defective in a way that exclusion on the basis of ideology would not? Put another way, does the balance of interests that favors the executive in excluding competing ideologies from policymaking forums shift where the exclusion involves religious identity or beliefs?

This would seem to be the case intuitively because the president is chosen on the basis of a political and ideological bias that voters expect to inform his or her policy choices. Thus, the exclusion of competing ideas from internal (non-public) policy forums among senior administration members is not only expected, but it is part of the political bargain that is made in each election. Elections create political insiders and outsiders, at least within the elected leaders and their immediate advisors. Executive privilege is a doctrine that essentially recognizes and assures the ability of these actors to do their jobs, and the exclusion of competing voices from their immediate ranks is a natural part of that privilege. Such an argument might even support the deference given to the executive branch in the gray areas where forums begin to open up and appear public, but which in reality form part of the policy making and implementing prerogative of the executive.

But discriminating on the basis of religious identity is not similarly part of the political calculus or the constitutional design. It may be true that faith matters (perhaps even more in recent political discourse) and that some voters likely take religious identity and religious beliefs into account (their own and those of a candidate) when they vote. But the constitution prohibits the translation of those beliefs and that identity into government policy in the same way that secular ideas and philosophies may be advanced, upheld, and integrated. Issues of sectarian identity and belief must remain in the background—perhaps informing and

[82] Of course consulting a particular sect because of its political clout rather than its belief system might be acceptable, and discerning religious versus political favoritism might be a difficult matter. *See, e.g.*, Julie Hirschfield Davis, *A New Test for Bush; President Withdraws Miers Nomination, Eyes New Choice for High Court*, BALTIMORE SUN, Oct. 28, 2005, at 1A. ("[T]he disclosure by Focus on the Family's James Dobson that he had received private assurances from Bush's top aide Karl Rove that Miers belonged to a pro-life church raised eyebrows among Republicans and Democrats.")

providing a context for policy but never becoming policy. At least that would seem the import of the religion clauses of the First Amendment.

It is possible that the political question doctrine would limit the practical reach of a First Amendment argument in the case of a close presidential advisor or closely-held White House process. While there is less justification for religious discrimination than viewpoint discrimination even at this proximity to the president, an effort by the courts to untangle motivations and exercise oversight would raise serious separation of powers questions. In a case concerning the discharge of a CIA agent, Justice Scalia suggested as much when he opined:

> It seems to me clear that courts would not entertain, for example, an action for backpay by a dismissed Secretary of State claiming that the reason he lost his Government job was that the President did not like his religious views—surely a colorable violation of the First Amendment. I am confident we would hold that the President's choice of his Secretary of State is a 'political question.'[83]

Even conceding this point, however, would not foreclose courts from oversight where religious discrimination does not concern a senior political appointment and takes place further from the Oval Office.

A. *Exclusion and Public Forums*

It is interesting to note that many of the Supreme Court's decisions requiring that even a limited public forum remain open to ideological diversity involve appeals by religious groups for access to those forums. In a series of cases dating from the early 1980s, the Supreme Court prohibited the exclusion of religious groups or viewpoints from such forums, even where the putative purpose of the restriction is to respect the Establishment Clause by assuring neutrality in religious matters. In *Widmar v. Vincent*,[84] the Court held that the University of Missouri at Kansas City (UMKC) could not close its facilities, which were provided to student groups for meetings, to a student religious group. The Court found that UMKC had "discriminated against student groups and speakers based on their desire to use a generally open forum to

[83] Webster v. Doe, 486 U.S. 592, 613–14 (1988) (Scalia, J., dissenting).

[84] 454 U.S. 263 (1981).

engage in religious worship and discussion,"[85] and that this exclusion could only be justified if it was "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."[86] The government argued that offering its facilities to religious groups would violate the Establishment Clause, and the Court agreed that compliance with constitutional obligations could be characterized as compelling.[87] But the Court rejected the idea that the use of facilities by a student group for religious worship and discussion would present an Establishment Clause violation.[88] Instead, the Court reversed the forensic inquiry, stating that "[t]he question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech."[89] The Court found that, despite the potential for an incidental religious benefit to the student group, the group could not be excluded from the forum created by UMKC.[90]

Twelve years later, in *Lamb's Chapel v. Center Moriches Union Free School District*, the Court used the same reasoning to prohibit a school district in New York from excluding an evangelical church from using classroom facilities after school hours to show a six-part film series on the need to instill "traditional, Christian family values at an early stage" as a means to "undermin[e] influences of the media."[91] While the Court acknowledged that the School District, "like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated," it found that the policy of permitting after-hours use for "'social, civic, and recreational'" purposes had, in essence, created a public forum.[92] As a result, "restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional

[85] *Id.* at 269.
[86] *Id.* at 270.
[87] *Id.* at 270–71.
[88] *Id.* at 273.
[89] *Id.*
[90] *Id.* at 274.
[91] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 388 (1993).
[92] *Id.* at 386, 390.

public forums such as parks and sidewalks."[93] The Court found "no suggestion . . . that a lecture or film about child rearing and family values would not be a use for social or civic purposes,"[94] and reasoned that the exclusion of Lamb's Chapel was based instead on impermissible viewpoint discrimination. The Court rejected fears of an Establishment Clause violation and a concern that the use of school property by a "'radical' church for the purpose of proselytizing . . . would lead to threats of public unrest and even violence."[95]

The Court later expanded its reasoning when it held that the University of Virginia could not refuse to pay for the publication of a student religious newspaper because of the religious viewpoint it espoused. In *Rosenberger v. Rector & Visitors of the University of Virginia*,[96] the Court found that the University had "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," and held that this was an impermissible form of "viewpoint discrimination."[97] The University had argued that funding speech in the form of student papers differed from providing access to facilities "because money is scarce and physical facilities are not."[98] But the Court countered that "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity."[99] Instead, the Court reasoned:

> Had the meeting rooms in *Lamb's Chapel* been scarce, had the demand been greater than the supply, our decision would have been no different. It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible.[100]

The Court continued:

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First

[93] *Id.* at 391.
[94] *Id.* at 393.
[95] *Id.* at 395.
[96] 515 U.S. 819 (1995).
[97] *Id.* at 831.
[98] *Id.* at 835.
[99] *Id.*
[100] *Id.*

> Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation.[101]

Rosenberger suggests that a public forum created by government is almost inherently more "limited" than a traditional public forum (and this may have implications for policy forums created by the executive branch—which could all be seen as "limited public forums"), but free speech principles nonetheless prohibit discrimination based on "the specific motivating ideology or the opinion or perspective of the speaker."[102] Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, argued in dissent that the decision approved "for the first time . . . the direct funding of core religious activities by an arm of the State"[103] pointing to the direct and open proselytizing of the publication:

> The character of the magazine is candidly disclosed on the opening page of the first issue, where the editor-in-chief announces Wide Awake's mission in a letter to the readership signed, 'Love in Christ': it is 'to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means.'[104]

But Justice Kennedy's majority opinion rejected, as had the majorities in *Widmar* and *Lamb's Chapel*, the state's claim that its desire to avoid a violation of the Establishment Clause represented a compelling interest for withholding funding for the publication.[105]

While each of these cases is cast in terms of traditional viewpoint discrimination, the viewpoints that were at issue were not merely political; they were, instead, religious. In *Rosenberger*, for example, it was not the editorial viewpoints (in essence, family values) that were being censored but the espousal of those

---

[101] *Id.* at 829 (citations omitted).
[102] *Id.*
[103] *Id.* at 863.
[104] *Id.* at 865.
[105] *Id.* at 845–46.

viewpoints by a religious group. Similarly, in *Lamb's Chapel*, the state did not seek to discriminate against "traditional, Christian family values," but rather against what it viewed as a "radical" sect seeking to proselytize by airing films that espoused those values.[106] The same films shown by the Young Republicans might not have raised a concern. The fact that the Court responded to each of these cases as simple viewpoint discrimination suggests that there is much about religious freedom that is simply the communication of ideas. But it is possible that there is more at work here, and that these cases would not have garnered the same majorities had the petitioners been the Students for a Democratic Society or the Young Democrats, rather than religious groups. While the majorities did not emphasize this point, the cases were at their core examples of religious groups being excluded on the basis of religion. At the same time, the viewpoint discrimination analysis that the Court ostensibly applied did not vary from traditional free speech doctrine. A viewpoint discrimination analysis was thus sufficient to protect religious speech in each of these cases, but this leaves open the question of whether an executive exclusion doctrine would operate any differently where religious exclusion is at issue.

B. *Exclusion and the Establishment Clause*

While the Supreme Court's treatment of free exercise claims in the public forum cases fail to distinguish religion cases from free speech cases in a way that would help distinguish executive exclusion based on religious versus ideological animus, Establishment Clause jurisprudence may offer some meaningful guidance.

1. *The* Lemon *Test*

In *Lemon v. Kurtzman*,[107] the Supreme Court sought to address the extent to which state aid can be offered to sectarian schools and drew upon earlier precedent to formulate a three-part test as an analytical tool in establishment cases. The Court reasoned that:

> Every analysis in this area must begin with consideration of the

[106] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 388, 395 (1993).

[107] 403 U.S. 602 (1971).

> cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'[108]

This three-part test once seemed to offer a relatively simple rubric for Establishment Clause cases, but as issues have become more complex and the ideologies have shifted on the Supreme Court, it has become something of a stepchild in current First Amendment jurisprudence. Justice Scalia, for example, has been a consistent critic and in his *Lamb's Chapel* concurrence took pains to declare the near-death of the *Lemon* test. He likened the "supposed test" to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."[109] Scalia also cited opinions of a majority of then-Justices (the opinion was issued in 1993) whom he claimed had "driven pencils through the creature's heart."[110]

Nevertheless, the *Lemon* test at least identifies the key elements that continue to serve as a touchstone for assessing establishment cases. Of particular significance for an analysis of an executive exclusion claim is that a statute (or, read more broadly, a government act) have a "secular purpose" and that its "effect" neither "advance nor inhibit religion." In recent cases, the formulation of the test has led to questions about how substantial or direct the "effect" of a law must be in advancing religion where a clearly secular purpose emerges. In *Zelman v. Simmons-Harris*,[111] Chief Justice Rehnquist writing for the majority held that where a program that aids religious schools does so only indirectly by virtue of private choice, it is "entirely neutral."[112]

---

[108] *Id*. at 612–13 (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968) & quoting Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970)).

[109] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (Scalia, J., concurring).

[110] *Id*. Scalia is not the only Justice to question the viability of the Lemon test. *See* Justice Kennedy's concurrence, and cases cited, in County of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 655–56 (1989), in which he stated "I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area."

[111] 536 U.S. 639 (2002).

[112] *Id*. at 662.

The Court has also questioned, in the words of Justice Kennedy in *County of Allegheny v. ACLU*, the "impression of formalism" that might require a "relentless extirpation of all contact between government and religion."[113] Thus, in recent years the Court has assembled majorities that will tolerate some advancement of religion as long as the effect is indirect or incidental and the law has a largely neutral purpose.[114]

Applying a purpose and effects test to executive exclusion of religious actors would appear to raise constitutional concerns beyond those revealed through a free speech analysis. While executive powers considerations would lead to a great deal of latitude in excluding ideas inconsistent with White House orthodoxy, there is no equivalent justification in the area of religion. It would be one thing, for example, for an executive devoted to interventionist regulatory market controls to exclude Milton Friedman from discussions about foreign trade policy because he is a notorious free market economist, but it would be another to exclude him because he is Jewish. The incidental effects reasoning would tolerate the offense to Friedman's faith if his exclusion were clearly related to his brand of economics, but where the purpose of the exclusion is faith-based the practice would appear to offend the Establishment Clause.

A more complex case would arise if the purpose of the exclusion were secular, but had the effect of marginalizing an entire sect. Suppose the White House decided to exclude all ideological opponents of stem cell research from an internal workshop on how best to regulate genetic research. One can imagine the rationale behind excluding persons who might enter the discussion with absolute and uncompromising views on a major topic of the discussion. But such a policy might also "incidentally" exclude all born again Christians or all orthodox Catholics. Under the line of cases that includes *Zelman*, *County of Allegheny*, and *Pinette*, the policy might well pass muster as long as no proof of religious discrimination (as opposed to viewpoint discrimination) was uncovered.

Of course the problem with ignoring "incidental"

---

[113] 492 U.S. at 657.

[114] *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 758 (1995) (a religious display on public property confers only an "incidental" benefit on religion where the law also allows "a variety of unattended [including secular] displays"); Widmar v. Vincent, 454 U.S. 263, 274 (1981).

discrimination and focusing primarily on purpose in the context of an executive exclusion analysis is that the executive policy process is usually so complex and multifaceted that it would be easy to argue that exclusive effects were incidental and to hide or limit inquiry into the real motivation behind a policy of exclusion. The executive branch is proficient at operating in secrecy, and discerning something akin to the legislative history that revealed Louisiana Senator Bill Keith's unambiguous sentiments in favor of teaching creationism in *Edwards v. Aguillard*[115] would be exceedingly difficult in an executive branch context. Moreover, any probing inquiry into the executive's actual purposes might itself raise insurmountable separation of powers or justiciability concerns. Nevertheless, the Court has held that "facial neutrality is not determinative" and has been willing to look at the "effect of a law in its real operation" to find evidence of its purpose.[116] This suggests some ability to inquire into purpose without working to expose the executive mindset.

2. *Endorsement*

An inquiry into the object and purpose of executive exclusion on the basis of religion might also be aided by the "endorsement test" first articulated in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*.[117] While the endorsement test has only gained a clear majority of the Court in one class of cases (the religious display cases),[118] and it has been subject to strong and repeated attacks from the conservatives who now dominate the Court,[119] the analysis offered by O'Connor, and embraced by at least some of the remaining justices,[120] might be used to complement or clarify a test for executive exclusion. In language adopted and repeated by other justices in subsequent cases, O'Connor explained in *Lynch* that "government endorsement or disapproval of religion" was an infringement of the Establishment Clause because "endorsement sends a message to nonadherents that they are outsiders, not full

[115] 482 U.S. 578, 587 (1987).

[116] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534–35 (1993).

[117] 465 U.S. 668 (1984).

[118] *See, e.g.*, County of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 590–91 (1989)

[119] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005).

[120] *Id.* at 707 (Stevens, J., Concurring)

members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[121]

In offering what might be seen as a policy justification for the endorsement test, O'Connor has touched on an issue that would be at the heart of any challenge to executive exclusion on religious grounds. Telling born-again Christians, for example, that they would not be welcome in a White House discussion about stem cell research is a powerful message of political exclusion—exclusion based on their identity as religious adherents. This message is profoundly different from simply telling policy opponents that they are not welcome to help an unfriendly administration make policy. The latter is almost expected; it is part of U.S. political fabric and constitutional design, which contemplates shifting policy winners and losers and creates checks, balances, and periodic elections. But the former is much more pernicious because it has implications about identity and personal conscience that go far beyond political disagreement. It stigmatizes and isolates from political processes on the basis of religious identity and belief, and that is an outcome inimical to the First Amendment. Thus, Justice O'Connor's endorsement "test" provides meaningful guidance in developing parameters of an executive exclusion theory.

IV. ENVIRONMENTALISM AND THE RELIGION ANALOGY

If one accepts the argument that executive exclusion on the basis of religion (versus viewpoint) is impermissible as processes become more public,[122] the question remains whether the viewpoints of environmentalists can be seen as religious beliefs or whether environmentalism can be seen in any sense as religion. The analysis begins with understanding how religion has been defined or understood by the courts.

A. *Defining Religion*

The Supreme Court has not offered a single or comprehensive definition of religion, relying instead of a range of formulations

[121] 465 U.S. at 688 (O'Connor, J., concurring).

[122] Setting aside the practical questions of proof noted above.

that offer elements for comparison rather than a meaningful test. An early definitional quest, in *Davis v Beason*,[123] leaned strongly in the direction of a theistic definition. The Court explained that "the term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[124] In subsequent cases, however, the Court has moved away from such a restrictive definition. In *Zorach v. Clausen*,[125] the Court laid claim to a theistic national heritage, but then spoke in terms of a First Amendment tolerance of religion in terms not bound to that theism: "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary."[126]

In *Torcaso v Watkins*,[127] the Court abandoned any idea of a theistic element and embraced an even more expansive understanding of religion subject to First Amendment protection. It noted "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[128]

In later conscientious objector cases, the Court even engaged in a degree of interpretive gymnastics in order to read a theological element out of a statute that seemed aimed at granting conscientious objector status only to those professing theistic beliefs. In *United States v. Seeger*,[129] the Court interpreted section 6(j) of the Universal Military Training and Service Act[130] which exempted from service "those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form."[131] The Act defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any

[123] 133 U.S. 333 (1890).
[124] *Id.* at 342.
[125] 343 U.S. 306 (1952).
[126] *Id.* at 313.
[127] 367 U.S. 488 (1961).
[128] *Id.* at 495 n.11.
[129] 380 U.S. 163 (1965).
[130] 50 U.S.C. App. § 456(j) (1964) (amended 1967).
[131] *Seeger*, 380 U.S. at 164–65.

human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[132] Reading theism out of the plain meaning of the statue, the Court stated:

> We have concluded that Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in a relation to a Supreme Being' and the other is not.[133]

Justice Harlan later confessed in another conscientious objector case, *Welsh v. United States*,[134] to his own "gravest misgivings as to whether [this] was a legitimate exercise in statutory construction,"[135] although the majority in *Welsh* stuck by this interpretation and continued to read "belief in relation to a Supreme Being" broadly enough to encompass nontheistic religious beliefs.[136] At bottom, though, whether through the gymnasium or the confessional, the majority of justices were unwilling to limit their understanding of "religion" solely to theistic belief systems.

The Supreme Court has offered little further guidance on what constitutes a religion for First Amendment purposes, although appellate cases and commentators have helped to fill the void. In a 1979 Third Circuit case, *Malnak v Yogi*,[137] the Court, in a *per curiam* opinion, found the "Science of Creative Intelligence-

---

[132] *Id*. at 165.

[133] *Id.* at 165–66.

[134] 398 U.S. 333 (1970).

[135] *Id.* at 344 (Harlan, J., concurring).

[136] *Id.* at 336–37. In fact, the majority in *Welsh* construed section 6(j) to exempt even "an individual [who] deeply and sincerely holds beliefs that are purely ethical or moral in source and content" thus effectively reading any idea of religion out of the statute. *Id.* at 340. That broad construction was limited to the statute and has only partial relevance to an effort to understand the scope of protection for a religion as defined by the First Amendment.

[137] 592 F.2d. 197 (1979).

Transcendental Meditation" (SCI/TM) to be a religious activity despite claims to the contrary by SCI/TM adherents.[138] The Court held that an SCI/TM course held off campus after school hours as an elective for five high schools which included "ceremonial student offerings to deities" violated the Establishment Clause.[139] In a detailed concurring opinion, Judge Adams reviewed the line of cases seeking to define religion and argued that a "new constitutional definition" of religion was being formed.[140] While the new definition was "not yet fully formed," he identified three "useful indicia."[141] The first question is whether the "ideas in question" deal with "ultimate concerns."[142] The second question is whether the views (whether or not presented as "religious") are presented as part of a "comprehensive belief-system that presents them as 'truth.'"[143] Adams suggested that a third element to consider is "any formal, external, or surface signs that may be analogized to accepted religions."[144]

Some scholars, most notably Professor Laurence Tribe, have urged a dual definition of religion that views the term expansively when free exercise claims are involved but in a more restricted manner where government establishment is alleged.[145] It is true that the interests at stake in free exercise cases might call for a more expansive definition of religion that would create challenges if applied in an establishment case, but a dual definition is difficult to justify on the basis of the Constitutional language, which is explicitly unitary. A dual definition might also create doctrinal confusion in establishment cases where the government is alleged to have "inhibited" one religion as it promoted another.[146] If the case ultimately turned on whether one religion had truly been disfavored, the application of differing definitions to competing faiths would itself raise questions. A dual definition might also raise the paradox that the same sect might be considered a religion

[138] *Id.* at 199.
[139] *Id.* at 200.
[140] *Id.* at 205–07 (Adams, J., concurring).
[141] *Id.* at 207–08 (Adams, J., concurring).
[142] *Id.* at 208 (Adams, J., concurring).
[143] *Id.* at 209 (Adams, J., concurring).
[144] *Id.*
[145] *See, e.g.*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1179–88 (2d ed. 1988); *see also* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1084 (1978).
[146] *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

in a free exercise claim and denied the same status in a subsequent establishment case.[147]

Professor Kent Greenawalt has offered what he calls an "analogical approach" to defining religion by reference to the characteristics of the "indisputably religious."[148] Greenawalt acknowledges that "agreement on a settled account of what makes something religious has been elusive," and looks instead to the elements of commonly understood and accepted religions (including beliefs, perspectives, practices, feelings, and even institutions) in order to better understand what he calls "paradigm instances" of religion.[149] He reminds us that religions typically join a number of different elements together, but that they "need not share any single common feature, because no single feature is indispensable."[150] Under his model, "[a] final decision to consider something religious depends on how closely the combination of characteristics resembles those of the paradigm instances, judged in light of the particular reason for the inquiry."[151] The flexibility of Greenawalt's approach is attractive because by looking at a combination of elements rather than a static definition it does not lock the analysis in to any traditional form of religion (something that itself has establishment implications). Moreover, by looking to what he calls the "family resemblances"[152] of a questioned religion "in light of the particular reason for the inquiry," he offers flexibility that accommodates the concerns of those advocating a dual approach who perceive the need for differing inquiries in free exercise and establishment cases.[153] He also accounts for the various approaches of the Supreme Court as it has worked through definitions of religion as a constitutional matter, recognizing that some statutory schemes have applied broader definitions.[154]

---

[147] Admittedly broader (and thus competing) definitions of religion are used in some statutory contexts, *see* Kent Greenawalt, *Title VII and Religious Liberty*, 33 LOY. U. CHI. L.J. 1, 32–35 (2001), but that does not create a constitutional paradox.

[148] Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 767 (1984).

[149] *Id.* at 762, 767–68.

[150] *Id.* at 768.

[151] *Id.*

[152] *Id.* at 763.

[153] *Id.* at 767, 769.

[154] Broader definitions are at work in statutory contexts such as the conscientious objector cases and under the Equal Employment Opportunity Act.

B. *Understanding Environmentalism*

The first challenge in discussing whether environmentalism is a belief system fairly analogous to religion is the fact that we are not discussing a single sect or even a consistent set of beliefs and practices that characterize all "adherents." Definitions of environmentalism are necessarily vague. Here are some efforts:

- **McGraw-Hill**: "Active participation in attempts to solve environmental pollution and resource problems."[155]
- **Oxford**: "[C]oncern with or advocacy of the protection of the environment . . . . Environmentalists stress that the earth's resources are finite and that environmental damage cannot be halted without movement away from policies aimed at continual economic growth."[156]
- **Columbia**: "[M]ovement to protect the quality and continuity of life through conservation of natural resources, prevention of pollution, and control of land use."[157]

Each of these definitions emphasizes the practical aims of environmentalism through terms such as "active participation," "movement," and "advocacy," (which sound political) but they also reveal the underlying character of environmentalism as concerned with the "earth" and the "continuity of life" (which sound spiritual).

As broad as they are, these definitions still fail to reveal the wide variety of beliefs and practices of environmentalists. These can range from persons who choose to recycle or drive a fuel efficient car to those who eschew motor vehicles entirely, dress in all natural fibers and adhere to strict dietary conventions such as ovo-lacto-vegetarianism.[158] There is even a "deep ecology" movement that rejects the anthropocentric view of traditional

See Greenawalt, *supra* note 147, at 32–35.

[155] McGraw-Hill, Online Learning Center, Environmental Science, http://highered.mcgraw-hill.com/sites/0070294267/student_view0/glossary_e-l.html (last visited Feb. 15, 2008).

[156] THE OXFORD ENCYCLOPEDIC ENGLISH DICTIONARY 471 (3d ed. 1996).

[157] THE COLUMBIA ENCYCLOPEDIA 914 (6th ed. 2000). The Encyclopedia also describes "New Environmentalism" as a "new movement" with a "broader goal—to preserve life on the planet. The more radical groups believe that continued industrial development is incompatible with environmentalism." *Id.* at 915.

[158] Those who eat no animal products except milk and eggs. THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE 1257 (4th ed. 2000).

environmentalism and emphasizes the intrinsic value of other species.[159] Deep ecology describes itself as "deep" because it asks complex and spiritual questions about the role of human life in the ecosphere.[160] There is even an eponymous "Church of Deep Ecology" incorporated as a religious non-profit institution in Minnesota in 2001, which describes its principal tenet as follows: "Nature does not exist to serve humans. Rather, humans are a part of nature, one species among many. All species have the right to exist for their own sake, regardless of their usefulness to humans."[161]

Yet despite this diversity of beliefs, there are some common underpinnings of environmentalism that can serve as points of comparison to more traditional religions. At the core of environmentalism, for example, are certain basic beliefs about the close relationship of man to nature, and these beliefs occupy a central position in the lives of environmentalists.[162] Environmentalists aspire (though the degree of aspiration and attainment varies as it does with many religions) to certain behaviors that are consistent with these beliefs (indeed in their own lives and, through efforts not dissimilar to proselytizing, in the lives of others). These beliefs are often expressed through practices such as dress, diet, modes of transportation, and vocation. Underlying beliefs about the relationship of man and nature also lead practices of "communing" with nature through outdoor activities such as hiking and camping. It would not be a stretch to consider some of these practices as rituals; certainly they are often ritualistic.

In each of these cases, one might see analogies to the belief systems, outward signs, and practices of accepted religions. However unlikely the analogy may seem at first blush, there are clear parallels. While environmentalism is not theistic, theism is

---

[159] *See* Church of Deep Ecology, http://www.churchofdeepecology.org/ (last visited Feb. 15, 2008).

[160] *See generally*, Stephan Harding, *What is Deep Ecology?*, RESURGENCE, Nov./Dec. 1997, *available at* http://www.resurgence.org/resurgence/185/harding185.htm.

[161] Church of Deep Ecology, *supra* note 159.

[162] In the case of the deep ecology movement the man/nature relationship is not even seen as dualistic. *See* Church of Deep Ecology, Humans vs Nature, http://www.churchofdeepecology.org/humansvsnature.htm (last visited Jan. 17, 2008).

not an indispensable element of religion.[163] Environmentalism's focus on earth-bound concerns rather than an afterlife has more in common with pantheism than with, for example, Christianity, but a belief in heaven is not a cornerstone characteristic of religion.

Viewed from an analogical standpoint, this suggests a number of striking parallels between environmentalism and traditional religions. These parallels may only be growing, as evidenced by the birth and growth of the deep ecology movement, and by growing alliances between environmental groups and mainline religions on shared issues of core concern,[164] as well as an increasing dialogue about the environmental values inherent in recognized religions including Christianity, Hinduism, and Buddhism.[165]

There is a final point that may be significant, particularly in the context of an assessment of religious exclusion claims relating to the Cheney Energy Task Force. Environmental groups—regardless of what claims they make for or about themselves—appear to have been viewed as a species of unwelcome zealot by the White House and its allies. On April 30, 2001, The Vice President spoke publicly about the administration's proposed energy plan shortly before the Task Force Final Report was released, but after it had been drafted. At the Annual Meeting of the Associated Press (AP) in Toronto, Mr. Cheney delivered extended remarks about the pending Final Report, repeatedly casting environmental concerns as beliefs unsupported by logic.[166] He noted that alternative fuels may become more plentiful "[y]ears down the road," but cautioned

[163] *See* Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

[164] On February 9, 2006, for example, a number of mainstream religious groups sponsored a full page advertisement in the New York Times claiming "Our commitment to Jesus Christ compels us to solve the global warming crisis." Advertisement of The Evangelical Climate Initative, N.Y. TIMES, Feb. 9, 2006, at A17.

[165] *See, e.g.*, Mary Evelyn Tucker & John A. Grim, *Introduction: The Emerging Alliance of World Religions and Ecology*, DAEDALUS, Fall 2001 at 1, 11–12; *see generally* Vasudha Narayanan, *Water, Wood, and Wisdom: Ecological Perspectives from the Hindu Traditions*, DAEDALUS, Fall 2001, at 179.

[166] Vice President Richard Cheney, Remarks by the Vice President at the Annual Meeting of the Associated Press (Apr. 30, 2001) (transcript *available at* http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010430.html) (on file with New York University Environmental Law Journal).

against staking "our economy and our way of life on that possibility."[167] He dismissed the "notion that somehow developing the resources in [the Arctic National Wildlife Refuge, a central cause for environmentalists for many years,] requires a vast despoiling of the environment" as "provenly false."[168] He questioned the "wisdom of backing away" from nuclear energy (another concern for environmentalists dating back to the 1970s) by turning the environmental argument on its head and claiming it is one of "the cleanest methods of power generation we know."[169]

Cheney placed his remarks to the AP in the context of being a "Westerner" who "grew up in Wyoming," where "[m]y dad worked in the Soil Conservation Service. It's a region where stewardship is a serious matter. People rely on the land not only for the livelihood it yields but for the life it offers. You come to appreciate the wonders of creation all around you."[170] This religious imagery was carried through to the Vice President's conclusion: "Conservation may be a sign of personal virtue, but it is not a sufficient basis all by itself for sound, comprehensive energy policy."[171]

Cheney had allied himself rhetorically with life, truth, stewardship, and "the wonders of creation," while dismissing "false" environmental "virtues." While one may dismiss the idea that Cheney's remarks were deliberately coded, it is difficult to imagine that a major address to the AP on the administration's seminal early-term policy was left to chance. Cheney certainly invoked the language of faith, and at least some observers appreciated the subtext. During an interview two months later on NewsHour, host Jim Lehrer read Cheney's "conservation is a personal virtue" quote back to him, and then contrasted it with remarks read two days prior on Cheney's behalf (by his wife; he was suffering laryngitis) asserting "conservation is a must" and calling for energy efficiency.[172] Lehrer asked Cheney directly:

---

[167] *Id.* at 2.

[168] *Id.* at 4.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 5.

[172] *The NewsHour with Jim Lehrer* (PBS television broadcast July 18, 2001) (transcript *available at* http://www.pbs.org/newshour/bb/white_house/july-dec01/cheney_7-18.html).

"Did you have a conversion or . . . what happened?"[173]

While Cheney's remarks in Toronto and his subsequent public statements were highly nuanced, there was also a collateral and far less nuanced conservative discourse equating environmentalism with religion. Conservative authors like Michael Crichton[174] denounce the religion of environmentalism[175] and conservative scholars like Robert Nelson[176] claim:

> For many of its followers today, environmentalism has been a substitute for fading mainline Christian and progressive faiths—its religious quality obvious to any close observer of its workings. Its language is often overtly religious: 'saving' the earth from rape and pillage; building 'cathedrals' in the wilderness; creating a new 'Noah's Ark' with laws such as the Endangered Species Act; pursuing a new 'calling' to preserve the remaining wild areas.[177]

Even the National Review, a conservative standard, publishes articles that challenge the orthodoxy of an "environmentalist religion,"[178] and decry the environmentalists' perspective on

---

[173] *Id.* Cheney answered "No." He then complained his remarks were taken out of context. He had not, apparently, been "converted." He may, however, have been advancing an alternate orthodoxy. *Id.*

[174] Crichton is a novelist with ties to the conservative movement. His 2005 novel "State of Fear" features "eco-terrorists" who "plot catastrophic weather disruptions to stoke unfounded fears about global climate change" (a policy concern at the heart of national energy policy). Crichton recently presented the novel in a lecture entitled "Science Policy in the 21st Century" at the conservative think tank, the American Enterprise Institute for Public Policy Research (AEI). In his introduction, he was praised by Christopher DeMuth (AEI president and former Reagan budget official) for conveying "serious science with a sense of drama to a popular audience." *See* Chris Mooney, *Some Like it Hot*, MOTHER JONES MAGAZINE, May/June 2005, at 36.

[175] *See* Michael Crichton, Speech at the Commonwealth Club, San Francisco, Cal. (Sept. 15, 2003) (transcript *available at* http://www.crichton-official.com/speech-environmentalismaseligion.html).

[176] Robert Nelson is a Senior Fellow with the Competitive Enterprise Institute (CEI), a conservative think tank based in Washington. CEI strongly supported the Bush administration's withdrawal from the Kyoto Climate Protocol early in the Bush administration—a move that uniformly angered environmental groups. CEI held to the "central truth that the economic well-being of the world cannot be reconciled with the drastic emissions cuts that might be needed to slow or stop potential global warming." Press Release, CEI, Tony Blair Aligns with Bush on Global Warming—CEI Commends British Prime Minister for Bold Change of Policy (Nov. 2, 2005), *available at* http://www.cei.org/gencon/003,04939.cfm.

[177] Robert H. Nelson, *Environmental Colonialism: "Saving" Africa from Africans*, INDEP. REV., June 22, 2003, at 65, 67.

[178] *See, e.g.*, Iain Murray, *Sir David King's Queenie Fit*, NAT'L REV., July 23,

climate change thus: "In equally medieval fashion, adherents of the environmentalist religion have launched an inquisition against scientific views that they consider heretical."[179] Nelson offers examples that might be seen to fit neatly into the analogical approach to defining a religion, but the message he and others in the President's camp communicate is clear: environmentalists are perceived as apostates of science and reason; theirs is a belief-based religious calling dominated by "crazy beliefs" and clouded judgment. "True scientists" working on issues such as energy policy and climate change can safely ignore the "religious, medieval" disciples of the environment. The acceptance of this world view within the White House, while difficult to prove, is intimated by the Vice President Cheney's remarks on environment and the Energy Task Force. The efforts by these conservative voices to contrast irrational beliefs with "facts" and true science echo rather clearly in Cheney's public statements. And though definitive proof of White House perceptions about environmentalists is unlikely to be uncovered, there is a sufficient record to raise doubts—especially when taken alongside the failure of the Task Force to meet more than once with environmental groups and the devotion of the Final Task Force Report to priorities inimical to environmental concerns.

Thus, in addition to the analogies one might make when viewing environmentalism objectively alongside the "indisputably religious," there is a question of whether the *basis* for the executive exclusion of environmental groups from the workings of the Cheney Energy Task Force was that many of those who hold conservative ideologies (notably the Vice President and his senior advisors) themselves equated environmentalism with a type of religion. It is possible that the belief set of environmentalists was analogized, by the administration, with religious beliefs. Environmental groups were treated as unwelcome "others" not because they might disagree on certain policy details but because their core belief system has been rejected by the administration. Alternatively it is also possible that the conservative view of environmentalists as sectarian zealots is simply hollow rhetoric; nothing more than hyperbole designed to make a political point. Yet there is regularity to the message and consistency to the

2004.

[179] *Id.*

practice of evading, excluding, and distancing environmentalists from the administration that looks like more than a superficial policy dispute. Absent direct evidence from the White House, divining a purpose behind the Cheney Energy Task Force exclusion is difficult if not impossible. But there is a suggestion, at least, that environmentalists were excluded from participation in the Task Force because their beliefs defied administration orthodoxy.

If the constitutional principle at issue is the right to be free from religious discrimination, then what the White House thinks of environmentalists and the reasons for exclusion would seem at least as important as how environmentalists self-identify and how they might be viewed objectively. The administration's motive is at least a question of fact that would bear closer examination if one were to assert religion-based rights on behalf of environmental groups.

V. THE CHENEY PROCESS

At the core of the Task Force was a working group of five Cabinet members, three Cabinet-level officials, and three senior presidential advisors.[180] It was chaired by Vice President Cheney and directed by a former Republican Hill staffer, Andrew Lundquist.[181] Task Force core members and their staffs also consulted regularly with as many as a hundred persons associated with the energy industry, and while the names of most of those consulted remain secret it is known that some of them, like former

[180] Official members were Vice President Cheney; Colin L. Powell, Secretary of State; Paul O'Neill, Secretary of Treasury; Gale Norton, Secretary of Interior; Ann M. Veneman, Secretary of Agriculture; Donald L. Evans, Secretary of Commerce; Norman Y. Mineta, Secretary of Transportation; Spencer Abraham, Secretary of Energy; Joe M. Allbaugh, Director of Federal Emergency Management Agency; Christine Todd Whitman, Administrator of Environmental Protection Agency; Joshua B. Bolten, Assistant to the President and Deputy Chief of Staff for Policy; Mitchell E. Daniels, Director of the Office of Management and Budget; Lawrence B. Lindsey, Assistant to the President For Economic Policy; and Ruben Barrales, Deputy Assistant to the President and Director of Intergovernmental Affairs. NAT'L ENERGY POLICY DEV. GROUP, *supra* note 2, at v.

[181] *Id.* Lundquist had spent fourteen years as the Staff Director of the Senate Committee on Energy and Natural Resources and as a senior legislative advisor for Senator Ted Stevens (R-Alaska). Press Release, The Lundquist Group, Prominent Republicans Join The Lundquist Group (Jan. 31, 2005) (on file with New York University Environmental Law Journal).

Enron Director Ken Lay, met dozens of times with core group members and staff.[182] Others, including representatives of the American Petroleum Institute and the Natural Gas Council, not only communicated regularly with the core group and staff to offer policy ideas, but also offered draft language that was incorporated verbatim into the final report and into many of the Executive Orders and agency directives spawned by the Task Force.[183]

Much of the work of the Cheney Energy Task Force remains secret.[184] Though it published a report and generated a range of Executive Orders, uncounted agency policy directives, and draft national energy legislation, details about its meetings and deliberative process have never been made public. Even the identity of those consulted, including industry representatives who met and worked regularly with the administration's core group, and who produced substantial portions of the Task Force product, has never been acknowledged.[185] Citizens groups and the Government Accountability Office (GAO) filed separate suits to learn details of Task Force meetings and the identities of participants (it is worth noting that this was the first such suit ever filed by the GAO against the White House) but the litigation failed.[186] While the names of some who worked with the Task Force have been revealed through collateral sources, including the list leaked to the Washington Post in July 2007, a full roster of industry participants and the substance of their contributions in shaping the policy instruments embraced by the Task Force still are not known.

What is known is that only a single meeting was held with environmental groups in April 2001, after the Task Force had

---

[182] Abramowitz & Mufson, supra note 5. In litigation associated with the breakup of Enron it was revealed that Lay met as many as forty times with Task Force staff and core members during the three-month life of the Task Force. Statement of Congressman John D. Dingell, Committee On Energy and Commerce, Sept. 15, 2004, *available at* http://energycommerce.house.gov/press/108st138.shtml.

[183] *See supra* note 12 and accompanying text.

[184] Democrats in the 110th Congress have promised to investigate the operation of the Task Force, and its inner working may still come to light. *See* Committee on Oversight and Government Reform, Cheney Energy Task Force, http://oversight.house.gov/investigations.asp?ID=110 (last visited Feb. 15, 2008).

[185] Abramowitz & Mufson, *supra* note 5.

[186] *See* Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d. 20 (D.D.C. 2002); Walker v. Cheney, 230 F. Supp. 2d. 51 (D.D.C. 2002).

largely completed its work.[187] Environmental groups were excluded from Task Force proceedings as fully as energy industry representatives were embraced.[188] They were also denied access to information about the work of the Task Force. Environmental groups had some limited success in obtaining records of Task Force machinations from federal agencies under the Freedom of Information Act,[189] but their effort to pierce the veil of the Task Force proceedings and membership was stopped short in litigation against the Vice President.[190]

The Natural Resources Defense Council (NRDC)[191] claimed that the Task Force Final Report was little more than a package of "incentives for the energy industry, emphasizing the need to increase domestic fossil fuel supplies and renewing a commitment to nuclear power."[192] NRDC acknowledged that the report "offered some token incentives for energy efficiency and renewable energy sources," but claimed "the plan is heavily biased in favor of the most polluting fossil fuels—coal and oil—at the expense of the environment and public health."[193] The Final Report proposed building between 1,300 and 1,900 new power plants, most coal-fired, over the next 20 years; laying 38,000 miles of new gas pipelines; constructing new refineries for oil and gas; granting millions to energy industry in subsidies; reawakening a nuclear energy industry in repose since the mid-1970s; and opening up vast new areas, including the Arctic National Wildlife

[187] Abramowitz & Mufson, *supra* note 5. One participant in that meeting, a representative of the Natural Resources Defense Council, did apparently join an earlier meeting with "energy efficiency" lobbyists and industry groups. *See Task Force Meeting List*, *supra* note 9. However, the meeting does not appear to have focused on the specific concerns of environmental groups relating to the proposed policy.

[188] *Id.*

[189] *See* Judicial Watch, Inc. v. United States Dep't of Energy, 310 F. Supp. 2d. 271, 285–87 (D.D.C. 2004).

[190] *In re* Cheney, 406 F.3d 723 (D.C. Cir. 2005).

[191] NRDC is one of the largest and most prominent environmental organizations in the United States. It claims the support of over one million members and summarizes its mission statement as "to protect the planet's wildlife and wild places and to ensure a safe and healthy environment for all living things." NRDC, About Us, http://www.nrdc.org/about (last visited Feb. 15, 2008).

[192] Press Release, NRDC, NRDC Offers Responsible Alternative to Bush Energy Plan (May 17, 2001), *available at* http://www.nrdc.org/media/pressReleases/010517.asp

[193] *Id.*

Refuge to oil and gas production.[194] The Task Force did speak to some environmental concerns, but in only a rhetorical fashion that failed to address core arguments raised by environmentalists regarding energy strategy.[195]

Environmental groups' larger complaint, however, was about the process by which the Task Force Final Report had been developed. The Sierra Club[196] joined NRDC and other environmental groups in alleging that the Cheney Energy Task Force was exclusionary, and had served as nothing more than a vehicle for collusion between the administration and the energy industry.[197] The White House, they charged, had solicited and welcomed industry participation,[198] but systematically shut out

[194] *See* NAT'L ENERGY POLICY DEV. GROUP, *supra* note 2, at viii–xiv.

[195] In his transmittal letter to President Bush, the Vice President asserted "[t]o achieve a 21st Century quality of life—enhanced by reliable energy and a clean environment—we must modernize conservation, modernize our infrastructure, increase our energy supplies, including renewables, accelerate the protection and improvement of our environment, and increase our energy security." NAT'L ENERGY POLICY DEV. GROUP, *supra* note 2, at iv. Environmentalists might puzzle over the Vice President's stated desire to "modernize conservation" and to "accelerate the . . . improvement of our environment," as these phrases suggest an anthropogenic rather than natural environment. Perhaps "modernizing" conservation is something akin to 'reforming' welfare in that it aims to reconstruct (or deconstruct) rather than strengthen the subject, but elsewhere the Final Report does appear to reveal at least a passing understanding of what one might consider traditional environmental issues. The Final Report, for example, quotes President Bush on its inside cover (and at page ix) claiming that "America must have an energy policy that plans for the future, but meets the needs of today. I believe we can develop our natural resources and protect our environment." *Id.* at ii, ix.

[196] Sierra Club, Inside the Sierra Club, http://www.sierraclub.org/inside (last visited Feb. 15, 2008) (Sierra Club is one of the country's largest environmental groups with national programs as well as local and state chapters across the country.).

[197] Rich Kassel, an NRDC senior attorney and campaign director of the group's Climate Center, welcomed what he called "a public debate over America's energy future." But he asserted "that debate has to be an open, democratic and honest one, free from the taint of backroom deals and political payoffs." NRDC, *Slower, Costlier, and Dirtier: A Critique of the Bush Energy Plan*, http://www.nrdc.org/air/energy/scd/execsum.asp (last visited Feb. 15, 2008). Larry Fahn, then President of the Sierra Club, in a retrospective article on the administration's energy policy claimed of the Energy Task Force: "One thing is clear—industry was given the red-carpet treatment and the American people, including representatives from consumer and environmental groups, as well as state and local governments, were completely shut out of the process." Larry Fahn, *Future Generations Be Damned! The Sorry Environmental Legacy of The Bush Administration*, TIKKUN, May 21, 2004 at 27, 29.

[198] *See, e.g.*, Statement of Congressman John D. Dingell, Committee

every traditional environmental group from every aspect of its work. The administration had, in essence, excluded persons with beliefs about the environment which the President and Vice President, both historically and philosophically tied to the energy industry, found antithetical to their policy objectives, and possibly to their own core beliefs.[199]

CONCLUSION

It is nothing new for a White House to embrace, indeed surround itself with, persons who share the policy perspectives of the President and to exclude those who do not. But Mr. Cheney's Task Force appears different. First, the Task Force was not a closely-held executive discussion. It communicated with hundreds of private citizens and public corporations over the course of three months by phone, fax, and e-mail, and in person. Drafts from trade associations and lobbyists were circulated, discussed, and incorporated into official policy. This was not "unvarnished advice" delivered to a chief executive in the sanctuary of the Oval office. It was the opposite: a series of highly polished private petitions delivered to public officials as a means to shape public policy. Whether these private sector actors are seen as *de facto* Task Force members under FACA or simply participants in a Task Force sponsored public audience, the process hardly resembles the internal White House rumination which is the traditional subject of executive privilege.

Moreover, the Cheney process excluded something other than unwelcome viewpoints. It excluded unwelcome persons. Some of the ideas advanced by environmentalists were addressed in the

On Energy and Commerce, Sept. 15, 2004, *available at* http://energycommerce.house.gov/press/108st138.shtml ("When the Enron scandal was revealed in the fall of 2001, people began to ask about the role of Enron in the development of the energy policy. We learned that there were over 40 meetings between Enron and White House officials, including several involving the vice president and Enron CEO Ken Lay.").

[199] Both Bush and Cheney had prior careers with the oil industry. Bush had been an oil prospector and founded a Texas oil prospecting company. *See* George Lardner Jr. & Lois Romano, *Bush Name Helps Fuel Oil Dealings*, WASH. POST, July 30, 1999, at A1. Cheney had entered the presidential campaign directly from the board of one of the nation's largest energy concerns, Halliburton. Allison Mitchell, *Bush is Reported Set to Name Cheney as Partner on Ticket*, N.Y. TIMES, July 25, 2000, at A21. The energy policy team they assembled shared a similar pedigree.

Final Report, but environmentalists themselves were shut out by the Task Force. Cheney's Task Force (along with his words and the claims of his supporters) created a sense that environmentalists were shut out less for *what* they think than for *how* they think and who they are. Energy industry participants shared core beliefs about consumption and production that informed and animated the work of the Task Force. Environmentalists did not share these beliefs, and they were consequently uninvited.

This exclusion of environmentalists from the Cheney Energy Task Force was a lamentable public policy decision by the White House. As a matter of principle, it breached important canons of self government and democratic process.[200] From an instrumentalist perspective, it removed from an important and complex national policy debate the opinions of many who care about, and might have contributed to, the formulation of a national energy policy. Even in the six years since the Task Force completed its work, changes in energy markets and a greater public understanding of the threat that fossil fuel consumption poses to the global climate provide ample basis to regret this exclusionary approach.

Yet the role that law might play in preventing similarly short-sighted choices in the future remains uncertain. The Cheney process appears biased and discriminatory, but it is difficult to argue that it was constitutionally deficient as viewpoint discrimination or discrimination on the basis of religious belief. While the process went well beyond the White House, it never inhabited the truly public space that would be necessary to make a viewpoint discrimination claim. And the case for religious exclusion is problematic because a claim that environmentalism should be understood as analogous to a religion cannot reasonably be made, at least in the context considered in this article. While some aspects of environmentalism (and some practices of environmentalists) can be seen to have a religious analog, it

[200] These principles rely in part on a view of democratic government that demands more than periodic elections and instead expects a government to remain engaged with the electorate (not simply a narrow "base") in an ongoing deliberative process. This view draws on values associated with deliberative democratic theory and civic republicanism. *See, e.g.*, Bessette, Joseph "Deliberative Democracy: The Majority Principle in Republican Government," in HOW DEMOCRACTIC IS THE CONSTITUTION?, Washington, D.C., AEI Press. pp. 102–16 (1980); Cass R. Sunstein, The Republican Civic Tradition: Beyond the Republican Revival, 97 YALE L.J. 1539 (1988).

appears fundamentally a set of behavioral and policy choices driven by a moral code with a political agenda. It is important to ask questions about definition in context, yet this conclusion appears sound in the context of the Cheney Energy Task Force.

Thinking in terms of belief certainly "problematizes" the exclusion of environmentalists in a way that a simple viewpoint discrimination analysis does not—and it also creates a basis for additional scrutiny of any asserted right of executive exclusion. But such an analysis may raise even greater problems. Understanding as religious a deeply held belief that shapes identity and motivates political participation is attractive, but it threatens to overlay complex doctrinal questions about establishment and free exercise on what remains (at least in the present) essentially a political disagreement. And the analysis would not necessarily stop with environmentalism. Given the increasing involvement of religious organizations in political life, an expansive definition of religion suggests that lines between ideological and religious discrimination could become hopelessly blurred.

Despite the limits of a belief-based analysis, the Cheney Task Force certainly sent messages to "adherents" about their membership in political community—and did so in a way that excluded "nonadherents" on the basis of their beliefs, and even identity. As Justice O'Connor recognized in articulating an endorsement test, there is something fundamental wrong with this approach. While environmentalism may not be seen in its dominant form as a religion (though in time this may change), treating environmentalists as political excommunicants certainly offends the principles behind the establishment clause. Particularly at a time when important national policy questions are increasingly understood as being driven by deeply-held beliefs, and at a time when the environmental debate is increasingly understood to be a debate about the future and quality of human life on the planet, the Cheney process suggests a need to better understand the limits of exclusion in presidential policy-making.

This paper is meant to offer only a modest push in the direction of that understanding. The ability of the executive branch to exclude participants from policymaking needs to be explored, whether understood as a doctrine of "executive exclusion" or in some other fashion. The Cheney Task Force, and the broader national debate about energy policy and climate change that has surged despite the current administration's design,

also suggest the need to think further about the underlying perspectives that drive environmental policy choices. One need not be apocalyptic about the global challenges that human development poses to see that competing moral, ethical, and even religious codes are increasingly called into the open by the debate over human impact on the environment.

While the constitutional implications of the Cheney process warrant further research and debate, there is a more immediate need to rethink the scope and application of the Federal Advisory Committee Act in light of the Cheney process. FACA is aimed at securing important constitutional ideals (fairness, open government, due process) in administrative processes. Yet time has shown that a determined executive can subvert this goal with relative expediency. While separation of powers issues will need to be examined and the White House prerogative respected where advisory committees are supporting truly executive functions, adjustments to FACA could tighten its scope and reinforce its impact without overreaching. The question of *de facto* membership, for example, seems easily remedied. And open meetings can be made a standard wherever senior advisors reach systematically into the public (or a select part of it) for advice. As Congress pursues what seem inevitable and continuing questions into the secrecy and opaqueness of recent executive practices, the reform of FACA should be preeminent among its objectives.