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Statement of Rep. Henry A. Waxman
Cheney Task Force Records and GAO Authority
February 12, 2003

Last Friday, February 7, the General Accounting Office abandoned its efforts to obtain basic records about the operations of the White House task force on energy policy. This action received only limited attention, and few people fully understand its profound consequences.

When we have divided government, the public can expect Congress to conduct needed oversight over the Executive Branch. But today we are living in an era of one-party control. This means the House and the Senate aren't going to conduct meaningful oversight of the Bush Administration.

When there is one-party control of both the White House and Congress, there is only one entity that can hold the Administration accountable . . . and that is the independent General Accounting Office.

But now GAO has been forced to surrender this fundamental independence.

When GAO decided not to appeal the district court decision in Walker v. Cheney, it crossed a divide. In the Comptroller General's words, GAO will now require "an affirmative statement of support from at least one full committee with jurisdiction over any records access matter prior to any future court action by GAO."

Translated, what this means is that GAO will bring future actions to enforce its rights to documents only with the blessing of the majority party in Congress.

This is a fundamental shift in our systems of check and balances. For all practical purposes, the Bush Administration is now immune from effective oversight by any body in Congress.

Some people say GAO should never have brought legal action to obtain information about the energy task force headed by Vice President Cheney. But in reality, GAO had no choice.

The Bush Administration's penchant for secrecy has been demonstrated time and again. The Department of Justice has issued a directive curtailing public access to information under the

Freedom of Information Act. The White House has restricted access to presidential records. The Administration has refused to provide information about the identity of over 1,000 individuals detained in the name of homeland security.

The White House deliberately picked this fight with GAO because it wants to run the government in secret.

GAO's efforts to obtain information about the Cheney task force began with a routine request. The task force was formed in January 2001 to make recommendations about the nation's energy future. During the course of the task force's deliberations, the press reported that major campaign contributors had special access to the task force while environmental organizations, consumer groups, and the public were shut out. Rep. Dingell, the ranking member of the Energy and Commerce Committee, and I felt that Congress and the public had the right to know whether and to what extent the task force's energy recommendations may have been influenced by well-connected outside parties. Accordingly, we asked GAO to obtain some basic information on the energy task force's operations, such as who was present at each meeting of the task force, who were the professional staff, who did the Vice President and task force staff meet with, and what costs were incurred as part of the process. We did not request, and GAO did not seek, information on internal communications.

From the start, the White House assumed a hostile and uncompromising position, arguing that GAO's investigation "would unconstitutionally interfere with the functioning of the Executive Branch." Stand-offs between Congress and the White House are not new, of course. Typically, they are resolved through hard bargaining and compromise. But the White House made clear that it wasn't willing to bargain or to compromise. Even when GAO voluntarily scaled back its request – dropping its request for minutes and notes – the Vice President's office was intransigent.

The White House's contempt for legitimate congressional requests for information was apparent even in the one area in which it conceded GAO's authority. The Vice President acknowledged that GAO was entitled to review the costs associated with the task force. However, the only information he provided to GAO about costs were 77 pages of random documents. Some of the pages consisted of simply numbers or dollar amounts without an explanation of what the money was for; other pages consisted only of a drawing of cellular or desk phones. Without an explanation – which the Administration refused to provide, of course – the information was utterly useless.

The statutes governing GAO's authority spell out an elaborate process which the agency must follow before initiating any litigation against the Executive Branch. The statute even gives the White House authority to block litigation by certifying that disclosure "reasonably could be expected to impair substantially the operations of the Government."

In this case, GAO followed the letter and the spirit of that statute, even giving the White House an opportunity to file a certification. But the White House position was that GAO had no right even to ask for documents. Faced with an Administration that had no interest in reaching an accommodation, GAO was left with a stark choice: GAO could drop the matter, effectively conceding the White House's position that it was immune from oversight, or it could invoke its statutory authority to sue the Executive Branch. Reluctantly, on February 22, 2002, GAO filed its first-ever suit against the Executive Branch to obtain access to information.

It's not hard to figure out why the White House was so eager to pick a fight with GAO. After all, GAO provides the muscle for Congress' oversight function. Over the past century, Congress has increasingly turned to GAO to monitor and oversee an Executive Branch that has ballooned in size and strength. Moreover, because it has earned a reputation for fairness and independence, GAO is particularly threatening to an Administration that doesn't want to be challenged on any front.

GAO's effort failed at the trial level. In December, the district court in the case issued a sweeping decision in favor of the Bush Administration, ruling that GAO has no standing to sue the Executive Branch. The judge who wrote the decision was a recent Bush appointee who served as a deputy to Ken Starr during the independent counsel investigation of the Clinton Administration. The judge's reasoning contorted the law, and it ignored both Supreme Court and appellate court precedent recognizing GAO's right to use the courts to enforce its statutory rights to information.

This brings us to last week. Before deciding whether to pursue an appeal, the Comptroller General consulted with congressional leaders. He found no support among Republican leaders for an appeal. And he decided not to appeal.

The judge's ruling raised major institutional issues about Congress' power to investigate the Executive Branch. But Republican leaders put party ahead of the institution and partisanship ahead of principle.

The hypocrisy about this issue on the Republican side is simply breathtaking. During the 1990s, it was Republicans in Congress who embarked on a concerted effort to undermine the authority of the President. Congressional committees spent over $15 million investigating the White House. They demanded – and received – information on the innermost workings of the White House. They subpoenaed top White House officials to testify about the advice they gave the President. They forced the White House to disclose internal White House documents – memos, e-mails, phone records, even lists of guests at White House movie showings. And they launched countless GAO investigations into everything from President Clinton's Health Care Task Force to his working group on China Permanent Normal Trade Relations.

And if the White House resisted, these same leaders insisted that Congress and the public's right to know was paramount. Defending his numerous demands for White House records, for example, Rep. Dan Burton insisted on the House floor that "public disclosure of the facts is the essence and in large part the purpose of congressional oversight. The American people have a right to know the facts." And other Republican leaders reiterated this message over and over again on countless television talk shows.

But now that President Bush and Vice President Cheney are in office, suddenly these priorities have changed. Oversight is no longer a priority. In fact, it's something to be avoided at all costs, including sacrificing the independence of GAO. Even when GAO asks for the most basic information – what private interests met with a White House task force – the answer is that GAO is not entitled to ask these questions.

By pressuring GAO to accept a badly flawed court decision, Republican leaders placed expediency over principle. In the short term, they will get what they want – a Bush White House that is accountable to no one. In the long term, however, they have done lasting damage to the balance of powers between Congress and the White House.

Consider this irony: In their eagerness to undermine the Clinton White House, Republicans in Congress tried to tear down the presidency. Now, in their eagerness to protect the Bush White House, they are willing to tear down Congress.

The implications of GAO's decision not to appeal are enormous. Without a realistic threat of legal action, GAO loses most of its leverage. In effect, the agency's ability to conduct effective independent investigations is emasculated. And in the process, core American values of open government and accountable leaders have been sacrificed.

The Comptroller General has stated that his decision not to appeal will have little impact on the day-to-day operations of GAO. There is some truth to this. Much of what GAO does every day are routine audits of government programs that virtually everyone supports. GAO will be able to continue this routine work. And if a Republican-controlled committee ever urges GAO to pursue a controversial investigation of the Bush Administration, GAO may be able to do this. But don't hold your breath.

What has been lost, however, is something very precious: it is GAO's ability to be more than an auditor of government books. To truly serve Congress and the American people, GAO needs the ability to take on important assignments even if they are not supported by the majority party, and it needs the authority to carry them out effectively even if they are controversial. This essential independence is now gone.

For the first time in its history, GAO's shield of nonpartisanship has been pierced. In this new world, partisan considerations matter. Congressional Republicans can dictate GAO action; congressional Democrats can't. That is a sea change in GAO's mission.

In the last eight years, some of our most important congressional powers have been misused for partisan purposes. We've seen the power to subpoena documents or individuals abused and twisted beyond recognition. The power to immunize witnesses was trivialized. The power to hold officials in contempt became a cheap political tool. And the power to impeach a President was reduced to a campaign strategy.

Now the General Accounting Office, with its well-deserved reputation for superb work, becomes the latest casualty of partisanship. We are losing something very special here, and it is slipping away almost without notice.

I ask unanimous consent to insert three short documents into the record. They are an exchange of correspondence with the Comptroller General on this issue and a fact sheet on the Walker v. Cheney case that my staff has prepared.