

# THE POLITICS OF EXECUTIVE PRIVILEGE

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## GAO INVESTIGATIONS

Congress relies on the General Accounting Office (GAO) to investigate executive agencies for inefficient and possibly corrupt practices. Various statutory authorities direct GAO to examine agency documents and papers. If agencies withhold documents, GAO has a number of options to force compliance, including efforts to gain the support of key lawmakers and committees. This chapter reviews the statutory authorities, the difficulties that GAO may encounter in gaining access to agency records, and the collision between GAO and Vice President Dick Cheney with regard to documents requested about the operation of the energy task force.

### Statutory Authorities

Congress created the General Accounting Office in 1921 to strengthen legislative control over executive agencies. The enabling statute directed the Comptroller General, as head of GAO, to investigate “all matters relating to the receipt, disbursement, and application of public funds.”<sup>1</sup> To enable the Comptroller General to perform that function, departments and establishments “shall furnish” information regarding the powers, duties, activities, organization, financial transactions, and methods of business “as he may from time to time require of them.”<sup>2</sup> The Comptroller General and his assistants were to “have access to and the right to examine any books, documents, papers, or records of any such department or establishment.”<sup>3</sup>

Comparable language appears in current law. The Comptroller General shall investigate “all matters related to the receipt, disbursement, and use of public money.”<sup>4</sup> However, the scope of that investigative power is qualified by

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1. 42 Stat. 25, §312(a) (1921).

2. *Id.* at 26, §313.

3. *Id.*

4. 31 U.S.C. §712 (2000).

other statutory provisions. When an agency record is not made available to the Comptroller General “within a reasonable time,” the Comptroller General may issue what is called a “demand letter,” which is a written request to the agency head, who has 20 days to describe the record withheld and the reason for its withholding. If the Comptroller General is not given an opportunity to inspect the record within the 20-day period, the Comptroller General may file a report with the President, the OMB Director, the Attorney General, the agency head, and Congress. Moreover, the Comptroller General may bring a civil action in federal court to require the agency head to produce a record and may subpoena a record of a person “not in the United States Government.”<sup>5</sup>

The Comptroller General may not bring a civil action or issue a subpoena if the record relates to activities the President designates as “foreign intelligence or counterintelligence activities;” or if the record is specifically exempted from disclosure to the Comptroller General by a statute that “without discretion requires that the record be withheld from the Comptroller General,” establishes particular criteria for withholding the record from the Comptroller General, or refers to particular types of records to be withheld from the Comptroller General; or by the twentieth day after the Comptroller General files a report regarding the withholding of a record the President or the OMB Director certifies to the Comptroller General and Congress that the record could be withheld under Exemptions 5 or 7 of the Freedom of Information Act “and disclosure reasonably could be expected to impair substantially the operations of the Government.”<sup>6</sup> Those procedures, however, do not “authorize information to be withheld from Congress.”<sup>7</sup>

## Problems of Access

A 1960 Senate document provided examples over the previous five years in which the Defense Department, the State Department, and the National Aeronautics and Space Administration (NASA) had withheld information from GAO. These conflicts were reported to the Senate Committee on Government Operations and to other committees, sometimes leading to a resolution of the

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5. *Id.* at §§716(b), 716(c).

6. *Id.* at §716(d). Exemption 5 of the FOIA refers to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” while Exemption 7 covers certain records or information compiled for law enforcement purposes. 5 U.S.C. §552(b).

7. *Id.* at §716(e)(3).

dispute and sometimes not.<sup>8</sup> In the case of the State Department, Congress subsequently passed legislation to assist GAO in obtaining documents, even to the point of providing for a cutoff of agency funds 35 days after a refusal has been made to GAO or pertinent congressional committees, unless the information is delivered or the President certifies that he has forbidden its release and given his reasons.<sup>9</sup>

In 1972, Deputy Comptroller General Robert F. Keller told a congressional committee that GAO had received good cooperation in obtaining access to executive records except for the State Department, the Defense Department, and certain activities of the Treasury Department, the Federal Deposit Insurance Corporation, and the Emergency Loan Guarantee Board. He said that GAO had been experiencing “increasing difficulties” in obtaining access to information for programs involving U.S. relations with foreign countries.<sup>10</sup> In 1975, Comptroller General Elmer B. Staats told a House committee that GAO did not know how much the United States spent on intelligence. GAO had stopped auditing CIA expenditures in 1962 after being unable to obtain information, and had difficulty in getting information from other intelligence agencies, including the National Security Agency and the Defense Intelligence Agency.<sup>11</sup>

A 1979 study by Joseph Pois, a lawyer and professor of public administration, includes a chapter on GAO’s access to information in executive agency and contractors’ files and records. Much of the chapter is devoted to continuing GAO difficulty in obtaining documents from the Defense Department. Even when GAO ultimately prevailed or negotiated an acceptable compromise, lengthy delays detracted from the timeliness and usefulness of the eventual report.<sup>12</sup>

More recent studies describe the problems that GAO encounters in seeking information from the executive branch. A 1996 GAO report on National Intelligence Estimates (NIEs) stated that the scope of the study “was significantly impaired” by a lack of cooperation from the CIA, the National Intelligence Council, and the Departments of Defense and State. Officials from Defense and State referred GAO to CIA, which declined to cooperate, explaining that

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8. S. Doc. No. 108, 86th Cong., 2d Sess. (1960).

9. *Id.* at 11–12; 73 Stat. 254, §401(i) (1959); 73 Stat. 720, §111(d) (1959).

10. 118 Cong. 18121 (1972).

11. Lawrence Meyer, “GAO Is Unable To Give Costs Of Intelligence,” *Washington Post*, August 1, 1975, at A2.

12. Joseph Pois, *Watchdog on the Potomac: A Study of the Comptroller General of the United States* 115–59 (1979).

GAO review of certain NIEs would be contrary to oversight arrangements that Congress had established.<sup>13</sup> GAO requested statutory authority to expand its oversight role of CIA but has not received it.<sup>14</sup>

At House hearings in 1997, a GAO official described the problems that he and his colleagues had encountered in conducting a review of counternarcotics activities in Colombia. A lengthy screening program within the State Department delayed by several months delivery of documents to GAO. Moreover, the department denied access to some documents and deleted or redacted information from others.<sup>15</sup> The experience contrasted with State Department cooperation the previous two years when GAO conducted counternarcotics reviews in Colombia, Mexico, Bolivia, and Peru.<sup>16</sup>

In 1997, a subcommittee of the House Appropriations Committee held hearings on GAO's investigation of allegations that there had been 938 overnight guests in the Executive Residence of the White House. The subcommittee wanted to know whether the \$550,000 in overtime pay for 36 full-time White House employees (maids, butlers, chefs, housekeepers, doormen, etc.) was related to these overnight stays. Seven months after the subcommittee had ordered the investigation, GAO was unable to comply because information had been withheld by the White House. The information was denied to GAO to "preserve the privacy of the First Family."<sup>17</sup> GAO had audited the Executive Residence in previous years without difficulty.<sup>18</sup>

On March 6, 2001, the GAO reported to the House Committee on International Relations regarding its study about U.S. participation in UN peace-keeping operations. After the Departments of State and Defense and the National Security Council had failed to provide GAO access to the records it requested, the Comptroller General issued "demand letters" to the head of each agency. After almost nine months of effort, GAO obtained from State

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13. U.S. General Accounting Office, "Foreign Missile Threats: Analytic Soundness of Certain National Intelligence Estimates," GAO/NSIAD-96-225, B-274120, August 1996, at 15.

14. See Frederick M. Kaiser, "GAO Versus the CIA: Uphill Battles Against an Overpowering Force," 15 *Int'l J. of Intell. & Counterintell.* 330 (2002).

15. "International Drug Control Policy: Colombia," Hearing before the Subcommittee on National Security, International Affairs, and Criminal Justice of the House Committee on Government Reform and Oversight, 105th Cong., 1st Sess. 70 (1997).

16. *Id.* at 73.

17. "Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998 (Part 6: GAO Investigation of the White House)," hearings before a Subcommittee of the House Committee on Appropriations, 105th Cong., 1st Sess. 7 (1997).

18. *Id.* at 11.

“reasonable access” to records. Following the demand letter, Defense provided some material but GAO had access to only about one-quarter of the Defense records it had requested and many of those were heavily redacted. The NSC responded by denying GAO “full and complete access to the records.”<sup>19</sup>

Access to FBI records continues to be a problem for the GAO. A report of June 20, 2001, disclosed that of all the law enforcement-related agencies, access to FBI records has been the “most sustained and intractable.”<sup>20</sup> GAO’s experience with the FBI “is by far our most contentious among law enforcement agencies.”<sup>21</sup>

## The GAO-Cheney Face-Off

GAO’s statutory procedure for issuing a demand letter and taking a dispute to civil court were both used in 2001–02 in an effort to obtain information from Vice President Dick Cheney about his energy task force. Starting with little fanfare, the dispute escalated in intensity and publicity after Enron’s bankruptcy in December 2001. As Enron executives came under fire for unethical and possibly criminal conduct, newspaper headlines began to suggest that Cheney’s refusal to release documents to GAO might somehow be an obstruction of justice. That was a misconception, but misconceptions carry weight and are very difficult to correct. The controversy did damage to both Cheney and GAO. Several leading Republicans in the House and the Senate ripped the accounting agency and threatened deep cuts in its budget. The costs were so high that both sides looked for a graceful exit through some type of face-saving compromise.

A complicating factor in the GAO-Cheney standoff was Cheney’s claim that the agency wanted to interfere with the “deliberative process” required for the executive branch. GAO insisted that it only wanted “facts” about the “development” and “formulation” of energy policy. At what point does a GAO inquiry into the development and formulation of energy policy shade into an

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19. U.S. General Accounting Office, March 6, 2001 letter to Rep. Henry J. Hyde, Chairman, Committee on International Relations, and Rep. Benjamin Gilman, Chairman, Subcommittee on the Middle East and South Asia, Subject: U.N. Peacekeeping: GAO’s Access to Records on Executive Branch Decision-making, at 2.

20. U.S. General Accounting Office, Testimony before the Senate Committee of the Judiciary, “GAO’s Work at the FBI: Access to Data, Documents, and Personnel” (June 20, 2001), at 1.

21. *Id.* at 6.

investigation of the deliberative process? One analyst thought that if GAO were to prevail in this contest, it “could strengthen the ability of Congress, or even a single lawmaker, to find out details not only about the policy deliberations of federal agencies, but also about discussions in the West Wing.”<sup>22</sup> That seems to me an overstatement, but the filing of a lawsuit is fraught with uncertainties for both sides.

### The Legislative Request

The dispute began on April 19, 2001, when Representatives John Dingell and Henry Waxman wrote to Comptroller General David Walker, asking him to determine who served on the energy policy task force chaired by Vice President Cheney. It was their understanding that the task force had met in private with “exclusive groups of non-governmental participants—including political contributors—to discuss specific policies, rules, regulations, and legislation.”<sup>23</sup> Dingell and Waxman, serving as ranking members of two committees with jurisdiction over federal energy policy (the House Committee on Energy and Commerce, and the House Committee on Government Reform), told Walker that they questioned the “apparent efforts of the task force to shield its membership and deliberations from public scrutiny.”<sup>24</sup> The word “deliberations” would trigger a major dispute between the two legislators and the Vice President’s office.

The April 19 letter directed GAO to produce a list of all task force members and staff, including their name, title, office, or employer represented. Moreover, the lawmakers wanted a list of all task force meetings, including the date, location, and duration of each meeting; the attendees at each task force meeting; the criteria used by the task force to determine which non-federal entities were invited to the meetings; the direct and indirect costs incurred by the task force; and other matters.<sup>25</sup>

On the same day, Dingell and Waxman wrote to Andrew Lundquist, executive director of the task force. They said it was their understanding that private meetings had been held at federal facilities “with the participation of both

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22. Jill Barshay, “Risk Enough for All in *Walker v. Cheney*,” CQ Weekly Report, March 2, 2002, at 562.

23. Letter of April 19, 2001, from Reps. Dingell and Waxman to Comptroller General Walker, at 1.

24. *Id.*

25. *Id.* at 2.



federal employees and private citizens and groups, including political contributors.”<sup>26</sup> It was their concern that the closed-door meetings “may violate the letter and spirit of the Federal Advisory Committee Act (FACA).”<sup>27</sup> Attached to the letter were questions relating to the task force meetings, including some of the information requested of GAO, but also much more specific data: the purpose and outcome of each meeting; whether transcripts or detailed minutes of the meeting were kept; and whether invitations had been extended to governors, state public utility commissioners, representatives of organized labor, representatives of consumer advocacy groups, and small business representatives.<sup>28</sup> This information, including “copies of all documents and records produced or received by the task force,” was to be delivered to the two lawmakers by May 4, 2001.<sup>29</sup>

On the date of the deadline, Cheney’s counsel, David S. Addington, wrote to the two House committees, identifying both the chairmen (W. J. “Billy” Tauzin and Dan Burton) and the two ranking minority members, Dingell and Waxman. It was Addington’s position that FACA did not apply to the task force because it “does not apply to a group ‘composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government.’”<sup>30</sup> However, as a matter of “comity between the legislative and executive branches,” he provided information on the composition of the task force and pointed out that task force members “have met with many individuals who are not Federal employees to gather information relevant to the Group’s work, but such meetings do not involve deliberations or any effort to achieve consensus on advice or recommendations.”<sup>31</sup> The task force had met with “a broad representation of people potentially affected by the Group’s work,” including individuals from companies or industries from various sectors (electricity, telecommunications, coal mining, petroleum, gas, refining, bioenergy, solar energy, nuclear energy, pipeline, railroad and automobile manufacturing); environmental, wildlife, and marine advocacy; state and local utility regulation and energy management; research and teaching at universities; research and analysis at policy organizations (think-tanks); energy

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26. Letter of April 19, 2001, from Reps. Dingell and Waxman to Andrew Lundquist, at 1.

27. *Id.*

28. *Id.* (three pages of “Questions for Andrew Lundquist”).

29. *Id.* at 1.

30. Letter of May 4, 2001, from David S. Addington, Counsel to the Vice President, to Reps. Tauzin, Dingell, Burton, and Waxman, at 1.

31. *Id.* at 1 and page 2 of “Responses of Andrew Lundquist.”

consumers; a major labor union; and about three dozen members of Congress and their staff.<sup>32</sup>

Addington's letter provided the dates and locations of all task force meetings and the general purpose and outcome of the meetings.<sup>33</sup> With regard to questions about whether the meetings were noticed in advance, open to the public, and on the record, an attachment to the letter explained that Section 3(2) of FACA provides that the term "advisory committee" excludes "any committee that is composed wholly of full-time, or permanent full-time, officers or employees of the Federal Government."<sup>34</sup>

On May 15, 2001, Dingell and Waxman wrote to Lundquist and told him it was inappropriate to refuse the records they requested. Lundquist's actions, they said, "only serve to deepen public suspicion over the administration's apparent efforts to shield the membership and deliberations of the task force and its staff from public scrutiny."<sup>35</sup> In order to help Lundquist "better understand" their request for records, they attached a definition that included such items as minutes, drafts, notes, logs, diaries, video recordings, e-mails, voice mails, and computer tapes.<sup>36</sup> In subsequent months, GAO would back away from the breadth of that definition and scale down its request.

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32. Responses of Andrew Lundquist, at 2–3.

33. *Id.* at 3.

34. *Id.* at 4. Actually, the exemption in FACA reads: "any committee which is composed of full-time officers or employees of the Federal Government." 86 Stat. 770, §3(2)(C) (1972); 5 U.S.C. App. §3(2)(c) (1994).

35. Letter of May 15, 2001, from Dingell and Waxman to Lundquist, at 1.

36. *Id.* at 3. The definition construed "records" in the "broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to, the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated."

## Challenging GAO's Legal Authority

The dispute sharpened on May 16, 2001, when Addington wrote to Anthony Gamboa, GAO's General Counsel, raising questions about a GAO fax transmittal sheet that asked to interview officials of the energy task force and the group's support staff. The fax explained that it was GAO's intent "to review the composition and workings of the President's Energy Policy Development Group." To Addington, GAO was seeking to inquire "into the exercise of the authorities committed to the Executive by the Constitution, including the authority to 'require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,' to 'take Care that the Laws be faithfully executed,' and, with respect to Congress, to 'recommend to their Consideration such Measures as he shall judge necessary and expedient.'" After citing these constitutional duties, Addington said it appeared that GAO "may intend to intrude into the heart of Executive deliberations, including deliberations among the President, the Vice President, members of the President's Cabinet, and the President's immediate assistants, which the law protects to ensure the candor in Executive deliberations necessary to effective government."<sup>37</sup> He closed by urging Gamboa to ask the Comptroller General to examine whether "the proposed inquiry is appropriate, in compliance with the law, and, especially in light of the information already provided as a matter of comity, a productive use of resources." Addington recommended that Walker "not proceed with the proposed inquiry." If Walker decided to go forward, Addington asked Gamboa to send a statement of GAO's legal authority.<sup>38</sup>

It took GAO two weeks to prepare a memo on its legal authorities. In the meantime, Dingell and Waxman wrote to Addington that they were "dismayed" by his letter questioning GAO's authority to conduct an investigation. Congressional oversight of the executive branch, they said, "includes the ability to examine all deliberations."<sup>39</sup> They asked whether the administration was relying on executive privilege, which can be invoked only by the President. If that was the intent, they wanted to receive clarification directly from President George W. Bush.<sup>40</sup> Executive privilege was never invoked. Dingell and Waxman closed by stating it "is a shame" that the Cheney task force "has begun deliberations" with such a "determined attitude of secrecy and stonewalling."

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37. Letter of May 16, 2001, from Addington to GAO General Counsel Anthony Gamboa, at 1.

38. *Id.* at 2.

39. Letter of May 22, 2001, from Dingell and Waxman to Addington, at 1.

40. *Id.*

They said that Congress and the public had a right to know how the energy policy “was developed, including what special interests were consulted, what influence they had, and how competing interests were reconciled.”<sup>41</sup>

Over time, the emphasis on “deliberations” by Dingell, Waxman, and GAO would be replaced by asking how the policy was developed and formulated. GAO seemed to think that an inquiry into *policy formulation* is not as intrusive as one into *policy deliberation*. Distinctions in this area are difficult to understand. For example, when Gamboa wrote to Addington on June 1, 2001, explaining GAO’s legal authority to conduct the investigation, the subject of the letter is entitled “GAO’s Review of the Development of the Administration’s National Energy Policy.”<sup>42</sup> The key word was now *development*. As to Addington’s concern that GAO was intruding “into the heart of Executive deliberations,” Gamboa insisted that GAO’s legal authority “extends to deliberative process information.” However, in the particular investigation of the Cheney task force, Gamboa said “we are not inquiring into the deliberative process but are focused on gathering factual information regarding the process of developing President Bush’s National Energy Policy.”<sup>43</sup> Gamboa denied that GAO “at this time” was requesting an interview with Cheney “or cabinet officials.” He did want GAO to interview Lundquist and “other officials” involved in the energy task force.<sup>44</sup>

The first mention of Enron Corporation appears in a June 5, 2001, letter from Waxman to Representative Dan Burton, chairman of the House Committee on Government Reform. Waxman cites a May 25, 2001, *New York Times* article that the head of Enron, Kenneth L. Lay, had met with Cheney for thirty minutes earlier in the spring and that the task force report “includes much of what Mr. Lay advocated during their meeting.” The article points out that Enron was a major donor to Republican causes.<sup>45</sup> Waxman told Burton that Congress and the public “have the right to know how the Administration develops policy in important areas such as energy issues, and the extent to which large donors are influencing such policy.”<sup>46</sup> He urged Burton to hold hearings on the Cheney task force to examine a number of matters, including “meetings attended by nonfederal participants,” the purpose of each meeting, and “what was discussed.”<sup>47</sup>

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41. Id. at 2.

42. Letter of June 1, 2001, from Gamboa to Addington, at 1.

43. Id.

44. Id. at 2.

45. Letter of June 5, 2001, from Waxman to Rep. Dan Burton, Chairman, House Committee on Government Reform, at 1.

46. Id. at 2.

47. Id.

On June 7, 2001, Addington wrote to Gamboa and commented upon the three statutes identified by GAO as the legal basis for its inquiry. Addington concluded that two of the statutes provided no legal basis for the inquiry, and the third statute provided a legal basis for only a limited inquiry. The first statute requires the Comptroller General to “evaluate the results of a program or activity the Government carries out under existing law” when a committee of Congress with jurisdiction over the program or activity “requests the evaluation.”<sup>48</sup> Addington said that this statutory provision did not justify the GAO inquiry because (1) the task force functioned under executive authorities granted by the Constitution and thus was not a program or activity carried out “under existing law,” and (2) the Dingell-Waxman request did not constitute a “request” from a “committee of Congress with jurisdiction over the program or activity.”<sup>49</sup>

The second statute provided that each agency shall give the Comptroller General information that the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency, allowing the Comptroller General to inspect an agency record to get the information.<sup>50</sup> Addington said that this provision of law provided only “the means for conducting an otherwise authorized investigation,” but even those investigations are limited by other legal authorities and privileges, “such as the constitutionally-based Executive privilege.”<sup>51</sup> Bush did not invoke executive privilege in this dispute.

The third provision of law authorizes the Comptroller General to investigate “all matters related to the receipt, disbursement, and use of public money.”<sup>52</sup> Addington promised to provide Gamboa with the direct and indirect costs incurred by Cheney and the task force staff. Addington also attached a presidential memorandum of January 29, 2001, establishing the Cheney task force. The memo lists the officers of the task force, its mission, required reports, and funding by the Department of Energy.

## The Demand Letter

Three weeks later, Gamboa sent Addington a ten-page letter defending GAO’s legal authority to conduct the inquiry. Gamboa argued that the three

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48. Letter of June 7, 2001, from Addington to Gamboa, at 1, citing 31 U.S.C. §717(b)(3).

49. *Id.* at 2.

50. *Id.*, citing 31 U.S.C. §716(a).

51. *Id.*

52. *Id.* at 3, citing 31 U.S.C. §712.

statutes and their legislative histories provided adequate authority to justify the inquiry.<sup>53</sup> As to responding to a request from Dingell and Waxman instead of a committee, Gamboa maintained that GAO's "Congressional Protocols" (practice rather than law) placed requests from "committee leaders" among GAO's top priorities for response.<sup>54</sup> Gamboa told Addington that the Comptroller General was prepared to issue a "demand letter" if he did not receive timely access to the information outlined in the GAO letter of June 1, 2001.<sup>55</sup>

Comptroller General Walker sent the demand letter on July 18, 2001, requiring Cheney to respond within twenty days. Walker said that his study "focuses on factual information, not the deliberative process."<sup>56</sup> However, the factual information was requested to understand "the development" of the administration's energy policy.<sup>57</sup> At what point does factual information edge into the deliberative process? Walker asked for (1) the names, titles, and offices represented by the attendees at each of the nine meetings conducted by the task force, (2) the names, titles, and offices of the six professional staff assigned to Cheney's office to support the task force, (3) the dates and locations of meetings between task force staff and individuals from the private sector, (4) the names, titles, and offices of those individuals, (5) the purpose and agenda of those meetings, (6) minutes or notes, (7) how the task force determined who would be invited to these meetings, (8) the same information (dates, locations, names, titles, offices, purpose and agenda, minutes or notes, and criteria for invitations) for the meetings that Cheney had, and (9) direct and indirect costs of the task force.<sup>58</sup> Much of this requested information (such as minutes or notes) would be dropped from subsequent GAO requests.

Cheney, refusing to release the names, said that if he responded to GAO's request "any member of Congress can demand to know who I meet with and what I talk to them about on a daily basis."<sup>59</sup> He stated that after meeting with outside groups, those private interests "were not in the meetings where we put together the policy and made the recommendations to the president. That's the big difference."<sup>60</sup> In a letter of August 2, 2001, Cheney told the

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53. Letter of June 22, 2001, from Gamboa to Addington.

54. *Id.* at 8.

55. *Id.* at 2.

56. Letter of July 18, 2001, from Walker to Cheney, at 1.

57. *Id.*

58. *Id.* at 1-2.

59. Joseph Curl, "Cheney Refuses Demand by GAO," *Washington Times*, July 27, 2001, at A1, A16.

60. *Id.* at A16.

House of Representatives that Walker had exceeded his lawful authority by trying to “unconstitutionally interfere with the functioning of the Executive Branch.”<sup>61</sup>

An appendix to the letter gave reasons for Cheney’s refusal. First, it said that GAO was not evaluating the “results” of the task force; it was “attempting to inquire into the process by which the results of the Group’s work were reached.” Second, the statutes giving GAO authority to obtain documents from executive agencies did not apply because the term “agency” as used in those statutes “does not include the Vice President of the United States, who is a constitutional officer of the Government.” Third, GAO would unconstitutionally interfere with the functioning of the executive branch. Its proposed inquiry as to how the President, the Vice President, and other senior advisers “execute the function of developing recommendations for policy and legislation” involved “a core constitutional function of the Executive Branch.”<sup>62</sup>

Here the administration uses the same word that GAO had highlighted in its earlier letters: the development of policy.<sup>63</sup> A statement by GAO on August 6, 2001, insisted that the information it requested from the administration “is purely factual in nature and relates solely to the process used by the group.”<sup>64</sup> How does one distinguish between the “process used” and the “deliberative process”?

GAO issued its “last best offer” to Cheney on August 17, 2001. Walker explained that the records sought “would not reveal communications between the President and his advisers and would not unconstitutionally interfere with the functioning of the executive branch.”<sup>65</sup> He said he was not asking for “any communications involving the President, the Vice President, or the President’s senior advisers.”<sup>66</sup> Walker now boiled down his request to four categories: (1) the names present at the task force meetings, (2) the names of the professional staff assigned to the task force, (3) who the task force met with, including the date, subject, and location of the meetings, and (4) the direct and indirect costs incurred in developing the energy policy.<sup>67</sup> Walker re-

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61. Letter of Aug. 2, 2001, from Cheney to the House of Representatives.

62. *Id.* (Appendix Two: Reasons).

63. GAO Letters of June 1 and June 22, 2001, from Gamboa to Addington, the subject of the letters being “GAO’s Review of the Development of the Administration’s National Energy Policy.”

64. GAO Statement, August 6, 2001.

65. Letter of August 17, 2001, from Walker to Cheney, at 1.

66. *Id.* at 4.

67. *Id.* at 2.

mindful Cheney that in a previous letter GAO had offered to eliminate the earlier request for minutes and notes and for the information presented by private individuals. As a “matter of comity,” Walker now excluded those two items from his request.<sup>68</sup>

Walker’s letter to Cheney triggered a provision in law that authorizes the President or the Director of the Office of Management and Budget to “certify” that the information requested by GAO could not be made available for various reasons, including that “disclosure reasonably could be expected to impair substantially the operations of the Government.”<sup>69</sup> Certification would permanently block a GAO lawsuit, and yet the administration chose not to issue a certification. Bottom line: If you want to go to court, go ahead.

## Going to Court

By September 7, 2001, after the requested materials were not delivered, Walker began to prepare for the lawsuit. He said he expected to file by the end of the month.<sup>70</sup> However, the terrorist attacks of September 11 caused GAO to delay filing out of deference to an administration hard-pressed by the crisis.<sup>71</sup> With the administration strained by the need to obtain emergency legislation and to prosecute the war in Afghanistan, Walker decided to wait.

Two developments early in 2002 rekindled the GAO-Cheney dispute. First, after Enron declared bankruptcy in December 2001, the press began to highlight the meetings it had with the energy task force. Second, the administration for some reason disclosed that Cheney and his aides had met with Enron six times in 2001.<sup>72</sup> If that type of information could be released by the administration, why not the rest? When exceptions are made to a principle, the principle can begin to look a little threadbare.

On January 24, 2002, Dingell and Waxman wrote to Walker, urging him to proceed with a lawsuit. The need for the information “has only increased over time, particularly with recent questions concerning the influence of officials

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68. *Id.*

69. 31 U.S.C. §716(d)(1)(C).

70. Ellen Nakashima, “GAO Prepares to Sue Cheney Over Records,” *Washington Post*, September 8, 2001, at A13; Joseph Kahn, “Federal Agency Likely to Sue White House,” *New York Times*, September 8, 2001, at A10.

71. Michael Grunwald and Ellen Nakashima, “Amid War, GAO Puts Legal Fight With Cheney on Hold,” *Washington Post*, November 9, 2001, at A35.

72. Mike Allen, “Cheney, Aides Met With Enron 6 Times in 2001,” *Washington Post*, January 9, 2002, at A3.



of Enron in the development of the National Energy Policy.<sup>73</sup> Walker announced the following day that he would sue the White House if it did not comply with his demands.<sup>74</sup> Newspaper headlines and subheads kept the spotlight on Enron. A subhead in the *Washington Post* declared: “Hill Probes Enron Influence on Task Force.”<sup>75</sup> Cheney, defending his position on “Fox News Sunday,” argued that “what’s really at stake here is the ability of the president and the vice president to solicit advice from anybody they want in confidence—get good, solid, unvarnished advice without having to make it available to a member of Congress.”<sup>76</sup>

Some Republicans began to desert the administration. Walker said that Senator Fred Thompson (R-Tenn.) and Rep. Christopher Shays (R-Conn.) wanted the White House to release the information.<sup>77</sup> Thompson, after deciding that the law favored the administration, thought release of the records would be politically wise.<sup>78</sup> Similarly, Rep. Dan Burton (R-Ind.) concluded that Cheney’s legal position was stronger than GAO’s, but counseled the administration to release the records to secure public trust.<sup>79</sup> Senator Charles E. Grassley (R-Iowa) advised the White House to release the information.<sup>80</sup>

On January 30, 2002, Walker announced that he would file a case in district court in order to obtain the documents he requested from the energy task force.<sup>81</sup> It was necessary to take this action, he said, because Congress

has a right to the information we are seeking in connection with its consideration of comprehensive energy legislation and its ongoing oversight activities. Energy policy is an important economic and environmental matter with significant domestic and international implications. It affects the lives of each and every American. How it is formulated has understandably been a longstanding interest of the

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73. Letter of January 24, 2002, from Dingell and Waxman to Walker, at 2.

74. Dana Milbank and Dan Morgan, “GAO Vows to Sue for Cheney Files,” *Washington Post*, January 26, 2002, at 1.

75. *Id.*

76. Dana Milbank, “Cheney Refused Records’ Release,” *Washington Post*, January 28, 2002, at A12.

77. *Id.*

78. Richard A. Opiel, Jr. and Robert Pear, “G.O.P. Senators Divide Over Disclosing Information on Enron-White House Contacts,” *New York Times*, January 30, 2002, at C6.

79. Jill Barshay, “Risk Enough for All in *Walker v. Cheney*,” *CQ Weekly Report*, March 2, 2002, at 563.

80. *Id.*

81. Letter of January 30, 2002, from Walker to Waxman, at 3.

Congress. In addition, the recent bankruptcy of Enron has served to increase congressional interest in energy policy....<sup>82</sup>

On the same day, Dingell and Waxman wrote to Cheney to clarify what they considered to be misconceptions about the GAO inquiry. They agreed that the President and the Vice President are “generally entitled to confidentiality when discussing federal policies with senior White House staff.” However, “confidentiality for discussions among the President and the Vice President and their top aides does not extend to external communications to the White House from outside groups.”<sup>83</sup> Included in the letter were twelve recent precedents where GAO sought and received records of communications between outside groups and the White House.<sup>84</sup> Dingell and Waxman noted that President Bush “did not make—and could not reasonably have made—the certification required under section 716 for withholding the information.”<sup>85</sup>

With Cheney taking a pounding in the press, Walker was not coming off unscathed either. Part of the criticism directed at Walker was the use of language that was unusual, if not unprecedented, for a Comptroller General. Because GAO is a nonpartisan agency funded by Congress, it is usually extremely cautious and circumspect in making public statements. Yet when Cheney said the task force could not be scrutinized because he headed it in his capacity as Vice President, Walker replied: “If all you have to do is create a task force, put the vice president in charge, detail people from different agencies paid by taxpayers, outreach to whomever you want and then you can circumvent Congressional oversight, that’s a loophole big enough to drive a truck through.”<sup>86</sup> After hearing Cheney object that GAO was overstepping its bounds, Walker remarked: “Talk is cheap.”<sup>87</sup>

These and other comments prompted charges that GAO was conducting an overzealous and partisan inquiry. To House Majority Leader Dick Armey (R-Tex.), GAO “is being pressured here on a partisan political basis, and they are wrong.”<sup>88</sup> Senator Ted Stevens (R-Alas.), the ranking member of the Ap-

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82. *Id.* at 2.

83. Letter of January 30, 2002, from Walker to Cheney, at 2.

84. *Id.* at 4–6.

85. *Id.* at 7.

86. Stephen Labaton and Richard A. Oppel, Jr., “Bush Says Privacy Is Needed On Data From Enron Talks,” *New York Times*, January 29, 2002, at A1.

87. Elizabeth Bumiller, “Cheney Is Set to Battle Congress To Keep His Enron Talks Secret,” *New York Times*, January 28, 2002, at A1.

88. Dave Boyer, “GOP terms GAO’s request a partisan hunt,” *Washington Times*, January 30, 2002, at A4.

ropriations Committee, said he was “appalled” at GAO’s pursuit of the White House documents. He argued that the principle of separation of powers prevented such investigations,<sup>89</sup> and warned that the lawsuit could mark the decline of GAO.<sup>90</sup>

GAO finally filed its long-delayed lawsuit on February 22.<sup>91</sup> Other suits, filed under the Freedom of Information Act, also sought documents on the administration’s energy policy. In one of these cases, a federal judge on February 27 ordered the Energy Department to turn over 7,500 pages of documents related to the Cheney task force.<sup>92</sup> On March 6, another federal judge in a FOIA case ordered seven government agencies to release thousands of documents related to the Cheney task force.<sup>93</sup> Several other courts were involved in lawsuits seeking documents from the task force.<sup>94</sup> In addition to information made available from litigation, reporters were talking directly to private groups involved in the task force meetings. A lengthy article in the *New York Times* identified the energy companies that met with the task force and contributions they made to the Republican and Democratic Parties in the 2000 election.<sup>95</sup> Some of the industry officials who met with the task force expressed surprise at the effort to keep the names secret: “Within the industry, there’s this feeling like, ‘Don’t we already know who was there?’”<sup>96</sup>

## The Court Decides

On December 9, 2002, District Judge John D. Bates dismissed the GAO complaint by holding that Comptroller General Walker lacked standing to bring the suit.<sup>97</sup> Walker, said the court, had suffered no personal jury, and

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89. *Id.*

90. Jill Barshay, “GAO’s Walker Says He Hopes To Avoid Court Fight With Cheney Over Energy Task Force Documents,” *CQ Weekly Report*, February 9, 2002, at 396.

91. Don Van Natta, Jr., “Agency Files Suit For Cheney Papers on Energy Policy,” *New York Times*, February 23, 2002, at A1.

92. Dana Milbank and Ellen Nakashima, “Energy Dept. Ordered To Release Documents,” *Washington Post*, February 28, 2002, at A1.

93. Don Van Natta, Jr., “Judge Orders More Papers on Task Force Released,” *New York Times*, March 6, 2002, at A18.

94. “Judges Knock Cheney Panel Court Efforts,” *Washington Post*, March 1, 2002, at A5.

95. Don Van Natta, Jr. and Neela Banerjee, “Top G.O.P. Donors in Energy Industry Met Cheney Panel,” *New York Times*, March 1, 2002, at A1.

96. *Id.* at A15.

97. *Walker v. Cheney*, 230 F.Supp.2d 51 (D.D.C. 2002).

any institutional injury would exist only “in his capacity as an agent of Congress—an entity that itself has issued no subpoena to obtain the information and given no expression of support for the pursuit of this action.”<sup>98</sup> Walker had identified only two Congressmen (Dingell and Waxman) “and four Senators who have expressed support for his investigation as a general matter, and has not identified any Member of Congress (other than *amicus* Senator Reid) who has explicitly endorsed his recourse to the Judicial Branch.”<sup>99</sup> When the case was before the court, Cheney’s counsel noted that Congress “has ‘plenty of practical leverage’ to get the requested information, including refusing to act on the President’s energy proposal until the information is produced.”<sup>100</sup>

To obtain documents from the executive branch, Congress must be willing to use its considerable leverage and press its advantage. In this dispute, Congress and its committees decided not to do that, and Judge Bates interpreted the congressional silence as a grave weakness to GAO’s position. Comptroller General Walker found himself, politically and institutionally, isolated. After checking with lawmakers in both Houses, Walker found inadequate support to continue the fight and announced that he would not seek an appeal.<sup>101</sup> He announced his willingness, “should the facts and circumstances warrant, to file suit to press our access rights in connection with a different matter in the future.” However, on such occasions he would not step out alone: “I believe it would be appropriate to have 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.”<sup>102</sup>

## Lieberman’s Subpoenas

Throughout this period, none of the committees or subcommittees of Congress had issued a subpoena for documents concerning the energy task force. On March 22, 2002, the Senate Committee on Governmental Affairs, chaired by Senator Joseph Lieberman (D-Conn.), issued 29 subpoenas to Enron to

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98. *Id.* at 74.

99. *Id.* at 68.

100. *Id.* at 68, n.12.

101. Dana Milbank, “GAO Ends Fight With Cheney Over Files,” *Washington Post*, February 8, 2003, at A4; Adam Clymer, “Agency Ends Pursuit of Cheney Energy Panel Data,” *New York Times*, February 8, 2003, at A32.

102. 149 Cong. Rec. H433 (daily ed. February 12, 2003).

document its relationship to the administration's energy task force.<sup>103</sup> At the same time, Lieberman said he would write letters to the White House seeking information about its contacts with Enron, instead of resorting to subpoenas.<sup>104</sup> In response to Lieberman's letter, White House Counsel Alberto Gonzales directed more than 100 staff members to complete a questionnaire that would detail communications between the administration and Enron in the months just before the company's collapse.<sup>105</sup> These White House efforts were made under the threat of a subpoena that Lieberman held in reserve.<sup>106</sup>

As the weeks rolled by, Lieberman expressed dissatisfaction with the lack of progress.<sup>107</sup> Although Gonzales asked that the subpoena not be issued,<sup>108</sup> Lieberman decided on May 22, 2002, to subpoena the documents—the first congressional subpoenas on the Bush administration.<sup>109</sup> Four hours after the subpoenas were delivered, the White House faxed Lieberman a six-page letter showing that Enron executives had a number of meetings and phone calls with White House officials that had been previously disclosed.<sup>110</sup> The subpoenas flushed out a number of documents and e-mails related to White House communications with Enron.<sup>111</sup> In some cases, the White House refused to make copies of Enron-related documents but allowed Lieberman's staff to come to the Eisenhower Executive Office Building, which is next to the White House, and look at some of them.<sup>112</sup>

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103. Dana Milbank, "Senate Panel Says Enron Must Detail Policy Role," *Washington Post*, March 23, 2002, at A1.

104. *Id.*

105. "White House Staff to Answer Enron Questionnaire," *Washington Post*, April 30, 2002, at A2; .

106. Richard A. Opper, Jr., "Senator Presses for Information on Enron," *New York Times*, May 4, 2002, at B3; "Lieberman Angered by Response on Enron," *Washington Post*, May 4, 2002, at A5.

107. Mike Allen, "Subpoena Urged on Enron Records," *Washington Post*, May 18, 2002, at A7; Richard A. Opper, Jr., "Senate Democrats Escalate Efforts to Get White House To Disclose Enron Contacts," *New York Times*, May 18, 2002, at B1.

108. "White House Asks Subpoena Not Be Issued," *Washington Post*, May 22, 2002, at A19.

109. Mike Allen, "Panel Demands Enron Papers," *Washington Post*, May 23, 2002, at A1.

110. *Id.*

111. Mike Allen, "White House Gathers Enron Data," *Washington Post*, May 25, 2002, at A4.

112. Mike Allen, "White House Gives Lieberman Limited Access to Enron Data," *Washington Post*, June 4, 2002, at A2. See also "Senate Panel Gets Some Enron Data," *Washington Post*, June 5, 2002, at A4.

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The Waxman-Dingell request can be described as a “gotcha” legislative tactic: An effort by lawmakers to put the administration immediately on the defensive and possibly unearth some damaging information useful in political campaigns. No doubt a relatively small legislative investment in time and energy can put a White House in a tail-spin as it begins the laborious search for documents. An alternative is to concoct strained legal arguments that deny the lawmakers the documents, but at risk of appearing to engage in a cover-up or obstruction of justice. In the end, regardless of the merits of the legal doctrines, the documents are likely to become public anyway.

In the face of what appears to be a win-win legislative strategy, is the administration without a remedy? Resourceful executive officials have a number of ways to discourage or blunt a legislative inquiry. In the case of the energy task force, the administration came to power with a conspicuous spotlight trained on the business/industry backgrounds of President Bush, Vice President Cheney, Defense Secretary Don Rumsfeld, and other top officials. It would have been prudent for the administration to go out of its way by meeting with a plethora of environmental, consumer, and labor unit groups. When the time came for a legislative investigation of the energy task force, the administration could have released a lengthy list of the groups it met with, without embarrassment. If an administration fails to protect itself in advance, it will take a political hit, and deservedly so.

At that point, an administration has to decide whether it is better to release the damaging information early and absorb the blows—probably doing short-term damage—or drag out the investigation as the outside world, day by day, knows the truth anyway, because other lawsuits are bringing documents to light. Administrations are supposed to have an instinct for minimizing political damage. They live in a political world and have to expect opponents to score political points when they have an opportunity to do, just as the administration will exploit a political advantage when it sees an opening. In the case of the Cheney energy task force, the administration prevailed in court but took a political beating that could have been avoided.