Risk Enough for All In Walker v. Cheney

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By Jill Barshay

An inquiring letter from Henry A. Waxman or John D. Dingell is not an unusual event. One of the half-dozen House Democrats left from the post-Watergate "reform" Class of 1974, Waxman has made a career of needling Republicans and investigating tobacco companies and corporate polluters; his office wall of gray file cabinets bulges with related correspondence. During his 45-year tenure, fellow Democrat Dingell has transformed the Energy and Commerce Committee into one of Capitol Hill ´s premier investigatory arms; his "Dingell-grams" - blunt demands for information and tart rebukes to insufficient responses - have been penned at the rate of hundreds a year.

So last April 19, there was no fanfare when California ´s Waxman and Michigan ´s Dingell put their signatures on two more missives. Soon after newspapers published stories about meetings between Vice President Dick Cheney ´s energy task force and contributors to President Bush ´s 2000 campaign, they requested details from Andrew D. Lundquist, the task force ´s executive director. Expecting that Lundquist might be less than cooperative, they also wrote to ask the General Accounting Office (GAO) to scrutinize the task force.

The ensuing standoff has escalated far beyond what any of the congressional participants ever expected. The legal, political and institutional consequences are now potentially so great that Waxman and Dingell have unwittingly committed Congress to one of the highest-stakes balance-of-powers battles since Watergate. And in doing so, they have unintentionally put on the line the future of much of the very congressional investigative powers that have served them so well.

"If they prevail, they make useless the whole idea of a General Accounting Office as a nonpartisan watchdog agency," Waxman said of the Bush administration. "If they prevail, it would be a green light for them to do a lot of other things in secret, not just the energy task force."

As the investigative agency of Congress, the GAO filed a federal lawsuit Feb. 22 to compel the vice president to disclose which industry executives were consulted last year by the National Energy Policy Development Group, as Cheney ´s task force was called. It is the first time the GAO has ever gone to court to force the executive branch to disclose documents. Both sides are preparing for the case to end at the Supreme Court, where legal experts say the outcome is uncertain. (Story, p. 566; background, CQ Weekly, pp. 539, 396, 289)

If the GAO wins decisively, the ruling 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. If it loses decisively, the results could be an evisceration of the GAO ´s own reach and a crippling of congressional oversight powers. At the moment, it appears that only Comptroller General David M. Walker, the head of the GAO, views the stakes as minimal; the worst outcome in court, he said, would curtail less than 1 percent of his agency ´s work - concerning the operations of the Executive Office of the President.

The Bush administration, if it wins, could gain a substantial long-term and institutional advantage: A strongly written Supreme Court opinion allowing the White House to keep the names of meeting participants secret could set a precedent allowing future presidents to fend off all manner of congressional inquiries. The president and vice president say they are compelled to fight back for this reason: It is time to reclaim prerogatives that the presidency has lost, or ceded, in recent decades.

But politically, Bush seems to be playing with fire. Already the Democratic Congressional Campaign Committee, gearing up to assist House candidates in the midterm election, has established a "Hey Dick Cheney, Disclose the Documents" Web site (www.disclosethedocuments.com), relishing the opportunity to accuse the administration of concealing the involvement of top campaign contributors - especially executives from Enron Corp., the failed energy trading giant - in policy development.

By and large, the views of the fight from Capitol Hill fall along party lines, with Republican leaders supporting the president ´s position and Democratic leaders supporting the GAO. A prominent exception among Republicans is Dan Burton of Indiana. He is urging the administration to give the GAO what it wants, but his reasoning has nothing to do with his standing as chairman of the House Government Reform Committee, one of the main congressional oversight panels. In fact, he sees Cheney ´s legal position as stronger than the GAO ´s.

Cheney ´s accelerating the dispute into a balance-of-powers contest is a "big mistake," Burton said. "The American people want to believe that the government is open and above board. . . . I believe this will come back to haunt them, and us, in the fall."

Waxman and Dingell say they never intended such a fight. Asked to define the proper boundary for congressional inquiry into White House operations, Waxman concedes that he has not given the constitutional issues "a great deal of thought." Says Dingell, "This became a constitutional issue only because Mr. Cheney and the president made it so. . . . Now it is about the ability of the vice president to stiff Congress."

Considering the stakes, it is all the more remarkable that the fight is over a relatively small amount of information from a task force that disbanded in September. The GAO has scaled back its original demand for notes and transcripts of meetings and now wants to know only the names of lobbyists and industry officials who met with the task force, what topics were discussed and how the task force spent public moneys.

Yet the GAO has already received much of this information from the Energy Department, the Interior Department and the EPA. Officials from those agencies regularly attended task force meetings and largely complied with GAO ´s requests for information last year. It appears that the main information the GAO does not have is about the meetings that Cheney held without officials from those agencies, including a session with Enron Chairman Kenneth Lay last year, which the White House already has disclosed, along with five other task-force meetings with Enron executives.

The refusal to disclose more to the GAO is part of a larger pattern of tight information management during the Bush White House ´s first year. Journalists routinely complain they are unable to obtain answers they would have received easily from the Clinton, Reagan or first Bush White House. Leaks are exceedingly rare.

The lid has only been twisted down tighter since the Sept. 11 terrorist attacks on the United States, and Congress has often complained. Attorney General John Ashcroft has refused to provide the names of more than 1,000 people detained as part of the Justice Department ´s investigation or where they are being held, provoking anger from senators at a December committee hearing. Earlier in the fall, Bush moved to restrict attendance at classified briefings on Capitol Hill until he was told that more members of Congress were entitled to some of the information by law. Since then he and Cheney have pressed congressional leaders to limit the coming inquiry into intelligence-gathering failures before Sept. 11. (2001 CQ Weekly, p. 2395; CQ Weekly, p. 311)

The White House split a working group on Social Security policy in two so that its work would not be subject to federal sunshine law. And while partly complying with a subpoena from Burton ´s committee for some records from the Clinton administration, Bush has refused in at least two other instances to turn over other papers sought by House Government Reform. These include details of some Clinton pardons

and some Reagan-era papers, even though their release has been sanctioned by the former presidents ´ advisers.

"This administration is trying to keep control of information and deliberative documents, even where there is an indication of illegal activity," Burton said.

His anger at the time stemmed from the Justice Department ´s refusal to turn over FBI records in a 30-year-old case that led to wrongful criminal convictions. On Feb. 27, Burton announced that his staff was preparing a resolution to hold the president in contempt of Congress in the matter. That evening, the White House handed over the documents the chairman sought.

Since Watergate, contempt citations have become a more frequently used tool of Congresses that have seen their demands for presidential records rebuffed. But they must have the support of the majority of at least one chamber at the Capitol, and there is no indication that such a move is being contemplated in the energy task force matter. (Timeline, pp. 562-566)

Fighting Erosion

Though Cheney ´s response to the lawsuit has been on narrow legal grounds so far, in public the vice president maintains he is fighting to strengthen the "principle" that the president has an expansive right to confidentiality. He also says he is working to push the balance of power closer to the White House, further from the Capitol.

"I have repeatedly seen an erosion of the powers and the ability of the president of the United States to do his job," Cheney said on ABC ´s "This Week" on Jan. 27. "We saw it in the War Powers Act. We saw it in the Budget Anti-Impoundment Act. We ´ve seen it in cases like this before, where it ´s demanded that presidents cough up and compromise on important principles. . . . That ´s wrong."

The vice president said he and Bush "feel an obligation . . . to pass on our offices in better shape than we found them to our successors. We are weaker today as an institution because of the unwise compromises that have been made over the last 30 to 35 years."

Waxman and Dingell emphatically disagree. "The power of the president is enormous, maybe more now than over any time in the last 20 years," Waxman said. "The power of the presidency has not eroded."

Some scholars share that opinion. "At the moment, the president is up and the Congress is down," said Stephen Hess, a Brookings Institution senior fellow. "After Watergate and Vietnam, it was the opposite. But I don ´t think it ´s been a steady decline like Cheney describes."

Lanny Davis, a White House lawyer throughout Bill Clinton ´s presidency, is on the side of the Bush administration in this case. "Congress has no right to know who the president consults with or what the subjects are, or else there is no such thing as executive advice and and candor from advisers," he said. "This is precisely the same argument I made on national television over and over again. . . . How in God ´s name can any Democrat criticize the Bush White House for taking the same position we took?"

John W. Dean III, President Richard M. Nixon ´s White House lawyer for three years, is on the side of Congress in this case. A court ruling in Cheney ´s favor, he wrote in an online law journal article in February, will create "a no-man ´s land where only the president and vice president can go, unobserved by the constitutional co-equals on Capitol Hill."

George Washington and most presidents since have refused demands by Congress for executive branch records. Sometimes presidents have acquiesced, often in the face of mounting political pressure. When they have resisted, Congress occasionally has abandoned its inquiries in deference to a president ´s

public popularity. That pattern may argue in favor of the current administration ´s position, at least so long as Bush retains approval ratings in the range of 80 percent. Appearing on NBC ´s "Tonight Show" on Feb. 19, Cheney won a huge round of applause when he told host Jay Leno that he was fighting the GAO to restore presidential power after years of erosion.

Presidential popularity notwithstanding, the federal government ´s expansion during and since the New Deal has created many more areas for Congress to explore, and the pace of the tussles over records between the two branches has picked up since World War II.

Still, Congress has never obtained documents under the terms of a federal court order. Instead, lawmakers have historically either abandoned their quests or settled for less than everything they asked for. When a dispute between the Reagan administration and the 97th Congress over environmental policy files made it into U.S. District Court, for example, Judge John Lewis Smith Jr. wrote that he would not settle the matter because "courts have a duty to avoid unnecessarily deciding constitutional issues." The two sides came to agreement soon thereafter.

`Eighteen Acres Under the Glass ´

Aside from the constitutional issues, competing values are at stake - the balance between transparency in government and efficiency of government, for example, especially at a time when expansive, round-the clock media coverage enhances the "fish bowl" nature of the venue for making public policy.

"The sort of confidentiality we absolutely took for granted under Eisenhower seriously chipped away under Nixon and is pretty much shredded now," said Hess, who served in both administrations. "It ´s 18 acres under the glass. It never would have entered my mind in an earlier time not to send a president a memo of exactly how I thought about something. Now, it ´s not what do I think, but how will it look when it ´s commandeered by Congress or leaked to The Washington Post?"

Bush says his administration is resisting the GAO to enhance the likelihood that he will receive such unvarnished advice, not only from his aides but also from people outside government.

"In dealing with his own staff, the president has the right to absolute confidential conversations, even though we fund the salaries of every person in the meeting," said Waxman, who used a similar argument in 1998 when he warned Republicans to be "careful of the precedents" in what they were demanding to know about staff advice at the Clinton White House. But Waxman says that same protection should not apply to the lobbyists, contributors and others with special interests who advise the president on major policy questions. At a minimum, he said, their identities should be made public.

No Executive Privilege

The administration has not invoked the concept of executive privilege. There appear to be two main reasons for this. The first is that the Supreme Court ´s landmark 1974 ruling in U.S. v. Nixon held that the claim could be invoked only to resist a subpoena that could reveal military and national security secrets, and neither a subpoena nor that sort of information is at issue in the GAO case. The second reason is that the privilege would probably need to be asserted by Cheney, as the chairman of the task force, which would be an untested bid to expand vice presidential prerogatives. "Until I hear that Cheney is the president, executive privilege doesn ´t apply here," Dingell said.

In its dispute with Cheney, meanwhile, the GAO maintains that the degree of privacy the administration is seeking is far broader than the current reach of executive privilege. GAO is seeking victory on narrower grounds: that it has the statutory authority to get the information it wants. Cheney ´s lawyers, who have not formally answered the suit, say the GAO is seeking to apply its authority too broadly.

In addition, Cheney wrote to the GAO in August that a "president and his senior advisers must be able to work in an atmosphere that respects confidentiality of communications if the president is to get the good, candid advice and other information upon which wise decision-making depends." But there have been exceptions to the administration ´s insistence on such confidentiality - such as when the White House detailed the consultations Bush had in developing his embryonic stem cell research policy. (2001 CQ Weekly, p. 2063)

Will Senate Weigh In?

The GAO has long been a favored investigatory adjunct of the minority parties in Congress, in part because the most favored tool for congressional inquiries into the executive branch - the subpoena - as a practical matter is available only to the majority in each chamber. The House Republican majority has shown no signs of wanting to confront a president of their own party in this way. And the Senate Democratic majority has not taken much of an overt interest in the cause launched by their colleagues in the House. "It may still come to that point," said Waxman.

The only promised intervention so far has come from Senate Majority Whip Harry Reid of Nevada. Angry at the administration ´s plans to make Yucca Mountain in his state the nation ´s nuclear waste repository, Reid has vowed to file a "friend of the court" brief in support of the GAO ´s case. Beyond that, four other senior Senate Democrats - Ernest F. Hollings of South Carolina, Carl Levin of Michigan, Byron L. Dorgan of North Dakota and Joseph I. Lieberman of Connecticut - wrote the GAO to endorse its preparation of the lawsuit.

"A loss could be a real blow to the cause of open and accountable government," said Lieberman, who chairs the Governmental Affairs Committee, which has jurisdiction for oversight of the executive branch. "For decades, Congress has relied on the GAO to help it in that work," he noted.

The White House has declined to say whether it would abide by a Senate subpoena. "That ´s a hypothetical question, which we don ´t answer," said Cheney spokeswoman Jennifer Millerwise.

Given the unpredictable nature of the case, it would appear that both sides have powerful incentives to strike a deal. A settlement would presumably allow Walker to repair GAO ´s relations with congressional Republicans, and it would end the risk of seeing his agency ´s investigatory powers curtailed. At the same time, a settlement could allow the White House to limit the appearance that it is hiding something and the risk that its ability to resist Congress could be eroded.

"Every time the president goes to court, he takes the chance of chipping away at the authority that has been given to him in Article II of the Constitution. So many powers exist because they haven ´t been challenged, they have just been accepted," said Hess.

"It seems to me to be politically maladroit, no matter how it goes," said Peter M. Shane, a constitutional law professor at Carnegie Mellon University in Pittsburgh who sees the GAO as having the stronger case.

Were Bush to prevail, Shane said, it would only be after a long legal battle during which the Democrats could be expected to maintain their public posture that the administration must be trying to hide something. "They can ´t possibly win in the press, even if they win in the law," Shane said.

Both sides might see an advantage in the assignment of U.S. District Judge John D. Bates to the case. He was nominated by Bush last year. But in his prior life as a prosecutor, he won a case to limit confidential discussions with lawyers inside the Clinton White House.

Between capitulation by the White House and an abandonment of the claims by the GAO lie several options, one of which was offered by Davis, the self-described "damage control" adviser to Clinton. "In

post-Enron Washington, my advice is to release the documents to the press, not Congress, so that you don ´t concede the separation-of-powers argument," he said.

Another possibility is that the lawsuit could be rendered effectively moot by the disclosure through other means of the material GAO wants. At least three public interest groups - Judicial Watch and environmental groups Natural Resources Defense Council and Sierra Club - are suing to obtain task-force details from the White House and the Energy Department under Freedom of Information and Federal Advisory Committee acts. Early rulings in those cases have gone against the administration.

No matter how Walker v. Cheney is resolved, Shane predicts, the material Waxman and Dingell went after 10 months ago "is not going to remain secret forever."