

Testimony of
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Mr. Chairman, Senator Hatch, Members of the Committee, I'm honored by your invitation to comment on the accountability issues that have arisen in connection with Enron's bankruptcy and its aftermath. These issues are obviously numerous and variegated. My testimony addresses questions of congressional oversight and investigation that have attained renewed prominence because of the Enron bankruptcy and the subsequent intense congressional interest in conducting its own investigations of this matter. In particular, I will comment today on the role of the GAO in disputes over access to information held by the Executive Branch.

As you know, Congress and the Executive have had a great many disputes with each other about congressional access to information that the Executive has preferred not to share. There was a significant dispute about this issue during the administration of President Washington, and the tug of war has been going on ever since. Neither the congressional right to conduct investigations, nor the Executive's right to resist disclosure of information to Congress, is expressly granted by the Constitution. Given the implicit nature of both rights, it should not be surprising that Members of Congress have tended to have a somewhat different view of the constitutional allocation of power than Presidents and their lawyers have taken. Traditionally, these disputes have been settled through negotiation, compromise, and sometimes capitulation. But as far as I'm aware, no court has ever issued a final judgment resolving such a dispute when the President has asserted his constitutional claims. That may be about to change.

The Comptroller General--acting in response to a request from Congressmen Dingell and Waxman--has demanded that the Vice President disclose information about private meetings that he held while he was a member of the National Energy Policy Development Group ("NEPD Group"), which was entrusted by the President with the task of developing recommendations for a new energy policy. The Comptroller General's demand letter was quite comprehensive, for it embraced all meetings in which the Vice President participated and it required a full account of every meeting, including "any information presented" as well as minutes or notes of the meeting. The Vice President responded that the GAO lacks statutory authority to enforce these demands, and argued that the demands would exceed Congress' constitutional authority even if the GAO was acting pursuant to statutory authorization. At one point, the Comptroller General appeared to withdraw his most intrusive inquiries, but he continued to seek a number of details about every meeting the Vice President and his support staff had, including the identity of everyone who attended every meeting, the agenda of the meeting, and the manner in which the Vice President or the staff decided who would be invited.

The Comptroller General stopped pursuing his demands in September, but in the wake of the Enron controversy he has announced that he plans to bring a lawsuit to compel the Vice President's compliance.

Is the GAO's demand authorized by the statute?

Two sources of authorization have been suggested. First, the GAO's organic statute authorizes the Comptroller General to "evaluate the results of a program or activity the Government carries out under existing law." A natural reading of the reference to programs or activities carried out "under existing law" suggests that these evaluations are meant to cover programs and activities established by Congress, rather than activities conducted under the President's independent constitutional authority to develop recommendations for future action. "Existing law," however, could conceivably be construed to include the Constitution, which might enable this provision to cover the Vice President's "activities" in preparing policy recommendations for the President.

The statute also authorizes the GAO to investigate "all matters related to the receipt, disbursement, and use of public money." This statutory language is on its face so broad that it could conceivably cover any matter related in any way, no matter how remote or indirect, to the use of public money. Because the Vice President receives a salary from the Treasury, and because public funds were no doubt used in other ways in connection with the meetings that the GAO is purporting to investigate, the statute could be read to authorize an investigation of these meetings.

Assuming for the sake of argument that the statute authorizes GAO to evaluate or investigate the work of the NEPD Group, however, the statute clearly does not purport to authorize the GAO to use any and all means to conduct its investigations or evaluations. The Vice President has already provided some records to the GAO, and the real question is whether the statute purports to require that the Vice President comply with GAO's demands for additional records about the nature of specific meetings. I think that it does not.

The statute requires government "agencies" to supply information about their activities to the GAO, and the term "agency" is given a broad definition that includes every "department, agency, or instrumentality of the United States Government" other than the legislative branch or the Supreme Court. The bare language of the statute could conceivably be stretched to include the Vice President, either as such or in his role as a member of the NEPD Group, but it certainly need not be so interpreted. Under the interpretive principle adopted by the Supreme Court in *Franklin v. Massachusetts*, moreover, the statute should not be construed to cover the President, and probably not the Vice President either, because it does not expressly so provide.

In any event, the express-statement rule invoked in *Franklin v. Massachusetts* is related to a more general principle of statutory construction, under which ambiguous statutes should be interpreted so as to avoid serious constitutional questions. And the constitutional questions raised by the GAO demand letter are very serious indeed. Beginning with George Washington, Presidents have consistently claimed that they may withhold some information from Congress, and the Supreme Court has recognized that a right of executive privilege is indeed implicit in the Constitution. Although the exact contours of the Executive's privilege of confidentiality remain subject to some uncertainty, the GAO's demands at the very least raise serious constitutional questions.

The most recent major decision on executive privilege arose from the Independent Counsel investigation of Secretary Mike Espy. The White House refused to disclose a number of documents that had been generated in the course of the Administration's own investigation of

allegations against Espy. Notwithstanding the fact that many of these documents had never been shown to the President, the D.C. Circuit held that most of them were immune from discovery by the Independent Counsel. The court explained that the privilege extends:

to communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisors.

Vice President Cheney plainly qualifies under this or any other description of a high-level advisor, and much of what the GAO demanded amounts to "communications authored or solicited and received by" the Vice President and his staff. Even after the GAO's apparent narrowing of its demands, it continues to demand "records providing the following information with regard to each of these meetings: (a) the date and location, (b) any person present, including his or her name, title, and office of clients represented, (c) the purpose and agenda, . . . and (f) how [members of the NEPDG, group support staff, the Vice President himself or others] determined who would be invited to the meetings." These records would appear to be "communications" and they were presumably authored or received by the Vice President's staff.

Although the Espy court noted that its decision applied only in the context of judicial proceedings, it would be surprising if the courts were to give the privilege a narrower scope in the context of a GAO inquiry into the President's policy-development process than it has in the context of a serious criminal investigation.

When one steps back from case law, which in any event cannot provide a definitive resolution, the serious nature of the constitutional questions becomes even more apparent. In 1796, when the House of Representatives was debating its response to President Washington's refusal to provide the House with documents relating to the Jay Treaty, Congressman James Madison argued that the House must have a right to ask for whatever information it thought fit. He also contended, however, that the President must have a correlative right to refuse the request if he saw fit. Madison concluded that "[i]f the Executive conceived that, in relation to his own department, papers could not be safely communicated, he might, on that ground, refuse them, because he was the competent though a responsible judge within his own department." Madison's point was that the President could not be compelled to disclose information, just as Congress could not be compelled to enact legislation without what it considered adequate information. And Madison subsequently did vote against an appropriation to implement the Jay Treaty. This has become the traditional way to resolve these disputes, with each party using its political leverage to bargain over the outcome. The resulting compromises have no doubt frequently left both sides dissatisfied, but neither side has ever had to concede a matter of principle to the other. Once the courts become involved, that may change.

Without claiming that Madison's theory would properly settle every dispute between Congress and the Executive, I believe that Madison did identify the constitutionally appropriate initial presumption. Applied to the present case, Madison's approach suggests that Congress might refuse to enact President Bush's energy proposals if a majority of legislators believed they first needed more information about the Vice President's work in the NEPD Group. But that is not at

all what is going on here. Instead, we have a situation where neither House of Congress, or even a congressional committee, has demanded any documents from the Vice President, and the GAO's purpose in conducting the investigation is, so far as I have been able to ascertain, rather unclear. Construing a statute that is at best ambiguous to permit this kind of constitutionally dubious fishing expedition would seem highly questionable at best.

While I was thinking about these issues, I began to wonder what would happen if a staffer in the White House office for political operations were to ask the FBI to investigate all meetings between Senators and private parties, at which matters before the Congress were discussed or mentioned (such as energy, or for that matter the regulation of the accounting profession). If the FBI then demanded that Senators provide documents and records like those that the GAO has sought from the Vice President, I imagine that quite a firestorm would ensue. And properly so.

The two cases are not perfectly analogous, but the hypothetical does suggest one reason why it might not make much sense for the Comptroller General to provoke a constitutional confrontation in this case. Elected officials in the legislative and executive branches have a long history of resolving their differences in the manner suggested by Congressman Madison, without involving the courts. The lawsuit that the Comptroller General is threatening to bring will no doubt be very interesting to professors like me, but it seems unlikely to serve the long-term institutional interests of the Congress.

Mr. Chairman, I'd be happy to answer any questions the committee may have.