The GAO's Assault on the Executive Branch

John C. Eastman

Available at: https://works.bepress.com/john_eastman/60/
The GAO's assault on the executive branch

Why the vice president drew the line on a demand for documents.

BY JOHN C. EASTMAN

Sept. 1, 1939. Adolf Hitler's Nazi Germany invades and defeats Poland. Within the year, he invades and secures the surrender of Norway, Denmark, Belgium, the Netherlands, Luxembourg and France. Most of western Europe is in his grasp. By August 1940, his sights turn, and the Battle of Britain begins. The official U.S. policy is neutral. (As recently as November 1939, Congress had approved arms sales to the European belligerents on a cash-and-carry basis.) But soon into her defense, Great Britain is running out of money and materiel.

At that time, President Franklin D. Roosevelt knew America was not ready for war, either physically or psychologically. He also understood that sustaining British opposition to Hitler would be critical to the ultimate security of the United States. He and his top advisers secretly negotiated a lend-lease agreement with Great Britain, in which the United States would provide warships and aircraft in exchange for air and naval base leases on British possessions in Newfoundland, British Guiana, Bermuda and other locations. Undoubtedly, Roosevelt's policy was developed after consultation not only with top cabinet officers but with heads of industry as well. Had those negotiations and consultations been made public, it is likely the lend-lease arrangement would have been scuttled before it ever got off the ground. Roosevelt's ability to carry out his constitutional duties as commander in chief and fulfill his constitutional obligation to assure that the laws were faithfully executed would have been severely, perhaps permanently, undermined if those negotiations had been publicized.

Roosevelt was able to act because the authors of the Constitu-
Vice President Dick Cheney's refusal to turn over records from the National Energy Policy task force deserves the gratitude of future executive leaders of America. AP/REX

It is simply beyond comprehension to permit such an intrusion by unelected agents acting on orders from a couple members of Congress.

ries with it the force of law. Its mission, as envisioned by Article II of the Constitution, is simply to provide advice and recommendations to the president.

In stark contrast to the secrecy Roosevelt was granted in his day, a federal Freedom-of-Information-Act lawsuit is filed against the Department of Energy even before the task force issues its final report in May 2001. The suit seeks access to documents generated during the task force's deliberations. A federal district court orders the Department of Energy to release the requested documents. However, in an aspect of the court's order largely overlooked by major media, the decision applies only to "non-exempt records"—meaning the Department of Energy simply has to provide an index of withheld records that meet exemption criteria. One key exemption contained in the Freedom of Information Act is that materials generated in a deliberative process need not be made public. That statutory exemption is probably compelled by the Constitution because, without it, any special-interest group—not just Congress—could unduly interfere with the president's constitutional duties.

Undoubtedly there will be challenges to the Department of Energy's anticipated use of the deliberative-process exemption, but whatever that outcome might be, the parallel lawsuit filed in February by the General Accounting Office against Cheney is even more troubling.

Power Struggle. Like the president, the vice president is a constitutionally elected officer in his own right. The director of the GAO is not elected, and the agency as a whole is simply an arm of Congress. It would be a constitutionally troubling violation of the separation of powers if Congress itself demanded access to executive-branch deliberations. But it is simply beyond comprehension to permit such an intrusion by unelected agents acting on orders from a couple members of Congress.

Many members of Congress have grown arrogant in their assertions of individual power. For example, witness the extraordinary claims by individual senators who think they have the constitutional

President Franklin D. Roosevelt's foreign policy at the dawn of World War II was shaped, in part, by secret consultations with industrial leaders. Catastrophe would have been the result if those consultations had been made public. AP

July 2002 21
The American Legion Magazine
right to blackball presidential nominees to the judiciary, even while acknowledging that the nominees would be confirmed by large majorities if a Senate vote were to be held. Unlike the president and vice president, members of Congress have no constitutional power to act unilaterally. Their constitutional power exists only as members of a legislative body, and the body acts only through the formal mechanisms of bicameralism and presentment — that is, passing laws by majority vote in both houses of Congress and presenting them to the president for signature — or later voting to override if the president chooses to veto.

The dangers inherent in the GAO’s lawsuit against Cheney should be obvious. The demands sought to intrude into the inner sanctum of executive-branch deliberations. Initiated by two House Democrats, those demands intensified after Enron collapsed and the opportunity arose to score political points. Just imagine the outcry if the tables were turned. What if the attorney general filed suit asking for a list of every meeting Senate Judiciary Committee Chairman Patrick Leahy, D-Vt., has held with other members of Congress or leaders of special-interest groups to discuss strategies to oppose the president’s judicial nominations? However improper Leahy’s foot-dragging might be, intrusion by the executive branch into the legislature’s business would be even more troubling.

More troubling still is the way in which the GAO lawsuit threatens to undermine, rather than enhance, accountability in the executive branch. The framers of our Constitution settled on a unitary executive in order to enhance accountability. Delegates to the constitutional convention debated whether to simply permit the president to obtain advice from his department heads or whether he should have a permanent council of advisers, as it is in England. James Iredell, a member of the constitutional convention and a leading proponent of its ratification in the North Carolina ratifying convention, argued that the mechanism adopted in the Constitution was preferable to a formal advisory council. Such a council, he argued, would have pernicious consequences, for the president would be naturally inclined to say, “You know my council are men of integrity and ability; I could not act against their opinions, though I confess my own was contrary to theirs,” and thereby avoid responsibility for his own actions, undermining the most effective check on the president’s power.

Forcing the energy task force’s deliberations into the public would have the same pernicious consequences. As it stands now, the policies proposed to Congress are the president’s, not the task force’s, or those of its individual members or even those of the industry and environmental leaders whose opinions were sought. As a result, the president alone would bear responsibility for them. If we expose the internal deliberations to public view, the president would be in the same position as James Iredell’s hypothetical president — able to say he had accepted the advice of his counselors against his better judgment and thereby avoid accountability. We would end up with either a completely unaccountable or a completely crippled government, or perhaps both.

The stakes may not be as high for the energy task force’s deliberations as they were for Roosevelt’s lend-lease deliberations, but principles lost when the stakes are low are just as certainly unavailable when the stakes are again high. Cheney recognizes the importance of those principles. We can only hope the courts recognize it, too.

John C. Eastman is a professor of constitutional law at Chapman University School of Law and director of the Claremont Institute Center for Constitutional Jurisprudence in California.

Article design: Doug Rollison