



Cheney and the Constitution

by **AZIZ HUQ**

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If it weren't so frightening, the irony would be delicious: A Vice President who has done more than any other to push the envelope on executive privilege at the expense of the courts and Congress takes the **position** that his office has both legislative and executive functions so as to avoid accounting for the use of classified materials.

Any veneer of intellectual legitimacy that executive power defenders have caked on their vision of a monarchical executive evaporates in the glare of this naked opportunism. And the scope and nature of today's constitutional crisis comes into clearer focus.

The term "constitutional crisis" is much abused, invoked generally whenever Congress shows some life. Confrontations on war funding and Congressional subpoenas, to cite recent examples, are in fact as old as the Republic. They are but healthy sparks from a constitutional confrontation of "ambition against ambition," precisely as the Framers intended.

But the true crisis is hidden in plain sight--the existence of an office in the Constitution--the Vice President's--with no real remit and no real limits, open to exploitation and abuse.

Consider as symptom number one Cheney's claim to be neither lawmaker nor executive--and thus exempt from any scrutiny of his handling of classified documents. In 2003 President Bush signed an **Executive Order 12958** requiring agencies and "any other entity" within the executive branch to report to a division of the National Archives on their classification and declassification activities. But since 2003 Cheney's office has pointed to his position as president of the Senate to justify a refusal to comply. In May 2006 a Cheney spokesperson told Mark Silva of the *Chicago Tribune* that the legal question had been "thoroughly reviewed." And that was the end of the matter. Only now has Representative Henry Waxman's House Oversight Committee begun to examine the Vice President's failure to comply.

Second, Cheney's argument makes no sense. The Vice President receives documents due to his executive policy-making role, not his position as Senate president. Not even Cheney has the chutzpah to claim he's using these documents in his senatorial capacity: Outing covert CIA agents is apparently an executive function.

Third, if his office performs "legislative" functions, Cheney should be subject to the Senate's strict rules for the handling classified documents. Since I doubt the Vice President would allow a Congressional sergeant-at-arms to enter his office, this in effect creates legal black hole (another one!) where classified documents can disappear without a trace.

Finally, Cheney's argument is plainly a non sequitur. Why should addition of legislative duties trigger the subtraction of executive obligations? In lawyerly terms, the 2003 order applies to "any" entity within the executive branch. Having another label doesn't stop Cheney from being one of those "any" entities.

So much for legal arguments. But then, Cheney and his chief counsel, David Addington, have never been sticklers for fidelity to the letter of the law, especially when that law hinders grander ambitions.

Indeed, Cheney and Addington will go down in history as the most aggressive and successful advocates of executive powers in this nation's history. As Fritz Schwarz and I have **charted**, Cheney and Addington were in large part responsible for the 1987 Congressional Minority Report out of the Iran-*contra* affair, which first asserted that the White House could wield "monarchical notions of prerogatives." They grounded their vision of executive power on the prerogatives exercised by the British kings who were overthrown by the American Revolution.

Since 2001 Cheney has been at the tip of the spear in pushing for executive authority to override laws against surveillance and torture, among other things. And he's aggressively used the Office of the Vice President to make unprecedented secrecy claims. In litigation around his energy task force, for example, Cheney invoked Article II of the Constitution--which creates the presidency--to underwrite his defiance of Congressional and private demands for information. The Supreme Court, while it didn't wholly accept Cheney's position, **yielded to it** with alarming deference in 2004. The suit was later dismissed by a lower court.

To rub salt in the open sore of hypocrisy, Cheney has been among the most assertive Vice Presidents in wielding executive privilege independent of the President. He's also made extravagantly petty claims of secrecy: for example, ordering the Secret Service to destroy logs of visitors to his residence at the Naval Observatory in Washington despite the 1978 Presidential Records Act's contrary demand.

For Cheney to be pushing the envelope on executive power is especially ironic, given the original constitutional status of the vice presidency: That office is a vestigial afterthought tacked on to the Constitution toward the end of the 1787 Constitutional Convention to solve a gaggle of unrelated problems. And it quickly proved more trouble than it was worth.

Discussed only in the convention's closing days, the Office of the Vice President was initially dreamt up to solve a problem with presidential selection. Under the original Electoral College system, each elector had two votes and was constitutionally obliged to cast one of those for an out-of-state candidate. The Framers reckoned this was a way of counteracting the provincial inclination to vote for a home boy, a worry borne out in the 1796 election, which left Thomas Jefferson as Vice President despite a Federalist majority. But the Framers were puzzled as to how to stop electors from simply throwing away that second vote. Enter the Vice President. This secondary office solved the wasted vote problem. And rather neatly, it solved at the same time the presidential succession problem.

Concerned that the vice presidency could be a staging post for a coup, the Framers cast about for some other function for the office. Drawing on the 1777 New York Constitution's design of a Lieutenant Governor's office, they hit on a solution--the Vice President would also serve as a tie-breaking president pro tempore of the Senate. This, they concluded, would justify his salary. Wearing his Senate cap, the Vice President would also conduct the presidential electoral vote count.

All these neat fixes unraveled quickly with the 1800 election. This ended in the sitting Vice President, Thomas Jefferson, presiding over a deadlocked Electoral College with substantial voting irregularities--and then counting himself into the presidency. As Yale law professor Bruce Ackerman and co-author David Fontana **tell the tale**, Jefferson brazenly took it upon himself to adjudicate a "blatant" irregularity with Georgia's votes. With a potential independent run by New York City Mayor Michael Bloomberg raising the possibility of all kinds of Electoral College deal-making in 2008, the prospect of

Cheney at the lectern tallying ballots should cause some trepidation.

The vice presidency, in short, was never intended as an independent center of constitutional power--let alone home of a shadow EPA (the rather wonderfully named White House Council on Environmental Quality); the secret architect of national energy policy; and the shameful global detention and torture policies--including the wretched **military commission system**.

Yet the combination of an intellectually insipid occupant of the White House and an ideologue of power as his second in command have combined to transform the constitutional topology. It has created a vice presidency that uses its lack of constitutional function as a license to seize whatever power can be gotten. This power has been largely unwritten by a radical and dangerous theory of executive power--now confirmed as merely a scrim to hide the accumulation of power.

The 1800 election of Thomas Jefferson, therefore, is not the only evidence of a ticking time bomb knitted into the Constitution. That heated election left as its legacy the **Twelfth Amendment**. Almost a century and a half later, Americans responded to the hazard of executive supremacy with the **Twenty-Second Amendment**, which imposed a two-term limit on Presidents and limited Vice Presidents to not more than ten total years in presidential service.

There is no call for another amendment. Yet. But perhaps we do need to start thinking about why perhaps the most powerful office in the country is not on the top of a ballot, and why its powers are not defined--or circumscribed--by any law or constitutional provision. Perhaps Congress could take for starters the order on classified evidence that Cheney is disobeying. It's an executive order because Congress passed the buck on crafting a legislative system for handling classified evidence. It's long past time for Congress to take this on. Past legislation has further provided clear channels of responsibility, particularly on military matters. That, indeed, was the primary purpose of the 1947 National Security Act, which implemented important reforms to the Armed Services.

It would be a good debate to have before the 2008 election, when Cheney will start opening the envelopes.

About Aziz Huq

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