UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. WALKER, Comptroller General of the United States, Plaintiff, v. RICHARD B. CHENEY, Vice President of the United States and Chair, National Energy Policy Development Group, Defendant.	)	Civil Action No. 1:02CV00340 (JDB)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF=S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT=S MOTION TO DISMISS SUBMITTED BY AMICUS CURIAE SENATOR HARRY REID

Amicus Curiae Senator Harry Reid submits this Memorandum of Points and Authorities in Support of the Comptroller General's Motion for Summary Judgment and in Opposition to the Vice President's Motion to Dismiss. The Vice President's submission in this case, if accepted by this Court, would substantially weaken, even incapacitate, Congress in its exercise of the legislative functions of oversight and investigation. Important when first filed due to the influence of energy policy on virtually every aspect of the nation's economy, environment, and security, this case has only grown in significance with defendant's initial submission to this Court. It is now clear, if it was not before, that defendant views this as a test case for his expansive, indeed absolutist, views of executive prerogatives. If defendant's arguments prevail, then no matter how clearly a statute was concerning the investigative authorities of Congress or any part or agent thereof, Congress could not reliably obtain information from the executive even if that information were crucial to Congress's performance of its legislative functions. In the broad run of cases, any information provided by the executive to Congress would come only as a matter of executive grace rather than as a matter of

constitutional or statutory duty. This result would not, as defendant would have it, respect the separation of powers; it would demean it.

STATEMENT OF THE INTERESTS OF AMICUS

Senator Reid has a special interest in the outcome of this case as the Senior Senator from the State of Nevada and by virtue of his leadership positions within the United States Senate. Senator Reid has a special interest not only in the specific information sought by the Comptroller General in this case, but also, more fundamentally, in the preservation of the ability and authority of the Comptroller General and the General Accounting Office to aid Congress in performance of its legislative functions.

After two terms in the House of Representatives, Senator Reid was elected to the Senate in 1986 and is currently serving his third term. Senator Reid serves as the Senate's Assistant Majority Leader, the Chairman of the Transportation, Infrastructure and Nuclear Safety Subcommittee of the Committee on Environment and Public Works, and the Chairman of the Energy and Water Development Subcommittee of the Committee on Appropriations. Senator Reid also currently serves as a conferee on the Senate-House Conference Committee charged with resolving the differences between the Senate and House energy bills passed by each chamber earlier this year. *See Congressional Record* at S3789 (May 1, 2002) (appointing Senate conferees).

In his role as Chairman of the Subcommittee on Transportation, Infrastructure and Nuclear Safety of the Committee on Environment and Public Works, Senator Reid has direct jurisdiction over authorizing legislation implemented by several departments and agencies of the executive branch and implicated by the work of the National Energy Policy Development Group (NEPDG). These departments and agencies include the Nuclear Regulatory Commission, the Environmental Protection Agency, the Department of Transportation's Federal Highway Administration, the

Council of Environmental Quality and several other departments and agencies.

The information sought in this case relates directly to the discharge of Senator Reid's duties to conduct legislative oversight of executive branch activities as Subcommittee Chairman. In particular, Senator Reid is interested in information relating to the NEPDG proposal to establish "a national repository for nuclear waste . . . .," National Energy Policy: Report of the National Energy Policy Development Group (May, 2001) at xiv (National Energy Policy), and moreover, a repository of a particular kind: "a deep geologic repository for nuclear waste." National Energy Policy at 5-17. Yucca Mountain in southern Nevada is the only deep geologic site under consideration as a nuclear waste repository at this time.

On February 14, 2002, President Bush recommended Yucca Mountain in southern Nevada as the site for a single national repository pursuant to the Nuclear Waste Policy Act (NWPA), Pub. L. 101-203 (1987), 42 U.S.C. § 10101 *et seq.* Under the NWPA, the State of Nevada has the right to veto President Bush's recommendation and exercised that veto on April 8, 2002. *See* 42 U.S.C. § 10136 (providing for veto). In order to move forward with the repository, the Senate must vote on a resolution to override that veto by the end of July 2002. *See* 42 U.S.C. § 10134 (providing for Congressional override).

It is difficult to conceive of an issue of greater import to Senator Reid, both in his role as Subcommittee Chairman and as the Senior Senator representing the people of Nevada, than the Yucca Mountain proposal. By supporting the Comptroller General in his effort to obtain the information involved in this case, Senator Reid seeks to ensure that the people of Nevada receive critical information regarding that proposal.

Senator Reid also has a special interest in information relating to the NEPDG proposal for the "streamlining the licensing of nuclear power plants," National Energy Policy at 5-16, and

"exten[ding] the Price-Anderson Act." National Energy Policy at 5-17. Each of these proposals falls directly within the jurisdiction of Senator Reid's Subcommittee. Both issues are anticipated to be a source of debate and contention during the recently convened Senate-House energy legislation conference of which Senator Reid is a member.

The information sought in this case also has direct bearing on Senator Reid's duties to conduct legislative oversight of executive branch expenditures as Chairman of the Subcommittee on Energy and Water Development of the Committee on Appropriations. That Subcommittee is responsible for providing fiscal appropriations to the U.S. Department of Energy (DOE). Much of the work conducted by the NEPDG involved changes to statutory law to be carried out administratively within the executive branch, particularly DOE. Such changes would not only change existing executive implementation of statutory duties, but would have a fiscal impact on DOE programs.

For example, the fiscal considerations of the NEPDG national repository proposal fall within the jurisdiction of Senator Reid's Energy and Water Development Appropriations Subcommittee. DOE has estimated that the total costs of the repository project are roughly $58 billion. The General Accounting Office (GAO) has been of critical importance to Senator Reid in conducting oversight of DOE's fiscal claims. In particular, the GAO has reported that, based upon its analysis of DOE information, DOE "currently does not have a reliable estimate of when, and at what cost, such a repository can be opened." General Accounting Office, *Nuclear Waste: Technical, Schedule, and Cost Uncertainties of the Yucca Mountain Repository Project*, GAO-02-191 at 4 (December 2001). The GAO has provided other similar investigative assistance to Senator Reid and other Members of Congress on this issue. *E.g.*, General Accounting Office, *Nuclear Waste: Status of DOE's Nuclear Waste Characterization Activities*, GAO/RCED-87-103FS (March 1987).

Finally, Senator Reid has a direct interest in the outcome of this case by virtue of his status as the Assistant Majority Leader of the Senate. In this role, Senator Reid helps forge the legislative agenda of the Senate. Just as modern agencies cannot function without extensive help from fact-finding experts, commissions and the like, so the modern Congress cannot function without such assistance. As noted above, the GAO, headed by the Comptroller General, provides crucial aid in Congress's efforts to understand the ways in which current legislative programs are functioning (or malfunctioning), so that legislative reform can be made the most productive. If the GAO and Congress's other fact-gathering vehicles cannot obtain information from the very officials and entities implementing the legislative programs Congress enacts, then Congress's duties of oversight and investigation will not be fulfilled.

The decision of the Court in this case will directly affect Senator Reid's ability to carry out his duty to serve and represent the people of Nevada, to conduct informed legislative oversight in his role as Chairman of two Senate Subcommittees, and to provide leadership within the United States Senate.

INTRODUCTION AND SUMMARY OF ARGUMENT

No adventurous theories of constitutional law, nor any distorting principles of statutory interpretation, are required to resolve this case in the Comptroller General's favor. The language, history, and structure of sections 712, 716, and 717 of Title 31 of the United States Code clearly provide the Comptroller General with authority to obtain information from defendant concerning, *inter alia*, the involvement of private parties in the development of the energy policies proposed by the National Energy Policy Development Group (NEPDG). To avoid the result that would flow from a fair reading of the relevant statutory provisions (a reading persuasively explicated in the Comptroller General's Memorandum of Points and Authorities in Support of Motion for Summary

Judgment, and not duplicated here), defendant invites this Court to embrace a remarkable series of extravagant constitutional theories. Although these theories come from an eclectic array of constitutional sources – ranging from Article III's familiar "case or controversy" requirement to the heretofore little-remarked Opinions in Writing Clause – they all reach for the same goal: to insulate the executive from Congressional oversight and investigation. The extreme novelty of defendant's constitutional theories should persuade this Court to decline defendant's invitation to distort the meaning of sections 712, 716, and 717 in order to cure the constitutional defects defendant sees in these provisions. Only by giving a nod in the direction of defendant's novel theories could this Court justify interpreting these provisions to avoid constitutional problems; but such assent would, in itself, imply the very kind of constitutional derring-do defendant purports to want to avoid. This Court should therefore read sections 712, 716, and 717 straight up, with due and respectful regard for the fact that that they were passed by Congress and signed into law by the President.

In this submission, Senator Reid responds to the arguments of defendant that most severely and systemically threaten Congress's authority to conduct oversight and investigations. These are the arguments on standing, remedial discretion, and the constitutionality of sections 712, 716, and 717. Defendant does not discuss the devastating implications of his arguments for legislative oversight and investigation. However, by looking closely at his arguments as a whole, a clear picture emerges: under defendant's constitutional theories, the kind of absolute executive privilege that has been unanimously rejected by the Supreme Court would be reincarnated under the Opinions in Writing and Recommendations Clauses, and judicial assistance in cases where the executive refuses to provide information to Congress would be unavailable. In defendant's constitutional universe, only the executive would have the authority to seek judicial review of the executive's own refusals

to provide information to the Congress. This is not the way separation of powers is supposed to work.

Perhaps subconsciously conceding the worrisome breadth of his constitutional arguments, defendant sprinkles throughout his brief reassurances that even if information concerning the NEPDG is not available via this case, other avenues for obtaining the information remain open to the legislative branch. *See, e.g.*, Def's. Mem. 15, 57, 62, 66. But this is nothing but a shell game within a shell game. Not only are defendant's efforts at reassurance belied by the breadth of his arguments in this very case; they are also belied by the aggressively secretive arguments the current administration has made in other cases involving disclosure of information possessed by the executive branch. Defendant has recently argued that the Federal Advisory Committee Act is unconstitutional if it applies to him,[1] and that the Freedom of Information Act may well be unconstitutional if applied to him.[2] Likewise, the Secretary of Commerce has argued that the "Seven Member Rule," pursuant to which an executive agency must submit information upon the request of any seven members of the Committee on Government Operations of the House of Representatives, 5 U.S.C. § 2954, is unconstitutional as well.[3] In these cases, too, the executive has tried to be reassuring. In challenging the "Seven Member Rule," for example, the Secretary of Commerce told the Ninth Circuit that "Congress has numerous tools at its disposal to obtain information from the executive branch, including its control over appropriations and its powers of

[1] *See* Memorandum in Support of Motion to Dismiss, *Judicial Watch, Inc. v. National Energy Policy Development Group*, C.A. No. 01-1530 (EGS), at 18-31 (D.D.C.) (filed March 8, 2002).

[2] *Id*. at 19 n. 16.

[3] Brief for the Appellant Secretary of Commerce, *Waxman v. Evans*, at pp. 24-32 (9th Cir.) (brief filed May 2002). The district court granted judgment in favor of the congressional representatives seeking census data, rejecting the Secretary's constitutional arguments. *Waxman v. Evans*, CV 01-4530 LGB (AJWx) (Jan. 22, 2002).

investigation and oversight"[4] – the very kinds of control challenged in the instant case. To discover where congressional prerogatives might be found, turn over each shell defendant offers, and you will find that every one is empty.

ARGUMENT

I. THIS CASE IS JUSTICIABLE.

Defendant asserts that this case is not justiciable because the Comptroller General has no standing to sue. Def=s. Mem. 10-16. Defendant is mistaken for three reasons, discussed in the three subsections that follow.

Before explaining how defendant's arguments on standing go astray, it is worthwhile to pause to consider the implications of his claims. If indeed the Comptroller General has no standing in this case, then he has no standing in *any* case brought pursuant to his statutory authority – not even in a case brought against the "head of an agency," as defendant understands that term, nor in a case brought against private individuals. If the Comptroller General must have a "personal stake" in the outcome of a lawsuit he brings and if he lacks such a stake in a lawsuit brought to vindicate his authority to obtain information, then he would always fail to meet the requirements of standing – no matter who the defendant was. Nor, according to defendant, do individual members of Congress, congressional committees, or even Congress itself, have standing to bring a claim seeking information from the executive concerning the opinions of executive branch employees or legislative recommendations of the President. Defendant would thus virtually shut down legislative oversight in the name of Article III. Seen from the correct perspective, defendant's arguments on standing would undermine, not uphold, the principles of separation of powers on which our government rests.

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[4] Waxman v. Evans Brief, *supra* note 3, at 30.

A. The Comptroller General Need Not Have a "Personal Stake" In The Outcome Of This Lawsuit In Order To Have Standing To Sue.

Defendant argues that the Comptroller General has no standing to bring this lawsuit because the Comptroller General has neither a Apersonal stake@ in the outcome of this lawsuit nor any injury Aparticularized as to him.@ Def's. Mem. 11.

Defendant errs in applying the doctrine of standing to this lawsuit brought by a government official in his official capacity, pursuant to a statute conferring on him a right to obtain information and a right to go to court to obtain that information if he does not receive it. The specific requirements of the doctrine of standing deployed by defendant simply have no bearing on the justiciability of a lawsuit of this nature. This Court should no more require the Comptroller General to demonstrate a Apersonal stake@ in the outcome of this lawsuit, under the doctrine of standing, than it would require Labor Secretary Elaine Chao to demonstrate a Apersonal stake@ in the outcome of an enforcement action based on workplace safety violations.

Defendant assumes, without any argument or explanation, that the Comptroller General must meet the same requirements for federal court litigation as private parties must. The Comptroller General, however, is not suing as David Walker, private citizen, but as the Comptroller General of the United States. He is suing pursuant to statutory authority which gives him the right to request information from the executive branch and which also gives him the right to initiate litigation against heads of agencies in order to compel compliance with his requests for information. In this setting, Mr. Walker need not demonstrate that he has a personal stake in Mr. Cheney=s compliance with his requests for information; indeed, it would be more than passing strange for Mr. Walker to explain how he has been *personally* injured by Mr. Cheney=s conduct.

That a government official statutorily invested with authority to litigate to protect government interests embodied in statutes may litigate without showing a personal stake in the outcome of the litigation is so obvious a principle that it serves as an unstated fundamental premise of, rather than an explicit finding in, the Supreme Court=s cases on standing. All of the cases having the posture of this one B that is, having as their context the conferral of a statutory right and the conferral of a cause of action to vindicate that right in federal court B have taken as their unstated premise that officials of the government, acting in their official capacity, could sue to vindicate the interest served by the statutory right. The only question has been whether *private* parties may also sue to vindicate the public interest, and it is in this context, and this context alone, where the Supreme Court has required personal injury to the private party as a prerequisite to maintaining an action in federal court. The ability of the *government* or its properly designated representatives to sue, without showing a "personal stake" in the outcome of the litigation, has been the unstated background assumption of all of these cases.

For example, in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), implicit in the Court's decision denying standing to a woman who sought enforcement of the child support statutes was the fact that defendant prosecutor in that case was the appropriate party to vindicate the interests served by those statutes. Indeed, the whole premise, albeit unspoken, of the case was that the prosecutor was the *only* person who could initiate an action to vindicate the interests served by the child support laws. The validity of this premise certainly did not depend on any additional assumption that the *prosecutor* had a "personal stake" in the outcome of the dispute. In fact, one hopes that if the prosecutor *had* had a "personal stake" in the dispute, basic principles of government ethics would have persuaded him to recuse himself from the case.

To the same effect is *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). In holding that a *qui tam* relator had standing to bring an action in the name of the federal government under the False Claims Act, the Supreme Court never once questioned whether the *Attorney General* (who is given the authority to bring an action on behalf of Athe Government itself,@ 529 U.S. at 769; 31 U.S.C. § 3730(a)) could bring an action under the False Claims Act even if he himself had not been injured by the false claim alleged. Another recent case reflecting this unstated premise is *Chao v. Mallard Bay Drilling*, 534 U.S. 235 (2002). The Court upheld the authority of Elaine Chao, Secretary of Labor, to bring litigation under Occupational Safety and Health Act – without inquiring into Ms. Chao=s Apersonal stake@ in the outcome of the litigation.

In point of fact, we are aware of no decision that requires a government official to demonstrate a "personal stake" in litigation in the circumstances presented here. Here, it is enough, according to conventional understandings of Article III, that the Comptroller General has a statutory right to obtain information from the executive and a statutory right to seek judicial assistance in enforcing that statutory right. Indeed, as noted above, such a Apersonal stake@ would ordinarily provide a government official reason to *withdraw* from litigation rather than providing a justification for being allowed to undertake the litigation. To require the Comptroller General to have a *personal stake* in the outcome of this litigation, brought in his official capacity, would be to turn standing on its head.

B. Plaintiff Has A Statutory Right To The Information Defendant Has Denied Him, And He Has Suffered An Injury In Fact By Virtue Of Defendant=s Denial.

Even if, contrary to our submission, this Court holds that the Comptroller General must demonstrate a Apersonal stake@ in the outcome of this lawsuit in order to obtain this Court=s

jurisdiction, Def's. Mem. 11, this requirement B of an Ainjury in fact@ B is easily met under settled standing doctrine. By denying the Comptroller General information to which the Comptroller General is entitled by statute, defendant has caused the Comptroller General to suffer an injury in fact under well-settled principles of standing.

Section 716(a) of Title 31 directs agencies of the federal government to Agive the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency,@ and further allows the Comptroller General to Ainspect an agency record to get the information.@ 31 U.S.C. § 716(a). If an agency fails to make such a record available to the Comptroller General, the Comptroller General may, after fulfilling certain preliminary requirements, *see id.* at ' 716(b)(1), file a civil lawsuit to effectuate the Comptroller General's request for information. *Id.* at § 716(b)(2).

Thus, Congress has given the Comptroller General a statutory right to obtain information, including agency records, when the Comptroller General Arequires@ this information. Sections 712 and 717 of Title 31 direct the Comptroller General, among other things, to Ainvestigate all matters related to the receipt, disbursement, and use of public money@ (*id.* at § 712(1)), and to Aevaluate the results of a program or activity the Government carries out under existing law@ (*id*. at § 717(b)). Where access to agency records is required in order for the Comptroller General to perform these statutorily assigned duties, section 716 confers upon the Comptroller General a right to obtain such records. By depriving the Comptroller General of such records, defendant has deprived the Comptroller General of his right to obtain information.

No more is required to show an injury in fact for purposes of Article III standing. As the Supreme Court has frequently reminded, the Aactual or threatened injury required by Art. III may exist solely by virtue of >statutes creating legal rights, the invasion of which creates standing.=@

Warth v. Seldin, 422 U.S. 490, 500 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). More specifically, the Court has long held that the deprivation of a statutory right of access to information gives rise to an injury in fact for Article III purposes. In its most recent and emphatic statement of this holding, the Court concluded that "an inability to obtain information" that a statute requires to be made public constitutes an injury in fact and thus provides a basis for standing. *FEC v. Akins*, 524 U.S. 11, 21 (1998).

Almost twenty years before *Akins*, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Court faced the question whether a real estate Atester@ who, Awithout an intent to rent or purchase a home or apartment, pose[d] as [a] renter[] or purchaser[] for the purpose of collecting evidence of unlawful steering practices,@ had standing to sue a real estate firm under the Fair Housing Act for misrepresenting the availability of apartments for rent. *Id*. at 373. Section 804(d) of the Fair Housing Act makes it unlawful for an individual or firm covered by the Act "[to] represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," 42 U. S. C. § 3604(d), and section 812(a) of the Act, 42 U.S.C. §3612(a), made this prohibition Aenforceable through the creation of an explicit cause of action.@ *Havens Realty*, 455 U.S. at 373. Thus, the Court held, Congress had Aconferred on all >persons= a legal right to truthful information about available housing.@ *Id*. at 373. Section 804(d) of the Fair Housing Act, the Court observed, was among the category of A>statutes creating legal rights, the invasion of which creates standing . . . .,=@ *Warth v. Seldin*, 422 U.S. 490, 500 (1975), because section 804(d), Ain terms, establishes an enforceable right to truthful information concerning the availability of housing.@ *Havens Realty*, 455 U.S. at 373. Despite the tester=s lack of any intent to rent an apartment, and thus the lack of any injury other than the deprivation of information, the Court concluded that A[a] tester who has been the object of a

misrepresentation made unlawful under §804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions.@ *Id.* at 373.

To the same effect is the Court=s decision in *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). There, the Court addressed a claim that the Federal Advisory Committee Act (FACA), 5 U.S.C. § 1 *et seq.*, should apply to consultations between the Department of Justice and the Standing Committee on Federal Judiciary of the American Bar Association (ABA), concerning potential nominees for federal judgeships. Faced with the threshold question whether plaintiffs had standing to maintain the lawsuit, the Court concluded that they did, reasoning as follows:

> As when an agency denies requests for information under the Freedom of Information Act, refusals to permit appellants to scrutinize the ABA Committee=s activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue. Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.

491 U.S. at 449.

The most recent in the line of cases squarely holding that the deprivation of statutorily guaranteed information constitutes an injury in fact for purposes of Article III standing is *FEC v. Akins*, 524 U.S. 11 (1998). There, a Agroup of voters,@ *id*. at 13, charged that the Federal Elections Commission should have required an organization concerned with U.S.-Israeli relations to disclose information regarding its membership, contributions and expenditures. The Commission argued that the voters had suffered no injury in fact within the meaning of Article III. The Court disagreed: AThe >injury in fact= that respondents have suffered consists of their inability to obtain information . . . that, on respondents= view of the law, the statute requires [the relevant organization] to make public.@ *Id*. at 21. In so holding, the Court invoked its previous cases holding that Aa plaintiff

suffers an >injury in fact= when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.@ *Ibid*. (citing *Public Citizen* and *Havens Realty*).

The Comptroller General has been denied information despite a statute which, "on [the Comptroller General's] view of the law," *Akins*, 524 U.S. at 21, entitles him to the information he has been denied. Under the Supreme Court=s established jurisprudence of standing, the Comptroller General has suffered an injury in fact and has standing to pursue this claim.

C. The Comptroller General's Association With Congress Does Not Deprive This Court Of Jurisdiction To Hear This Case.

Defendant argues that standing in this case is precluded by the Supreme Court=s decision in *Raines v. Byrd*, 521 U.S. 811 (1997). In so arguing, defendant mischaracterizes the Comptroller General's complaint as one brought by individual members of Congress and misapplies *Raines* to the circumstances presented here.

In *Raines*, the Court held that members of Congress lacked standing to challenge the validity of the Line Item Veto Act on the ground that the injury they alleged was Awholly abstract and widely dispersed.@ 521 U.S. at 829. Although Congress had given Aadversely affected@ members of Congress a right of action to challenge the statute, 2 U.S.C. § 692(a)(1), the statute had not itself conferred on individual members of Congress any right or obligation to act on Congress=s official behalf. 521 U.S. at 829. Moreover, the Court held, the dilution of the plaintiffs= voting power through the President's exercise of the line item veto was not Asufficiently concrete@ to confer standing. *Id.* at 830.

In this case, in contrast, defendant has refused to provide the Comptroller General with specific, particularized information to which the Comptroller General, and the Comptroller General alone, is entitled by statute. The Comptroller General's interest is not, unlike the congressmen's

interest in *Raines*, in preventing the dilution of his own official authority. Rather, the Comptroller General's interest is in vindicating a statutory right given to him in his official capacity as the Comptroller General of the United States. This setting is a far cry from the diffuse and non-statutory injury asserted in *Raines*.

The same goes for the political injuries found not to confer standing in the D.C. Circuit cases cited by defendant, *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000), and *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000). In those cases, plaintiff congressmen sought to achieve through the courts a result they had been unable to achieve through the legislative process. As the Supreme Court had done in *Raines*, the D.C. Circuit in these cases sent the plaintiffs back to the forum where their complaints truly belonged: the Congress.

This dispute, in contrast, does not arise out of dissatisfaction with a prior legislative judgment. Indeed, this dispute is an effort to *effectuate* a prior legislative judgment, reflected in section 716 in Title 31 of the United States Code. Section 716 confers on the Comptroller General the authority to file a civil action in the event the head of an agency fails to provide him with information he has requested pursuant to his statutory authority to conduct investigations. Section 716 emphatically does not require the Comptroller General to await action by one whole house of Congress, let alone by both houses. Thus, although defendant is certainly correct to observe that Congress or its committees might use different mechanisms (such as subpoenas, Def's. Mem. 14) to obtain information, this argument begs the question presented here, that is, whether action by the Comptroller General is one of several appropriate vehicles for obtaining information from the executive.

In the end, it is clear that defendant=s fundamental objection to this lawsuit sounds not in the detailed requirements the Supreme Court has established for private parties under Article III, but in more general principles of separation of powers. Hints that this lawsuit would be constitutionally vulnerable even if there were a different plaintiff (such as a congressional committee or even Congress itself) may be found throughout defendant=s treatment of the standing issue. But defendant finally gives the game away in the last footnote of his discussion of standing. Here, defendant concedes that even ACongress as a whole@ could not bring this lawsuit, since ACongress has *no right* to information concerning the process by which the President exercises his constitutionally-assigned powers to call for the opinions of his top advisers and to recommend legislation to Congress that he judges necessary and expedient. . . .@ Def's. Mem. 16 n. 5 (emphasis added). This passage presages defendant=s extraordinary concluding section in which he argues for an absolute privilege for information concerning such opinions and recommendations. We will return to this point in our treatment of defendant=s constitutional argument. For now, it is enough to note that defendant=s basic claim is not that this case was brought by the wrong party, but that it cannot be brought by *any* party.

II. THIS COURT SHOULD DECIDE THE COMPTROLLER GENERAL=S CLAIMS, NOTWITHSTANDING THE D.C. CIRCUIT=S EMBATTLED DOCTRINE OF REMEDIAL DISCRETION.

Relying on the D.C. Circuit's doctrine of remedial discretion, defendant asks this Court to decline to entertain the Comptroller General's claims. Even if this doctrine would be embraced by the D.C. Circuit today (and there is reason to believe it would not be), it has no relevance to the circumstances presented here.

The D.C. Circuit developed the doctrine of "remedial discretion"[5] to allow the court to stay its hand in cases brought by individual members of Congress to challenge "congressional action or inaction regarding legislation," even where the court found that plaintiffs had standing to sue under the Circuit's then-existing precedents on congressional standing. *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 881 (D.C. Cir. 1981). The court reasoned that "[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action." *Ibid.* The doctrine thus arose as a kind of antidote to the court's rather liberal views, prevailing at that time, on congressional standing. Almost as soon as the doctrine was announced, however, individual judges on the D.C. Circuit began to argue that the concerns addressed by the doctrine of remedial discretion would be more appropriately handled through the doctrine of standing. *Crockett v. Reagan*, 720 F.2d 1355, 1356 (D.C. Cir. 1983) (Bork, J., concurring); *Moore v. United States*, 733 F.2d 946, 956-57 (D.C. Cir. 1984) (Scalia, J., concurring in result); *Melcher v. Federal Open Market Committee*, 836 F.2d 561, 565 n. 4 (D.C. Cir. 1987) (suggesting doubt as to whether *Riegle* furnishes a viable doctrine for deciding constitutional claims); *id*. at 565 (Edwards, J., concurring) (same).

This disquiet only grew after the Supreme Court's decision in *Raines*, which cast a shadow over many of the Circuit's cases granting standing to individual members of Congress to challenge legislative action or inaction. In *Chenoweth*, the panel noted that the court had "questioned *Riegle* as frequently as we applied it," and observed that all but one of its cases applying *Riegle* could have been disposed of on standing grounds without use of the doctrine of equitable discretion (and the

[5] The D.C. Circuit has used the term "remedial discretion" in cases (like this one) seeking both injunctive and declaratory relief, and the term "equitable discretion" in cases seeking only declaratory relief. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1175 & n. 25 (D.C. Cir. 1983).

other case was reversed on other grounds by the Supreme Court). 181 F.3d at 114. Although the panel ended up discrediting the rule announced in *Riegle* without formally overruling it (the latter course would have required submitting the issue to the full court, *Irons v. Diamond*, 670 F.2d 265, 268 n. 11 (D.C. Cir. 1981)), the decision in *Chenoweth* makes clear how shaky the status of the doctrine of remedial discretion has become after *Raines*.

In any event, the doctrine of remedial discretion is not applicable to this case. As defendant himself notes, the D.C. Circuit adopted the doctrine of remedial discretion for the situation in which "individual members [of Congress]" seek "judicial review of executive action in advance of any action by Congress itself." Def's Mem. 17-18. Defendant's description of this doctrine rules out its applicability to this case. This is not a case brought by individual members of Congress, and it is not a case brought "in advance of any action by Congress itself." This is a case brought by the Comptroller General; however much defendant would like to recharacterize plaintiff's complaint as one brought by individual members of Congress, he may not do so without flouting the rules of civil procedure. Moreover, Congress has already acted (in legislation signed by the President) by granting the Comptroller General the authority to sue in the circumstances presented here. Thus this is not a case seeking "judicial review of executive action in advance of any action by Congress itself" (Def's. Mem. 17-18), nor is it a case where the plaintiff "alleges an injury which could be substantially cured by legislative action." *Riegle*, 656 F.2d at 881. Congress has *already* given the Comptroller General the authority to sue; the Comptroller General does not need *another* statute to "cure" the injury asserted here.

Finally, the two other cases cited by defendant in his discussion of equitable discretion – *United States v. AT&T Co.*, 551 F.2d 384 (D.C. Cir. 1976), and *United States v. House of*

Representatives, 556 F.Supp. 150 (D.D.C. 1983) – do not support defendant's efforts to avoid the disclosure of the information the Comptroller General seeks.

In *United States v. AT&T,* the D.C. Circuit declined to rule on the merits in a case brought by the Department of Justice (in the name of the United States) "to enjoin the American Telephone and Telegraph Co. (AT&T) from complying with a subpoena of a subcommittee of the House of Representatives issued in the course of an investigation into warrantless 'national security' wiretaps." 551 F.2d at 385. The chairman of the House subcommittee intervened on behalf of the House of Representatives, "the real defendant in interest." *Id.* at 385. The Justice Department's request for an injunction was, in the court's view, "equivalent to an order quashing the Committee subpoena, which is generally an *impermissible frustration of the congressional power to investigate in an area*, conceded by all to be the situation here, in which 'legislation could be had.'" *Id*. at 388, quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 506 (1975) (emphasis added). The court noted that its previous ruling in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (1974) (en banc), had established, "at a minimum, that the mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict." 551 F.2d at 390 (citing, in the next sentence, *United States v. Nixon*, 418 U.S. 683 (1974)). In discussing the executive's interest in withholding information from Congress based on national security, the court noted that Supreme Court cases in this area did not "establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede Congress in exercising its legislative powers." 551 F.2d at 392. The court also sympathized with Congress's anxiety about having to take the executive at its word in describing the contents of expurgated memoranda; "'unreviewed executive discretion,'" the court observed, "'may yield too readily to pressures . . ."

Id. at 394-95, quoting *United States v. United States District Court*, 407 U.S. 297, 317 (1972). Nevertheless, the court declined to reach the merits of the dispute brought by the Department of Justice. Emphasizing how close the parties had come to settling the dispute on their own, 551 F.2d at 386-87, 394, the court remanded the case to the district court with a request to the parties to attempt to negotiate a settlement. *Id.* at 395.

AT&T does not support defendant's request that this Court decline to entertain the Comptroller General's claims. The case, by its terms, is very different from the circumstances presented here. Defendant has never acted in a way that would suggest willingness to come to the kind of agreement the court hoped for in *AT&T*. Moreover, *AT&T* does not support defendant's request to dismiss this case. In *AT&T*, the D.C. Circuit ordered the district court to provide it with a status report on any further negotiations between the parties within three months of the D.C. Circuit's decision. 551 F.2d at 395. Vice President Cheney, however, does not want this Court to oversee negotiations with the Comptroller General; he wants this case dismissed. *AT&T* provides no support for this disposition.

Finally, and most fundamentally, *AT&T* is redolent with judicial desire to protect Congress's investigative prerogatives. The Department of Justice was asking for a decision that would have ratified the quashing of a congressional subpoena, and the court refused to provide it. The case was a *loss*, not a victory, for the executive, and defendant's reliance on it is unavailing.

Defendant's invocation of *United States v. House of Representatives of the United States*, 446 F.Supp. 150, is equally awkward. In *House of Representatives*, the district court dismissed an action brought by the United States and Ann M. Gorsuch, then the Administration of the Environmental Protection Agency (EPA), in her official capacity. The lawsuit sought, among other things, an injunction preventing "any further action to enforce the outstanding subpoena" issued to

Gorsuch.[6] Like *AT&T*, therefore, *House of Representatives* was a case brought by the executive, attempting to enlist judicial support for effectively quashing a congressional subpoena.

The history of the dispute in *House of Representatives* is helpful in understanding why the case cuts against, not in favor of, defendant's position in this litigation. The dispute in *House of Representatives* began when a congressional subcommittee issued a subpoena to Administrator Gorsuch, seeking documents concerning the implementation of the "Superfund" program for cleaning up hazardous waste sites. After Administrator Gorsuch indicated her intention to withhold certain documents from the subcommittee on the basis of an asserted executive privilege for "enforcement sensitive" documents, the House of Representatives voted to cite her for contempt of Congress. The very day the House voted to cite Administrator Gorsuch for contempt, the Justice Department sued the House of Representatives to prevent compliance with the subpoena. The next day, Congress certified its contempt resolution to the United States Attorney for presentment to the grand jury. 556 F. Supp. at 151. By then, however, the "Executive Branch, through the Justice Department, ha[d] chosen an alternate route": namely, suing the House of Representatives in order to avoid fully complying with the subpoena. *Id*. at 151, 152. The district court granted the House's motion to dismiss the Justice Department's lawsuit, while encouraging the "two branches to settle their differences without further judicial involvement." *Id*. at 153. The court noted, however, that "[i]f these two co-equal branches maintain their present adversarial positions, the Judicial Branch will be required to resolve the dispute by determining the validity of the Administrator's claim of executive privilege." *Id*. at 152.

[6] Stanley M. Brand and Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71, 79 (1986) (citing Complaint at 7, *United States v. House of Representatives*, 556 F.Supp. 150 (D.D.C. 1983) (Civ. No. 82-3583)).

Judicial resolution was, however, never required: the month after the district court dismissed the suit brought by the Justice Department, Gorsuch resigned as EPA Administrator amid increasing controversy over her handling of the hazardous waste program at EPA.[7] The day she resigned, the White House agreed to turn over the documents requested by Congress.[8] Eventually, one high-ranking EPA official, Rita Lavelle, was convicted of perjury and other crimes in connection with the matters under investigation by Congress, and over twenty other high-ranking EPA officials resigned as a consequence of these events.[9]

Like *AT&T*, *House of Representatives* was a *loss* for the executive.[10] To cite the case as if it supports an unreviewable privilege to withhold documents from Congress is to ignore both the limited holding of the case and the circumstances surrounding the plea for judicial intervention in that case. The context of the case is, in truth, like a poster child for the value of congressional oversight and investigation: without these legislative capacities, the misdeeds surrounding implementation of the Superfund program might never have come to light. In addition, foreshadowing the discussion to come regarding defendant's most ambitious constitutional theories, it may be instructive to observe that if defendant's novel interpretation of the Opinions in Writing

[7] Administrator Gorsuch had married in the midst of these events, and was at this point Anne Burford.

[8] *Burford Quits as EPA Administrator*, WASH. POST, p. A1 (Mar. 10, 1983).

[9] *Lavelle Verdict: E.P.A. Trial Over, But Not Inquiries*, N.Y. TIMES, p. A9 (Dec. 3, 1983). This episode had other reverberations, even more central to modern separation of powers concerns: the day after Gorsuch resigned, the head of the Office of Legal Counsel during these events testified before Congress on the circumstances surrounding the assertion of executive privilege. See H.R. Rep. No. 99-435, Vol. 1, at 617 (1985). This testimony was sufficiently troubling to lead to the appointment of an independent counsel, eventually culminating in the Supreme Court's 8-1 decision upholding the constitutionality of the independent counsel law. *See Morrison v. Olson*, 487 U.S. 654 (1988).

[10] In response to the court's decision, Representative Elliott H. Levitas of Georgia, chairman of the House subcommittee that had originally issued the subpoena to Administrator Gorsuch, breathed a large sigh of relief: "This is a very important decision," he said, "because, if it had gone the other way, the entire ability of Congress to perform its constitutional oversight function would have been placed in jeopardy."*Effort to Quash Gorsuch Charge Balked in Court*, N.Y. TIMES, p. A1 (Feb. 4, 1983).

Clause had been embraced at the time of the Gorsuch controversy, many of the features of that controversy would not have been legitimate objects of congressional inquiry.[11]

III. SECTIONS 712, 716, AND 717 OF TITLE 31 OF THE UNITED STATES CODE DO NOT VIOLATE THE SEPARATION OF POWERS.

The final sections of defendant's brief make explicit what has been implicit all along: defendant believes that no matter what sections 712, 716, and 717 of Title 31 might have said, no matter how plainly, the Comptroller General simply may not, consistent with the Constitution, seek information about the NEPDG, nor file suit to obtain information defendant has denied him. Defendant's arguments are audacious: in the course of describing his own view of what the Constitution means, defendant manages to brush aside the language and history of the constitutional provisions upon which he relies, controlling Supreme Court precedent that dooms his claims, and the devastating implications of his claims for Congress's authority to conduct oversight and investigations. By pasting together selective quotations from constitutional provisions and Supreme Court cases that, if digested in full, fundamentally undermine his position, defendant engages in a high-stakes form of wishful thinking.

Defendant argues that this Court must give the GAO's statute the narrow interpretation he offers because otherwise the court will be forced to confront difficult constitutional questions and to resolve them against the statute. Def's. Mem. 51-52. On the contrary, defendant's constitutional claims rest on constitutional provisions – the Opinions in Writing and Recommendations Clauses – whose language and history make them unavailable to deliver the absolute privilege for executive information defendant seeks. Defendant's aggressive construction of these provisions also runs

[11] Under defendant's expansive understanding of the Opinions in Writing Clause, for example, Congress had no legitimate interest in seeking to learn how and why executive privilege had come to be asserted by Administrator Gorsuch at the direction of the President, as this inquiry would certainly seem to involve scrutiny of opinions given by presidential advisers to the President.

counter to the Supreme Court's decisions regarding executive prerogatives to withhold documents from disclosure. Far from avoiding a difficult constitutional moment, defendant's constitutional "avoidance" arguments would invite one.

A. Defendant's "Per Se" Test Is A Thinly Disguised Effort To Resuscitate Absolute Executive Privilege Under The Cover Of Two Constitutional Provisions That By Their Terms Do Not Provide The Privileged Shelter Defendant Seeks.

Defendant begins his extraordinary constitutional argument by claiming that a "per se" test applies to this case: he argues that this Court must protect information concerning the NEPDG from disclosure to Congress, period, without balancing any of the governmental interests at stake. Def's. Mem. 54. Ironically enough, defendant apparently draws this per se principle from *Barenblatt v. United States*, 360 U.S. 109 (1959), one of the leading cases on Congress's authority to conduct investigations. Def's. Mem. 54 (citing *Barenblatt*).

Defendant has simply invented a new name – "per se test" – for the absolute executive privilege rejected unanimously by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974). Indeed, the privilege requested by defendant is even broader than that rejected in *Nixon*. First, defendant's argument would, if accepted, result in the first-ever acknowledgement that the Vice President enjoys the same constitutional privileges as the President. Second, the information defendant seeks to withhold is very different from the "confidential conversations" among close presidential advisers involved in *Nixon*. Much of the information sought by the Comptroller General likely resides in the "daily logs and appointment records" of defendant; the quotation is from *Nixon*, which reported that such logs and records had been delivered by President Nixon to the Special Prosecutor – without, it appears, any accompanying assertion of executive privilege. *Nixon*, 418 U.S. at 688. Third, defendant's absolute privilege would extend to information concerning communications with parties outside the government. The cases on executive privilege do not stretch this far. The D.C. Circuit has held that executive privilege extends to communications "made

by presidential advisers in the course of preparing advice for the president . . . even when these communications are not made directly to the President." *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). The court also made clear, however, that "staff outside the White House in executive branch agencies" could not qualify for the privilege. *Ibid*. This holding would exclude most of the members of the NEPDG, and would certainly exclude information concerning communications with *private parties*.[12] The privilege requested by defendant is sufficiently expansive that it would allow the executive branch to withhold information about virtually any activity so long as it was preceded by a general request by the President for advice. Such a privilege would effectively shut down congressional oversight of executive branch activities.[13] Nothing in the Opinions in Writing Clause or Recommendations Clause supports such a result.

1. The Opinions in Writing Clause Does Not Give Defendant an Absolute Privilege to Withhold Documents from the Comptroller General.

Despite his heavy reliance on the Opinions in Writing Clause, defendant does not quote the language of the clause in his brief. *See* Def's. Mem. 51 (referring to clause without quoting it). The clause provides that the President

> may 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.

[12] *See also id*. at 753 (noting that court's holding does not extend to "the congressional-executive context").

[13] There is considerable tension between defendant's arguments based on the Opinions in Writing Clause and his later argument, designed to reassure this Court of the benign nature of his constitutional claims, that his statutory arguments "would not interfere with the Comptroller General's ability to seek records from traditional 'agencies' (i.e., virtually the entire Executive Branch, excepting only the President, defendant, and the President's other close advisers whose sole function is to advice and assist the President)." Def's. Mem. 66. It is hard to know what defendant has in mind in the quoted passage, given the extravagant constitutional claims that precede it in his brief. Although defendant does not explain what he means by the "traditional 'agencies,'" it seems plausible to assume that they at least include the traditional cabinet-level departments – the very entities covered by the Opinions in Writing Clause. It is hard to square defendant's bold constitutional claims with his attempted reassurances to this Court.

U.S. CONST. Art. II, § 2, cl. 1. The language of the Opinions in Writing Clause makes clear that the authority it gives to the President is limited in three important ways. First, the President is given authority to require opinions "in writing." Second, the President is given power to ask for the opinions of "the principal Officer in each of the executive Departments." Third, the President is empowered to require an opinion from such officers "upon any Subject relating to the Duties of their respective Offices." It is ironic that defendant has offered the Opinions in Writing Clause as a "textual" source for the privilege he seeks, Def's. Mem. 52, since the very text of this clause makes it inapplicable to the circumstances of this case. In addition to ignoring the explicit language of the Opinions in Writing Clause, defendant also ignores the history of that clause and the separations of powers jurisprudence that has been developed by the Supreme Court.

The materials sought by the Comptroller General are not "opinions, in writing." In fact, the written "opinion" developed by the task force – the 170-page energy policy report produced in May 2001 – was heavily publicized by the President himself. It is hard to see how lists of attendees at meetings, for example, can be transformed into "opinions, in writing" or anything close without doing violence to the language of Article II.

Defendant's energy policy task force was composed of the Vice President, the Secretaries of Treasury, Interior, Agriculture, Commerce, Transportation, and Energy, the Director of the Federal Emergency Management Agency, the Administrator of the Environmental Protection Agency, the Deputy Chief of Staff to the President for Policy, and the Assistants to the President for Economic Policy and Intergovernmental Affairs. Pl.'s Statement of Material Facts as to Which There is No Genuine Issue ¶ 2 (Fact Stmt.). Five Department of Energy employees and a White House Fellow were also assigned to the Office of the Vice President to serve as NEPDG staff. Fact Stmt. ¶ 5. The

task force also invited input from numerous persons and entities outside of the federal government[14] – a fact central to the dispute that has followed.

Many of the people identified above are not even arguably "the principal Officer" in an "executive Department." Deputies, assistants, agency staff, and White House Fellows are not, according to their very job title, the "principal officer" of the entity for which they work. Even more clearly, private persons, outside the government, consulted by the members of the NEPDG or its staff, are not "principal officers" in "executive departments." "Principal officers" of *something* they might well be; principal officers of "executive departments" they are surely not.[15]

Finally, the Opinions in Writing Clause refers to opinions "upon any Subject relating to the Duties of [the principal officers'] respective Offices." We do not doubt that the duties of the offices of the members of the energy task force relate, at least in part, to energy policy. Nevertheless, it is worthwhile to remember that these duties were not created by the Constitution, nor by the President acting alone, but by statutes enacted by Congress. Defendant implicitly asks this Court to conclude that the statutory duties of the offices of the members of the energy task force are sufficient to bring the members' opinions within the coverage of the Opinions in Writing Clause, and yet he will not acknowledge that this statutory cover comes with a price: the same statutes that create executive

[14] See Complaint ¶ 20 (citing attachment to May 4, 2001, letter from Vice President Cheney's Counsel to Representatives John Dingell and Henry Waxman and others).

[15] On the meaning of the words "principal officer" and "executive department" in the Opinions in Writing Clause, see *United States v. Germaine*, 99 U.S. 508, 511 (1878), in which the Court held that the surgeon to the Commissioner of Pensions was not an "officer of the United States" because the Commissioner was not the head of a department within the meaning of Article II. The Court distinguished "inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments," from the heads of departments, and noted that the same meaning should attach to the Opinions in Writing Clause, under which the Court was aware of no case "in which such written opinion has been officially required of the head of any of the bureaus, or of any commissioner or auditor in these departments." 99 U.S. at 511. To similar effect is *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), in which the Court, in holding that the United States Tax Court was not a "department," opined that only "executive divisions like the Cabinet-level departments" were "departments" within the meaning of the Appointments and Opinions in Writing Clauses. *Id*. at 886. *See also id*. at 918 (Scalia, J., concurring in the judgment) (the word "Departments" includes "all independent executive establishments").

duties with respect to energy policy also contemplate broad public participation in the development of this kind of policy. *See* Pl's. S.J. Mem. 7.

The history of the Opinions in Writing Clause also undermines defendant's arguments. The Clause has always been a rather obscure cousin to the more famous provision paired with it in a draft of the Constitution, allowing advisory opinions from the Chief Justice.[16] (The latter provision was, of course, ultimately dropped.) From the beginning, the Opinions in Writing Clause was dismissed even by the framers as of little importance; a mere "redundancy," Alexander Hamilton pronounced.[17] More recently, Justice Jackson included the Clause among the "trifling" provisions of Article II that he thought helped to demonstrate the limits on the executive's authority. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 & n. 9 (1959) (Jackson, J., concurring).[18]

The post-framing history of the Opinions in Writing Clause is equally damaging to defendant's claims. In over 200 years of back-and-forth between Congress and the executive concerning disclosure of information to the former by the latter, the Opinions in Writing Clause has never emerged as a source of absolute executive privilege.[19] Yet there have been ample opportunities for the clause to be deployed to this end, if that were an appropriate use of the clause.[20]

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[16] Akhil Reed Amar, *Some Opinions on the Opinions in Writing Clause*, 82 VA. L. REV. 647, 656 (1996).

[17] *Id.* at 648, citing THE FEDERALIST No. 74, at 447 (Clinton Rossiter ed., 1961).

[18] *See also Myers v. United States*, 272 U.S. 52, 55 (1926) (McReynolds, J., dissenting) ("It is beyond the ordinary imagination to picture forty or fifty capable men, presided over by George Washington, vainly discussing, in the heat of a Philadelphia summer, whether express authority to require opinions in writing should be delegated to a President in whom they had already vested the illimitable executive power here claimed.")

[19] The Opinions in Writing Clause has been so little remarked upon in the 200-plus years of its existence that students of the Constitution have not even settled upon a single name for the clause. Some, like defendant, prefer the usage "Opinions Clause." Others refer to it as the "Opinions in Writing Clause." *See, e.g.*, Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1290-94 (1999). We have chosen the latter usage because it hews most closely to the actual text of the clause.

[20] Even in cases where executive privilege has not formally been invoked, the complete absence of any reference to the

The complete lack of authority for asserting executive privilege based on the Opinions in Writing Clause is like Holmes's dog that didn't bark: it is perhaps the most telling evidence of the weakness of defendant's arguments.

In the intensely fought battle over the Watergate tapes, for example, the Opinions in Writing Clause did not emerge as a justification for President Nixon to withhold the tapes from either the congressional committees investigating Watergate or from the court hearing criminal charges arising out of it. Yet the assertion of the kind of privilege requested by defendant would have been as appropriate there as it is here; the tapes in question easily could have been conceptualized as involving conversations in which the President sought the opinion of his advisers on the appropriate response to the Watergate burglary and related events. *See, e.g.*, *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (1974) (en banc) (reviewing Senate committee's subpoena for tapes of five conversations between the President and his former Counsel, John W. Dean, III).[21] The fact that no one saw the cases that way – and the fact that the Supreme Court, in its unanimous opinion requiring the President to turn over the tapes, did not even mention the Opinions in Writing Clause – reveals defendant's belated discovery of the Opinions in Writing Clause as a source for absolute executive privilege as the desperate legal stratagem it is.

Indeed, the D.C. Circuit has already ruled against the kind of claim asserted here. In *Common Cause v. Nuclear Regulatory Commission*, 674 F.2d 921 (D.C. Cir. 1982), the court summarily rejected the Nuclear Regulatory Commission's argument that application of the

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Opinions in Writing Clause can be telling. In *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), for example, the whole case concerned the executive's duty to disclose written recommendations from his advisers on important matters of public policy, yet the Court uttered not one peep about the Opinions in Writing Clause.

[21] The D.C. Circuit ultimately decided not to enforce the subpoena against the President because another congressional committee already possessed the very same tapes. 498 F.2d at 732.

Government in the Sunshine Act, 5 U.S.C. § 552b, to the agency's budgetary meetings would violate the Opinions in Writing Clause. The court emphasized that in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the Supreme Court had "expressly included the Government in the Sunshine Act among the 'abundant statutory precedent for the regulation and mandatory disclosure of [information] in the possession of the Executive Branch'" and had noted that "'[s]uch regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy.'" 674 F.2d at 935, quoting *Administrator of General Services*, 433 U.S. at 445.

2. The Recommendations Clause Does Not Give Defendant an Absolute Privilege to Withhold Documents from the Comptroller General.

Defendant also claims that the Recommendations Clause gives him an absolute right to withhold the information the Comptroller General has sought. It does nothing of the sort.

Section 3 of Article II of the Constitution provides in part:

> [The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary occasion, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the time of Adjournment, he may adjourn them to such Time as he shall think proper . . .

Once again, the language and history of these passages, together with relevant Supreme Court precedent, rule out the use defendant attempts to make of them.

The Recommendations Clause refers only to recommendations offered for *Congress's* consideration – not to recommendations for the executive's consideration. However, most of the proposals ultimately offered by the NEPDG – and thus, one may perhaps be forgiven for presuming, the bulk of the work actually done by the NEPDG – involved reforms that would be carried out

within the executive branch itself.[22] At the very least, therefore, the limited text of the Recommendations Clause does not support the blanket privilege requested by defendant concerning all NEPDG information.

Furthermore, the Recommendations Clause does not even purport to restrict information the executive must give to Congress. Coupled with the state-of-the-union clause just preceding it, the Recommendations Clause is clearly offered in the service of making more rather than less information and advice available to Congress so that Congress can perform its constitutionally assigned functions. Defendant's claim that the Recommendations Clause gives the President the authority to withhold or transfer whatever information to Congress he wants, based on his view of what is "necessary and expedient," Def's. Mem. 55, simply misreads the language of the Clause: it is not *information* that the President judges to be "necessary and expedient," but the *"Measures"* the President recommends to the Congress's consideration. The text of the clause, if anything, supports the notion that the President on occasion should assist the Congress in the exercise of its legislative functions – and certainly does not support the opposite notion that the President (and Vice President) have an absolute privilege to withhold broad categories of information from Congress.

The history of the Recommendations Clause is equally damaging to defendant's argument. The clause was included in the Constitution in order to protect the President from the criticism he might have otherwise received if he saw fit to recommend legislation to Congress; James Madison reported that the words of the clause were changed to "shall recommend" from "may recommend" "in order to make it the duty of the President to recommend, & thence prevent umbrage or cavil at his doing it." *Ass'n of American Physicians & Surgeons v. Clinton*, 997 F.2d 898, 908 n. 7 (D.C.

[22] *See generally* National Energy Policy: Report of the National Energy Policy Development Group (May, 2001); see also Office of the Press Secretary, Press Briefing by Ari Fleischer (May 16, 2001), available at <www.whitehouse.gov/news/briefings/20010516.html >.

Cir. 1993) ("*AAPS*"), quoting J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 464 (G. Hunt & J. Scott eds., 1987). Like the Opinions in Writing Clause, therefore, the very existence of the Recommendations Clause suggests relatively narrower rather than broader authority for the executive. Why, after all, would an all-powerful executive require explicit authority to make suggestions to Congress?

Moreover, the D.C. Circuit has rejected the very claim defendant now presses. In *AAPS*, the government argued that under the Recommendations Clause, the President had "the sole discretion to decide what measures to propose to Congress" and that the Clause left "no room for congressional interference." *Id.* at 906. The government argued that the Federal Advisory Committee Act (FACA) could not constitutionally be applied to the President's Task Force on National Health Care Reform because that would interfere with the President's power to recommend legislation. Moreover, the government argued, the textual basis of the recommendations power meant that the case was governed by the "per se test" recommended by Justice Kennedy's concurring opinion in *Public Citizen*, rather than by the balancing test of *Morrison v. Olson*. 997 F.2d at 907.

In ruling on what it termed the government's "somewhat artificial" argument, *id*. at 908, the D.C. Circuit observed, first, that Justice Kennedy's per se test was arguably inconsistent with the Supreme Court's decision in *Morrison*, which employed a balancing test despite the fact that the explicit constitutional power to "take Care that the Laws be faithfully executed" was implicated there. *Id*. at 907. The court also noted that if the government's interpretation of the Recommendations Clause were accepted, "FACA would be problematic with regard to virtually all policy advice." In that case, the statute "would be unconstitutionally suspect on its face" – a

conclusion the court declined to embrace. *Ibid*.[23] Finally, the court pointed out that not only was the Recommendations Clause "less an obligation than a right," but it was a right possessed by everyone: "*anyone in the country can propose legislation*." *Id*. at 908 (emphasis added).[24] The notion that the right to recommend legislation is one of the "*exclusive* enumerated responsibilities" of the President, as defendant asserts (Def's. Mem 52 (emphasis added)), is sheer fantasy.

B. Even Under A Balancing Test, Defendant Has No Privilege To Withhold The Information The Comptroller General Seeks.

Defendant also argues that he should be exempt from disclosing information relating to the NEPDG even if this Court uses a balancing test rather than the "per se" test he has proposed. Def's. Mem. 57-62. This information should not be given privileged status even under a balancing test.

In his discussion on balancing, defendant cites *United States v. Nixon* as authority for his claims. Def's. Mem. 59, 60-61. Defendant's invocation of the leading case on executive privilege comes as something of a surprise. Throughout the exchanges with the Comptroller General leading up to this litigation, and in his papers filed so far, defendant has studiously avoided using the term "executive privilege" to describe the privilege from nondisclosure he asks this Court to recognize. His coyness is well founded: the traditional doctrine of executive privilege does not apply to the information defendant seeks to withhold in this case, and in any event, defendant has not properly asserted the privilege in this litigation.

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[23] The court went on to discuss the constitutional problems it perceived in applying FACA to the Task Force. 997 F.2d at 908-11. This part of the decision is dicta insofar as the court rested its holding on its statutory conclusion that FACA did not apply to the Task Force. In any event, FACA's requirements that the proceedings of a committee established to advise the President on a matter of public policy be opened up to public scrutiny and that the committee be constituted to achieve an even balance of members raise different constitutional issues than are raised by the Comptroller General's request solely for information concerning the NEPDG's meetings.

[24] Because the power to recommend legislation belongs to "anyone in the country," even Justice Kennedy would not apply to this case the "per se" test he recommended in his concurring opinion in *Public Citizen*. That test, he made clear, should be reserved for powers within the "sole province" and "exclusive control" of the President. 491 U.S. at 484, 485. Clearly, recommending legislation to Congress is not such an exclusive power.

The Supreme Court has recognized that the Constitution implicitly provides an executive privilege for only certain kinds of information. Information relating to foreign affairs and national security, ongoing law-enforcement activities, and the confidential communications of close presidential advisers has been held covered in appropriate circumstances by executive privilege. *See In re Sealed Case*, 121 F.3d 729, 736-40 (D.C. Cir. 1997). The courts have not recognized an executive privilege for the kind of information defendant seeks to withhold in this case, which includes, among other things, lists of attendees at meetings held with parties outside the White House. The bulk of the information sought by the Comptroller General does not involve confidential conversations of the President or even his close advisers. Only one piece of the information sought by the Comptroller General – the process by which the NEPDG chose the attendees at meetings – could conceivably involve confidential communications. Without knowing more about the information defendant has withheld, however, this Court cannot conclude that this information includes confidential communications. Executive privilege cases since *United States v. Nixon* counsel against simply taking the executive at his word in a situation like this.

Moreover, there has not been a formal and proper assertion of executive privilege in this case. First, and most basically, the D.C. Circuit has indicated that it is only the *President* who may assert executive privilege. *Common Cause v. Nuclear Regulatory Commission*, 674 F.2d 921, 935 (D.C. Cir. 1982). The President has not done so here (nor has the Vice President). Second, the courts have also required the President to assert executive privilege with specificity as to the information withheld – indicating what is being withheld, and why. The D.C. Circuit has refused to allow a President to avoid this requirement through "a blanket assertion of privilege." *Dellums v. Powell*, 642 F.2d 1351, 1363 (D.C. Cir. 1980).

Defendant's effort to reap the benefits of, without meeting the requirements for, an assertion of executive privilege cannot stand. To the extent that defendant means to suggest that merely requiring him formally to assert executive privilege "'impermissibly undermine[s]' the powers of the Executive Branch," *Morrison*, 487 U.S. at 695 (quoted at Def's. Mem. 58), such a principle cannot coexist with *United States v. Nixon* and the cases following it. In any event, a close reading of defendant's brief reveals that defendant's decision not to formally invoke executive privilege rested not on any grand constitutional principle, but instead on less grand political calculations. In a footnote, defendant all but admits that he chose not to invoke traditional executive privilege because of the "political capital" he would have been forced to expend had he done so. Def's. Mem. 27, n. 13. The Court should not distort constitutional doctrine in the service of nakedly political calculations.

If, despite defendant's failure to meet the requirements for an assertion of executive privilege, this Court decides to undertake the kind of balancing employed by the Court in the *Nixon* cases, it should hold that the balance favors disclosure of the information the Comptroller General seeks. Defendant's argument to the contrary is almost wholly premised on his claims that neither Congress nor the Comptroller General has any legitimate interest in this information, and that the executive has a fundamental interest in keeping this information secret, because of the prerogatives granted to the President under the Opinions and Recommendations Clauses. The utter failure of defendant's arguments based on those clauses fatally undermines his arguments based on balancing. In addition, defendant's failure to meet the procedural requirements for asserting executive privilege – including a detailed explanation of the information he was withholding, and why, in each instance, he thought it protected by privilege – means that, on his side of the constitutional balance, there is nothing to

place on the scales except the kind of blanket interest in executive secrecy that has been rejected in cases since *United States v. Nixon*.

C. The Comptroller General's Initiation Of This Suit To Compel The Production Of Information Relevant To Congress's Legislative Function Does Not Violate Article II.

Defendant's final constitutional argument is that the Comptroller General's initiation of this lawsuit violates Article II's Take Care Clause. His theory is that section 716's provisions regarding judicial review "impermissibly assign[] an executive power to a legislative agent. Because the power to bring an enforcement action to vindicate public interests is executive in nature, it is unconstitutional for Congress to retain it for its own agent." Def's. Mem. 62. Although defendant does not say so, the implication of his argument is that no one but the executive has the power to vindicate Congress's right to conduct legislative oversight and investigation. It would be awkward indeed to condone this concentration of power in one branch in the name of separation of powers.

On defendant's view of the separation of powers, it would be unconstitutional not only for the Comptroller General, but also for Congress or any part thereof, to file the present lawsuit. Only the executive could do so. But this leaves Congress at the mercy of the very branch from which it is seeking information, thus inviting the problematic situation presented in *United States v. House of Representatives*, in which Congress sought to enlist the help of the executive in prosecuting an executive branch official for contempt of Congress, only to be preempted by a lawsuit from the executive charging that Congress's demands for information were unlawful. *See* Part II, *supra*. As in *Morrison v. Olson*, 487 U.S. 654 (1988), where in upholding the independent counsel statute the Supreme Court acknowledged the conflicts the executive branch faces in prosecuting its own officials for crimes, this Court, too, should recognize the conflicts latent in defendant's implicit

assertion that only the executive may seek to enforce information demands placed on the executive by Congress or its agents.[25]

In any event, the function served by the Comptroller General is not one reserved to the executive. The Comptroller General has brought this lawsuit in the service of Congress's unchallenged authority to conduct oversight and investigations in performing its legislative function. The Supreme Court has long held that Congress has the authority to conduct oversight and investigations, and that this power includes authority to enforce its demands for information:

> [T]he [constitutional provisions respecting Congress's powers] are not of doubtful meaning, but . . . are *intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end*. . . . A legislative body cannot legislative wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so *some means of compulsion are essential to obtain what is needed.* All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry – *with enforcing process* – was regarded and employed as a necessary and appropriate attribute of the power to legislate – indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

McGrain v. Daugherty, 273 U.S. 135, 175 (1927) (emphasis added). In *McGrain*, the Supreme Court held that Congress's investigative authority empowered it even to issue a warrant for "attachment of a person" – allowing the person to be *taken into custody* to be brought before the Senate – to a person who had refused to appear before a Senate committee in response to a subpoena. Nowhere did the Court suggest that Congress could not enforce its demand for information from

[25] Under defendant's exceedingly compartmentalized view of governmental powers, it may well be that the Capitol Police are unconstitutional, too, since they "can arrest and press charges against lawbreakers" – "functions that could be characterized as 'executive' in most contexts." *Bowsher v. Synar*, 478 U.S. 714, 753 (1986) (Stevens, J., concurring in the judgment).

the witness in question because that would have been to exercise an executive function. On the contrary, as the quoted passage makes clear, the Court thought *enforcement* of congressional demands for information inheres in the legislative function as surely as the authority to demand the information itself does.

To the same effect, in rejecting a virtually identical constitutional challenge to the Comptroller General's authority, the Eighth Circuit observed:

> Far from being a case in which the [Comptroller General] brought suit against [defendant] for breaching the law, the [Comptroller General], in this case, was merely seeking information for a legitimate investigative purpose. Its issuance of a subpoena enforceable in district court was necessary to accomplish that purpose. To hold otherwise would be to render meaningless the [Comptroller General's] role as an investigating arm of Congress. We reject [defendant's] Separation of Powers argument.

United States v. McDonnell Douglas Corp., 751 F.2d 220, 225 (8th Cir. 1984). *Accord McDonnell Douglas Corp. v. United States*, 754 F.2d 365, 368 (Fed. Cir. 1985).[26]

Buckley v. Valeo, 424 U.S. 1, 136 (1976), relied upon by defendant in arguing that section 716 violates Article II (Def's. Mem. 62-63), in fact supports our view of Congress's authority. In *Buckley*, the Court made clear that insofar as the Federal Elections Commission was empowered to "investigat[e] and inform[]", there could "be no question that the Commission as presently constituted may exercise them." 424 U.S. at 137. The Court then quoted most of the passage from *McGrain* that is set forth above, including the references to Congress's need for "true recourse" and "some means of compulsion" in carrying out its investigative functions. *Id.* at 138. To be sure, the Court went on to conclude that the vesting of other, "more substantial powers" in the Commission

[26] *See also Synar v. United States*, 626 F. Supp. 1374, 1399 & n. 29 (1986) (Scalia, Johnson, and Gasch, per curiam) (including Comptroller General's litigation authority under section 716 within the category of powers, "in the performance of which [the Comptroller General] cannot 'in any proper sense by characterized as an arm or an eye of the executive'") (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935)), *affirmed sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986).

– including the responsibility for conducting civil litigation in the federal courts – violated Article II. *Id.* at 138-39. But the powers of the Federal Elections Commission at issue in *Buckley* embraced generalized authority to undertake enforcement of the new election law, including power to seek penalties for violations of the law. *See id.* at 179-80 (statutory appendix) (setting forth penalties available under §§441 and 456 of the Federal Election Campaign Act). The Comptroller General, in contrast, has no generalized authority to ensure compliance with law, nor is he permitted to seek penalties or other kinds of relief conventionally associated with entities exercising the executive function. The power the Comptroller General has is the same kind of power ratified in *McGrain* and the many cases following it: a "means of compulsion" to obtain information relating to the legislative function.

Defendant's vision of Article II, if accepted, would have severe consequences for the balance of powers between the President and Congress. The logical implication of defendant's argument based on Article II is that only the executive can come to court to protect the constitutional prerogatives of Congress. Yet the executive experiences no such subservience with respect to Congress: as defendant makes plain, without explicitly saying so in his brief, he would run to court in a heartbeat if, for example, Congress attempted to attach conditions to appropriations for the executive's development of energy policy. Def's. Mem. 56-57 (citing judicial decisions, at 57). The lopsided constitutional structure that would result from defendant's interpretation of Article II cannot be countenanced in the name of separation of powers.

CONCLUSION

For the foregoing reasons, the Court should grant plaintiff's motion for summary judgment and deny defendant's motion to dismiss.

Respectfully submitted,

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