UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. WALKER, Comptroller
General of the United States,
Plaintiff,

v. C.A. No.1:02cv340JDB

RICHARD B. CHENEY, Vice President
of the United States,
Defendant.

DEFENDANT'S MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 12(b)(1) and (6), defendant moves to dismiss this case as non-justiciable and for failure to state a claim upon which relief can be granted. Defendant further opposes plaintiff's motion for summary judgment. In support of defendant's motion to dismiss and in opposition to plaintiff's motion for summary judgment, defendant respectfully refers the Court to the attached memorandum of points and authorities.

Respectfully submitted,

May 21, 2002

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Comptroller General David M. Walker seeks to place this Court in the middle of an asserted inter-branch dispute over access to executive branch documents. Specifically, he sought (and continues to seek), based on a request from two individual legislators, documents from the Vice President regarding the process by which the Vice President and top presidential advisers assisted the President in the development of the President's National Energy Policy. In response, the Vice President explained that the Comptroller General's request exceeded his statutory authority and sought unconstitutionally to interfere with the functioning of the presidency. The Comptroller General then filed this suit to enlist the courts in his effort to compel the Vice President to disclose documents. The Comptroller General's claim for judicial relief requires ignoring well-established limits on the judiciary and relies on a virtually boundless view of the Comptroller General's own authority. The Comptroller General's view would work a revolution in the separation of powers. Disputes between the executive and legislative branches that have been resolved without judicial involvement from the earliest days of the republic would be the subject of district court litigation, with the Comptroller General, a congressional agent, playing the central role. Fortunately, the Court can avoid this fundamental reworking of the constitutional scheme by deciding this case on narrower statutory grounds.

The Vice President moves to dismiss the suit principally on the grounds that: (1) the Comptroller General lacks standing; (2) the doctrines of justiciability and equitable discretion warrant dismissal of the case; (3) Section 716 of title 31, the asserted jurisdictional basis for this suit, only authorizes suits against the head of an agency, and the Vice President is not the head of an agency; (4) Sections 712 and 717 of title 31, the asserted bases for the Comptroller General's inquiry, do not provide statutory authority for this inquiry; (5) if these statutes did provide the authority that the Comptroller General claims, they would be unconstitutional as applied in this case;

and (6) at a minimum, the statutes should be interpreted to avoid such a constitutionally doubtful reach. To survive this motion to dismiss, the Comptroller General must prevail on every one of these statutory and constitutional issues.

If the Court dismisses the case on one of the narrower grounds for decision — that the Comptroller General lacks standing to sue, that the doctrines of justiciability or equitable discretion warrant dismissal, or that the Comptroller General cannot sue the Vice President under Section 716 of title 31 because he is not the head of an agency — the Court need not resolve the full reach of the Comptroller General's statutory authority or whether that authority is consistent with the constitutional separation of powers. If the Court goes beyond these narrow grounds, it should strive to interpret the Comptroller General's statutory authority to avoid constitutional difficulties. The Comptroller General asserts a virtually unlimited authority to investigate the Executive Branch. He claims the authority to investigate all expenditures of money, and he views time as money. He claims the authority to investigate program results, and interprets results to include the entire process by which the results were produced. The Comptroller General's interpretation of his authority is neither the only nor the most natural reading of the statutory text, and the most natural reading of the text gives the Comptroller General a still formidable statutory power that co-exists with the Constitution. If, however, this Court determines that Congress intended to aggrandize its agent at the expense of powers exclusively entrusted to the executive branch, then it should strike down the statute as unconstitutional.

The Vice President's Message to the House and Senate stated clearly why the Comptroller General's suit cannot stand as a matter of constitutional law:

> If the Comptroller General's misconstruction of the statutes * * * were to prevail, his conduct would unconstitutionally interfere with the functioning of the Executive Branch. For example, due regard for the constitutional separation of powers requires respecting the independence of the President, the Vice President and the President's

> other senior advisers as they execute the function of developing recommendations for policy and legislation — a core constitutional function of the Executive Branch. Also, preservation of the ability of the Executive Branch to function effectively requires respecting the confidentiality of communications among a President, a Vice President, the President's other senior advisers and others. A President and his senior advisers must be able to work in an atmosphere that respects confidentiality of communications if the President is to get the good, candid advice and other information upon which wise decisionmaking depends.

Compl. Ex. J at app. 2.

For the reasons explained below, the Vice President asks the Court to deny Comptroller General Walker's motion for summary judgment and to grant the Vice President's motion to dismiss the case.

BACKGROUND AND STATEMENT OF FACTS

I. GAO's History and Statutory Basis

Congress created the office of the Comptroller General and the General Accounting Office (GAO) in the Budget and Accounting Act of 1921, 42 Stat. 20, 23 (1921). It established GAO as an agent of Congress, "independent of the executive departments," 31 U.S.C. § 702(a), and made the Comptroller General removable only by Congress through the impeachment process or by enactment of a joint resolution removing the Comptroller General for specified causes, 31 U.S.C. § 703(e)(1). See Bowsher v. Synar, 478 U.S. 714, 730-731 (1986) (describing Comptroller General as "an agent of Congress") (citation omitted).

Prior to the adoption of the 1921 Act, no centralized budget process existed. Rather, each department and agency submitted independent budget proposals to Congress, which Congress determined resulted in "extravagance, inefficiency, and duplication of service." H.R. Rep. No. 14, 67th Cong., 1st Sess. 4 (1921). The 1921 Act thus created both the Bureau of the Budget (now the Office of Management and Budget, 31 U.S.C. § 501), to centralize the budget process, and the General Accounting Office, to provide Congress with a mechanism for auditing certain activities of

the other parts of government "to insure at all times a businesslike execution of the budget." H.R. Rep. No. 14, supra, at 7. As the House committee described it:

> The creation of [the General Accounting Office] will enable it to furnish information to Congress and to its committees regarding the expenditures of the Government. He could and would be expected to criticize extravagance, duplications, and inefficienc[ies] in executive departments.

Id. at 8 (emphasis added).

Accordingly, the 1921 Act authorized the Comptroller General to "investigate * * * all matters relating to the receipt, disbursement, and application of public funds." § 312, 42 Stat. 20, 25. That same authorization now exists in 31 U.S.C. § 712(1), which authorizes the Comptroller General to "investigate all matters related to the receipt, disbursement, and use of public money."[1] Then, as now, this authorization was intended to allow the Comptroller General to secure "necessary information concerning the financial transactions of the Government." The General Accounting Office: A Study of Its Functions and Operations, H.R. Rep. No. 81-1441 at 6 (1949) (emphasis added). Consistent with that limited financial purpose, "GAO's activities in the first several decades emphasized strict compliance with laws governing the federal spending process." See Staff of the Senate Comm. on Governmental Affairs, 103d Cong., 2d Sess., The Roles, Mission and Operation of the U.S. General Accounting Office, 2 (Comm. Print 1994) (National Academy of Public Admin.); Pl's. S. J. Mem. 10.

In 1967, Congress mandated that GAO undertake a more comprehensive review of specified economic opportunity programs to determine not only whether those programs were operating efficiently, but also whether their results were fulfilling the policy goals Congress had set for them.

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[1] During the 1982 codification of title 31, Congress replaced the term "application" with "use" in § 712, without intending any substantive effect. See H.R. Rep. No. 97-651, 97th Cong., 2d Sess. 1-3 (1982), reprinted in 1982 U.S.C.C.A.N. 1895, 1895-1897.

See Economic Opportunity Amendments of 1967, Pub. L. No. 90-222, 81 Stat. 672, 727. The Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140, and the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, subsequently gave the Comptroller General a similar authority to evaluate the results of federal programs in general. As currently codified, that authority purports to allow the Comptroller General to "evaluate the results of a program or activity the Government carries out under existing law — (1) on the initiative of the Comptroller General; (2) when either House of Congress orders an evaluation; or (3) when a committee of Congress with jurisdiction over the program or activity requests the evaluation." 31 U.S.C. § 717(b).

GAO's authority to conduct program-results evaluations under § 717(b) remains limited to reviewing whether programs created and funded by congressional enactment are efficiently and effectively satisfying Congress's stated goals. See H.R. Rep No. 91-1215 at 17-18, reprinted in 1970 U.S.C.C.A.N. 4417, 4432-33 (House Report to the 1970 Act describing the new "extension[]" of GAO's work in a section entitled "Oversight and Program Analysis Assistance to the Congress," and stating that GAO's new non-audit responsibilities were intended to assist Congress in "determining whether existing programs are being administered in accordance with congressional intent" and in "exploring the advisability of modifying or even of abolishing such programs") (emphasis added). As then-Comptroller General Staats explained, § 717(b) clarifies GAO's "charter to review and evaluate Federal and federally assisted programs as to whether these programs are being carried out as intended by the Congress. In other words, [the statute allows GAO to determine] whether programs are achieving congressionally stated objectives in the most effective manner and at the lowest cost." Letter from Comptroller General Elmer B. Staats to Rep. B.F. Sisk (Oct. 31, 1969) (Pl's. S.J. Mem. Ex. 7) (emphases added).

Finally, in the General Accounting Office Act of 1980, 94 Stat. 311, 312, Congress added the current provisions of 31 U.S.C. § 716(b), which purport to provide a judicial-enforcement mechanism to assist the Comptroller General in his efforts to inspect agency records. Where "an agency record is not made available to the Comptroller General," he may make a written request to the head of the agency. § 716(b)(1). If the agency head does not provide the requested records within twenty days, the Comptroller General may report that fact to the President, the Director of the Office of Management and Budget, the Attorney General, the agency head, and Congress. Ibid. The Act provides that, after waiting twenty more days, the Comptroller General may initiate litigation "to require the head of the agency" to produce the records. § 716(b)(2) (emphasis added). No suit may be filed, however, if the records sought pertain to foreign intelligence or counterintelligence, if the records are exempt by statute from disclosure to the Comptroller General, or if the President or the OMB Director certifies within twenty days of the Comptroller General's report that the records would be exempt from disclosure under the Freedom of Information Act's exemptions for deliberative or confidential law enforcement records and that disclosure would "impair substantially the operations of the Government." § 716(d)(1).

Title 31 defines the term "agency" to mean "a department, agency, or instrumentality of the United States Government." 31 U.S.C. § 101. Nothing in either the text or legislative history of title 31 identifies the President, the Vice President, or close presidential advisers within the definition of "agency" subject to suit by the Comptroller General.

II. The Present Dispute

On January 29, 2001, the President created the NEPDG, 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. Compl. Ex. A. Acting pursuant to the powers granted to the President by the Constitution, including the powers to obtain opinions from the principal officers in the Executive Branch and to recommend for the consideration of Congress such measures as the President judges "necessary and expedient," see U.S. CONST. art II, § 2, cl. 2; id. art. II § 3, the President charged the NEPDG to develop, under the Vice President's leadership, a national energy policy and "to gather information, deliberate, and * * * make recommendations to the President." Compl. Ex. A at 2. The NEPDG made its recommendations to the President in May 2001. Under the terms of the President's memorandum, the NEPDG ceased to exist by September 30, 2001. Id. at 3.

Even before the NEPDG completed its work, two individual congressmen, Rep. John D. Dingell, who happens to be the ranking minority member of the House Committee on Energy and Commerce, and Rep. Henry A. Waxman, who happens to be the ranking minority member of the House Committee on Government Operations, asked GAO to investigate the manner in which the NEPDG conducted its business. Compl. ¶ 21. Solely as a result of this request, GAO initiated an investigation. Id. at ¶¶ 21-22. See also id. at ¶ 14. GAO initially demanded access to a broad range of documents as well as interviews with members and staff. Id., Exh. C. Although it questioned GAO's legal authority to investigate the NEPDG, the Office of the Vice President did provide, as a matter of comity and reserving all authorities and privileges, information concerning the composition of the NEPDG staff, the nature of their activities, the number and dates of NEPDG meetings, and its expenditures. Id. at ¶ 26, 30.

GAO persisted in its sweeping requests for information about the NEPDG. Following informal attempts at an amicable resolution, the Comptroller General formally demanded a broad

range of information under 31 U.S.C. § 716(b) on July 18, 2001. Among the categories of information he sought were the identities of all persons who attended NEPDG meetings, information regarding staff, the identity of all persons consulted by the Vice President and NEPDG staff, the contents of all discussions with such persons (including minutes and notes of such meetings), and the criteria used to determine with whom the Vice President and the staff met. Compl. ¶ 39, Ex. I. As alleged in the Complaint, the Comptroller General subsequently withdrew his initial requests for minutes and notes of meetings. Id. at ¶ 42. Nevertheless, as the Complaint and plaintiff's memorandum in support of his motion for summary judgment both make clear, the Comptroller General continues to insist that the Vice President must disclose, inter alia, every person with whom the Vice President met while he was serving as a close presidential adviser discharging express constitutional functions at the request of the President and the "purpose" and "agenda" of each of those meetings. He even demands information concerning what decision-making process the Vice President and his staff followed in "determin[ing] who would be invited to the meetings." Compl. Prayer for Relief ¶ (a); Pl's. S.J. Mem. 25-26,28,34.

The Vice President declined to comply with these sweeping, intrusive, and unprecedented requests because they exceeded the Comptroller General's statutory authority and would unconstitutionally have interfered with the functioning of the Executive Branch. Compl. ¶ 44.[2]

Again invoking § 716, the Comptroller General reported the existence of the dispute to the President, the Vice President, Congress, the Attorney General, and the Director of the Office of Management and Budget on August 17, 2001. Id. at ¶ 47. On September 6, 2001, the Office of the

[2] As the Complaint correctly notes, GAO also pursued similar inquiries with other agencies, whose heads were members of the NEPDG. Those agencies responded to GAO's requests, except to the extent that the requests overlapped with those directed to the Vice President for meetings held by the Vice President or NEPDG staff. Compl. ¶ 51.

Vice President provided certain additional information relating to the identities of the NEPDG staff, id. at ¶ 52, but again declined to provide the expansive range of documents demanded. The Comptroller General then filed this unprecedented action, initiating a lawsuit, purportedly under 31 U.S.C. § 716(b), for a judicial decree forcing the Vice President to comply with the Comptroller General's demands for information regarding the deliberations of the President's internal task force.

ARGUMENT

The Comptroller General alleges a right to documents concerning the discharge of the President's constitutional functions in the possession of the President's closest advisers, and indeed the President himself. That alleged right is completely inconsistent with the constitutional system of separation of powers. That doctrine limits the role of the judiciary to deciding only those cases where the plaintiff has a genuine stake in the outcome of the litigation. Where, as here, a plaintiff has not suffered any personal injury and attempts to assert only the general, institutional interests of Congress, he lacks standing. Moreover, even when parties have had standing, courts in comparable cases have relied on principles of separation of powers to decline to exercise jurisdiction, remitting such matters to the political branches for resolution. In addition, the Comptroller General lacks the statutory authority he claims, especially in light of separation-of-powers principles. A straightforward construction of the applicable statutes alone compels the conclusion that the Comptroller General's demands in this case are ultra vires. That conclusion is only bolstered by the separation-of-powers implications of this case; the principle of constitutional avoidance clearly precludes the Comptroller General's overly expansive interpretation of his statutory authority. Finally, if the Comptroller General's sweeping construction of his statutory authority were correct, then his demands for documents from the Vice President would violate the separation of powers by directly interfering with the President's ability to discharge his express constitutional functions and

by providing a legislative agent with an executive power to seek judicial enforcement of the law.

I. Plaintiff Lacks Standing to Maintain This Action

This Court need not reach the merits of this dispute because the Comptroller General lacks Article III standing to bring this suit. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Raines v. Byrd, 521 U.S. 811, 818 (1997) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976)). It is a bedrock of Article III's case-or-controversy requirement that a plaintiff must establish his personal standing to sue. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (plaintiff bears burden of establishing standing); see also Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982).

The Supreme Court has repeatedly emphasized that a core purpose of Article III's standing doctrine is to safeguard the proper separation of powers by preventing courts from wading into disputes that are better resolved by the political branches of government. "[T]he law of Article III standing is built on a single basic idea – the idea of separation of powers." Allen v. Wright, 468 U.S. 737, 752 (1984). These separation-of-powers concerns are heightened where the courts are asked to resolve a dispute between the coordinate political branches. The "standing inquiry [is] especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Raines, 521 U.S. at 819-20 (citations omitted).

To satisfy his burden of establishing standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen, 468 U.S. at 751. Whether a plaintiff possesses standing "often turns on the nature

and source of the claim asserted." Warth v. Seldin, 422 U.S. 490, 500 (1975). The Supreme Court has "consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." Raines, 521 U.S. at 819.

This "personal stake" requirement is of particular concern in a suit, such as this one, brought to vindicate congressional interests. See Raines, 521 U.S. at 818-20. Under those circumstances, an individual plaintiff must assert a personal, not institutional, interest to establish injury in fact. Id. at 820-21. Because plaintiff's Complaint does not allege any such personal stake in this case, it must be dismissed for lack of standing.

Indeed, this suit is far removed from an exercise of the "judicial Power" and the resolution of "Cases" and "Controversies" as the Framers understood those terms. As the Supreme Court has explained, "Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 774 (2000) (citation omitted). There certainly is no history or tradition that would support inter-branch lawsuits, much less inter-branch suits brought by a mere agent of Congress.

In Raines, the plaintiffs were members of Congress challenging the validity of the Line Item Veto Act, which they had opposed as legislators. They brought suit under a provision of the Act that purported to grant standing and authority to challenge the Act's constitutionality to "[a]ny member of Congress." 521 U.S. at 815 (citation omitted). The plaintiffs claimed that the Act injured them by altering the balance of powers between the executive and legislative branches and by changing the effectiveness of their votes on appropriations bills. At the outset, the Supreme Court warned that "[i]n the light of th[e] overriding and time-honored concern about keeping the Judiciary's power

within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute." Id. at 820. "Instead," the Court explained, "we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." Ibid.

The Court in Raines found no such injury on the part of the individual members of Congress. At most, the Court ruled, the members had only alleged "institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." 521 U.S. at 821. Because "the institutional injury they allege[d was] wholly abstract and widely dispersed," id. at 829, it was insufficient to confer standing on any individual member of Congress.[3]

The Raines Court also emphasized that history cut strongly against legislative standing. "It is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." 521 U.S. at 826. The Court recounted separation-of-powers disputes that arose over more than a century of the Nation's history and concluded that in each case, neither Congress nor the Executive sought judicial intervention. Id. at 826-828. While the Court acknowledged that "[t]here would be nothing irrational about a system that granted standing in these cases," it held that such a system "is obviously not the regime that has obtained under our Constitution to date." Id. at 828. Rather, "[o]ur regime contemplates a more restricted role for Article III courts." Ibid.

The Raines Court held that Congress cannot evade the Article III requirement of a

[3] The Supreme Court contrasted Raines with Powell v. McCormack, 395 U.S. 486 (1969), where it recognized the standing of an individual congressman to challenge his expulsion by the House because he had a personal interest in, inter alia, receiving a congressional salary.

particularized injury by authorizing an individual who lacks such an injury to bring suit. "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." 521 U.S. at 820 n.3. Accordingly, the Court found no Article III standing despite the Line Item Veto Act's express authorization of "[a]ny member of Congress" to bring an action for declaratory and injunctive relief challenging the Act's constitutionality.

The Supreme Court in Raines emphasized that Congress itself had taken no action to press the dispute and that individual congressmen had alternative remedies they could pursue:

> We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action * * * . We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach) * * * .

521 U.S. at 829 (footnote omitted). The Raines Court cited Bender v. Williamsport Area School Dist., 475 U.S. 534, 544 (1986), and United States v. Ballin, 144 U.S. 1, 7 (1892), for the proposition that legislative bodies must generally act collectively. 521 U.S. at 829. The absence of such collective action precludes the assertion of an institutional injury, even where Congress has initially authorized suits by certain individuals.

In two subsequent cases, the D.C. Circuit has applied this same rule to preclude challenges by individual members of Congress on standing grounds. In Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999), cert. denied, 529 U.S. 1012 (2000), the court held that individual members of Congress lacked standing to challenge an executive order on the protection of rivers on the ground that the order denied them the opportunity to vote on the order's subject matter. The court found such a claimed injury "identical" to that dismissed by the Supreme Court in Raines as insufficient. 181 F.3d at 117. And, in Campbell v. Clinton, 203 F.3d 19, 20-21 (D.C. Cir.), cert. denied, 531 U.S. 815 (2000), the court held that individual congressmen lacked standing to challenge the President's

alleged noncompliance with either the War Powers Resolution, 50 U.S.C. § 1541 et seq., or the War Powers Clause of the Constitution. The court confirmed that individual members do not have standing to assert Congress's institutional interests in an inter-branch dispute because "political self-help [is] available to congressmen," in the form of power over appropriations or even "the possibility of impeachment." 203 F.3d at 23, 24. "Indeed," the court reasoned, "Raines explicitly rejected [the] argument that legislators should not be required to turn to politics instead of the courts for their remedy." Id. at 24.

Raines, Chenoweth, and Campbell preclude the Comptroller General's standing in this case. Here, the Comptroller General, is simply acting as a surrogate for two individual members of Congress, purportedly to vindicate an institutional Legislative Branch interest in access to executive branch documents. The Comptroller General makes no claim of any individualized or personal injury to himself. To the contrary, he asserts that he instituted this action as an agent of Congress, acting at the behest of two individual members. Nor do the two congressmen assert a personal interest in the documents, and the only legitimate interest that could be asserted by congressmen qua congressmen would be for the use of the documents necessary for the legislative process. The Comptroller General lacks standing to vindicate that institutional interest, as Raines makes clear. This is particularly true where, as here, Congress has numerous potential political avenues for obtaining information it needs for legislative purposes, and Congress and the Executive Branch have traditionally used their political mechanisms to resolve disputes over documents. Indeed, as GAO has acknowledged, if it fails to obtain documents under § 716, "Congress could invoke its own authorities to attempt to gain access." Pl's. S. J. Mem. Ex. 6, at 14. The give and take of informal interactions between Congress and the Executive Branch, on occasion backed by more formal mechanisms of, e.g., congressional subpoenas — not judicial actions brought by congressional

agents — is "the regime that has obtained under our Constitution to date." Raines, 521 U.S. at 828.[4]

Here, however, no House of Congress or congressional committee has invoked the traditional mechanisms to obtain information or has undertaken any effort to obtain any of the records plaintiff seeks. As in Raines, neither House of Congress has authorized any action on behalf of either the Senate or the House. Raines thus makes clear that individual Members of Congress cannot assert Congress's institutional interests.

Section 716's authorization for judicial actions does not suffice to give the Comptroller General standing. As Raines demonstrates, the "authorization" that is potentially relevant to the standing inquiry is an authorization by Congress acting collectively after a particular dispute has arisen, not some general statutory authorization to file suit made in advance of a particular dispute. See 521 U.S. at 820, 829. In sum, as was the case with the plaintiffs in Raines, the Comptroller General "ha[s] alleged no injury to [himself] as [an] individual[] (contra, Powell), the institutional injury [he] allege[s] is wholly abstract and widely dispersed (contra, Coleman), and [his] attempt to litigate this dispute at this time and in this form is contrary to historical experience." Id. at 829.

Indeed, plaintiff's claim presents an even more attenuated case for standing than the claims in Raines, Chenoweth, or Campbell because this suit is not brought by a member of Congress, but by a congressionally created stalking horse. The Comptroller General acts as Congress's agent, Bowsher, 478 U.S. at 732, and, as such, he necessarily seeks to vindicate Congress's institutional interests. And here, the Comptroller General is essentially acting to fulfill the curiosity of two

[4] Notably, the Constitution provides for the political branches to address each other directly in the governance of the Nation in various ways, see, e.g., U.S. CONST. art. II, § 3 (President authorized to "give to the Congress Information of the State of the Union," and to "recommend to their Consideration such Measures as he shall judge necessary and expedient"); id. art. I, § 7, cl. 2. (Congress required to "present[]" bills for President's review, and if he disapproves he must return it "with his Objections"); id. art. I, §§ 2,3 (describing impeachment power), but provides no mechanism for invoking judicial resolution of inter-branch disputes.

individual members. While Raines left open the question of whether Congress itself could bring suit for institutional injuries through a majority vote of its members (or the members of one chamber), it makes clear that anything short of such collective action does not satisfy Article III. 521 U.S. at 827-30 & n.10. If Congress could not delegate to individual members the right to sue in Raines, 521 U.S. at 820 n.3, it, a fortiori, cannot delegate that right to a surrogate acting at the request of a few individual members. (Indeed, purporting to do so creates unique separation-of-powers problems.) Were it otherwise, the holding in Raines would be entirely ineffective and inexplicable. GAO, acting as an agent of Congress, but without the specific authorization of even one House of Congress, simply cannot satisfy the particularized, personal injury requirement of Article III.[5]

II. This Action Is Also Nonjusticiable under the Doctrine of Equitable Discretion

Even if plaintiff had standing, the D.C. Circuit has practiced restraint in cases of this type, in recognition of the same separation-of-powers concerns that underpinned the Supreme Court's holding in Raines. Disputes between the executive and legislative branches over access to documents date back to the Washington Administration. Judicial resolution of these inherently political disputes, however, is virtually unprecedented. Raines, 521 U.S. 826-828. That no court has ever examined GAO's statutory authority to sue the Executive Branch under § 716 is no mere

[5] Indeed, even if a suit by the Comptroller General could somehow be treated the same as a suit brought by Congress as a whole (rather than by the two individual members who requested the investigation), plaintiff would still lack standing for the basic reasons articulated in Raines. This unprecedented GAO suit threatens core separation-of-powers values by injecting the courts into inter-branch disputes. Such judicial actions are not "the regime that has obtained under our Constitution to date," Raines, 521 U.S. at 828, and Article III standing principles prohibit this innovation. As explained below in Part IV, Congress 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, and therefore it simply has not suffered any judicially congnizable injury sufficient to satisfy Article III. Moreover, as explained below in Part III.D, the Comptroller General has not followed the procedures for initiating suit set forth by Congress, and so this suit has not been "authorized" in any sense of the term.

coincidence. No Comptroller General has ever sued under those provisions (see Pl's. S.J. Mem. 17). That record presumably reflects that the courts, rather than enter this inherently political thicket, generally leave such political disputes for resolution by the political branches through the political process, and that the political process has proved capable of resolving such disputes in the past. Indeed, as demonstrated below, these concerns have led courts, even when faced with demands sanctioned by full committees or even full chambers of Congress, to decline to hear such cases. This lawsuit provides an even less compelling circumstance for departure from this longstanding tradition of judicial restraint, as no legislative body has authorized either GAO's request for records or this litigation.

Even before the Supreme Court confirmed that Article III precludes suit by individual members of Congress to vindicate institutional interests, the D.C. Circuit accommodated the serious separation-of-powers concerns inherent in inter-branch disputes under the equitable or remedial discretion doctrine, which calls for courts to refrain from exercising jurisdiction over such litigation. The D.C. Circuit first expressly applied that doctrine in cases brought by legislators where the standing or political-question doctrines were thought to be insufficient means of articulating the separation-of-powers concerns presented by such cases. See Riegle v. Federal Open Market Comm., 656 F.2d 873, 880-81 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981). Thus, the D.C. Circuit concluded, "[t]he most satisfactory means of translating our separation-of-powers concerns into principled decisionmaking is through a doctrine of circumscribed equitable discretion" to be applied in cases "[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators * * * ." Id. at 881; see also Melcher v. Federal Open Market Comm., 836 F.2d 561 (D.C. Cir. 1987), cert. denied, 486 U.S. 1042 (1988); Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985). Accordingly, where individual members have

sought judicial review of executive action in advance of any action by Congress itself, courts have repeatedly applied their remedial discretion to withhold relief. See, e.g., Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); Lowry v. Reagan, 676 F. Supp. 333, 339 (D.D.C. 1987).

Those same concerns were presaged in earlier confrontations between the Executive and Congress over documents. In United States v. AT&T Co., 551 F.2d 384 (D.C. Cir. 1976), appeal after remand, 567 F.2d 121 (D.C. Cir. 1977), the Justice Department sought to block production of a telephone company's records of national security wiretaps to a congressional committee in response to a congressional subpoena. The court noted that the subject of the inquiry, wiretap legislation, was a "suitable area of federal legislation," 551 F.2d at 393, and that the House of Representatives, as a whole, had voted to intervene in the lawsuit, thereby negating "the possibility of a wayward committee acting contrary to the will of the House." Id. Acknowledging the interests of both branches and the difficulty inherent in any judicial effort to balance those interests, the court noted that "[t]he legislative and executive branches have a long history of settlement of disputes that seemed irreconcilable." Id. at 394. The AT&T case would have been a relatively easy case for judicial resolution because, unlike most disputes between the Legislative and Executive Branches over documents, the relevant records were in the hands of a non-governmental party. But despite its power to resolve the dispute, the court declined to do so, ordering instead that the parties seek a negotiated solution. In so doing, the court emphasized that a judicial resolution would not necessarily protect the interests of both branches and could forever alter the constitutional balance of powers:

> This dispute between the legislative and executive branches has at least some elements of the political-question doctrine. A court decision selects a victor, and tends thereafter to tilt the scales. A compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance.

551 F.2d at 394; accord Leach v. Resolution Trust Corp., 860 F. Supp. 868, 874-876 (D.D.C. 1994) (dismissing suit filed by congressman).

Applying this same rule, the court in United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983), declined to entertain a declaratory judgment action by the Executive Branch concerning the rights of a House committee to subpoena documents over which the President asserted executive privilege:

> When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted. Judicial restraint is essential to maintain the delicate balance of powers among the branches established by the Constitution.

556 F. Supp. at 152 (citation omitted).

Unlike AT&T or House of Representatives, the present action comes with no legislative endorsement by either House or even by a committee. No subpoena has been issued, no resolution has been passed, and no statute has been enacted in response to this dispute. This controversy thus lacks even the level of contention, urgency, or finality presented in those cases. Consequently, there is an even less compelling need for judicial intervention here.[6]

In a case strikingly similar to this one, this Court in Leach v. Resolution Trust Corp., 860 F. Supp. 868 (D.D.C. 1994), declined to give an expansive reading to a statutory provision allowing access for a ranking minority committee member to agency records otherwise exempt from disclosure under the FOIA. This Court noted that the ranking member had failed to persuade a

[6] As this case amply demonstrates, the equitable jurisdiction doctrine is among "'the doctrines that cluster about Article III'" to "define[] with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." Allen, 468 U.S. 750 (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-1179 (D.C. Cir. 1982) (Bork, J. concurring)). Because those doctrines, which in addition to equitable discretion include standing, mootness, ripeness, and political question, often "overlap[]," the same concerns that should lead this court to apply the equitable discretion doctrine also raise concerns under the ripeness and political question doctrines.

majority of the committee to authorize his request for the documents sought in litigation and that many of the documents sought were, in fact, being produced to the committee. 860 F. Supp. at 874-76. In such circumstances, where a single member of Congress in the legislative minority sought to invoke judicial review, the Court noted that it was "extremely hesitant to interfere with the legislative process" and concluded "that the exercise of its remedial discretion to decline review * * * is the appropriate method of coping with the important separation-of-powers concerns implicated by this suit." 860 F. Supp. at 876.[7]

The same separation-of-powers concerns underlying those cases should lead this Court to dismiss this action. As plaintiff has conceded, the inquiry here originated with a request from two individual members of Congress and may now be supported by some individual Senators. See Pl's. S. J. Mem. 38-39. Neither request came with the authorization of a full House (or even a committee). Although neither Member has the authority to compel the production of any documents on his own, the Comptroller General purports to exercise his discretionary authority on their behalf.[8] The intervention of the Comptroller General, however, cannot change the fact that the two instigating Members lack the support of either a committee or chamber majority. Just as in Leach, neither ranking minority member has been able to persuade a sufficient number of his colleagues to support the request for information. Nor has any of the committees chaired by the interested Senators taken

[7] In Chenoweth, the court noted that the equitable discretion doctrine had developed, in part, as an alternative application of separation-of-powers concerns, after the D.C. Circuit (prior to Raines) had erroneously permitted individual members of Congress to sue the Executive Branch. The court held that Raines compelled dismissal of the claims in Chenoweth for lack of standing. 181 F.3d at 114-116. It noted, however, that the same result would apply under its remedial discretion, as plaintiffs could seek a political solution through legislation. 181 F.3d at 116.

[8] Enforcement of congressional subpoenas is normally preceded by a collective action of a full House, such as authorizing a referral to a U.S. Attorney for prosecution, Wilson v. United States, 369 F.2d 198 (D.C. Cir. 1966). In earlier times, Houses were known to conduct contempt proceedings before the full chamber. In re Chapman, 166 U.S. 661 (1897).

action here. Rather, in substance, the dispute here is still between the interested Members and their colleagues, not the Comptroller General and defendant, and it is precisely this type of dispute for which the equitable discretion doctrine was devised.

Congress is well-equipped under the Constitution to engage in disputes over documents with the Executive Branch, such as through the use of its subpoena power. Even if the House had done so, the same separation-of-powers concerns underlying the decisions in AT&T and House of Representatives, discussed above, would require judicial restraint. That it has not done so here is strong evidence that Congress, as a collective institution, has not deemed this matter of sufficient moment to precipitate the confrontation plaintiff now seeks. As Leach demonstrates, it makes no sense to precipitate constitutional confrontations by allowing a congressional agent ready access to federal court that circumvents the appropriately cumbersome process of getting a full House to take action. Under the equitable discretion doctrine, judicial intervention in these circumstances is simply not warranted.

III. The Comptroller General Has No Statutory Authority to Bring This Lawsuit or to Review the Activities of the NEPDG

Even if the Comptroller General were assumed to have Article III standing to bring this lawsuit (which he does not), and even if the principles of justiciability and equitable discretion were assumed not to warrant its dismissal (which they do), the Comptroller General has failed to state a claim on which relief can be granted. A straightforward reading of the statutes on which he relies does not support the virtually limitless authority he asserts. Accordingly, this Court should dismiss the Complaint.

A. Section 716 does not authorize this lawsuit because the Vice President is not the head of an agency

The Comptroller General's claim to judicial review rests on a statutory provision that purports to allow him to "bring a civil action in the district court of the United States for the District of Columbia to require the head of the agency to produce a record." 31 U.S.C. § 716(b)(2). Plaintiff's extended treatment of his statutory authority under §§ 712 and 717 (see Pl's. S.J. Mem. 23-48) is therefore all for naught if he cannot establish a statutory right to bring a judicial-enforcement action under § 716(b). Yet, the sole defendant in this lawsuit, the Vice President, is not "the head of [an] agency," as § 716(b) requires. Cf. 31 U.S.C. § 716(a) (allowing Comptroller General to "inspect an agency record"). Accordingly, by its plain terms, § 716(b) does not authorize this action. As a result, regardless of whatever "right to access and examine any records of the executive branch" (Pl's. S.J. Mem. 12) the Comptroller General claims, this lawsuit must be dismissed because it is not an attempt to require "the head of [an] agency to produce a record."

In his summary judgment motion, plaintiff contends that "Congress used the term 'agency' in its broadest sense," and that "both the NEPDG and the [Office of the Vice President]" are agencies under § 716. Pl's. S.J. Mem. 49. But like so many of plaintiff's arguments, his so-called plain-meaning argument proves far too much. If taken seriously, it would actually empower the Comptroller General to seek records directly from the President, or from this Court concerning meetings with its law clerks.[9] Plaintiff's attempt to treat the Vice President as an agency head is no

[9] Plaintiff emphasizes that the chapter of title 31 dealing with GAO refines the definition of "agency" by excluding "the legislative branch" and "the Supreme Court." See 31 U.S.C. § 701(1). But under plaintiff's mechanical application of statutory-construction canons, that exclusion would suffice to demonstrate that this Court is an "agency," or at least an "instrumentality" or "office * * * of the Government." Pl's. S.J. Mem. 50. Moreover, under plaintiff's theory, the express exclusion of the Supreme Court would be superfluous if Article III courts were not already included in title 31's general definition of "agency"; and the exclusion of one court certainly implies that all other courts are included. Thus, under plaintiff's construction of title 31, this Court is an "agency" subject

less an affront to our government of separated powers, but it is, in any event, clearly barred by established case law.

1. Congress has not expressly stated that the Vice President is an "agency" under title 31

Contrary to plaintiff's claims, neither the Vice President nor the Office of the Vice President (OVP) can reasonably be considered an "agency." Even if the Vice President or OVP might arguably fall within the nebulous phrase "instrumentality of the United States Government," 31 U.S.C. § 101 (defining "agency"), Congress's failure to state expressly any intent to reach the Vice President prevents this Court from concluding that he is an agency or head of an agency for purposes of title 31.

In Franklin v. Massachusetts, 505 U.S. 788 (1992), the Supreme Court considered whether the President is an "authority of the Government of the United States" and thus an "agency" under the Administrative Procedure Act. Id. at 800 (quoting 5 U.S.C. §§ 701(b)(1), 551(1)). Of course, the President is literally an "authority of the Government." Nevertheless, the Court concluded that, when the President is neither "explicitly excluded" nor "explicitly included," "textual silence is not enough" to make the President an "agency." Id. at 800-801 (emphasis added). Instead, it would "require an express statement by Congress" to establish otherwise. Id. at 801 (emphasis added). As the Court explained, this clear-statement requirement arose "[o]ut of respect for the separation of powers and the unique constitutional position of the President." Id. at 800.[10]

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to the Comptroller General's judicial-enforcement authority.

[10] The Court's reference to "respect for the separation of powers," 505 U.S. at 800, does not change the fact that it required an "express statement," rather than merely invoking the canon of constitutional avoidance to construe a statutory term. Although they are sometimes both implicated in an individual case, the two principles are different. See, e.g., Vermont Agency v. United States ex rel. Stevens, 529 U.S. 765, 787 (2000) (explaining that the Court's construction of the word "person" in the qui tam statute was "buttressed by two other considerations," a clear-statement

Two years later, the Court reconfirmed its holding that the President is not an "agency." See Dalton v. Specter, 511 U.S. 462, 470 (1994). Since then, courts in this Circuit have looked to Franklin's express-statement requirement in construing statutes other than the APA. See Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 905 (D.C. Cir. 1993) (AAPS) ("Although [the anti-nepotism statute] defines agency as 'an executive agency,' we doubt that Congress intended to include the White House or the Executive Office of the President." (citing, inter alia, Franklin)); Tulare County v. Bush, 185 F. Supp. 2d 18, 28 (D.D.C. 2001) ("Because the President is not a federal agency within the meaning of the APA, presidential actions are not subject to review pursuant to the APA. Applying similar logic, the President is not a federal agency for the purposes of [the National Environmental Policy Act]." (internal citations omitted)).

Franklin's clear-statement requirement should apply equally to the Vice President. Like the President, the Vice President has a "unique constitutional position." Franklin, 505 U.S. at 800. He alone, among senior executive-branch officials, is "totally protected from the President's removal power." Meyer v. Bush, 981 F.2d 1288, 1295 (D.C. Cir. 1993). He alone is designated by the Constitution to serve as Acting President (see U.S. CONST. amend. XXV), or to "become President" upon the death of the President elect (id., amend. XX, § 3), or upon the removal, death, or resignation of the President (see id., amend. XXV, § 1). In fact, he and the President are the only two public officials in the United States who are elected through a process involving every State. See id., art. II, § 1 & amend. XII. Similarly, the presidency and vice presidency are the only two

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requirement and the constitutional-avoidance doctrine). In this case, the clear-statement requirement means that Congress must expressly mention the President or the Vice President in a statute (which it has not done in the case of title 31). The canon of constitutional avoidance, as discussed below in Part V, independently means that this Court should, in order to avoid the serious constitutional problems posed by plaintiff's broad readings of §§ 712, 716, and 717, adopt the straightforward constructions offered by the defendant — such as a construction of § 716 that excludes the Vice President from its scope.

offices that are defined in Article II of the Constitution, rather than by statute. Finally, the Vice President alone has legislative functions as the President of the Senate. See U.S. CONST. art. I, § 3, cl. 4. Given his unique constitutional status in the Executive Branch, the Vice President should enjoy the protection of Franklin's clear-statement requirement.

In fact, in a parallel context, Congress itself has already recognized that the President and the Vice President are like each other but unlike federal agencies. The general statutory framework that governs the preservation, handling, and disclosure of federal-government records creates two mutually exclusive categories. See Armstrong v. Executive Office of the President, 90 F.3d 553, 556 (D.C. Cir. 1996), cert. denied, 520 U.S. 1239 (1997). The first category, "agency" records, is covered by the Federal Records Act. See id.; 44 U.S.C. §§ 3101-3107, 3301-3314. The second category is covered by the Presidential Records Act. See Armstrong, 90 F.3d at 556; 44 U.S.C. §§ 2201-2207. Tellingly, Congress has classified the executive records of the Vice President and his staff as "Presidential records" rather than "agency" records. See 44 U.S.C. § 2207 ("Vice-Presidential records shall be subject to the provisions of [the Presidential Records Act] in the same manner as Presidential records."); Armstrong v. Bush, 924 F.2d 282, 286 n.2 (D.C. Cir. 1991) ("The President, the Office of Vice President, and the components of the [Executive Office of the President] whose sole responsibility is to advise the President are subject to the [Presidential Records Act] and create 'presidential records.' The components of the EOP that have statutory responsibility * * * are subject to the [Federal Records Act] and create 'federal records.'").[11]

[11] The Presidential Records Act is not the only statute that distinguishes between the Vice President and agencies. Another was invoked by the court in Haddon v. Walters, 43 F.3d 1488 (D.C. Cir. 1995). The D.C. Circuit determined that Congress did not consider the "Executive Residence" to be an "independent establishment" for purposes of Title VII of the Civil Rights Act of 1964. In doing so, the court looked to an unrelated statute, 3 U.S.C. § 112, which allows "[t]he head of any department, agency, or independent establishment" to detail employees to certain entities in the White House, including "the White House Office, the Executive Residence at the White House,

In this case, there is simply no "express statement by Congress" that includes the President or Vice President within title 31's definitions of "agency." If anything, the General Accounting Office Act of 1980, which added the judicial-enforcement provisions to what is now § 716, indicates that the President and Vice President are excluded from the category of agency heads who are subject to judicial enforcement at the Comptroller General's behest. Section 102 of the Act, which added the judicial-enforcement provisions now codified in § 716, referred generically to the "records of any department or establishment." General Accounting Office Act of 1980, Pub. L. No. 96-226, § 102, 94 Stat. 311, 312 (emphasis added). By contrast, the preceding section of the Act (section 101), which expanded GAO's authority to audit certain confidential accounts, referred three times to agencies and the President using the disjunctive. Twice it referred to "the approval, authorization, or certificate of the President of the United States or an official of an executive agency." § 101, 94 Stat. 311. The third time it referred to "the President or the head of the agency concerned." Ibid.[12] These references show clearly that Congress, at the precise moment when it adopted the judicial-enforcement provision invoked by plaintiff, knew how to include the President within a provision otherwise applicable to agency heads. Congress's failure to do the same thing in § 716's judicial-enforcement provision demonstrates that Congress did not intend for the President or Vice President to be included in that provision. See Brown v. Gardner, 513 U.S. 115, 120 (1994) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate

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[and] the Office of the Vice President." See 43 F.3d at 1490. If the Executive Residence is not an "independent establishment" because those terms are placed in separate lists in § 112, it must also follow that the Office of the Vice President is not an "agency."

[12] These references are currently codified, as amended, at 31 U.S.C. § 3524(a)(1) ("the approval, authorization, or certificate of the President or an official of an executive agency"), and 31 U.S.C. § 3524(a)(2) ("the President or head of the agency").

inclusion or exclusion." (internal quotation marks omitted)); accord Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438 (2002).

In the face of this evidence that Congress did not intend to treat the President or Vice President as the "head of [an] agency" under § 716 — or at best was silent on the question — plaintiff asserts that § 716's "structure" "indicates that Congress envisioned that the Comptroller General could * * * bring suit * * * for records under the control of high-level officials at the White House." Pl's. S.J. Mem. 51. He extrapolates that dubious proposition from the fact that some records may be exempted from the reach of judicial enforcement if they are related to activities designated by the President as foreign intelligence or counterintelligence activities, or if the President or Director of OMB certifies that they would fall within certain FOIA exemptions. See 31 U.S.C. § 716(d)(1)(A) and (C). But the fact that the President may prevent certain agency disclosures does not suggest a right to insist on disclosures directly from the Office of the President or the Vice President.[13]

Many traditional "agencies" have records related to foreign intelligence activities or records that fall within the relevant FOIA exemptions. Thus, § 716(d)(1)(C) shows only that Congress empowered the President or Director of OMB to stop an enforcement action by the Comptroller General against any agency for such records, not that the Office of the President or the Office of the Vice President was to be implicitly included among the agencies subject to the provision. In fact, as plaintiff has indicated, the certification procedure in § 716(d)(1)(C) was employed by the Clinton Administration in connection with the Comptroller General's attempt to obtain access to records of

[13] Of course, this provision has its own constitutional problems. To the extent this statute is construed to authorize a congressional agent to seek documents from the Executive (with no expenditure of political capital by the Congress as a whole) and allow the Executive to resist only if the President expends the political capital inherent in an assertion of privilege, it represents an improper effort by Congress to aggrandize itself at the expense of the Executive.

the Department of Defense and the Department of State. See Access to Executive Branch Records, GAO-01-440R (Mar. 6, 2001) (Pl's. S.J. Mem. Ex. 6).[14]

The only other evidence that plaintiff provides to demonstrate Congress's purported intent to reach the President or Vice President is contained in committee reports associated with the GAO Act of 1980. Of course, as an initial matter, those reports cannot satisfy Franklin's requirement of an "express statement." On its face, Franklin requires "an express statement by Congress." 505 U.S. at 801 (emphasis added). Needless to say, committee reports cannot satisfy this standard. See, e.g., FEC v. Rose, 806 F.2d 1081, 1090 (D.C. Cir. 1986) ("Congressmen typically vote on the language of a *bill* rather tha[n] on reports that accompany it" (emphasis in original, internal quotation marks omitted)). Moreover, abjuring reliance on committee reports is consistent with the manner in which the Supreme Court applies its clear-statement requirements. Unlike mere "interpretative presumption[s]," the Court's clear-statement requirements protect "weighty and constant values," often constitutional ones. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108-109 (1991) (citations omitted). When such requirements apply, "the unequivocal expression" that the Court has "insist[ed] upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report." United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992)

[14] This reasoning also explains why plaintiff over-reaches when he relies on the 1979 testimony of the Director of OMB. See Pl's. S.J. Mem. 54. Testifying on a version of the bill that did not yet include any exclusions in the judicial-enforcement provisions (i.e., no exclusion for records about foreign intelligence activities, nor any general exclusion for records exempted from disclosure to the Comptroller General by other statutes), the Director noted that the judicial-enforcement provisions "could potentially permit the Comptroller General to sue to compel the disclosure of the same documents which section 101 of H.R. 24 would deny him access to." General Accounting Office Act of 1979: Hearing Before a Subcomm. of the House Comm. on Gov't Operations, 96th Cong., 1st Sess. 89, 110 (1979). Because section 101 of H.R. 24 expressly exempted "certain authorities of the Director of Central Intelligence * * * for sensitive foreign intelligence and counter-intelligence activities," as the Director of OMB pointed out (id. at 87, 104), his caution about the potentially broader scope of section 102 was well-taken, even without assuming that section 102 would apply to suits against the President.

(emphases added, internal quotation marks omitted); see also EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 262-63 (1991) (Marshall, J., dissenting) (noting that "[c]lear-statement rules," like the one adopted by the majority in that case, do not operate "to reveal actual congressional intent," rather they "foreclose inquiry into extrinsic guides to interpretation, and even compel courts to select less plausible candidates from within the range of permissible constructions" (emphasis added, internal citations omitted)). Thus, the statutory language is dispositive in demonstrating that plaintiff has not met his burden under Franklin of identifying an express statement by Congress.

Yet, even if — contrary to precedent — the committee reports are considered here, they contain no express statement indicating an intent to include the Vice President within the definition of an agency. Plaintiff relies upon a single sentence in the Senate Report, which refers to "enforcement actions at the Presidential level" and the President's ability to avoid a suit against himself or his close advisers by exercising the certification power now contained in § 716(d)(1)(C). S. Rep. No. 96-570, at 8, reprinted in 1980 U.S.C.C.A.N. 732, 739. That reference, however, which merely assumes without expressly stating that the President is subject to a § 716 suit, is too opaque to satisfy Franklin. More importantly, it is inconsistent with the statutory text. The Senate Report states that the bill allows the President or Director of OMB to "preclude a suit * * * for information which would not be available under the Freedom of Information Act." S. Rep. No. 96-570, supra, at 8, reprinted in 1980 U.S.C.C.A.N. 739. Thus, the report says that the President can prevent the disclosure of records "which would not be available under [FOIA]," or, in other words, that the Comptroller General's access does not extend beyond what is allowed under FOIA.

The Senate Report's description of the President's certification authority is inconsistent with the terms of the statute. The certification authority in § 716(d)(1)(C) contains no broad carve-out or per se exclusion for presidential advisers co-extensive with FOIA, as the Senate Report implies.

Instead, the statute requires a determination (by the President or Director of OMB) that one of two specific FOIA exemptions (out of nine) would apply to the records and that "disclosure reasonably could be expected to impair substantially the operations of the Government." 31 U.S.C. § 716(d)(1)(C). While not insubstantial, that certification power does not extend as far as the protections afforded by FOIA, and its exercise imposes a much higher administrative burden on the Executive than does FOIA. In 1980, as it does today, FOIA did not make available any documents from the President and his principal advisers and assistants; there was no need whatsoever to determine whether documents fell within individual exemptions, or how harmful disclosure might be. All of those records were simply off-limits under FOIA because presidential advisers were "not included within the term 'agency' under the FOIA." Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980); see also Part III.A.2, below.[15] The Senate Report incorrectly suggests that the certification power prevents the judicial-enforcement power from being any broader than FOIA. That inconsistency with the statute renders the Senate Report especially unworthy of respect in attempting to establish an express congressional statement. See, e.g., Public Citizen v. Carlin, 184 F.3d 900, 904 (D.C. Cir. 1999), cert. denied, 529 U.S. 1003 (2000) ("Legislative history may show the meaning of the texts * * * but may not be used to show an 'intent' at variance with the meaning of the text." (quoting In re Sinclair, 870 F.2d 1340, 1344 (7th Cir.1989)). In other words, because the Senate Report mischaracterizes the President's certification power, its apparent assumption that there can be "enforcement actions at the presidential level" should be given no credence. (Moreover, even if that sentence in the Senate Report is taken seriously, the only way to

[15] Kissinger was actually decided the week after the date of the Senate Report. But even before the release of the Kissinger opinion — which affirmed the district and appellate courts on this point — it was settled that presidential advisers were not considered agencies under FOIA. See, e.g., 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 1.2, at 8 (2d ed. 1978).

give practical effect to its conclusion that the Comptroller General's access to presidential-level documents is co-extensive with FOIA is to exclude the President and Vice President from the definition of "agency."[16])

Plaintiff also attempts to locate congressional intent to allow judicial-enforcement against the President and Vice President in the fact that the House and Senate Reports both reprint (in an appendix) GAO's own list of the difficulties it claimed to have had in gaining access to executive branch documents, including two examples involving entities within the Executive Office of the President. See Pl's. S.J. Mem. 52-53. Of course, those appendices, prepared by GAO, are even less convincing as an "express statement by Congress" than the actual committee reports (which were at least prepared by congressional staffers). The Senate Report itself neither discusses any examples of prior access problems, nor does it specifically endorse all of the examples in GAO's list. Nowhere does it indicate that the new provisions would have prevented each of the problems cited by GAO. See S. Rep. No. 96-570, supra, at 5, reprinted in 1980 U.S.C.C.A.N. 736. The House Report is even less helpful to plaintiff. Although it reprints GAO's list in an appendix, the only examples of access problems that the Committee actually describes involved the Department of Defense and the Department of State, not the White House. See H.R. Rep. No. 96-425, at 5 (1979).

There is simply no clear statement of any congressional intent to include the President or Vice President among the agency heads to which § 716(b) applies. To the contrary, given the differences between sections 101 and 102 of the GAO Act of 1980, there are affirmative indications that Congress excluded them. The best that can be said for the Comptroller General's case is that the President and Vice President are "not explicitly excluded" nor "explicitly included"; but such

[16] This is also consistent with the statutory distinction, discussed above, between "agency records," which are subject to FOIA, and presidential and vice presidential records, which are not.

"textual silence" led the Supreme Court to conclude in Franklin that the President is not an "authority of the Government of the United States." 505 U.S. at 800. Under these circumstances, the Vice President cannot be considered an agency or an agency head subject to the judicial-enforcement provisions in § 716.

2. Entities whose "sole function is to advise and assist the President" are not "agencies"

The same conclusion also follows from well-established interpretations of the term "agency" in other statutes dealing with access to records. As mentioned above, even when the judicial-enforcement provisions were added in 1980, it was clear that the definitions of "agency" under the APA and FOIA did not include the President's close advisers or entities whose sole function was to advise and assist the President. The definition of "agency" in title 31 is no broader than those used in the APA and FOIA. Furthermore, as relevant here, the sole function of the Vice President is to advise and assist the President (and the same was true for the NEPDG while it existed). Accordingly, for this independent reason, neither the Vice President nor the NEPDG can be considered to be or to have been an "agency" under § 716.[17]

As the Supreme Court explained just one month before the GAO Act of 1980 became law, telephone notes made by Henry Kissinger while he was serving as Assistant to the President were not "agency records" under FOIA. Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S.

[17] Plaintiff purports to sue the Vice President in part as the Chairman of the NEPDG, but the Vice President is always a constitutional officer, regardless of the "capacity" in which he is alleged to have acted. This means that Franklin applies to him regardless of how he is characterized by plaintiff. Moreover, as a matter of law, the NEPDG ceased to exist by September 30, 2001, several months before this lawsuit was filed (see Compl. Ex. A at 3 (Memorandum from the President directing that "[t]he Energy Policy Development Group shall terminate no later than the end of the fiscal year 2001")), which would render moot any suit against the Vice President as Chairman of the NEPDG. Nevertheless, defendant discusses here why the NEPDG was not an "agency," and thus why the Vice President could not have been the head of an agency by virtue of being Chairman of the NEPDG.

136, 156 (1980).[18] The FOIA defines "agency," then and now, to include not only the APA's definition of "agency" (any "authority of the Government") but also "any * * * establishment in the executive branch of the Government (including the Executive Office of the President)." 5 U.S.C. §§ 551(1), 552(f)(1). In spite of that broad definition, the Court concluded that "the 'Executive Office' does not include the Office of the President," and therefore that "'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President' are not included within the term 'agency' under the FOIA." Kissinger, 445 U.S. at 156 (quoting H.R. Conf. Rep. No. 93-1380, at 15 (1974)).

The D.C. Circuit has repeatedly applied this exception for presidential advisers to entities within the White House and the Executive Office of the President that advise and assist the President. For example, in Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993), the court considered an entity similar to the NEPDG. The plaintiff had brought a FOIA action against President Reagan's Task Force on Regulatory Relief, which was headed by then-Vice President Bush and included certain cabinet members as well as the President's Assistant for Policy Planning. Id. at 1289. The court concluded that the task force was not an "agency" by focusing on "three interrelated factors": "how close operationally the group is to the President, what the nature of its delegation from the President is, and whether it has a self-contained structure." Id. at 1293. Ultimately, the court concluded that the task force primarily advised the President; because it did not "exercise substantial independent authority," its members — including the cabinet officers — "were acting, in truth, just as would senior White House staffers." Id. at 1297.

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[18] This portion of the Court's opinion — which appeared in Part III — was unanimous. See Kissinger, 445 U.S. at 161 (Brennan, J., concurring in part and dissenting in part) (dissenting from Part II of the Court's opinion); id. at 162 n.3 (Stevens, J., concurring in part and dissenting in part) ("I agree with Part III of the Court's opinion that the summaries of Dr. Kissinger's telephone conversations when he was a Presidential adviser were not 'agency records' * * * .").

In other cases, the D.C. Circuit has determined that the National Security Council and the Counsel to the President are not agencies under FOIA. See Armstrong, 90 F.3d at 565 (National Security Council); National Sec. Archive v. Archivist of the United States, 909 F.2d 541, 545 (D.C. Cir. 1990) (Counsel to the President). More recently, this Court has concluded that the logic that excludes the President and his staff from the definition of "agency" necessarily excludes the Vice President and his staff as well:

> Offices within the White House whose functions are limited to advising and assisting the President do not come within the definition of an 'agency' within the meaning of FOIA or the Privacy Act. This includes the Office of the President (and by analogy the Office of the Vice President) and undoubtedly the President and Vice President themselves.

Schwartz v. United States Dep't of Treasury, 131 F. Supp. 2d 142, 147 (D.D.C. 2000), aff'd, 2001 WL 674636 (D.C. Cir. 2001). Several other decisions have applied the presidential-adviser exception to the Government in the Sunshine Act or the Privacy Act, both of which borrow FOIA's definition of "agency."[19]

The term "agency" in § 716 (which does not expressly refer to "the Executive Office of the President") should, a fortiori, be read to incorporate the same exemption for presidential advisers. The GAO Act of 1980 referred to the "records of any department or establishment." Pub. L. No. 96-226, § 102, 94 Stat. 311, 312 (1980). The current version speaks simply of "agency," which is defined as "a department, agency, or instrumentality of the United States Government." 31 U.S.C. § 716(b); id. § 101. When applied within the Executive Branch, those references are, if anything,

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[19] See Rushforth v. Council of Econ. Advisers, 762 F.2d 1038, 1043 (D.C. Cir. 1985); Dale v. Executive Office of the President, 164 F. Supp. 2d 22, 25-26 (D.D.C. 2001); Tripp v. Executive Office of the President, 200 F.R.D. 140, 143-146 (D.D.C. 2001); Broaddrick v. Executive Office of the President, 139 F. Supp. 2d 55, 58-60 (D.D.C. 2001); Sculimbrene v. Reno, 158 F. Supp. 2d 26, 29-35 (D.D.C. 2001); Falwell v. Executive Office of the President, 113 F. Supp. 2d 967, 970 (W.D. Va. 2000); but see Alexander v. FBI, 971 F. Supp. 603, 606-607 (D.D.C. 1997).

less inclusive than FOIA's definition of "agency," which includes any "authority of the Government" and "any executive department * * * or other establishment in the executive branch of the Government (including the Executive Office of the President)." 5 U.S.C. §§ 551(1), 552(f)(1).

In this case, the sole function of the Vice President and the NEPDG was to advise and assist the President. Of course, as Congress has recognized, that is the Vice President's general function (aside from his duties as President of the Senate). By statute, the Vice President is authorized to appoint and pay staff members in order to enable him "to provide assistance to the President in connection with the performance of functions specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities." 3 U.S.C. § 106(a). There can be no doubt here that the Vice President was acting solely "to provide assistance to the President."

The three-part test set forth in Meyer makes clear that the Vice President and task force here, just like the Vice President and task force there, do not qualify as agencies. First, the NEPDG was "close operationally * * * to the President." 981 F.2d at 1293. Like the Task Force on Regulatory Relief in Meyer, the NEPDG included the Vice President, several cabinet members, and members of the President's personal staff. See 981 F.2d at 1289 (identifying task force members); Compl. Ex. A ¶ 1 at 1-2 (identifying NEPDG members). In addition, the NEPDG reported directly to the President. See Compl. Ex. A. ¶¶ 2-3 at 2.

Second, the President did not delegate "substantial independent authority" to the NEPDG. 981 F.2d at 1297. If anything, the NEPDG had even less independent authority than the task force in Meyer, which not only advised the President but also provided "'guidance' and 'direction' to the OMB Director" and possessed "authority to resolve disputes between agencies and OMB." 981 F.2d at 1294. By contrast, the NEPDG's only functions were to "develop a national energy policy" by "gather[ing] information, deliberat[ing], and * * * mak[ing] recommendations to the President."

Compl. Ex. A ¶ 2 at 2.[20] As the D.C. Circuit has subsequently explained, the "authority to make policy recommendations for approval by the President" is a "quintessentially advisory" function, and demonstrates a lack of substantial independent authority under the Meyer test. Armstrong, 90 F.3d at 561; see also Rushforth v. Council of Econ. Advisers, 762 F.2d 1038, 1041 (D.C. Cir. 1985) (contrasting the ability to "take direct action" with providing "advice and assistance").

Third, the NEPDG did not have a "self-contained structure." 981 F.2d at 1293. Like the task force in Meyer, it was akin to "a partial cabinet group," which "operated out of the Vice President's office * * * borrowing [staff]" from an agency. Id. at 1296; see Def's. Response to Pl's. Statement of Material Facts ¶ 5 (describing NEPDG staff). In addition, because the NEPDG included among its members the "Assistant to the President and Deputy Chief of Staff for Policy, [the] Assistant to the President for Economic Policy, and [the] Assistant to the President for Intergovernmental Affairs" (Compl. Ex. A. ¶ 1 at 1-2), it was obviously "intertwine[d] * * * with the President's immediate personal staff," rather than self-contained. Armstrong, 90 F.3d at 560.

* * *

Because the Vice President, the OVP, and NEPDG are neither agencies nor agency heads, § 716 is inapplicable here. Not only is there no legal obligation to provide access to records under § 716(a), but there is no cause of action granted by § 716(b). Without a cause of action, the Comptroller General has failed to state a claim upon which this Court can grant relief. Thus, under Rule 12(b)(6), this Court can — and should — dismiss the Complaint for that reason alone, without the need to reach any of the other statutory or constitutional arguments discussed below.

[20] It is appropriate to evaluate the NEPDG's role on the basis of the presidential memorandum that established it. See Meyer, 981 F.2d at 1294 (calling the Executive Order that established the task force "the most important indication of the Task Force's role").

B. Section 712 does not apply because the Comptroller General is not investigating the use of public money

Plaintiff's self-aggrandizing method of interpreting his authorizing statute continues with respect to 31 U.S.C. § 712, which provides the first substantive ground for his asserted right to access NEPDG records. Under that section, the Comptroller General is given the power to "investigate all matters related to the receipt, disbursement, and use of public money." There were, of course, certain NEPDG activities that were related to the disbursement or use of public money (see Def's. Response to Pl's. Statement of Material Facts ¶ 7), and the Vice President has already, as a matter of comity, furnished the Comptroller General with documents pertaining to the NEPDG's costs. See id. at ¶¶ 16-17; Compl. ¶ 23.

Plaintiff, however, would turn § 712(1) into a "sweeping" clause of all-encompassing power. Pl's. S.J. Mem. 3. Few things even tangentially associated with the federal government would elude his jurisdictional mandate. No minute of any federal employee's day — from the President on down — would be beyond his searching gaze, because he literally equates time with money: He claims authority "to determine how time, and therefore money, was spent." Pl's. S.J. Mem. 26. He claims the need to know, and the authority to learn, everything about meetings and even the planning processes for them — not just who attended (id. at 25), but also what "subjects [were] discussed at the meetings held by the Vice President" (ibid.), "how many meetings were focused on one subject versus another" (id. at 26), and even how the Vice President and his staff decided who would be invited (id. at 25). All of those details are supposed to provide Congress with the information necessary to determine "whether the NEPDG spent public funds for meetings efficiently and effectively." Id. at 26. Of course, it strains the bounds of credibility to assert that the 1921 Congress, which adopted the predecessor to § 712(1) focused on the need to audit the federal spending process, contemplated any need, let alone authority, to so micromanage the Executive — or, for that matter,

to treat the Judiciary the same way merely because it also "use[s] * * * public money."

Plaintiff's reading of § 712(1) is untenable for three principal reasons. First, it would render superfluous several subsequent grants of authority to the Comptroller General. If the power to investigate "all matters related to the * * * use of public money" were as unbounded as plaintiff contends, there would have been no need, for example, for Congress to have fifty years later added § 717(b) to grant the power plaintiff invokes to evaluate the results of federal programs. Indeed, in addition to rendering superfluous other sources of authority to investigate the government, plaintiff's reading would also render nugatory the procedural and substantive limits contained in those other sources, since § 712(1) could always be used to achieve what would not be permitted under another statutory provision. Plaintiff himself, moreover, describes the enactment of § 717(b) as an "expanded mandate" that required GAO to develop new areas of "expertise beyond auditing and accounting." Pl's. S.J. Mem. 12.

Second, the very breadth of plaintiff's view of his own authority would create obvious constitutional difficulties in many circumstances. Congress's powers to investigate are not limitless. Congress "cannot inquire into matters which are within the exclusive province of one of the other branches of the Government" (Barenblatt v. United States, 360 U.S. 109, 112 (1959); see also Part IV.A, below), and it is inconceivable that Congress could expand its power by delegating it to an agent. Yet it is difficult to conceive of a matter within the "exclusive province of one of the other branches of the Government" that would not be "related to the * * * use of public money" in the sense that plaintiff construes that phrase. 360 U.S. at 112.

Third, plaintiff's reading of § 712(1) ignores canons of statutory construction that would counsel in favor of a reading that would avoid the first two problems. The statute refers to "matters related to the receipt, disbursement, and use of public money." 31 U.S.C. § 712(1) (emphasis

added). The three related terms "receipt, disbursement, and use" should be read together, and the apparently broad concluding term "use" should be read as limited to the class addressed by "receipt" and "disbursement." "Under the principle of ejusdem generis, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." Norfolk & Western R.R. v. Train Dispatchers, 499 U.S. 117, 129 (1991); see also Bazuaye v. United States, 83 F.3d 482, 484 (D.C. Cir. 1996) (following both the ejusdem generis and noscitur a sociis canons to limit the meaning of "any other law enforcement officer"). The word "use" must be read as coming from the same vein as the other two fiscal and accounting terms: "receipt" and "disbursement." This explains why, despite having had § 712(1) authority for decades, GAO's expertise before 1970 was focused in "auditing and accounting" (Pl's. S.J. Mem. 12) and a 1949 congressional summary had emphasized GAO's role in securing "necessary information concerning the financial transactions of the Government," The General Accounting Office: A Study of Its Functions and Operations, H.R. Rep. No. 81-1441 at 6 (1949) (emphasis added).

In order to avoid creating severe statutory problems (by rendering nugatory GAO's other sources of authority to investigate the government), and constitutional problems (by expanding GAO's investigative powers beyond those available to Congress itself), this Court should reject plaintiff's untethered reading of § 712(1), and recognize that GAO's powers under that provision pertain only to financial transactions.

C. Section 717(b) does not apply because the Comptroller General is not evaluating the "results of a program or activity the Government carries out under existing law," and because the procedural prerequisites for a § 717(b) evaluation have not been met

As a general proposition, Congress has the power of inquiry only in aid in its exercise of its legislative power. See Barenblatt, 360 U.S. at 111-112. It has purported to delegate part of its power of inquiry by statute to the Comptroller General. As the Comptroller General acknowledges, his

investigative powers were expanded when, in 1970 and 1974, Congress directed him to "evaluate the results of a program or activity the Government carries out under existing law." 31 U.S.C. § 717(b) (emphasis added). GAO's investigation in this case goes far beyond the limits of that statutory authorization because (1) a "program or activity * * * under existing law" refers only to programs authorized by Congress and does not include the Executive's exercise of constitutional functions; (2) GAO is attempting to investigate the process by which the NEPDG developed its recommendations rather than the "results" of that process; (3) the NEPDG is not included in § 717(b)'s reference to "Government" for the same reasons that it is not included within § 716's references to "agency"; and (4) GAO's inquiry was not requested by a committee or conducted on the initiative of the Comptroller General, as § 717(b) requires.

1. The NEPDG did not engage in a "program or activity * * * under existing law"

The Comptroller General's authority to conduct evaluations under § 717 does not extend to any governmental program or activity, but only to those that are "carrie[d] out under existing law." 31 U.S.C. § 717(b). In the context of the statutory scheme, this is evidently part of Congress's attempt to determine whether the programs and activities it has established by statute are achieving Congress's goals. But the NEPDG was not created pursuant to any statutory program, and it did not attempt to achieve any results intended by Congress. Instead, it was established by the President, pursuant to his Article II powers, including his powers to obtain opinions from the principal officers in the Executive Branch and to recommend for the consideration of Congress such measures as he judges "necessary and expedient." U.S. CONST. art II, § 2, cl. 2; id. art. II § 3. Indeed, the NEPDG's mission of formulating policy recommendations to the President, including proposals for new legislation, is the antithesis of Congress's concern with measuring the success of existing programs or activities.

Taken in context, the phrase "under existing law" refers to statutory law. The limitation to statutory programs is implicit in the fact that evaluations done at the request of a congressional committee are limited to those instances where the committee has "jurisdiction over the program or activity." Id. § 717(b)(3). Moreover, the legislative history of § 717(b) unambiguously shows that the Comptroller General's authority to conduct program-results evaluations was limited to programs created by Congress, and GAO itself has repeatedly characterized its power in precisely that way.

The first general incarnation of § 717's program-results evaluations appeared in the Legislative Reorganization Act of 1970 (1970 Act),[21] which was largely directed at improving Congress's ability to review executive branch implementation of congressionally-created programs. Thus, the House Report described the new "extension[]" of GAO's work in a section entitled "Oversight and Program Analysis Assistance to the Congress," and said GAO's new non-audit responsibilities were intended to assist Congress in "determining whether existing programs are being administered in accordance with congressional intent" and in "exploring the advisability of modifying or even of abolishing such programs." H.R. Rep No. 91-1215, supra, at 17-18, reprinted in 1970 U.S.C.C.A.N. 4417, 4432-4433 (emphases added). These goals underscore that GAO's reviews were to be limited to statutory programs, not constitutional provisions; Congress, of course,

[21] As plaintiff notes, even before 1970, GAO had conducted program-results reviews when Congress had specifically authorized them by statute. As GAO's in-house history program has explained: "As a result of 1967 legislation, GAO began to evaluate government programs, specifically the poverty programs." Roger R. Trask, GAO History Program, GAO History, 1921-1991, GAO/OP-3-HP at 61 (Feb. 1991). "The poverty programs work between 1967 and 1969 * * * demonstrated GAO's qualifications to do program evaluation and was a dress rehearsal for the major thrust of GAO reporting in the 1970s." Id. at 63; see also id. at 90 ("with the effort on the poverty programs between 1967 and 1969, GAO moved into program evaluation"); Staff of the Senate Comm. on Governmental Affairs, 103d Cong., 2d Sess., The Roles, Mission and Operation of the U.S. General Accounting Office, 3 (Comm. Print 1994) (National Academy of Public Admin.) ("in the 1960's * * * GAO developed a new role in evaluating government programs, beginning with an 18-month evaluation of economic opportunity programs that Congress mandated in 1967"). Obviously, this precursor of § 717(b) authority was a review of previously enacted statutory laws.

lacks authority to "modify[]" or "abolish[]" the President's constitutional functions, and thus would not need GAO's assistance in "overseeing" those functions.

The 1970 Act also expanded the responsibilities of congressional committees. In describing those new responsibilities (which were among those that GAO's new powers were supposed to aid), the House Report makes clear that references to "laws" meant only "statutory laws":

> [E]ach Senate standing committee shall review and study * * * the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee. The stated purposes of these reviews and studies is to assist the Senate in its analysis, appraisal, and evaluation of the application, administration, and execution, of the laws enacted by the Congress and in the formulation, consideration, and enactment by the Senate of such modifications of, or changes in, those laws, and of such additional legislation, as may be necessary or appropriate.

H.R. Rep No. 91-1215 at 72-73, reprinted in 1970 U.S.C.C.A.N. 4491 (emphases added); see also id. at 73-74, reprinted in 1970 U.S.C.C.A.N. 4492 (substantively identical discussion about House standing committees). Just as in the descriptions of congressional committees' legislative-review functions, the reference in § 717(b)(3) to requests for GAO from committees "with jurisdiction over the program or activity" should be understood as referring only to programs carried out under the "laws enacted by the Congress."

Several of the Comptroller General's own contemporaneous descriptions of the potential new program-results authority evinced this same understanding, and stand in stark contrast to the virtually unbounded authority he now claims before this Court. Comptroller General Staats, for example, explained that § 717(b) would clarify GAO's "charter to review and evaluate Federal and federally assisted programs as to whether these programs are being carried out as intended by the Congress. In other words, [the statute would allow GAO to determine] whether programs are achieving congressionally stated objectives in the most effective manner and at the lowest cost." Letter from Comptroller General Elmer B. Staats to Rep. B.F. Sisk (Oct. 31, 1969) (Pl's. S.J. Mem. Ex. 7)

(emphases added).[22]

Thus, the legislative history of § 717(b) and the contemporaneous statements of the Comptroller General recognized that program-results evaluations were intended to measure programs against benchmarks established by Congress — and therefore could not be intended to apply to the Executive's formulation of new proposals or exercise of independent constitutional functions, which Congress cannot regulate.[23] That understanding, moreover, comports with the long-recognized

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[22] GAO repeated the express reference to congressional objectives in its in-house Comprehensive Audit Manual, which described the purpose of program-results reviews as to "evaluate whether desired results or benefits of agency programs and activities are being achieved and whether the objectives established by the Congress are being met." Quoted in FREDERICK C. MOSHER, THE GAO: THE QUEST FOR ACCOUNTABILITY IN AMERICAN GOVERNMENT 177 (1979) (emphasis added). Later, in 1975 congressional testimony, Comptroller General Staats explained that "program evaluation and analysis" determined "whether programs are achieving the results which the Congress envisioned in enacting legislation." Review of the Powers, Procedures, and Policies of the GAO: Hearing Before a Subcomm. of the House Comm. on Gov't Operations, 94th Cong., 1st Sess. 4 (1975) (emphasis added); see also id. at 28 ("we are trying to see if the objectives of the statutes have been carried out effectively, and if not, why not" (emphasis added)). Indeed, as plaintiff notes (Pl's. S.J. Mem. 36), even Comptroller General Staats's 1969 testimony described the first question posed by a review of program results as follows: "Is the program accomplishing the results intended as spelled out in the legislative objectives or through implementing directives of the executive branch agency and within the costs anticipated at the time the legislation was enacted?" Capability of GAO to Analyze and Audit Defense Expenditures: Hearings Before the Subcomm. of the Senate Comm. on Gov't Operations, 91st Cong., 1st Sess. 33 (1969) (GAO 1969 Hearing) (emphasis added). The reference to "implementing directives of the executive branch agency" obviously does not contemplate the Executive's constitutional functions.

[23] Plaintiff implausibly purports to find an unexpressed intent by Congress to extend program-results evaluations to the discharge of the Executive's constitutional functions in a two-paragraph summary of a single GAO study — a 1969 review of a 1963 National Security Action Memorandum establishing a National Communications System (NCS) — that was included in a 67-page appendix to a statement Comptroller General Staats provided a Senate subcommittee. See Pl's. S.J. Mem. 43-44 (citing GAO 1969 Hearing 81). Of course, that slight reference could not have worked such a dramatic transformation in the statute's scope, especially in light of the numerous contrary subsequent characterizations of § 717(b) by committee reports and by Comptroller General Staats himself. Moreover, GAO's limited study, whatever the propriety of GAO's conducting it under its authority at the time, merely evaluated whether the National Security Adviser's 1963 directives had been achieved; it did not evaluate the advisory efforts by three separate groups to develop those directives. See Pl's. S.J. Mem. Ex. 5 at 10-11 (describing Emergency Planning Committee, task group, and NSC subcommittee on communications). Therefore, that precedent

distinction between the statutory and constitutional functions of the Executive. In Marbury v. Madison, for example, Chief Justice Marshall's opinion for the Court distinguished between "cases in which the executive possesses a constitutional * * * discretion" and those where "the legislature proceeds to impose on that officer other duties." 5 U.S. (1 Cranch) 137, 166 (1803); cf. Dalton v. Specter, 511 U.S. 462, 474 (1994) (explaining the "recognized" "distinction between claims that an official exceeded his statutory authority, on the one hand, and claims that he acted in violation of the Constitution, on the other").[24]

The NEPDG was not created pursuant to any statutory program, and it did not attempt to achieve any results intended by Congress. Instead, it was established by the President, pursuant to his Article II powers, including his powers to seek opinions from his principal officers and to recommend measures that he judges "necessary and expedient" for consideration by Congress. U.S. CONST. art II, § 2, cl. 2; id. art. II § 3. The NEPDG's sole mission was to make policy recommendations to the President, not to "carr[y] out" any "program or activity" authorized by

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cannot support GAO's attempt to evaluate the process by which the NEPDG developed its advisory recommendations. As its name clearly stated, the National Energy Policy Development Group existed to develop policy and advise the President, not to "carr[y] out" that policy.

[24] The evidence of congressional intent specific to § 717(b) defeats plaintiff's attempts to support his expansive interpretation of the term "existing laws." The fact that the term "law" often includes, for example, the common law (Pl's. S.J. Mem. 41 n.21) is unremarkable, since common law persists only to the extent that the legislature does not supplant it with legislation. Similarly, the fact that the Constitution is law under the Supremacy Clause or Rule 11 (id. at 41) is inapposite, since those provisions are not directed exclusively at areas over which Congress may inquire in aid of its legislative power.

Of course, plaintiff's attempt to define "existing law" in § 717 by reference to uses of that phrase in other contexts is fundamentally misguided. Needless to say, there are many instances in the United States Code where the phrase "existing law" patently means only statutory law. See, e.g., 36 U.S.C. § 2103(c) (excepting American Battle Monuments Commission from "the requirements of existing laws or regulations" for purposes of contracting); 40 U.S.C. § 806 (repealing "[a]ll existing laws or parts of laws inconsistent with the provisions of this chapter"); 31 U.S.C. § 1105(a)(16) (requiring budget to include "the level of tax expenditures under existing law in the tax expenditures budget * * * for the fiscal year for which the budget is submitted").

statute. It thus falls clearly outside the scope of the authority granted by § 717(b) to conduct program-results evaluations.

There is simply no truth to plaintiff's claim that the NEPDG "necessarily carried out activities under a variety of statutes." Pl's. S.J. Mem. 45. Even if any of the NEPDG's recommendations related to the President's own duties under LIHEAP or other statutory programs, the recommendations still came in response to the President's constitutional authority to request them, and were therefore not subject to the usual statutory limitations on agency behavior. See, e.g., Alaska v. Carter, 462 F. Supp. 1155, 1160 (D. Alaska 1978) (invoking constitutional doubt doctrine to "hold[] that any recommendations by the Secretary of Interior on the exercise of the President's powers under the Antiquities Act, which recommendations have been requested by the President, do not come under the NEPA impact statement process [which would otherwise apply to Secretary of Interior]"). Nor is there any evidence that the NEPDG's report took the place of the Energy Secretary's annual report on the Strategic Petroleum Reserve (see Pl's. S.J. Mem. 46), or any other independent statutory obligation.

2. GAO is not evaluating the "results" of a program or activity

Even assuming that the NEPDG somehow carried out a program or activity under existing law (which it did not), § 717(b) only gives GAO authority to "evaluate the results of" that program or activity. 31 U.S.C. § 717(b) (emphasis added). In this case, however, GAO seeks to evaluate the process by which the NEPDG developed its recommendations rather than the results of that process.

The noun "result" means "the outcome of the deliberations of a council or assembly," or "[t]he effect, consequence, issue, or outcome of some action, process, design, etc." 13 OXFORD ENGLISH DICT. 761 (2d ed. 1989). It thus necessarily rests on the contrast between an outcome and the process by which it was produced. In this case, it is obvious that the "results" of the NEPDG's

work were "the outcome of [its] deliberations" (i.e., its actual report). Indeed, plaintiff himself admits that an activity's "results" are its "consequences, effects, or conclusions." Pl's. S.J. Mem. 32 (internal quotation marks and alterations omitted). Yet, he attempts to deprive the term "results" of any function in § 717(b) by asserting that "an inquiry into the NEPDG's processes is necessary to any evaluation of the results of the NEPDG's activities." Pl's. S.J. Mem. 34.[25]

Plaintiff, however, would (plausibly) claim precisely the same power if the statute omitted any reference to results and instead read "[t]he Comptroller General shall evaluate a program or activity the Government carries out." This Court should refuse to adopt a construction that would render utterly superfluous the statutory phrase "the results of." See Duncan v. Walker, 533 U.S. 167, 174 (2001).

Moreover, contrary to plaintiff's assertion, a result or outcome can be evaluated independent of the process by which it was achieved. Proposals like the ones contained in the NEPDG's final report have their own value as policy ideas, and can be meaningfully evaluated on their own terms. Plaintiff's attempt to pretend otherwise is the equivalent of saying that a reviewer cannot comment on the merits of a book or a judicial opinion without being able to analyze the author's word-processing software, work schedule, and sources of inspiration — as well as all of the rough drafts that preceded the published product. GAO's own history belies that attempt.[26] The Comptroller

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[25] Plaintiff's attempt to claim that a "result" includes the "process" that leads to or culminates in that result illogically and unnecessarily conflates two words that are defined — even in plaintiff's dictionary — in relation to each other. See WEBSTER'S THIRD NEW INT'L DICT. 1808 (1993) (defining "process" as a "progressively continuing operation that consists of a series of controlled actions or movements systematically directed toward a particular result or end" (emphasis added)); see also 12 OXFORD ENGLISH DICT. 546 (defining "process" as "[a] continuous and regular action or succession of actions, taking place or carried on in a definite manner, and leading to the accomplishment of some result" (emphasis added)).

[26] As plaintiff points out (Pl's. S.J. Mem. 15-16), in 1993, GAO evaluated the recommendations of the National Performance Review (Vice President Gore's task force to reform

General's conflation of results and process also creates needless friction between the Legislative and Executive Branches. Although the results of a deliberative process may reflect that process and lead to a claim of privilege, the legislative intrusion into the deliberative process itself inevitably creates the prospect of privilege assertions and inter-branch conflict.

Notably, plaintiff's misguided attempt to treat "results" as if it meant "process" provides the alleged foundation for this lawsuit. The Comptroller General began his July 18, 2001 "statutory 'demand letter'" (Compl. ¶ 29) by saying that GAO was "reviewing the process by which the National Energy Policy was developed." Compl. Ex. I at 1 (emphasis added). Similarly, in his August 17, 2001 report purportedly made under § 716, the Comptroller General explained that he was seeking "records relat[ed] to the process by which the National Energy Policy was developed." Compl. Ex. K at 1 (emphasis added). Because that purpose for the investigation was not authorized by the plain statutory language of § 717(b), this suit must be dismissed.

3. As presidential advisers, the Vice President and the NEPDG should not be presumed to fall within § 717(b)'s generic reference to "Government"

As discussed above, in Part III.A.1, it is established that the President or Vice President should not be assumed to be an "authority of the Government" unless Congress expressly states otherwise. Franklin, 505 U.S. at 800. For the same reasons, the term "Government" in § 717(b) should not be read to encompass the President or Vice President absent an express statement by

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government management). GAO's nearly-300-page interim report provided its "initial comments" on the National Performance Review's major recommendations. Although the report noted whether or not GAO agreed with each recommendation, it was "primarily based on [GAO's previously] issued reports and testimonies," rather than on any analysis of the processes pursued by the National Performance Review in developing its recommendations. Management Reform: GAO's Comments on the National Performance Review's Recommendations, GAO/OCG-94-1 at 1, 5-7 (Dec. 3, 1993).

Congress to the contrary. No such express statement exists in § 717.[27]

Similarly, as described above, in Part III.A.2, when the term "agency" includes "any authority of the Government," it is construed so as not to apply to presidential advisers. Thus, the undefined term "Government" in § 717(b) should not be assumed to incorporate those entities within the White House whose sole function is to advise and assist the President, and § 717(b) should not be read to apply to the Vice President or the NEPDG, because they did nothing but give advice to the President.

4. The procedural prerequisites of § 717(b) have not been met because GAO's evaluation was not requested by a committee or conducted on the initiative of the Comptroller General

Under § 717, the Comptroller General may conduct a program-results evaluation only at the request or order of a "House" or "committee of Congress," or "on the initiative of the Comptroller General." 31 U.S.C. § 717(b)(1)-(3). Here, however, none of those preconditions has occurred.

As GAO's General Counsel explained in his June 1, 2001 letter to the Vice President's Counsel, GAO concluded that its "review of the development of the National Energy Policy is * * * required by law" because it was "requested by a congressional committee of jurisdiction." Compl. Ex. G at 1 (emphasis added). In other words, the Comptroller General did not decide to initiate this evaluation. Rather, GAO's Assistant Director for Natural Resources and Environment "supervised the opening of GAO's investigation into the NEPDG" pursuant to her understanding of GAO's Congressional Protocols. 04/08/02 Decl. of Margaret J. Reese ¶ 2 (Pl's. S.J. Mem. Ex. 1). But those protocols incorrectly declare that GAO "has a statutory obligation to fulfill requests" from "committee leaders," which it defines improperly as "those from the committee or subcommittee

[27] Even though Franklin's express-statement requirement is grounded in separation-of-powers concerns, it obviously applies to the exercise of statutory as well as constitutional functions by the President or Vice President. See 505 U.S. at 801 ("We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed" as agency action (emphasis added)).

Chair, Ranking Minority Member (Ranking Member), * * * on a program or activity within the committee's jurisdiction." GAO's Congressional Protocols, GAO-01-145G at 4, 5 (Nov. 2000).

Treating ranking minority members as the equivalent of a "committee of Congress" misconstrues the statute and ignores the democratic foundations and practical realities of Congress. Belatedly recognizing that a request by ranking minority members does not in fact trigger a statutory obligation to conduct an evaluation, plaintiff now portrays GAO's Congressional Protocols as the means by which he had "channel[ed]" the discretion available to him under § 717(b)(1). Pl's. S.J. Mem. 39. Read properly, however, § 717(b)(1) requires at a minimum the Comptroller General to exercise his discretion in a particular instance to initiate an evaluation; it should not allow him simply to rely on a generic policy of treating all requests from ranking minority members as triggering a statutory obligation. Such a policy would contravene Congress's express decision to trigger an automatic investigation only at the request of a majority of a committee or House, and it would be inconsistent with the principles of standing and equitable discretion discussed above.[28]

Where, as here, the Comptroller General asks the judiciary to intervene in a dispute between the two political branches, his failure to exercise his own discretion personally to initiate an investigation may not be dismissed as a kind of harmless error. As described above, in Part II, courts are particularly wary of intervening in such disputes before it is clear that they are truly intractable and that the issue is joined at the highest levels within each branch. For similar reasons, Congress imposed an exhaustion requirement on the Comptroller General when it gave him the power to initiate a civil suit under § 716(b). The drafters of § 716 recognized that any judicial-enforcement action should be taken only as a "remedy of last resort." General Accounting Office Act of 1979:

[28] Moreover, any attempt by the Comptroller General to institute such a suit on his own discretion, without any particular request or authorization from Congress, would only exacerbate those standing and equitable discretion problems.

Hearing Before a Subcomm. of the House Comm. on Gov't Operations, 96th Cong., 1st Sess. 96 (1979) (Rep. Horton); see also Pl's. S.J. Mem. 13 (recognizing that Comptroller General can pursue judicial enforcement "only after exhausting a set of detailed procedures").[29]

Thus, even assuming that Congress possesses the power to bring a lawsuit against the President or the Vice President and delegated that power to its agent, the Comptroller General (which is not the case), the courts should refrain from hearing such a dispute where, as here, Congress's designated agent has not even followed the minimal procedures that Congress contemplated. Here, a GAO staff member initiated an investigation under the erroneous impression that it was "required by law" under § 717(b)(3). There was thus no "decision" as such, but merely a check to see whether the request had come from ranking minority members on a committee of jurisdiction. Of course, once that action was taken, the Comptroller General's own discretion was permanently compromised. He was no longer able to exercise his independent judgment to determine whether to initiate an evaluation, because doing so would second-guess the automatic, but already public, "decision" his staff had made to investigate the NEPDG. Under the circumstances, it would defeat the purpose of the carefully calibrated exhaustion scheme in § 716 to allow this lawsuit to proceed on the basis of an investigation with such a tainted origin.

[29] This exhaustion requirement refutes plaintiff's attempt to assert that this question is "moot" now that four Senate Committee Chairman have expressed their support for "continu[ing] the ongoing investigation." Pl's. S.J. Mem. 39 n.20; Compl. Ex. P. The Comptroller General's "statutory 'demand letter'" (Compl. ¶ 29) was written on July 18, 2001. The purposes of the exhaustion requirement obviously could not be served if the investigation purportedly justifying the July 18, 2001 letter did not become legitimate until the Senate Chairmen wrote their letter on January 22, 2002.

IV. The Statutory Provisions Plaintiff Invokes Would Be Unconstitutional If Applied to Authorize GAO's Investigation of the NEPDG and the Filing of This Lawsuit

Even assuming that § 712(1) or § 717(b) grants, as a matter of statutory construction, the broad investigative powers that the Comptroller General claims (which they do not), and that such an authority is judicially enforceable under § 716 (which it is not), the exercise of those powers against the Executive in the circumstances of this case would violate well-established separation-of-powers principles. The NEPDG functioned pursuant to the President's express Article II powers, including his powers to seek opinions from principal officers in executive departments (art. II, § 2, cl. 1) and to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient" (art. II, § 3). Therefore, Congress is barred from encroaching upon or interfering with the exercise of those functions through a non-textual and delegated investigatory authority. This result is true whether this Court analyzes the question under the per se test applicable to the exercise of express Article II powers, or under the balancing test that has been applied in the context of implied executive powers.[30]

A second constitutional problem would be created if § 716(b) were interpreted to provide the Comptroller General the authority to file this lawsuit against the Vice President: The Constitution does not countenance the spectacle of having a legislative agent exercise executive powers by filing

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[30] In Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898 (D.C. Cir. 1993) (AAPS), the D.C. Circuit considered constitutional concerns arising from interference with the President's ability to seek advice from his "closest advisers." Id. at 910. The court's ultimate holding was one of statutory construction, but it looked to constitutional concerns before it applied the canon of constitutional avoidance to its statutory analysis. The government urged a per se test based on the Recommendations Clause. In its inconclusive discussion of constitutional concerns, the court declared the government's focus on the Recommendations Clause to be "somewhat artificial," and instead found "more persuasive" the notion that constitutional concerns were raised by the "operational proximity to the President himself" of the Task Force on National Health Care Policy. Id. at 908-909. Thus, the court's discussion, rather than resting on a per se test, focused on a balancing test. Defendant discusses both forms of analysis below.

a civil enforcement action against the Executive.

A. The NEPDG's information-gathering and policy-developing activities for the President are within his exclusive enumerated responsibilities under Article II and are beyond Congress's investigative and legislative powers

Article II, section 1 of the Constitution vests "[t]he executive Power" in the President of the United States. In order to fulfill his executive duties, the President must be able to deliberate with his advisers and to obtain information. Both the Opinion Clause and the Recommendations Clause reflect this need and provide textual foundations for the President's powers to gather information and develop policy — and both clauses also show that those executive powers are not subject to interference from Congress.

During the Constitutional Convention of 1787, the Framers considered several times whether to provide the President with some form of advisory council that included representatives of the Legislature or Judiciary. See JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 at 487-488, 509-510, 569, 598-602 (W.W. Norton & Co. 1966) (debates of Aug. 20, 22, and 31 and Sept. 7, 1787). They rejected each of those proposals, and chose instead to enshrine in Article II the President's power to seek advice from those under his direct control. As Alexander Hamilton subsequently explained, the unity of the Executive would be destroyed if the President were "subject[ed] in whole or in part to the controul and co-operation of others, in the capacity of counsellors to him." THE FEDERALIST, No. 70 at 472-73 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961). The Opinion Clause thus provides the President with information-gathering powers within the unitary structure of the Executive, which in turn establishes that the power to receive opinions from executive officers is not subject to interference from the other branches. As one commentator has explained:

> The juxtaposition of the power the President was granted [in the Opinion Clause] and the restrictions on that power which were rejected suggests that the Framers expressly

> granted the President a discrete sphere of control over the process by which he gathers the information necessary to make a decision; a process that — within the context of the separation of powers — cannot be interfered with by the other two branches of government.

Neil Thomas Proto, The Opinion Clause and Presidential Decision-Making, 44 MO. L. REV. 185, 195 (1979) (emphases in original).

The Recommendations Clause (along with the State of the Union Clause) provides further textual evidence of the President's powers to gather information and develop and propose policy. Those clauses expressly contemplate that the President will, "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" — two functions that he may even accomplish by invoking his power "to convene both Houses [of Congress], or either of them." U.S. CONST., art. II, § 3. The President's duties to inform Congress and to recommend measures for its consideration both presuppose that the President "must possess more extensive sources of information * * * than can belong to [C]ongress." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 807 (Ronald D. Rotunda & John E. Nowak eds., Carolina Acad. Press 1987) (1833). Of course, those duties also presuppose that the President will be able to cultivate his sources of information, and also to develop the "measures" that he will recommend, because the quality of his recommendations will be commensurate with his ability to inform himself and deliberate about them.[31] Most importantly, the Recommendations Clause expressly vests the exercise of those powers in the President's own discretion. Because the President's duty requires him to recommend only

[31] An earlier draft of the Recommendations Clause had referred to "Matters" rather than "Measures." "The greater presidential participation needed to submit 'measures' implicitly presumes that there exist presidential prerogatives of investigation, inquiry, and advocacy by which to formulate and articulate such proposed solutions." J. Gregory Sidak, The Recommendation Clause, 77 GEO. L.J. 2079, 2084 (1989).

what "he shall judge necessary and expedient" (U.S. CONST., art. II, § 3 (emphasis added)), the Constitution indicates clearly that this exclusive power must remain free from interference.

Thus, the powers in both the Opinion and Recommendations Clauses are entrusted exclusively to the President — and are textually committed to his discretion. Congress cannot regulate or exercise its derivative power to investigate the exercise of those functions. As the Supreme Court explained in Barenblatt v. United States, 360 U.S. 109 (1959): "Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." Id. at 111-112.[32] For this reason, the Supreme Court has consistently refused to tolerate legislative intrusions on the Executive's express powers and duties. See INS v. Chadha, 462 U.S. 919 (1983) (Presentment Clause); United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1871) ("[I]t is clear that the legislature cannot change the effect of * * * a pardon."); Public Citizen v. Dep't of Justice, 491 U.S. 440, 482 (1989) (Kennedy, J., concurring) (Congress cannot "encroach[] upon a power that the text of the Constitution commits in explicit terms to the President.").[33]

Interference with the President's information-gathering activities is no less unconstitutional

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[32] As plaintiff acknowledges (Pl's. S.J. Mem. 7), Congress's power to investigate is only implicit in its power to legislate, and thus it cannot extend beyond the function it is supposed to aid. See McGrain v. Daugherty, 273 U.S. 135, 175 (1927) ("the constitutional provisions which commit the legislative function to [Congress] are intended to include [the power of inquiry] to the end that the [legislative] function may be effectively exercised").

[33] In that case, the three concurring justices found that Congress could not provide a right of access to information about the Justice Department's consultations with the ABA in the process of nominating federal judges without unconstitutionally "interfer[ing] with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution." 491 U.S. at 488 (emphasis added). The rest of the Court in Public Citizen did not resolve this constitutional issue, because it chose to avoid "undeniabl[y]" "formidable constitutional difficulties" by construing the Federal Advisory Committee Act so as not to apply to the Justice Department's consultations with the ABA. Id. at 466 (majority opinion).

when it affects his exercise of his Recommendations or Opinion Clause authority than when it touches on his power to grant pardons, nominate judges, or have legislation presented for his approval or veto. Indeed, the interference with express constitutional functions is particularly grave because both of those clauses directly implicate the information-gathering and policy-development process itself. Although the Recommendations Clause contemplates the transfer of information to Congress, it expressly leaves to the President's judgment what it would be "necessary and expedient" to communicate. As Barenblatt shows, Congress simply lacks authority to inquire into the NEPDG's activities, because they are "matters * * * within the exclusive province" of the Executive. 360 U.S. at 111-112. Where the text of the Constitution explicitly commits a power to the President, the courts "refuse[] to tolerate any intrusion by the Legislative Branch." Public Citizen, 491 U.S. at 485 (concurring opinion) (emphasis in original); see also Schick v. Reed, 419 U.S. 256, 266 (1974) (pardon power "flows from the Constitution * * * and * * * cannot be modified, abridged, or diminished by the Congress"); cf. Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 227 (1995) (Congress cannot interfere with Judiciary's power to issue final judgments).

Allowing the Comptroller General to inquire into or compel disclosure about how the President carried out his constitutional functions with the NEPDG "would constitute a direct and real interference" with the President's core powers, including those granted by the Opinion Clause and Recommendations Clause. Public Citizen, 491 U.S. at 488 (Kennedy, J., concurring); see also Jay S. Bybee, Advising the President: Separation of Powers and the Federal Advisory Committee Act, 104 YALE L.J. 51, 105 (1994) ("Any restriction on the President's access to advice would impede not only his ability to recommend to Congress needed changes, but also his ability to carry out his remaining duties."). The Opinion and Recommendations Clauses expressly commit powers to a particular branch of the Government in the text of the Constitution, which makes any degree of

congressional intrusion unconstitutional. Put simply, the "mere fact" that the statutory provisions on which the Comptroller General relies "would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution * * * is enough to invalidate the Act." Public Citizen, 491 U.S. at 488-89 (Kennedy, J., concurring) (emphasis added).

There can be no question that the virtually unlimited right of access that the Comptroller General asserts would significantly interfere with the process by which the Executive Branch obtains information and exercises its constitutional functions. As the D.C. Circuit has explained, the "mere presence" of legislative agents, even if they "remain completely silent," has significant "potential to influence" the decision-making process that they are observing. FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993). The chilling effect recognized by the D.C. Circuit will be no different if the stages of the decision-making process are reviewed after the fact than if the observations occur while the decision-making process is still ongoing.

Indeed, plaintiff's own arguments contemplate the aggressive regulation of the President's information-gathering and policy-developing powers. He contends that Congress needs to know about the behind-the-scenes operation of the NEPDG to evaluate "the desirability of additional appropriations restrictions to control the use of public money for energy policy development in the future." Pl's. S.J. Mem. 3. Furthermore, he assumes that Congress could impose such restrictions on the Executive to prevent "establishment[s] within the White House" from being "responsib[le] for energy policy development." Id. at 34.

Contrary to plaintiff's suggestions, Congress cannot evade the constitutional limitations on its investigative and legislative powers by invoking its power of the purse. Any attempt by Congress to regulate the President's core textual powers through its power over appropriations would violate

separation-of-powers principles. See United States v. Will, 449 U.S. 200, 226, 230 (1980) (holding that certain appropriations affecting judicial salaries violated Article III). Congress's spending power does not allow it to "impair the President's pardon power by denying him appropriations for pen and paper." OPM v. Richmond, 496 U.S. 414, 435 (1990) (White, J., concurring, joined by Blackmun, J.); see also Klein, 80 U.S. at 147 (holding that Congress could not use an appropriations rider to "impair[] the effect of a pardon, and thus infring[e] the constitutional power of the Executive"). Similarly, in this case, Congress cannot regulate — and, by regulating, attempt to forbid — the President's consultations with whomever he judges necessary to accomplish his constitutional functions under the Opinion and Recommendations Clauses. In sum, the per se test required by Barenblatt and the cases dealing with express constitutional functions applies in this case and clearly forecloses the powers asserted by the Comptroller General.

B. Even under a balancing approach, the President's information-gathering and confidentiality interests greatly outweigh any purported legislative interest here

Even if this Court balances the intrusion on executive power with the legislative interest at stake, rather than applying the per se test of Barenblatt, the Comptroller General's asserted authority would be just as unconstitutional. The threat to the President posed by this case is great because the intrusion is so extensive. On the other hand, the Legislature has no legitimate interest in the information the Comptroller General seeks, and has other means to pursue it in any event.

The D.C. Circuit addressed a somewhat less obvious separation-of-powers threat in AAPS. The plaintiff in that case sought to apply the Federal Advisory Committee Act to President Clinton's Task Force on National Health Care Reform. The court avoided a decision on the constitutional question by applying the doctrine of constitutional avoidance. Nevertheless, it recognized the serious constitutional concerns that would arise from any "statute interfering with a President's ability to seek advice" "from those closest to him, whether in or out of government." 997 F.2d at 910 (internal

citation and quotation marks omitted). In dicta, the court indicated that, were it to reach the constitutional issue, it would apply a standard it extrapolated from Morrison v. Olson and find the statute to be unconstitutional as applied. It summarized that standard as follows: "Morrison tells us to balance how much the interference with the President's executive power prevents the President from accomplishing his constitutionally assigned functions against the overriding need to promote objectives within the constitutional authority of Congress." 997 F.2d at 910.

Under that approach, the Comptroller General's asserted authority to intrude into the President's methods of informing himself for the purpose of proposing policy initiatives "'impermissibly undermine[s]' the powers of the Executive Branch, * * * or 'disrupts the proper balance between the coordinate branches.'" Morrison v. Olson, 487 U.S. 654, 695 (1988). It is hard to imagine a more direct assault on the President's core executive powers than the asserted authority of a congressional agent to superintend the deliberative process by which the Vice President and others formulated policy recommendations for and on behalf of the President. The information that the Comptroller General seeks would expose information-gathering and policy-making activities (including deliberations) at the heart of the Executive Branch. Despite his protestations of restraint, the broad categories of information plaintiff requests in this lawsuit speak for themselves. He asks this Court to require disclosure of everyone that the Vice President met with while he was serving as a close presidential adviser discharging express constitutional functions at the request of the President, the "purpose" and "agenda" of each of those meetings, and even what decision-making process the Vice President and his staff followed in "determin[ing] who would be invited to the meetings." Compl. Prayer for Relief ¶ (a).[34]

[34] Note that these requests belie the Comptroller General's claim in his August 18, 2001 statutory report that "we are not asking for any communications involving the President, the Vice President, or the President's senior advisers." Compl. Ex. K at 4. In any event, the constitutionality

The Comptroller General's asserted authority strikes at the heart of the Executive's constitutional functions. At a minimum, it would intrude upon powers that are textually committed to the Executive — a result that, even taken alone, must weigh heavily in the balance (if it does not dispose of the need for the balancing, see supra). Moreover, just as in AAPS, plaintiff's action "implicates executive powers" because it would interfere with a group that has "operational proximity to the President." 997 F.2d at 898 (emphasis in original). In addition, plaintiff's claim would compromise executive branch deliberations by undercutting the President's well-recognized need for confidentiality. See, e.g., United States v. Nixon, 418 U.S. 683, 708 (1974) ("A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."); In re Sealed Case, 121 F.3d 729, 750 (D.C. Cir. 1997) ("[T]he critical role that confidentiality plays in ensuring an adequate exploration of alternatives cannot be gainsaid. If presidential advisers must assume they will be held to account publicly for all approaches that were advanced, considered but ultimately rejected, they will almost inevitably be inclined to avoid serious consideration of novel or controversial approaches to presidential problems.").[35] As the court in AAPS explained, "[a] group directly reporting [to] and advising the President must have confidentiality in each stage in the formulation of advice to him." 997 F.2d at 910. But requiring "disclosure of the real information-gathering process" would "inevitably * * * compromise[]" the "confidentiality of the advice-giving function." Id. (emphasis added). The Comptroller General's claim in this case would

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of these statutes must be evaluated on the basis of the authority they convey to the Comptroller General (which in his view is virtually limitless), not the authority he has, in fact, exercised in this test case.

[35] In In re Sealed Case, the D.C. Circuit also expressly held that the President's constitutionally protected interest in confidentiality extends to conversations among his immediate advisers for which the President is not present. See 121 F.3d at 750.

compromise the confidentiality of advice within the Executive Branch because he asserts, after all, the authority to investigate not only the "results" of the NEPDG's deliberations, but also the deliberative "process" itself.

Against those great intrusions, plaintiff can offer no bona fide congressional interests. As an initial matter, Congress's legitimate interests are non-existent when it comes to investigating the discharge of functions within the exclusive province of another branch. See Barenblatt, 360 U.S. at 111-112. Congress's non-textual investigative authority is derivative of its legislative authority and Congress could not validly regulate the process by which the Vice President and President formulate presidential recommendations.

Notwithstanding that limitation, plaintiff has suggested several hypothetical reasons why Congress might be interested in the process by which the NEPDG developed its policy recommendations. By and large, those conjectural interests rely on untenable assumptions about Congress's powers — for example, that Congress needs to know whether the NEPDG consulted with a sufficient number of people so that it can determine whether it should exercise its purported power to "attach riders to appropriations laws that prohibit the executive branch from developing comprehensive energy policies through private task force meetings with only selected members of the public." Pl's. S.J. Mem. 27.

Even if plaintiff could identify some legitimate legislative interest in the information, that peripheral interest would clearly be insufficiently weighty to justify intrusion upon the President's exercise of his constitutional powers and his interest in confidential information-gathering and deliberations. Precedent shows that it takes especially heavy interests to outweigh even those interests of the Executive that are only implicitly protected by the Constitution. See, e.g., United States v. Nixon, 418 U.S. at 713 (allowing in camera review of executive communications only

because of a "demonstrated, specific need for evidence in a pending criminal trial"). The D.C. Circuit has indicated just how substantial Congress's interests need to be to warrant disclosure of executive materials. In Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc), the D.C. Circuit, sitting en banc, refused to enforce a congressional subpoena for the Watergate tapes. In doing so, the court recognized the "great public interest in maintaining the confidentiality of conversations that take place in the President's performance of his official duties." Id. at 729. The court said that interest could "be defeated only by a strong showing of need by another institution of government — a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations." Id. at 730 (emphasis added). Applying that standard, the court concluded that a congressional committee's desire to satisfy its legislative responsibilities and its purported "oversight power," was insufficient to overcome the President's paramount interest. See id. at 732-733. Thus, Congress lost because it could not demonstrate that the subpoenaed evidence was "demonstrably critical to the responsible fulfillment" of its appropriate functions. Id. at 731.

Congress's needs for executive branch records are significantly less weighty in this case. Congress has already received the most important information it needs to accomplish its legislative functions: the President's actual policy proposals and initiatives, along with his judgment that those measures are necessary and expedient. Congress may use that information to reach its own independent conclusions about the recommendations. It can also obtain information to assist that process from its own sources, and does not need to know what sources were used in the development of the NEPDG's recommendations.[36] Even so, if Congress truly is interested in further details about

[36] Plaintiff suggests that the validity or desirability of the NEPDG's policy proposals turns in part on who the Vice President and others consulted while developing those proposals. As the Supreme Court has already recognized in the legislative context, the actions of democratically

the President's proposals and initiatives, it may attempt to employ its own information-gathering powers (efforts that have been held to be prerequisites for judicial involvement, see supra Part II).

C. A civil enforcement action brought by a legislative agent against the Executive violates Article II's Take Care Clause

The judicial-enforcement provisions of § 716 also violate the separation of powers by impermissibly assigning an executive power to a legislative agent. Section 716(b) purports to delegate to the Comptroller General the power to enforce a statutorily created right to information. 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.

In Bowsher v. Synar, 478 U.S. 714 (1986), the Supreme Court held that the Comptroller General is Congress's agent and "he may not be entrusted with executive powers." Id. at 732. That result is dictated by the nature of separation of powers: "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." Id. at 726; see also Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 276 (1991) ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it."); Buckley v. Valeo, 424 U.S. 1, 136 (1976) ("[T]he legislature cannot engraft executive duties upon a legislative office * * * ." (quoting Springer v. Philippine Islands, 277 U.S. 189, 202 (1928)).

In Buckley, the Supreme Court invalidated a statutory scheme that allowed the Federal Elections Commission to file enforcement actions, because, as the FEC was then constituted, several of its members had been appointed by Congress. The Court admitted that those legislative agents

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accountable officials stand on their own, regardless of who pressed for or opposed those actions. See Mazurek v. Armstrong, 520 U.S. 968, 973 (1997) ("the fact that an anti-abortion group drafted the Montana law * * * says nothing significant about the legislature's purpose in passing it").

could act in aid of legislative action, but it denied them the authority to seek judicial relief:

> The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed."

424 U.S. at 138 (emphasis added).

The power to file a lawsuit on behalf of the government to vindicate public interests is a quintessentially executive power. Here, Congress has vested that core executive power in its own agent. The Supreme Court's separation-of-powers jurisprudence has consistently recognized the substantial difference between congressional initiatives that force the executive or judiciary to share power with others, and those that actually enlarge Congress's own powers. See, e.g., Morrison, 487 U.S. at 694 ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."); Commodity Futures Trading Comm'n v. Schor, 478 U. S. 833, 856-857 (1986) (contrasting Bowsher's "question of the aggrandizement of congressional power at the expense of a coordinate branch" with the less-serious question of undermining of "the role of the Judicial Branch" "without appreciable expansion of [Congress's] own power"); Buckley, 424 U.S. at 122 ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.").

In other words, there is a salient difference between a statute that creates a so-called "private attorney general" and one that creates an additional public attorney general who is not subject to executive control. See, e.g., Atlantic States Legal Found., Inc. v. Buffalo Envelope, 823 F. Supp. 1065, 1073-1075 (W.D.N.Y. 1993) (upholding citizen-suit provision because "Congress may * * * determine who will vindicate [statutory] rights" and "[a] constitutional concern arises only where

Congress has reserved unto itself the right to control or supervise the enforcement of the rights it created"); Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132, 1138 (E.D. Pa. 1993) (concluding that "citizen suits are not an unlawful delegation of executive power" because Congress has not granted executive power "to a person or persons under its control"); see also Morrison, 487 U.S. at 696 (explaining the Executive's powers to supervise and control the independent counsel; "[m]ost importantly, the Attorney General retains the power to remove the counsel for 'good cause' * * * .").

The aggrandizement in this case is especially egregious because it would allow a legislative agent to wield executive powers against the Executive — and also to invoke the powers of the Judiciary in the process. Because § 716(b), if interpreted to allow this action, would effect a congressional aggrandizement of executive power in flagrant disregard for the Constitution's separation of powers, this Court should refuse to employ it and dismiss the Complaint.

V. This Court Should Avoid Serious Constitutional Problems by Adopting Defendant's Reasonable Constructions of §§ 712, 716, and 717

This Court should adopt the statutory constructions advanced above, in Part III, based on traditional principles of statutory interpretation and governing case law. Yet, in light of the serious constitutional problems, described in Part IV, that would arise from construing the statutes to allow this lawsuit, this Court should, at the least, adopt the narrower view of these provisions urged by defendant under the well-established doctrine of constitutional avoidance. It is a "cardinal principle" that, where there is a "serious doubt of constitutionality" about a statute, a court should "ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1932). Thus, to the extent that this Court finds defendant's statutory-construction arguments to be even "fairly possible," it should adopt them and dismiss this case without directly addressing the difficult separation-of-powers questions that would otherwise

be posed by the Comptroller General's unprecedented enforcement action.

As described above, in Public Citizen, the Supreme Court unanimously recognized that serious constitutional problems would be posed by a potential infringement on the President's Article II power to nominate judges. See 491 U.S. at 466 (application of the statute would "undeniabl[y]" "present formidable constitutional difficulties"); id. at 482 (Kennedy, J., concurring in judgment, joined by Rehnquist, C.J., and O'Connor, J.) (finding a "plain" constitutional violation). The opinion of the Court explained that the doctrine of constitutional avoidance is "especially" applicable to cases — such as this one — that "concern the relative powers of coordinate branches of government." Id. at 466. In light of that principle, it went so far as to reject what it called a "literalistic reading" of FACA. Id. at 463-464.

In AAPS, the D.C. Circuit described the Supreme Court's decision in Public Citizen as adopting "an extremely strained construction of the [statute] in order to avoid the constitutional question." 997 F.2d at 906.[37] And in AAPS itself, the D.C. Circuit applied the avoidance doctrine and concluded that FACA did not apply to President Clinton's Task Force on National Health Care Reform. It noted that any "statute interfering with a President's ability to seek advice * * * raises Article II concerns," and found those concerns would be especially great if a statute were to interfere with the President's attempt to "seek[] advice from those closest to him, whether in or out of government." Id. at 910. The court avoided "the difficult constitutional issue" that the case posed by concluding that the First Lady was "a 'full-time officer or employee' of the government." Id. at 910, 911.

Plaintiff's claim in this case presents at least as grave a constitutional problem as those

[37] In turn, an opinion from this Court has said that the decisions in both Public Citizen and AAPS resorted to "adroit semantics" in order to avoid separation-of-powers questions. Northwest Forest Res. Council v. Espy, 846 F. Supp. 1009, 1014 (D.D.C. 1994).

avoided in Public Citizen and AAPS. The Comptroller General seeks to gain judicially compelled access to documents that record information-gathering and policy-development activities at the highest levels of the Executive. Just as in AAPS, constitutional "difficulties arise because of the [NEPDG's] operational proximity to the President himself — that is, because the [NEPDG] provide[d] advice and recommendations directly to the President." 997 F.2d at 909 (emphasis added). Construing the statutes to permit this lawsuit to proceed would clearly present "serious constitutional problems." Solid Waste Agency v. Army Corps of Eng'rs, 531 U.S. 159, 173 (2001).

As described in Part III, defendant's proposed constructions of §§ 712(1), 716(b), and 717(b) are reasonable as a matter of statutory construction. Defendant's readings would shield from congressional encroachment the President's ability to have his close advisers discharge constitutionally enumerated functions, but they would do so only by preventing the excesses of plaintiff's positions — not by leaving the Comptroller General powerless. Indeed, recognizing the limits inherent in the language of §§ 716 and 717 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, the Vice President, and the President's other close advisers whose sole function is to advise and assist the President). Nor would it prevent Congress — if it actually intends for the Comptroller General to seek judicial enforcement against the President or Vice President himself — from making the "express statement" required by Franklin. Similarly, to recognize the limits inherent in the language of §§ 712(1) and 717(b) would not interfere with the Comptroller General's ability to evaluate the results of federal programs authorized by statute (i.e., most of the activities of the Executive Branch, excepting only those that are conducted pursuant to the powers expressly enumerated in Article II). Nor would it prevent the Comptroller General from initiating such an evaluation on the basis of an honest judgment rather than an automatic response to a

mistaken belief about the authority of ranking minority members to act for their committees.

Public Citizen and AAPS demonstrate that this Court should prefer any reasonable statutory construction to one that would interfere with the President's ability to seek advice in pursuance of his constitutional functions. Accordingly, this Court should adopt the reasonable constructions of §§ 712(1), 716(b), and 717(b) articulated above and dismiss the Complaint.[38]

[38] Of course, the Court need not reach every one of the statutory questions in order to dismiss the Complaint. If the Vice President is not the head of an agency under § 716(b) — either because Congress has failed to make the express statement required by Franklin or because the NEPDG operated (like the task force in Meyer) only to advise and assist the President — that reason alone requires dismissal under Rule 12(b)(6).

CONCLUSION

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

Respectfully submitted,

May 21, 2002

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. WALKER, Comptroller
General of the United States,
Plaintiff,

v. C.A. No.1:02cv340JDB

RICHARD B. CHENEY, Vice President
of the United States,
Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S
STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 56.1, defendant submits his response to the numbered paragraphs of plaintiff's Statement of Material Facts:

1. Not disputed that President Bush established the National Energy Policy Development Group (NEPDG) by memorandum dated January 29, 2001, that a copy of that memorandum is attached as Exhibit A to the Complaint, and that plaintiff has accurately quoted portions of that memorandum in this paragraph. Defendant refers the Court to the memorandum for a full statement of its contents.

2. Not disputed.

3. Not disputed.

4. Not disputed that funding for the NEPDG was to be provided by the Department of Energy to the maximum extent permitted by law and that the Vice President or his designee was authorized to submit to the President a proposal to use appropriations available to the President to meet any funding needs which could not be met through DOE appropriations. Compl. Ex. A at 2-3.

5. Not disputed that the NEPDG was supported by five professionals employed at the DOE and a White House Fellow, and that plaintiff has accurately quoted a portion of Responses by Andrew Lundquist, Executive Director of the NEPDG, to Questions from the Ranking Minority Members of the House Committee on Government Reform and the House Committee on Energy and Commerce. Compl. Ex. E. Defendant refers the Court to those responses for a full statement of their contents.

6. Not disputed that individuals on the NEPDG support staff met with individuals who were not federal employees to gather information relevant to the NEPDG's work and that such meetings did not involve deliberations or efforts to achieve consensus, but were used as forums to collect individual views. Compl. Ex. E, attachments 1 at 2.

7. Not disputed that, to the extent there were costs for the activities of the NEPDG, including its meetings, public money defrayed those costs.

8. Not disputed that a letter was sent by Reps. Dingell and Waxman to plaintiff on April 19, 2001, that a copy of that letter is contained at Exhibit B to the Complaint, and that plaintiff has accurately quoted a portion of that letter. Defendant refers the Court to the letter for a full statement of its contents.

9. Not disputed.

10. Not disputed that Exhibit C to plaintiff's Complaint was provided by GAO staff to the Counsel to the Vice President on May 8, 2001. Defendant refers the Court to that exhibit for a full statement of its contents.

11. Not disputed that David S. Addington, Counsel to the Vice President, sent the letter contained at Exhibit D to the Complaint to Anthony A. Gamboa, GAO General Counsel, on May

16, 2001. Defendant refers the Court to that letter for a full statement of its contents.

12. As to the first sentence, not disputed that Mr. Addington included with the May 16 letter a copy of the Responses by Andrew Lundquist, Executive Director of the NEPDG, to Questions from the Ranking Minority Members of the House Committee on Government Reform and the House Committee on Energy and Commerce, referred to in ¶ 5, above. As to the second sentence, see response to ¶ 6, above. As to the third sentence, not disputed that the Vice President convened nine meetings of the NEPDG between January 29, 2001, and May 2, 2001. Defendant refers the Court to the Responses for a full statement of their contents.

13. Not disputed that the May 4 letter and attachment do not disclose such information. Disputed that information of this type has not been made available to GAO. See, e.g., Pl's. Statement ¶ 32; Letter of Margot H. Anderson, Deputy Director, DOE's Office of Policy, to Jim Wells, Director, GAO's Natural Resources and Environment, July 16, 2001 (attachment A, infra) (identifying, inter alia, DOE employees serving as NEPDG staff, DOE attendees at NEPDG meetings, dates, times, and places of meetings with non-federal employees by Secretary Abrams).

14. Not disputed that Mr. Gamboa sent the letter contained in Exhibit F to the Complaint to Mr. Addington on June 1, 2001. Defendant refers the Court to that letter for a full statement of its contents.

15. Not disputed that Mr. Addington sent the letter contained at Exhibit G to the Complaint to Mr. Gamboa on June 7, 2001. Defendant refers the Court to that letter for a full statement of its contents.

16. Not disputed that the Counsel to the Vice President sent to GAO as a matter of comity, under cover of a letter to the GAO General Counsel dated June 21, 2001 (Pl's. S.J. Mem.

Ex. 2), 77 pages retrieved from files in the Office of the Vice President responsive to GAO's inquiry that it was "interested in obtaining the direct and indirect costs incurred by both the Vice President and the Group support staff." Defendant refers the Court to that letter for a full statement of its contents.

17. Not disputed that the letter dated June 21, 2001 forwarded 77 pages from the files of the Office of the Vice President and directed the GAO to the Department of Energy for more detailed information. See Pl's. S.J. Mem. Ex. 2.

18. Not disputed that Mr. Gamboa sent the letter contained at Exhibit H to the Complaint to Mr. Addington on June 22, 2001. Defendant refers the Court to that letter for a full statement of its contents.

19. Not disputed.

20. Not disputed.

21. Not disputed.

22. Not disputed, except to clarify that both contacts occurred in July 2001, not 2002.

23. Not disputed that the Deputy White House Counsel and GAO's General Counsel were unable to reach a compromise.

24. Not disputed that the Comptroller General sent the letter contained in Exhibit I to the Complaint to the Vice President on July 18, 2001 and that plaintiff has accurately quoted a portion of that letter. Defendant refers the Court to that letter for a full statement of its contents.

25. See response to ¶ 24, above.

26. Not disputed that the Comptroller General unsuccessfully attempted to call the Vice President on July 30, 2001.

27. As to the first sentence, not disputed. As to the second sentence, not disputed that GAO has stated that it no longer seeks minutes or notes of the meetings, although defendant lacks sufficient basis to confirm or deny the particular statement to which plaintiff refers. See Pl's. Statement ¶ 30. The date on which GAO eliminated such materials from its requests is not material.

28. Not disputed that the Comptroller General received copies of the August 2, 2001, of the Messages from the Vice President of the United States to the Senate and the House of Representatives dated August 2, 2001, contained in Exhibit J to the Complaint. Defendant refers the Court to those letters for a full statement of their contents.

29. Not disputed.

30. Not disputed that the Comptroller General sent, on August 17, 2001, to the President, the Vice President, the leaders of the Senate and House of Representatives, the Director of the Office of Management and Budget, and the Attorney General the letter at Exhibit K to the Complaint. Defendant refers the Court to that Exhibit for a full statement of its contents. As to the last sentence, see response to ¶ 27, above.

31. Not disputed.

32. Not disputed.

33. Not disputed.

34. Not disputed.

35. Not disputed that the listed senators sent to plaintiff the letter contained in Exhibit P to the Complaint on January 22, 2002, and that plaintiff has accurately quoted a portion of that letter. Defendant refers the Court to the letter for a full statement of its contents.

36. Not disputed that the Vice President and the Comptroller General spoke by telephone and that no compromise was reached.

37. Not disputed that plaintiff sent the letter contained in Exhibit R to the Complaint to the persons identified in this paragraph on January 30, 2002. Defendant refers the Court to that exhibit for a full statement of its contents.

Respectfully submitted,

May 21, 2002

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