

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

DAVID M. WALKER, )  
Comptroller General of the United States )  
General Accounting Office )  
441 G Street, N.W. )  
Washington, D.C. 20548, )

Plaintiff, )

v. )

RICHARD B. CHENEY, )  
Vice President of the United States and Chair, )  
National Energy Policy Development Group )  
Office of the Vice President )  
Eisenhower Executive Office Building )  
Washington, D.C. 20501, )

Defendant. )

Civil Action No. 1:02cv00340

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff Comptroller General of the United States ("Comptroller General") brings this action for declaratory and injunctive relief and in support of his claims alleges as follows:

**NATURE OF THE CASE**

1. This is an action arising under 31 U.S.C. §§ 712, 716, and 717 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, against defendant, Richard B. Cheney, for access to certain records relating to the composition and activities of the National Energy Policy Development Group ("NEPDG"). Defendant is sued in his official capacity as the Vice President of the United States and as the official who served as the Chair of the NEPDG.

2. The Comptroller General is the head of the General Accounting Office ("GAO"), a legislative agency created to assist Congress in the performance of its constitutional responsibilities, including the enactment of legislation and oversight of the executive branch. In May 2001, GAO initiated an investigation and evaluation of the activities of the NEPDG, a task force charged with gathering information and formulating energy policy recommendations for the President. GAO initially requested information concerning, among other things, the composition of the task force; the persons with whom the Vice President, in his capacity as Chair of the NEPDG, and the NEPDG support staff met; the notes and minutes of any such meetings; and the costs incurred by the NEPDG in developing its policy recommendations. GAO sought such information to determine how the NEPDG's energy policy recommendations were developed, in order to aid Congress in considering proposed legislation, assessing the need for and merits of future legislative changes, and conducting oversight of the executive branch's administration of existing laws.

3. Through the spring and summer of 2001, GAO engaged in extensive attempts to reach an agreement with the Vice President's office on GAO's information requests in a good faith effort to fulfill its statutory responsibilities in a manner that accommodated the Vice President's asserted need to protect executive deliberations. Although GAO was entitled to all of the information that it initially requested, it significantly narrowed the scope of its inquiry in order to accommodate the Vice President's concerns. In particular, GAO voluntarily eliminated its request for minutes or notes of meetings that NEPDG support staff and the Vice President held, and for information that was presented at these meetings. Despite its efforts to reach a reasonable accommodation, GAO has been denied access to information it has a statutory right to obtain. Because the parties have been unable to resolve this dispute, the Comptroller General,

in order to fulfill his statutory responsibilities, hereby brings this action for declaratory and injunctive relief.

#### **THE PARTIES**

4. Plaintiff David M. Walker is the Comptroller General of the United States and head of the General Accounting Office. *See* 31 U.S.C. § 702.

5. Defendant Richard B. Cheney is the Vice President of the United States and served as the Chair of the NEPDG by virtue of his authority, under a Presidential Memorandum dated January 29, 2001, to “lead the development of a national energy policy” by the NEPDG; to “preside at meetings of the [NEPDG]”; and to “direct [the NEPDG’s] work.” Memorandum of the President to the Vice President and others (Jan. 29, 2001) (Exhibit A) at 1-2.

#### **JURISDICTION AND VENUE**

6. Jurisdiction in this Court is proper under 28 U.S.C. § 1331 in that an actual controversy arising under 31 U.S.C. §§ 712, 716, and 717 exists between the parties relating to the parties’ respective rights, duties, and obligations under these statutes.

7. Venue is proper in this Court under 31 U.S.C. § 716(b)(2) and 28 U.S.C. § 1391(e).

#### **GENERAL ALLEGATIONS**

##### **The Statutory Authority of GAO and The Comptroller General**

8. GAO is an agency in the legislative branch of the federal government. Congress created GAO and the office of the Comptroller General in the Budget and Accounting Act of

1921. As amended since 1921, GAO's principal authorities and mandates today are set forth at 31 U.S.C. §§ 701 *et seq.*; the key provisions at issue in this litigation are sections 712, 716, and 717.

9. Section 712 of title 31 broadly authorizes GAO to investigate all matters relating to the use of public funds. Section 712 provides in pertinent part that “[t]he Comptroller General shall - (1) investigate all matters related to the receipt, disbursement, and use of public money.” 31 U.S.C. § 712(1).

10. Section 717 of title 31 also confers broad authority on GAO to evaluate federal government programs and activities. Section 717(b) provides in pertinent part:

“The Comptroller General shall evaluate the results of a program or activity the Government carries out under existing law –

- (1) on the initiative of the Comptroller General; [or] . . .
- (3) when a committee of Congress with jurisdiction over the program or activity requests the evaluation.”

31 U.S.C. § 717(b)(1), (3).

11. To ensure that GAO is able to obtain the information necessary to discharge its duties, section 716 authorizes the Comptroller General to obtain all “information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions” of the agency under investigation. 31 U.S.C. § 716(a). If an agency declines to provide GAO with requested records, the Comptroller General may make a formal demand for them. Within 20 days of receiving such a demand, the head of the agency must then permit inspection or identify the records that are being withheld and the reasons for their non-disclosure. *See* 31 U.S.C. § 716(b)(1). “If the Comptroller General is not given the opportunity to inspect the record within the 20-day period, the Comptroller General may file a report with the President, the Director of

the Office of Management and Budget ["OMB"], the Attorney General, the head of the agency, and Congress." *Id.* Twenty days after filing this report, the Comptroller General "may 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." *Id.* § 716(b)(2). The only limitations on GAO's authority to file suit arise where either the record relates to "activities the President designates as foreign intelligence or counterintelligence activities"; the record is "specifically exempted from disclosure to the Comptroller General" by statutes not relevant here; or, by the 20<sup>th</sup> day after a report is filed by the Comptroller General under 31 U.S.C. § 716(b)(1), the President or the Director of OMB certifies to the Comptroller General and Congress that the record being withheld "could be withheld under section 552(b)(5) or (7) of title 5 and disclosure reasonably could be expected to impair substantially the operations of the Government." 31 U.S.C. §§ 716 (b), (d).

### **GAO's Congressional Protocols**

12. In order to protect and maintain GAO's status as a provider of professional, objective, fact-based, and non-ideological analyses and reports, the Comptroller General has developed protocols to govern the exercise of GAO's authority to undertake investigations into the use of public funds and to initiate evaluations of programs and activities of the government. Under these protocols, GAO gives first priority to "Congressional mandates, senior leader requests, and committee leaders requests"; second and third priority are given to "Committee Member requests" and "Individual member requests," respectively. GAO's Congressional Protocols at 4-5 (GAO-01-145G Nov. 2000). According to the protocols, "Committee leader requests" include those from committee or subcommittee chairs and Ranking Minority Members, when the request concerns a program or activity within the committee's jurisdiction. *Id.* at 5.

GAO has long had a policy of giving high priority to responding to requests from Ranking Minority Members. For example, a 1990 GAO policy manual stated that GAO is required to perform work requested by committee chairs, and that as a matter of policy GAO assigns equal status to requests from Ranking Minority Members. See GAO General Policy Manual at 3.0-3 (May 1990).

### **Prior GAO Investigations of White House Activities and Operations**

13. For decades, GAO has monitored and investigated myriad executive branch activities. During that period, the executive branch has complied with countless GAO requests for information. At times, there have been disputes between the executive branch, including the White House, and GAO about the scope of a particular request. However, until the instant dispute, accommodations and compromises have generally been reached, and GAO has never been forced to file suit to obtain access to records.

14. GAO's previous reviews of White House activities and operations have included the activities of a variety of presidential task forces and a range of presidential advisers. In the early 1990's, for example, GAO conducted reviews of President Clinton's Health Care Task Force at the request of Ranking Minority Members. As part of its investigation into the composition and costs of that task force, GAO requested, and the White House provided, the names of outside consultants who had met with task force working group members. In 2000, GAO reviewed various activities of the White House China Permanent Normal Trade Relations Working Group and obtained thousands of documents in response to its information requests. These documents included communications between working group members and outside individuals, businesses, and trade associations. Most recently, at the request of an individual

member of Congress, GAO has been investigating possible vandalism to White House office premises allegedly performed by the staff of the Clinton Administration. In that matter, the current administration has granted GAO access to White House records and personnel to facilitate the investigation.

### **The Current Dispute**

15. By Memorandum dated January 29, 2001, President Bush established the NEPDG within the Executive Office of the President "to develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." Exhibit A at 2. In particular, the NEPDG was directed "to gather information, deliberate, and, as specified [in the January 29 Memorandum], make recommendations to the President." *Id.* The Memorandum also provided that the Department of Energy was to make funds available, to the extent permitted by law, to pay the cost of personnel to support the activities of the NEPDG; in the event that Department of Energy appropriations were unavailable, the Memorandum directed the Vice President to submit a proposal for funding to the President, and if necessary to obtain assistance from the National Economic Council staff. *See id.* According to the Memorandum, the NEPDG was to consist of the Vice President, the Secretary of the Treasury, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, the Director of the Federal Emergency Management Agency, the Administrator of the Environmental Protection Agency, 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. The January 29 Memorandum stated that the Vice President was to "lead the development" of a

national energy policy, to “preside at [NEPDG] meetings,” and to “direct [the NEPDG’s] work . . . .” *Id.* at 1, 2.

16. By letter dated April 19, 2001, Representative John D. Dingell, Ranking Member of the House Committee on Energy and Commerce, and Representative Henry A. Waxman, Ranking Member of the House Committee on Government Reform, wrote to the Comptroller General requesting that GAO undertake an investigation into “the conduct and composition of the [NEPDG].” Letter of Hon. John D. Dingell and Hon. Henry A. Waxman to Hon. David M. Walker (April 19, 2001) (Exhibit B) at 1. The Ranking Members asked GAO to determine, “[a]t a minimum, . . . who serves on this task force; what information is being presented to the task force and by whom it is being given; and . . . the costs involved in the gathering of the facts.” *Id.* They requested that, in conducting the investigation, GAO specifically seek the following: a complete list of all NEPDG members and staff, and an identification of any members or staff who were not full-time employees of the federal government; a complete list of all NEPDG meetings, including the date, location, and attendees of each meeting; the criteria used to determine which non-federal entities would be invited to the meetings and an identification of the person or persons responsible for extending invitations under those criteria; an accounting of the legal authorities pursuant to which the NEPDG was organized and was conducting its business; and an accounting of all direct and indirect costs that the NEPDG was incurring.

17. GAO opened its investigation into the NEPDG on May 7, 2001, when a GAO official called the Deputy White House Counsel. The Deputy Counsel indicated that the appropriate contact for GAO’s NEPDG investigation would be the Vice President’s Counsel, and, at the Deputy Counsel’s request, the Vice President’s Counsel contacted GAO on May 8, 2001.



18. At the request of the Vice President's Counsel, on May 8, 2001, GAO staff provided him with a list of the general subjects in which GAO was interested as part of its review of the composition and workings of the NEPDG. See GAO Fax Transmittal Sheet and attachment (May 8, 2001) (Exhibit C). GAO also indicated that it would need to conduct interviews and to review documents to complete its work, *see id.* at 1, and it asked to schedule, through the Vice President's Counsel, an initial meeting within several days.

19. After a week of unsuccessful attempts by GAO to speak with the Vice President's Counsel to schedule the initial meeting, the Vice President's Counsel sent to GAO a letter dated May 16, 2001, the same day that the Vice President, as NEPDG Chair, reported to the President on the NEPDG's proposed national energy policy. See Letter of David S. Addington, Counsel to the Vice President, to Anthony H. Gamboa, GAO General Counsel (May 16, 2001) (Exhibit D). The Vice President's Counsel objected to GAO's inquiry and sought confirmation that the Comptroller General believed such an inquiry was appropriate. The Vice President's Counsel stated further that an inquiry into the composition and workings of the NEPDG would, "of necessity," constitute an examination by the legislative branch:

"into the exercise of authorities committed to the Executive by the Constitution, including the authority to 'require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,' to 'take Care that the Laws be faithfully executed,' and, with respect to Congress, to 'recommend to their Consideration such Measures as he shall judge necessary and expedient.' It appears that the GAO may intend to intrude into the heart of Executive deliberations, including deliberations among the President, the Vice President, members of the President's Cabinet, and the President's immediate assistants, which the law protects to ensure the candor in Executive deliberations necessary to effective government."

*Id.* at 1. The Vice President's Counsel requested that GAO's General Counsel "ask the Comptroller General to examine whether proceeding with the proposed inquiry is appropriate, in compliance with law, and . . . a productive use of resources," and urged that the Comptroller General not proceed with the inquiry. *Id.* at 2. Finally, the Vice President's Counsel asked for a statement of GAO's legal authority to conduct its investigation and a description of the purpose and scope of the inquiry "with regard to the Vice President and his staffs." *Id.*

20. The May 16 letter of the Vice President's Counsel to GAO enclosed a May 4, 2001 letter which the Counsel had sent to Representatives Dingell and Waxman (as well as to the Chairmen of the Committees on which they were the Ranking Members) responding to their request for information related to the applicability of the Federal Advisory Committee Act to the NEPDG. *See* Letter of David S. Addington, Counsel to the Vice President, to Hon. W. J. "Billy" Tauzin, Hon. John D. Dingell, Hon. Dan Burton, and Hon. Henry A. Waxman (May 4, 2001) (Exhibit E). In an attachment to the Vice President's Counsel's May 4 letter, the NEPDG Executive Director indicated that the NEPDG received staff support from five employees of the Department of Energy, who had been temporarily assigned for this purpose to the Office of the Vice President ("OVP"), and from a White House Fellow, who likewise had been temporarily assigned to the OVP. The May 4 attachment further stated that these staff persons had met with and gathered information from many individuals who were not federal employees, and that such meetings did "not involve deliberations or any effort to achieve consensus on advice or recommendations." Exhibit E, Attachment at 2. The attachment did not identify the names of the NEPDG staff persons, the names of the people with whom they met, the dates of the meetings, or the subjects discussed at those meetings. The attachment did provide the dates of

nine NEPDG meetings that the Vice President had convened at the White House Complex. *Id.*, Attachment at 3.

21. On June 1, 2001, GAO's General Counsel advised the Vice President's Counsel that the Comptroller General had determined that GAO's review and request for information concerning the NEPDG were appropriate and authorized under 31 U.S.C. §§ 712, 716, and 717. Letter of Anthony H. Gamboa, GAO General Counsel, to David S. Addington, Counsel to the Vice President (June 1, 2001) (Exhibit F). Citing the legislative history of those provisions, GAO's General Counsel noted that GAO's access authority extends to deliberative materials, but explained that GAO was "focused on gathering factual information regarding the process of developing President Bush's National Energy Policy" and was "not inquiring into the deliberative process." *Id.* at 1. The General Counsel explained that GAO needed additional information, beyond that provided in the attachment to the Vice President's Counsel's May 4 letter, to complete its review, and requested a meeting with the NEPDG Executive Director as soon as possible to discuss the timing and scope of GAO's review. *Id.* at 2. In an attachment to his June 1 letter, the GAO General Counsel requested information concerning: (1) the persons who attended the nine NEPDG meetings at the White House Complex; (2) the six NEPDG staff persons; (3) any meetings that the NEPDG staff persons had with individuals on NEPDG matters; (4) any meetings the Vice President had with individuals on NEPDG matters; and (5) the costs incurred by the Vice President and NEPDG staff on NEPDG matters. *See id.*, Enclosure.

22. The Vice President's Counsel responded to GAO's June 1 letter by a letter dated June 7, 2001, and explained why, in his view, sections 712, 716, and 717 did not authorize GAO's overall inquiry. *See* Letter of David S. Addington, Counsel to the Vice President, to

Anthony H. Gamboa, GAO General Counsel (June 7, 2001) (Exhibit G) at 1-3. "As a matter of comity," however, the Vice President's Counsel offered to obtain cost information responsive to GAO's fifth information request in the attachment to its June 1 letter. *Id.* at 3. The Vice President's Counsel also enclosed a copy of the January 29, 2001 Presidential Memorandum establishing the NEPDG, but provided no additional information and made no offer to discuss GAO's inquiry further.

23. On June 21, 2001, the Vice President's Counsel submitted to the GAO General Counsel 77 pages of information purportedly relating to expenses that the OVP incurred in connection with the NEPDG. The materials were virtually impossible to analyze and consisted, for example, of pages with dollar amounts but no indication of the nature or purpose of the apparent expenditure.

24. By letter dated June 22, 2001, GAO's General Counsel responded to the Vice President's Counsel's June 7 letter. The GAO General Counsel addressed each of the legal arguments the Vice President's Counsel had raised in objection to GAO's investigation and explained why GAO in fact was entitled to the information it sought under 31 U.S.C. §§ 712, 716, and 717. *See* Letter of Anthony H. Gamboa, GAO General Counsel, to David S. Addington, Counsel to the Vice President (June 22, 2001) (Exhibit H) at 2-9. The General Counsel noted that GAO was providing this explanation "so that you will assist us in obtaining the information we need without further delay." *Id.* at 2. He expressed GAO's expectation that the OVP "will proceed expeditiously to respond to our existing and future access requests on this review, as well as allowing us to interview appropriate officials. Since over a month has elapsed since our first request, we ask that the information we requested be provided immediately." *Id.* at 10. He closed by stating that "Comptroller General Walker is prepared to issue a demand

letter under 31 U.S.C. § 716 if we do not receive timely access to the information we have requested.” *Id.*

25. On June 29, 2001, GAO’s General Counsel placed a call to the Vice President’s Counsel in an effort to arrange a meeting to discuss GAO’s requests. Later that day, a Special Counsel at the Department of Justice (“DOJ”) returned the GAO General Counsel’s call, stating that he was doing so at the request of the Vice President’s Counsel. During this call, GAO’s General Counsel emphasized that GAO did not seek records reflecting the NEPDG deliberations on policy recommendations, that it had narrowed the scope of its inquiry from the original request, and that it was willing to explore different ways in which the information it sought could be supplied. The DOJ Special Counsel continued to assert that GAO had no authority to conduct the review.

26. On July 9, 2001, representatives from GAO met with the Deputy White House Counsel and the DOJ Special Counsel to discuss GAO’s outstanding information requests. The GAO officials stated that they hoped to be able to reach a mutually agreeable accommodation and to that end, GAO remained willing to explore different ways of receiving the information. The Deputy White House Counsel and DOJ Special Counsel continued to question GAO’s statutory authority to perform its investigation. The meeting concluded by the Deputy White House Counsel and the DOJ Special Counsel indicating that they would review additional legal authorities, determine if any information would be provided to GAO, and call GAO by close of business the next day.

27. On July 12, 2001, GAO’s General Counsel called the Deputy White House Counsel to see if a decision had been reached regarding whether the remaining NEPDG

information would be provided. The GAO General Counsel was informed that no decision had been reached.

28. On July 17, 2001, GAO's General Counsel again called the Deputy White House Counsel to ask whether any information would be forthcoming. The Deputy White House Counsel indicated that nothing would be forthcoming from the Vice President's office or the NEPDG staff.

29. The following day, on July 18, 2001, the Comptroller General wrote to the Vice President requesting "full and complete access, under 31 U.S.C. § 716(b), to records relating to the development of the Administration's National Energy Policy." Letter of Hon. David M. Walker to the Vice President (July 18, 2001) (Exhibit I) at 1. In his statutory "demand letter," the Comptroller General sought the following information:

- (1) for each of the nine NEPDG meetings convened at the White House Complex, "the names of the attendees for each meeting, their titles, and the office represented";
- (2) for the six NEPDG staff persons assigned to the OVP, "their names, titles, the office each individual represented; the date on which each individual began working for such office; and the responsibilities of the group support staff";
- (3) for each meeting held by an NEPDG staff person to gather information relevant to the NEPDG's work, "(a) the date and location, (b) any person present, including his or her name, title, and office, or clients represented, (c) the purpose and agenda, (d) any information presented, (e) minutes or notes, and (f) how members of the NEPDG, group support staff, or others determined who would be invited to the meetings";
- (4) with regard to any meetings the Vice President as chair of the NEPDG had with individuals to gather information relevant to the NEPDG, "(a) the date and location, (b) any person present, including his or her name, title, and office, or clients represented, (c) the purpose and agenda, (d) any information presented, (e) minutes or notes, and (f) how the Vice President or others determined who would be invited to the meetings"; and

(5) with regard to the direct and indirect costs of the NEPDG, "all records responsive to [GAO's prior] request, including any records that clarify the nature and purpose of the costs."

*Id.* at 1-2. The Comptroller General noted that, on May 8, 2001, GAO had requested an initial meeting with the OVP, had twice explained the statutory bases for its request, and had met with representatives of the White House Counsel's Office and the Department of Justice, but that these efforts had failed to resolve the issue. *See id.* at 2. The Comptroller General advised the Vice President that "[p]ursuant to 31 U.S.C. § 716(b), you are required to respond to this request within 20 days. The law further requires that if full access to the requested records is not granted, you must furnish a description of any information withheld and state the reasons for withholding the information." *Id.* at 3.

30. On July 30, 2001, the Comptroller General placed a call to the Vice President to discuss the outstanding access issues and to seek a solution to the impasse. The Comptroller General was unsuccessful in reaching the Vice President.

31. On July 31, 2001, the Counsel to the Vice President returned the call to the Comptroller General. In the interest of comity and out of respect for the Vice President, the Comptroller General eliminated GAO's request for minutes and notes of meetings that NEPDG staff or the Vice President had with individuals to gather information relevant to the NEPDG's work and for the information presented at these meetings. The Counsel to the Vice President indicated that he would advise the Vice President of GAO's reduction in the scope of its request.

32. On August 1, 2001, GAO's General Counsel and the Vice President's Counsel spoke by telephone regarding the Comptroller General's demand letter of July 18, 2001, and the Comptroller General's July 31 reduction in the scope of information requested in that letter.

GAO's General Counsel reiterated the Comptroller General's accommodation, but the Counsel to the Vice President again asserted that GAO had no authority to perform its review. As a result, no resolution was reached.

33. The following day, on August 2, 2001, the Vice President sent memoranda to the Senate and the House of Representatives to inform them of the Comptroller General's efforts to obtain the information still in dispute. The Vice President asserted that these efforts "exceed [the Comptroller General's] lawful authority and . . . , if given effect, would unconstitutionally interfere with the functioning of the Executive Branch." *See, e.g.*, Memorandum of the Vice President to the House of Representatives (Aug. 2, 2001) (Exhibit J) at 1. The Vice President appended a single-page explanation for his assertions, stating, among other things, that "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." *Id.*, Appendix Two.

34. At no point during the 20-day period following the Vice President's receipt of the Comptroller General's July 18 demand letter did the Vice President or his office afford the Comptroller General an opportunity to inspect any of the records requested in the demand letter, or suggest any form of accommodation. Nor did the Vice President provide a description to GAO of each record withheld, as required by 31 U.S.C. § 716(b)(1).

35. Pursuant to 31 U.S.C. § 716(b), on August 17, 2001, the Comptroller General submitted reports to the President, the Vice President, the Congress, the Director of OMB, and the Attorney General, setting forth the parties' dispute concerning access to the NEPDG documents. *See, e.g.*, Letter of Hon. David M. Walker to the Vice President (Aug. 17, 2001)



(Exhibit K). Consistent with the accommodation he had made to the Vice President's Counsel on July 31, the Comptroller General's report reconfirmed and made clear that GAO no longer sought either the minutes or notes of meetings that NEPDG staff or the Vice President had had with individuals to gather information relevant to NEPDG's work, or any of the information presented at those meetings. *See id.* at 2 & n.2. The report described the records in dispute, the history of GAO's efforts to obtain those records, and GAO's statutory bases for its inquiry. *See id.* at 3-10. The Comptroller General stated that "[u]nless an exemption under section 716(d)(1) is invoked, such as certification by the President or Director [of] OMB, I am authorized to bring a civil action for judicial enforcement of our access request if full and complete access to the records we are requesting is not provided to GAO in 20 days following this report." *Id.* at 10. He concluded his report by expressing the hope "that this pending access problem can be resolved expeditiously, without litigation, and in a manner that will allow us to fulfill our oversight and reporting responsibilities to Congress." *Id.*

36. On September 6, 2001, the OVP provided to GAO the names of the six members of the NEPDG support staff. Neither the Vice President nor his office provided access to GAO to any of the other records in dispute within 20 days of the filing of the August 17 statutory report, nor have they provided such access since that time.

37. Neither the President nor the Director of OMB made a certification under section 716(d)(1)(C) of title 31 within 20 days of the submission of the Comptroller General's August 17 statutory report. Furthermore, the President has not asserted Executive Privilege with respect to any of the records in dispute.

38. At the same time that the Vice President was refusing to provide GAO with records relating to the composition and activities of the NEPDG, GAO sought and obtained some of the same types of information from some of the other members of the NEPDG, in particular, the Secretary of Energy, the Secretary of the Interior, and the Administrator of the Environmental Protection Agency. Their agency staffs provided GAO with information concerning whom their agency head and staff met with to develop the proposed national energy policy, when the meetings occurred, where they occurred, and what the general topics of the meetings were. The staffs declined, however, to provide any information relating to meetings that the Vice President or the NEPDG staff held, including who else participated in such meetings, and instead referred GAO to the OVP for that information. In the meantime, the Vice President selectively disclosed to the press and to members of Congress some of the NEPDG information sought by GAO. *See, e.g.*, Letter of David S. Addington, Counsel to the Vice President, to Hon. Henry A. Waxman (January 3, 2002) (Exhibit L).

39. The information GAO is seeking from the OVP is instrumental to GAO's review of how the NEPDG spent public funds, how it carried out its activities, and whether it followed applicable law. This information will enable GAO to report fully to Congress on the process through which the proposed national energy policy was developed, and will thereby assist Congress in the discharge of its legislating and oversight functions. For example, the information concerning the names of the individuals and organizations that the Vice President and NEPDG support staff met with and the dates and subjects of those meetings will assist Congress in evaluating the proposed national energy policy that the NEPDG developed. This information will inform Congress as to whether the policy was formulated based on input from a broad representation of affected groups, whether Congress ought to elicit the views of other

interested parties and constituencies, and whether and to what extent it may be appropriate for Congress to commission further studies. In addition, this information will assist Congress in determining whether and to what extent future legislation, relating, for example, to national energy policy or openness in government, may be appropriate. A number of NEPDG proposals, moreover, concern the administration of existing law. Congress routinely conducts oversight of the manner in which the executive branch implements the law, and is entitled to inquire into the bases and reasons for any proposed changes in such implementation, including any potential appropriations issues associated with these changes.

#### **Initiation of This Lawsuit**

40. On September 7, 2001, GAO issued a public statement concerning its dispute with the Vice President in which it stated that the limited information the Vice President's office had provided on September 6 was inadequate. See Exhibit M. GAO noted that it had not received a certification from the President or the Director of OMB in connection with the balance of information it sought and stated that it was "finalizing . . . discussions with key Congressional leaders and . . . preparing for possible litigation." *Id.*

41. As a result of the tragic events of September 11, 2001, GAO decided to postpone the initiation of any litigation. In a public statement issued September 28, 2001, GAO explained that it remained concerned about the Vice President's failure to provide the information in dispute, and that it believed the matter involved important issues. "However," GAO noted, "given our current national focus on combating terrorism and enhancing homeland security, this matter is not a current priority." See Exhibit N.

42. Out of deference to the executive branch's efforts to respond to the events of September 11, GAO deferred pursuit of its information requests until October 15, 2001. On that date, GAO's General Counsel called the Vice President's Counsel to advise him that GAO intended to begin interviewing the members of the NEPDG support staff identified in the OVP's September 6 communication. The Vice President's Counsel denied GAO access to the NEPDG staff, asserting that because GAO had issued a statutory report pursuant to 31 U.S.C. § 716, GAO allegedly could pursue its information requests only by filing suit in federal court. GAO's General Counsel stated that he did not agree with that view and noted that GAO's efforts to interview the NEPDG staff were an additional attempt to reach an accommodation and thereby possibly avoid the necessity of litigation.

43. On October 16, 2001, a GAO official placed a call to the NEPDG Executive Director to arrange interviews of the NEPDG support staff. The GAO official explained that GAO sought explanations concerning the 77 pages of information that the OVP had previously provided reflecting purported NEPDG expenses, as well as information responsive to GAO's other requests. The GAO official was referred to the Vice President's Counsel, who advised her that she should confer with GAO's General Counsel.

44. On January 9, 2002, in response to press inquiries, the Comptroller General issued a public statement that he would make a decision within one month whether GAO intended to file suit in order to obtain access to the NEPDG-related information. *See* Exhibit O.

45. By letter dated January 22, 2002, Senator Carl M. Levin, Chairman of the Senate Committee on Armed Services and the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs; Senator Joseph I. Lieberman, Chairman of the Senate

Committee on Governmental Affairs; Senator Ernest F. Hollings, Chairman of the Senate Committee on Commerce; and Senator Byron L. Dorgan, Chairman of the Subcommittee on Treasury and General Government of the Senate Committee on Appropriations, and the Subcommittee on Consumer Affairs, Foreign Commerce, and Tourism of the Senate Committee on Commerce, Science, and Transportation, joined the previous Congressional request that the Comptroller General investigate the composition and workings of the NEPDG. *See* Letter of Hon. Carl M. Levin, Hon. Joseph I. Lieberman, Hon. Ernest F. Hollings, and Hon. Byron L. Dorgan to Hon. David M. Walker (Jan. 22, 2002) (Exhibit P). Noting that "Congress will begin to consider legislation that will establish a national energy policy," the Senators requested the Comptroller General to determine who helped to shape the Administration's energy policy, how the NEPDG decided which individuals to invite to participate in meetings with NEPDG members and staff, what interests those participants represented, what the participants proposed, and what changes they requested. *Id.*

46. On January 24, 2002, in light of the January 22 request by four Senate Chairmen urging GAO to pursue its investigation of NEPDG activities, the Comptroller General placed a call to the Vice President to discuss GAO's outstanding records requests. When the Vice President returned the call that day, they discussed their respective positions, and the Comptroller General reaffirmed his willingness to make a further reasonable accommodation regarding access to the requested records, but no accommodation was reached.

47. On January 25, 2002, the Comptroller General wrote to each of the four Senate Chairmen who had requested GAO to continue its investigation of the NEPDG. The Comptroller General confirmed that the Senators were acting in their official capacities as chairs of committees or subcommittees having jurisdiction over the subject of the investigation and

acknowledged GAO's responsibility to assist the Congress in discharging its legislating and oversight responsibilities. The Comptroller General indicated that, if GAO could not reach a reasonable accommodation on its access dispute with the Vice President, the Comptroller General would advise the Congress whether GAO would file suit to enforce its access rights. *See, e.g.*, Letter of Hon. David M. Walker to Hon. Joseph I. Lieberman (January 25, 2002) (Exhibit Q).

48. On January 30, 2002, the Comptroller General wrote to certain Chairmen and Ranking Members of Senate and House Committees. The Comptroller General explained that GAO's numerous attempts to reach a reasoned and reasonable accommodation with the Vice President regarding access to limited NEPDG information had failed; that GAO had exhausted all statutorily required processes for resolving its access requests out of court; and that GAO's only remaining recourse was to file suit or forgo further assertion of its access rights. The Comptroller General noted further that if the Vice President's arguments were to prevail, any administration seeking to insulate its activities from oversight and public scrutiny could do so by assigning those activities to the Vice President or a body under the White House's direct control. In order to fulfill GAO's statutory mission and obligations and obtain information to assist Congress in the discharge of its legislating and oversight functions, the Comptroller General stated that GAO was taking the steps necessary to file suit to obtain the information outlined in its August 17, 2001 statutory report. *See, e.g.*, Letter of Hon. David M. Walker to Hon. Robert C. Byrd (Jan. 30, 2002) (Exhibit R). A copy of the Comptroller General's January 30 letter was sent to the President and Vice President, among others. *See id.* at 3.

49. Since the Comptroller General's announcement on January 30, 2002, that GAO was preparing to file suit, no one from the OVP, the White House Counsel's Office, or the

Department of Justice has contacted GAO to propose any resolution of the dispute between GAO and the Vice President that would eliminate the need to file this lawsuit.

## **CLAIM FOR RELIEF**

### **Count One**

#### **(Failure To Provide Statutory Right Of Access To Records)**

50. Plaintiff realleges paragraphs 1-49 as if set forth fully herein.

51. The Comptroller General has the right, under 31 U.S.C. §§ 712 and 717, to investigate and evaluate the composition and activities of the NEPDG, and the right, under 31 U.S.C. § 716, to obtain access to all records that the Comptroller General requires in order to conduct such an investigation and evaluation.

52. The Comptroller General has taken all steps required under 31 U.S.C. § 716 to perfect his right to bring an action in this Court to enforce his right of access to records that the Comptroller General requires in order to conduct an investigation and evaluation of the NEPDG. In addition, the Comptroller General has exhausted all reasonable means of resolving this dispute without litigation, and has made all reasonable efforts to fulfill his statutory duties in a manner that accommodates the legitimate interests of the Vice President.

53. The Vice President declined to make available the records GAO seeks within 20 days of the date of the Comptroller General's July 18, 2001 demand letter requesting submission of the records, as required by 31 U.S.C. § 716(b)(1), and has not made them available since.

54. Neither the President nor the Director of OMB made a certification under 31 U.S.C. § 716(d)(1)(C) within 20 days of the submission of the Comptroller General's August 17, 2001 statutory report.

55. Despite the absence of such a statutory certification, and despite the reasonable accommodations that the Comptroller General has made, the Vice President has refused to provide records that the Comptroller General is statutorily entitled to inspect.

56. Accordingly, the Comptroller General is entitled to a declaration that he has a statutory right to production of all records identified in his July 18, 2001 demand letter, as limited by his August 17, 2001 statutory report, that the Vice President has failed to produce, and to an injunction directing the Vice President, as the head of the OVP or as Chair of the NEPDG, to produce those records.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, by its undersigned counsel, requests that the Court grant the following relief:

- (a) a declaration, pursuant to 28 U.S.C. §§ 2201 and 2202, that the Comptroller General is entitled to the production of all records described in the Comptroller General's demand letter of July 18, 2001, as limited by his statutory report of August 17, 2001, that the Vice President has failed to produce: specifically, the documents that describe (1) who was present at each of the meetings conducted by the NEPDG, including the names of the attendees, their titles, and the office represented; (2) with whom the Vice President as Chair and each of the NEPDG support staff met to gather information for the proposed national energy policy, including the name, title and office or clients represented; and the date, purpose, agenda, and location of the meetings; (3) how the Vice President, the members of the NEPDG, or others determined who would be invited to the meetings; and (4) the direct and indirect costs that were incurred in developing the proposed national energy policy;



- (b) an injunction directing the Vice President, as the head of the Office of the Vice President or as Chair of the NEPDG, to produce those records; and
- (c) such further relief as this Court deems just and proper.

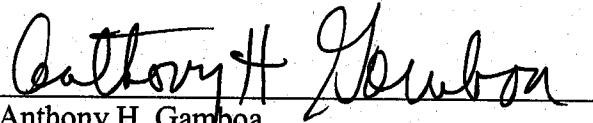
Respectfully submitted,



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Dated: February 22, 2002