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United States General Accounting Office
Washington, DC 20548

B-287944

June 22, 2001

The Honorable David S. Addington
Counsel to the Vice President
Office of the Vice President

Subject: GAO's Review of the Development of the Administration's National Energy Policy

Dear Mr. Addington:

This responds to your letter dated June 7, 2001, stating that GAO lacks authority to review the activities of the National Energy Policy Development Group (NEPDG). We disagree with your position. As discussed below, GAO has broad authority under 31 U.S.C. §§ 712 and 717 to conduct the subject review and obtain information requested in my June 1, 2001, letter.

As you know, in April 2001, GAO received a request letter from Representatives John D. Dingell and Henry A. Waxman, Ranking Minority Members of the House Committee on Energy and Commerce and the House Committee on Government Reform, respectively. The letter asked GAO to obtain certain factual information related to the NEPDG's activities and the energy policy development process.[1] On May 8, 2001, in response to the request letter, GAO requested that the NEPDG supply factual information concerning meetings held by the NEPDG, including times,

[1] NEPDG consists of 12 federal officers, including the Vice President, the Secretaries of Agriculture, Energy, and Interior, and the Administrator of the Environmental Protection Agency. Memorandum from the President to the Vice President et al. at 1 (January 29, 2001) (hereinafter Presidential Memorandum). NEPDG's mission is 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." Id. The memorandum stated that "the Department of Energy shall, to the maximum extent permitted by law and consistent with the need for funding determined by the Vice President after consultation with the Secretary of Energy, make funds appropriated to the Department of Energy available to pay the costs of personnel to support the activities of the [NEPDG]." Id. at 2.

attendees, and agendas. We also asked the NEPDG to supply information concerning the costs incurred by the Vice President and the NEPDG in carrying out the activities outlined in the Presidential Memorandum establishing the NEPDG.[2]

On May 16, 2001, you sent a letter to GAO questioning the appropriateness of GAO's review, expressing reluctance to supply the information requested, and asking for a statement of GAO's legal authority to conduct the audit.[3] We responded on June 1 that the inquiry was consistent with our authorities, and supplied a list of questions to help guide further discussions.

In your June 7 letter, you contend that our investigation exceeds relevant statutory authority. Specifically, you assert that GAO lacks authority to pursue this inquiry because (1) section 712 is limited to financial matters and does not include audits of governmental activities; (2) section 717 limits GAO to reviewing activities undertaken pursuant to statutory rather than Constitutional authorities; and (3) section 717 does not authorize GAO to respond to requests from Ranking Minority Members.

As explained below, 31 U.S.C. §§ 712 and 717 provide clear authority for the subject inquiry. We are providing this response so that you will assist us in obtaining the information we need without further delay. In this regard, Comptroller General David M. Walker has advised me that he is prepared to issue a demand letter under 31 U.S.C. § 716 if we do not receive timely access to the information outlined in our June 1 letter.[4]

Relevant Statutes

GAO's basic audit authority stems from section 312(a) of the Budget and Accounting Act of 1921.[5] The language is now codified at 31 U.S.C. § 712, which provides that "the Comptroller General shall – (1) investigate all matters related to the receipt, disbursement, and use of public money." Two later enactments made mandatory and explicit the means through which GAO was to exercise certain aspects of this broad authority. First, section 117(a) of the Budget and Accounting Procedures Act of 1950,

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[2] Presidential Memorandum.

[3] As an attachment to your May 16 letter, you supplied a copy of information submitted to the Chairmen and Ranking Minority Members of the House Committee on Energy and Commerce and the House Committee on Government Reform. While this information was helpful, it left many of our requests for information unaddressed.

[4] Under 31 U.S.C. § 716(a), GAO has broad right of access to agency records. If the agency records are not made available to GAO within a reasonable time, GAO may issue a demand letter pursuant to 31 U.S.C. § 716(b)(1).

[5] Pub. L. No. 67-13; 42 Stat. 20, 25-26 (1921) (formerly codified at 31 U.S.C. § 53).

now codified at 31 U.S.C. § 3523(a), requires GAO to "audit the financial transactions of each agency."[6] Second, section 204(a) of the Legislative Reorganization Act of 1970, now codified at 31 U.S.C. § 717(b), states as follows:

> "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;
> (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."

Analysis

GAO is authorized under 31 U.S.C. §§ 712(1) and 717(b) to review the activities of the NEPDG and to respond to the requests of Ranking Minority Members. We explain each of these conclusions in detail below.

Section 712 Grants GAO Broad Authority

Section 712(1) authorizes GAO to "investigate all matters related to the receipt, disbursement, and use of public money." This broad grant of authority contains only one limitation: that the subject of the inquiry involve the use of public money. It is beyond dispute that appropriated funds paid for the activities of the NEPDG, and thus that the NEPDG's activities are a matter related to the use of public money.[7] Accordingly, its activities are within the scope of GAO's audit authority under section 712(1). We have consistently interpreted section 712(1) in this manner.[8]

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[6] The Budget and Accounting Procedures Act of 1950 was designed in part "to modernize and simplify governmental accounting and auditing methods and procedures." S. Rep. No. 2031, 81st Cong., 2d. Sess. 1 (1950). According to the Senate report, "[t]his section provides certain clarification of authority as the basis for improvement and simplification of the audit function of the General Accounting Office on a coordinated basis with the improvement of accounting and internal control procedures in the agencies." Id. at 14.

[7] See Presidential Memorandum at 3 (stating that the Department of Energy is to make funds available, to the maximum extent permitted by law, for the NEPDG's activities).

[8] See, e.g., The White House: Status of Review of the Executive Residence, GAO/T-OGC/AIMD-98-12 (November, 1997). As we have noted, id. at 7:

> "Over the last century, the Supreme Court has characterized the scope of congressional power to investigate as penetrating and far-reaching as the

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Your letter concedes that section 712(1) authorizes GAO to obtain information on the direct and indirect costs that the NEPDG incurred in carrying out its functions, but maintains that section 712(1) does not authorize GAO to obtain a variety of other types of information sought, such as the composition and duties of the staff employed by the NEPDG and information on meetings carried out either by the NEPDG as a whole or by individual members of the NEPDG and members of the public.[9] To the extent that you argue that section 712(1) limits GAO audit authority to financial transactions, the argument is clearly inconsistent with the statutory language quoted above, which contains no such limitation. The statute extends GAO's audit authority to "all matters" related to the use of public money, not just matters related to costs of activities. The legislative history of section 312(a) of the Budget and Accounting Act of 1921 (what is now section 712(1)) makes clear that Congress intended to extend GAO's audit authority beyond accounting matters.[10]

Your letter also argues that the requirement for GAO to review programs and activities contained in section 717 (discussed in detail below) indicates that GAO's audit authority under section 712(1) must be "narrowly circumscribed." However, the authority contained in section 717 is a clarification of authority that existed under the predecessor to section 712. As the Senate Report accompanying the General Accounting Office Act of 1980, Pub. L. No. 96-226, 94 Stat. 311, explained:

> "[T]he Budget and Accounting Act of 1921 [at what is now section 712] provides sufficiently broad and comprehensive authority to investigate '... all matters relating to the receipt, disbursement, and application of public funds[.]' This authority extends not only to accounting and financial auditing but also to administration, operations, and program

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> potential power to enact legislation, oversee the operation of government, and appropriate funds under the Constitution. Barenblatt v. United States, 360 U.S. 109, 111 (1959); McGrain v. Daugherty, 273 U.S. 173 (1926). The Court presumes a valid legislative purpose for congressional inquiries, In re Chapman, 166 U.S. 661, 670 (1897)[.]"

[9] The documentation previously supplied to GAO in your May 16 letter contains limited information on the first category of meetings, and no information with regard to the second.

[10] 61 Cong. Rec. 1090 (1921). Representative Robert Luce, the sponsor of a floor amendment that broadened GAO's audit authority in the bill, stated, "The purpose [of the amendment], Mr. Chairman, is to make sure that the Comptroller General shall concern himself not simply with taking in and paying out money from an accountant's point of view, but that he shall also concern himself with the question as to whether it is economically and efficiently applied." Id.

evaluation. Succeeding legislation affecting GAO's authority generally has served to make mandatory, explicit, and emphatic the requirement for GAO to assess the efficiency, economy and effectiveness of program operation by the Executive branch."[11]

Accordingly, your position that 31 U.S.C. § 712 must be narrowly construed is without merit.

Section 717(b) Authorizes GAO to Evaluate Government Programs and Activities

Section 717(b) authorizes 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; ... or (3) when a committee of Congress with jurisdiction over the program or activity requests an evaluation." (Emphasis added.) You assert that the NEPDG did not carry out its activities "under existing law." You contend that "the Vice President and the other officers of the United States who serve on the NEPDG act only in relation to exercise of the authorities committed to the Executive by the Constitution, rather than by statute." In this connection, you argue that the term "existing law" in section 717 refers only to activities carried out pursuant to statute, and thus that section 717 does not authorize GAO to investigate activities carried out solely under constitutional authorities.[12] As authority for this

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[11] S. Rep. No. 570, 96th Cong., 2d Sess. 2 (1980). It is true that the House report accompanying the House version of what would become the Legislative Reorganization Act of 1970 referred to the provision now contained in section 717 as "new statutory authority to review and analyze the results of Government programs and activities." H.R. Rep. No.1215, 91st Cong., 2d. Sess. at 18 (emphasis added). The report also referred to GAO's program reviews under the provision as a reasonable extension of the work GAO already performs. Id. While the provision may be considered "new authority" in the sense that it specifically directed the Comptroller General to assist the Congress in evaluating the results of the activities of the Government, the broad authority in section 712(1) to investigate all matters related to the use of public money already authorized GAO to carry out program evaluations. In fact, GAO had been reviewing the results of federal programs under the authority of section 712(1) for many years prior to the enactment of section 717. See, e.g., Report on the Compilation of General Accounting Office Findings and Recommendations, Fiscal Year 1968, H.R. Doc. No. 33, 91st Cong., 1st Sess. (1969) (listing the findings and recommendations from dozens of program reviews).

[12] We assume for the purposes of discussion that you are correct in your assertion that the sole authority for the NEPDG's activities resides in Article II of the Constitution. Although unnecessary to our decision, we observe that the NEPDG's activities appear to be authorized by section 102 of the Department of Energy Organization Act, which provides that one purpose of the Act is "to provide for a mechanism through which a coordinated national energy policy can be formulated

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latter assertion, you rely on a 1988 opinion from the Office of Legal Counsel (OLC) of the Department of Justice, which argued that "the phrase 'program or activity ... under existing law' must refer only to activities carried out pursuant to statute, and not activities carried out pursuant to the Executive's discharge of its own constitutional responsibilities."[12]

Our Office has consistently maintained that the phrase "existing law" is not limited in the manner you suggest, based on the plain language of the statute.[14] Words in a statute carry their ordinary meaning unless Congress clearly indicates that a different meaning was intended.[15] The NEPDG was tasked with developing an energy policy, an activity of the Government carried out under existing law. The phrase "existing law," absent any qualifier or limitation, encompasses all forms of federal law that authorize the government to conduct its activities, including the Constitution, statutes, and regulations, all as interpreted by the judiciary in applicable court decisions. After all, the Constitution is the supreme law of the land.[16] The phrase "existing law" is not limited by any other language in the Legislative Reorganization Act of 1970. While the OLC's 1988 opinion contended that "the use of the qualifier 'existing' appears to suggest that the law at issue are statutes that may lapse rather than constitutional authorities of the President, which are of greater permanence,"[17] we see no basis for this position. We have found no support in either the statutory

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and implemented[.]" 42 U.S.C. § 7112(3). As noted above, the President directed DOE to use its appropriations to fund NEPDG's activities, presumably pursuant to this or other legislative authority.

[12] 12 Op. Off. Legal Counsel 171, 172 (1988).

[14] See, e.g., GAO-01-440R at 15 (March 6, 2001) (stating that GAO is authorized to review activities related to U.S. participation in U.N. peacekeeping efforts in Kosovo); B-235836, August 9, 1989 (explaining GAO's authority to review certain activities related to the Iran/Contra affair).

[15] See, e.g., Smith v. United States, 508 U.S. 223, 228 (1993).

[16] As the Founders stated in Article VI: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land[.]" When Justice Marshall famously asserted that "it is emphatically the province and duty of the judicial department to say what the law is," he was referring not only to the construction of statutes, but to the construction of the Constitution itself. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). "The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts." Id. (Emphasis added.)

[17] 12 Op. Off. Legal Counsel 171, 172 (1988).

language or legislative history for the proposition that Congress, in using the word "existing," intended to refer only to some sources of law and not others.[18] In fact, such a limitation would be contrary to Congress' reliance on GAO to aid it in discharging its constitutional responsibilities.

Our review of the legislative history of the 1970 act disclosed nothing to support the contention that in using the term "law" Congress actually meant to limit GAO's authority under this section only to activities carried out pursuant to statutory law. The legislative history of the Legislative Reorganization Act of 1970 indicates that Congress was confronted with two widely differing proposals for providing analysis and review direction to GAO, and chose the more expansive.[19] The decision to emphasize the role of review and analysis within GAO was part of the larger effort by Congress to enhance congressional oversight over the spending power and activities of the executive branch.[20] Had Congress, in its effort to fortify its oversight activities, intended to exclude a large portion of governmental activities from GAO's purview, one would have expected some mention of that fact in the legislative history. In any event, your letter cites no evidence in the Legislative Reorganization Act itself nor in the legislative history that Congress intended to exclude all sources of law other than statutes from the term "law" in section 717.[21] In view of the provision of the Constitution you cited as support for NEPDG's activities, your restrictive reading could have the practical effect of denying GAO any evaluation and review authority, an intent clearly not contemplated by Congress and that could defeat the purpose Congress did articulate.

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[18] The 1988 OLC opinion also argued that "the juxtaposition of 'program or activity' with 'existing law' [in section 717] strongly suggests an intent to refer to statutory responsibilities." Id. To the extent the OLC is merely asserting that the phrase "program or activity" must refer to statutory programs or statutory activities, we have already rebutted this argument.

[19] Compare S. 844, 91st Cong., 1st Sess. § 204 (1969) (GAO to focus on cost benefit analyses) with H.R. 17654, 91st Cong., 2d Sess. § 204(a) (1970) (containing the language ultimately enacted).

[20] See, e.g., H.R. Rep. No. 1215, 91st Cong., 2d Sess. 10-11 (1976).

[21] Material in the House Report cited by the 1988 OLC opinion is not to the contrary. See H.R. Rep. No. 1215, 91st Cong., 2d Sess. 82 (1970) (directing GAO to "review and analyze government program results in a manner which will assist the Congress to determine whether those programs and activities are achieving the objectives of the law"). This language indicates the committee's desire that GAO focus its work on the effectiveness of governmental activities, not that the committee intended to prohibit GAO from examining a whole class of such activities. The legislative history is devoid of any statement to the effect that section 717 somehow limits GAO's audit and investigative authority.

Over the years, GAO has conducted many reviews that involve a wide range of White House programs and activities. For example, GAO has conducted reviews of several White House task forces. Most recently, GAO reviewed various activities of the White House China Trade Relations Group, and received extensive information in response to its information requests.[22] In prior years, GAO reviewed activities of the President's Task Force on Health Care Reform[23] and the Presidential Commission on the Human Immunodeficiency Virus Epidemic (known as the AIDS Commission).[24] In addition, GAO has examined numerous aspects of the White House's operations, including its travel practices, procurements, personnel practices, and information management and security.

Sections 712 and 717(b) Authorize GAO to Respond to Requests of Ranking Minority Members

Both sections 712 and 717 authorize GAO to respond to the requests of Ranking Minority Members. As stated earlier, section 717(b) authorizes GAO to "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 an evaluation." Section 712(1) authorizes GAO to "investigate all matters related to the receipt, disbursement, and use of public money," without limitation on how the initiative to decide which matters to investigate should be exercised.

The Comptroller General has established the policies and procedures under which he implements his audit and investigative authorities in GAO's Congressional Protocols.[25] Under the Protocols, requests from "committee leaders" are among GAO's top priorities for response.[26] The Protocols define "committee leaders" to include committee or subcommittee Chairs and Ranking Minority Members.[27] The

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[22] See B-285298, May 22, 2000; and Federal Lobbying: China Permanent Normal Trade Relations (PNTR) Lobbying Activities, GAO/GGD-00-199R, September 29, 2000.

[23] Cost of Health Care Task Force Related Activities, GAO/T-GGD-95-114, March 14, 1995; and GAO/GGD-96-114, March 14, 1995.

[24] Federal Advisory Committee Act: Presidential Commission on AIDS – Compliance with the Act, GAO/GGD-89-17, October 19, 1988.

[25] GAO's Congressional Protocols, GAO-01-145G (November 2000). A number of Members and staff commented on the Protocols during a trial implementation that lasted from January to September, 2000. Id. at 1.

[26] Id. at 4.

[27] Id. at 5.

definition is essential for GAO to implement effectively its role in supporting Congress in a "professional, objective, fact-based, nonpartisan, nonideological, fair, and balanced" manner.[28] Although the Congressional Protocols discussed above are new, the concepts underlying them, including GAO's responsiveness to Ranking Minority Member requests, have been in existence for many years.[29]

In asserting that GAO lacks the authority to respond to the requests of Ranking Minority Members, you rely in part on a 1978 OLC opinion that attempted to reach a similar conclusion.[30] The OLC opinion addressed the issue of GAO's audit authority under section 717(b)(1) briefly in a footnote, as follows:

> "Section [717(b)(1)], it is true, enables the Comptroller General to proceed on his own initiative. However, it cannot be anticipated that the Comptroller General will take that step after having received the request of a single Congressman, since such a step could have the effect of jeopardizing his role as an independent nonpolitical agency of the legislative branch."[31]

The OLC's conclusory statement ignores the applicable statutory language. Section 717 authorizes the Comptroller General to initiate audits and investigations "on his own initiative" without further qualification. Section 712(1) authorizes the Comptroller General to investigate "all matters relevant to the ...use of public money," without limitation as to the policy or process used to prioritize and initiate audits and investigations given our limited resources. It is well established that when Congress creates such open-ended authority in a federal agency, the agency has wide discretion in how best to implement the authority.[32] It would be difficult to conceive of language giving any official greater discretion than does the language in the statutory provisions at issue. Had Congress wished to limit the Comptroller General's discretion to initiate investigations, particularly with respect to investigations requested by its own members, it would have manifested its intent to do so by using more qualified language.[33]

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[28] Id. at 4.

[29] For example, in FY 1999 through the present, for the full committees alone, GAO has worked on over 170 requests from Ranking Minority Members.

[30] 2 Op. Off. Legal Counsel 415 (1978).

[31] Id. at 420, n.5 (citations and internal quotations omitted).

[32] Chevron v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984).

[33] We also observe that, contrary to the OLC's assertion, if GAO's policy were to respond only to requests from the majority party, such a policy could make GAO more partisan rather than less.

Conclusion

For the reasons described in this letter, the GAO inquiry into the operations and activities of the NEPDG is clearly authorized by 31 U.S.C. §§ 712 and 717(b). We trust that the Office of the Vice President 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. As previously noted, 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.

Sincerely yours,

Anthony H. Gamboa
General Counsel

Enclosure

cc: Chairman and Ranking Minority Member
Committee on Energy and Commerce
House of Representatives

Chairman and Ranking Minority Member
Committee on Government Reform
House of Representatives

The Honorable John D. Ashcroft
The Attorney General