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

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

**AMICUS CURIAE BRIEF OF THE CENTER FOR GOVERNMENT INTEGRITY, A PROJECT OF CITIZENS UNITED FOUNDATION, IN SUPPORT OF DEFENDANT RICHARD B. CHENEY'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT**

## INTRODUCTION

The parties to this action, wherein the Comptroller General seeks to compel production of documents from the Vice President of the United States, are proceeding on cross-dispositive motions before this Court. Plaintiff's motion for summary judgment is pending, and the defendant's opposition thereto, together with his own motion to dismiss or for summary judgment, are about to be filed. The Center for Government Integrity, a project of Citizens United Foundation, submits this *amicus*

*curiae* brief[1] in support of the defendant's motion to dismiss or for summary judgment, and in opposition to the plaintiff's motion for summary judgment in this action.

**INTEREST OF THE AMICUS CURIAE**

The Center for Government Integrity ("CGI") was founded by Citizens United Foundation in 1998 under the leadership of David N. Bossie, former Chief Investigator of the Government Reform and Oversight Committee of the U.S. House of Representatives. CGI is a project of Citizens United Foundation ("CUF"), a non-partisan, non-profit research and education foundation under Section 501(c)(3) of the Internal Revenue Code. CUF was established in 1992. It is dedicated to informing the American people about public policy issues which relate to traditional American values, including: the Constitution as the supreme limit on federal power, a strong national defense as the primary role of the federal government; free enterprise as the economic system that has enabled the American people to attain and maintain an historically high standard of living; belief in God and Judeo/Christian values as the fundamental underpinning of our way of life; and the recognition of the family as the basic social unit of our society.

CUF fulfills its mission through various projects, including CGI, which conducts research, analyzes issues and provides information to the public on matters related to government and ethics. In the past, the organization has filed *amicus curiae*

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[1] Center for Government Integrity has filed a motion, with the parties' consent, for leave to file this *amicus curiae* brief.

briefs in other federal litigation involving constitutional issues, including briefs in U.S. District Courts, U.S. Courts of Appeals and the United States Supreme Court.

This brief is intended to assist the Court in fully developing and understanding issues of first impression that are presented in this case, with a particular focus on the questions whether the Vice President is an Article I or Article II officer of the United States, and whether he is a proper party defendant herein.

## STATEMENT OF FACTS

On February 22, 2002, the Comptroller General of the United States filed the pending action to force Vice President Richard B. Cheney to produce certain records relating to the composition and activities of the National Energy Policy Development Group ("NEPDG"). The requested records include "documents setting forth the identities of the attendees at each of the NEPDG's task force meetings; the dates, subjects, agendas, and locations of the meetings with non-federal parties held by the Vice President as Chair of the NEPDG, or the NEPDG support staff, and the identities of the parties in attendance; the method by which the NEPDG members or staff determined which non-federal parties to invite to these meetings; and the NEPDG's direct and indirect costs." (Memorandum of Points and Authorities In Support of Plaintiff's Motion for Summary Judgment at 6 ("Plaintiff's Memorandum").)

By memorandum, President George W. Bush established the NEPDG on January 29, 2001, as an advisory panel "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." (Plaintiff's Statement of Material Facts as to Which There is No Genuine Issue ¶ 1 ("Fact Stmt.").) According to the memorandum, the NEPDG was to consist of the Vice President, the Secretaries of the Treasury, Interior, Agriculture, Commerce, Transportation, and 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." Fact Stmt., ¶ 15. The January Memorandum also specified 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." Fact Stmt. ¶¶ 5 and 15. Finally, according to the Memorandum, NEPDG was directed "to gather information, deliberate, and . . . make recommendations to the President." Fact Stmt. ¶ 15.

Pursuant to the request of certain Members of Congress, the Comptroller General opened an investigation of the NEPDG. (Fact Stmt. ¶¶ 8 and 9.) As part of the investigation the Comptroller General requested certain NEPDG records from the Vice President. (Fact Stmt. ¶ 10.) The Vice President responded by questioning the General Accounting Office's ("GAO") authority to conduct a review or investigate the activities of the NEPDG. (Fact Stmt. ¶¶ 11-15.)

During the course of correspondence, a limited number of records were produced. (Fact Stmt. ¶¶ 12 and 16-17.) Following further consultations, the scope of the records request was narrowed. (Fact Stmt. ¶¶ 19-27.) The Vice President,

however, refused to produce any additional records, asserting the Comptroller General's lack of authority to conduct the review. (Fact Stmt. ¶ 28.)

On August 17, 2001, the Comptroller General filed a report under 31 U.S.C. § 716(b) with the President, Vice President (presumably as "the head of the agency" under inspection), the leaders of the House and Senate, Director of OMB and the Attorney General, informing them of the parties' dispute concerning access to the NEPDG records. (Fact Stmt. ¶ 30.) During the 20-day period following receipt the report, neither the President nor the Director of OMB made a certification under 31 U.S.C. § 716(d)(1)(C). (Fact Stmt. ¶ 30.) Although the Vice President produced the names of the six NEPDG staff members, the Vice President refused, and continues to refuse, to produce any of the additional records sought by the Comptroller General. (Fact Stmt. ¶¶ 32-37).

On February 22, 2002, the Comptroller General filed the pending action to enforce what he asserts is his "statutory right under 31 U.S.C. §§ 712,716, and 717 to obtain records necessary to discharge his congressionally delegated responsibilities to investigate all matters relating to the use of public money and evaluate the results of federal government activities and programs." (Plaintiff's Memorandum at 1.)

The Comptroller General has moved for summary judgment, asserting that the case presents "pure questions of law, as to which there are no material facts in dispute." (Plaintiff's Memorandum at 2.) The essence of his legal argument is that 31 U.S.C. § 716 "establishes the Comptroller General's right to inspect NEPDG records and authorizes him to enforce that right by bringing suit against the Vice President "in

his official capacity as the Vice President of the United States and as the official who served as the Chair of the NEPDG." Fact Stmt. ¶ 1; Plaintiff's Memorandum at 23.

The Comptroller General has argued that, whether the Vice President is sued in his capacity as Vice President or as "chair" of the NEPDG, the Vice President, as "both head of the O[ffice of] V[ice] P[resident] and the head of the NEPDG," is "the head of [an] agency for the purposes of [31 U.S.C.] Section 716." Plaintiff's Memorandum at 53. In doing so, the Comptroller General has presumed that the Office of the Vice President is wholly within the Executive Branch, and that such office embraces the duties of the Vice President under the Memorandum creating the NEPDG. Moreover, the Comptroller General has presumed that the January 29 Memorandum established the Vice President as the "head" of the NEPDG, and therefore, the head of an agency subject to the provisions of 31 U.S.C. Section 716. Plaintiff's Memorandum at 50-56. CGI submits that the Comptroller General is mistaken, and that Richard B. Cheney is not a proper party defendant to this action.

## SUMMARY OF ARGUMENT

Vice President Richard B. Cheney is not a proper party defendant to this action. According to Paragraph 1 of the Complaint, Mr. Cheney has been sued "in his official capacity as the Vice President of the United States and as the official who served as Chair of NEPDG."

According to 31 U.S.C. Section 701, the Comptroller General has no authority to sue any person who is "head" of an "agency" which is part of "the legislative branch." Having sued Mr. Cheney in his capacity as the Vice President of the United

States, the Comptroller General has sued an agency of the Legislative Branch of the federal government. The Vice President holds the office of "President of the Senate," an office which is clearly part of the Legislative Branch of the government with the legislative power to break tie votes in the United States Senate. U.S. Const. Art. I, § 3 cl. 4. Therefore, the Vice President, *qua* Vice President, is exempt from this suit, being part of the Legislative Branch.

The Comptroller General also has sued Mr. Cheney as "chair of the NEPDG." Although the Comptroller General has claimed that the Office of the Vice President "is a component of the Executive Office of the President [under] the Reorganization Plan of 1977, 5 U.S.C.A. App. 1, at 440 (West 1996)," he has failed to allege or demonstrate that the Vice President's duties under the Memorandum establishing the NEPDG fall within the duties of Mr. Cheney as the "head" of the Office of the Vice President. Nor are Mr. Cheney's powers and duties as part of the Executive Office of the President sufficient to constitute him, as Vice President, the "head" of the NEPDG. Indeed, the President's Memorandum of January 29, 2001, did not make Mr. Cheney the "head" of the NEPDG. Although the Comptroller General has alleged that Mr. Cheney is "chair" of the NEPDG, it has only alleged that, as "chair," Mr. Cheney has the power to "lead" the group in "the development of a national energy policy," to "preside" at NEPDG meetings, and to "direct" the work of the NEPDG. Such allegations, however, fall short of demonstrating that Mr. Cheney is the "head" of the NEPDG.

For these reasons, Mr. Cheney would not appear to be a proper party to this case, and the plaintiff's motion for summary judgment should be denied.

## ARGUMENT

### I. THE VICE PRESIDENT OF THE UNITED STATES MAY NOT BE SUED UNDER 31 U.S.C. SECTION 716 IN HIS CAPACITY AS VICE PRESIDENT OF THE UNITED STATES.

According to the first Paragraph of his Complaint, the Comptroller General has sued Richard B. Cheney "in his official capacity as the Vice President of the United States." 31 U.S.C. Section 716 does not authorize such a suit.

#### A. Constitutionally, The Vice President Is An Officer in the Legislative Branch of the Federal Government.

According to 31 U.S.C. Section 701, the Comptroller General has no authority to bring suit under 31 U.S.C. Section 716 against a person who is the "head of an agency" which is part of the "legislative branch" of the federal government.

In his capacity as Vice President, Mr. Cheney serves as "President of the Senate." Article I, Section 3, Clause 4, U.S. Const. The Senate is clearly an agency of the Legislative Branch of the federal government, being one of two bodies "vested" with the legislative powers "granted" by the Constitution. Article I, Section 1, U.S. Const. The power thus vested in the Vice President by Article I, Section 3, Clause 4 of the Constitution to cast a "vote" in the Senate, whenever it is "equally divided," is legislative in nature, not executive:

> If the speaker of the Senate was to be chosen from its own members, the State upon whom the choice would fall might possess either more or less than its due share of influence. If the speaker were not allowed to vote, except

> where there was an equal division, independent of his own vote, then the State might lose it own voice; if he were allowed to give hive vote and also a casting vote, then the State might, in effect, possess a double vote. Either alternative would of itself present a predicament sufficiently embarrassing. On the other hand, if no casting vote were allowed in any case, then the indecision and inconvenience might be very prejudicial to the public interests in case of an equality of votes. It might give rise to dangerous feuds or intrigues, and create sectional and State agitations. The smaller States might well suppose that their interests were less secure and less guarded than they ought to be. Under such circumstances, the Vice-President would seem to be the most fit arbiter to decide, because he would be the representative, not of one State only, but of all, and must be presumed to feel a lively interest in promoting all measures for the public good. [1 J. Story, Commentaries on the Constitution of the United States, § 738 (5th ed. 1891).]

That the office conferred upon the Vice President is legislative in nature, and not executive, is further evidenced by Article I, Section 3, Clause 5, which confers upon the Senate the right to choose "a president *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of the President of the United States." *See* 1 J. Story, Commentaries at §§ 733-740.

The Vice President's position as an officer in the Legislative Branch is also confirmed by Article II of the Constitution. Although the President and Vice President are elected together for four-year terms, the Constitution confers upon the Vice President no executive powers and no executive office duties. Article II, Section 1, Clause 1 vests "[t]he executive Power … in a President of the United States of America." Article II, Section 2, makes the President Commander in Chief of Armed Forces and grants him the power to make treaties, and appoint various officials. And

Article II, Section 3 states that the President shall take care that the laws are faithfully executed.

In stark contrast, Article II confers no executive powers whatsoever upon the Vice President. Instead, Article II, Section 1, Clause 3 states that the Vice President's **only** official duty under Article II is as President of the Senate, that is, to count and certify the votes for President and Vice President. *See also* U.S. Const. Amend. XII.

That the Vice President becomes President upon the death, resignation or removal of the President, *see* U.S. Const. Amend. XXV, § 1, or Acting President when the President is incapacitated, U.S. Const. Amend. XXV, §§ 3 and 4, does not convert the Vice Presidency into an Executive Branch post. If it did, then the Speaker of the House of Representatives and President pro tempore of the Senate would be Executive Branch officials under the same rationale, since those two Legislative Branch offices are also in the line of succession to the presidency. *See* 3 U.S.C. § 19(a).

As a matter of constitutional law, therefore, the Vice President is not a member of the Executive Branch, despite being a potential member of the Executive Branch, contingent upon the death, resignation or removal of the President.

### B. Legislatively, the Vice President is an Officer in the Legislative Branch of the Federal Government.

#### 1. Senate Practices & Procedures Acknowledge The Vice President As A Legislative Branch Officer.

From the beginning, the Senate has treated the Vice President as an officer in the Legislative Branch. In the early days of the republic, questions arose as to the extent of the Vice President's inherent powers as the presiding

officer of the Senate. At first, it was assumed that "the power of preserving order during the deliberations of the Senate, in all cases where the rules of the Senate did not specially prescribe another mode, had been silently supposed to belong to the Vice-President as an incident of office." 1 J. Story, Commentaries on the Constitution, *supra*, at § 739.

In 1826, however, the Vice President called into question his power, by virtue of his office, to preserve order in the Senate. Justice Story characterized this as a "virtual surrender of the presiding power (if not universally, at least in that case) into the hand of the Senate" that "disarmed the officer even of the power of self-protection from insult or abuse, unless the Senate should choose to make provision for it." *Id*. But the Vice President's surrender of power was short-lived. In 1828, the Senate passed a rule providing that "every question of order shall be decided by the president without debate, subject to appeal to the Senate." *Id*. at § 740.

The Senate's modern practices continue to recognize the Vice President as a Legislative Branch officer. For example, the terms "Vice President" and "President of the Senate" are used interchangeably throughout the Senate's Standing Rules. Rule One uses the title "Vice President" in referring to the Senate's presiding officer. See Standing Rules of The Senate §§ I.1 and I.2. Rule Two, however, uses the term "President of the Senate of the Untied States" in the forms recommended for use in certifying the election or appointment of United States Senators. *Id*. at § II.3. Rule Fourteen discusses the procedure for presenting bills, amendments and joint resolutions to the President of the United States after they have been "signed by the Speaker of the

House and the President of the Senate." *Id.* at § XIV.5. Rule Twenty-Three grants Senate floor privilege to the "Vice President." *Id.* at § XXIII. [2]

### 2. Congressional Statutes Recognize the Vice President as an Officer of the Legislative Branch.

Title 2 of the United States Code provides the Vice President, as President of the Senate, with various embellishments of Legislative Branch office, including postage and stationery allowances. 2 U.S.C. §§ 42a, 46a and 46a-1. Congress has also imposed several Legislative Branch duties on the Vice President. As President of the Senate, he receives notices from the states certifying the election of senators, 2 U.S.C. § 1a, and administers the oath of office that each senator must take prior to entering office. 2 U.S.C. § 21. The Vice President also is required to take an oath as President of the Senate. 2 U.S.C. § 22. The Vice President is obligated to certify the salary and mileage accounts of senators. 2 U.S.C. § 48. Moreover, when a witness summoned to appear before the Senate fails to appear, the Vice President is obligated to certify the failure to appear to the appropriate United States attorney so the matter can be brought before a grand jury. 2 U.S.C. § 194.[3]

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[2] It is also noteworthy that the Vice President, in his capacity as President of the Senate, sits alongside the Speaker of the House when the President, pursuant to Article II, Section 3 of the Constitution, delivers his State of the Union speech to a joint session of Congress.

[3] In a statute similar to the statute at issue in this case, Congress has authorized the Comptroller General to initiative a civil action "against any department, agency, officer or employee of the United States" for failure to make budget authority "available for obligation." 2 U.S.C. § 687. However, as a precursor to any such action, the Comptroller General must file an "explanatory statement" with the Speaker of the House and President of the Senate. *Id.* If, as the Comptroller General asserts in this action, Congress considered the Vice President an Executive Branch officer who is

### C. As an Advisor to the President, the Vice President is not Converted into an Officer of the Executive Branch of the Federal Government.

The Comptroller General appears to have presumed that, because the Office of the Vice President ("OVP") is a component of the Executive Office of the President ("EOP")," the Vice President, himself, is an officer of the Executive Branch of government. Plaintiff's Memorandum at 51. Just because the President has chosen to include the Vice President among his close advisors, however, does not make the Vice President an officer of the Executive Branch.

Even the Reorganization Plan No. 1 of 1977 ("1977 Plan"), upon which the Comptroller General has heavily relied, states that "the combination of constitutional, statutory, and Presidentially assigned duties … make[s]" the Office of the Vice President "unique." *Executive Order No*. 12045 of March 27, 1978, 43 Fed. Reg. 13347, reprinted in a note preceding 3 U.S.C.S. Section 101. In fact, the Vice President, alone, among those who chair the ten EOP units identified in the 1977 Plan, is not appointed by the President. Indeed, once elected, the Vice President is independent of the President. While Article II, Section 2, Clause 2 vests the President with power to appoint certain government officials, the Vice President is not one of them.

To be sure, President George W. Bush, like other recent presidents, has frequently sought and received advice from his Vice President. President Bush, as has

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subject to suit by the Comptroller General under 31 U.S.C. § 716, it is quite odd that the Comptroller General would be required to report to the President of the Senate under a comparable code section that authorizes him to sue Executive Branch agencies and officials.

also been the case with other modern presidents, has sought, and listened to, advice from a variety of sources, including business leaders, foreign leaders, Members of Congress and the general public. Indeed, the Constitution imposes a duty on the President to obtain the "advice and consent" of the Senate on treaties and nominations (U.S. Const. Art. II, § 2 cl. 2), but seeking such "advice and consent" does not make the 100 members of the Senate officers of the Executive Branch. According to the 1977 Plan, the Vice President provides "policy and political advice" to the President. As is true of the Senate, so it is true of the Vice President: the act of rendering advice to the President does not make the Vice President an Executive Branch officer.

Nor does the Vice President become an Executive Branch official because the President has formally named him to chair the National Energy Policy Development Group. Presidents have frequently named members of the Legislative and Judicial Branches to panels without switching their status to the Executive Branch. The Warren Commission is a prime example. It was created by an Executive Order of President Lyndon B. Johnson to investigate and report on the assassination of President John F. Kennedy. Exec. Order No. 11,130, 28 Fed. Reg. 12,789 (1963). The Warren Commission was chaired by Chief Justice Earl Warren; other members included: Senators Richard B. Russell and John Sherman Cooper; Representatives Hal Boggs and Gerald R. Ford; Allen W. Dulles, former Director of the Central Intelligence Agency; and John J. McCloy, former Director of the World Bank. Throughout his tenure on the panel, Chief Justice Warren remained a member of the Judicial Branch. Similarly, Senators Russell and Cooper, and Representatives Boggs and Ford kept their status as

members of the Legislative Branch. The fact that members of the Warren Commission were not divested of their respective Judicial and Legislative Branch posts further illustrates and confirms the point that Vice President Cheney was not transformed from President of the Senate to an Executive Branch post by accepting the President's appointment to an advisory panel.

## II. VICE PRESIDENT CHENEY MAY NOT BE SUED UNDER 31 U.S.C. SECTION 716 AS "CHAIR" OF THE NEPDG.

The Comptroller General has contended that, for the purposes of 31 U.S.C. Section 716, "agency" has been broadly defined to include all the "instrumentalities" that a president might use to develop national policy. Plaintiff's Memorandum at 50-56. Completely overlooked in this analysis, however, is the fact that the Comptroller General has not sued an entity of the Executive Branch, but a person. After all, 31 U.S.C. Section 716 does not authorize a suit against an "agency," but against the "head" of an agency. Thus, plaintiff has the burden of establishing that Mr. Cheney, as "chair" of the NEPDG, is the **"head"** of an "agency" within the meaning of 31 U.S.C. Section 716.

Unlike "agency," the term "head" is not defined by statute. According to Webster, a "head" of an entity composed of other persons is "one who stands in relation to others somewhat as the head does to the rest of the members of the [human] body." Webster's Third International Dictionary (Springfield, MA: 1964). In other words, the head of an agency must be in control of that agency in the same way that the human brain, eyes, ears, nose and mouth control the human body.

The Comptroller General has made no effort here either to allege or prove that Mr. Cheney stands in relation to the Secretaries of Treasury, Interior, Agriculture, Commerce, Transportation and Energy in the same way as the human head stands in relation to the arms, hands, torso, legs and feet of the human body. To the contrary, the Comptroller has alleged that, according to the President's January 2001 Memorandum establishing the NEPDG, Mr. Cheney is authorized only to "lead," "preside," and "direct," not to command, insist and decide. It appears from the Memorandum, then, that the role envisioned for the Vice President was akin to the chairmanship of a corporate board, with the decision-making power residing in the body, not the chairman. Thus, there is no evidence contained in the January 2001 Memorandum indicating that Mr. Cheney is the "head" of the NEPDG.

Nor is there anything in the 1977 Plan demonstrating that the Vice President, if requested by the President to participate in the formulation of policy, was to serve as the "head." To the contrary, the Office of the Vice President is listed therein as one of 10 units within the EOP. While the Office of the Vice President was recognized as reflecting a "unique" combination of constitutional, statutory, and presidentially assigned duties, the 1977 Plan did not indicate that the Vice President would play any particular role in the carrying out of those duties. Rather, it appears that the 1977 Plan contemplated that the President would be supplied with "the widest possible range of opinions," in order to ensure that the President made the final policy decisions.

In light of the limited role assigned to the Vice President within the Executive Office of the President, as well as a limited role on the NEPDG, it is submitted that the

Vice President is not the "head" of the NEPDG, and therefore, that he is not subject to being sued under 31 U.S.C. Section 716.

## CONCLUSION

For the foregoing reasons, the Center for Government Integrity submits that Vice President Cheney is not a proper party defendant to the Comptroller General's suit under 31 U.S.C. § 716, that the plaintiff's motion for summary judgment should be denied, and that the defendant's motion to dismiss or for summary judgment should be granted.

Respectfully Submitted,

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May 21, 2002

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that the foregoing Amicus Curiae Brief of the Center For Government Integrity, a Project of Citizens United Foundation, In Support of Defendant Richard B. Cheney's Motion to Dismiss or For Summary Judgment was served, this ___ day of May, 2002, by depositing copies thereof in the United States Mail, First-Class, postage prepaid, addressed to counsel for the parties as follows:

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