UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S CONSOLIDATED REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

The Comptroller General demonstrated in his opening brief that Congress granted him the right to review the information at issue in this litigation, and to bring this action to enforce that right. Defendant responds to this showing by launching a sweeping assault on Congress's decision to delegate its investigative power to a "mere agent," Def. Mem. at 11, and by insisting that this Court dismiss this congressionally-authorized action as "an affront to our government of separated powers," *id.* at 23, that would "work a revolution" in "the constitutional scheme," *id.* at 1. But it is defendant—not the Congresses that enacted the laws or the Presidents who signed them—who seeks to work a revolution in separation of powers principles, one that would drastically interfere with Congress's essential power to oversee the activities of the executive branch.

Repeatedly invoking the separation of powers, defendant asks this Court to misuse justiciability principles to dictate the precise manner in which Congress exercises its oversight authority; to misapply presumptions and rules of construction for the avowed purpose of thwarting, rather than effectuating, Congress's clear intent; and to create a new and unbounded immunity from oversight based on constitutional provisions that have never before been invoked in an inter-branch dispute over documents. Indeed, under defendant's conception of "our government of separated powers," *id.* at 23, no such disputes could ever again reach the courts. Instead, Congress would have to exercise its oversight authority through the concededly "cumbersome process of" getting a majority of Congress (or one House) to engage in political self-help, *id*. at 21, which, according to defendant, consists either of voting to hold executive branch officials in contempt or passing legislation (presumably funding cut-offs) to compel the production of information. Defendant asks this Court to shackle Congress's oversight power in

this remarkable and unprecedented manner simply to spare the executive branch the political burden of invoking a statutory certification provision or asserting executive privilege.

As the Comptroller General explains in detail below, defendant's entire submission rests on a profound misunderstanding of the separation of powers framework that governs inter-branch document disputes. Congress is constitutionally entitled to delegate to its agents both its investigative power, and its authority to sue to enforce that power. Congress has long delegated these powers, and the courts have consistently recognized the legitimacy of such delegations. Indeed, not only have the courts entertained litigation initiated by congressional agents against the President himself, they have repeatedly stressed that the Judiciary must respect Congress's decisions concerning the delegation and enforcement of its investigative powers, which are matters peculiarly within the province of the legislative branch.

Once the constitutionally flawed underpinnings of defendant's claims are exposed, it is clear that his various challenges to this action must fail. Because of the delegable nature of Congress's investigative authority, the Comptroller General has plainly suffered an injury-in-fact sufficient to confer standing. Unlike legislators who seek redress for "wholly abstract and widely dispersed" injuries to Congress's lawmaking power (which can be exercised only on a collective basis), the Comptroller General suffers a "personal" and "particularized" injury when the exercise of his delegated power is frustrated by a refusal to provide records to which he alone is statutorily entitled. Nor is this suit barred by the equitable discretion doctrine, which applies only where a legislator seeks to use the courts to thwart the will of his *fellow legislators*. Indeed, by insisting that this Court dismiss a statutorily-authorized suit against the executive branch because "[n]o subpoena has been issued, no resolution has been passed, and no statute has been

enacted in response to this dispute," Def. Mem. at 19, defendant openly invites misuse of the doctrine, which seeks to ensure that courts do not meddle in Congress's internal affairs.

Similarly, no separation of powers principle justifies an unprecedented application of the "clear statement" rule to an information-disclosure statute enacted in aid of Congress's oversight authority. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the Court applied this extraordinary rule to a statute that purported to authorize judicial review and control (through injunctive relief) of the President's performance of his discretionary duties. In explaining that separation of powers principles prohibit courts from enjoining the President, the Court went out of its way to note that he enjoys no comparable immunity from compulsory information demands of the type made by the Comptroller General in this case. *See id.* at 802-03. Accordingly, the clear statement rule cannot be used to frustrate Congress's unmistakable intent to allow its agent to sue to obtain documents from the entire executive branch, including the President himself. Nor can defendant escape such oversight demands by equating the term "agency" in § 716 of title 31 with Congress's use of that term in other statutes, such as the Freedom of Information Act. Statutes enacted in aid of Congress's broad constitutional power to oversee the executive branch cannot be narrowed based on the scope of different statutes, passed by different Congresses, to address different concerns.

Finally, there is no merit to defendant's contention that constitutional concerns justify invalidating or narrowing the Comptroller General's investigative authority. Contrary to defendant's claim, the development of national energy policy is not a matter within the exclusive province of the executive branch, and cannot be made so simply because the President seeks information and advice on the subject pursuant to his powers under the Recommendations and Opinions Clauses. The fact that a power is enumerated and under the President's exclusive

control does not preclude congressional inquiry into activities conducted pursuant to that power, any more than the Take Care Clause, which is also enumerated and exclusive, prevents Congress from overseeing the manner in which the executive branch executes the laws. Indeed, defendant cannot, by invoking the Opinions and Recommendations Clauses, resurrect the very same absolute presidential privilege that the courts rejected over a quarter of a century ago.

Nor does the Comptroller General's review interfere with the President's exercise of his constitutional duties. In contending otherwise, defendant both greatly exaggerates the scope of the Comptroller General's information requests—which do not seek the notes and minutes of NEPDG meetings or its deliberations on recommendations—and completely ignores the fact that § 716 authorized the President to preclude this suit altogether, and leaves intact the President's ability to assert executive privilege. To show that the Comptroller General's statutory authority is unconstitutional, or that it raises serious constitutional difficulties justifying a narrowing construction, defendant must show that merely requiring the executive branch to avail itself of the statutory certification mechanism or to assert privilege prevents the President from accomplishing his constitutionally assigned functions. No such showing, however, is possible. Nor is there any basis for defendant's remarkable claim that requiring the President to "expend[] the political capital inherent in an assertion of [executive] privilege" when Congress "as a whole" has not expended such capital raises constitutional problems. Def. Mem. at 27 n.13. In fact, Presidents on numerous occasions have asserted privilege in response to demands by congressional agents, without the participation of Congress as a whole.

Stripped of defendant's many misapplications of separation of powers principles, this case involves straightforward questions of statutory interpretation. Defendant's claim that § 712 and § 717 of title 31 authorize the Comptroller General to review nothing more than hotel and

taxi receipts, and to read, along with the rest of the world, the NEPDG's report, is simply untenable. These statutes, enacted in aid of Congress's broad oversight and appropriations powers, confer authority on the Comptroller General and the agency he heads, the General Accounting Office ("GAO"), to investigate all matters related to the use of public money, and to evaluate the results of all government activities and programs. Defendant's contrary contentions ignore the plain language, structure, and legislative history of the statutes, as well as the settled practices of GAO and the executive branch under those statutes.

ARGUMENT

I. SECTION 716 CONSTITUTES A PROPER DELEGATION OF CONGRESS'S INVESTIGATIVE POWER, AND ITS CONCOMITANT AUTHORITY TO SUE TO ENFORCE THAT POWER.

A central, mistaken theme pervades defendant's submission—namely, that the Constitution requires Congress to exercise its investigative powers through the "cumbersome process of getting a full House to take action," Def. Mem at 21, and prohibits Congress from delegating this power to "a mere agent." *Id.* at 11. This "non-delegation" theory is most evident in defendant's justiciability arguments, where he contends that the Comptroller General lacks standing (or that this Court should dismiss the case under the doctrine of "equitable discretion") because the Comptroller General seeks to vindicate Congress's institutional interests without "a majority vote of [Congress] (or the members of one chamber)." *Id.* at 16. This same premise also underlies defendant's claim that the statute unduly interferes with the President's ability to receive confidential advice (and should therefore be narrowly construed or declared unconstitutional). Because the statute affords ample protection to confidential deliberations by (1) authorizing the President (or the Director of the Office of Management and Budget ("OMB")) to preclude suit through a certification and (2) leaving intact the President's right to

assert executive privilege before and even after suit is brought, defendant's claim of interference necessarily rests on the proposition that the Constitution forbids Congress from merely requiring the President to expend "the political capital inherent in an assertion of executive privilege" (or a statutory certification) without an expenditure of such capital "by the Congress as a whole." *Id.* at 27 n.13. Defendant's "non-delegation" premise is demonstrably wrong. Placed in its proper historical and legal context, § 716 constitutes a wholly permissible delegation of congressional power.

A. Congress May Delegate Its Investigative Power, And Its Ancillary Authority To Sue To Enforce That Power, To Its Agents.

1. Congress Has Long Delegated its Investigative Power to its Agents, and the Courts Have Recognized the Legitimacy of Such Delegations.

Although the Constitution makes no mention of a congressional power to investigate, Congress has exercised such authority since its inception, and the Supreme Court has long recognized that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). This essential investigative power resides in each House of Congress. *Id*. at 160-61. Although the House and Senate initially exercised this power by adopting resolutions that authorized specific investigations, in the early part of the 20th century, each House began to delegate its investigative powers to standing committees. Today, House and Senate rules define the jurisdiction of all standing committees, and empower them to require, by subpoena, the attendance and testimony of witnesses and production of documents. *See* H.R. R. XI(2)(m)(1)(b); Senate R. XXVI(1). The rules of these committees govern issuance of

subpoenas, and in some instances permit issuance by a committee chairman alone, with or without the concurrence of a ranking minority member.[1]

As a matter of practice and custom, most congressional requests for executive branch information are made informally, and most such requests are honored. *See* Todd Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. Rev. 563, 626 (1991). Use of a subpoena, therefore, is typically reserved for those situations in which an executive branch official fails to respond to an informal request for information. Failure to comply with a congressional subpoena is a misdemeanor, punishable by a fine of up to $100,000 and imprisonment for up to one year. *See* 2 U.S.C. § 192; 18 U.S.C. §§ 3571(b)(5), 3559(a)(6).

The executive branch, however, is not powerless to resist congressional demands for information. Since the Washington Administration, Presidents have refused to comply with such demands by asserting what is today known as "executive privilege."[2] Although executive privilege, like Congress's power to investigate, is not explicitly mentioned in the Constitution, the Supreme Court recognized its existence in *United States v. Nixon*, 418 U.S. 683, 705-07 (1974) ("*Nixon I*"), and the D.C. Circuit upheld the President's assertion of the privilege in response to a congressional committee demand for information. *Senate Select Comm. v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).

Use of the subpoena power to compel the production of information from the executive branch first became prevalent after World War II. Beginning with Franklin Roosevelt, every

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[1] *See* Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, at CRS-5 (CRS Report for Congress 1995); *see also*, *e.g.*, H.R. Comm. on Gov't Reform R. 18(d) (permitting Chairman to issue subpoenas).

[2] For decades, Presidents typically resisted congressional demands for information by asserting that disclosure was "not in the public interest." *See History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress: Part I – Presidential Invocations of Executive Privilege Vis-à-vis Congress*, 6 Op. Off. Legal Counsel 751, 770, 775 (1982) ("*Executive Privilege Assertions: Part I*") (citing privilege assertions using that formulation).

President has been required to "expend[] the political capital inherent in an assertion of executive privilege," Def. Mem. at 27 n.13, in response to subpoenas issued by committees or subcommittees.[3] Indeed, in a number of instances, Presidents have made such assertions in response to requests by individual members of Congress, where no subpoena had been served.[4]

Congress, moreover, has long delegated its investigative powers to agents other than its own committees or members. In 1921, Congress conferred authority on the Comptroller General to obtain information from the executive branch, *see* Budget and Accounting Act, 1921, ch. 18, § 313, 42 Stat. 20, 26, and it has since confided investigative powers in various commissions, such as the Federal Election Commission. *See Buckley v. Valeo*, 424 U.S. 1, 137-38 (1976). Well before it enacted § 716, Congress conferred on agents such as the Comptroller General the power to compel either the production of information or a presidential certification indistinguishable from an assertion of privilege. The 1959 amendments to the Mutual Security Act of 1954 provided for the automatic termination of certain funds unless the executive branch

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[3] *See Executive Privilege Assertions: Part I*, 6 Op. Off. Legal Counsel at 770-80 (recounting assertions by Presidents Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Nixon, Carter and Reagan in response to subpoenas or "requests" by committees or subcommittees). Louis Fisher, *Congressional Access to Executive Branch Information: Legislative Tools* CRS-40-41 (CRS Report for Congress 2001) (describing President Ford's assertion in response to committee subpoena and vote to hold Secretary of State Kissinger in contempt for failing to comply); Morton Rosenberg, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments* app. A at 25-26 (CRS Report for Congress 1999) (noting assertions by Presidents George H. Bush and Clinton in response to subpoenas); Memorandum from George W. Bush, to the Attorney General Re: Congressional Subpoena for Executive Branch Documents (Dec. 12, 2001) (assertion by President George W. Bush) (Ex. 1).

[4] *See Executive Privilege Assertions: Part I*, 6 Op. Off. Legal Counsel at 774 (assertion by President Truman after "members of a Senate Appropriations Subcommittee sought detailed information on the administration of the Loyalty Security Program"; no mention of a subpoena); *id.* at 775 (assertion by President Eisenhower after "Senator Lyndon Johnson asked for the release of" certain reports; no mention of a subpoena); *id.* at 776 (assertion by President Kennedy after "Senator Thurmond requested the names of" government employees who recommended changes in specific speeches; no mention of a subpoena); Louis Fisher, *supra*, at CRS-15

produced information requested by the Comptroller General (or certain designated committee chairs), or the President personally certified that the documents should not be disclosed. *See* Mutual Security Appropriation Act, 1960, Pub. L. No. 86-383, § 111(d), 73 Stat. 717, 720. In order to avoid such funding terminations, President Eisenhower was forced to make three certifications (one in response to a request by the Comptroller General) in which he asserted that disclosure would be "incompatible with the national interest"[5]—language virtually indistinguishable from that used to assert executive privilege. *See supra* note 2.

In a lengthy opinion addressing the effect of such a certification, Attorney General William P. Rogers nowhere questioned the constitutionality of a statute that compelled the President to expend the political capital inherent in a privilege-like certification in response to information requests from the Comptroller General or individual members of Congress. *See Mutual Security Program—Cutoff of Funds from Office of Inspector General and Comptroller*, 41 Op. Att'y Gen. 507 (1960). Although the statute authorized requests for "papers and documents . . . of a character long protected by the Executive privilege," *id.* at 525, including those that "'reflect the advice to the President of members of his cabinet and others of his principal advisers,'" *id.* at 510 (quoting President's certification), the Attorney General never suggested that Congress could not delegate its investigative authority to an agent, or that it could not empower such an agent to make requests that would require the President to make a personal

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(assertion of privilege by President Reagan before Democrats on the Senate Judiciary Committee "began rounding up votes to subpoena" the records in question).

[5] *See* Letter to the Chairman, Senate Foreign Relations Subcommittee, Concerning His Request for a Report Evaluating the Mutual Security Program in Viet-Nam, 1959 Pub. Papers ¶ 278 (Nov. 12, 1959) (Ex. 2); Letter to the Comptroller General of the United States Concerning His Requests for Reports Evaluating the Mutual Security Program In Iran and Thailand, 1959 Pub. Papers ¶ 342 (Dec. 22, 1959) (Ex. 2); The President's Certification as to His Forbidding Disclosure to Congress of Certain Documents Relating to Aid to South American Countries, 1960 Pub. Papers ¶ 380 (Dec. 23, 1960) (Ex. 2).

certification indistinguishable from an assertion of privilege. To the contrary, the Attorney General correctly characterized the certification mechanism as an "accommodation" to the President. *Id.* at 524.

In short, it has been settled constitutional practice for more than a half century that Congress need not act through a full House vote, let alone through bicameralism and presentment, in order to compel either the production of executive branch documents or the expenditure of political capital inherent in an assertion of executive privilege. Instead, for disputes over executive branch information, Congress has chosen to require a full House vote only for the drastic measures of referring a contempt of Congress citation to the United States Attorney *for criminal prosecution*, *see* 2 U.S.C. § 194, *Wilson v. United States*, 369 F.2d 198 (D.C. Cir. 1966), or directing the Sergeant-at-Arms to *arrest and imprison* a contemnor until he or she complies with an order. Those are truly extraordinary actions, depriving individuals of their liberty or reputations, to which Congress has never resorted in order to compel executive branch compliance with a subpoena.[6]

The Supreme Court has long approved Congress's practice of delegating its investigative powers to its agents. *See McGrain*, 273 U.S. at 158 (committee subpoenas "are to be treated as if issued by the Senate."). "The theory of a committee inquiry," the Court has explained:

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[6] To plaintiff's knowledge, Congress has never attempted to imprison an executive branch official for failure to comply with a subpoena. In the nearly 150 years since it first enacted the criminal contempt statute, a full House of Congress has voted to refer a federal official for prosecution only once. *See* Peterson, *supra*, at 571-74 (recounting 1982 House referral against EPA Administrator Anne Gorsuch). Because the House took this step *after* the assertion of privilege, the resolution was not intended to compel a privilege assertion or the production of documents. *See id.* at 572 & n.52 (quoting House Resolution, which included no demand for production). In fact, a criminal referral is not made to compel compliance with a subpoena, but to punish a past failure to comply. *See* S. Rep. No. 95-170, at 41 (1978) ("A witness cannot purge himself of criminal contempt."); Carl Beck, *Contempt of Congress* 6 (1959) (purpose of the criminal contempt statute is not to coerce compliance, but to punish recalcitrant witnesses).

> is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose. Their function is to act as the eyes and ears of the Congress in obtaining facts upon which the full legislature can act. To carry out this mission, committees and subcommittees, *sometimes one Congressman*, are endowed with the full power of the Congress to compel testimony.

Watkins v. United States, 354 U.S. 178, 200-01 (1957).[7] The Court has likewise confirmed that Congress may confide in agents other than committees or individual members powers of "an investigative and informative nature . . . which [it] might delegate to one of its own committees." *Buckley*, 424 U.S. at 137 (referring to the Federal Election Commission).

In approving those practices, the Court has made clear that the manner in which Congress chooses to delegate its investigative powers is "a matter of congressional administration," not a subject governed by the Constitution. *Gojack v. United States*, 384 U.S. 702, 707 (1966). Thus, while an "essential premise" of a delegation of investigative power to a committee "is that the House or Senate shall have instructed the committee members on what they are to do with the power delegated to them," *Watkins*, 354 U.S. at 201, Congress is not required to provide such instructions in resolutions authorizing each specific inquiry a committee may conduct. Rather, such instructions may be, and often are, "embodied in the authorizing resolution" creating a standing committee and setting forth its jurisdiction. *See id.* at 201-02 & n.37 (citing the House Resolution in which the House Un-American Activities Committee was made a standing committee).

Before sustaining a conviction under the contempt of Congress statute, which makes it a crime to refuse to "answer any question pertinent to the question under inquiry," 2 U.S.C. § 192, courts will review whether a committee's charter is so vague that a witness cannot ascertain the pertinence of the question propounded, particularly if the question implicates the witness's

[7] Unless otherwise indicated, all emphases have been added.

constitutional rights. *See Watkins*, 354 U.S. at 205-15 Outside of that limited situation, however:

> it is not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigative committees. That is a matter *peculiarly within the realm of the legislature*, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected.

Id. at 205. Similarly, the D.C. Circuit has emphasized that it is for Congress to decide how to delegate its investigative power, and that it would be:

> an inappropriate intrusion into the legislative sphere for the courts to decide without congressional direction that . . . only the chairman of a committee shall be regarded as the official voice of the Congress for purposes of receiving . . . information, as distinguished from its ranking minority member, other committee members, or other members of the Congress.

Murphy v. Department of Army, 613 F.2d 1151, 1157 (D.C. Cir. 1979).

2. Congress Has Long Conferred on its Agents its Ancillary Authority to Sue to Enforce Delegated Investigative Power, and the Courts Have Entertained Litigation Initiated by Those Agents.

For nearly as long as it has delegated its investigative powers, Congress has delegated its ancillary authority to sue to enforce investigative demands, and the courts have accepted that Congress may confer such litigating authority on its agents. Indeed, in *Reed v. County Commissioners*, 277 U.S. 376 (1928), the Court indicated that Congress could, by statute (and possibly by resolution of one House), broadly authorize a "committee or its members, collectively or separately, to sue." *Id.* at 388-89. In response to *Reed*'s suggestion, the Senate immediately adopted a resolution authorizing all of its committees to bring any suit "'necessary to the adequate performance of the powers invested in it or the duties imposed upon it.'" *See Senate Select Comm. v. Nixon*, 366 F. Supp. 51, 56 n.8 (D.D.C. 1973) (quoting S. Res. 262, 70th

Cong. (1928)). That authorization, which was intended "to ensure standing," *id.*, remains in effect to this day with respect to subpoenas directed to federal officials.[8]

In light of that resolution, which was the only source of litigating authority possessed by the Senate Select Committee when it first brought suit to enforce a subpoena against the President, the district court in *Senate Select Comm. v. Nixon* never questioned the committee's standing to sue; instead, it dismissed the suit for want of a statutory grant of jurisdiction to hear the claim. *Id*. at 55-61. After Congress enacted such a statute, both the district court and the court of appeals reached the merits of the committee's claims. *See Senate Select Comm.*, 498 F.2d at 728-33. During the pendency of the appeal, the Senate passed a resolution stating that "the initiation and pursuit of this litigation by the select committee and its members *was and is fully authorized by applicable custom and law*, including the provision of S. Res. 262," and that the Senate "approves and ratifies the actions of the select committee in instituting and pursuing the aforesaid litigation." S. Res. 194, 93d Cong. (1973). Noting this resolution, the D.C. Circuit nowhere questioned the Senate's conclusion that the Committee possessed standing under the 1928 Resolution, let alone held that post-dispute authorization was a necessary predicate to the

[8] Congress superseded the 1928 resolution with respect to subpoenas directed to private persons in the 1978 Ethics in Government Act. That Act created the office of the Senate Legal Counsel; empowered it (and any Senate committee or subcommittee) to bring civil actions to enforce such subpoenas when directed to do so by a Senate resolution; and conferred jurisdiction on this Court to hear such actions. *See* Pub. L. No. 95-521, §§ 703(b), 705(a), (f)(1), 92 Stat. 1824, 1877-79 (codified as amended at 2 U.S.C. §§ 288b(b), 288d(a), (f)(1), and 28 U.S.C. § 1365(a)). Although the Act exempted subpoenas directed at federal officials from the jurisdictional grant, this exemption was "not intended to be a Congressional finding that the Federal courts do not now have the authority to hear a civil action to enforce a subpena against an officer or employee of the Federal Government." S. Rep. No. 95-170, at 91-92. *See also Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act*, 10 Op. Off. Legal Counsel 68, 87 n.31 (1986) ("*Response to Congressional Requests*") (legislative history shows that the Act was not intended to limit civil enforcement remedy to subpoenas directed to private citizens).

committee's suit. *Senate Select Comm.*, 498 F.2d at 727.[9] Indeed, defendant cites no case—and plaintiff is not aware of any—in which a court has ever ruled that, in authorizing its agents to seek judicial relief in aid of delegated investigative power, Congress must "act[] collectively *after a particular dispute has arisen*," Def. Mem. at 15 (emphasis in original).

Rather than claim authority to dictate how Congress must delegate its investigative or litigating powers to its agents, courts have identified an accommodations process that must be exhausted before they will resolve an inter-branch dispute over information. The D.C. Circuit has explained that the Constitution "contemplates such accommodation," and that "[n]egotiation between the two branches should . . . be viewed as a dynamic process affirmatively furthering the constitutional scheme." *United States v. AT&T Co.*, 567 F.2d 121, 130 (D.C. Cir. 1977). As the Court's holding in *Senate Select Committee* makes clear, however, the accommodation process is not a jurisdictional bar to an action seeking enforcement of a subpoena.

B. Congress's Delegation Of Investigative And Litigating Authority To The Comptroller General Is Consistent With Constitutional Practice And Precedent.

Congress's delegation of investigative and litigating authority to the Comptroller General is entirely consistent with these long-standing constitutional practices and judicial precedents. In lieu of an authorizing resolution by a single House, Congress has, through the more formal means of bicameral approval and presentment to the President, delegated to the Comptroller General Congress's own authority to investigate "all matters related to the receipt, disbursement, and use of public money," and to "evaluate the results of a program or activity the Government carries out under existing law." 31 U.S.C. §§ 712(1), 717(b). Similarly, through bicameralism

[9] Similarly, in *United States v. AT&T Co.*, 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977), the Court found that a House resolution conferred standing on a single member to assert its investigatory power in an action challenging the validity of a subpoena, *id.* at 391, but did not suggest that such litigation-specific authorization

and presentment, Congress as a whole has delegated to the Comptroller General Congress's own authority to demand the production of documents, and its authority to seek a judicial order enforcing such a demand. *Id.* § 716(a), (b).

In several important respects, however, the delegation Congress has made to the Comptroller General is more circumscribed than the delegations each House has made to its standing committees. In apparent deference to the executive branch, Congress did not make it a crime to fail to comply with a Comptroller General request for information. As a consequence of that accommodation, however, such requests had no legally coercive force. To remedy that problem, in 1980 Congress authorized the Comptroller General to sue to enforce such requests, but, in doing so, subjected that authority to several significant conditions. First, Congress placed certain highly sensitive categories of documents entirely outside the reach of the Comptroller General's litigating authority. *Id.* § 716(d)(1)(A)&(B). Second, Congress adopted a certification mechanism that allows the President, or the Director of OMB, conclusively to preclude any suit by the Comptroller General for certain deliberative materials, *id.* § 716(d)(1)(C)—an option that is not available when a committee subpoenas such materials. Third, Congress imposed what defendant himself concedes to be a "carefully calibrated exhaustion scheme" that must be completed before any suit can be brought. Def. Mem. at 50.

This exhaustion scheme ensures that courts will not lightly or frequently be called upon to resolve clashes between the needs of the executive and legislative branches. Equally important, it assures a significant degree of congressional control over any litigation the Comptroller General ultimately initiates. Under this scheme, the Comptroller General must file a report concerning the dispute not only with the President and various executive branch officials,

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was constitutionally required.

but also with "Congress" itself. 31 U.S.C. § 716(b)(1); *see also* Compl. ¶ 48 (noting that the Comptroller General informed the Chairmen and Ranking Minority Members of various Senate and House Committees). In light of Congress's power to remove the Comptroller General, 31 U.S.C. § 703(e)(1)(B), as well as its plenary control over GAO's budget, the § 716 process ensures that, as a practical matter, the Comptroller General will not initiate a lawsuit that contravenes the will of Congress. *Bowsher v. Synar*, 478 U.S. 714, 729 (1986) (under broad removal provision, Congress "could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will"); *Morrison v. Olson*, 487 U.S. 654, 692 (1988) ("power to remove" for "'good cause'" confers "ample authority" to "control or supervise"). Congress specifically chose this carefully circumscribed delegation of litigating authority over OMB's proposed alternative, which would have required the Comptroller General to ask an oversight committee with appropriate jurisdiction to subpoena documents he could not obtain. *General Accounting Office Act of 1979: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 96th Cong., 89, 96 (1979) (hereafter "*1979 GAO Hearings*").

In sum, the delegations of authority that Congress has made to the Comptroller General are wholly consistent with the separation of powers framework that governs inter-branch disputes. As the Comptroller General explains below, these delegations do not raise constitutional concerns, and the Comptroller General himself has standing to vindicate his exercise of the investigative authority Congress has conferred on him.

II. THE COMPTROLLER GENERAL HAS STANDING TO BRING THIS ACTION.

Although the Comptroller General alone is authorized to bring a civil action under § 716, defendant claims that the Comptroller General lacks standing to invoke this remedy. According to defendant, the Comptroller General has suffered no "injury in fact," and is merely a "congressionally created stalking horse" seeking to vindicate Congress's institutional interests—

interests that are judicially cognizable only if a majority of Congress (or a majority of one of its chambers) votes to bring suit. Def. Mem. at 15-16. These arguments do not withstand scrutiny.

A. The Comptroller General's Claim Satisfies The Requirements For Article III Standing.

To establish Article III standing, the Comptroller General must demonstrate (1) that he has suffered an "injury in fact"; (2) that this injury is "fairly traceable [to] . . . the alleged conduct of the defendant"; and (3) that the requested relief "will remedy the alleged injury in fact." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (internal quotation marks and brackets in original omitted). The Comptroller General has satisfied those requirements.

The "injury in fact" the Comptroller General has suffered is his "inability to obtain information . . . that, on [his] view of the law, the statute requires" defendant to provide. *Federal Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998). Sections 712 and 717 authorize the Comptroller General to undertake certain investigations and evaluations, and § 716 requires each agency to give "the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency." 31 U.S.C. § 716(a). The Supreme Court has repeatedly held "that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be . . . disclosed pursuant to a statute." *Akins*, 524 U.S. at 21; *see also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449 (1989) (failure to obtain information subject to statutory disclosure requirement "constitutes a sufficiently distinct injury to provide standing to sue"). This "injury in fact" is directly "traceable" to defendant; he does not dispute that he has control over the records at issue and that he refuses to provide them. Nor can there be any dispute that the relief the Comptroller General

seeks—a judicial order requiring production of the records to which the Comptroller General is statutorily entitled—will remedy the alleged injury in fact.

Defendant nowhere mentions the Court's dispositive holdings in *Akins* and *Public Citizen*. He claims instead that, despite a statutory right to the records in dispute, the Comptroller General lacks standing because (1) he has brought this suit not to vindicate his own statutory rights, but to satisfy the "curiosity" of two members who themselves allegedly lack standing; (2) he alleges only an "institutional injury" insufficient, under *Raines v. Byrd*, 521 U.S. 811, 821 (1997), to establish individual injury in fact; and (3) a legislative agent acting in his official capacity can never possess standing. Those claims are fundamentally mistaken.

B. The Comptroller General Has Brought This Action To Vindicate His Statutory Right To Information.

"For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, . . . must construe the complaint in favor of the [plaintiff]," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), and must "'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (alteration in original) (quoting *Lujan v. National Wildlife Fed.*, 497 U.S. 871, 889 (1990)). In asserting that "the Comptroller General is simply acting as a surrogate for two individual members of Congress," Def. Mem. at 14, defendant improperly ignores numerous allegations in which the Comptroller General makes clear that he has brought this action to vindicate his own statutory rights in order to assist Congress as a whole. Thus, he alleges that he has brought this action "to enforce *his* right of access to records that [he] requires," Compl. ¶ 52, and "to fulfill *his* statutory responsibilities," *id.* ¶ 3, and the "statutory mission and obligations" of the agency he heads, *id.* ¶ 48. He seeks these records, moreover, to "aid *Congress*"—not two "curious" members—"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." *Id.* ¶ 2.

These allegations are in no way undermined by the fact that the Comptroller General initiated his investigation after receiving a request from two Ranking Minority Members. He has explained that, under practices and protocols he and his predecessors developed to govern the exercise of their discretion, priority has long been given to requests from ranking members. *Id.* ¶ 12. Because the protocols themselves are an exercise of the Comptroller General's discretion, the initiation of an investigation in accordance with those protocols remains an exercise of *his* discretion. *See Bowsher v. Merck & Co.*, 460 U.S. 824, 844 (1983) ("the fact that the Comptroller General's request had its origin in the requests of [two] Congressmen . . . does not vitiate [his] authority").[10] Moreover, in response to an objection raised by the Vice President's Counsel at the very outset of the investigation, the Comptroller General personally confirmed that he believed the investigation was appropriate and in compliance with the law. Compl.. ¶¶ 19, 21. Acceptance of these allegations is particularly warranted here, given the presumption that government decisionmakers act in good faith, *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 497 (1976), and the longstanding rule that courts may not examine the motives underlying congressionally authorized investigations. *Watkins*, 354 U.S. at 200; *Barenblatt v. United States*, 360 U.S. 109, 132 (1959). In light of the allegations of the complaint, therefore, there is simply no basis for concluding that the Comptroller General lacks standing because he seeks only to "fulfill the curiosity of two individual members." Def. Mem. at 15-16.

[10] Defendant elsewhere challenges the validity of the protocols. Def. Mem. at 48. In light of the Court's obligation to accept all allegations in the complaint, this challenge, which is in all events mistaken, *see infra* Part IV.C.3, provides no basis for dismissal on standing grounds.

C. Defendant's Reliance On The "Legislative Standing" Cases Is Misplaced.

Nor is there any merit to defendant's claim that the Comptroller General has suffered no "personal" injury sufficient to establish injury in fact. Def. Mem. at 11-12. Because Congress properly delegated its investigative power to the Comptroller General, he suffers a "personal" and "particularized" injury where, as here, his exercise of that authority is frustrated by a refusal to provide records to which he is entitled.

The "legislative standing" cases upon which defendant relies all involved Congress's institutional interest in its lawmaking power. In *Raines*, the plaintiff legislators claimed to have suffered an injury in fact because the Line Item Veto Act "alter[ed] the legal and practical effect of . . . votes they may cast," "divest[ed] [them] of their constitutional role in the repeal of legislation," and "alter[ed] the constitutional balance of powers . . . with respect to measures containing separately vetoable items." 521 U.S. at 816 (internal quotation marks omitted). Similarly, in *Chenoweth v. Clinton*, 181 F.3d 112, 113 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000), legislators claimed that creation of a program by executive order "denied them their proper role in the legislative process." And in *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir.), *cert. denied*, 531 U.S. 815 (2000), the legislators claimed to have standing because President Clinton's prosecution of air and missile attacks on Yugoslavia "'completely nullified' their votes against declaring war and against authorizing a continuation of the hostilities." *Id.* at 29 (Randolph, J., concurring) (quoting Amended Complaint).

Congress's core power to make law, of course, cannot be delegated. This power must be exercised collectively, through the "single, finely wrought and exhaustively considered[] procedure" set forth in sections 1 and 7 of Article I. *INS v. Chadha*, 462 U.S. 919, 951 (1983). The standing principle announced in *Raines* buttresses this non-delegation principle: because Congress's lawmaking power must be exercised collectively, any alleged injury to that power

cannot be redressed at the behest of individual members acting without the approval of the collective body itself. *See* 521 U.S. at 821 (legislators lacked standing because they claimed "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally"). In addition, *Raines*' refusal to permit an individual response to a collective injury recognizes and respects the institution's own internal procedures and rules, by preventing disgruntled legislators from frustrating the collective legislative will through judicial means. *See id.* (attaching "importance to the fact that . . . both Houses actively oppose [the legislators'] suit."); *Campbell*, 203 F.3d at 23 (noting that a measure to withdraw U.S. troops, which the appellant legislators supported, had been defeated in Congress).

By contrast, because Congress can delegate its investigative power, *see supra* Part I, and because it chose in §§ 712, 716, and 717 to make such a delegation to the Comptroller General, a refusal to provide records to which the Comptroller General is statutorily entitled does not cause an institutional injury that "is wholly abstract and widely dispersed," *Raines*, 521 U.S. at 829. Rather, such a refusal causes a "personal" and "particularized" injury to the Comptroller General himself: it is the exercise of *his delegated authority that has been frustrated*, and he has a correspondingly personal and concrete interest in remedying that injury to his delegated authority. The Comptroller General, therefore, plainly has standing to seek redress for the individualized injury he has suffered.[11]

[11] For these reasons, recognition of the Comptroller General's standing would not render *Raines* "entirely ineffective and inexplicable." Def. Mem. at 16. *Raines* applies to legislator suits brought to vindicate Congress's non-delegable lawmaking power.

Indeed, this conclusion is compelled by the Court's decision in *Vermont Agency of Natural Resources*. There, the Court held that Congress could assign to a private citizen the United States' claim for injury to its proprietary interest, and that "the United States' injury in fact suffices to confer standing" on such an assignee. 529 U.S. at 773-74. Here, Congress did not merely assign a claim for injury to its investigative power to the Comptroller General; it delegated the power itself to him, and expressly authorized him to seek judicial relief when an executive branch official or private citizen frustrated his exercise of that power.

Not only do these delegations establish the Comptroller General's standing, they also distinguish his claim in several other fundamental respects from the legislative standing claims rejected in *Raines* and its progeny. In *Raines*, the Court deemed it "importan[t]" that, while the Line Item Veto Act created a cause of action for disgruntled legislators who sought to overturn a legislative vote, the Act did not authorize such legislators "to represent their respective Houses of Congress in [such an] action, and indeed both Houses actively oppose[d] their suit." *Raines*, 521 U.S. at 829.[12] Here, by contrast, Congress has made a delegation of litigating authority that is, if anything, more authoritative than that enjoyed by the Senate Select Committee when it sued to enforce a subpoena issued to the President. *See supra* p. 12. In *Reed*, the Court reserved for another day the issue of whether a single House could confer standing on one of its agents, but plainly understood that Congress as a whole could do so. *See* 277 U.S. at 388. That, of course, is precisely what Congress did when it enacted § 716 in 1980. Moreover, as noted above, *supra*,

[12] Defendant blurs this distinction by asserting that *Raines* rejected the legislators' claims despite the fact that "*Congress . . . initially authorized suits by certain individuals*." Def. Mem. at 13 (emphasis in original). Congress, however, did not "authorize" disgruntled legislators to sue on its behalf; rather, it authorized the courts to hear claims brought by certain individuals, including members of Congress and "'any individual adversely affected.'" *Raines*, 521 U.S. at 815 (quoting Act). Under the Act, members of Congress had no more authority to sue on behalf of the institution than adversely affected private citizens enjoyed.

pp. 15-16, § 716's "carefully calibrated exhaustion scheme," Def. Mem. at 50, with its congressional notification and waiting period requirements, ensures that the Comptroller General does not pursue claims that Congress "actively oppose[s]." *Raines*, 521 U.S. at 829.

Similarly, the fundamental difference between Congress's investigative and lawmaking powers renders the "self-help" rationale of *Raines*, *Chenoweth*, and *Campbell* entirely inapplicable here. The "self-help" to which the courts referred in those cases was the ability to *enact legislation* to stop allegedly unconstitutional or illegal conduct that the legislators asked the courts to enjoin. *See Raines*, 521 U.S. at 829 (Congress could repeal the Act or exempt appropriations from its coverage); *Campbell*, 203 F.3d at 23 (Congress could pass a law forbidding use of U.S. forces in Yugoslavia or cut off funds for the operation, and could impeach the President should he "act in disregard of Congress' authority on these matters"); *Chenoweth*, 181 F.3d at 116 (legislators could terminate program created by executive order "were a sufficient number in each House so inclined"). The Comptroller General, however, seeks only documents, and Congress has never been required to pass legislation demanding the production of specific documents. In fact, the executive branch has objected to use of the appropriations power to compel such productions. *See* Statement of the President Upon Approval of Bill Amending the Mutual Security Act of 1954, 1959 Pub. Papers, ¶ 171 (July 24, 1959) (Eisenhower) (Ex. 3); *Mutual Security Program—Cutoff of Funds from Office of Inspector General and Comptroller*, 41 Op. Att'y Gen. 507 (1960).

Application of *Raines*' self-help rationale to a congressional agent's request for documents would be not only unprecedented, but would impermissibly usurp Congress's authority to decide how to exercise its investigative power. Where, as here, a congressional agent has suffered an injury in fact, courts have no authority, under the rubric of ensuring Article

III standing, to insist that Congress or its agents resort to non-litigative means of seeking information, such as issuance of a committee subpoena or adoption of a House resolution of inquiry. Nor do courts have authority to insist that Congress, in authorizing its agent to sue in federal court, "act[] collectively" only "after a particular dispute has arisen," Def. Mem. at 15 (emphasis deleted). Such uses of Article III's standing requirements would effectively allow the judicial branch, at the behest of the executive branch, to dictate decisions about the delegation and exercise of the legislative branch's investigative powers. In fact, Congress considered and rejected the executive branch's proposal that the Comptroller General be required to ask a committee with jurisdiction to subpoena documents he could not obtain. *See 1979 GAO Hearings* at 89, 96. This Court must respect that decision as "peculiarly within the realm of the legislature," and must accept the decision as long as it does not affect "the constitutionally protected rights of individuals." *Watkins*, 354 U.S. at 205; *see also Murphy*, 613 F.2d at 1157.

Defendant seeks to justify this unprecedented invasion of Congress's internal prerogatives by repeatedly (and erroneously) suggesting that an inter-branch lawsuit over documents represents an Article III "innovation" that "threatens core separation-of-powers values." Def. Mem. at 16 n.5; *see also id.* at 11. Yet, nearly 75 years ago, the Senate concluded that it could confer standing on its agents by authorizing all standing committees to sue to enforce their subpoenas. *See supra* p. 12. That authorization, which provided the basis for the Senate Select Committee's standing when that congressional agent first sued the President for documents in 1973, *see id.* p. 12-13, remains in effect to this day with respect to subpoenas directed to federal officials. *See McGrain*, 273 U.S. at 161-64 (constitutionality of Congress's exercise of its investigative power established by longstanding practice). Moreover, courts in this Circuit have entertained two inter-branch disputes over documents, using the judicial power

in one case to facilitate a settlement, *United States v. AT&T Co.*, 551 F.2d 384, 395 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977), and reaching the merits in the other, *Senate Select Committee*, 498 F.2d at 733.[13] In yet a third case, a court dismissed a declaratory judgment action initiated by the executive branch on the ground that other *judicial* means for testing a subpoena were available, noting that, if these two "co-equal branches maintain their present adversarial positions, the Judicial Branch *will be required to resolve the dispute*." *United States v. House of Representatives of the United States*, 556 F. Supp. 150, 152 (D.D.C. 1983).

In none of those cases did the courts suggest that inter-branch disputes over information could be resolved only in the political arena. In fact, the Justice Department itself has recognized that "[a]ny notion that the courts may not or should not review such disputes is dispelled by *United States v. Nixon*," and that, "in some circumstances, only judicial intervention can prevent a stalemate between the other two branches." *Response to Congressional Requests*, 10 Op. Off. Legal Counsel at 88 n.33. The fact that courts have only rarely been called upon to address inter-branch document disputes demonstrates that political mechanisms typically enable the two branches to resolve their differences. It does not prove that the Constitution mandates political resolutions of such disputes, or that Article III empowers the courts to compel political settlements by dictating to Congress how it must exercise its investigative power.

D. The Comptroller General May Bring This Suit In His Official Capacity.

Finally, defendant makes the remarkable assertion that a congressional agent simply cannot have standing when acting in his official capacity. *See* Def. Mem. at 11, 14. In *Raines* itself, however, the Court declined to embrace that very proposition. Noting that, in *Coleman v.*

[13] As noted above, *see supra* pp. 13-14 & n.9, in neither case did the courts suggest, let alone hold, that a congressional agent lacked standing in the absence of an "authorization by Congress acting collectively *after a particular dispute has arisen*." Def. Mem. at 15 (emphasis in original). Nor does *Raines* impose such a requirement.

Miller, 307 U.S. 433 (1939), it had "upheld standing for legislators . . . *claiming an institutional injury*," *Raines*, 521 U.S. at 821, the Court went to considerable lengths to distinguish, rather than overrule, *Coleman*'s holding. *See id.* at 823-24 (describing *Coleman*'s holding as one recognizing the standing of legislators whose votes are "completely nullified," and explaining why the claim asserted by the legislators in *Raines* "does not fall within [that] holding"). In subsequent cases, the D.C. Circuit has likewise analyzed whether a legislator seeking to enjoin allegedly unconstitutional or illegal conduct has stated a claim that falls within *Coleman*'s "nullification" holding. *See Campbell*, 203 F.3d at 22-23; *Chenoweth*, 181 F.3d at 117. These exercises would be pointless if, as defendant claims, no legislator or legislative agent can ever have standing to vindicate an institutional interest. Under such a theory, legislators suing in their official capacities to vindicate an institutional interest would never have standing, regardless of whether their votes were "nullified." The D.C. Circuit rejected such a theory when then-Judge Scalia advanced it, *see Moore v. U.S. House of Representatives*, 733 F.2d 946, 952-53 (D.C. Cir. 1984), and the analysis in *Raines* makes clear that the Supreme Court has not embraced it either.

Such a theory, moreover, proves entirely too much. "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other . . . ." *In re Debs*, 158 U.S. 564, 584 (1895). Congress has properly delegated its investigative power to the Comptroller General, and he, like any government official whose properly delegated powers are frustrated, may "apply to [the] courts for any proper assistance in the exercise" of that power. Indeed, Congress conferred authority on the Comptroller General to bring a judicial action to enforce a subpoena directed to private individuals, *see* 31 U.S.C. § 716(c)(2), and courts have sustained that authority against separation

of powers challenges. *See United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224-25 (8th Cir. 1984) ("*McDonnell Douglas I*"). Yet, under defendant's "official capacity" theory, the Comptroller General has no standing to enforce such a subpoena, inasmuch as he seeks merely to vindicate an institutional interest in obtaining documents to which he is statutorily entitled.

In the final analysis, defendant's "official capacity" claim is really an Article II argument—*i.e.*, the Comptroller General cannot exercise the "executive" power of suing to enforce the law—dressed in Article III clothing. The merits of defendant's Article II claim, which in any event is wrong, *see infra* Part V.C, cannot be resolved under the guise of determining standing.

III. THE COURT SHOULD NOT DISMISS THIS ACTION UNDER THE DOCTRINE OF EQUITABLE DISCRETION.

Defendant argues that, even if the Court concludes (as it must) that the Comptroller General has standing, the complaint should be dismissed under the doctrine of equitable discretion. Assuming that doctrine has any vitality after *Raines*, it is inapplicable here. Indeed, dismissal would frustrate, rather than advance, the interests the doctrine is designed to serve.

The doctrine of equitable discretion applies *not* to inter-branch disputes, but to cases where a plaintiff legislator's "dispute *appears to be primarily with his fellow legislators*." *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981); *see also Crockett v. Reagan*, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (per curiam) (same); *Moore*, 733 F.2d at 956 (same); *Leach v. Resolution Trust Corp.*, 860 F. Supp. 868, 874 (D.D.C. 1994) (same). In such cases, the D.C. Circuit has explained, "separation-of-powers concerns are most acute. Judges are presented *not with a chance to mediate between two political branches* but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the processes of democratic

decisionmaking." *Riegle*, 656 F.2d at 881. The doctrine is thus designed to prevent judicial "meddl[ing] in the internal affairs of the legislative branch." *Moore*, 733 F.2d at 956.

As an initial matter, it is unclear that the doctrine survived *Raines*. After tracing the doctrine's history, the D.C. Circuit observed in *Chenoweth* that *Raines* may "require us to merge our separation of powers and standing analyses." 181 F.3d at 116. In other words, where, as here, a plaintiff has standing to vindicate his exercise of properly delegated congressional power, no further inquiry into the propriety of the suit on separation of powers grounds is permissible.

But even if it applies in cases where a congressional agent has standing, the doctrine is plainly inapplicable here. The Comptroller General's actual dispute is *not* with any legislators, committees, or House of Congress, but with the executive branch. He seeks to exercise investigative and litigating authority that Congress as a whole delegated to him, and to do so only after exhausting an accommodations process that afforded Congress notice of the dispute and an opportunity to object to, and even prevent, initiation of this lawsuit. *See supra* pp. 15-16. As a result of that notice, four Senators who chair three committees and three subcommittees endorsed the Comptroller General's efforts and urged him to proceed with this action. Compl. ¶ 45.

This case is thus starkly different from, not "strikingly similar to," *Leach v. Resolution Trust Corp.* *See* Def. Mem. at 19. In *Leach*, there was "no indication" that "the House of Representatives, the Committee, or its Chairman, ha[d] delegated any oversight or investigative authority to" the plaintiff legislator, and ample evidence that Congress and the relevant committee had "specifically *not* authorized" the plaintiff's request for executive branch documents. 860 F. Supp. at 870-71 & n.2 (internal quotation marks omitted; emphasis in original). Indeed, the court found that the plaintiff had been on the losing side of a "strident

controversy in the House . . . over the appropriate format and timetable for hearings pertaining to" the very information he sought through the courts. The court invoked the equitable discretion doctrine in order to "avoid[] improper interference with the legislative process." *Id.* at 874.

Here, where the Comptroller General indisputably *has* been delegated investigative authority by Congress as a whole, use of the doctrine will cause precisely the harm it was intended to prevent—judicial "meddl[ing] in the internal affairs of the legislative branch." *Moore*, 733 F.2d at 956. Defendant urges the court to dismiss this action because "[n]o subpoena has been issued, no resolution has been passed, and no statute has been enacted in response to this dispute," Def. Mem. at 19. But there is no constitutional *requirement* that Congress exercise its investigative power in the manner defendant seeks to prescribe. *Cf. Senate Select Comm.*, 366 F. Supp. at 54 (noting that the Senate Committee had chosen to file civil action rather than send the Sergeant at Arms to secure information by force or hold the President in criminal contempt because of its judgment that the latter methods were "inappropriate and unseemly"). In the absence of any such requirement, courts have no authority, through the use of equity powers or otherwise, to dictate the manner in which Congress chooses to delegate and exercise its investigative power. *See Watkins*, 354 U.S. at 205; *Murphy*, 613 F.2d at 1157.

The only precondition to judicial relief that courts may impose on a congressional agent with standing is the constitutionally derived accommodation requirement. *United States v. AT&T Co.*, 567 F.2d at 130. The Comptroller General more than satisfied this requirement by unilaterally narrowing his document requests and offering to explore other means of obtaining the information he sought. Defendant, however, remained steadfastly unwilling to provide any information other than the names of task force members and employees, the dates of task force meetings, and 77 pages of unexplained receipts and unintelligible drawings and symbols. *See*

Compl. ¶¶ 19-34. It is the executive branch's unprecedented refusal even to consider a reasonable accommodation or to exercise its statutory certification power (*see id.* ¶¶ 13-14; Pls. Mem. at 15-17 (detailing information provided to GAO in prior White House investigations)), not the unwillingness of courts to enter "this inherently political thicket," that explains why no court has had occasion to examine the Comptroller General's authority to sue an agency head. Def. Mem. at 16-17. Indeed, the very cases defendant cites confirm that, when presented with "a chance to mediate between two political branches," *Riegle*, 656 F.2d at 881, the Judicial Branch is "*required* to resolve the dispute" where, at the conclusion of the accommodations process, the two "co-equal branches maintain their . . . adversarial positions." *United States v. House of Representatives*, 556 F. Supp. at 152.

IV. THE COMPTROLLER GENERAL HAS AUTHORITY TO BRING THIS SUIT AND TO REVIEW THE ACTIVITIES OF THE NEPDG.

The Comptroller General demonstrated in his opening brief that he had the authority, under § 712 and § 717, to review the activities of the NEPDG, and the authority, under § 716, to bring this suit in order to obtain the records he needs to conduct that review. Defendant responds by offering what he describes as "fairly possible" alternative interpretations of these provisions—interpretations he urges the Court to adopt in order to avoid the "serious constitutional problems" that a straightforward reading would supposedly create. Def. Mem. at 64. But as the Comptroller General explains in this section, the interpretations defendant proffers are not "fairly possible." To the contrary, in order to rule that the Comptroller General has exceeded his authority under these provisions, this Court must, among other things, (1) misapply the "clear statement rule" and ignore the language, structure, purpose and legislative history of § 716; (2) read the words "all matters related to the . . . use" of public money out of § 712; (3) change the phrase "existing law" in § 717 to "statutory law"; and (4) ignore the fact

that the NEPDG was acting pursuant to the President's statutory, as well as constitutional, authority. As the Comptroller General explains in Section V of this brief, the proper interpretation of §§ 712, 716 and 717 does not raise any constitutional problems, let alone constitutional concerns sufficient to justify contorting the language of the statutes in the manner defendant advocates.

A. Section 716 Authorizes The Comptroller General To Bring Suit Against The Vice President.

As the Comptroller General has shown, the language, structure, purpose and legislative history of § 716 make unmistakably clear that the Vice President is the head of an "agency" within the meaning of the statute. *See* Pl. Mem. at 48-51. Lacking any credible response, defendant asks the Court, literally, to ignore this showing. He urges the Court to take the unprecedented—and wholly unjustified—step of applying the "clear statement" rule to an information-disclosure statute enacted in aid of Congress's broad oversight powers. Tacitly conceding that he cannot establish the essential predicates for use of such an extraordinary rule (which in this case would indisputably frustrate, rather than effectuate, Congress's clear intent), defendant offers an equally untenable fallback argument. He claims that the Senate did not understand the law it passed, and that the report it wrote to accompany that law should be ignored because it mischaracterizes the statute. In a crowning irony, defendant asks the Court to interpret § 716 based on the legislative history of a different statute, passed by a different Congress to address different concerns. These arguments are baseless.

1. The Language, Structure, Purpose and History of the 1980 Act Make Unmistakably Clear That the Vice President is the Head of an Agency Within the Meaning of § 716.

As the Comptroller General demonstrated in his opening brief, the term "agency," as used in § 716, necessarily encompasses the Office of the Vice President and the NEPDG, both of

which are "instrumentalities" of the United States Government. *See* 31 U.S.C. § 101 (defining "agency" for purposes of title 31 as "department, agency, or instrumentality of the United States Government"); *see also* Pl. Mem. at 48-50. Section 701, which further defines the term "agency" for purposes of the precise provisions at issue in this case, confirms the term's broad sweep by providing that it "includes the District of Columbia but does not include the legislative branch or the Supreme Court." 31 U.S.C. § 701. The clear inference to be drawn from this language is that the term does include all instrumentalities of the executive branch.

That inference is irrefutably confirmed by the purpose and history of § 716 itself. Congress enacted this provision in direct response to complaints from then-Comptroller General Elmer Staats that "GAO ha[d] encountered difficulty in obtaining information from Executive Branch agencies . . . to which it has the right of access by law." S. Rep. No. 96-570, at 5 (1980); *see also* H.R. Rep. No. 96-425, at 4 (1980) (same). Both the Senate and House Reports cite Comptroller General Staats' testimony concerning these problems, as well as an overview he prepared on the subject, which the Senate and House reprinted as appendices to their respective reports. *See* S. Rep. No. 96-570, at 5 & app.; H.R. Rep. No. 96-425, at 4 & app. B.[14] That overview lists, as examples of difficulties GAO experienced with "Federal Agencies," two "serious access to records difficulties at the White House," which, GAO explained, "illustrate[d] the full range of [its] access problems." *See* S. Rep. No. 96-570, app. at 22.

[14] Defendant's suggestion that this overview should be ignored because it was reprinted as an appendix to each report and was not prepared by congressional staffers, Def. Mem. at 31, is baseless. In explicating the meaning of statutes, courts regularly rely on appendices or other documents prepared by individuals who are not congressional staffers that are reprinted in House or Senate reports. *See*, *e.g.*, *Negonsott v. Samuels*, 507 U.S. 99, 106-07 (1993); *United States v. Dion*, 476 U.S. 734, 741-43 (1986); *Carter/Mondale Presidential Comm., Inc. v. FEC*, 711 F.2d 279, 284 n.9 (D.C. Cir. 1983); *Electronic Indust. Ass'n Consumer Elecs. Group v. FCC*, 636 F.2d 689, 694-96 (D.C. Cir. 1980). As noted, moreover, both reports expressly refer to the Comptroller General's testimony and his overview.

Congress believed that "the availability of [a] judicial enforcement" mechanism would "minimize and, over time, virtually eliminate" precisely the types of access problems GAO had identified. H.R. Rep. No. 96-425, at 7. Congress made unmistakably clear, moreover, that an enforcement mechanism prompted, in part, by access problems at the White House could be used against the President and his principal advisers. Thus, the Senate Report explained:

> [W]ith regard to enforcement actions *at the Presidential level*, certifications provided for under section 102(d)(3) of the bill are intended to authorize the President and the Director of the Office of Management and Budget to preclude a suit by the Comptroller General *against the President and his principal advisers and assistants*, and *against those units within the Executive Office of the President whose sole function is to advise and assist the President*, for information which would not be available under the Freedom of Information Act.

S. Rep. No. 96-570, at 8.[15]

For its part, the executive branch was fully aware that Congress intended to authorize judicial actions for access to White House documents. The 1980 Act, which included what is now § 716, was introduced only months after GAO's two access disputes with the White House arose, and only months after the Justice Department opined on whether the President could assert executive privilege in response to GAO's demand for White House materials.[16] In addition, OMB made clear its understanding that certain presidential documents could be the subject of the new judicial remedy that the 1980 Act created. The 1980 Act included two sections, § 102

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[15] In light of the Report's express reference to "a suit by the Comptroller General *against the President*," it is simply impossible to understand defendant's contention that the Senate Report "merely assumes *without expressly stating* that the President is subject to a § 716 suit." Def. Mem. at 29 (emphases in original omitted).

[16] GAO's dispute concerned access to White House records pertaining to an evaluation by the Council of Economic Advisers and appointments to the U.S. Metric Board. H.R. Rep. No. 96-425, app. B at 27. GAO made these requests on July 27, 1978. *See General Accounting Office—Authority to Obtain Information in the Possession of the Executive Branch*, 2 Op. Off. Legal Counsel 415 (1978) (opining on whether the President could assert privilege in response to the requests). The legislation that included what is now codified as § 716, H.R. 24, was introduced in the House six months later, on January 15, 1979. *See* H.R. 24, 96th Cong., § 102 (1979).

(which became § 716), and § 101, which granted the Comptroller General authority to audit "unvouchered" or confidential expenses that had previously been exempt from GAO review. *See id.* at 3. Among the unvouchered expenses the Comptroller General would be allowed to inspect under § 101 was the "President's special authority in foreign assistance." H.R. Rep. No. 96-425, app. at 26. OMB "agree[d] that the Comptroller General should audit virtually every account,"[17] but it sought authority in § 101 that would allow the President to exempt highly sensitive foreign intelligence and counter-intelligence information. *Id.* at 3. Recognizing that the new judicial enforcement provision of § 102 would apply to materials made available under § 101, OMB also sought to preclude suit under § 102 for any foreign intelligence information the President chose to exempt. *See* § 102(d)(1) (codified as amended at 31 U.S.C. § 716(d)(1)(A)). Thus, OMB plainly recognized that, absent an exemption, documents relating to the President's special authority in foreign assistance *would* be subject to the judicial remedy.[18]

In short, Congress indisputably intended to permit actions under § 716 against the President and his closest advisers, and the executive branch plainly understood this. The executive branch raised a number of objections to this judicial remedy—including a suggestion, which it ultimately abandoned, that the remedy might be unconstitutional, *see infra* pp. 78-79,—but never contended that the law could not or should not apply to the President or his closest

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[17] *See 1979 GAO Hearings* at 87. The Director of OMB specifically referred to "28 accounts" that had been listed in "[t]his committee's report last year on legislation similar to H.R. 24." *Id.* The report in question included the President's special authority in foreign assistance in its list of 28 accounts. *See* H.R. Rep. No. 95-1586, app. A at 20 tbl.2 (1978).

[18] Defendant thus misconstrues the import of this testimony. Even if, as defendant implausibly claims, the OMB Director assumed that § 102's exemptions would be invoked only for CIA materials and not presidential records, *see* Def. Mem. at 27-28 & n.14, the Director plainly understood that the judicial remedy applied to presidential records unless the President exercised his exemption authority.

advisers. Defendant's efforts to obtain through judicial interpretation what the executive branch could not gain through direct negotiation with Congress should be rejected.

2. The Clear Statement Rule Does Not Apply to an Information-Disclosure Statute Such as § 716.

Recognizing that the text, structure, purpose and legislative history of the 1980 Act provide overwhelming evidence that Congress clearly intended to authorize suits "against the President and his principal advisers," defendant invokes the "clear statement" rule in a strained effort to pretermit any consideration of Congress's actual intent. Indeed, he touts use of such a rule precisely because it does "*not* operate 'to reveal actual congressional intent,'" and because it "'compel[s] courts to select less plausible candidates from within the range of permissible constructions.'" Def. Mem. at 28-29 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 262-63 (1991) (Marshall, J., dissenting)). The "clear statement" rule, however, has never been applied to an information-disclosure statute, and for good reason: the predicates for applying such strong and counter-majoritarian medicine are wholly lacking with respect to such laws. In fact, application of a clear statement rule to § 716 would subvert separation of powers principles by burdening, with no constitutional justification, the exercise of Congress's oversight authority.

Clear statement rules have been applied "[i]n traditionally sensitive areas," *United States v. Bass*, 404 U.S. 336, 349 (1971), in order to "ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 546 (1992) (Scalia, J., concurring in judgment and dissenting in part). In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the Court applied the rule for the first time to a statute affecting the exercise of the President's powers. In so doing, however, the Court did not adopt a blanket rule that "'textual silence is not enough' to make the President an

'agency.'" Def. Mem. at 23 (emphasis deleted). To the contrary, the Court ruled only that the President is not an agency for purposes of the Administrative Procedure Act ("APA")—a statute that regulates exercises of agency discretion and subjects agency decisions to judicial review and potential invalidation. *Franklin*, 505 U.S. at 800-01.

The Court made clear that it was the regulatory impact of the APA on the exercise of the President's discretion, and not the mere fact that the APA uses the term "agency," that justified invocation of the clear statement rule. The Court stated that it would require a clear statement:

> before assuming [Congress] intended the President's *performance of his statutory duties to be reviewed for an abuse of discretion*. As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements. Although the President's actions may still be reviewed for constitutionality, we hold *that they are not reviewable for abuse of discretion under the APA*.

Id. at 801 (citations omitted). The D.C. Circuit relied on this same rationale when it ruled, a year prior to *Franklin*, that the President was not an "agency" under the APA. "When Congress decides purposefully to enact legislation *restricting or regulating presidential action*, it must make its intent clear." *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991).

Use of the stringent clear statement rule to determine whether the APA applies to the President's performance of his statutory duties is fully consistent with the rule's rationale, because it ensures that "extraordinary constitutional powers are not invoked." *Cipollone*, 505 U.S. at 546 (Scalia, J., concurring in judgment and dissenting in part). As the Court emphasized in *Franklin*, separation of powers principles have long compelled the conclusion that courts have no jurisdiction "'to enjoin the President *in the performance of his official duties*.'" 505 U.S. at 803 (quoting *Mississippi v. Johnson*, 71 U.S.C. (4 Wall) 475, 501 (1867)); *see also id.* at 827 (Scalia, J., concurring) ("the President . . . may not be ordered to perform particular executive . . . acts at the behest of the Judiciary"). Because the APA expressly authorizes courts to enjoin

agency actions, 5 U.S.C. §§ 702, 706, use of the stringent clear statement rule ensured that courts would not undertake to exercise a truly extraordinary power (directing the President's performance of his statutory duties) without clear textual evidence that Congress had "in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 349; *see also Armstrong*, 924 F.2d at 289 ("Legislation *regulating presidential action* . . . raises 'serious' practical, political, and constitutional questions that warrant careful congressional and presidential consideration.") (quoting *Bass*, 404 U.S. at 350)**.**

By stark contrast, separation of powers principles do not immunize the President from information demands made by the coordinate branches of government. To the contrary, the Court in *Franklin* explicitly contrasted the judiciary's inability to direct the President's performance of his official duties, with its ability to subject him to compulsory process. *See* 505 U.S. at 802; *id.* at 826 (Scalia, J., concurring). Indeed, in *Nixon I*, 418 U.S. at 706, the Court explained that "neither the doctrine of separation of powers, nor the need for confidentiality . . . without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process." *See also United States v. Burr*, 25 F. Cas. 30 (C.C. Va. 1807) (No. 14,692D) (Marshall, C.J.) (upholding subpoena directed to President Jefferson).

The President, of course, has been subject to congressional demands for information since the founding of the Republic. *See Executive Privilege Assertions: Part I*, 6 Op. Off. Legal Counsel at 752-56. And in *Senate Select Committee*, the D.C. Circuit recognized that Congress could, through an authorized agent, demand information directly from the President himself. Indeed, in holding that the President enjoys absolute immunity from civil damages for his official actions, the Supreme Court relied, in part, on the fact that "[v]igilant oversight by

Congress" will "deter Presidential abuses of office." *See Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982).

Thus, application of an information-disclosure statute such as § 716 to the President (or Vice President) does not invoke "extraordinary constitutional powers" or eliminate "important constitutional protections." To the contrary, congressional demands for information from the President involve the exercise of Congress's traditional oversight authority, and § 716 does not purport to eliminate the President's important constitutional right to protect deliberative materials through the exercise of executive privilege; in fact, it affords him an additional, statutory means of protecting such information. Application of the clear statement rule to such an information-disclosure statute, therefore, is utterly unwarranted.

Tellingly, the Supreme Court did not invoke the clear statement rule when deciding whether another information-disclosure statute, the Freedom of Information Act ("FOIA"), applied to the President. In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), the requesters argued that records of the Office of the President were "agency" records because FOIA's definition of "agency" expressly includes the "Executive Office of the President" ("EOP"), which in turn captures a complex of offices that includes the Office of the President. In rejecting this argument, the Court did not mention the clear statement rule, notwithstanding the fact that a designation of the broad complex known as the EOP would not have sufficed to satisfy that rule. Nor did the Court suggest that applying an information-disclosure statute to the President would raise separation of powers concerns. Instead, the Court cited the statute's legislative history, which demonstrated that Congress did not intend to include the Office of the President within the definition of "agency."[19] *Id*.

[19] Since *Franklin*, a number of district courts have concluded that the Privacy Act, which adopts FOIA's definition of "agency," does not apply to the White House Office. Although

The simple and inescapable reality is that applying the clear statement rule here would subvert, rather than promote, the separation of powers. Congress's core oversight powers include a judicially recognized authority to conduct oversight of the President himself, subject to the President's authority to assert executive privilege in response to oversight demands. Section 716 tracks and implements these principles by permitting the Comptroller General to bring an action for records against the President and his closest advisers, while affording the President a statutory mechanism to preclude suit over deliberative materials, and leaving intact his ability to assert executive privilege before or after suit is brought. Applying the clear statement rule to this scheme not only would allow the executive branch to renege on the compromise it struck when this carefully crafted scheme was adopted, *see supra* pp.33-34, but would affirmatively disrupt the separation of powers. Because the President's unique constitutional status does not immunize him from congressional oversight, due regard for his status cannot justify burdening the exercise of Congress's oversight powers with a judge-made requirement that Congress express its already clear intent to authorize information-disclosure suits against the President or Vice President in statutory text.[20]

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several of these courts expressly acknowledged the regulatory impact of the Act (which, unlike FOIA, affirmatively regulates agency use of certain private information, *see* 5 U.S.C. § 552a, *et seq.*), none invoked the clear statement rule to reach this result. *See Tripp v. Executive Office of the President*, 200 F.R.D. 140 (D.D.C. 2001), *appeal dismissed*, No. 01-5189, 2001 WL 1488614 (D.C. Cir. Oct. 17, 2001); *Dale v. Executive Office of the President*, 164 F. Supp. 2d 22 (D.D.C. 2001); *Sculimbrene v. Reno*, 158 F. Supp. 2d 26 (D.D.C. 2001); *Barr v. Executive Office of the President*, No. 99-CV-1695, 2000 WL 33539396 (D.D.C. Aug. 9, 2000) (same); *Falwell v. Executive Office of the President*, 113 F. Supp. 2d 967 (D.W. Va. 2000).

[20] For these same reasons, there is no basis to defendant's claim that application of § 716 to the Office of the Vice President would raise separation of powers concerns sufficient to justify a narrowing construction of this provision. *See also infra* Part V.

3. The Clear Statement Rule Does Not Apply to the Vice President.

Even if it were permissible to apply the clear statement rule to an information-disclosure statute that does not impair the President's ability to protect sensitive deliberative materials—and plainly it is not—there is no basis for extending that rule, for the first time, to the Vice President.

In *Franklin*, the Court explained that "the unique constitutional position of the President" justified invocation of the clear statement rule with respect to a statute that arguably regulated the President's actions. 505 U.S. at 800. The "uniqueness" of the President's constitutional position can scarcely be overstated. Article II of the Constitution vests all of "[t]he executive Power" in the President. U.S. Const. art. II, § 1, cl. 1. It provides that he alone "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States," *id.* art. II, § 2, cl. 1, that he alone has the responsibility to "take Care that the Laws be faithfully executed," *id.* art. II, § 3, cl. 4, and that he alone has the power to grant pardons and reprieves, to negotiate treaties, to receive ambassadors, and to nominate ambassadors and judges of the Supreme Court. *Id.* art. II, § 2, cls. 1, 2, § 3, cl. 3. He is "the sole organ of the nation" in foreign affairs. *Haig v. Agee*, 453 U.S. 280, 291 (1981) (internal quotation marks omitted). In short, the Framers consciously decided to vest all executive power "in the hands of a *single, constitutionally indispensable, individual*." *Clinton v. Jones*, 520 U.S. 681, 712 (1997). (Breyer, J., concurring in judgment)

The Vice President's constitutional role is vastly different. Although he holds one of only two offices defined by Article II and is one of only two officials elected through a process involving every state, U.S. Const. art. II, § 1 & amend. XII, the Vice President exercises no executive power under the Constitution unless and until the President is incapacitated, or fails to serve out his term. *Id.* amend XXV, amend. XX, § 3. Indeed, the only power the Constitution

confers on the Vice President is the legislative power to break tie votes in the Senate. *Id.* art. I, § 3, cl. 4.

A Vice President may serve as one of the President's closest advisers. But the Supreme Court has consistently recognized that the "President's unique status under the Constitution distinguishes him from other executive officials," *Nixon v. Fitzgerald*, 457 U.S. at 750, and that "[s]uits against other officials—including Presidential aides—generally do not invoke separation-of-powers to the same extent as suits against the President himself." *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982); *see also In re Sealed Case*, 121 F.3d 729, 748 (D.C. Cir. 1997) ("the President enjoys more extensive privileges than other executive branch officers"). As Justice Scalia has explained, "the *principals* in whom the executive and legislative powers are *ultimately* vested—viz., the President and the Congress (as opposed to their agents)—may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary." *Franklin*, 505 U.S. at 827 (Scalia J., concurring). "Cabinet or inferior officers," however, may be enjoined. *Id.* at 826. Here, as defendant himself concedes, his sole function was "to advise and assist the President." Def. Mem. at 32.

Thus, even assuming that the clear statement rule could apply to foreclose an information-disclosure suit against the President under § 716, there is no basis for applying the rule to bar such a suit against the Vice President. The President may assign responsibilities to the Vice President as the President sees fit, but in so doing, he cannot strip the Comptroller General of a judicial remedy that would otherwise be available if the President assigned the same responsibilities to a Cabinet officer. Shielding executive branch officials from information-disclosure requirements merely because their offices are "defined in Article II of the Constitution, rather than by statute," *id*. at 23-24, is simply not one of the "weighty and constant

values" that the clear statement rule was designed to protect. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

4. The Legislative History of the 1980 Act Forecloses Defendant's Interpretation of the Term "Agency" as Used in § 716.

Defendant tacitly recognizes that if the clear statement rule does not apply—and it plainly does not—consideration of the § 716's legislative history is fatal to any claim that the term "agency" does not include the Office of the Vice President or President. Defendant is thus forced to make the remarkable assertion that the Senate Report so "mischaracterizes the President's certification power" that it "should be given no credence" and cannot be "taken seriously." Def. Mem. at 30. But it is defendant who mischaracterizes the Report. Nor is there any merit to his claim that the scope of the Comptroller General's authority should be determined based on the legislative history of other statutes, passed by different Congresses to address different problems.

As noted above, the Senate Report states that:

> certifications provided for under section 102(d)(3) of the bill are intended to authorize the President and the Director of [OMB] to preclude a suit by the Comptroller General against the President and his principal advisers and assistants, and against those units within the Executive Office of the President whose sole function is to advise and assist the President, for information which would not be available under [FOIA].

S. Rep. No. 96-570, at 8. This description of the certification mechanism—*i.e.*, that the President may issue a certification that precludes an action under § 716 for documents that would not be available to a FOIA requester—is entirely accurate. Section 716 permits certification with respect to two categories of documents—deliberative documents, as defined by FOIA exemption (b)(5), and law enforcement documents, as defined by FOIA exemption (b)(7). *See* 31 U.S.C. § 716(d)(1)(c) (expressly incorporating these FOIA exemptions).

Defendant tries to discredit the Report by suggesting, inaccurately, that it describes the certification mechanism as establishing an "exclusion for presidential advisers *co-extensive with FOIA*." Def. Mem. at 29; *see also id.* at 30 (the "certification power does not extend as far as the protection afforded by FOIA"). But the Report does not say or imply any such thing. It states that the President can "preclude a suit . . . for information that would not be available under [FOIA]." This is plainly true: a certification covering deliberative documents would preclude a suit for information "which would not be available under [FOIA]"—*i.e.*, information falling within FOIA exemption 5. The Report does not state the President can preclude a suit "for *all* information that would not be available under FOIA," and defendant cannot discredit the Report by so mischaracterizing it.

Nor does the Report "impl[y]" that the certification provision "contains [a] broad carve-out or per se exclusion" of the two FOIA-exempt categories of documents, or "that the Comptroller General's access does not extend beyond what is allowed under FOIA." Def. Mem. at 29. To the contrary, by stating that the President is "authorize[d] . . . to preclude a suit . . . for information that would not be available under [FOIA]," the Report makes clear that the Comptroller General's authority extends beyond what FOIA allows. Obviously, authority to preclude suit over FOIA-exempt documents would be entirely unnecessary if the Comptroller General had no access rights to such documents in the first place.

Defendant's lengthy argument that the Court should equate the term "agency" in § 716 with FOIA's definition and adopt the analysis of *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), *see* Def. Mem. at 31-36, is equally mistaken. The legislative history of FOIA expressly states that the term "agency" should not be construed to include persons or entities "'whose sole function is to advise and assist the President,'" *Kissinger*, 445 U.S. at 156 (quoting H.R. Conf.

Rep. No. 93-1380, at 15 (1974)); the legislative history of § 716 says *exactly the opposite*. As noted above, the Senate Report expressly refers to "suit[s] by the Comptroller General against the President *and his principal advisers and assistants, and against those units within the Executive Office of the President whose sole function is to advise and assist the President*." S. Rep. No. 96-570, at 8. This fact is completely dispositive of defendant's claim.

Furthermore, FOIA serves an entirely different purpose than § 716. FOIA mandates the disclosure of documents for use by the public, not the Congress. While FOIA exempts certain categories of information from disclosure, it expressly provides that those exemptions are "not authority to withhold information from Congress." 5 U.S.C. § 552(d). Indeed, emphasizing Congress's "special right of access to privileged information not shared by others," the D.C. Circuit cited that very provision to stress that "'a law controlling public access to Government information has absolutely no effect upon congressional access to information.'" *Murphy*, 613 F.2d at 1155-56 & n.12 (quoting H.R. Rep. No. 89-1497, at 11-12 (1966)). In testifying on legislation that became § 716, the Director of OMB also recognized the far broader reach of § 716. He complained that information "withholdable under" FOIA, as well as the Privacy Act, the Sunshine Act, and the Federal Advisory Committee Act, "will be available upon request to each employee of the GAO and the Congress." *1979 GAO Hearings*, at 89. Because § 716 affords a judicial-enforcement remedy to a congressional agent, not the public, it is entirely improper to rely on FOIA's definition of "agency" to preclude the Comptroller General from suing to obtain White House documents, particularly in light of the fact that Congress adopted that remedy, in part, in response to access problems GAO encountered with the White House itself. *See supra* p. 32.[21]

[21] Because the Privacy Act and Sunshine Act expressly incorporate FOIA's definition of "agency" by reference, judicial interpretations of these statutes are equally irrelevant. In fact,

For these same reasons, defendant's reliance on the Presidential Records Act ("PRA") and the Federal Records Act ("FRA") is wholly misplaced. Like FOIA, these statutes provide the public access to governmental documents. *See Armstrong*, 924 F.2d at 287-88. The fact that Congress grouped the documents of the President, the Vice President, and presidential advisers together under the PRA, which provides a less generous timetable for public disclosure of materials than does the FRA, in no way demonstrates that Congress intended to preclude its own agent from gaining access to such materials. The text, structure, purpose and legislative history of § 716, moreover, make unmistakably clear that Congress had no such intent.

If anything, the PRA confirms that Congress intended to use the term "agency" in its broadest sense in § 716. The PRA was passed just two years before the 1980 Act that added § 716. Congress plainly knew how to differentiate the records of the President, the Vice President, and units within the EOP that advise and assist the President, from the records of other agencies—Congress drew such distinctions in the text of the PRA in 1978, and in the legislative history of FOIA in 1966. Yet, Congress drew no such distinction in § 716, and clearly stated in the accompanying report that it intended to permit actions against precisely these entities.[22]

Congress's decision to incorporate FOIA's definition in those statutes, while choosing not to do so in § 716, militates against application of FOIA's definition here.

[22] Defendant's reliance on *Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995), is equally misplaced. Construing a 1972 amendment to Title VII, which defined "executive agency" to mean "an Executive department, a Government corporation, and an independent establishment," the Court concluded that the term "independent establishment" did not include the "Executive Residence at the White House," because Congress had, in a separate statute, treated "independent establishment" and the "Executive Residence" as distinct entities. *See id.* at 1490. Section 716, however, uses the much broader phrase "instrumentality of the United States," and defendant cites no statute in which Congress has distinguished the "Office of the Vice President" from an "instrumentality of the United States." Indeed, § 716's current definition of "agency" replaced without substantive effect a prior definition that included the term "office" – a term that obviously captures the "Office of the Vice President."

Finally, defendant asks the Court to infer that Congress intended to exclude the President (and presumably the Vice President as well) because, "at the precise moment when it adopted the judicial-enforcement" mechanism of § 102 of the 1980 Act, it referred three times in § 101 to agencies and the President in the disjunctive. Def. Mem. at 26. The inference defendant seeks to draw from this fact is completely misleading.

As originally enacted in 1980, § 716 authorized the Comptroller General to sue the head of a "department or establishment," not the head of an "agency." *See* Pl. Mem at 50. In 1980, the phrase "department or establishment" meant "any executive department, . . . office, agency, or other establishment." *See id.* Accordingly, when § 101 referred to authorizations that other statutes conferred on the "President" and the head of an "agency" to approve unvouchered expenditures, the term "agency" was merely one of many entities captured by the broader phrase "department or establishment." By differentiating the "President" from the head of an "agency," therefore, Congress was not suggesting that § 716 did not authorize suit against the President, as defendant's historically inaccurate comparison suggests. To the contrary, Congress made clear that suit could be brought against the President, because he was the head of the Office of the President (or the White House Office), one of the "executive . . . office[s]" included within the phrase "department or establishment." After the 1982 re-codification of title 31, Congress used the term "agency" to encompass the same set of entities previously captured by the phrase "department or establishment," including all "executive" offices.

B. Section 712 Authority To Investigate "All Matters Related To" The Disbursement And Use Of Public Money Authorizes The Comptroller General To Investigate The NEPDG's Activities.

Section 712 broadly authorizes the Comptroller General to "investigate all matters related to the disbursement . . . and use of public money." According to defendant, however, this broad grant of authority entitles the Comptroller General to nothing more than documents reflecting

NEPDG costs, such as telephone bills, taxi receipts, or salaries. Indeed, defendant claims that "it strains the bounds of credibility" to believe that § 712 empowers the Comptroller General to learn *why* these costs were incurred, or what NEPDG staff persons were actually paid to do. Def. Mem. at 37.

Contrary to defendant's view, however, Congress did not simply authorize the Comptroller General to investigate the "disbursement of public money." Rather, it authorized investigations into "*all matters related to* the receipt, disbursement, *and use* of public money." Although defendant understandably wishes to read the phrase "all matters related to" out of the statute, that is not a permissible interpretation. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) (rejecting interpretation that "simply reads the words 'relating to' out of the statute"). The subjects the NEPDG discussed at its meetings are plainly "matters related to the [NEPDG's] use of public money," not subjects "tangentially associated with the federal government." Def. Mem. at 37. Merely by obtaining such information, moreover, the Comptroller General is not "micromanag[ing] the Executive" *Id.* at 37-38. He is simply reporting to Congress on how public money was spent—information to which Congress is indisputably entitled.

Defendant nevertheless contends that construing § 712 to authorize the Comptroller General to review the information at issue would render superfluous subsequent grants of authority, such as § 717. Def. Mem. at 38. But defendant misunderstands the relationship between § 712 and § 717. The latter statute expanded the Comptroller General's authority not so much by enlarging the universe of information that he had authority to review, but rather by mandating and broadening the types of analyses that he was to perform. Thus, while § 712 and § 717 each independently authorizes the Comptroller General to review the activities of the

NEPDG, they direct him to focus on different aspects of those activities. Section 712 authorizes the Comptroller General to investigate all matters related to the use of public funds—*e.g.*, for what purposes money was spent, and whether it was spent efficiently and in compliance with the laws. In contrast, § 717 authorizes him to evaluate the results of government activities—*e.g.*, to assess the value or quality of the results of government activities or to determine whether the activities are achieving their objectives. The Comptroller General is entitled to review information relevant to each inquiry, and, indeed, in the course of doing so, may review the same information although for distinct analytical purposes.

Nor is it true that § 712 must be construed narrowly to avoid the constitutional difficulties that would arise were the Comptroller General to inquire into a matter "within the 'exclusive province of one of the other branches of the Government.'" *Id*. at 38. But as the Comptroller General explains in greater detail below, the investigation he seeks to conduct under § 712 (and under § 717) raises no constitutional difficulties at all. The development of national energy policy is *not* a matter within the exclusive province of the executive branch; instead, it falls squarely within Congress's legislative domain. *See infra* Part V.A. And because the President can always decline to disclose any confidential information he is constitutionally entitled to protect, either by making a certification under § 716 or by asserting executive privilege, there is no basis for suggesting, as defendant does throughout his submission, that the investigation the Comptroller General seeks to conduct will interfere with the discharge of the President's constitutional duties. *See infra* Part V.B. The doctrine of constitutional avoidance, therefore, provides no basis for narrowing the broad language of § 712, which plainly authorizes the Comptroller General to investigate the purposes for which public money is disbursed and used; the efficiency and effectiveness of, as well as the applicability of federal laws to, that

disbursement and use; and the desirability of additional appropriations restrictions to control similar disbursements and uses in the future.

Finally, defendant contends that the statutory canon, *ejusdem generis*, requires a narrow reading of the term "use." Def. Mem. at 38-39. The canon is inapplicable here, however, because there is no uncertainty in the breadth of the term "use" as it applies to public money, *see Garcia v. United States*, 469 U.S. 70, 74-75 (1984) (*ejusdem generis* triggered only by uncertain statutory text); *Gooch v. United States*, 297 U.S. 124, 128 (1936) (same). In any event, as the Comptroller General's initial brief demonstrated, Pl. Mem. at 29-31, the statute's legislative history could not be clearer in confirming the capaciousness of the meaning of "use." *See Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 44 n.5 (1983) (*ejusdem generis* overcome by contrary legislative history). Moreover, the use of this canon would be particularly inappropriate here, for it effectively reads the term "use" out of the statute. Notably, in attempting to apply the *ejusdem generis* canon, defendant asserts that "use" should be read, like the words "receipt" and "disbursement," as a "fiscal and accounting term[]," but fails to offer any definition of "use" or otherwise suggest a meaning for it distinct from "receipt" or "disbursement." Def. Mem. at 38-39. Finally, even if "use" did refer simply to financial transactions—which it does not— § 712 authorizes the Comptroller General to investigate "all matters related to" those financial transactions, which would necessarily include, *inter alia*, the purpose, efficiency, and legality of those transactions.

C. Section 717 Authorizes The Comptroller General To Evaluate The NEPDG's Activities.

The Comptroller General is also entitled to the information he seeks in order to "evaluate the results of a program or activity the Government carrie[d] out under existing law." 31 U.S.C. § 717(b). Defendant's arguments to the contrary do not withstand scrutiny.

1. The Comptroller General is Evaluating the Results of the NEPDG's Activities.

As the Comptroller General explained in his opening brief, GAO regularly conducts, at Congress's request or on the Comptroller General's own initiative, program evaluations under § 717(b) that focus on the processes and methodologies government agencies use to carry out programs or activities. *See* Pl. Mem. at 32-34. Defendant contends, however, that this long-standing practice is *ultra vires*, and that for decades GAO and Congress have misconstrued the scope of § 717. According to defendant, GAO can only evaluate the "outcome" of government activities, and is prohibited from evaluating the processes that produced those results. This argument is profoundly mistaken.

It is simply not true, as defendant contends, that interpreting § 717 to authorize an examination of governmental processes renders the phrase "results of" superfluous. That phrase makes clear that GAO cannot evaluate processes or methodologies in the abstract, or based on criteria of GAO's own choosing. Rather, GAO must evaluate processes in terms of their efficacy in achieving the specified results of the government program or activity in question, as GAO did, for example, when it evaluated the Census Bureau's planning processes in order to analyze the accuracy of the census results. *See id.* at 33 n.14. Thus, the phrase "results of" provides an important limit on GAO's authority. Interpreting § 717(b) to permit an examination of the process used by the NEPDG to prepare its report is fully consistent with, rather than in derogation of, the function that phrase serves.

The fact that the NEPDG's proposals can be evaluated "on their own terms," Def. Mem. at 46, is beside the point. The text of § 717 does not require GAO to evaluate the output of government activities solely "on their own terms," and the legislative history makes clear that Congress intended no such limitation. To the contrary, in hearings concerning program results

reviews, the Comptroller General provided illustrative summaries of those reviews, many of which focused on processes and procedures as a means of evaluating results. *See Capability of GAO to Analyze and Audit Defense Expenditures: Hearings Before the Subcomm. on Executive Reorganization of the Senate Comm. on Gov't Operations*, 91st Cong. 72-81 (1969).[23] Indeed, prior to the enactment of § 717, GAO submitted to Congress many program results reviews that examined processes and procedures as a means of evaluating results, and it was this practice that Congress ratified by enacting § 717.[24] Pl. Mem. at 11-12. GAO continued to submit such reviews to Congress after § 717's enactment,[25] and the fact that Congress did not question this practice when further amending and reenacting § 717 in 1974, *see* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, sec. 702, § 204, 88 Stat. 297, 326 provides additional evidence of Congress's intent, *cf. United States v. Wilson*, 290 F.3d 347, 357 (D.C. Cir. 2002) ("Executive Branch's interpretation of the law through its implementation colors the background against which Congress was legislating"), and establishes that GAO's

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[23] These summaries included, for example: *Administration and Management of the Biology and Medicine Research Program of the Atomic Energy Commission* (GAO/B-165117 Apr. 16, 1969) (examining "management procedures" but not "quality of research performed"); *Review of Need to Improve Procedures for Reporting Individuals as Rehabilitated Under the Vocational Rehabilitation Program* (GAO/B-164031(3) Nov. 26, 1968) (examining reporting procedures to evaluate rehabilitation program); *Evaluation of Two Proposed Methods for Enhancing Competition in Weapons Systems Procurement* (GAO/B-39995 July 14, 1969) (examining weapons system procurement procedures).

[24] *See*, *e.g.*, *Review of Manned Aircraft Nuclear Propulsion Program* (GAO/B-146759 Feb. 28, 1963) (examining management and administration procedures as a means of evaluating program); *Review of Projects in Colombia Showing Need for Improvements in Planning and Supervision* (GAO/B-161882 Sept. 21, 1967) (reviewing methods of planning and supervision to evaluate development projects).

[25] *See*, *e.g.*, *Assessment of the Teacher Corps Program at Northern Arizona University and Participating Schools on the Navajo and Hopi Indian Reservations* (GAO/B-164031(1) May 12, 1971) (examining new teaching methods and their dissemination to evaluate Teacher Corps program); *A Single Agency Needed to Manage Port-of-Entry Inspections—Particularly at U.S. Airports* (GAO/B-114898 May 30, 1973) (examining management practices to evaluate inspection program).

interpretation of the statute is entitled to deference. *Cf. Utah v. Evans*, 122 S. Ct. 2191, 2203 (2002) (legal deference owed to agency's interpretation when "Congress, aware of this interpretation, has enacted related legislation without changing the statute"). Moreover, GAO's in-house *Comprehensive Audit Manual*, which defendant himself relies on for the proper explication of § 717 evaluations, Def. Mem. 43 n.22, confirms that such evaluations "will, in many cases, include reviews of management policies, procedures, and practices to appraise their effects on accomplishments and achievement of objectives." GAO, *Comprehensive Audit Manual* 12-3 (1972).

Finally, even if § 717 generally prohibited GAO from examining the NEPDG's processes —and it plainly does not—such an evaluation would still be permissible here As the Comptroller General's initial brief explained, GAO is also evaluating another "result" or "output" of the NEPDG's activities—the degree of public participation in the development of national energy policy, an issue that has long been the subject of congressional legislation. Pl. Mem. at 34-35. Because there is no support for any interpretation limiting the term "results" in § 717 to only one "result," or only "the formal work product," such public participation is a "result" of the NEPDG's activities that the Comptroller General has authority to evaluate. Indeed, defendant offers no contrary argument.

2. The NEPDG's Activities Were Carried Out Under "Existing Law."

Defendant's argument that the NEPDG's activities were not carried out under "existing law" is equally misguided. In fact, neither of the two contentions upon which this argument rests—*i.e.* that the phrase "existing law" refers to statutory law alone, and that the NEPDG's activities were carried out solely under constitutional law—is correct.

a. "Existing law" does not mean "statutory law."

Ignoring the principle that the starting point in every case of statutory interpretation is the language of the statute itself, *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985), defendant asks this Court to construe the phrase "existing law" based on statutory context and legislative history. Def. Mem. at 41-44. The obvious difficulty of defining "existing" to mean "statutory," or of otherwise finding ambiguity in the word "existing," no doubt explains defendant's disregard for the text, but cannot justify it. In any event, whether the inquiry starts with context and history or ends with them, they do not support the limitation defendant seeks to read into the statute.

Defendant argues, first, that the term "existing law" is properly interpreted to mean "statutory law" because "evaluations done at the request of a congressional committee are limited to those instances where the committee has 'jurisdiction over the program or activity.'" Def. Mem. at 41. He offers no explanation for why this fact justifies such a limitation, and it is difficult to discern one. In any event, if the jurisdiction of congressional committees dictates the meaning of the term "existing law," then the term should be interpreted to include constitutional law. Committees have jurisdiction not only over programs and activities carried out under statutory authorities alone, but also over many programs and activities carried out by the executive pursuant to its constitutional authorities. The jurisdiction of the House Armed Services Committee, for example, includes the "[c]ommon defense generally," "the Departments of the Army, Navy, and Air Force generally," and "[t]actical intelligence and intelligence-related activities," H.R. R. X, cl. 1(c), and thus covers activities carried out by the President under his constitutional authority as "Commander in Chief," U.S. Const. art II, § 2, cl. 1. Similarly, the Senate Foreign Relations Committee's jurisdiction, which extends to, among other things, "[r]elations of the United States with foreign nations generally," "executive agreements," and

"foreign policy," S. Comm. on Foreign Relations R. 1(a), covers activities carried out by the President under his constitutional foreign affairs power, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). Accordingly, the fact that a committee may request evaluations of programs or activities within its jurisdiction supports, rather than undercuts, the natural reading of "existing law" to include both statutory and constitutional law.

Defendant's attempt to limit the term "existing" based on § 717's legislative history fares no better. He does not cite a single statement in the historical record specifying that programs and activities carried out pursuant to constitutional law were excluded from the purview of § 717 evaluations, or even distinguishing statutorily-authorized activities from constitutionally-authorized activities. Instead, defendant points only to language indicating that the Comptroller General was expected to evaluate federal programs and activities against congressional objectives or intent, or "against benchmarks established by Congress." Def. Mem. at 41-43. Congressional benchmarks, however, do not necessarily apply to statutorily authorized programs alone; they may extend to all federal programs and activities, *see*, *e.g.*, 5 U.S.C. § 901(a)(3) ("[t]he Congress declares that it is the policy of the United States . . . to increase the efficiency of the operations of the Government to the fullest extent practicable"), including those carried out pursuant to constitutional powers. *See*, *e.g.*, 30 U.S.C. § 1441(1)(A) ("It is the intent of Congress—(1) that any international agreement to which the United States becomes a party should . . . provide assured and nondiscriminatory access, under reasonable terms and conditions, to the hard mineral resources of the deep seabed for United States citizens . . . .").[26]

[26] Defendant quotes at length from the House Report's discussion of § 118 of the 1970 Act (enacting 2 U.S.C § 190d), which concerned "congressional committees' legislative-review functions," to show that the term "laws" means only "statutory laws" or "laws enacted by the Congress." Def. Mem. at 42. But § 118 used the term "laws," not the phrase "existing law," and it did not concern the Comptroller General's authority under § 717 at all. Moreover, while GAO was expected to help committees perform legislative reviews under § 118, such reviews

Moreover, the fact that the legislative history contains numerous references to congressional objectives does not demonstrate that the Comptroller General was *prohibited* from evaluating programs and activities established pursuant to the President's constitutional powers. Rather, these references simply support the undisputed proposition that the primary focus of his responsibilities under the Act would be to evaluate programs and activities established by statute. This is hardly remarkable given that, as defendant acknowledges, "most of the activities of the Executive Branch" are established by statute.[27] Def. Mem. at 66.

Defendant's failure to provide any evidence that the Comptroller General's focus on statutory programs and activities was meant to be exclusive stands in stark contrast to the affirmative evidence indicating that § 717 authorizes the Comptroller General to evaluate activities carried out under constitutional law. As discussed in the Comptroller General's initial brief, then-Comptroller General Staats provided to Congress as an illustrative example of the type of review that would be authorized by § 717 a report evaluating the progress of a multi-agency task force, established pursuant to the President's constitutional powers over foreign affairs and national security, in achieving objectives set forth by the President and addressing concerns expressed by congressional committees.[28] Pl. Mem. at 43-44. Since § 717's

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did not define the outer limits of committee oversight functions, and GAO's program evaluation function was in no way limited to assisting with legislative reviews. Accordingly, the legislative history of § 118 provides no basis for narrowing the plain meaning of "existing law" in § 717.

[27] Nor does GAO's in-house *Comprehensive Audit Manual* suggest that § 717 evaluations are limited to examining programs established by statute. Def. Mem. at 43 n.22. The manual states that the "primary purpose" of such evaluations is "to provide the Congress with information that it can use in discharging its legislative and surveillance responsibilities" by "reporting the progress of Federal agencies in accomplishing the objectives of their programs and activities and by identifying the problems that need resolution to improve the effectiveness of their operations." GAO, *Comprehensive Audit Manual* at 12-1 (1972).

[28] As noted above, *supra* note 14, there is no basis to defendant's claim that an agency's illustration of authority it has exercised in the past, and that it seeks to have permanently codified, can simply be ignored because that illustration was part of an appendix submitted to

enactment, moreover, GAO has for several decades consistently interpreted the statute as authorizing reviews of activities conducted pursuant to the President's constitutional powers,[29] and Congress, which received, and in fact often requested, those reviews, has certainly been aware of that interpretation. That Congress subsequently enacted related legislation without changing § 717—and, in doing so, actually reaffirmed GAO's interpretation of its authorities[30]—and has continually reappropriated funds for GAO without ever suggesting that GAO's interpretation is incorrect, establishes that GAO's interpretation is entitled to deference. *Cf. Utah*, 122 S. Ct. at 2203; *Wilson*, 290 F.3d at 356-57; *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 316 (9th Cir. 1988) ("Federal agencies are . . . entitled to deference because their activities are subject to continuous congressional supervision by virtue of Congress's powers of advice and

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Congress. Def. Mem. at 43 n.23. Defendant's further contention that the NCS report did not involve an examination of processes and procedures as a means of evaluating results, *id.*, is both wrong, *see Review of Status of Development Toward Establishment of a Unified National Communication System* 2, 28-33 (GAO/B-166655 July 14, 1969) and irrelevant. The significance of the NCS report lies in the fact that GAO reviewed activities carried out pursuant to the President's constitutional powers.

[29] *See*, *e.g.*, *Improved Executive Branch Oversight Needed for the Government's National Security Information Classification Program* (LCD-78-125 Mar. 9, 1979) (evaluating procedures used to satisfy objectives of executive orders issued pursuant to President's constitutional authority to protect national security information); *Continuing Problems in DOD's Classificaiton of National Security Information* (LCD-80-16 Oct. 26, 1979) (same); *National Security: The Use of Presidential Directives to Make and Implement U.S. Policy* (NSIAD-89-31 Dec. 28, 1988) (examining, *inter alia*, process by which President developed national security policy); *U.N. Peacekeeping: Executive Branch Consultations With Congress Did Not Fully Meet Expectations in 1999-2000* (GAO-01-917 Sept. 10, 2001) (examining whether executive branch decisions to participate in multilateral operations satisfied policy objectives set forth in a Presidential Decision Directive issued in part pursuant to the President's constitutional foreign affairs power).

[30] *See* General Accounting Office Act of 1980, Pub. L. No. 96-226, § 102, 94 Stat. 311, 312-14. When Congress enacted § 716 in 1980, the Senate and House reports made clear that Congress "depend[ed] on GAO assistance in fulfilling its oversight and legislative responsibilities," approved of the "refocusing of GAO's attention and responsibilities" on matters beyond "the traditional finance and accounting activities," and intended to leave intact GAO's existing rights of access. *See* S. Rep. No. 96-570, at 2; H.R. Rep. No. 96-425, at 2.

consent, appropriation, and oversight."). This evidence that Congress intended in § 717 to authorize evaluations of programs carried out under statutory and constitutional law is consistent with Congress's clear expectation that the Comptroller General would assist it in the exercise of its oversight and appropriations powers, *see* H.R. Rep. No. 91-1215, at 17-18 (1970), which extend to many activities initiated by the President pursuant to his constitutional powers.[31]

Finally, defendant omits from his account of the legislative history the actual reason Congress used the word "existing" to modify "law" in § 717. That reason was not, as defendant claims, to specify "statutory" law—a goal Congress could have easily accomplished simply by using the phrase "under statutory law"—but rather to distinguish the analytical focus of GAO, which was to engage in fact-based analyses of the results of existing programs and activities, from that of the new Congressional Research Service, which was to engage in more predictive analyses of activities and programs that the government might undertake in the future, or under future law.[32] *See* Pl. Mem. at 42-43. Indeed, the fact that GAO's § 717 authority is not included in the House Report's general discussion of GAO's roles and responsibilities under the 1970 Act, and instead is described in conjunction with a discussion of CRS's new authorities, confirms that

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[31] Congress has often conducted oversight of the President's exercise of exclusive constitutional powers. *See*, *e.g.*, House Comm. on Gov't Reform, *Justice Undone: Clemency Decision in the Clinton White House*, H.R. Rep. No. 107-454 (2002); *Pardon of Richard M. Nixon and Related Matters: Hearing Before the House Comm. on the Judiciary*, 93d Cong. (1974). As noted above, and explained in greater detail below, the formulation of a national energy policy is simply not an exercise of constitutional power possessed exclusively by the President. *See infra* Part V.A. Nothing in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), or *Dalton v. Specter*, 511 U.S. 462 (1994), is to the contrary. Indeed, as Justice Jackson explained in his famous *Youngstown* concurrence, when Congress and the President have concurrent authority over a matter, the President's exercise of independent constitutional powers may be tempered by congressional legislation or oversight. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see also OPM v. Richmond*, 496 U.S. 414, 425 (1990).

[32] The Comptroller General also has authority to undertake future-oriented, predictive analyses under other statutes. Pl. Mem. at 43 n.22.

one of Congress's primary concerns in drafting § 717 was to clarify the respective analytical emphases of GAO and CRS. *See* H.R. Rep. No. 91-1215, at 11 (stating that an explanation of the Comptroller General's duties "in reviewing and analyzing ongoing Federal programs, as set forth in section 204(a), appears elsewhere in this report," along with an explanation of CRS's duties). Defendant does not, because he cannot, refute this showing.

b. The NEPDG's activities were not carried out under constitutional law alone.

Even if § 717 precluded evaluations of activities or programs carried out solely under constitutional law—and it does not—the NEPDG's activities were plainly carried out, at least in part, pursuant to statutory law, as even a cursory examination of the NEPDG's Report, *National Energy Policy* (May 2001) ("*Report*"), makes clear. The *Report* provides over 100 recommendations, many of which concern the executive branch's administration of existing laws. *See Report* (recommending efforts to change or re-examine the administration of, *inter alia*, the Clean Air Act,[33] the Energy Policy Conservation Act,[34] and the Outer Continental Shelf Lands Act[35]). In other words, as defendant himself stated three times in letters to the Comptroller General and to the Congress, *see* Compl. Exs. D, G, J, but notably no longer acknowledges before this Court, Def. Mem. at 44, the NEPDG carried out its activities in part

[33] The *Report* recommends, for example, that the President "direct the Attorney General to review existing enforcement actions regarding New Source Review," and direct the EPA Administrator and the Secretary of Energy to "streamline the permitting process" for oil refineries. *See Report* 7-18 (administration of 42 U.S.C. §§ 7411, 7475-7479, 7661-7661f).

[34] The *Report* recommends, for example, that the President direct the Secretary of Energy to "[e]xpand the Energy Star program beyond office buildings," to "[e]xtend the Energy Star labelling program," and to take steps "to improve the energy efficiency of appliances." *See Report* 4-11 (administration of 42 U.S.C. §§ 6291-6309).

[35] The *Report* recommends, for example, that the President "direct the Secretaries of Commerce and Interior to re-examine the current federal legal and policy regime (statutes, regulations, and Executive Orders) to determine if changes are needed regarding energy-related activities and the siting of energy facilities . . . on the Outer Continental Shelf [OCS]," and "direct the Secretary of

pursuant to the President's exercise of his power, *inter alia*, to "take Care that the Laws be faithfully executed"—a power that is always exercised to carry out responsibilities under statutory law. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("'The duty of the President to see that the laws may be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.'") (quoting *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting)); *id*. at 633 (Douglas, J., concurring) ("the power to execute the laws starts and ends with the laws Congress has enacted"); *see also* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51, 100-01 & n.245 (1994).

The fact that the President also may have relied on his powers under the Opinions Clause and Recommendations Clause to establish the NEPDG does not thereby untether the NEPDG's activities from its statutory bases. *Cf. Franklin*, 505 U.S. at 798 n.1 ("[T]he President may be involved in the [statutory] policymaking tasks of his Cabinet members, whether or not his involvement is explicitly required by statute."). Entities established by the President for the sole purpose of developing policy recommendations regularly act under both constitutional and statutory law. *See*, *e.g.*, Exec. Order No. 12,946, 60 Fed. Reg. 4829 (Jan. 20, 1995) (establishing advisory committee on the basis of constitutional and statutory authorities); Exec. Order No. 12,502, 50 Fed. Reg. 4195 (Jan. 28, 1985) (same).

Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978), is not to the contrary. The court there held merely that the National Environmental Policy Act impact statement requirement did not apply when the Secretary of Interior provided recommendations to the President concerning

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Interior to continue OCS oil and gas leasing and approval of exploration and development plans on predictable schedules" *See Report* 5-20 (administration of 43 U.S.C. § 1331 *et seq.*).

the exercise of the President's powers under the Antiquities Act. Nowhere did the court suggest that the Secretary of the Interior was acting pursuant to the President's constitutional powers alone;[36] indeed, the court explicitly stated that the basis for the Secretary's provision of his views was "the exercise of the President's powers under the Antiquities Act." *See id.* at 1160. Unlike when an officer provides the President with opinions on a matter committed by the Constitution to his exclusive discretion (*e.g.*, the granting of a pardon), when the NEPDG provided the President with its views on the administration of federal statutes, it was carrying out its activities in furtherance of statutory objectives, not constitutional ones alone.

Finally, defendant's assertion that the NEPDG "did not attempt to achieve any results intended by Congress," Def. Mem. at 44, is incorrect. Congress has passed numerous laws regarding the development of national energy policy, some of which concern the achievement of energy-specific objectives, *see*, *e.g.*, 42 U.S.C. §§ 7401-7642 (prevention and control of air pollution); 30 U.S.C. §§ 181-287 (regulation of mineral lands leasing), while others concern objectives relating to the process by which energy policy is developed. *See*, *e.g.*, 42 U.S.C. § 7112(11), (15) (broad participation in the development of energy policy by the public, and state and local governments); 15 U.S.C. § 764(b)(1), (3), (10) (same). Congress's objectives clearly apply to the NEPDG's activities, and whether the President intended the NEPDG to achieve those objectives is irrelevant. To hold otherwise would set a precedent that would allow the President to evade congressional oversight at will, as he could assert the non-applicability of congressional objectives whenever he reassigned the responsibility for developing policies to implement statutes to entities that he established in the White House or in other departments.

[36] Indeed, the court rejected plaintiff's attempt to justify differential treatment, for NEPA purposes, when the President exercises his power to proclaim national monuments under the Antiquities Act and when the Secretary of the Interior provides recommendations on the exercise of the President's powers under the Antiquities Act. *Alaska*, 462 F. Supp. at 1159-60.

3. The Comptroller General Exercised His Discretion to Initiate this Evaluation of the NEPDG's Activities.

Finally, defendant argues that long-standing policies and protocols established by a series of Comptrollers General to channel their broad discretion under § 717(b) somehow violate the statute, and that GAO's reliance on these protocols in this case precludes this suit. Def. Mem. at 48-50. These arguments, which apply only to § 717 not § 712, are groundless.

Defendant begins his attack on the protocols by misquoting and mischaracterizing them. They do not treat requests by ranking minority members as "triggering a statutory obligation" to conduct an evaluation. *Id.* at 49 (emphasis deleted). Instead, as the Comptroller General has explained, the protocols establish the "priority" by which GAO responds to requests that it is required to undertake or *decides* to accept. Pl. Mem. at 39. Indeed, the protocols expressly state that GAO "has a statutory obligation to fulfill requests from *the Congress and its committees*"—not Ranking Minority Members. *GAO's Congressional Protocols* 4 (GAO-01-145G Nov. 2000), *at* http://www.gao.gov. Insofar as the Comptroller General gives priority to requests by Ranking Minority Members, it is not because he believe that he is obligated to do so by statute, but rather because he has decided, in the exercise of his broad discretion, to undertake on "his own initiative," whenever possible, evaluations requested by Ranking Minority Members.

The protocols thus recognize, and are completely consistent with, GAO's obligation to conduct evaluations at the request of a committee or full House. Nothing in the text or history of § 717 remotely prohibits the Comptroller General from prioritizing all other requests, and from giving equal priority to the requests of committee chairs and ranking minority members. Indeed, because Congress is fully aware of how its agent has implemented his authority under § 717(b)(1), *see id*. at 4 (GAO "consult[s] regularly with committee Members and their staffs to ensure that GAO's work is prioritized in accordance with the committees' needs"), the

Comptroller General's interpretation of the statute's open-ended grant of discretion is entitled to the greatest deference. *Cf. Kenaitze Indian Tribe*, 860 F.2d at 316. Nor is there anything in the text or history of § 717 that forbids the Comptroller General from delegating his authority to initiate evaluations. In fact, the Comptroller General has specific authority to delegate any of his duties and powers to GAO officers and employees. *See* 31 U.S.C. § 711(2). Defendant's contention that the Comptroller General must exercise his discretion "personally" "in a particular instance" is yet another baseless attempt to dictate to Congress and its agent how Congress's investigative power must be exercised. *See Watkins*, 354 U.S. at 205; *Murphy*, 613 F.2d at 1157.

In any event, the Comptroller General did make a personal determination that GAO's evaluation of the NEPDG should go forward. Compl. Ex. F. Defendant tries to dismiss this personal decision as "permanently compromised" because, once GAO staff made the initial "public" contact with the Vice President's office in an effort to seek NEPDG information, the Comptroller General was allegedly "no longer able to exercise his independent judgment." Def. Mem. at 50. But § 717 does not require that the Comptroller General approve each and every evaluation *before* his staff can take any action. Indeed, agency heads routinely exercise supervisory authority after, rather than before, decisions are made public, yet courts nonetheless properly presume that agency heads control their subordinates, *see*, *e.g.*, *Edmond v. United States*, 520 U.S. 651, 664 (1997) ("The power to remove officers . . . is a powerful tool for control."), and retain independent decision-making power. *Cf. Franklin*, 505 U.S. at 824-25 (Scalia, J., concurring in part and concurring in the judgment) (courts may not "assume, no matter how objectively reasonable that assumption may be, that the President (or, for that matter, any official of the Executive or Legislative Branches), in performing a function that is not wholly ministerial, will follow the advice of a subordinate official").

In short, there is no basis to defendant's claim that the procedural prerequisites to this suit have not been met. The Comptroller General followed the requisite procedures before initiating this suit, engaged in extensive accommodation efforts, and invoked his right to sue as "a remedy of last resort," after defendant made clear that further negotiations would be fruitless.[37]

V. THE COMPTROLLER GENERAL'S REVIEW OF THE NEPDG'S ACTIVITIES AND HIS SUIT FOR DOCUMENTS IS CONSISTENT WITH, AND INDEED FURTHERS, THE CONSTITUTIONAL SEPARATION OF POWERS.

The Comptroller General's authority to review the NEPDG's activities is completely consistent with the constitutional separation of powers. That review does not intrude into an exclusive province of the executive branch or interfere with the discharge of the President's duties, and this lawsuit involves no usurpation of an executive function. Indeed, because the statute supplements the President's constitutional right to protect confidential deliberations, it cannot be deemed unconstitutional unless defendant shows that merely requiring the President to invoke the statutory certification mechanism or to assert privilege prevents the President from accomplishing his constitutionally assigned functions. Unable to make such a showing, defendant impermissibly seeks, through his constitutional arguments, to avoid expending the political capital necessary to exercise these statutory and constitutional tools, and instead to shift the responsibility to this Court for his failure to disclose information.

[37] Defendant also argues that § 717's phrase, "a program or activity *the Government* carries out under existing law," should not be interpreted to include programs or activities carried out by the President or Vice President. Def. Mem. at 47-48. But the activity at issue here was carried out by the NEPDG, not the President or Vice President alone. Moreover, for the reasons set forth in Part IV.A.2, the clear statement rule does not apply to the information-disclosure statutes at issue here.

A. The Comptroller General's Review Of The NEPDG's Activities Falls Within Congress's Power Of Inquiry And Does Not Implicate Any Matter Over Which The President Has Exclusive Authority.

The proper framework for determining whether the Comptroller General's NEPDG review is consistent with constitutional separation of powers principles involves a balancing analysis of the executive and legislative branch's competing interests. *See infra*, Part II.B. Defendant, however, contends that this Court need not apply that analysis because Congress, and thus the Comptroller General, "simply lacks authority to inquire into the NEPDG's activities." Def. Mem. at 55). According to defendant, the NEPDG acted pursuant to the President's "core powers" under the Opinions Clause, U.S. Const. art. II, § 2, cl. 1, and the Recommendations Clause, *id.* § 3, cl. 1. Contending that Congress cannot regulate or investigate the exercise of those powers, defendant remarkably asserts that the development of national energy policy is a "'matter[] . . . within the exclusive province' of the Executive." Def. Mem. at 55. Defendant is profoundly wrong.

Congress's authority over the nation's energy policies is indisputable. It has legislated extensively concerning national energy policies, and has enacted laws explicitly directing executive branch officials to develop such policies. *See supra* p. 60. Indeed, federal law currently requires the President to develop a "proposed National Energy Policy Plan," 42 U.S.C. § 7321(a)(1), and sets parameters for how he is to do so—he must, *inter alia*, "insure that consumers, small businesses, and a wide range of other interests, including those of individual citizens who have no financial interest in the energy industry, are consulted in the development of the Plan." *Id.* § 7321(d). Congress also has plenary authority over the appropriation of all public money. *See OPM v. Richmond*, 496 U.S. 414, 425 (1990) ("Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury"). Because Congress may

legislate and appropriate with regard to the development of energy policy, and may do so specifically with regard to the President's development of that policy, the NEPDG's activities, and surely their consultations with non-federal employees, fall within Congress's broad power of inquiry.[38]

Contrary to defendant's claims, neither the Opinions Clause nor the Recommendations Clause insulates the NEPDG's activities from "any" congressional oversight. Def. Mem. at 52-57 (emphasis deleted). The Opinions Clause provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," U.S. Const. art. II, § 2, cl. 1. This Clause does not confer on the President any power vis-à-vis the other branches. *See Youngstown*, 343 U.S. at 640-41 & n.9 (Jackson, J., concurring) (referring to the Opinions Clause as "trifling" and "inherent in the Executive if anything is"); *see also The Federalist No. 74*, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (characterizing Opinions Clause as

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[38] Defendant dismisses the notion that Congress can adopt "'appropriations restrictions to control the use of public money for energy policy development in the future,'" or legislate with regard to the White House's "'responsib[ility] for energy policy development.'" Def. Mem. at 56. Yet Jay Bybee, the current head of the Office of Legal Counsel on whom defendant relies for a capacious understanding of the President's advice-seeking powers, *id*. at 55, acknowledges that Congress can regulate, at least in part, the process by which the President, or his advisers, develops policies to implement federal laws:

> First, when Congress prescribes consultations as a part of the President's Take Care responsibilities, the requirement does not infringe upon his judgment and, indeed, becomes part of the President's duty to faithfully execute the law. It is when the advice is made binding on the President that he has been relieved of his Take Care responsibilities in violation of the separation of powers. Second, when the President appoints his own advisory committees in support of his Take Care responsibilities, and Congress funds the committees, then Congress may place some restrictions on the committees. In this context, the Take Care Clause is the occasion for the exercise of the implied power, but it exists concurrently with Congress' spending power.

Bybee, *supra*, at 123 (footnote omitted). While Bybee was focusing on congressional regulation of advisory committees that include non-federal employees, his reasoning nonetheless applies

a "mere redundancy in the plan, as the right for which it provides would result itself from the office"). Instead, the Clause establishes only the President's primacy within the executive branch. As defendant recounts, the Framers included the Opinions Clause after considering and rejecting a plan to create a "Council of the State," or "Privy Council," to advise the President. The Framers substituted the clause for such a council not, as defendant argues, to protect the President from "interference from the other branches," Def. Mem. at 52-53, but to preclude the President from using the Council as a shield. *See* 2 *The Records of the Federal Convention of 1787*, at 542 (Max Farrand ed., rev. ed. 1966) ("The question of a Council was considered in the Committee, where it was judged that the Presidt. by persuading his Council—to concur in his wrong measures, would acquire their [the Council members'] protection for them [the measures]."); *see also* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 Va. L. Rev. 647, 661-66 (1996) (discussing historical origins of the Opinions Clause). In other words, in establishing the unitary structure of the executive, the Opinions Clause aims to enhance presidential accountability, not, as defendant would have this court do, to diminish it.

The Recommendations Clause in turn provides that the President shall "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3, cl. 1. This Clause establishes the President's only function, beyond his approval or veto function, in the lawmaking process: "the recommending of laws he thinks wise." *Youngstown*, 343 U.S. at 587; *see also id.* at 632 (Douglas, J., concurring) (Recommendations Clause "serves only to emphasize that it is his function to recommend and that it is the function of Congress to legislate."). Pursuant to this Clause, "[t]he President has the

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with equal, if not greater, force, for Congress surely has greater authority with respect to governmental employees.

undisputed authority to recommend legislation, but he need not exercise that authority with respect to any particular subject or, for that matter, any subject." *Association of Am. Physicians & Surgeons, Inc. v. Clinton,* 997 F.2d. 898, 908 (D.C. Cir. 1993) ("*AAPS").* In other words, the purpose of this Clause is to "squelch any congressional objections to the President's right to recommend legislation." *Id.* at 908 n.7; *see* James Madison, *Notes of Debates in the Federal Convention of 1787*, at 464 (G. Hunt & J. Scott, eds. 1987) (Clause "prevent[s] umbrage or cavil at" President for making recommendations); *see also See* J. Gregory Sidak, *The Recommendation Clause*, 77 Geo. L.J. 2079, 2082 (1989) (Clause intended to "prevent *objections* to the President's recommendations to Congress" (emphasis in original)).

Nevertheless, defendant contends that these Clauses "expressly commit powers" to the President's "'exclusive' control, and, therefore, "*any* degree of congressional intrusion" with those powers is unconstitutional." Def. Mem. at 55-56. But the mere fact that powers are "express," or enumerated, and under the President's "exclusive control" does not thereby shield the exercise of those powers from any congressional inquiry. Indeed, the President's power to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, cl. 4, is both "express" and within the President's "exclusive control," *Buckley*, 424 U.S. at 138, yet it is beyond question that Congress may, consistent with the Constitution, oversee, or intrude to some degree upon, that power. *See*, *e.g.*, *Morrison*, 487 U.S. at 695 (upholding Independent Counsel Act even though it "undeniab[ly] . . . reduce[d] the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity"); *see also AAPS*, 997 F.2d at 907. The D.C. Circuit set forth precisely this analysis in rejecting the government's claim, indistinguishable from the one here, that any interference with the President's exercise of his power under the

Recommendations Clause should be held per se unconstitutional, rather than evaluated under a balancing test.[39] *See AAPS*, 997 F.2d at 910 (stating that the proper constitutional analysis of asserted congressional interference, even if "it relate[d] to advice the President seeks concerning the exercise of an enumerated power," is the balancing analysis set forth in *Morrison v. Olson* (which was first set forth in *Nixon v. Administration of Gen. Servs.*, 433 U.S. 425 (1977) ("*Nixon II"*)); *see also Common Cause v. NRC*, 674 F.2d 921, 935 (D.C. Cir. 1982) (applying "'pragmatic, flexible'" test set forth in *Nixon II* to analyze permissibility of asserted congressional interference with Opinions Clause power).

The Court's holdings in cases involving the President's pardon power, *see United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), *Schick v. Reed*, 419 U.S. 256 (1974), his power to approve or veto laws, *see INS v. Chadha*, 462 U.S. 919 (1983), and the judiciary's power to issue final judgments, *Plaut v. Spendthrift Farm, Inc.* , 514 U.S. 211 (1995), are not to the contrary. Each of those cases involved the exercise of powers over which the President or the judiciary has exclusive authority in the sense that Congress has no concurrent authority.[40] By contrast, the

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[39] Given that "[t]he President's constitutional duty to take care that laws be faithfully executed, moreover, seems far greater in importance than his authority to recommend legislation," *see AAPS*, 997 F.2d at 908, it would be odd to conclude that the President's recommendation power must be more jealously guarded than the President's take care power.

[40] In light of the inherently exclusive nature of those powers, § 712 and § 717 could not properly be construed to permit an investigation into the reasons for a particular pardon grant or judicial decision. Even with regard to those powers, however, the Comptroller General could investigate certain matters bearing on the use of public funds. For example, the Comptroller General could investigative how many pardon applications the Justice Department receives and processes each year in order to advise Congress as to the appropriate funding for the Office of the Pardon Attorney. Similarly, while he cannot inquire into case discussions between a judge and law clerk, the Comptroller General could examine judicial workloads and the manner in which judges use law clerks in order to advise Congress on whether it should fund additional law clerk positions for the courts. *Cf. D.C. Courts: Staffing Levels Determination Could Be More Rigorous* (GAO/GGD-99-162 Aug. 27, 1999) (discussing staffing and workload levels for the D.C. Courts); *Federal Judiciary: Information on the Use of Recalled Magistrate and Bankruptcy Judges* (GAO/GGD-99-22 Jan. 15, 1999) (examining practice and cost of using

President does not necessarily exercise such exclusive authority with regard to opinions requested; insofar as those opinions relate to matters that could fall within the administration of federal statutes, Congress has concurrent authority to request and review them.[41] Nor does the President exercise such exclusive authority with respect to recommending legislation. Congress of course recommends legislation, and, indeed, as the D.C. Circuit has observed, so can anyone, *see AAPS*, 997 F.2d at 908.

The conclusion that the Opinions and Recommendations Clauses do not protect the President's "powers to gather information and develop policy" from "any degree of congressional intrusion," Def. Mem. at 52, 55-56 (emphasis deleted), is compelled, moreover, by the Supreme Court's holdings in the *Nixon* cases. Even communications directly to the President concerning legislative recommendations or the opinions of principal officers on subjects relating to their official duties are, in general, nothing more than communications falling under the Presidential privilege—"communications 'in performance of [a President's] responsibilities' 'of his office' and made 'in the process of shaping policies and making decisions.'" *Nixon II*, 433 U.S. at 449 (quoting *Nixon I*, 418 U.S. at 711, 713, 708) (alteration in original) (internal citations omitted). When the President asserts privilege, those types of communications, insofar as they do not reveal military, diplomatic, or sensitive national security secrets, are only presumptively

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recalled judges for assistance in meeting temporary workload increases). This case, however, simply does not involve an investigation into a plenary presidential (or judicial) power.

[41] Indeed, Congress regularly requests from executive branch officials, including the principal officers in the executive departments, opinions regarding the duties of their office, and has done so since the first Congress. *See* Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66 (requiring the Secretary of the Treasury "to make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives"); *see also* Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 Geo. Wash. L. Rev. 627, 671-78 (1989) (discussing congressional reporting requirements).

privileged, not absolutely so. *Nixon I*, 418 U.S. at 706; *Nixon II*, 433 U.S. at 446-47; *see also In re Sealed Case*, 121 F.3d at 743 & n.12.[42] Defendant cannot cloak such communications with absolute immunity by invoking the President's Opinions and Recommendation Clauses powers, rather than the President's inherent need for confidential Presidential communications. *See Nixon v. Sirica*, 487 F.2d 700, 718 (D.C. Cir. 1973) (executive privilege not absolute even if "President was engaged in performance of his constitutional duty").

B. The Comptroller General's Review Of The NEPDG's Activities Does Not Interfere With The President's Exercise Of His Constitutionally Assigned Functions.

As the Supreme Court has made clear, "in determining whether [a statute] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon II*, 433 U.S. at 443 (citing *Nixon I*, 418 U.S. at 711-12); *see also Morrison*, 487 U.S. at 695 (quoting *Nixon II*, 433 U.S. at 443). Because the President had the statutory means to certify and thus preclude the GAO's review of defendant's documents, and could still seek to assert privilege with respect to those documents, the Comptroller General's review does not in any way prevent the executive branch from carrying out its functions. Even if there were any disruption, moreover, that impact is justified by Congress's overriding need to oversee the NEPDG's use of public money and its development of national energy policy.

[42] Defendant relies extensively on Justice Kennedy's concurring opinion in *Public Citizen* in support of his assertion of an absolute privilege for the exercise of the President's information-gathering and policy-developing powers. Def. Mem. at 54-56 (citing concurrence five times). But that concurrence is not controlling authority. Nor does it even support defendant's sweeping claims. Justice Kennedy maintained not that any intrusion with the President's information-gathering ability in general was unconstitutional, but only any intrusion with the President's ability to gather information necessary to exercise his plenary Article II nominations power. *See Public Citizen*, 491 U.S. at 488-89 (Kennedy, J., concurring).

Defendant asserts that the Comptroller General's NEPDG review impermissibly interferes with executive branch powers because it would "expose information-gathering and policy-making activities (including deliberations) at the heart of the Executive Branch." Def. Mem. at 58. But that assertion mischaracterizes what is at issue here. As a preliminary matter, the Comptroller General does not seek to discover "broad categories of information," Def. Mem. at 58, including "everything about meetings and even the planning processes for them," *id*. at 37. He does not seek, for example, the notes and minutes of any NEPDG meetings, or any information concerning the NEPDG's prioritization of issues or deliberation on recommendations.[43] Instead, he seeks a narrowly defined category of records relating to the identities of the attendees in NEPDG task force meetings, the NEPDG meetings with non-federal employees, or the NEPDG's costs.

More fundamentally, the executive branch had the ability to preclude suit through a certification, and could still attempt to assert privilege with respect to the documents sought by the Comptroller General. A decision by this Court upholding the Comptroller General's statutory rights both to review the NEPDG's activities and to bring suit for the documents at issue does not necessarily resolve the question whether those documents must be disclosed. *See Soucie v. David*, 448 F.2d 1067, 1071-72 (D.C. Cir. 1971) (pointing out that executive branch can still assert privilege if agency documents subject to disclosure under FOIA); *cf. Nixon II*, 433 U.S. at 450 (clarifying that the President's ability to assert executive privilege before disclosure of presidential records to public meant that public access to records was not at issue). Instead, the significance of that decision would simply be that, absent a valid assertion of executive

[43] Notwithstanding the fact that he claims to be challenging the statutes on an "as applied" basis, Def. Mem. at 51, defendant remarkably asserts that the "constitutionality of these statutes must be evaluated on the basis of the authority they convey to the Comptroller General . . . not

privilege, the NEPDG documents must be disclosed to the Comptroller General.[44] Put another way, what is at issue is not simply whether the Comptroller General is entitled to the NEPDG documents. Rather, it is whether, absent a certification or any assertion of executive privilege, the Comptroller General is entitled to the documents.

The relevant constitutional inquiry, therefore, is not whether the disclosure of NEPDG documents prevents the executive branch from accomplishing its constitutionally assigned functions, but instead whether requiring the executive branch to avail itself of the statutory certification mechanism or to assert privilege to protect the NEPDG documents does. The answer to that question is, of course, no. *See Pacific Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259, 1265 (D.C Cir. 1980) (noting that executive branch could avoid any potential constitutional problems raised by open meeting requirements of Sunshine Act by invoking statutory exemption). Presidents have often asserted executive privilege without contending that the obligation to do so impaired their ability to discharge their duties. *See supra* pp. 7-8. And the executive branch has issued at least four certifications under either § 716 or the 1954 Mutual Security Act without claiming that the obligation to certify caused any undue burden. *See* Pl. Mem. at 16-17; *supra* p. 9. Indeed, Attorney General Rogers characterized the latter certification provision as an "accommodation" to, not a disruption of, the President's duties. *See supra* p. 10. The fact that the executive branch might be required, in defendant's words, to "expend political capital" to employ these statutory or constitutional means of protecting information cannot

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the authority he has, in fact, exercised in this test case." *Id*. at 58 n.34. This is nothing short of an impermissible request for an advisory opinion from this Court.

[44] Resolution of this case is thus distinguishable from that in AAPS, upon which defendant relies. *See infra* Part VI.

possibly amount to a disruption of unconstitutional proportions; the expenditure of political capital is part and parcel of the daily business of the political branches.[45]

Even if the "burden" of invoking the certification provision or asserting privilege constituted a constitutionally cognizable "disruption"—which it does not—Congress's need to perform *its* constitutionally assigned functions clearly overrides that burden. As the Comptroller General's initial brief detailed, requiring the executive branch, insofar as it does not certify or assert privilege, to provide the information sought will assist Congress in the performance of its constitutional appropriations and legislative functions. Information concerning the NEPDG's activities will enable the Comptroller General, for example, to meet Congress's need to oversee the executive branch's use of public money, and to ensure that such use was in compliance with federal law. *Cf. Nixon II* at 453-54 (upholding intrusion into confidentiality of executive branch communications in part because of "the importance of the materials to the Judiciary in the event that they shed light upon issues in civil or criminal litigation"). Also, the information will allow the Comptroller General to satisfy Congress's need to understand how the NEPDG developed policy in order to evaluate whether the group achieved congressional objectives concerning energy policy and its development, and to gauge the necessity for legislation related to energy or other policy developments in the future. *See id.* at 453 (upholding intrusion into confidentiality of executive branch communications in part because of "Congress' need to understand how . . .

[45] Without any elaboration, defendant baldly asserts that requiring the executive branch to "expend[] the political capital inherent in an assertion of privilege" with "no expenditure of political capital by the Congress as a whole" to seek documents represents "an improper effort" by Congress "to aggrandize itself at the expense of the Executive." Def. Mem. at 27 n.13. But, because the Comptroller General acts as an agent of Congress, the whole Congress does expend whatever political capital accompanies a suit for documents. Also, under defendant's "parity of political capital" theory, not even a House of Congress, let alone a congressional committee, could compel the President to assert executive privilege, yet committees and even individual members have often compelled such assertions. *See supra* pp. 7-8.

political processes had in fact operated in order to gauge the necessity for remedial legislation.").[46]

Defendant attempts to dismiss Congress's need for the information GAO seeks by claiming that, in investigating the NEPDG's development of national energy policy, GAO is "investigating the discharge of functions within the exclusive province of another branch." Def. Mem. at 60. But, for the reasons discussed above, Congress is *not* investigating such functions. *See supra* Part V.A. The development of energy policy, regardless of whether it is carried out by the Energy Department or the White House, does not belong within the President's exclusive province, but instead falls squarely within Congress's authority over the nation's energy laws.

Defendant also urges this Court to apply the wrong legal standard in assessing Congress's need for the information sought. Relying on *Nixon I*, 418 U.S. at 713, and *Senate Select Committee*, 498 F.2d at 730, defendant contends that Congress's need must be equivalent to a "'demonstrated, specific need for evidence in a pending criminal trial'" or be substantiated by "'a showing that *the responsibilities of that institution cannot responsibly be fulfilled without access* to the records of the President's deliberations.'" Def. Mem. at 60-61 (emphasis in original). But, in those cases, the President had asserted executive privilege, and the Court's role there was to determine whether Congress's need justified overriding that assertion. *See Nixon I*, 418 U.S. at 688, *Senate Select Comm.*, 498 F.2d at 727, 730. Here, of course, the President has made no such assertion—presumably because no court would uphold such an assertion with respect to the documents GAO seeks—and the standard elaborated upon in those cases is thus inapposite. *See Common Cause*, 674 F.2d at 935 (declining to apply executive privilege analysis

[46] Although *Nixon II* upheld a statute providing for the disclosure of Presidential communications to another part of the executive branch, the intrusion at issue there was greater than any here. Under that statute, Presidential communications had to be disclosed before a

to determine constitutionality of asserted interference with President's ability to receive opinions when executive branch did not assert privilege and instead raised only separation of powers claim).

In his efforts to exaggerate the Comptroller General's disruption to executive branch functions, defendant obscures the availability of both the certification mechanism and the President's right to assert executive privilege. Yet in his attempts to minimize Congress's comparative need for the information, defendant argues as though a valid assertion of the privilege has been made. Defendant cannot have it both ways. The President can expend the political capital necessary to assert privilege and thereby obtain the benefit of the *Nixon I* balancing test, or he can decline to do so and accept the consequences—enforcement of the Comptroller General's statutory rights to the information sought. What the executive branch plainly cannot do is to ask this Court effectively to assert the privilege on his behalf. *See Soucie*, 448 F.2d at 1071-72 & n.8 (instructing that executive branch must make an "express claim" of executive privilege before court will consider whether FOIA disclosure provisions are unconstitutional as applied).

C. The Comptroller General's Suit In Aid Of Congress's Investigative Authority Does Not Violate Article II's Take Care Clause.

Finally, defendant contends that the Comptroller General's right to sue to enforce his right of access to executive branch records violates Article II's Take Care Clause and the separation of powers in all circumstances. Def. Mem. at 62. To succeed in this facial attack on an Act of Congress, defendant must meet an extremely heavy burden. Out of respect for the political branches, the federal judiciary accords a strong presumption of constitutional validity to

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claim of privilege could be litigated. *Nixon II*, 433 U.S. at 450. Here, by contrast, the President may assert privilege first and avoid any disclosure whatsoever if a court upholds his assertion.

every statute passed by Congress. *See*, *e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). As the Supreme Court has explained:

> The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from *any reasonable doubt* that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest.

Nicol v. Ames, 173 U.S. 509, 514-15 (1899); *see also Sinking-Fund Cases*, 99 U.S. 700, 718 (1878) ("Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."). Defendant has failed by a wide margin to overcome this presumption.

Claiming that the filing of a lawsuit is a "quintessential[]" means through which the executive branch exercises its take care power, defendant argues that § 716(b) "impermissibly assign[s] an executive power to a legislative agent." Def. Mem. at 62, 63. But as history and judicial precedent make clear, it is the purpose of an activity, not its label, that determines whether it is legislative or executive in nature. Thus, the power to arrest and imprison persons is traditionally an executive function, yet it is firmly established that Congress's agents may perform those actions in support of Congress's power of inquiry and contempt. *See McGrain*, 273 U.S. at 174-76; *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230-34 (1821); *In re Chapman*, 166 U.S. 661, 671-72 (1897); *Marshall v. Gordon*, 243 U.S. 521, 537-38 (1917).

So too here, the purpose of a suit under § 716(b) is to compel the production of records in aid of the legislative power of inquiry. As the Supreme Court observed in *Buckley v. Valeo*, 424 U.S. 1 (1976), a legislative body needs information to legislate wisely, and:

> "[e]xperience has taught that mere requests for . . . information often are unavailing, and also that information which is volunteered is not always accurate or complete; so *some means of compulsion are essential to obtain what is needed*. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—*with enforcing*

> *process*—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it."

Id. (quoting *McGrain*, 273 U.S. at 175); *see also Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503-04 (1975) ("The power to investigate and to do so through compulsory process plainly falls" within the "'legitimate legislative sphere.'"). In conferring on the Comptroller General a right to inspect executive branch records, and a concurrent right to enforce it, § 716 does not effect a "congressional aggrandizement of executive power," Def. Mem. at 64, but instead constitutes a wholly permissible delegation of Congress's own power of inquiry. *Cf. Young v. U.S. ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 795, 800 (1987) (upholding courts' authority to initiate contempt prosecutions for disobedience of court orders as "part of the judicial function," and not as "an execution of the criminal law in which only the Executive Branch may engage"). Indeed, relying on the same passage from *Buckley*, the Eighth Circuit adopted precisely that reasoning in upholding against separation of powers challenge the Comptroller General's § 716 authority (originally codified in 31 U.S.C. § 54(c)(2)). *See McDonnell Douglas I*, 751 F.2d at 224-25 (rejecting argument that Comptroller General exercises executive power); *accord McDonnell Douglas Corp. v. United States*, 754 F.2d 365, 368 (Fed. Cir. 1985) ("*McDonnell Douglas II*").[47]

That Congress may, consistent with the Constitution, authorize a judicial enforcement action as a means of "enforcing process" is well-established. The Supreme Court indicated long ago that Congress could authorize a "committee or its members" to "invoke the [judicial] power" in support of its power of inquiry. *Reed*, 277 US. at 388-89. In addition, the D.C. Circuit has

[47] The Eighth Circuit entertained a challenge to the judicial enforcement provisions brought by a private party, rather than the executive. *McDonnell-Douglas I*, 751 F.2d at 222, 224-25. Its reasoning, however, applies with equal force regardless of whom the Comptroller General is investigating. *Id.*

recognized the right of a congressional agent to do so against the executive.[48] *See Senate Select Comm.*, 498 F.2d at 727-28.

Beyond judicial precedent, longstanding practices by the Congress also compel this conclusion. Since 1928, the Senate has authorized all of its committees to bring any suit "'necessary to the adequate performance of the powers invested in it or the duties imposed upon it.'" *See Senate Select Comm.*, 366 F. Supp. at 56 n.8. In further support of its investigative power, Congress in 1970 established the authority of any House of Congress, committee, or subcommittee, to institute a judicial action to seek an immunity order. *See Organized Crime Control Act of 1970*, Pub. L. No. 91-452, § 201(a), 84 Stat. 922, 928 (codified, as amended, at 18 U.S.C. § 6005). In 1978, moreover, Congress created the Office of Senate Legal Counsel and empowered it to bring civil actions to enforce subpoenas or seek immunity orders. *See* Pub. L. No. 95-521, §§ 701, 703, 707, 92 Stat. at 1875, 1877, 1880 (codified, as amended, at 2 U.S.C. §§ 288, 288b(d), 288f). Likewise, the House has authorized its agent, the House general counsel, to institute judicial proceedings for immunity orders. *Congressional Oversight Manual* CRS-127 (CRS Report to Congress, 2002). In addition, for the past 30 years, each House of Congress has authorized special investigatory committees to participate in judicial proceedings. *See id.* at CRS-49-51 (committees investigating, *inter alia*, Koreagate, ABSCAM, the Iran-Contra affair, and the October Surprise).

Furthermore, presidential administrations of both parties have previously acknowledged Congress's, or its agent's, constitutional power to seek judicial review in support of the power of inquiry. Testifying before Congress on an earlier version of the bill that enacted the provision at

[48] Just as Congress may delegate this authority to its committees, it may delegate that authority to agents created by statute. *See Buckley*, 424 U.S. at 137 ("Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same

issue here, the executive branch stated that, although it was a "close question," the Comptroller General's judicial enforcement provision—which at that time did not even include the exhaustive procedural and notification requirements, the exemptions for intelligence materials, or the certification mechanism—was constitutional. *See Strengthening Comptroller General's Access To Records; New Procedure for Appointment: Hearings Before a Subcomm. of the Comm. on Gov't Operations*, 95th Cong. 55, 75 (1978) (statement of Lawrence A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice) (stating that enforcement provision is "probably constitutional"). On at least three other occasions, the executive branch has expressed a consistent view. *See Response to Congressional Requests*, 10 Op. Off. Legal Counsel at 87-88 & n.31, 33 (Charles J. Cooper) (acknowledging Congress's authority to file a civil action as "a viable option" to enforce its subpoenas); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101, 137 n.36 (1984) (Theodore B. Olsen) (noting that Congress may already have "the power to apply for . . . civil enforcement" of its subpoenas and, "at the very least, Congress may authorize civil enforcement of its subpoenas and grant jurisdiction to the courts to entertain such cases."); *Brief for the Attorney General as Appellee and for the United States as Amicus Curiae* at 108 n.66, *Buckley v. Valeo*, 424 U.S. 1 (1976) (No. 75-436) (*AG Buckley Brief*) ("Congress has the right to enforce its own subpoenas and, if the [Federal Election] Commission is an arm of Congress, we see no constitutional bar to possession of such power by the Commission."); *cf. Proposed Legislation to Grant Additional Power to The President's Commission on Organized Crime*, 7 Op. Off. Legal Counsel 128, 138

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general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them.").

(1983) (Ralph W. Tarr) (Commission including, *inter alia*, two members of Congress "may be permitted to apply to the court for enforcement of the subpoena through its own staff attorneys, rather than through the Attorney General").

Against the weight of this judicial and executive branch precedent, defendant basically relies on one case, *Buckley v. Valeo.*[49] Def. Mem. at 62-64. But, even there, his reliance is misplaced. At issue in *Buckley* was the "wide ranging" power of the Federal Election Commission to bring civil enforcement actions to "'implement'" provisions, or to correct "'acts or practices'" that constituted a "'violation,'" of the Federal Election Campaign Act. *Buckley*, 424 U.S. at 111. It was that power, the exercise of which did not "require the concurrence of or participation by the Attorney General" and "rest[ed] solely with the Commission"—and not any power to enforce congressional demands for information—that the Court referred to when it stated that "[t]he Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function." *Id.* at 111, 138. Indeed, that is precisely how the Eighth Circuit read *Buckley*, relying on it to show that the Comptroller General may sue to enforce his access rights without violating Article II. *See McDonnell Douglas I*, 751 F.2d at 225. And it is precisely what the Attorney General argued in *Buckley*, when he urged invalidation of the FEC's enforcement powers, but acknowledged the Commission's right to sue to compel compliance with its subpoenas. *See AG Buckley Brief* at 108 & n.66.

Finally, there is no basis to defendant's conclusory assertion that the purported aggrandizement in this case is "especially egregious" because the Comptroller General may

[49] Defendant points to two cases upholding citizen-suit provisions in part because Congress did not "'control'" or "'supervise'" the enforcement of those actions. Def. Mem. at 63-64. Those citizen suits, however, involved the enforcement of statutory rights unrelated to Congress's

bring suit "*against the Executive.*" Def. Mem. at 64 (emphasis in original). If, as defendant alleges, the power to bring suit for documents were an executive power—which it is not—it would make no difference whether the Comptroller General exercised it with regard to private parties or the executive. If accepted, in other words, defendant's argument would necessarily require the invalidation of the Comptroller General's authority to enforce its right of access to documents of private parties. In fact, however, the exercise of this litigating authority is equally permissible whether it is exercised against private parties or the executive—in either case, the Comptroller General is exercising Congress's ancillary power to compel compliance with investigative demands.

Accordingly, in seeking to prohibit the Comptroller General from bringing suit under § 716, defendant asks this Court not to prohibit an impermissible congressional aggrandizement of executive power, but to effectuate an unconstitutional limit on Congress's legislative power.

VI. APPLICATION OF THE CONSTITUTIONAL AVOIDANCE CANON HERE IS INAPPROPRIATE AND WOULD FRUSTRATE, RATHER THAN SERVE, THE CONSTITUTIONAL SEPARATION OF POWERS.

In a final effort to avoid the plain meaning and intent of the statutes, defendant asks this Court to apply the canon of constitutional avoidance. But that canon has no application here. There are no "serious constitutional problems" with requiring the executive to certify or assert privilege in order to prevent a disclosure of information that would interfere with the President's discharge of his duties. Nor is there any ambiguity in the statutes that authorize this suit. *See HUD v. Rucker*, 122 S. Ct. 1230, 1235 (2002) (avoidance canon "'has no application in the absence of statutory ambiguity'").

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power of inquiry. Judicial approval of citizen suits, moreover, undercuts defendant's claim that the power to file a lawsuit is a unique power of the executive branch.

Studiously ignoring the executive branch's capacity for self-help under § 716, defendant contends that "this case presents at least as grave a constitutional problem as those avoided in *Public Citizen* and *AAPS*." Def. Mem. at 65-66. But both *Public Citizen* and *AAPS* involved the application of the Federal Advisory Committee Act ("FACA") to particular presidential advisory committees. The application of FACA threatened the President's Article II nomination power at issue in *Public Citizen*, and his ability to seek the advice at issue in *AAPS*, because FACA would have regulated the conduct and membership of the President's advisors. *See*, *e.g.*, 5 U.S.C. App. §§ 5(b)(2), 5(c), 10(2) (requiring, *inter alia*, notice of meetings and balanced membership). As the *AAPS* court, for example, pointed out, "FACA's requirement that an advisory committee must be 'fairly balanced in terms of the view represented' would—if enforceable and applied to groups of presidential advisers—restrict the President's ability to seek advice from whom and in the fashion he chooses." *See AAPS*, 997 F.2d at 909; *see also Public Citizen*, 491 U.S. at 488 (Kennedy, J., concurring) ("FACA would regulate so as to interfere with the *manner* in which the President obtains information"). Accordingly, *Public Citizen* and *AAPS* did not involve an obligation either to disclose information or to expend the political capital necessary to protect that information, but rather regulation of the President's discharge of his duties in circumstances where the President had no statutory or constitutional means to avoid such regulation. Where, as here, the President had the ability to preclude disclosure through a statutory certification, and retains the ability to assert executive privilege with respect to the documents sought, the doctrine of constitutional avoidance is inappropriate. *See Pacific Legal Found.*, 636 F.2d at 1265 (rejecting application of avoidance canon because of executive branch's ability to avoid possible constitutional problems through invoking statutory exemption); *Soucie*, 448 F.2d at 1071-72 (holding there are no "[s]erious constitutional questions" posed by FOIA's disclosure

requirements for executive branch documents if executive branch does not assert executive privilege).

Finally, even if this case did raise serious constitutional questions—which it does not—application of the avoidance canon is inappropriate. That canon is founded on a respect for Congress and a presumption about its intent. As the Supreme Court has explained, "[W]e are loathe to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils." *Public Citizen*, 491 U.S. at 466. But, here, the text, structure, history, and purposes of the statutes provide precisely that "firm evidence." Mindful of the statutes' implications for the separation of powers—and exhibiting particular concern for suits against the President and his high-level advisers—Congress, in consultation with the President, crafted a complex statutory scheme that carefully accommodates their respective concerns. Enacted by Congress and signed by the President, this statutory scheme represents the two branches' considered judgment on a balancing of interests that comports with the separation of powers. Not only does respect for those coordinate branches counsel against the mechanical application of the avoidance canon, but the Constitution itself forbids it. Where, as here, there is no ambiguity in the statutes' meaning, application of the avoidance canon, "'while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution.'" *Rucker*, 122 S. Ct. at 1235-36 (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)).

CONCLUSION

For the foregoing reasons and the reasons set forth in the his opening brief, the Comptroller General respectfully requests that this Court deny defendant's motion to dismiss and grant plaintiff's motion for summary judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July 2002, true and correct copies of the foregoing Plaintiff's Consolidated Reply In Support Of His Motion For Summary Judgment And Opposition To Defendant's Motion To Dismiss was served by mail on the following:

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