UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

v.

C.A. No.1:02cv340JDB

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

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES
IN REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

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PRELIMINARY STATEMENT

In his most recent brief, the Comptroller General claims that the dismissal of this action would permanently "shackle Congress's [investigative] power in [a] remarkable and unprecedented manner." Plaintiff's Consolidated Reply ("Pl's. Reply") 1-2. He makes this claim despite the undisputed facts that no Comptroller General has ever sued to compel any executive-branch official to produce a document and no court has ever ordered the Executive Branch to produce a document to Congress or one of its agents. It is plaintiff's position, not defendant's, that would change the accepted historical practice and forever tilt the balance between the Executive and Congress.

Two individual members of Congress instigated this lawsuit. Yet, plaintiff goes to great lengths to establish that he seeks NEPDG documents to serve Congress's institutional interests on his own initiative, rather than on behalf of even two members. In any event, Congress itself has not taken any meaningful act that would indicate it has any interest in the information plaintiff seeks. Plaintiff therefore lacks standing, and there is no cause for this Court to intervene at this stage, when neither the Congress, a House of Congress, a committee of Congress, nor even a subcommittee of Congress has acted.

Further, as defendant has demonstrated, plaintiff lacks the statutory authority to pursue his demands against the Vice President. Neither the plain language, nor common sense, requires interpreting the relevant statutory provisions to give the Comptroller General the authority to sue anyone, up to and including the President and Vice President, with respect to any matter that involves any expenditure of government time or money.

Of course, if plaintiff really possesses the virtually limitless authority he claims, then his statutory powers would plainly violate the Constitution. Regardless of whether the question is analyzed through the exclusive powers assigned to each branch by the Constitution or through a

balancing of the harms that would accrue to each, plaintiff claims nothing less than a legislative power to regulate the manner in which the President and his closest advisers develop the President's policies — a power that Congress does not have and one that it cannot assign to itself or its agents consistent with constitutional separation-of-powers principles. To grant an agent of Congress the power to enlist the courts in document disputes with the Executive would fundamentally alter "the regime that has obtained under our constitution to date." Raines v. Byrd, 521 U.S. 811, 828 (1997). It would, indeed, work a revolution in the separation of powers. This Court should decline plaintiff's invitation to alter our constitutional regime and dismiss this lawsuit.

ARGUMENT

I. Plaintiff Lacks Standing

The Article III limitations on congressional standing articulated in Raines, apply to plaintiff's claims and preclude any finding of standing in this case. See Def's. Mem. 10-16. Plaintiff advances several arguments in an attempt to evade those standing limitations. None has merit.

As an initial matter, plaintiff appears to vacillate as to whose injuries he is seeking to vindicate in this lawsuit. When it suits his purposes, plaintiff readily confesses that he brings this action solely in his official capacity as an agent of Congress, to vindicate Congress's investigative power. See, e.g., Pl's. Reply 22 ("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."). Yet in discussing standing, plaintiff appears to disavow any attempt to vindicate Congress's institutional interests, and likens his injuries in not receiving documents to those of citizens, who of course do not exercise Congress's investigative power. See id. at 17 (citing FEC v. Akins, 524 U.S. 11 (1998); Public Citizen v. United States Dep't of Justice, 491 U.S. 440

(1989)); see also Reid Amicus Br. 13 (citing Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), for the same proposition).

Plaintiff cannot have it both ways, and it is clear that he is no ordinary plaintiff seeking to enforce his personal rights under a disclosure statute. Properly understood, plaintiff asserts an injury only in his official capacity as an agent of Congress, exercising Congress's delegated investigative power. Like the congressional plaintiffs in Raines, "[i]f [plaintiff] were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead." 521 U.S. at 821. Moreover, plaintiff's Complaint makes clear that he is acting solely as an agent of Congress and is seeking information "to aid Congress in considering proposed legislation." Compl. ¶ 2. And his opening memorandum candidly acknowledges that he wants the information because he theorizes that it might help Congress to "adopt new appropriations restrictions on the use of federal funds to conduct private meetings on matters of national policy," including appropriations riders "that prohibit the executive branch from developing comprehensive energy policies through private task force meetings with only selected members of the public, or that condition the use of funds for such meetings on after-the-fact disclosures concerning the persons in attendance and the subjects discussed." Pl's. S.J. Mem. 26, 27. His reliance on Akins and Public Citizen, both of which involved the rights of private parties under disclosure statutes, is therefore misplaced.

Thus, the real — and only — "injury" plaintiff seeks to remedy in this case is a perceived institutional injury to Congress's collective powers. Whatever else can be said about these abstract and hypothetical injuries to congressional power, they — like the injuries alleged in Raines — necessarily constitute "institutional injur[ies] (the diminution of legislative power), which necessarily damage[] all Members of Congress and both Houses of Congress equally." 521 U.S. at 821. Although, as the designated agent of Congress, plaintiff may feel this institutional injury acutely, it

remains an institutional injury to Congress's collective powers. Plaintiff thus fits squarely within Raines's holding that an individual plaintiff — even one expressly authorized to sue, as the individual members of Congress were in Raines, see Def's. Mem. 11 — lacks standing to remedy the kinds of institutional injuries plaintiff asserts here. 521 U.S. at 829.[1]

Plaintiff spills considerable ink refuting an argument that defendant never made — that Congress cannot delegate its investigative powers. The point is not that Congress cannot delegate its investigative powers to an agent, but that in so doing, Congress cannot evade the limits on its ability to vindicate abstract institutional injuries in court. Delegation to a congressional agent does not transmogrify a lawsuit into something other than a lawsuit to vindicate institutional interests. The legislative standing problem in Raines would not have gone away if the Line Item Veto Act created a mechanism for the Comptroller General or Senate Legal Counsel to institute a lawsuit at Senator Byrd's request, rather than authorizing him to file the lawsuit himself.

Moreover, it does not matter for purposes of standing whether plaintiff is acting at the behest of two individual members, whose request initiated his investigation into the NEPDG and who themselves would lack standing under Raines, or, as he now claims, on his own initiative to vindicate the interests of Congress as a whole. See Pl's. Reply 18-19, 22. Either way, plaintiff lacks standing. Contrary to plaintiff's and amicus Reid's suggestion, the fact that plaintiff is an unelected congressional agent, rather than a member of Congress, does not cure — and indeed only exacerbates — the standing and separation-of-powers problems raised by this suit. Raines effectively struck

[1] Contrary to the assertions of plaintiff and amicus Reid, defendant has not argued that plaintiff cannot, as a matter of law, assert an injury in his official capacity. Rather, defendant contends that the absence of congressional authorization for this specific action and the lack of any asserted personal interest by plaintiff preclude any finding of injury. Amicus Reid's hyperbolic claim that defendant's argument will spell the end of Congress's ability to investigate executive-branch activities ignores the fact that this is the first effort by a Comptroller General to enforce his demands for executive-branch documents through judicial action.

down an attempt by Congress to confer standing and authority to sue on "[a]ny Member of Congress." 521 U.S. at 815 (citation omitted). Congress cannot avoid that holding by purporting to confer that same authority on an unelected agent, whether that agent is acting at the behest of an individual member or sua sponte.[2]

As in Raines, plaintiff seeks to sue to vindicate Congress's institutional interests, without any actions by Congress as a whole, or even as much as a subcommittee, indicating that the documents are needed or that other, non-judicial avenues for obtaining the documents have been exhausted. The absence of those actions is fatal to any claim of "informational injury" on the part of Congress, or plaintiff as its agent. Cf. Raines, 521 U.S. at 829 (noting that no collective action had been taken by Congress to authorize the suit brought by individual members); Watkins v. United States, 354 U.S. 178, 206 (1957) ("It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function. The reason no court can make this critical judgment is that the House of Representatives itself has never made it."). By contrast to this case, in Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc), a case on which plaintiff heavily relies, the suit was endorsed not only by the full vote of the committee that initiated it, but also by a Senate resolution and the enactment by the full Congress of a specially tailored jurisdictional

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[2] Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000), is of no assistance to plaintiff. In that case, the Supreme Court held that the assignment of the United States' interest in a false-claims action did not create a constitutional problem. Nothing in Vermont Agency, however, suggests that Congress can avoid a constitutional limit on its standing by delegating the authority to sue to vindicate congressional interests to an unelected agent. Id. at 774. Equally misplaced is plaintiff's reliance on Bowsher v. Merck & Co., 460 U.S. 824 (1983), for the proposition that the absence of any express authorization for this specific action is irrelevant. In that case, the Comptroller General had a contractual right to demand the information sought from a government contractor. Id. at 828. Further, the United States intervened as a party to pursue the same claim. Id. at 829; see also United States v. McDonnell Douglas Corp., 751 F.2d 220, 223 (8th Cir. 1984) ("McDonnell Douglas I"). Thus, no question of plaintiff's standing was presented.

statute. Id. at 727.

Contrary to plaintiff's assertion (Pl's. Reply 20-22), it is of no moment that Raines involved Congress's legislative power while this case involves its investigative power. Congress's investigative powers are wholly derivative of its legislative powers, see Def's. Mem. 54 & n.32, and Congress does not somehow strengthen its hand by relying on a derivative power. Congress suffers an informational "injury" only to the extent that its power to legislate in an appropriate area is impaired. If a direct impairment of that power does not suffice to confer standing, an indirect impairment fails a fortiori.

Nor can plaintiff distinguish Raines on the ground that it was concerned only about precluding "disgruntled legislators from frustrating the collective legislative will through judicial means." Pl's. Reply 21. As a congressional agent, plaintiff understandably focuses on Raines's salutary effect of prohibiting end-runs around the normal majoritarian legislative process, but the Supreme Court's primary focus in Raines was on "the judiciary's proper role in our system of government." 521 U.S. at 818. In any event, this case raises precisely the concerns about "disgruntled legislators" that plaintiff attributes to Raines. Plaintiff acknowledges that he instituted this investigation at the request of two individual members of Congress and concedes that Congress has multiple collective means of seeking information regarding the NEPDG if it truly wants the information. In the absence of such collective action, however, there is simply no way to prevent ranking minority members or other individual members from initiating such investigations through the means of the Comptroller General precisely because they cannot persuade their colleagues to vote to issue a subpoena.

Nor will denying plaintiff standing to bring this unprecedented lawsuit interfere with traditional efforts by Congress and its agents to obtain information from the Executive. The

concerns of plaintiff and his amicus confuse commonplace congressional efforts to obtain documents without aid from the courts with extraordinary efforts to enlist the courts to obtain documents. Committees, subcommittees, and individual members remain free to request and receive executive-branch documents through the normal give and take by which the vast majority of executive-branch materials are shared with Congress. But, as the case law makes clear, some sort of collective action is needed before Congress, let alone its agents, can embroil the courts in the process. The Supreme Court made this distinction clear in Reed v. County Commissioners of Delaware County, 277 U.S. 376 (1928), when it upheld the dismissal of an action brought by senators by noting that the "[a]uthority to exert the powers of the Senate to compel production of evidence differs widely from authority to invoke judicial power for that purpose." Id. at 389; see also Part IV.C below.

Nor are plaintiff's standing woes solved by the fact that Congress has "authorized" plaintiff, unlike the senators in Reed, to bring a cause of action to enforce his document requests. The statute challenged in Raines likewise created an express cause of action, which purported to authorize any member of Congress to sue. 521 U.S. at 815-816. As the Court made clear in Raines, however, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." Id. at 820 n.3; see also Department of Commerce v. United States House of Representatives, 525 U.S. 316, 328-329 (1999).

Moreover, because Congress and its agents retain ample non-judicial means to obtain documents, there is no precedent for finding standing for a congressional agent under the circumstances of this case. After reviewing more than a century of separation-of-powers disputes between the political branches, the Raines Court concluded: "It is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power."

521 U.S. at 826. The total lack of any historical support for judicial intervention into such disputes led the Supreme Court to hold that "grant[ing] standing in these cases * * * is obviously not the regime that has obtained under our Constitution to date." Id. at 828. Clearly, granting mere congressional agents the power to drag the Vice President into court to force compliance with informational requests without any collective action authorizing either the specific request for information or the subsequent effort to involve the courts would bear no resemblance whatsoever to the "regime that has obtained under our Constitution."[3]

Plaintiff, for his part, acknowledges the total lack of historical support for his suit, but oddly attempts to turn that novelty to his advantage, complaining that "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.'" Pl's. Reply 14 (quoting Def's. Mem. 15 (emphasis in original)). In fact, there is no case in which a congressional agent like the Comptroller General, as opposed to a congressional committee, has filed suit to obtain executive-branch materials. And the burden is on the plaintiff to establish standing, not the defendant to disprove it. Given that Congress retains

[3] Plaintiff disputes the significance of a congressional authorization in the context of a specific dispute over particular information, as opposed to a broad delegation to the Comptroller General of a general authorization to bring suit. There is, however, a critical difference in terms of political accountability and control. A vote by a committee or full House ensures that Congress needs the information and is willing to take political responsibility for insisting on access to it. A one-time broad delegation to the Comptroller General, by contrast, involves virtually no political accountability for Congress. It can sit on the sidelines, while the Executive expends political capital dealing with the Comptroller General. If the request is perceived as reasonable, Congress can associate itself with its agent, while if it is perceived as overbearing, Congress can distance itself from the request. In the context of a different structural aspect of the Constitution, the Supreme Court has drawn a sharp dichotomy between the level of political accountability and control involved in a general delegation of the power to sue, and the prosecution of a specific lawsuit. See Alden v. Maine, 527 U.S. 706, 756 (1999) ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.").

numerous potential political avenues for obtaining any information it needs for legislative purposes, and Congress and the Executive Branch have traditionally used their political mechanisms to resolve disputes over documents, plaintiff cannot possibly satisfy that burden here. As defendant demonstrated in his prior memorandum, it is the give and take of informal interactions between Congress and the Executive Branch, on occasion backed by more formal mechanisms, e.g., congressional subpoenas — not judicial actions brought by congressional agents — that is "the regime that has obtained under our Constitution to date." Raines, 521 U.S. at 828. For that reason, plaintiff lacks standing to bring this action.

II. This Action Should Be Dismissed As A Matter Of Equitable Discretion

Separation-of-powers principles likewise compel this Court to exercise its equitable discretion and dismiss plaintiff's Complaint. See Def's. Mem. 16-21. This doctrine of equitable discretion counsels against embroiling the courts in inter-branch disputes where, as here, one or both of the branches have alternative means of pursuing their respective interests without the need for judicial intervention. See Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 881 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981); Melcher v. Federal Open Mkt. Comm., 836 F.2d 561 (D.C. Cir. 1987), cert. denied, 486 U.S. 1042 (1988); Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985); see also Goldwater v. Carter, 444 U.S. 996, 996 (1979) (Powell, J., concurring) ("The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.").

Plaintiff mistakenly asserts that the doctrine of equitable discretion no longer exists because it has been merged with modern standing law, and that even if it does exist, it applies only to cases brought by individual members of Congress, not unelected congressional agents such as himself.

Both arguments are mistaken.[4]

While it is true that modern standing requirements, particularly those articulated by the Supreme Court in Raines, reflect many of the same separation-of-powers concerns reflected in the equitable-discretion doctrine, that does not deny the doctrine's continuing validity. As the D.C. Circuit explained in Chenoweth v. Clinton, 181 F.3d 112, 115 (D.C. Cir. 1999), cert. denied, 529 U.S. 1012 (2000), "[o]ur [pre-Raines] conclusion that the [congressional] plaintiffs had standing to sue * * * got them into court just long enough to have their case dismissed because of the separation of powers problems it created." While the Supreme Court's legislative standing doctrine may now keep many congressional plaintiffs out of court entirely (including plaintiff here), it does not follow that equitable-discretion principles have no application in the rare case when a congressional plaintiff does have standing. The equitable-discretion doctrine is an independent principle that applies whether or not a case also involves a legislative standing defect. The Supreme Court, the D.C. Circuit, and this Court have applied equitable-discretion principles in cases without a congressional plaintiff. In Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), the Supreme Court employed a variant of equitable discretion to deny injunctive relief. Id. at 313 ("The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."). Moreover, in its classic equitable-discretion cases, AT&T

[4] Plaintiff once again betrays his bias as a congressional agent by asserting (Pl's. Reply 27-28) that principles of equitable discretion serve only to protect the "internal affairs of the legislative branch." Rather, the D.C. Circuit has explained that those separation-of-powers principles protect the courts and counsel against the premature resolution of competing legal claims between the political branches, for fear that any decisions would permanently "tilt the scales" of the balance of power between the two political branches — without any regard for the direction in which the scales would be tilted. United States v. AT&T Co., 551 F.2d 384, 394 (D.C. Cir. 1976) ("AT&T I"), appeal after remand, 567 F.2d 121 (D.C. Cir. 1977) ("AT&T II").

I and AT&T II, the D.C. Circuit invoked the doctrine in a lawsuit initiated by the Executive to enjoin compliance with a congressional subpoena. United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983), was also a suit initiated by the Executive. The issue of legislative standing — under either the old D.C. Circuit or the current Supreme Court precedents — would have played no role in any of those cases.

Nor, as those cases make clear, is application of the doctrine limited to cases brought by individual members of Congress, as opposed to actions brought by congressional agents or others. AT&T I, AT&T II, and House of Representatives all involved actions brought by the Executive Branch. Moreover, as explained above, separation-of-powers concerns are exacerbated, not eliminated, by the fact that plaintiff is an unelected agent, rather than a member, of Congress. It is precisely because plaintiff asserts an authority to circumvent the normal process for obtaining executive-branch materials and to enlist the courts in the process, that principles of equitable discretion apply with full force. The notion that a congressional agent, acting either sua sponte or on the behalf of two members, may embroil the courts in sensitive inter-branch disputes without any collective action by Congress is flatly inconsistent with the principles of equitable discretion. Moreover, plaintiff's and amicus Reid's assertion that applying the doctrine to plaintiff would be "unprecedented" merely reflects the fact that no congressional agent like plaintiff has ever sued an executive-branch official to enforce a document request.

Without any meaningful evidence that Congress needs or desires the information, plaintiff is seeking to make this Court the first in history not only to entertain an inter-branch political dispute instigated by an unelected congressional agent, but also to order that executive-branch documents be turned over to any congressional entity. Established principles of equitable discretion should prevent this Court from taking either of those unprecedented steps.

III. The Comptroller General Lacks Statutory Authority To Bring This Lawsuit Or To Review The NEPDG's Activities

Even if this extraordinary lawsuit were justiciable and plaintiff had standing, he would lack statutory authority to bring this suit. Stripped to its essence, this is a lawsuit by an unelected agent of Congress seeking to force the Vice President to disclose the process by which he and other close presidential advisers formulated advice to the President, at the President's direction, to facilitate the President's execution of his constitutionally assigned functions. Whatever the ultimate resolution of that claim, it blinks reality for plaintiff to suggest that it does not confront the Court with sensitive and delicate constitutional questions of the highest order. Before confronting those profound questions, however, this Court must first resolve whether Congress, in fact, statutorily authorized a legislative agent — without direction from the Congress as a whole, a House of Congress, or a committee of Congress — to initiate such a constitutional confrontation. Plaintiff insists that such authority can easily be inferred from vague statutory language and selective citations of legislative history. Controlling precedent dictates a much more circumspect approach.

A. The Vice President Is Not The "Head Of An Agency" Under 31 U.S.C. § 716

As explained in defendant's opening memorandum (at 22-32), plaintiff's litigation authority is statutorily confined to filing suit against a "head of [an] agency" to obtain "agency record[s]." 31 U.S.C. § 716(b). Plaintiff's central argument in response (Pl's. Reply 46) is that, because the statutory language could be read to include the President and Vice President, it must be so construed. That argument simply ignores the obvious separation-of-powers difficulties with such a broad interpretation of plaintiff's right to sue. The separation-of-powers problems inherent in a lawsuit against the Vice President warrant the application of a clear-statement rule. Def's Mem. 23-32. An intent to allow suit against a unique constitutional officer should not be lightly inferred. Nevertheless, even absent such a clear-statement rule, this suit is precluded by the well-established

rule that close presidential advisers like the Vice President (or groups of presidential advisers like the NEPDG) are not an "agency" under any sensible construction of that term.

1. Congress Has Not Expressly Stated That The Vice President Is An "Agency"

The Supreme Court has made clear that, when Congress legislates "[i]n traditionally sensitive areas," a "clear statement" of intent is required to "assure[] that the legislature has in fact faced, and intended to bring [the matter] into issue." Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989) (quoting United States v. Bass, 404 U.S. 336, 349 (1971)); see also Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991) (clear-statement rule applies when a case could "significantly alter the balance between Congress and the President"). The Supreme Court applied the principle to the President in Franklin v. Massachusetts, 505 U.S. 788 (1992). "Out of respect for the separation of powers and the unique constitutional position of the President," the Supreme Court required "an express statement by Congress before assuming it intended" to subject the President to the APA. Id. at 800-801. The Court found language that neither "explicitly excluded" nor "explicitly included" the President insufficient. Id. at 800. In light of the Vice President's unique constitutional role, those same principles require a clear statement in the statutory text before subjecting the Vice President to suit.

In response, plaintiff points (Pl's. Reply 31-32) to statutory language that does not "explicitly include[]" the President or the Vice President but rather expressly covers only agencies. See 31 U.S.C. § 101 (defining "agency" as a "department, agency, or instrumentality of the United States Government"); id. § 701 (agency definition "includes the District of Columbia government but does not include the legislative branch or the Supreme Court"). Not only is plaintiff's response inadequate to answer Franklin's clear-statement requirement, but the term "agency" cannot be read naturally to embrace the President or Vice President. The President and Vice President are

constitutionally created officials with unique statuses, responsibilities, and positions in our constitutional structure, and bear no resemblance to common understandings of "departments," "agencies," or "instrumentalities." Tellingly, no court has ever held that the President or Vice President is a department, agency, or instrumentality. A long line of controlling judicial decisions has held exactly the opposite. See, e.g., Franklin, 505 U.S. at 800-801; Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993); Armstrong v. Executive Office of the President, 90 F.3d 553, 556 (D.C. Cir. 1996), cert. denied, 520 U.S. 1239 (1997); Haddon v. Walters, 43 F.3d 1488 (D.C. Cir. 1995); Schwartz v. United States Dep't of Treasury, 131 F. Supp. 2d 142, 147 (D.D.C. 2000), aff'd, 2001 WL 674636 (D.C. Cir. May 10, 2001); see also Def's. Mem. 32-36. Those decisions make clear that, absent explicit congressional direction, the term "agency" will not be construed to include individuals or entities "whose sole function is to advise and assist the President." Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980).

Plaintiff insists that the Vice President is an "instrumentality." But Congress did not say so, either explicitly or implicitly. The term "instrumentality" is not defined in the statutes dealing with GAO or even the Dictionary Act, 1 U.S.C. § 1. The only hint as to the meaning of an "instrumentality" in title 31 comes from a committee report for the 1982 re-codification of title 31, which says that the term "instrumentality," as used in the definition of "agency," does not include "entities such as the Tennessee Valley Authority." H.R. Rep. No. 97-651, at 25 (1982), as reprinted in 1982 U.S.C.C.A.N. 1895, 1919. If the term does not embrace an entity like the TVA, which is commonly considered to be a governmental "instrumentality,"[5] it is far from "obvious" (Pl's. Reply 45 n.22) that it could embrace individuals that no court has ever held to be an instrumentality. In any

[5] See, e.g., Tennessee Power Co. v. TVA, 306 U.S. 118, 134 (1939); TVA v. EPA, 278 F.3d 1184, 1189 (11th Cir. 2002).

event, the very need to hunt through legislative history for clues as to the meaning of "instrumentality" makes clear that this Court should not assume that Congress intended to subject the President or the Vice President to intrusive regulation that it was not even willing to impose on the TVA.

Plaintiff also relies on the supposed breadth of the term "establishment," which was the catch-all term in the pre-1982 version of title 31. Pl's. Reply 46. Obviously, a clear-statement requirement cannot be satisfied by unclear language that used to be, but is no longer, in the statute. In any event, the Vice President, like the President, is a constitutional officer, not an establishment. Likewise, the NEPDG is not an establishment because "[t]he President does not create an 'establishment' * * * every time he convenes a group of senior staff or departmental heads to work on a problem." Meyer, 981 F.2d at 1296.

Lacking the requisite statutory text, plaintiff proffers part of one paragraph from one committee report in the statute's legislative history. That effort is unavailing. "If clarity does not exist" in the statutory text, "it cannot be supplied by a committee report." United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992).[6]

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[6] In any event, the Senate Report on which plaintiff focuses so much attention cannot be trusted. Its premise is that suits "against the President and his principal advisers * * * for information which would not be available under" FOIA would be "preclude[d]," S. Rep. No. 96-570, at 8 (1980), reprinted in 1980 U.S.C.C.A.N. 732, 739, but the certification power granted by the statute simply does not provide the protection for presidential advisers that FOIA does. Def's. Mem. 29-30. In response, plaintiff says Congress must not have intended the statutory certification power to be co-extensive with FOIA because the Report did not say the President could preclude a suit "for all information that would not be available under FOIA." Pl's. Reply 43. But, of course, the Report also could have been more clear had it said the President could preclude a suit "for some of the information that would not be available under FOIA." The ambiguity arising from the Report's failure to specify "all" or "some" undercuts, rather than supports, plaintiff's search for statutory clarity. Moreover, it is surely more likely that Congress intended to grant protection as broad as FOIA (i.e., protection that would completely prevent any suits against presidential advisers), since the D.C. Circuit held, shortly before § 716 was adopted, that FOIA's exclusion for presidential staff was necessary to avoid raising "a constitutional issue of separation of powers." Ryan v. Department

Unable to satisfy the clear-statement rule, plaintiff unsuccessfully tries to circumvent it. Plaintiff first claims (Pl's. Reply 35, 36) that the clear-statement rule does not apply to information-disclosure statutes, because such statutes do not seriously implicate the separation of powers. That remarkable argument is contradicted by common sense, the caption of this case, and a host of Supreme Court cases recognizing the separation-of-powers problems inherent in enlisting the courts in inter-branch document disputes. See, e.g., Public Citizen, 491 U.S. at 452; AT&T I, 551 F.2d at 394 (judicial intervention in a document dispute could forever "tilt the scales" of the "constitutional balance" between the branches). In emphasizing that the President "has been subject to congressional demands for information since the founding of the Republic" (Pl's. Reply 37), plaintiff once again ignores the critical distinction recognized by the Supreme Court in Reed between congressional efforts to obtain documents through the normal give and take between the political branches, and efforts to embroil the courts in those disputes. The latter are rife with separation-of-powers difficulties, and § 716 concerns nothing but the latter.

Plaintiff contends, secondly, that the clear-statement principle applies only when legislation "restrict[s] or regulat[es] presidential action." Pl's. Reply 36. That is a distinction without a difference. Regulating the manner in which the President and his advisers obtain, retain, or provide access to information, and forcing him to turn over documents, does restrict and regulate presidential action and implicate his constitutional powers. See Armstrong v. Bush, 924 F.2d at 290; Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 910-911 (D.C. Cir. 1993) ("AAPS") ("disclosure of the real information-gathering process" of presidential advisers would "inevitably" compromise the "formulation of advice" to the President); FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993) (recognizing that the "mere presence" of legislative observers can

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of Justice, 617 F.2d 781, 788 n.19 (D.C. Cir. 1980).

"influence" executive decision-making process).[7]

Plaintiff also notes that, more than a decade before Franklin, the Supreme Court did not explicitly apply a clear-statement rule in Kissinger. Pl's. Reply 38. But it is of little help to plaintiff that the Court did not apply such a rule in a case where it was unnecessary, because the Court found clear congressional intent to exclude the President's advisers. What plaintiff needs is a case holding that the President and Vice President are subject to statutory regulation of their confidential communications in the absence of explicit congressional direction. No such case exists.

Lastly, plaintiff claims that the clear-statement rule does not apply to the Vice President. Pl's. Reply 40-42. That argument fails. The Vice President's position, like the President's, is constitutionally "unique." Def's. Mem. 24-25. Indeed, courts and statutes have consistently carved out both the President and the Vice President for differential treatment from federal agencies. See Armstrong v. Executive Office of the President, 90 F.3d at 556 (distinguishing Presidential and Vice Presidential records, covered by the Presidential Records Act of 1978, from agency records, covered by the Federal Records Act of 1950); Armstrong v. Bush, 924 F.2d at 286 n.2 (similar); 44 U.S.C. § 2207 (records of the Vice President are classified as presidential records); 3 U.S.C. § 112. Furthermore, when the Vice President is not serving as Acting President, his primary executive responsibilities are those that have been assigned to him by the President. As such, his "operational proximity" to the President warrants the highest level of protection from outside interference. AAPS, 997 F.2d at 910.

Moreover, in the context of this lawsuit, the distinction between the President and Vice

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[7] Plaintiff's contention (Pl's. Reply 39) that no clear statement is necessary because § 716 reflects an alleged "compromise" between the Executive Branch and Congress is of no moment. A statute is not "somehow immunized from constitutional scrutiny because the Act * * * was passed by Congress and approved by the President." INS v. Chadha, 462 U.S. 919, 942 n.13 (1983).

President is one of form rather than substance. The structure of § 716 presupposes that the Comptroller General's lawsuit will be brought against the "agency" that is responsible for the creation of the requested "record[s]." It is the President who directed the NEPDG to formulate policy advice for him; the President who sought that advice to assist the exercise of his presidential duties; the President who was the ultimate recipient of the advice; and the President who would use that information in a manner that (plaintiff alleges) somehow implicates the Legislative Branch's interests. The structural constitutional principles animating the clear-statement rule cannot be avoided by the simple expedient of naming as defendant the individual who provides the President advice or "records," rather than the President who receives and uses the advice or "records."

Indeed, even plaintiff cannot hew to his own formalistic and ultimately unworkable distinction between the President and the Vice President. His reading of the statute requires the conclusion that the President himself is also an "agency," even though Congress did not explicitly say so. Pl's. Reply 46. That alone reveals the unprecedented nature of plaintiff's claim; if the President had made himself the head of the NEPDG, plaintiff would assert the same authority to sue under § 716. Indeed, plaintiff's favorite passage of legislative history addresses suits against the President himself. See note 6, supra. Moreover, plaintiff's bottom line is the even-more-striking claim that the President 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." Id. at 41. Under plaintiff's reading, the question would not be whether the Comptroller General is actually suing an agency head, but whether he might have been able to sue one if the circumstances were different. Thus, according to plaintiff, the President's chief of staff, his domestic policy adviser, or the White House Counsel will each be subject to suit by the Comptroller General whenever they are given "responsibilities" that the President might instead have "assigned * * * to

a Cabinet officer." Ibid. Such counterfactual analysis cannot be what Congress contemplated when it used the term "agency."[8]

2. *Entities That Only "Advise And Assist The President" Are Not "Agencies"*

As in the Supreme Court's Kissinger decision, this Court can resolve the statutory question without resort to a clear-statement rule. Indeed, all the justifications for the clear-statement rule suggest, a fortiori, that § 716's references to "agency" should not be construed as applying to those — like the Vice President and the NEPDG as a whole — whose "sole function is to advise and assist the President." Kissinger, 445 U.S. at 156. This principle is clearly established in the context of FOIA, the APA, and other statutes. Def's. Mem. 32-36. There is no reason to believe that FOIA's definition of agency — which applies to any "authority of the Government" including any "establishment in the executive branch," 5 U.S.C. §§ 551(1), 552(f)(1) — is any narrower than the definition of "agency" in title 31 — which used to refer to "establishment[s]," Budget and Accounting Act, § 2, 42 Stat. 20 (1921), and now refers to "instrumentalit[ies]," 31 U.S.C. § 101. Rather than attempt to claim that the NEPDG would be an "agency" under the test set forth in Meyer v. Bush, 981 F.2d at 1288, plaintiff simply says that "FOIA serves an entirely different purpose than § 716." Pl's. Reply 44. In reality, however, both statutes involve disclosure and both employ terms that have established meanings in the structure of the Executive Branch. Plaintiff does not, and cannot, explain why Congress's "different purpose" means that the 1921 use of the term "establishment" (in the GAO statute) had a longer reach than the 1974 use of the term

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[8] Even Comptroller General Staats, on whose authority plaintiff relies, recognized the central difference between the President and agencies. After pointing out that "any President can prevent information in his own possession from being made available to the Congress," he said: "But we don't see this as the primary problem. I think our primary problem is with the agencies * * * ." Strengthening Comptroller General's Access to Records; New Procedures for Appointment: Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 95th Cong., 2d Sess. 45 (1978) (emphases added).

"establishment" (in the revision to FOIA). The Vice President is not naturally understood to be an agency, let alone the head of an agency, and so, even without resort to a clear-statement rule, the statute does not reach the Vice President.[9]

B. Section 712 Does Not Apply Because The Comptroller General Is Not Investigating The "Use Of Public Money"

Although § 716 contains the only provision that could conceivably authorize plaintiff to file this lawsuit, he must look elsewhere to establish his rights of access to the "agency records" he seeks. Plaintiff repeatedly displays a limitless conception of his own authority, under which every expenditure of government time or money, and proposals as well as results, come within his bailiwick. Plaintiff's failure to perceive any limits on his own authority makes little practical difference if he relies on non-judicial means of enforcing his rights, as he has done until filing this unprecedented suit. This Court, therefore, can avoid opining on the precise contours of plaintiff's investigative authority (and forever "tilting the scales" with respect to that authority) by limiting his authority to sue under § 716 in accordance with well-recognized principles of statutory construction. But if plaintiff can sue any executive official up to and including the President to effectuate his investigative demands, then the statutory text must be construed to place meaningful limits on that investigative authority.

Plaintiff previously invoked both 31 U.S.C. § 712(1) and 31 U.S.C. § 717(b), but now he finds the wellspring of his access rights in § 712, which dates from the original establishment of GAO in 1921. Pl's. Reply 47. Section 712(1) empowers the Comptroller General to "investigate all matters related to the receipt, disbursement, and use of public money." In plaintiff's view, it entitles

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[9] Plaintiff's reliance (Pl's. Reply 5-6, 8-9) on the certification mechanism of § 716(d)(1) is misplaced. Because the Vice President is not the "head of [an] agency," and because the records plaintiff seeks are not "agency record[s]," the lawsuit-precluding exception in § 716(d)(1) is inapplicable to this case.

him to investigate, "inter alia, the purpose, efficiency, and legality" of all of the NEPDG's "uses" of public funds and, to that end, to probe into "[t]he subjects the NEPDG discussed at its meetings," "how many meetings focused on one subject versus another," and how the Vice President and his staff decided with whom they would meet. Pl's. Reply 47, 49; Pl's. S.J. Mem. 25-26. Plaintiff thus reads the term "use" in § 712(1) as vastly expanding the scope of his authority beyond routine investigations of how money was expended and converting it into a substantive authority to pass policy judgment on the "efficiency" of governmental programs and deem their "purpose" inappropriate. Under plaintiff's reading, the same authority would allow him to review memoranda and meetings between law clerks and their judges in the guise of assessing their "efficiency" and whether government pens and pencils could better be dedicated to other "purposes." Whether and how often the President should hold Cabinet meetings, how long particular matters should dominate the agenda, and who should attend those meetings would also appear to fall in the Comptroller General's own conception of his powers — under his alleged right to "determine how time, and therefore money, was spent." Pl's. S.J. Mem. 26. Elementary canons of statutory construction foreclose that sweeping and constitutionally troublesome reading of § 712(1).

"Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-115 (2001) (emphasis added); see also Gutierrez v. Ada, 528 U.S. 250, 255 (2000) ("words and people are known by their companions"). Applying that principle, the term "use" in § 712(1) must share the financial connotations of its companions "receipt" and "disbursement." The ability to police the "use" of federal money means tracking its actual expenditure, not superintending every policy judgment made by officials using federal money and certainly not probing the confidential communications

underlying those policy decisions.

As explained in defendant's opening memorandum (at 38), moreover, plaintiff's expansive reading of § 712(1) would render superfluous subsequent statutory grants of authority to the Comptroller General, such as § 717(b)'s power to evaluate program results. Perhaps recognizing the insensible implications of his position, plaintiff now appears to focus on "how public money was spent." Pl's. Reply 47. However, the Vice President has previously provided plaintiff with documents pertaining to the NEPDG's costs (Def's. Mem. 37), and thus has advised him "how public money was spent." The term "use" does not give the Comptroller General license to probe deeper.

Plaintiff's reliance (Pl's. Reply 47) on the phrase "matters related to" the "use" of federal money to broaden the scope of his authority is likewise unavailing. Like "use," "related to" must be read in context. See Morales v. Trans World Airlines, Inc., 504 U.S. 374, 390 (1992) (the phrase "related to" is not all-encompassing; some connections are too "tenuous" to be related). Moreover, the very use of the term "related to" presupposes that some matters will be unrelated to the use of federal funds. Yet the fundamental problem with plaintiff's construction of "use" and "related to" is that nothing appears to fall outside his asserted authority. For the statutory terms to have any constraining effect, the matters investigated by plaintiff accordingly must be tied to the accounting and auditing functions of tracking costs — the "receipt, disbursement, and use of public money" — and not evaluating the content of every conversation, communication, or action of every federal employee, every work day.

Plaintiff's focus on § 712(1) as the primary source of his access-to-records authority is also significant because, for decades, it was clear that, under that provision, GAO lacked untrammeled access to White House documents. As Comptroller General Campbell candidly explained in 1962:

> [W]e are certain you understand that [GAO] investigations of White House activities are not subject to the same techniques as those conducted in the various departments and agencies. Files of the White House Office, with the exception of financial records, are normally not available to us. Also, White House personnel are not always available for interview. This has been the situation in all recent Administrations.

Letter from Comptroller General Joseph Campbell to Rep. John W. Byrnes, B-142983, at 2 (Sept. 18, 1962) (attached below as Exhibit A). Comptroller General Campbell tellingly carved out "financial records" as the only "[f]iles of the White House Office" that were "normally available" to GAO (and like Comptroller General Staats, see note 8, supra, he clearly differentiated his authority vis-à-vis the White House from his authority vis-à-vis "departments and agencies"). But, under plaintiff's view, all those other "files" would have been "related to the * * * use of public money." In reality, the Comptroller General's authority extends no farther today that it did in 1962. Section 712(1) simply cannot justify the sweeping investigative authority that plaintiff claims.

C. *The Comptroller General Is Not Evaluating The "Results Of A Program Or Activity The Government Carries Out Under Existing Law"*

1. *The NEPDG Did Not Carry Out A "Program Or Activity" "Under Existing Law"*

The Comptroller General also claims that the NEPDG was a "program or activity" carried out under "existing law." 31 U.S.C. § 717(b). The structure and context of that statutory provision, however, reveal that it applies only to programs or activities undertaken pursuant to extant statutory law. Def's. Mem. 40-45. Indeed, plaintiff fails to identify anything in the common meaning of those terms that extends them to every presidential exercise of a constitutional prerogative independent of an existing statutory provision. The legislative history confirms that § 717(b)'s reference to "existing law" means statutory law, id. at 42, as do GAO documents and the statements of previous

Comptrollers General. Id. at 41-44 & nn.21-24.[10]

Plaintiff answers that it is difficult to define "'existing' to mean 'statutory.'" Pl's. Reply 53. But the real question is whether "law" means statutory law.[11] There is some ambiguity as to whether the term law, unmodified, includes constitutional law. Sometimes "law" includes constitutional law; sometimes it does not. See, e.g., U.S. Const. art. III, § 2, cl. 1 (referring to "this Constitution, the Laws of the United States, and Treaties"); 28 U.S.C. § 1331 (referring to "the Constitution, laws, or treaties of the United States"). But here the modifier "existing" makes clear that "law" refers to statutory law. While the statute books are constantly changing, the Constitution has changed only 27 times in over 200 years. By limiting plaintiff's role to "existing law," therefore, Congress logically was focused on the constantly changing statutory law. See Def's. Mem. 44 n.24 (citing statutes where "existing law" can refer only to statutory law).

Plaintiff dedicates substantial effort to insisting that Congress has "surveillance" and "oversight" responsibilities. Pl's. Reply 54-57. But any such powers must be defined and cabined by the scope of Congress's legislative authority. He also asserts that Congress can bootstrap itself into authority over any governmental activity by announcing "the intent of Congress" or Congress's

[10] Plaintiff claims that those sources said only that "the primary focus" of program-results evaluations is to evaluate statutory programs. Pl's. Reply 55. Despite his insinuation that this distinction is important, he cites nothing that says the evaluation of non-statutory programs is a "secondary" (or lesser) focus. Moreover, internal GAO documents have continued to recognize the fact that "programs" are defined by statute. For example, in 1999, GAO explained matter-of-factly that "Congress mandates the programs that agencies undertake and monitors their progress * * * ." GAO, Standards for Internal Control in the Federal Government, GAO/AIMD-00-21.3.1, at 9 (Nov. 1999) (<http://www.gao.gov/special.pubs/ai00021p.pdf>).

[11] Thus, plaintiff misses the point when he dismisses the 1970 House Report as dealing with "the term 'laws,' not the phrase 'existing law.'" Pl's. Reply 54 n.26. Similarly, defendant agrees that "existing" is primarily intended to distinguish between the roles of GAO and CRS. Id. at 57. That does not change the fact that the "programs * * * under existing law" that GAO may evaluate are established by statute, and GAO is supposed to help Congress determine whether it wants to make changes to those already-established statutory programs.

"declar[ation] that [something] is the policy of the United States." Id. at 54. Of course, as explained below in Part IV.B.1 (and at Def's. Mem. 54 & n.32), Congress's investigative power does not extend beyond those areas where Congress may legislate, and thus does not extend to areas within the exclusive province of the Executive, the Judiciary, or the States, which are granted exclusive authority in certain areas under the "existing" Constitution. See, e.g., U.S. Const. amend. XXI, § 2.[12] In any event, plaintiff's argument simply begs the question of whether Congress intended for GAO to evaluate the results of statutorily mandated programs to assist Congress with its prospective legislative needs, or whether it intended for GAO to superintend any subject that could be addressed in a Sense-of-the-Senate resolution, let alone the exercise by the Judiciary, the Executive, and the States of their exclusive powers under the Constitution.

As an alternative, plaintiff insists (Pl's. Reply 58-60) that the NEPDG operated pursuant to statute. It did not. The President established the NEPDG to make policy recommendations to him, Compl. Exh. A ¶ 2, not to "carr[y] out" any statutory programs or activities, 31 U.S.C. § 717(b). Plaintiff claims that the NEPDG provided many recommendations to the President "concern[ing] the executive branch's administration of existing laws." Pl's. Reply 58 (citing the Clean Air Act,

[12] Plaintiff cites hypothetical and actual GAO studies dealing with military and foreign-affairs powers. Pl's. Reply 53-56 & nn.28-29. Those are, however, areas where Congress or the Senate has legislative authority to enact and amend statutory law. The NEPDG involved the exercise of the President's exclusive constitutional powers — namely, the formulation of administration policies — an area where Congress may not probe. In addition, several of the GAO studies on which plaintiff relies were based entirely on publicly available information (e.g., The Use of Presidential Directives to Make and Implement U.S. Policy, GAO/NSIAD-89-31, at 1 (Dec. 1988)), or reflect that the Executive Branch refused to provide information (e.g., Executive Branch Consultations With Congress Did Not Fully Meet Expectations in 1999-2000, GAO-01-917, at 3 (Sept. 2001). They thus do nothing to strengthen plaintiff's hand. Plaintiff's citation to two examples where Congress has investigated presidential pardons, Pl's. Reply 57 n.31, does not prove that GAO may conduct such investigations. In fact, a computer search of the full text of all of the GAO reports since 1975 that are available on GAO's website does not reveal a single one that studied clemency or pardons. See http://www.gao.gov:8765/indexfull.html.

the Energy Policy and Conservation Act, and the Outer Continental Shelf Lands Act). Yet, the NEPDG's recommendations were obviously not the "results" of any programs under those statutes. A policy recommendation to the President that he should order a change in the way that the Clean Air Act is administered, is not an "activity * * * carrie[d] out under" the Clean Air Act. 31 U.S.C. § 717(b). It is a policy recommendation carried out, not under the Clean Air Act, but pursuant to the President's constitutional authority to "require" opinions from his advisers and to prepare "Measures" that he might recommend to Congress. U.S. Const. art. II, § 2, cl. 1; id. art. II, § 3.[13]

2. *The NEPDG's Activities Were Not The "Results" Of A Program Or Activity*

Section 717(b) does not empower the Comptroller General to police every stage of every federal program or activity — he may evaluate only their "results." The NEPDG's provision of advice and recommendations to the President, however, is at the far end of the spectrum that starts with policy formation and ends with results under an enacted program. If such policy proposals qualify as results, it is hard to see what is off-limits for a GAO investigation.

Plaintiff first responds that the phrase "results of" simply prevents the Comptroller General from evaluating programs or activities "in the abstract, or based on criteria of GAO's own choosing." Pl's. Reply 50. That makes no sense. The word "results" connotes nothing about the review criteria to be applied. It instead limits what may be reviewed (under whatever criteria GAO would apply). Only the culmination of agency action may be evaluated, not those tentative intermediate steps that lack administrative or regulatory impact. See Dalton v. Specter, 511 U.S. 462, 469-470 (1994)

[13] Plaintiff misreads Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978). Pl's. Reply 59-60. In that case, even though the Secretary of the Interior was advising the President about the exercise of the President's own statutory powers, the court invoked the constitutional-doubt doctrine to exempt the Secretary's recommendations from statutory requirements that would otherwise apply to the Secretary's own actions. Thus, the constitutional elements of the Opinion Clause completely trumped the context of the statutory function about which advice was being provided. That is precisely defendant's point.

(recommendations to the President are not reviewable under the APA because they "carr[y] no direct consequences" and are "tentative" unless and until the President adopts them); Def's Mem. 45 (defining "result"). Thus, plaintiff's persistent and exclusive focus on "the process by which the National Energy Policy was developed," Compl. Exh. I at 1 (emphasis added), rather than the "results" of the President's solicitation and receipt of advice (which were provided to Congress in the NEPDG's public report), reveals how untethered this lawsuit is from statutory text. Beyond that, plaintiff's point that the Comptroller General cannot review the President's "program[s] or activit[ies]" in the "abstract" is exactly defendant's point.

Plaintiff also argues that "results" must mean "processes and procedures" because GAO has investigated such processes in the past. Pl's. Reply 51. That argument simply demonstrates the key difference between typical inter-branch give and take and judicially-enforced rights. Any time the Executive formulates a legislative proposal, there are practical reasons to share information with Congress and its agents, because Congress possesses the authority to refuse to act on the legislative proposal. But it is one thing for the Executive to share information with Congress, even in the absence of any obvious congressional authority to demand the information, to facilitate passage of an executive proposal. It is quite another thing to recognize a judicially-enforceable right to meddle in confidential executive-branch deliberations that lead to policy proposals. Congress's ability to refuse to act on executive proposals gives it all the power it needs; it does not need a judicially-enforceable right that would forever tilt the separation-of-powers balance.

Finally, plaintiff contends (Pl's. Reply 52) that a perceived congressional interest in "the degree of public participation in the development of national energy policy" generates a "result" for the GAO to investigate. But if Congress's supposed interest in process makes all processes a result, then the word "results" in § 717(b) becomes meaningless. Congress should not be able to co-opt any

executive-branch activities simply by imposing goals on those activities that are unrelated to the President's purpose in having those activities occur.[14]

IV. The Comptroller General's Enforcement Action Violates The Constitutional Doctrine Of Separated Powers

As defendant established in his opening memorandum, plaintiff's efforts to intrude upon the process by which the President receives advice from his closest advisers violate the constitutional separation of powers in two distinct ways. First, whether viewed through the per se test applicable to the exercise of express Article II powers (Def's. Mem. 52-57), or the balancing test that has been applied elsewhere (id. 57-62), Congress may not authorize its agent to review the manner in which the President and his closest advisers develop the President's legislative and policy proposals. Second, Congress may not aggrandize its own powers by granting a legislative agent the power to seek judicial enforcement against the Executive Branch. Id. at 62-64.

A. Neither Statutory Certification Nor An Assertion Of Executive Privilege Is A Necessary Predicate For Addressing Constitutional Problems

Plaintiff's separation-of-powers argument is based primarily on the mistaken proposition that there can be no constitutional threat to the Executive Branch in this case because the President previously "had the statutory means to certify" that NEPDG documents should not be disclosed, and because he "could still seek to assert [executive] privilege with respect to those documents." Pl's.

[14] For the same reason that courts require a clear statement before concluding that close presidential advisers fall within generic statutory references to "agency," see Part III.A.1, supra; Def's. Mem. 47-48, Congress's use of the general term "Government" in § 717(b) is insufficient to trigger coverage of the purely advisory activities of close presidential advisers like the Vice President or the NEPDG. Plaintiff's only response is to argue (again) (Pl's. Reply 63 n.37) that clear-statement rules do not apply to information-disclosure statutes. That argument has no more traction in this context than it does under § 716 and should accordingly be rejected.

Reply 70.[15]

This Court is not required to wait for a formal claim of executive privilege before considering defendant's constitutional arguments. As Judge Gesell aptly observed, a claim that no constitutional questions are raised if the President has not invoked an executive privilege "misses the point." Nader v. Baroody, 396 F. Supp. 1231, 1234 n.5 (D.D.C. 1975). "It is not that the construction of the Act plaintiff urges would impinge on the privilege of confidentiality for executive communications itself, but that it might impinge on the effective discharge of the President's powers * * * which raises constitutional questions." Ibid. In fact, the case law makes clear that constitutional separation-of-powers concerns are broader than specific executive privilege concerns. See Nixon v. Administrator of General Services, 433 U.S. 425, 446 (1977) ("Nixon II"); Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 935 (D.C. Cir. 1982). Indeed, in both Public Citizen and AAPS, the Supreme Court and the D.C. Circuit based their holdings on constitutional concerns about impinging on the confidentiality of executive-branch consultations (see Public Citizen, 491 U.S. at 466-467; AAPS, 997 F.2d at 909-911) — even though there had been no assertion by the President of an executive privilege in either case.

Moreover, plaintiff's suggestion that the possibility of invoking executive privilege avoids separation-of-powers problems does not withstand inspection. To the extent that a statute or an application of a statute to the President or Vice President inevitably implicates only privileged interests, that fact hardly indicates the absence of a separation-of-powers problem. Quite to the

[15] See also Pl's. Reply 63 ("requiring the President to invoke the statutory certification mechanism or to assert privilege"); id. at 71 ("the executive branch had the ability to preclude suit through a certification, and could still attempt to assert privilege"); id. at 72 ("absent a certification or any assertion of executive privilege, the Comptroller General is entitled to the documents"); id. at 73 ("the 'burden' of invoking the certification provision or asserting privilege"). Plaintiff makes the same claim elsewhere. See id. at 5-6, 8-9, 15, 30, 48.

contrary, a statute (or an application of a statute) that routinely implicates highly sensitive executive-branch deliberations is constitutionally suspect on that score, see AAPS, 997 F.2d at 910, and its application to those with greater proximity to the President is more problematic, see id.; Meyer, 981 F.2d at 1293. Plaintiff's reliance on executive privilege is thus overdrawn, because it is precisely those who have the greatest proximity to the President who are most protected by executive privilege. See In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997). Finally, plaintiff's argument ignores the practical separation-of-powers consequences of invoking executive privilege. The Executive must occasionally invoke the privilege in dealing with Congress; it should not routinely be forced to invoke it in litigation with a congressional agent.

Plaintiff's reliance on the certification power granted by § 716(d)(1)(C) is equally mistaken. The certification power has no relevance to this case. The statute required the certification power to have been asserted within 20 days of the Comptroller General's July 18, 2001 report, long before this lawsuit was filed. See 31 U.S.C. § 716(d)(1)(C). At that time, however, the Vice President had repeatedly asserted that the Comptroller General had no authority to investigate the executive branch "function of developing recommendations for policy and legislation." Compl. Exh. J at App. 2. The Vice President denied the fundamental validity of the Comptroller General's sweeping request for documents and specifically stated that § 716 did not apply at all because the Vice President is a constitutional officer and not an "agency head" to whom § 716 applies. It is hardly surprising that, having concluded the § 716 was completely inapplicable, the Vice President did not seek to use the exception in § 716 relating to certification by the President or the Director of the Office of Management and Budget. Moreover, the fact that the Vice President did not seek certification under § 716(d)(1)(C) in August 2001 cannot be thought to estop the Vice President from arguing that

judicially-compelled disclosure to GAO would now be unconstitutional.[16]

In fact, Public Citizen and AAPS are again fatal to plaintiff's reliance on the absence of certification. Both of those courts based their holdings on constitutional concerns, even though the statute at issue, the Federal Advisory Committee Act ("FACA"), provided mechanisms that theoretically could have been invoked to avoid disclosure. See 5 U.S.C. app. § 10(b) (incorporating disclosure exemptions from FOIA); id. § 10(c) (incorporating Sunshine Act's closed-meeting provisions). Indeed, the President has a fundamental ability to avoid FACA by limiting membership on a committee to government officials. See 5 U.S.C. app. § 3(2). As this suit demonstrates, however, under plaintiff's view, the Executive has no comparable opportunity to avoid plaintiff's asserted authority to sue anyone, including the President, for materials on virtually any subject.

Finally, plaintiff's blinkered focus on certification and affirmative invocation of executive privilege is also contradicted by the privilege cases on which he relies. He admits that presidential communications are "presumptively privileged" (Pl's. Reply 69-70), but his analysis would completely reverse that presumption. Rather than requiring the legislature to demonstrate a need for the executive-branch documents at issue, as United States v. Nixon would appear to dictate, see 418

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[16] Plaintiff cites only two cases that could even arguably impose such a requirement (Pl's. Reply 71, 72), but those cases each involved statutory exemptions that could be invoked in the future, or exemptions whose applicability had not yet been determined. See Pacific Legal Found. v. Council on Envtl. Quality, 636 F.2d 1259, 1265 (D.C. Cir. 1980) (noting that Council could, in the future, decide to close meetings under the Sunshine Act; "It may be that by closing certain meetings, the Council could avoid possible constitutional problems. We apply the settled rule that federal courts will not anticipate a question of constitutional law * * * ." (internal quotation marks omitted)); Soucie v. David, 448 F.2d 1067, 1072 (D.C. Cir. 1971) (remanding to district court with instructions to consider executive-privilege question "[o]nly if the Act seems to require disclosure"). Moreover, unlike in those cases, the "remedy" of statutory certification under § 716 has more stringent requirements than its non-statutory alternative, both in terms of when it must be asserted and what must be proved.

U.S. 683, 708 (1974) ("Nixon I"),[17] plaintiff claims that the Executive must assert the privilege first, or else "the Comptroller General is entitled to the documents." Pl's. Reply 72. In other words, plaintiff would require the Executive to strike first or completely forgo his shield against any claim, without regard to the alleged need for disclosure.

B. The NEPDG's Activities Are Not Legitimately Subject To Congressional Investigation

1. The NEPDG Operated Pursuant To The President's Exclusive Article II Powers

Defendant's opening memorandum demonstrated that Congress, and therefore plaintiff, has no power to investigate the President's exercise of his exclusive Article II functions. See Def's. Mem. 52-57. That argument is straightforward: (1) Congress "cannot inquire into matters which are within the exclusive province of one of the other branches," Barenblatt v. United States, 360 U.S. 109, 111-112 (1959); (2) actions taken pursuant to the Recommendations and Opinion Clauses of Article II are within the exclusive province of the President; and (3) the NEPDG functioned pursuant to those constitutionally reserved powers. Because this argument focuses on the extent of Congress's legislative powers, it is not privilege based. Moreover, balancing of interests is unnecessary because, in those areas where Congress has no legislative power, it has no investigative power whatsoever — regardless of how intrusive any particular investigation might be.

Plaintiff admits that Congress has no legislative (and therefore investigative) powers in areas where "the President or the judiciary has exclusive authority." Pl's. Reply 68. But, if one reads the fine print, it is hard to find any executive power that plaintiff actually believes is exclusive. Compare Pl's. Reply 57 n.31 (asserting congressional oversight authority over specific pardon

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[17] See also In re Sealed Case, 121 F.3d at 753-756; Senate Select Comm., 498 F.2d at 730-731 (when a request is made by the grand jury, it must make its showing of need "before a generalized claim of confidentiality can be said to fail," and that "presumption against any judicially compelled intrusion into presidential confidentiality, and the showing requisite to its defeat, hold with at least equal force" in a suit brought by a congressional agent).

decisions), with id. at 68 n.40 (disclaiming this same authority). Accordingly, it is not surprising that plaintiff denies that this case "involve[s] an investigation into a plenary presidential * * * power." Id. at 68 n.40. To do so, however, plaintiff is forced to trivialize the importance of the Recommendations and Opinion Clauses to the structure of the Constitution (id. at 65-67); to create and knockdown a strawman Take Care Clause argument (id. at 67-68); to exaggerate Congress's appropriations powers (id. at 65 & n.38); and to claim (incorrectly) that the NEPDG did not operate pursuant to the President's constitutional powers to develop policy and legislation (id. at 74).

The Recommendations and Opinion Clauses are both important textual indications of the President's powers to gather information and develop and propose policy. Def's. Mem. 52-54. Plaintiff views the Recommendations Clause as serving merely to "squelch" objections from Congress when the President makes recommendations, and he asserts that there is nothing exclusive about the constitutional power to recommend legislation to Congress. Pl's. Reply 66-67, 69; see also Reid Amicus Br. 33-34. Yet, the Recommendations Clause is rendered trivial only by plaintiff's excessively crabbed reading of it, which would grant the President nothing more than the right given every other person under the Petition Clause (U.S. Const. amend. I), the right to hand over recommendations to Congress without penalty. The natural reading of the Recommendations Clause, however, is that it gives the President not only the power to make recommendations, but also the logically anterior ability to develop "Measures" and then evaluate which ones he finds to be "necessary and expedient." U.S. Const. art. II, § 3; see also Def's. Mem. 53 n.31. Furthermore, the power is certainly exclusive to the President, because he is the only person able to determine what "he shall judge necessary and expedient." U.S. Const. art. II, § 3 (emphases added). The Clause gives the President the discretion to determine what he shall convey to the Congress. Moreover, to ensure that the President maintains control over the recommendations that bear his imprimatur, he

needs exclusive control over the process by which he develops his recommendations. As a result, that process is constitutionally vested "within the exclusive province of one of the other branches" besides Congress. Barenblatt, 360 U.S. at 111-112.

In dealing with the Opinion Clause, Plaintiff once again cannot escape his Congress-centric view of the universe. Although he acknowledges that the Opinion Clause "establishes * * * the President's primacy within the executive branch," he views that provision and the entire "unitary structure of the executive" as an effort to "enhance presidential accountability" to Congress. Pl's. Reply 66. But the founders did not devise a unitary executive and give the President exclusive powers in order to facilitate congressional "oversight." If they had, we would not have developed a tradition whereby the President (who, as the embodiment of an entire branch of government, is uniquely politically accountable) never appears at congressional "oversight" hearings. Indeed, as the debates in the Constitutional Convention demonstrate, the Opinion Clause was the result of an express decision to grant the President a power free from congressional or judicial participation or regulation. Def's. Mem. 52. Where the Constitution grants exclusive authority to the President, and the President alone, there is no role for congressional investigation. See, e.g., Barenblatt, 360 U.S. at 111-112.

Plaintiff repeatedly asserts that "the development of national energy policy is not a matter within the exclusive province of the executive branch." Pl's. Reply 3. That is certainly true, and the Recommendations Clause presupposes that both Congress and the President play an important role in policy development. But surely "the development of national energy policy" by the Executive is a matter within the exclusive province of the Executive Branch. The founders made a conscious decision that political accountability would be served if the Executive could prepare and present legislation that Congress might or might not adopt. They rejected the suggestion that legislators

have partial agency in the Executive's deliberations and proposals because vesting power in a plurality "tends to conceal faults, and destroy responsibility." The Federalist No. 70 at 476 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Such congressional meddling in the President's policy-development process would suggest precisely the kind of diffusion of authority that the Opinion Clause was intended to avoid. Id. at 477.[18] The constitutional design likewise gives Congress no need to intrude into executive deliberations under the Opinion and Recommendations Clauses.[19] Congress has a full and fair opportunity to review the results of the opinions offered to the President when he makes his formal recommendations to Congress. Moreover, Congress can express its views that the President's process was infirm by rejecting his recommendations.[20]

Plaintiff also argues that the President has no more exclusivity under the Recommendations and Opinion Clauses than he enjoys under the Take Care Clause. Pl's. Reply 67. Although the Take Care Clause is, of course, a very important power to the President, its unique nature makes it a

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[18] Thus, plaintiff misconstrues the comment in The Federalist No. 74 that the Opinion Clause is a "mere redundancy." Pl's. Reply 65-66. It was a "redundancy" precisely because it was so important to the concept of the unitary executive, which had already been discussed in The Federalist No. 70. See Akhil Reed Amar, Some Opinions on the Opinion Clause, 82 Va. L. Rev. 647, 663-664 (1996) (making this point about The Federalist Nos. 70 and 74).

[19] As with the Recommendations Clause, plaintiff attempts to argue that the President's Opinion Clause power is not exclusive. He says, "Congress has concurrent authority to request and review" opinions from executive-branch officials. Pl's. Reply 69. Of course, Congress's power to "request" opinions (subject to the normal accommodation process between the branches) is a far cry from the President's express constitutional power to "require" them.

[20] Senator Reid takes a slightly different tack, contending that the Opinion Clause does not allow the President to seek opinions from anyone but principal officers, or to seek unwritten opinions. Reid Amicus Br. 27. As Professor Amar has explained, both of those conclusions over-read the words of the Clause to the point of being inconsistent with it. See Amar, 82 Va. L. Rev. at 667, 670. Moreover, contrary to Senator Reid's insinuation, defendant has not suggested that every single piece of information that the Comptroller General seeks was itself an "Opinion in writing" required by the President. Instead, defendant argues that the NEPDG's policy-development activities were undertaken pursuant to that and other express constitutional functions of the Executive. Therefore, under Barenblatt, they lie beyond Congress's investigative authority.

unique subject of congressional concern. Unlike many of the other Article II powers (including those in the Recommendations and Opinion Clauses), Congress has significant authority to define the scope of the President's duties under the Take Care Clause. The Take Care Clause implicates the results of the legislative process — a process that necessarily presupposes pervasive congressional involvement. The Opinion and Recommendations Clauses stand at the opposite extreme, both structurally and procedurally. They allow the President to formulate a proposal that expresses his view of what the law should be, before the many voices in Congress help determine what the law is. Thus, contrary to plaintiff's assertion, there is nothing "odd" about concluding that "the President's recommendation power must be more jealously guarded than the President's take care power" (Pl's. Reply 68 n.39), because that recommendation power is a distinct authority and is not subject to congressional definition.[21]

There can be no dispute that, under the aegis of the Recommendations and Opinion Clauses, only the President may control the development of his policy, regardless of what independent requirements Congress has attempted to impose on the Executive Branch. Allowing Congress to usurp the President's authority to develop his own policy and legislative proposals would constitute a much greater incursion on executive power than the limitation on the President's removal power sanctioned by Morrison v. Olson, 487 U.S. 654 (1988).[22] Put simply, because Congress lacks the

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[21] Moreover, plaintiff exaggerates the extent to which Congress can interfere with the deliberations that inform executive decisions to take care that the laws be faithfully executed. Whatever Congress's authority to inquire into the Executive's actions, it does not have any well-established authority to interfere with the deliberative process in which the prudence of those actions is debated.

[22] Plaintiff makes the breathtaking, but undeveloped, assertion that Congress's spending powers give it complete control over "the President's development of [energy] policy, the NEPDG's activities, and surely their consultations with non-federal employees." Pl's. Reply 65. That argument proves far too much. AAPS specifically noted that a "statute interfering with a President's ability to seek advice directly from private citizens * * * raises Article II concerns." 997 F.2d at 910.

legislative powers to regulate the development of the President's policy and legislative initiatives, plaintiff has no investigative powers over the development of those initiatives.[23]

2. Even Under A Balancing Approach, The President's Information-Gathering And Confidentiality Interests Greatly Outweigh Any Purported Legislative Interest

Plaintiff repeatedly — but incorrectly — asserts that a "balancing" test presents the proper approach to the constitutional issues in this case. Pl's. Reply 64, 68, 70. Even under such a test, however, it is clear that plaintiff's claims must fail. See Def's. Mem. 57-62.

Plaintiff does not directly address the strength of the President's constitutional interests in formulating policy proposals free from congressional interference,[24] but they are evident from the D.C. Circuit's decision in AAPS. Just like AAPS, this case involves the deliberations of "a committee of [the President's] closest advisers" dedicated to developing the President's policy and legislative recommendations "on a domestic issue he considers of the utmost priority." 997 F.2d at

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(The court did not note that potential right-of-petition concerns would also be raised if Congress could regulate presidential receipt of private persons' views.) Moreover, as applied to close presidential advisers (like those who composed the NEPDG), plaintiff's argument would permit Congress to eliminate executive privilege altogether. The privilege exists between the President and his close advisers, but, according to plaintiff, because those advisers are paid with federal funds, Congress may dictate the conditions on which their conversations with the President are confidential (or not). That conclusion is refuted by the law-review article plaintiff cites. See Jay S. Bybee, Advising the President, 104 Yale L.J. 51, 120 (1994) ("In a broad sense, everything the President does while in office may be said to be an exercise of the powers of his office, and thus nominally subject to Congress'[s] Necessary and Proper power. But that notion carried to its logical conclusion would have the President serving at congressional sufferance, a conclusion at odds with the idea of divided government."); id. at 126 ("the President's ipse dixit should suffice to demonstrate the need for confidentiality [of an advisory committee's advice]."); see also Def's. Mem. 56-57 (describing constitutional limits on conditional spending).

[23] The one congressional investigative power not tethered to legislative powers — the power of the House of Representatives (not the Comptroller General) to investigate serious allegations of impeachable conduct in aid of its sole constitutional power to impeach — is not involved in this case in any way.

[24] Plaintiff addresses the President's confidentiality interests only in his procedural discussion of statutory certification and assertion of executive privilege, which is refuted above in Part IV.A.

909. The AAPS court explained that the President has a "strong" "confidentiality interest" in "each stage in the formulation of advice to him" by a group with such "operational proximity to the President." Id. at 910 (emphasis omitted).

On the other side of the balance, even if there were some hypothetically legitimate congressional interest at stake, there is absolutely no need that justifies this suit. Congress can fully vindicate any concerns it may have about how the President's energy policies were formulated by refusing to act on his legislative recommendations and statutorily foreclosing his non-legislative proposals. Moreover, Congress's ability to take these actions gives it considerable practical leverage to obtain any information it wants. It does not need to have a congressional agent assert a sua sponte right to sue to get this information even when, as here, not a single committee has taken available actions to obtain the information. The Supreme Court in Reed held that a Senate resolution authorizing a committee to take all steps necessary to support its inquiry did not authorize a judicial action for documents. As here, Congress's other tools to obtain information render unnecessary a right to sue for the documents.

Moreover, even if this Court were to give credence to the congressional interests plaintiff postulates, despite the lack of a collective congressional determination about them, Congress's need for the information plaintiff seeks is simply inadequate to outweigh the Executive's interests in formulating policy free from congressional interference. Neither plaintiff nor his amicus has identified any congressional interest even remotely sufficient to justify the serious intrusion into executive-branch processes he seeks. Plaintiff suggests only a few reasons why Congress has an interest in NEPDG documents. Pl's. Reply 69. He claims that Congress has a present interest in NEPDG documents because they would "satisfy Congress's need to understand how the NEPDG developed policy in order to evaluate whether the group achieved congressional objectives * * *, and

to gauge the necessity for legislation related to energy or other policy developments in the future." Id. at 73.[25] (Senator Reid's amicus brief fails to specify any congressional interest in, or need for, the information plaintiff seeks.[26]) Plaintiff's explanation is wholly inadequate as a counterbalance to the President's interest in preserving the confidentiality of the communications he and his advisers receive. At best, this argument is completely circular because it assumes the legitimacy of "congressional objectives" concerning the manner in which the President formulates his recommendations. Moreover, to the extent Congress's legitimate interest is in future energy legislation, it has ample alternative means better designed to formulate an alternative legislative record. Congress certainly does not have to understand the process by which the President developed his policy proposals in order to understand the policy proposals themselves. Congress has the NEPDG's report and the President's recommendations. The development process is irrelevant except as a means for members of Congress to discourage the adoption of presidential recommendations with which they disagree.

Plaintiff patterns his claimed legislative interests after a reference in Nixon II to "Congress'[s] need to understand" and "to gauge the necessity for remedial legislation." Pl's. Reply 73-74. That quotation, however, has been wrenched out of context and does not support plaintiff's asserted legislative purposes.

The Court in Nixon II did not approve any contemporaneous disclosures to Congress. In

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[25] Plaintiff makes no mention of his earlier claim (Pl's. S.J. Mem. 3, 27-28, 34 n.16) that Congress needs to know whether the NEPDG complied with FACA.

[26] In discussing the balancing test, Senator Reid describes only the Executive's interests. Reid Amicus Br. 34-37. Furthermore, in describing his own interests in this case, Senator Reid focuses merely on the substance of the NEPDG's policy proposals and on the budgetary impact they might have if implemented, id. at 3-5 — not on the NEPDG policy-development process in which plaintiff is interested. See Compl. Exh. I at 1, Exh. K at 1 (Comptroller General describing his interest in "the process by which the National Energy Policy was developed").

general, it addressed three forms of disclosure. The first was an immediate, but very limited, disclosure to allow presidential materials to be "screened and catalogued by professional archivists" or otherwise used by the Executive Branch. 433 U.S. at 450. The Court stressed that the presidential materials would remain "in full control" of the Executive Branch and that they would not be made "available to the Congress." Id. at 444 (internal quotation omitted).[27] Second, the Court recognized that presidential materials could "be made available for use in judicial proceedings," but only pursuant to "lawful process," and still subject to case-by-case claims of privilege. Id. at 444, 451 n.13. Third, the Court addressed the "need to preserve the materials for legitimate historical and governmental purposes." Id. at 452. It assumed that "public access" would "eventually" "be provided" to the materials (id. at 451 n.13), but that, even then, "the restriction on public access ultimately established by regulation" would "preserve executive confidentiality" (id. at 450). This prospect of "eventual disclosure" (ibid.) to the public was the only form of disclosure to which the Court thought Congress would be privy. Id. at 444. Thus, the only way in which the Court said the Act "may be thought to aid the legislative process and thus to be within the scope of Congress' broad investigative power" or to satisfy "Congress'[s] need to understand" (id. at 453) was in preserving the materials for access sometime in the future — after President Nixon's expectation of confidentiality had been "subject to [the] erosion over time [that occurs] after an administration leaves office" (id. at 451).

In other words, Nixon II did not authorize any form of real-time disclosure to Congress, but only the preservation of materials for history's sake. Accordingly, Nixon II does not support plaintiff's claim that Congress needs NEPDG documents now, because disclosure to GAO is not

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[27] See also 433 U.S. at 443-444 ("It is therefore highly relevant that the Act provides for custody of the materials in officials of the Executive Branch * * * . For it is clearly less intrusive * * * than to have Congress or some outside agency perform the screening function.").

necessary to ensure that NEPDG documents — like other presidential records from the Bush–Cheney Administration — will be preserved.

C. *A Legislative Agent Cannot Bring A Civil Enforcement Action Against The Executive*

Plaintiff's suit also flouts the Supreme Court's admonition that Congress's "power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." Quinn v. United States, 349 U.S. 155, 161 (1955). The power to file a lawsuit on behalf of the government to vindicate public interests is a quintessentially executive power, and therefore Congress cannot vest that power in its own agent, like plaintiff, without violating separation-of-powers principles. In response, plaintiff argues that Congress may "authorize a judicial enforcement action as a means of 'enforcing process'" in support of its "legislative power of inquiry." Pl's. Reply 76, 77; see also Reid Amicus Br. 38-40. But that blurs the line between Congress's inherent contempt powers (which complement the traditional congressional process of obtaining executive-branch documents that plaintiff seeks to circumvent here) and the dramatically different power to invoke judicial process. Yet, even assuming that plaintiff correctly analogizes this case to Congress's power to invoke judicial process for the enforcement of its subpoenas, this action would transgress two established lines by vesting discretion in a non-committee congressional agent to seek judicial enforcement against executive-branch officials. This Court should not countenance such an unprecedented legislative aggrandizement.

Plaintiff's conflation of Congress's inherent powers and the power to seek judicial enforcement is most evident in his misreading of Reed. Plaintiff quotes Reed for the proposition that "[t]he 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." Pl's. Reply 77 (bracketed

addition in plaintiff's brief). In fact, Reed rejected the proposition that Congress's investigative powers necessarily include the ability to "invoke judicial power." In Reed, the Court held that Senators seeking to secure evidence for their investigation of a senatorial election did not have the authority to sue, because that power was not included in the Senate's grant of authority to issue subpoenas and "do such other acts as may be necessary in the matter of [the] investigation." 277 U.S. at 388. The Court explained that the Senate is "fully empowered, and may determine [matters related to the election of Senators] without the aid of the House of Representatives or the Executive or Judicial Department." Ibid. (emphases added). Thus, it refused to read the Senate's grant of authority as going farther than "the established practice of the Senate to rely on its own powers." Id. at 389. As the Court expressly noted: "Authority to exert the powers of the Senate to compel production of evidence differs widely from authority to invoke judicial power for that purpose." Ibid. (emphasis added).

Though unacknowledged by plaintiff, the Reed Court's distinction between Congress's inherent enforcement powers and the power to seek judicial enforcement is present in every one of the Supreme Court cases plaintiff cites in this context. Not one of those cases (see Pl's. Reply 76-77) provides an example of Congress or its agents seeking judicial enforcement; instead, they illustrate only two forms of enforcement power: (1) Congress's inherent power to have a contumacious witness arrested (by a congressional sergeant at arms), tried (before the bar of the House or Senate), and punished (by a term of imprisonment in the Capitol guard room or the D.C. jail); and (2) the Executive Branch's power to prosecute the crime of congressional contempt.[28]

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[28] See Eastland v. United States Servicemen's Fund, 421 U.S. 491, 495-496 (1975) (no enforcement process because subpoena recipient filed pre-emptive action seeking injunctive and declaratory relief); McGrain v. Daugherty, 273 U.S. 135, 154 (1927) (habeas action brought against Senate's deputy sergeant at arms); Marshall v. Gordon, 243 U.S. 521 (1917) (habeas action brought against House sergeant at arms); In re Chapman, 166 U.S. 661, 664 (1897) (criminal contempt

Even the discussion in Buckley v. Valeo (invoked at Pl's. Reply 76-77, 78 n.48, and quoted at Def's. Mem. 63) is completely consistent with the distinction between Congress's inherent enforcement powers and judicial enforcement. In Buckley, the Court recognized that Congress could delegate powers "of an investigative and informative nature" to the Federal Election Commission (whose members included congressional agents), but, in support of that proposition, it cited only cases involving Congress's inherent enforcement powers. 424 U.S. 1, 137-138 (1976) (citing McGrain, Kilbourn v. Thompson, 103 U.S. 168 (1880), and Eastland); see Kilbourn, 103 U.S. at 175-177 (arrest by House sergeant at arms); see note 28, supra (describing inherent-enforcement context of McGrain and Eastland). The Buckley Court then explained that a different result applies "when we go beyond this type of authority" (i.e., the investigative and informative authority to issue subpoenas and trigger the use of Congress's inherent enforcement powers). 424 U.S. at 138. It concluded that: "The [FEC's] enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress." Ibid. (emphasis added).[29] Thus, Buckley itself drew the line of constitutional

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prosecution brought by district attorney, not any congressional agent); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821) (false-imprisonment action brought against House sergeant at arms).

In one contempt case, the Supreme Court noted that a claim of legislative privilege "deserves greater respect" from the courts in "a case in which the defendants are members of a legislature" than in a case "where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege." Tenney v. Brandhove, 341 U.S. 367, 378 (1951). Plaintiff's case, which affirmatively seeks judicial aid and has been brought by an official acting on behalf of Congress rather than a member, combines both of the factors that warrant less respect.

[29] The footnote plaintiff cites from the Attorney General's brief in Buckley (Pl's. Reply 79, 80) is no more supportive of his position. In a section of the brief arguing that the Court should not even address the constitutionality of the powers and duties of the FEC, the Attorney General noted in passing that "Congress has the right to enforce its own subpoenas." Brief of the Attorney General as Appellee at 108 n.66, Buckley v. Valeo, No. 75-436 (filed Oct. 1975). Yet, that brief cited only cases involving prosecution by the Executive Branch. Compare ibid. (citing Watkins, Bryan, and Chapman), with Watkins v. United States, 354 U.S. 178, 186 (1957) (case brought by U.S. Attorney after full House of Representatives approved contempt resolution); United States v. Bryan, 339 U.S.

permissibility between Congress's inherent enforcement powers and the invocation of judicial enforcement.

The other cases on which plaintiff relies (Pl's. Reply 77, 78) are inadequate to overcome those principles. The D.C. Circuit's decision in Senate Select Committee predated Buckley (and also arose in the context of case-specific authorizations by the Senate of subpoena power and by Congress of district court jurisdiction, see 498 F.2d at 727, both of which are absent here). The Supreme Court's decision in Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987), relied on courts' own inherent contempt powers, and thus provides no authority for plaintiff's attempt to seek the aid of a separate branch of government. The non-controlling McDonnell Douglas decisions from other circuits are also unpersuasive. They misinterpreted Buckley by ignoring the distinction between Congress's inherent enforcement authority and the "discretionary power to seek judicial relief." See United States v. McDonnell Douglas Corp., 751 F.2d 220, 225 (8th Cir. 1984) ("McDonnell Douglas I") (relying on Eastland, McGrain, and Buckley to show that Congress has "some means of compulsion" to enforce its investigative powers); McDonnell Douglas Corp. v. United States, 754 F.2d 365, 368 (Fed. Cir. 1985) ("McDonnell Douglas II") (relying on Watkins for the proposition that Congress's implied powers "include the power to investigate"). Moreover, both of the McDonnell Douglas cases are distinguishable because the Comptroller General there had access under § 716(c)(1) pursuant to an "agreement."[30]

Even if it were somehow appropriate to analogize plaintiff's assertion of judicial-enforcement

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323 (1950) (same); Chapman, 166 U.S. at 667 (prosecution by district attorney on referral by president of Senate).

[30] See McDonnell Douglas I, 751 F.2d at 226 ("MDC specifically agreed to the inclusion of the access clause in its contract with the Air Force. MDC cannot now be heard to complain about the consequences of its agreement."); McDonnell Douglas II, 754 F.2d at 368 (finding subpoena power based on "the access clause in the contract, agreed to by the parties").

power to Congress's contempt or subpoena-enforcement powers, those analogs provide no precedent for the two further steps that would be necessary to legitimate plaintiff's action. Plaintiff cites no case in which a congressional agent sought judicial enforcement as an exercise of its own discretion without express approval from even a congressional committee, and none seeking judicial enforcement against the Executive Branch. In general, courts will not require disclosure of information sought by a legislative agent when there has not been at least committee or subcommittee approval. See Exxon Corp. v. FTC, 589 F.2d 582, 592-593 (D.C. Cir. 1978) ("The principle is important that disclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members."). Many congressional contempt prosecutions have foundered because they were based on the judgment of only a committee or subcommittee rather than a vote of the entire House or Senate. See, e.g., Watkins, 354 U.S. at 206 ("It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought * * * ."); AT&T I, 551 F.2d at 393 n.16 (the "resolution of the full House or Senate" "assures the witness some safeguard against aberrant subcommittee or committee demands"). Indeed, Congress's own practice recognizes the importance of authorization by a full house in the context of both contempt findings and subpoena enforcement. See, e.g., Exxon Corp., 589 F.2d at 593 ("Congress itself has manifested a concern to prevent the issuance of subpoenas by individual members as opposed to committees, subcommittees or duly authorized committee chairmen * * * .").[31] Because plaintiff has no such house or committee authorization here, the

[31] See also 4 Deschler's Precedents of the United States House of Representatives, H.R. Doc. No. 94-661, Ch. 15, § 22, at 188 (1977) ("When either the House or Senate receives a report of contumacious conduct from a committee, it routinely considers a resolution * * * to certify the facts to the U.S. Attorney. By reviewing this resolution, the body checks the action of the committee."); 2 U.S.C. § 288b(b) (allowing Senate Legal Counsel to bring a "civil action to enforce a subpena of the Senate or a committee or subcommittee of the Senate * * * only when directed to do so by the adoption of a resolution by the Senate" (emphasis added)); Rules of the H. of Rep., 107th Cong., rule

contempt and subpoena cases he cites cannot legitimate his action.[32]

Finally, plaintiff claims that it "make[s] no difference" in terms of aggrandizing effect whether the Comptroller General files suit against "private parties or the executive." Pl's. Reply 81. That claim is contrary to common sense and the case law. See Def's. Mem. 63-64. Although plaintiff does not recognize the difference, courts do, and there has never been a single case in which a court required the Executive to divulge information to Congress or its agents. Furthermore, even Congress has acknowledged the difference between enforcement actions against the Executive Branch and those against private parties. The Ethics in Government Act of 1978, on which plaintiff relies (Pl's. Reply 78), grants district-court jurisdiction over civil subpoena-enforcement actions brought by "the Senate or any authorized committee or subcommittee of the Senate," but it specifically withholds jurisdiction over actions "to enforce * * * any subpena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity." 28 U.S.C. § 1365(a); see also S. Rep. No. 95-170, at 89 (1977), reprinted in 1978 U.S.C.C.A.N. 4216, 4305 ("This bill * * * does not provide any authority for enforcement of subpenas against executive branch officials.").[33]

XI, cl. 2(m)(3)(C) (2001) ("Compliance with a subpoena issued by a committee or subcommittee * * * may be enforced only as authorized or directed by the House.").

Plaintiff also adverts to the authority to seek judicial immunity (Pl's. Reply 78), but "the request for such an order" must be approved by the majority of a house or by two-thirds of a full committee (not subcommittee). See 18 U.S.C. § 6005(b)(1), (2).

[32] Moreover, in this context, the difference between the use of contempt power to enforce a particular subpoena for particular documents or testimony is quite different from the blanket authority to exercise prosecutorial discretion that plaintiff claims. The former is quite analogous to other legislative acts and includes the legislative safeguards of a majority vote. The latter is a classic example of the Executive's prosecutorial discretion without the unique safeguards of political accountability that limit the Executive.

[33] The statute also eschews the 1928 Senate resolution plaintiff cites. Compare Pl's. Reply 78, with 28 U.S.C. § 1365(e).

V. **Well-Established Principles Of Constitutional Avoidance Compel Rejection Of Plaintiff's Statutory Arguments**

The parties' competing interpretations of the statutory provisions underlying this litigation present the Court with a clear choice. It can adopt a construction of those statutory terms that is consistent with the natural and established meaning of those terms in other laws and consistent with the traditional established means of resolving inter-branch document disputes without resort to the courts. In so doing, the Court will avoid difficult and sensitive constitutional questions grounded in the separation of powers. In the alternative, the Court can adopt plaintiff's unprecedented reading of statutory language, empower a congressional agent with unprecedented powers, and force the statute onto treacherous constitutional shoals. The Supreme Court and the D.C. Circuit have made clear what course this Court should choose. Statutes — including information-disclosing statutes — must be construed to avoid such constitutional confrontations. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). The Court's hesitation to adopt a constitutionally troublesome reading of statutory text "is especially great where, as here, [the arguments] concern the relative powers of coordinate branches of government." Public Citizen, 491 U.S. at 466; see also AAPS, 997 F.2d at 910-911.

Plaintiff mistakenly insists that this Court has no choice but to enter the constitutional thicket. He argues first (Pl's. Reply 81) that the statute is not ambiguous. The Supreme Court and the D.C. Circuit have already recognized that terms like "agency" and "agency records" are not self-defining, at least with respect to statutes creating judicially-enforceable rights and their applicability to the President, Vice President, and close presidential advisers. See Franklin, 505 U.S. at 800-801; Meyer, 981 F.2d at 1291-1297; Armstrong v. Executive Office of the President, 90 F.3d at 556. The word

"use" here is at least as "woolly" as FACA's reference to "utilize[]" that was construed in Public Citizen. 491 U.S. at 452. And equating the NEPDG's provision of advice to the President with the end results of an agency's execution of a statutory program is, to say the least, not the most natural usage of those terms. Plaintiff's assertion (Pl's. Reply 83) that Congress deliberately intended to "court[]" the "perils" of "dangerous constitutional thickets" is belied by the fact that Congress failed to enact the clear statutory language that would have forced the issue.

Plaintiff's insistence that principles of constitutional avoidance do not apply to information-disclosure statutes because such statutes do not raise serious separation-of-powers problems is simply wrong, as a host of D.C. Circuit and Supreme Court cases reveal. See Part III.A.1, supra. For example, the D.C. Circuit applied avoidance principles in AAPS, even though the Task Force had already terminated its operations, because disclosure of documents was still at issue. 997 F.2d at 901 & n.1; see also Public Citizen, 491 U.S. at 450-451 (predicating appellants' Article III standing on the fact that they "might gain significant relief" from the application of the "public inspection" provisions of FACA).

Plaintiff's last argument in support of constitutional confrontation, rather than avoidance, is that the President could previously have invoked certification and may still invoke executive privilege. Pl's. Reply 82. But, as already noted, the possibility that the President might have structured matters to avoid a lawsuit or could later invoke executive privilege did not preclude the Supreme Court in Public Citizen or the D.C. Circuit in AAPS from applying avoidance principles. See also Nader, 396 F. Supp. at 1234 & n.5 (invoking constitutional-avoidance canon, even though there was no claim of executive privilege).

Plaintiff's construction of the statutory provisions to allow him to sue anyone up to and including the President to obtain materials on virtually any subject would raise a host of separation-

of-powers problems. It would render the unelected Comptroller General one of the most powerful constitutional actors and forever tilt the balance of the separation of powers in Congress's favor. If plaintiff were correct that no other reading of the statutory provisions is fairly possible, then there would be little doubt that this Court must reject Congress's effort to aggrandize itself at the expense of the Executive (and all courts but the Supreme Court). However, the far-more-natural reading of those provisions — and the far-more-prudent judicial course — avoids those constitutional defects.

CONCLUSION

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

Respectfully submitted,

August 26, 2002

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CERTIFICATE OF SERVICE

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DAVID B. SALMONS

Exhibit A

Attach and digest with B-142983 9/6/62

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

B-142983

SEP 18 1962

Honorable John W. Byrnes
House of Representatives

Dear Mr. Byrnes:

By letter of May 8, 1962, you called to our attention articles appearing in the Christian Science Monitor and the New York Herald Tribune indicating that members of the White House Staff were engaged in "lobbying" activities with respect to the Administration's program for elderly medical care under Social Security. In view of certain prohibitory statutes, you requested that we investigate the matter and, if the newspaper accounts were found to be accurate, that we disallow any illegal expenditures from appropriated funds.

We requested the White House to furnish us a complete report in the matter to include the names of the employees involved and the appropriation from which they were being paid. As we informed you by letter of September 6, 1962, the Assistant Special Counsel to the President advised us that the activities of the government personnel concerned consisted of supplying information in response to specific inquiries. We stated that although we did not have firsthand knowledge of the facts of the matter, the information reported to us by the White House did not indicate any violation of law.

Your letter of September 7, 1962, raises the question as to whether we have determined that the newspaper accounts which generated your request for investigation are false, and you request that we furnish you a copy of the report of investigation upon which such determination might have been based.

We did not conduct an investigation of the newspaper allegations and we did not reach a determination as to their accuracy. As stated in our letter of September 6, our conclusion that there was no violation of law was predicated upon the information furnished us by the White House. We recognized, of course, that the White House response conflicted with the newspaper reports.

You correctly point out that our Office is charged with the responsibility for determining that public funds are used in accordance with law and that we are provided with broad investigative powers for executing that responsibility. However, our responsibility with respect

to overseeing the expenditure of public funds, covering as it does the entire Executive Branch of the Government, is a large one. Upon a number of occasions we have encountered, notwithstanding the broad investigative powers granted us by statute, considerable resistance on the part of Executive Agencies in the matter of our access to information necessary to the conduct of our investigations. Where there were significant sums of money in question or where we otherwise considered the issues of major significance we have pressed for ultimate resolution of such controversies over our right to obtain the information we were seeking. Although we have gone so far as to enlist the assistance of committees of the Congress, and notwithstanding clear indications of the congressional will that we not be denied any material we consider necessary to the proper discharge of our responsibility, we have not always been successful in such controversies.

At present our relations with the Executive Branch concerning the furnishing of information are relatively good. But we are certain you understand that investigations of White House activities are not subject to the same techniques as those conducted in the various departments and agencies. Files of the White House Office, with the exception of financial records, are normally not available to us. Also, White House personnel are not always available for interview. This has been the situation in all recent Administrations.

In the final analysis, therefore, we concluded that to proceed beyond the White House reply in the subject matter would entail the probability of reaching a stalemate which we would not be able to ultimately resolve and which, consequently, might serve to jeopardize the reasonably ready access we now have to information in other important areas. And since we did not consider that the amount of funds which might have been involved in the reported activities was significant, we decided not to pursue the matter further.

While we can understand that our response might not be satisfactory in terms of your interest in the violations indicated, we trust that you will appreciate our position in the matter as it relates to the overall responsibility of this Office.

Sincerely yours,

JOSEPH CAMPBELL

Comptroller General
of the United States