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## ***Walker v. Cheney: District Court Decision and Related Statutory and Constitutional Issues***

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name redacted  
Legislative Attorney  
American Law Division

# *Walker v. Cheney*: District Court Decision and Related Statutory and Constitutional Issues

## Summary

On January 29, 2001, President Bush established the National Energy Policy Development Group (NEPDG), with Vice President Cheney serving as Chairman. Along with the Vice President, the NEPDG consisted of six executive department heads, two agency heads, and various other federal officers. The NEPDG was tasked with developing a national energy policy “designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future.”

Based on reports that meetings of the NEPDG included “exclusive groups of non-governmental participants,” Representative Waxman and Representative Dingell asked the General Accounting Office (GAO) to initiate an investigation regarding the NEPDG’s activities. Subsequent to initiating its investigation, GAO requested information from the Vice President regarding the names and titles of individuals present at any NEPDG meetings, including any non-governmental participants, as well as information pertaining to the purpose and agenda of the meetings, the process by which the NEPDG determined who would be invited to such meetings, and any minutes or notes produced. The Vice President refused to provide the requested information, asserting that GAO did not possess the authority to investigate the activities of the NEPDG. The Vice President further argued that GAO’s request exceeded constitutional boundaries, even if authorized by statute. After several attempts to obtain the requested information were unsuccessful, GAO invoked its authority under 31 U.S.C. §716, which enables the Comptroller General to issue a demand letter requesting the release of relevant records and, ultimately, to sue for their production by a noncomplying agency.

After subsequent attempts to obtain the requested records were likewise unsuccessful, GAO filed a suit for declaratory and injunctive relief to enforce its asserted statutory right of access to the requested records on February 22, 2002. The Vice President responded by filing a motion to dismiss on May 21, 2002, questioning GAO’s statutory authority and arguing that the suit unconstitutionally interfered with the functioning of the Executive Branch. On December 9, 2002, the United States District Court for the District of Columbia dismissed the suit on standing grounds, holding that the Comptroller General had not suffered a personal or institutional injury sufficient to merit judicial resolution of issues affecting the balance of power between Congress and the Executive Branch. The decision in *Walker* has the potential to significantly limit the ability of GAO to exercise leverage in its oversight of the Executive Branch, and could be interpreted as casting doubt on the scope of congressional power regarding the exercise and delegation of its investigative authority. The Comptroller General announced on February 7, 2003 that GAO would not file an appeal of the district court decision.

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# *Walker v. Cheney*: District Court Decision and Related Statutory and Constitutional Issues

## Introduction

In *Walker v. Cheney*,<sup>1</sup> the District Court for the District of Columbia dismissed the suit filed by the Comptroller General against the Vice President seeking information related to the composition and activities of the National Energy Policy Development Group (NEPDG), declaring that the Comptroller General did not have standing to maintain the action. This report provides an overview of the dispute giving rise to the lawsuit, a consideration of the potential ramifications of the district court's decision, and an analysis of related statutory and constitutional issues that were not addressed by the district court.

## Overview of the Dispute<sup>2</sup>

On January 29, 2001, President Bush established the National Energy Policy Development Group (NEPDG) via Presidential Memorandum.<sup>3</sup> President Bush tasked the NEPDG with developing a national energy policy “designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future.”<sup>4</sup> The President's memorandum directed the Vice President to serve as chair, with membership extended to the Secretary of the Treasury, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, as well as several other federal officers. The memorandum also directed the Department of Energy to make funds available to the NEPDG to cover the costs of support staff.

The memorandum established that the NEPDG's functions were to “gather information, deliberate, and...make recommendations to the President.” The memorandum further called for the NEPDG to submit to the President a report

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<sup>1</sup>230 F.Supp.2d 51 (D.D.C. 2002).

<sup>2</sup>Much of the background material contained herein is taken from a prior CRS report which discussed the issues in *Walker v. Cheney* prior to the district court's decision. *See, Walker v. Cheney*: Statutory and Constitutional Issues Arising From the General Accounting Office's Suit Against the Vice President, Congressional Research Service, Report No. RL31397, May 1, 2002.

<sup>3</sup>Presidential Memorandum, National Energy Policy Development Group, January 29, 2001.

<sup>4</sup>*Id.*

“setting forth a recommended national energy policy designed to help the private sector, and as necessary and appropriate State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy for the future.” The NEPDG issued its report on May 16, 2001, the provisions of which were approved as the “National Energy Policy” by the President.<sup>5</sup>

On April 19, 2001, Representative Waxman and Representative Dingell wrote to Andrew Lundquist, executive director of the NEPDG, requesting information pertaining to the operations of the task force. Representatives Waxman and Dingell also wrote to GAO, requesting that it initiate an investigation regarding the NEPDG’s activities, based upon reports that task force meetings included “exclusive groups of non-governmental participants.”<sup>6</sup> Subsequent to initiating its investigation, GAO requested information from the Vice President regarding the names and titles of individuals present at any NEPDG meetings, including any non-governmental participants, as well as information pertaining to the purpose and agenda of the meetings, the process by which the NEPDG determined who would be invited to such meetings, and whether minutes or notes were kept.<sup>7</sup> After several attempts to obtain the requested information were unsuccessful, GAO issued a demand letter on July 18, 2001, pursuant to 31 U.S.C. §716(b),<sup>8</sup> requesting the aforementioned records, including copies of the minutes and notes of the meetings, as well as any information presented by private sector attendees.<sup>9</sup>

On August 17, 2001, GAO submitted a report to Congress under 31 U.S.C. §716(b), declaring that the Vice President had persisted in his refusal to turn over the requested information.<sup>10</sup> In its report, GAO stated that it was withdrawing its request for copies of minutes, notes, and information presented by private individuals “as a matter of comity” and was seeking documents regarding: (1) the names of those present at NEPDG meetings; (2) the names of the NEPDG’s professional support staff; (3) the names of those with whom NEPDG members and support staff met to gather information for the National Energy policy, including the date, subject, and

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<sup>5</sup>Letter from Vice President Cheney to the House of Representatives, August 2, 2001. All correspondence referred to herein may be accessed at: [http://www.house.gov/reform/min/inves\\_energy/energy\\_cheney.htm](http://www.house.gov/reform/min/inves_energy/energy_cheney.htm).

<sup>6</sup>Letter from Reps. Waxman and Dingell to GAO, April 19, 2001.

<sup>7</sup>For detailed chronologies of interactions between the Office of the Vice President and GAO, *see*, Letter from Vice President Cheney to the House of Representatives, August 2, 2001; GAO Report on Vice President Cheney’s Refusal to Release Records, August 17, 2001.

<sup>8</sup>31 U.S.C. §716 directs federal agencies to provide the Comptroller General with access to information regarding their activities. Section 716(b) enables the Comptroller General to issue a demand letter requesting the release of relevant agency records, and, ultimately, to sue an agency for their production. Section 716(d), however, establishes a certification procedure whereby the Executive Branch can preclude a suit by the Comptroller General. *See* n.57 and accompanying text, *infra*, for a detailed overview of GAO’s access enforcement authority under §716.

<sup>9</sup>GAO Demand Letter to Vice President Cheney, July 18, 2001.

<sup>10</sup>GAO Report on Vice President Cheney’s Refusal to Release Records, August 17, 2001.

location of such meetings, and; (4) what direct and indirect costs were incurred in developing the National Energy Policy. While this report to Congress specifically identified the requested documents as relating to the four categories listed above, it should be noted that GAO's "scaling back" of its request related only to its prior demand for the minutes and notes of NEPDG meetings with outside interests. As such, it would appear that the request in the July 18 demand letter for information pertaining to the purpose and agenda of the NEPDG meetings, as well as the process by which the NEPDG determined who would be invited to such meetings, was still in effect. Subsequent attempts to obtain the requested records were likewise unsuccessful, prompting the Comptroller General to announce on January 30, 2002, that GAO would file suit under 31 U.S.C. §716(b)(2) to enforce its asserted statutory right of access to the requested NEPDG records.<sup>11</sup>

GAO filed a complaint for declaratory and injunctive relief on February 22, 2002.<sup>12</sup> On April 11, 2002, GAO filed a motion for summary judgment. Thereafter, the Vice President filed a motion to dismiss and an opposition to GAO's motion for summary judgment on May 21, 2002. Hearings on the motions by the parties were held on September 27, 2002, and the district court dismissed the complaint on December 9, 2002, holding that the Comptroller General did not have standing to bring the suit.<sup>13</sup> The Comptroller General announced on February 7, 2003, that GAO would not file an appeal of the district court's decision.<sup>14</sup>

## The Decision in *Walker v. Cheney*

The court in *Walker* dismissed GAO's suit after determining that the Comptroller General lacked standing to sue under the principles and standards delineated in *Raines v. Byrd*.<sup>15</sup> In *Raines*, the Supreme Court held that six Members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act of 1996. In reaching this conclusion, the Court noted the "restricted role for article III courts" in resolving disputes between the political branches, and determined that the Members bringing the suit had not suffered a sufficient personal injury to merit a finding of constitutional standing.<sup>16</sup> The Court distinguished a personal injury to a private right from an institutional or official injury, explaining that a congressional plaintiff may be able to establish standing to sue in instances where the plaintiff has suffered either a personal injury, such as the loss of a seat in

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<sup>11</sup>Decision of the Comptroller General Concerning NEPDG Litigation, January 30, 2002.

<sup>12</sup>GAO Statement Concerning Litigation, February 22, 2002. *Walker v. Cheney*, Complaint for Declaratory and Injunctive Relief, Case No. 1:02CV00340 (D.D.C. February 22, 2002).

<sup>13</sup>*See Walker v. Cheney*, Civ. No. 02-0340(JDB), slip op. at 40 (D.D.C. Dec. 9, 2002). For a thorough overview of the doctrine of standing and its application in *Walker v. Cheney*, *See*, (name redacted), " *Walker v. Cheney*: An Overview of the Standing Issue," Congressional Research Service, Congressional Distribution Memorandum, December 26, 2002.

<sup>14</sup>GAO press statement on *Walker v. Cheney*, February 7, 2003. Available from [<http://www.gao.gov/press/w020703.pdf>].

<sup>15</sup>521 U.S. 811 (1997).

<sup>16</sup>521 U.S. at 818-20.

Congress, or an institutional injury that is not “abstract and widely dispersed.” Ultimately, the Court noted that the “diminution of legislative power” resulting from the passage of the act constituted an institutional injury affecting all Members, as opposed to a particularized and concrete personal injury.<sup>17</sup>

Applying these maxims, the court in *Walker* determined that it was required to conduct an “especially rigorous” standing inquiry, because the case presented “core separation of powers questions at the heart of the relationship among the three branches of our government.”<sup>18</sup> Engaging in this calculus, the court held that the injury alleged by the Comptroller General was not personal, stressing that his interest in the suit was “solely institutional, relating exclusively to his duties in his official capacity.”<sup>19</sup> The court then determined that the institutional injury alleged by the Comptroller General, namely the Vice President’s denial of information requested pursuant to GAO’s statutorily conferred investigative and access enforcement authority, was insufficient to establish standing. The court predicated this finding on its conclusion that the Comptroller General was acting as an agent of Congress in demanding the information and bringing the suit, and had no “freestanding institutional injury or personal injury of his own to assert.”<sup>20</sup> The court then reiterated that the jurisdiction of the federal courts “can be invoked only when the plaintiff himself has suffered some threatened or actual injury.”<sup>21</sup>

The court went on to consider the harm to the Comptroller General’s principal, Congress, but found such an inquiry to be “of little comfort to plaintiff.”<sup>22</sup> In particular, the court characterized the importance of the requested documents as relating only to Congress’ discharge of its general legislative and oversight functions, and held that the alleged injury to these prerogatives was “too vague and amorphous to confer standing.”<sup>23</sup> The court further declared that, “like the injury asserted in *Raines*,” the injury to Congress in the current controversy “concerns merely an ‘abstract dilution of institutional legislative power,’” damaging all Members and both Houses equally,<sup>24</sup> and is therefore not the kind of concrete injury that is sufficiently “distinct and palpable” for standing.<sup>25</sup> The court did acknowledge that the potential impact upon Congress in the present case was more concrete than the injury alleged in *Raines*, in that “any harm here relates to a reasonably well-defined set of information.”<sup>26</sup> The court proceeded, however, to discount the applicability of prior precedents establishing that a House or committee has standing to enforce its right

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<sup>17</sup>*Id.* at 821.

<sup>18</sup>*Walker*, 230 F.Supp.2d at 65 (quoting *Raines*, 521 U.S. at 819).

<sup>19</sup>*Id.* at 66.

<sup>20</sup>*Id.* at 66.

<sup>21</sup>*Id.* at 67 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

<sup>22</sup>*Id.* at 67.

<sup>23</sup>*Id.* at 67.

<sup>24</sup>*Id.* at 67 (citing *Raines*, 521 U.S. at 821).

<sup>25</sup>*Id.* at 67-68 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

<sup>26</sup>*Id.* at 68.

of access to information, concluding that the injury to Congress' right to the documents was "conjectural" or "hypothetical" because no congressional entity had requested or subpoenaed the information.<sup>27</sup>

In reaching this conclusion, the court in *Walker* found it to be of "some importance" that Congress had not expressly authorized the present suit, and determined that a generalized delegation of investigative and access enforcement authority to GAO was not sufficiently specific to provide a basis for the Comptroller General to seek judicial resolution of the significant constitutional issues raised by the suit.<sup>28</sup> In particular, while stressing that it did not "intend to direct the delegation and exercise of Congress' investigative powers,"<sup>29</sup> the court held that the "highly generalized allocation of enforcement power to the Comptroller General...hardly gives this Court confidence that the current Congress has authorized this Comptroller General to pursue a judicial resolution of the specific issues affecting the balance of power between the Article I and Article II Branches that have crystalized during the course of this dispute and lawsuit."<sup>30</sup> Based on these factors, the court concluded that the exercise of judicial power in this case was not "warranted as a 'last resort, and as a necessity,'" and declined to address the merits of the suit.<sup>31</sup>

The court's decision in *Walker* has the potential to significantly limit the ability of GAO to sue the Executive Branch to obtain information, and could have the

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<sup>27</sup>*Id.* at 68 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). It should be noted that the court distinguished "the generalized harm to legislative power" that may occur when documents cannot be obtained from an injury pertaining "to a highly specific constitutional mandate (such as the duty to apportion Representatives)" and from an injury "threaten[ing] the composition of Congress itself." *Id.* at 68 n.19. To illustrate this distinction, the court pointed to *United States House of Representatives v. United States Department of Commerce*, 11 F. Supp. 2d 76, 89 (D.D.C. 1998) (three-judge court), where the court found that the House had standing to sue regarding the alleged refusal by the Census Bureau to provide a proper accounting of the number of persons in each state, because it "had been deprived of information to which it, as a legislative body, was personally entitled and which it required in order to perform a mandatory constitutional function — the apportionment of Representatives among the states." The court in *Walker* did not explain why the grant of legislative power to Congress by Article I, section 1, is not as specific as the grant of the power to apportion Representatives by section 2 of the Fourteenth Amendment. See *Shampansky*, n.14, *supra*.

<sup>28</sup>*Id.* at 68. The court noted several other factors that contributed to its holding. In particular, the court found it significant that Congress had an "alternate remedy" to cure its alleged injury, in that it could issue a subpoena for the information. *Id.* at 30. Also, the court gave some weight to the fact that while its decision prevented the Comptroller General from gaining access to the NEPDG documents, private parties were seeking similar information in other suits. See *id.* at 31 n.14. Finally, the court was further influenced by the fact that there was no precedent for a suit by a Comptroller General for access to executive branch records, and that no court has "ever ordered the Executive Branch to produce a document to Congress or its agents." *Id.* at 32-33.

<sup>29</sup>*Id.* at 69.

<sup>30</sup>*Id.* at 69-70.

<sup>31</sup>*Id.* at 69 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).



practical effect of impairing its ability to gather information in a traditional sense.<sup>32</sup> It is also important to note that the court's decision could even be interpreted as casting doubt on the ability of Congress itself to bring suit to enforce subpoenas.<sup>33</sup> Accordingly, this report considers the potential impact of the decision on GAO's investigatory and access enforcement functions and provides an overview of related statutory and constitutional issues that were not addressed by the district court.

### **GAO Access to Executive Branch Information After *Walker*.**

If interpreted broadly, the holding in *Walker* could greatly limit the ability of GAO to compel production of information from the Executive Branch. Specifically, the court's decision does not clearly establish whether GAO retains the ability to sue executive departments and agencies. While it may be argued that the decision is limited to the specific scenario of an enforcement action against the President or Vice President, nothing in the court's decision clearly indicates that a less rigorous standing inquiry may be applied to actions against agencies.<sup>34</sup> In the event that the decision is interpreted as only applying to suits against the President or Vice President, its effect, while palpable, would not necessarily have a dramatic impact on GAO's efficacy, given that the majority of its investigations appear to focus on agency activity. However, if the court's analysis extends to suits against agencies, the strict standing requirements delineated in the decision could effectively strip 31 U.S.C. §716 of any force in the congressional/executive context. If such an interpretation adheres, GAO's investigative efforts could be hampered by its inability to bring suit to compel the production of requested information. Specifically, while the present controversy marks the first time that GAO has brought suit against the Executive Branch, it is important to note that prior investigations have been characterized by mutual efforts at negotiation and compromise, presumably influenced by an awareness on the part of the Executive Branch that a blanket refusal to provide requested information could result in a lawsuit.

A modern example of this dynamic centers on GAO efforts to obtain records for the House Committee on International Relations regarding the process used by the Executive Branch to approve U.N. peacekeeping operations.<sup>35</sup> After the Departments of State and Defense and the National Security Council failed to provide the requested records, GAO issued demand letters to each agency on November 9, 2000. The State Department responded by denying the demand for access, but nonetheless

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<sup>32</sup>See Stuart Taylor, Jr., *Barring A Suit Against Cheney Could Cripple Oversight by the GAO*, *Fulton County Daily Report*, Dec. 19, 2002 (Taylor). The impact of the ruling on the ability of GAO to sue an agency, rather than the Vice President, is uncertain. See 31 U.S.C. § 716. See also Randolph May, *The Reluctant Referee*, *Legal Times*, Jan. 13, 2003, at 38 (questioning whether ruling in *Walker*, as to standing of Comptroller General to sue Vice President, would apply in suit against executive department head).

<sup>33</sup>See *Walker*, 230 F.Supp.2d at 67-70.

<sup>34</sup>*Id.*

<sup>35</sup>See, U.N. Peacekeeping: GAO's Access to Records on Executive Branch Decision-Making, General Accounting Office, GAO-01-440R, March 6, 2001.

committed to negotiate “a mutually acceptable accommodation.”<sup>36</sup> Subsequent negotiations resulted in an agreement between GAO and State that provided “reasonable access” to the records.<sup>37</sup> The Department of Defense failed to respond adequately to GAO’s request, leading it to threaten the issuance of a statutory report under §716(b)(1).<sup>38</sup> GAO and the DOD subsequently reached an accommodation regarding the records at issue after GAO filed the report, indicating its willingness to sue for access. The NSC responded to GAO’s demand letter by “formally denying...full and complete access” to the requested records.<sup>39</sup> This step prompted the GAO to issue a report, again evincing its contemplation of bringing suit to compel access. In this instance, however, the Director of the Office of Management and Budget certified, pursuant to §716(d)(1)(C), that disclosure of the material requested from the NSC “reasonably could be expected to impair substantially the operations of the Government,” thereby precluding the GAO from bringing suit.<sup>40</sup>

As this example illustrates, GAO’s authority to sue for access to records appears to have provided leverage in convincing executive entities to either provide requested information or to invoke the certification mechanism of §716(d). Thus, the court’s decision could have the practical effect of depriving GAO of its traditional point of leverage in such negotiations, giving rise to the possibility that the Executive Branch could become less responsive to future GAO inquiries.

### **GAO Access to Private Sector Information After *Walker*.**

While the factors mentioned above give rise to the possibility that GAO’s ability to exercise leverage in its oversight of executive branch entities could be significantly diminished, it does not appear that the decision in *Walker* will impair its ability to gain access to information held by private sector entities. As noted above, the decision is predicated on the notion that a standing inquiry must be “especially rigorous” in those rare cases that involve “core separation of powers questions at the heart of the relationship among the three branches of our government.”<sup>41</sup> Accordingly, there would appear to be little basis to the argument that the court’s decision somehow undermines prior precedent establishing Congress’ authority to delegate its investigative powers, especially in instances where such separation of powers concerns are absent.<sup>42</sup>

### **The Decision Not to Appeal.**

As noted above, the court’s decision could have a significant impact on the ability of GAO to investigate the activities of executive branch entities. However, on

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<sup>36</sup>*Id.* at 6.

<sup>37</sup>*Id.* at 2, 6.

<sup>38</sup>*Id.* at 9.

<sup>39</sup>*Id.* at 2.

<sup>40</sup>*Id.* at 2.

<sup>41</sup>*Walker*, 230 F.Supp.2d at 65.

<sup>42</sup>See n.82 and accompanying text, *infra*.

February 7, 2003, GAO announced “[a]fter a thorough review and analysis of the district court’s decision..., as well as extensive outreach with congressional leadership and others concerning various policy matters and the potential ramifications of the court’s decision,” that it would not file an appeal.<sup>43</sup> Explaining this decision, GAO stated that it strongly believed the court’s decision was incorrect, but that an appeal “would require investment of significant time and resources over several years.” GAO then stated that since the district court did not consider the merits of the suit, its decision had “no effect on GAO’s statutory audit rights or the obligation of agencies to provide GAO with information.” GAO then forwarded a narrow interpretation of the court’s holding, arguing that the decision “is confined to the unique circumstances posed by this particular case and does not preclude GAO from filing suit on a different matter involving different facts and circumstances in the future.”<sup>44</sup>

GAO then called on the administration to “do the right thing and fulfill its obligations when it comes to disclosures to GAO, the Congress, and the public, not only in connection with this matter but all matters in the future.”<sup>45</sup> However, as was evidenced by the nature of the dispute in *Walker v. Cheney*, the administration’s position on what constitutes proper compliance with such obligations is significantly narrower than that of GAO. Accordingly, GAO’s decision not to appeal the decision in *Walker* could result in the practical curtailment of GAO oversight of the executive branch.

## Related Statutory and Constitutional Issues

Concluding the announcement of its decision not to appeal, GAO stated that it hoped it would “never again [be] put in the position of having to resort to the courts to obtain information that Congress needs to perform its constitutional duties, but we will be prepared to do so in the future if necessary.”<sup>46</sup> Given this express declaration of GAO’s willingness to revisit the issue of its access enforcement authority with regard to the executive branch, it is useful to consider the underlying statutory and constitutional issues that were not addressed in the decision in *Walker v. Cheney*, as similar issues will likely adhere to any future dispute between the two parties.

### GAO’s Investigative Authority.

GAO’s primary audit authority is derived from section 312(a) of the Budget and Accounting Act of 1921.<sup>47</sup> Currently codified at 31 U.S.C. §712, this provision, in pertinent part, directs the Comptroller General to “investigate all matters related to

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<sup>43</sup> GAO press statement on *Walker v. Cheney*, February 7, 2003. Available from [<http://www.gao.gov/press/w020703.pdf>].

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>Pub. L. No. 67-13; 42 Stat. 20, 25-26 (1921).

the receipt, disbursement, and use of public money.”<sup>48</sup> Additionally, 31 U.S.C. §717(b) empowers the Comptroller General to “evaluate the results of a program or activity the Government carries out under existing law.” Based on this authority, GAO requested access to the aforementioned information regarding the NEPDG on the grounds that both §712 and §717(b) authorize such an inquiry. In response, the Vice President argued that neither provision imbues the GAO with authority sufficient to support its position.<sup>49</sup>

Regarding §712, the Vice President argued that it merely provides GAO with the authority to conduct an audit of the costs incurred by the NEPDG, and did not provide any basis for its requests for such information as the names of NEPDG meeting attendees. While this interpretation is plausible under the plain terms of the statute, it should be noted that the express language of §712, viewed in relation to relevant legislative history, indicates that Congress intended for GAO to serve a broad role. Specifically, §712(1) states that the Comptroller General is to “investigate all matters related to the receipt, disbursement and use of public money.” This language, as enacted in 1921, was designed, according to one member, to ensure “that the Comptroller General shall concern himself not simply with taking in and paying out money from an accountant’s point of view, but that he shall also concern himself with the question as to whether it is economically and efficiently applied.”<sup>50</sup> This conception was reiterated in 1980:

“[T]he Budget and Accounting Act of 1921 provides sufficiently broad and comprehensive authority to investigate ...’all matters relating to the receipt, disbursement, and application of public funds...’ This authority extends not only to accounting and financial auditing but also to administration, operations, and program evaluation. Succeeding legislation affecting GAO’s authority generally has served to make mandatory, explicit, and emphatic the requirement for GAO to assess the efficiency, economy, and effectiveness of program operation by the Executive Branch.”<sup>51</sup>

Belying these statements to some degree, GAO did not utilize its full statutory authority initially, serving Congress throughout the 1920’s and 1930’s primarily by auditing vouchers to ensure the accuracy of payments.<sup>52</sup> However, Congress has explained that governmental expansion has necessarily increased its reliance on GAO to provide it with “essential information about federal programs,” particularly in light

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<sup>48</sup>31 U.S.C. §712(1).

<sup>49</sup>See “Defendant’s Motion to Dismiss and Opposition to Plaintiff’s Motion for Summary Judgment” at 37.

<sup>50</sup>61 Cong. Rec. 1090 (May 5, 1921) (Statement of Rep. Luce).

<sup>51</sup>S. Rep. No. 96-570, at 2, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1980). *See also*, H. Rep. No. 96-425, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2 (1979) (stating that the authority vested in the Comptroller General by the Budget and Accounting Act of 1921 “extends not only to accounting and financial auditing but also to related aspects of administration, operations and program evaluation”).

<sup>52</sup>Harry S. Havens, *The Evolution of the General Accounting Office: From Voucher Audits to Program Evaluations*, GAP/OP-2-HP, January 1990.

of its “statutory authority to participate directly in the oversight process as an independent congressional entity.”<sup>53</sup>

Turning to §717(b), the Vice President argued against its application on the basis that it only authorizes the Comptroller General to “evaluate the results of a program or activity the Government carries out under existing law.”<sup>54</sup> Specifically, in light of the fact that the NEPDG was created by a presidential order, as opposed to statute, the Vice President maintained that its activities did not constitute a program or activity carried out under existing law for the purposes of §717. In response, GAO argued that the term “existing law,” absent any qualifier or limitation, refers to all sources of law.

While both positions are tenable, prior GAO practice could be interpreted as supporting the notion that its statutory authority extends to entities such as the NEPDG. In particular, GAO has previously investigated similarly situated entities, such as the White House China Trade Relations Group and the President’s Task Force on Health Care Reform, reportedly receiving sufficient responses to its inquiries.<sup>55</sup> Furthermore, in 1980 when enacting the enforcement mechanisms of 31 U.S.C. §716, Congress specifically contemplated GAO’s authority to investigate pertinent activities of the President and his advisers without questioning its underlying authority to engage in such activity, indicating an assumption on the part of Congress that such authority was preexisting.<sup>56</sup> This consistent assertion of authority by GAO, coupled with Congress’ implicit acknowledgment, would likely be given some degree of weight by a reviewing court.<sup>57</sup>

### **GAO Access Enforcement Authority.**

Under 31 U.S.C. §716, federal agencies are directed to provide the Comptroller General with information regarding the duties, powers, activities, organization, and

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<sup>53</sup>S. Rep. No. 96-570, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 2 (1980); *reprinted in* 1980 U.S.C.C.A.N. 732.

<sup>54</sup> See “Def.’s Motion to Dismiss” at 39; Letter from Vice President Cheney to the House of Representatives, August 2, 2001.

<sup>55</sup> See, Federal Lobbying: China Permanent Normal Trade Relations (PNTR) Lobbying Activities, GAO/GGD-00-199R, September 29, 2000; Cost of Health Care Task Force Related Activities, GAO/T-GGD-95-114, March 14, 1995; GAO/GGD-96-114, March 14, 1995.

<sup>56</sup> See n.67 and accompanying text, *infra*.

<sup>57</sup> It might be argued that GAO’s interpretation of its authority is entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S.837 (1984). This point is especially pertinent in light of Congress’ determination that the Budget and Accounting Act of 1921 is itself broad enough to justify GAO’s investigatory duties. See n. 7-8 and accompanying text, *supra*. See also, *Eli Lilly & Co. v. Staats*, 574 F.2d 904, 910 (7<sup>th</sup> Cir. 1978), *cert. denied*, 439 U.S. 959 (1978) (noting that GAO access to records was justified not only by the specific access provision in question, but also by the broad investigatory powers vested in the Comptroller General). See also, *Bowsher v. Merck*, 460 U.S. 824 (1983).

financial transactions of the agency.<sup>58</sup> To effectuate this directive and buttress GAO's investigative power, §716 also imbues the Comptroller General with the ability to demand the release of relevant records and to sue for their production by a noncomplying agency. Specifically, under §716(b)(1), the Comptroller General may make a written request to the head of an agency that has failed to make records available. The Comptroller General's letter must state the authority for inspecting the records and the reason for inspection. Upon receipt of such a letter, the head of the agency is afforded 20 days to respond, describing the records withheld and the reasons therefore. In the event that the requested records are not released for inspection within the 20 day response period, the Comptroller General may file a report with the President, the Director of OMB, the Attorney General, the head of the relevant agency, and Congress. Twenty days after the filing of the report, the Comptroller General is authorized to file suit in the district court of the United States for the District of Columbia to require the head of the agency to produce the requested records.<sup>59</sup>

This authority is tempered, however, by §716(d) which enables the Executive Branch to preclude a suit by the GAO on certain grounds. In particular, §716(d)(1) prevents the Comptroller General from bringing suit if the requested records pertain to matters designated as foreign intelligence or counterintelligence activities by the President, or in instances where the records are statutorily exempted from disclosure. Additionally, the President or Director of the OMB may preclude a suit under §716(d)(1)(C) by certifying to the Comptroller General and Congress that a record may be withheld under 5 U.S.C. §552(b)(5) or 5 U.S.C. §552(b)(7) of the Freedom of Information Act and that "disclosure reasonably could be expected to impair substantially the operations of the Government."<sup>60</sup> In the present case, the President did not avail himself of the certification provision within the allotted period of time, thereby enabling the Comptroller General to bring suit under §716(b)(2). It should be noted, however, that the Administration may nonetheless choose to assert that the requested information is privileged independent of §716(d)(1)(C).

Based upon the investigatory and enforcement authority outlined above, GAO maintained that it had authority to bring suit to compel disclosure of the requested NEPDG records. Conversely, the Administration asserted that the Comptroller General may not bring suit under §716, arguing (1) that GAO's lack of investigatory authority under §712 and §717 prevents an enforcement action, and (2) that neither the Vice President nor the NEPDG qualify as an agency that may be subjected to such an action.<sup>61</sup>

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<sup>58</sup>31 U.S.C. §716(a).

<sup>59</sup>31 U.S.C. §716(b)(2).

<sup>60</sup>31 U.S.C. §716(d)(1)(C). Such a certification must be made by the 20<sup>th</sup> day after a report is filed by the Comptroller General under §716(b)(1). *Id.* Regarding matters that may be precluded by such a certification, 5 U.S.C. §552(b)(5) pertains to deliberative materials, while 5 U.S.C. §552(b)(7) relates to records or information compiled for law enforcement purposes.

<sup>61</sup> See "Def.'s Motion to Dismiss" at 22; The Vice President also argues that GAO may not  
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The first prong of the Vice President’s argument hinges upon the proper interpretation of the investigative authority vested in the Comptroller General, as discussed above. Regarding the second prong of the Vice President’s argument, a review of the relevant statutory provisions and case law reveals countervailing principles that could influence the determination of the issue. Chapter 7 of Title 31 appears to define “agency” quite broadly, to include a “department, agency, or instrumentality of the United States Government” or the District of Columbia, expressly excluding the legislative branch and the Supreme Court.<sup>62</sup>

In *Franklin v. Massachusetts*, the Supreme Court determined that the term “agency,” as employed in the Administrative Procedure Act (APA), could not be construed to include the President.<sup>63</sup> Specifically at issue was whether provisions of the APA authorizing review of final agency action applied to the presidential action taken pursuant to statute.<sup>64</sup> The Court noted that while the APA exempts Congress, the courts, territories of the United States and the District of Columbia from review, no express provision removes the President from its ambit. Despite the negative implication that presidential actions are covered under the APA arising from the express preemption of the other bodies, the Court held the statute inapplicable. Explaining this decision, the Court stated that “out of respect for the separation of powers and the unique constitutional position of the President,” it “would require an express statement by Congress before assuming it intended the President’s performance of his statutory duties to be reviewed” under the APA.<sup>65</sup> Given the status of the Vice President as a constitutional officer and the proximity of the NEPDG to the President, it is possible that a reviewing court would likewise require an explicit statement from Congress prior to acknowledging GAO’s authority in the present scenario.

It is important to note, however, that the legislative history surrounding the enactment of §716 indicates that Congress intended for the President and his principal advisers to be subject to suit, potentially mitigating the effect of the Court’s

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<sup>61</sup>(...continued)

request NEPDG records based on the fact that while §717(b)(3) states that an evaluation may be requested by a “committee of Congress with jurisdiction over the program or activity,” the current investigation was initiated at the behest of two individual Congressmen. *Id.* at 48. While a literal reading of §717(b)(3) would seem to support this position, the Supreme Court rejected an identical argument in *Bowsher v. Merck & Co.*, 460 U.S. 824, 844 (1983), stating that if the “records sought by GAO are within the scope of the access-to-records provisions, the fact that the Comptroller General’s request had its origin in the requests of Congressmen or that the GAO reported the data to Congress does not vitiate its authority.” Further, §717(b)(1) empowers the Comptroller General to conduct an investigation on his own initiative. It should be remembered, however, that the district court in *Walker* found it significant that Congress had not authorized the present suit. *See, Walker*, 230 F.Supp.2d at 69.

<sup>62</sup>31 U.S.C. §701(1); 31 U.S.C. §717(a).

<sup>63</sup>*Franklin v. Massachusetts*, 505 U.S. 788 (1992).

<sup>64</sup>*Id.* at 801.

<sup>65</sup>*Id.* at 800-801.

decision in *Franklin*.<sup>66</sup> Discussing the ability of the President or the Director of OMB to prevent a suit by the Comptroller General, the Senate Report accompanying the General Accounting Office Act of 1980<sup>67</sup> states:

“[W]ith regard to enforcement actions at the Presidential level, certifications provided for under section 102(d)(3) [currently 31 U.S.C. § 716 (d)(1)(C)] of the bill are intended to authorize the President and the Director of the Office of Management and Budget to preclude a suit by the Comptroller General against the President and his principal advisers and assistants, and against those units within the Executive Office of the President whose sole function is to advise and assist the President, for information which would not be available under the Freedom of Information Act.”<sup>68</sup>

From this statement, it appears that Congress intended to imbue the Comptroller General with the authority to file suit against the President and his principal advisers. Specifically, it seems that there would be no reason for Congress to provide the certification provision unless the President and his advisers were covered. Given this apparent intention, it would appear that Congress conceived of the term “agency,” as used in Chapter 7 of Title 31, as necessarily including the President and his principal advisers. Furthermore, the structure of the certification provision itself contemplates high level access by GAO, given that it enables the President to prevent access to deliberative information that could “impair substantially the operations of the Government.”<sup>69</sup> Thus, while the President and his advisers are not expressly included in the aforementioned definitions, it is possible that a reviewing court would find the structure and legislative history of § 716 sufficiently explicit to allow suit against the Vice President or the NEPDG in the current case.

### **Congressional Delegation of Investigative Authority.**

While the aforementioned statutory arguments were cited by both parties as being dispositive of the controversy, the Vice President also asserted that the initiation of a lawsuit by GAO to enforce its statutory right of access pursuant to § 716 constituted the execution of the laws of the United States,<sup>70</sup> a power which is

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<sup>66</sup>S. Rep. No. 96-570, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1980); *reprinted in* 1980 U.S.C.C.A.N. 732.

<sup>67</sup>Pub. L. 96-226, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1980).

<sup>68</sup>S. Rep. No. 96-570, at 8, 1980 U.S.C.C.A.N. at 739.

<sup>69</sup>31 U.S.C. § 716(d)(1)(C). According to the Senate Report, the certification provision “represents a compromise” to objections by the Executive Branch that the enforcement authority contained in § 716 could endanger the confidentiality of highly sensitive information. S. Rep. No. 96-570 at 6-8, 1980 U.S.C.C.A.N. at 737-739.

<sup>70</sup>See “Def’s Motion to Dismiss” at 62. The Vice President also argued that allowing GAO to access information regarding the activities of the NEPDG would violate the separation of powers doctrine by intruding on the President’s constitutional authority to receive advice from his principal officers. In forwarding this argument, the Vice President relied heavily  
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committed solely to the Executive Branch.<sup>71</sup> To properly elucidate an analysis of the ability of Congress to delegate investigatory and subpoena enforcement authority to the GAO, it is first necessary to consider the scope of Congress' oversight authority.

While there is no definitive constitutional or statutory provision imbuing Congress with investigative authority, a long line of Supreme Court precedent establishes Congress' power to engage in oversight and investigation of any matter related to its legislative function.<sup>72</sup> Unless there is a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress possesses the essentially unfettered power to compel necessary information from executive agencies, private persons and organizations. Even though the Constitution does not contain any express provision authorizing Congress to conduct investigations and take testimony in support of its legislative functions, the Supreme

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<sup>70</sup>(...continued)

on the Supreme Court's holding in *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989).

In *Public Citizen*, the Supreme Court addressed the question of whether the Federal Advisory Committee Act (FACA) applied to advice to the DOJ from the American Bar Association's Standing Committee on Federal Judiciary regarding nominees for federal judgeships. The Court, while acknowledging that the ABA Committee furnished advice and recommendations to the President via the DOJ, nonetheless found that the committee was not covered by FACA. *Id.* at 452. In reaching this determination, the Court stated that it was "an axiom of statutory interpretation that 'where 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.'" *Id.* at 466. Noting that the application of FACA would present "formidable constitutional difficulties" regarding infringement upon "the President's Article II power to nominate federal judges," as well as the separation of powers doctrine, the Court applied this principle of statutory interpretation to hold that the Committee was not utilized by the President in a manner that would trigger the application of the Act. *Id.* at 467.

It is important to note that the decision in *Public Citizen* focused on the constitutional difficulties that would arise if the provisions of FACA were allowed to intrude on the President's ability to gather information necessary to exercise his plenary Article II power to nominate judges. *See Public Citizen*, 491 U.S. at 488-489 (Kennedy, J., concurring). Accordingly, there is cause for doubt that a reviewing court would find a constitutional difficulty in the current scenario, given that the Opinions Clause is not generally considered to be a source of substantive constitutional power. *See Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 640-641 (1952). Nonetheless, it is possible that a reviewing court could determine that GAO's suit, under the circumstances presented in this case, interfered with the President's constitutional authority to receive advice from his closest advisors.

<sup>71</sup>*See Buckley v. Valeo*, 424 U.S. 1, 140-141; *Springer v. Philippine Islands*, 277 U.S. 189, 201-202 (1928).

<sup>72</sup>For a thorough analysis of legal principles governing congressional oversight, *See* (name redacted), *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, Congressional Research Service Report No. 95-464A, April 7, 1995.

Court has held conclusively that congressional investigatory power is so essential that it is implicit in the general vesting of legislative power in the Congress.<sup>73</sup>

In *Eastland v. United States Serviceman's Fund*, for instance, the Court stated that the “scope of its power of inquiry...is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”<sup>74</sup> Also, in *Watkins v. United States*, the Court emphasized that the “power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.”<sup>75</sup> The Court further stressed that Congress’ power to investigate is at its peak when focusing on alleged waste, fraud, abuse, or maladministration within a government department. Specifically, the Court explained that the investigative power “comprehends probes into departments of the federal government to expose corruption, inefficiency, or waste.”<sup>76</sup> The Court went on to note that the first Congresses held “inquiries dealing with suspected corruption or mismanagement of government officials.”<sup>77</sup> Given these factors, the Court recognized “the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government.”<sup>78</sup>

As a corollary to this accepted oversight authority, the Supreme Court has likewise determined that the “[i]ssuance of subpoenas...has long been held to be a legitimate use by Congress of its power to investigate.”<sup>79</sup> In particular, the Court has repeatedly cited the principle that:

“A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information — which not infrequently is true — recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry — with enforcing process — was regarded and employed as a

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<sup>73</sup>E.g., *McGrain v. Daugherty*, 272 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); See also, *United States v. A.T.T.*, 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 1212 (D.C. Cir. 1977).

<sup>74</sup>421 U.S. at 504, n. 15 (quoting *Barenblatt*, *supra*, 360 U.S. at 111).

<sup>75</sup>354 U.S. at 187.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.* at 182.

<sup>78</sup>*Id.* at 200, n.33.

<sup>79</sup>*Eastland v. United States Servicemen's Fund*, 421 U.S. at 504.

necessary and appropriate attribute of the power to legislate — indeed, was treated as inhering in it.”<sup>80</sup>

Given that these cases establish Congress’ expansive authority to investigate and compel information from the Executive Branch, the question turns to whether this power may be delegated to an agent of the legislative branch. It is well established that Congress possesses the fundamental ability to delegate investigative authority to an entity such as GAO. In *Buckley v. Valeo*, for instance, the Supreme Court, while invalidating certain functions of the Federal Election Commission on Appointments Clause grounds, stated that “[i]nsofar as the powers confided in the Commission are essentially of an investigative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them.”<sup>81</sup>

A review of the applicable law indicates that the statutory enforcement scheme of §716 appears to comport with constitutional requirements. In particular, reviewing courts have determined that enforcement of a subpoena through judicial process is not “execution of the laws of the United States” as contemplated for separation of powers purposes. Such a determination was made in *McDonnell Douglas Corp. v. United States*, where the Court of Appeals for the Eighth Circuit addressed a challenge to the constitutionality of GAO’s access enforcement authority.<sup>82</sup> Rejecting the argument that an enforcement suit by GAO constituted execution of the law in violation of the separation of powers doctrine, the court stated that GAO’s suit was “[f]ar from being a case in which the [Comptroller General] brought suit against [McDonnell Douglas Corporation] for breaching the law, the [Comptroller General], in this case, was merely seeking information for a legitimate investigative purpose.”<sup>83</sup> Further stressing the legitimate investigative nature of GAO’s suit, the court went on to explain that the issuance of a judicially enforceable subpoena was “necessary to accomplish” its investigative mission and that a determination to the contrary would “render meaningless the [Comptroller General’s] role as an investigating arm of Congress.”<sup>84</sup> A similar conclusion was reached by the Court of Appeals for the Federal Circuit in a related case: “[t]he power of the Executive, under the Constitution, to execute the laws is not involved here. The 1980 Act does not erode the Executive’s authority.”<sup>85</sup> Based on these two appeals court rulings, it is possible that a reviewing court would uphold GAO’s access enforcement authority in the

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<sup>80</sup>*McGrain v. Daugherty*, 273 U.S. at 175; *See also, Buckley v. Valeo*, 424 U.S. 1, 138 (1976), *Eastland v. United States Servicemen’s Fund*, 421 U.S. at 504-505.

<sup>81</sup>424 U.S. 1, 137 (1976). *See also, Hannah v. Larche*, 363 U.S. 420, 427 n.9, 454-485 (1960) (approving the vesting in the Civil Rights Commission, an advisory body, subpoena issuance and, “as is customary when Congress confers subpoena power on an investigatory agency” subpoena enforcement authority, and listing 20 examples of such congressional delegations to executive departments and agencies, independent agencies and commissions, independent regulatory agencies, and legislative branch entities as far back as 1800).

<sup>82</sup>751 F.2d 220 (8<sup>th</sup> Cir. 1984).

<sup>83</sup>*Id.* at 225.

<sup>84</sup>*Id.* at 225.

<sup>85</sup>*McDonnell Douglas Corp. v. United States*, 754 F.2d 365, 368 (Fed. Cir. 1985).

current case as it pertains to information sought in aid of GAO's investigatory duties, as distinguished from activities constituting "execution of the laws of the United States."<sup>86</sup>

### **Executive Privilege.**

In the hypothetical event that a reviewing court determined that the weight of the law fell in GAO's favor regarding the statutory and constitutional issues discussed above, it is possible that the Administration would have asserted that the requested information was covered by the doctrine of executive privilege.

Just as the Constitution contains no provisions authorizing the investigatory and oversight functions of Congress, there is likewise no express grant of executive privilege. However, beginning with President Washington, the Executive Branch has claimed that the separation of powers doctrine implies that the President possesses the power to withhold confidential information in the face of legislative and judicial demands.<sup>87</sup>

Politically speaking, it is rare for interbranch disputes over contested information to reach the courts for a judicial determination on the merits. Consequently, the existence of a presidential confidentiality privilege was not judicially established until the Watergate era, when the courts recognized the presidential confidentiality privilege as an inherent aspect of presidential power.<sup>88</sup> In

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<sup>86</sup>It should also be noted that this conclusion adheres, irrespective of the Supreme Court's decision in *Bowsher v. Synar*, 478 U.S. 714 (1986). In *Bowsher*, the Court addressed the constitutionality of the Gramm-Rudman Deficit Reduction Act. Under the Act, the Comptroller General was empowered to review deficit estimates from the Office of Management and Budget and the Congressional Budget Office, and to mandate spending reductions to meet a specified deficit level. The Court found that the Act imbued the Comptroller General, an official appointed by the President, but removable by Congress, with the power to interpret provisions of the Act, and to dictate the means by which the Executive Branch implemented budget reduction measures. *Id.* at 728. The Court determined that the Comptroller General, a legislative branch officer, was performing the functions of an executive officer in executing a law passed by Congress, a duty constitutionally committed to an officer of the Executive Branch. *Id.* at 733. This dynamic rendered the Act unconstitutional, according to the Court, since permitting "the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of laws" in violation of the separation of powers doctrine. *Id.* at 726. As the factors cited by the Court indicate, the scope of the holding in *Bowsher* is clearly limited to instances where congressional agents are imbued with the authority to execute the laws. As such, it seems evident that the ability of GAO to bring suit pursuant to a "legitimate investigative purpose" is not implicated. *McDonnell*, 751 F.2d at 225.

<sup>87</sup>*See* (name redacted), Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments, Congressional Research Service, Report No. RL30319, September 21, 1999.

<sup>88</sup>*United States v. Nixon*, 418 U.S. 683 (1974); *See also, Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir.1973); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (continued...)

*United States v. Nixon*, the Supreme Court addressed a claim of executive privilege in response to a subpoena issued during a criminal trial to the President at the request of the Watergate Special Prosecutor. The Supreme Court found a constitutional basis for the doctrine of executive privilege, noting that “[w]hatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Article II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.”<sup>89</sup> The Court went on to explain that while it considered presidential communications to be “presumptively privileged,” there was no support for the contention that the privilege was absolute, precluding judicial review whenever asserted, as such a conclusion “would upset the constitutional balance of a ‘workable government.’”<sup>90</sup> In particular, the Court explained that “when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent national security secrets we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production” of materials needed to enforce criminal statutes.<sup>91</sup>

Upon determining that a claim of privilege is not absolute, the Court weighed the President’s interest in confidentiality against the judiciary’s need for the materials in a criminal proceeding, stating that it was “necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.” Concluding this calculus, the Court held that the judicial need for the tapes, as established by a “demonstrated, specific need for evidence in a pending criminal trial,” was of greater significance than the President’s “generalized interest in confidentiality...”<sup>92</sup> It should be noted that the Court specifically limited the scope of its decision, stating that it was not concerned with “the balance between the President’s generalized interest in confidentiality...and congressional demands for information.”<sup>93</sup>

Coupled with related and subsequent decisions, the Court’s decision in *Nixon* established the “contours of the presidential communications privilege.”<sup>94</sup> Pursuant to the standards developed in these cases, the President may invoke the privilege “when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain

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<sup>88</sup>(...continued)

(D.C. Cir. 1974); *Nixon v. Administrator of Gen. Services.*, 433 U.S. 425 (1977).

<sup>89</sup>*United States v. Nixon*, 418 U.S. at 705.

<sup>90</sup>*Id.* at 707.

<sup>91</sup>*Id.* at 706.

<sup>92</sup>*Id.* at 685, 713.

<sup>93</sup>*Id.* at 712, n. 19.

<sup>94</sup>*In re Sealed Case (Espy)*, 121 F.3d 729, 744 (D.C. Cir. 1997).

confidential.”<sup>95</sup> As noted above, such an invocation renders the requested materials presumptively privileged, requiring an adequate showing of need to overcome the claim. This standard was further clarified in *In re Sealed Case* (hereinafter referred to as “*Espy*”), where the Court of Appeals for the District of Columbia Circuit addressed issues regarding the scope of the privilege, whether and to what extent the privilege extends to presidential advisers, whether the President must have seen or had knowledge of the material at issue, and the standard of need necessary to overcome a claim of privilege.<sup>96</sup>

*Espy* arose from an Office of Independent Counsel (OIC) investigation regarding allegations of impropriety by former Secretary of Agriculture Mike Espy. As part of the investigation, a grand jury issued a subpoena for all documents relating to a report prepared for the President by the White House Counsel’s Office regarding the allegations. Regardless of the fact that the President had not viewed any of the documents underlying the report, he withheld 84 documents on the basis of “executive/deliberative privilege.” The OIC moved to compel production of the withheld documents. Subsequent to *in camera* review, the district court upheld the claims of privilege forwarded by the President. In its decision, the Court of Appeals agreed generally with the district court’s determination that the documents in question were subject to the presidential communications privilege.<sup>97</sup> However, the court vacated and remanded in order to provide the OIC an opportunity to provide a sufficient justification for its need for certain items of evidence.<sup>98</sup>

At the outset of its opinion, the court distinguished between the presidential communications privilege and the deliberative process privilege, noting that while the former has a constitutional basis in the separation of powers doctrine, the latter is a common law privilege applicable to the decisionmaking of executive officials generally.<sup>99</sup> The court went on to explain that while both privileges are qualified, the deliberative process privilege “disappears altogether when there is any reason to believe government misconduct occurred,” whereas “the presidential communications privilege is more difficult to surmount,” requiring a “focused demonstration of need, even when there are allegations of misconduct by high level officials.”<sup>100</sup>

Turning to the question of whether the subpoenaed documents could be claimed to be privileged even though the President had never viewed them, the court stated

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<sup>95</sup>*Id.*

<sup>96</sup>*Id.*

<sup>97</sup>*Id.* at 758.

<sup>98</sup>*Id.* at 761-762.

<sup>99</sup>*Id.* at 745-746.

<sup>100</sup>*Id.* at 746. The deliberative process privilege allows the government to withhold information that would reveal recommendations and deliberations pertaining to the formulation of governmental decisions and policies, and does not apply to documents that merely state or explain a decision made by the government, or material that is purely factual. *Id.* at 737.

that “the public interest is best served by holding that communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President.”<sup>101</sup> The court based this conclusion on what it characterized as “the President’s dependence on presidential advisers and the inability of the deliberative process privilege to provide advisers with adequate freedom from the public spotlight,” as well as “the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources.”<sup>102</sup> Further illuminating the scope of the privilege, the court stated that it “must apply both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser’s staff, since in many instances advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President.”<sup>103</sup>

Recognizing that a decision extending the presidential communications privilege to presidential advisers “could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the president,” the court limited the privilege to White House advisers and staff that are in “operational proximity” to presidential decisionmaking. Specifically, the court stated that “the privilege should not extend to staff outside the White House in executive branch agencies. Instead the privilege should apply only to communications authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers.”<sup>104</sup> The court went on to stress that the privilege was not applicable to information that does not “call ultimately for direct decisionmaking by the President.”<sup>105</sup>

While the principles established above are applicable to the scenario at issue in *Walker v. Cheney*, it is unclear whether a reviewing court would have accepted a claim of privilege in the case. In particular, it seems evident that the Vice President and the staff of the NEPDG would qualify as “immediate White House advisers” as

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<sup>101</sup>*Id.* at 752.

<sup>102</sup>*Id.* at 751-752.

<sup>103</sup>*Id.* at 752. Regarding the standard of need necessary to overcome a claim of privilege, the court determined that a party must demonstrate that the requested documents are relevant to the proceeding and cannot be obtained elsewhere with due diligence. *Id.* at 754-755.

<sup>104</sup>*Id.* at 752. “[I]t is ‘operational proximity’ to the President that matters in determining whether the ‘[t]he President’s confidentiality interest’ is implicated (quoting *American Ass’n of Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 910 (D.C. Cir. 1993) (emphasis omitted)).

<sup>105</sup>*Id.* at 752.

conceived of in *Espy*.<sup>106</sup> To the extent that the Vice President and his staff were engaged in the “investigation and formulation of advice to be given to the President,” regarding a national energy policy, a substantial argument could be made that such information would fall within the ambit of the presidential communications privilege.<sup>107</sup>

However, it should be noted that in *Walker v. Cheney*, any hypothetical assertion of privilege would probably have been based on a broad claim of public interest in the confidentiality of the requested material. Specifically, GAO’s current information request, as outlined in the complaint, is significantly less intrusive than the demands contained in the initial demand letter.<sup>108</sup> Whereas GAO’s original request sought information that could be regarded as reflective of the deliberative product and processes of the NEPDG, the complaint as filed sought:

“[D]ocuments that describe (1) who was present at each of the meetings conducted by the NEPDG, including the names of the attendees, their titles, and the office represented; (2) with whom the Vice President as chair of the and each of the NEPDG support staff met to gather information for the proposed national energy policy, including the name, title and office or clients represented; and the date, purpose, agenda, and location of the meetings; (3) how the Vice President, the members of the NEPDG, or others determined who would be invited to the meetings; and (4) the direct and indirect costs that were incurred in developing the proposed national energy policy.”<sup>109</sup>

Accordingly, while it is conceivable that the information requested in the complaint pertaining to the purpose and agenda of NEPDG meetings with outside interests and the process by which the NEPDG determined who would be invited to such meetings could be construed as privileged, there is no indication that the material was in any way related to the types of information, such as national security secrets, that the Supreme Court deemed worthy of the highest levels of protection in *Nixon*.<sup>110</sup> Furthermore, it seems unlikely that the material sought by GAO would have been deemed revelatory of presidential deliberations in light of the fact that it does not appear to relate to information that would “call ultimately for direct decisionmaking by the President.”<sup>111</sup> Rather, the material sought by GAO appears to have encompassed information pertaining to the scope and composition of meetings that were to provide the basis for the subsequent formulation of recommendations and advice to be presented to the President regarding the development of a national

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<sup>106</sup>See *Espy*, 121 F.3d at 752.

<sup>107</sup>*Id.*

<sup>108</sup>See n.10 and accompanying text, *supra*.

<sup>109</sup>*Walker v. Cheney*, Complaint for Declaratory and Injunctive Relief, p.24, Case No. 1:02CV00340 (D.D.C. February 22, 2002).

<sup>110</sup>See *Nixon*, 418 U.S. at 706-707.

<sup>111</sup>*Espy*, 121 F.2d at 752.



energy policy.<sup>112</sup> Thus, to the extent that GAO's request did not seek information regarding the direct deliberations of individuals in "operational proximity" to the President in formulating policy advice, it would not appear that the concerns voiced by the court in *Espy* would be implicated. As such, it is possible that a reviewing court would not have accepted a hypothetical claim of privilege. In *Walker v. Cheney*, much would have depended on a reviewing court's interpretation of the scope of GAO's request for information.

## Conclusion

The district court in *Walker v. Cheney* predicated its decision on a determination that the Comptroller General had not suffered a personal or institutional injury sufficient to merit judicial resolution of issues affecting the balance of power between Congress and the Executive Branch. Given the broad language employed by the court, it seems evident that GAO's ability to exercise leverage in its oversight of the Executive Branch could be significantly limited, especially if the decision is interpreted as prohibiting enforcement actions against executive departments and agencies as well as the President and Vice President. Furthermore, even if the Comptroller general had pursued an appeal in an effort to obtain a reversal of the district court's standing analysis, there were still a host of significant statutory and constitutional issues that could have affected the outcome of the dispute.

As noted above, while GAO's investigatory and access enforcement authority have a strong historical and statutory basis, there are competing principles of statutory interpretation that could influence a reviewing court's consideration of this authority in any future conflicts with the executive branch. Likewise, the aforementioned constitutional issues regarding the delegation of access enforcement authority to the GAO and the applicability of the presidential communications privilege to the activities of presidential advisors could prove to be of substantial significance in any future disputes. Given the breadth and importance of the issues implicated in *Walker v. Cheney*, it would appear that the only certainty at this juncture is that the district court's decision will have a significant impact on the future of legislative oversight in the congressional/executive context.

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<sup>112</sup>In particular, Vice President Cheney stated that the meetings with outside interests were separate from the NEPDG's internal deliberations: "[w]e heard from a broad variety of folks out there, but they were not in the meetings where we put together the policy and made recommendations to the president." Joseph Curl, "Cheney Refuses Demand by GAO," *Washington Times*, at A1, A16, July 27, 2001.

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