No. 13-5127

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAUSE OF ACTION,
Plaintiff-Appellant,

v.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,
Defendant-Appellee.

On Appeal from a Final Order of the United States District Court for the District of Columbia (Hon. James E. Boasberg, U.S. District Judge)

BRIEF OF THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

Kerry W. Kircher, General Counsel
William Pittard, Deputy General Counsel
Christine Davenport, Senior Assistant Counsel
Todd B. Tatelman, Assistant Counsel
Mary Beth Walker, Assistant Counsel
Eleni M. Roumel, Assistant Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700

Counsel for Amicus Curiae

November 22, 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Circuit Rules of this Court, counsel for amicus curiae the Bipartisan Legal Advisory Group of the U.S. House of Representatives respectfully represents as follows:

Parties and Amici Below

All parties, intervenors and amici appearing before the District Court are listed in the Brief for the Appellee (Nov. 15, 2013).

Rulings Under Review

References to the ruling at issue appear in the Brief for the Appellee (Nov. 15, 2013).

Related Cases

None.

/s/ Todd B. Tatelman
Todd B. Tatelman, Assistant Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700

Counsel for Amicus Curiae

November 22, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes & Regulations:

Legislative Authorities:

Other Authorities:

GLOSSARY

APA	Administrative Procedure Act
CBO	Congressional Budget Office
CRS	Congressional Research Service
FCIC	Financial Crisis Inquiry Commission
FCIC Final Report	The Financial Crisis Inquiry Report, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States (2011)
FERA	Fraud Enforcement and Recovery Act of 2009
FOIA	Freedom of Information Act
FRA	Federal Records Act
GAO	Government Accountability Office
NARA	National Archives and Records Administration
9/11 Commission	National Commission on Terrorist Attacks Upon the United States

STATEMENT OF INTEREST[1]

Amicus curiae the Bipartisan Legal Advisory Group of the U.S. House of Representatives presents the institutional position of the House in litigation matters in which it appears.[2] The House's interest in this case arises out of Appellant Cause of Action's contention that it is entitled under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") to access records of a now defunct congressional commission – the Financial Crisis Inquiry Commission ("FCIC") – held by Appellee the National Archives and Records Administration ("NARA").

---

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no other person or entity, other than the amicus curiae, contributed money that was intended to fund the preparation or submission of this brief.

[2] *See* H. Res. 5, 113th Cong. § 4(a)(1)(B) (2013) ("[T]he Bipartisan Legal Advisory Group continues to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears . . . ."), *available at* http://beta.congress.gov/113/bills/hres5/BILLS-113hres5eh.pdf; Rule II.8, Rules of the House of Representatives (113th Cong.) ("House Rules") (establishing Office of General Counsel which "function[s] pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships"), *available at* http://clerk.house.gov/legislative/house-rules.pdf.

The Bipartisan Legal Advisory Group currently is composed of the Honorable John A. Boehner, Speaker of the House; the Honorable Eric Cantor, Majority Leader; the Honorable Kevin McCarthy, Majority Whip; the Honorable Nancy Pelosi, Democratic Leader; and the Honorable Steny H. Hoyer, Democratic Whip.

The FCIC is one of many congressional commissions Congress has created over the years. Typically, as it did here, Congress creates such commissions in the context of significant national traumas or issues, and charges the commissions to investigate the trauma or issue, and then to report to Congress its factual findings, analysis of the underlying causes, and/or substantive policy proposals.

FOIA, as a general matter, does not apply to congressional records. *See, e.g.*, 5 U.S.C. §§ 552(f)(1) (statute applies only to "agencies" of United States), 551(1)(A) (excluding Congress from definition of "agency"); *United We Stand America, Inc. v. I.R.S.*, 359 F.3d 595, 603 (D.C. Cir. 2004) ("Congressional documents . . . are not subject to FOIA at all . . . ."). Because congressional commissions play an increasingly important role in the legislative process, the House has a particular interest in seeing that the congressional exemption in FOIA is construed in a manner that encompasses the records of such commissions. Any judicial decision that subjected the records of congressional commissions to FOIA – either during their existence or after the transfer of their records to NARA – would have the potential to discourage their continued creation and use by Congress, and thereby to impair one of the important mechanisms by which Congress conducts the people's business.

Both parties have consented to the House's participation as amicus in this matter. *See* Notice of Intent to File Brief as Amicus Curiae (Nov. 8, 2013).

PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

In 2009, after the collapse of several major domestic financial institutions and the ensuing nationwide financial crisis, Congress "established" the FCIC "in the legislative branch" for the purpose of "examin[ing] the causes . . . of the current financial and economic crisis in the United States." Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 5(a), 123 Stat. 1617, 1625 (2009) ("FERA"). Over the next approximately 18 months, the FCIC took testimony from more than 700 witnesses and gathered a substantial volume of documents. *See* The Fin. Crisis Inquiry Report, Final Report of the Nat'l Comm'n on the Causes of the Fin. & Econ. Crisis in the United States, at xi (2011) ("FCIC Final Report"), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf. The FCIC submitted its final report to Congress on January 27, 2011, and, pursuant to its authorizing statute, ceased operations shortly thereafter. *See* FERA § 5(i) ("The Commission . . . shall terminate 60 days after the date on which [its] final report is submitted . . . .").

Shortly before it ceased operations, the FCIC advised the Archivist of the United States of its intent to transfer its records to NARA for preservation and public access, subject to various limitations on public access to the records. *See* Letter from Phil Angelides, Chairman, FCIC, to the Hon. David Ferriero, Archivist, at 1 (Feb. 10, 2011) (App. at A033). The FCIC's records then were

transferred to NARA pursuant to a written agreement which expressly incorporated the restrictions on disclosure set forth in the Angelides letter. *See* Agreement to Transfer Records to the Nat'l Archives of the United States (Feb. 11, 2011) (App. at A036); *Cause of Action v. Nat'l Archives & Records Admin.*, 926 F. Supp. 2d 182, 184 (D.D.C. 2013) (App. at A390).

On October 3, 2011, Cause of Action submitted to NARA a FOIA request for certain FCIC documents. *See* Letter from Amber D. Taylor, Sr. Att'y, Freedom Through Justice Foundation, to Gary M. Stern, Gen. Counsel, NARA (Oct. 3, 2011) (App. at A014-20). NARA denied the request on the ground that the FCIC's records were not "agency records" and, therefore, not subject to FOIA. *See* Letter from Matt Fulgham, Assistant Dir., Ctr. for Legislative Archives, to Amber D. Taylor, Sr. Att'y, Freedom Through Justice Foundation (Dec. 1, 2011) (App. at A021-22). Subsequently, NARA also denied Cause of Action's administrative appeal. *See* Letter from Debra S. Wall, Dep'y Archivist of the U.S., to Daniel Epstein, Exec. Dir., Cause of Action (Feb. 6, 2012) (App. at A027-31).

In August 2012, Cause of Action sued, contending *only* that NARA had violated FOIA. *See* Compl. ¶¶ 43-46 (Aug. 14, 2012) (Count 1, for Violation of FOIA) (App. at A012). NARA moved to dismiss on the grounds that (i) the FCIC's records are exempt from FOIA because they are legislative, and legislative records transferred to NARA retain their legislative character; and (ii) NARA lacks

sufficient control over the FCIC records to render them "agency records" subject to FOIA. *See* Def.'s Mem. in Supp. of Mot. to Dismiss at 9-26 (Oct. 1, 2013) (App. at A052-69).

The District Court granted NARA's motion on the ground that NARA did not exercise sufficient control over the FCIC documents to render them "agency records" subject to FOIA, *see Cause of Action*, 926 F. Supp. 2d at 185, 188-89 (App. at A393, A397-99). It did not address NARA's first argument, *see id*. at 187 (App. at A396).

ARGUMENT

The House urges this Court to affirm the District Court on the ground that the FCIC records are exempt from FOIA because they were legislative when created or collected, and remained legislative when deposited with NARA by virtue of NARA's sole function as a repository with respect to those records.

In Part I below, we explain why the FCIC was part of the Legislative Branch and its records legislative in nature. We first describe congressional commissions generally, including their characteristics and important role in the legislative process, and why that role is operationally indistinguishable from the role played by congressional committee staffers and legislative branch entities such as the Governmental Accountability Office ("GAO"), the Congressional Budget Office

("CBO"), and the Congressional Research Service ("CRS"). We then explain why the FCIC in particular should be regarded as an auxiliary of the legislative branch.

In Part II below, we explain why the FCIC records legally are exempt from FOIA, notwithstanding the fact that they now are held by NARA.[3]

I. The FCIC Was Part of the Legislative Branch, and Its Records Are Legislative.

A. Congressional Commissions Are Established in the Legislative Branch and Operate as Auxiliaries to the House and Senate.

Congress normally exercises the great bulk of its legislative and oversight jurisdiction through standing and ad hoc committees. *See, e.g.*, House Rule X (organization of House committees, including legislative jurisdiction, oversight responsibilities, and committee staffs); House Rule XI (procedures of committees, including records, meetings and hearings, and subpoena power). While Committees are composed of Members, they are staffed by non-Members, and it is the non-Member staffers who, at the direction of the Members, do a substantial amount of the fact-gathering, as well as the initial analysis, drafting, and

[3] NARA argues separately that this Court may affirm the District Court on the ground that the FCIC records are not "agency records" for FOIA purposes because NARA does not "control" them. *See* Br. for the Appellee at 34-52 (Nov. 15, 2013). While we concur with that argument, we believe the Court can and should affirm on the alternate, less fact-intensive ground set forth in this brief, and concurred in by NARA, *see id*. at 25-34, which would render it unnecessary for the Court to reach NARA's "control" argument.

formulating of legislative and policy proposals that underpin the work of congressional committees.[4]

Congress – and congressional committees in particular – also rely on separate Legislative Branch entities such as GAO, CBO and CRS to carry out the investigative and analytical work that otherwise might be performed by committee staffers. *See, e.g.*, *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 844 (1983) ("The GAO is an independent agency within the legislative branch that exists in large part to serve the needs of Congress."); *Bowsher v. Synar*, 478 U.S. 714, 731 (1986) ("The Comptroller General and the GAO are 'a part of the Legislative Branch.'" (quoting 59 Stat. 616, 63 Stat. 205)); *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 430 n.11 (S.D. Ohio 2011) ("[CRS] works exclusively for the United States Congress. . . . As a legislative branch agency within the Library of Congress, CRS has been a valued and respected resource on Capitol Hill for nearly a century.").

[4] In the Speech or Debate context, the courts repeatedly have recognized the legislative role played by committee staffers. *See, e.g.*, *Gravel v. United States*, 408 U.S. 606, 616 (1972) (in applying Speech or Debate Clause, "a Member and his aide are to be treated as one" (quotation marks omitted)); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 507 (1975) (dismissing on Speech or Debate grounds claims asserted against committee counsel: "We draw no distinction between the Members [of the committee] and the Chief Counsel."); *Pentagen Techs. Int'l, Ltd. v. Comm. on Appropriations*, 20 F. Supp. 2d 41, 43-44 (D.D.C. 1998) (dismissing on Speech or Debate grounds claim against House committee predicated on investigative work of committee staff), *aff'd*, 194 F.3d 174 (D.C. Cir. 1999).

For instance, GAO frequently is tasked by congressional committees to perform complex audits and in depth evaluations of specific federal agencies and/or programs. CBO supports the legislative process by producing analyses of budgetary and economic issues; providing budgetary advice on legislative proposals at all stages of the lawmaking process; and issuing formal, detailed cost estimates of bills reported by congressional committees. And subject matter experts at CRS assist congressional committees in identifying public policy problems as well as analyzing the potential consequences of various policy options.[5]

Congress also has found it useful, in some circumstances, to utilize congressional commissions to perform some of these tasks. *See* Cong. Research Serv., *Congressional Commissions: Overview, Structure, and Legislative Considerations* 5 (2013) ("CRS Report") (Addend. at AD019, AD027-28) (from 1989-2012, Congress created 96 such commissions).

[5] In the Speech or Debate context, the courts repeatedly have recognized the legislative role played by these types of Legislative Branch entities. *See, e.g.*, *Chapman v. Space Qualified Sys. Corp.*, 647 F. Supp. 551, 553-54 (N.D. Fla. 1986) (quashing on Speech or Debate grounds subpoena to GAO, an arm of Congress); *Webster v. Sun Company, Inc.*, 561 F. Supp. 1184, 1188-90 (D.D.C. 1983) (Speech or Debate protections apply to employees of CRS, an arm of Congress), *vacated and remanded on other grounds*, 731 F.2d 1 (D.C. Cir. 1984); *Easton v. Office of Tech. Assessment*, No. 86-1863, at 8-11 (D.D.C. Feb. 6, 1987) (dismissing, on Speech or Debate grounds, suit against Office of Technology Assessment, an arm of Congress) (Addend. at AD011-12).

In terms of structure and organization, congressional commissions normally are (i) established by statute; (ii) consist of varying numbers of members with relevant areas of expertise, all or most of whom are appointed by the House and Senate Leadership; (iii) serve in an advisory capacity; (iv) report directly to Congress; and (v) exist only until a specified date or through completion of the required report. *See, e.g.*, CRS Report at 1 (Addend. at AD024); Colton C. Campbell, *Creating an Angel: Congressional Delegation to Ad Hoc Commissions*, 25 Cong. and the Presidency 161, 162-67 (1998) ("Campbell") (Addend. at AD053).

Operationally, congressional commissions – like committee staff members and Legislative Branch entities like GAO, CBO and CRS – investigate events or issues, collect evidence, analyze facts to reach judgments about causation, formulate legislative and policy proposals, and prepare and submit reports. Congress may turn to a congressional commission for a host of reasons: e.g., the need for greater expertise than may be available at the committee level; a perceived need to elevate the visibility of an issue; the fact that an issue may span multiple areas of legislative jurisdiction; the need to have an issue examined over a longer time period or in greater depth than may be practical at the committee level; or the political desirability of obtaining policy recommendations and proposals that may be characterized as non-partisan or bipartisan. *See, e.g.*, Campbell at 169. But

regardless of the reason why a congressional commission is created, the fact is that such commissions operate as auxiliaries to Congress, and generate a work product that is substantively indistinguishable from the work product of congressional committee staff and Legislative Branch entities such as GAO, CBO and CRS. Three recent examples demonstrate this point.

The 9/11 Commission. In 2002, Congress created the National Commission on Terrorist Attacks Upon the United States ("9/11 Commission"). *See* Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, §§ 601-11, 116 Stat. 2383, 2408-13 (2002). The 9/11 Commission was "established in the legislative branch," *id.* § 601, and composed of 10 members, nine of whom were appointed by Members of Congress, *see id.* § 603(a)(2)-(6).[6] The 9/11 Commission was granted numerous powers akin to those of a congressional committee, including the power to hold hearings, receive evidence, and administer oaths, *see id.* § 605(a)(1)(A), and issue and enforce its own subpoenas, *see id.* § 605(a)(2). In addition, the 9/11 Commission was authorized "to secure directly from any executive department, bureau, agency, board, commission, office, independent establishment, or instrumentality of the Government, information, suggestions, estimates, and statistics . . . ." *Id.* § 605(c)(1).

[6] The tenth member of the 9/11 Commission was appointed by the President. *See id.* § 603(a)(1).

Pursuant to its authorizing legislation, *id.* at § 610(b), the 9/11 Commission submitted to Congress a final report that contained an exhaustive accounting of the facts and circumstances surrounding the terrorist attacks of September 11, 2001, as well as recommendations for corrective measures intended to help avert future acts of terror. *See generally* National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report (2004), *available at* http://9-11commission.gov/Report/911Report.pdf. The 9/11 Commission's report contained recommendations for changes to numerous areas of U.S. law and policy, including (i) organization and oversight of the intelligence community and Department of Defense; (ii) border, transportation, and critical infrastructure security; (iii) emergency preparedness; and (iv) government information policy, many of which recommendations subsequently were enacted into law. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (2007).

The 9/11 Commission closed its doors within 60 days after it submitted its report, pursuant to its authorizing statute. *See* Pub. L. No. 107-306 at § 610(b), (c)(1).

Oversight Panel. In 2008, Congress created the Congressional Oversight Panel "as an establishment in the legislative branch" for the purpose of reviewing the current state of the financial markets and the regulatory system. *See*

Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 125,122 Stat. 3765, 3791 (2008), codified at 12 U.S.C. § 5233(a), (b). The Oversight Panel, the members of which were appointed by House and Senate leaders, *see* 12 U.S.C. § 5233(c)(1), was directed to report to Congress regarding the impact, extent, and effectiveness of the programs created by the Act, as well as to produce a special report on regulatory reform, *see id.* § 5233(b)(1), (2). The Oversight Panel was empowered to hold hearings, receive evidence, and "administer oaths or affirmations to witnesses appearing before it," *id.* § 5233(e)(1), as well as to secure information directly from any department or agency of the United States, *see id.* § 5233(e)(3).

The Oversight Panel operated for approximately three years, during which time it produced 28 reports on specific issues – e.g., farm loan restructuring, foreclosure mitigation efforts, commercial real estate losses, small business credit crunch, and the rescue of AIG – plus the required report on regulatory reform in January 2009, plus a final report two years later in March 2011. *See* Congressional Oversight Panel: Congressional Oversight Panel Reports, *available at* http://cybercemetery.unt.edu/archive/cop/20110401223225/http:/cop.senate.gov/reports/.

Subsequently, the Oversight Panel terminated its operations, pursuant to its authorizing statute. *See* 12 U.S.C. §§ 5233(f), 5230 (requiring Panel to terminate six months after sunset of underlying authority provided for by Act).

Strategic Posture Commission. Also in 2008, Congress created the Congressional Commission on the Strategic Posture of the United States to "examine and make recommendations with respect to the long-term strategic posture of the United States." National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1062(a), 122 Stat. 3, 319 (2008). The Commission's 12 members were appointed by the Chairs and Ranking Members of the House and Senate Armed Services Committees. *See id.* § 1062(b)(1). The authorizing statute required the Secretaries of State, Defense, and Energy, as well as the Director of National Intelligence and "any other United States Government official" to provide the Strategic Posture Commission with "full and timely cooperation" in the carrying out of its duties and responsibilities. *Id.* § 1062(d)(1). The statute also directed the Commission to submit a report recommending a strategic posture and nuclear weapons strategy for the United States not later than December 1, 2008, *see id.* § 1062(e), and to terminate on June 1, 2009, *see id.* § 1062(g).

The Strategic Posture Commission met and deliberated for more than 11 months, and ultimately submitted its final report to Congress on May 6, 2009. *See* America's Strategic Posture: The Final Report of the Congressional Commission

on the Strategic Posture of the United States (2009), *available at* http://www.usip.org/sites/default/files/America%27s_Strategic_Posture_Auth_Ed_0.pdf. The final report contains nearly 100 findings and recommendations regarding the adaptation of components of our security strategy to the challenges and opportunities confronting the country. *See id.* at xvi.

B. The FCIC Bore All the Characteristics of a Congressional Commission and Operated in Practice as an Auxiliary to Congress.

The FCIC fits very comfortably into the congressional commission framework described above. The legislative language creating the FCIC was added to FERA by way of an amendment on the Senate floor. *See* 155 Cong. Rec. S4551-4552 (daily ed. Apr. 22, 2009). One of the amendment's co-sponsors, explaining the amendment to his colleagues, noted that the FCIC was modeled after the highly successful 9/11 Commission: "We have created a bipartisan commission . . . that has both subpoena power and the funding necessary to do precisely what the 9/11 Commission did. It is structured in the same way except targeted on the investigation of the financial markets . . . ." *Id.* at S4552 (statement of Sen. Isakson).

In establishing the FCIC, Congress made perfectly clear that the Commission was part of the Legislative Branch. First, the FCIC's authorizing statute expressly states that it was "established in the legislative branch." FERA §

5(a). Second, each of the FCIC's 10 members was selected by congressional leadership. *See id.* § 5(b)(1)(A)-(D). Third, the FCIC was granted extensive information access powers akin to those of congressional committees, including the authority to issue and enforce subpoenas, *see id.* § 5(d)(2)(A), (B), and the authority to "secure directly from any department, agency, bureau . . . or instrumentality of the United States any information related to any inquiry of the Commission conducted under this section," *id.* § 5(d)(4)(A). Fourth, the statute obligated the FCIC to submit a written report to Congress detailing the Commission's findings and conclusions, and obligated its chairman to appear before the House and Senate committees of jurisdiction to answer questions about the report's findings and conclusions. *See id*. § 5(h)(1), (4). Finally, the statute mandated that the FCIC terminate its operations "60 days after the date on which the final report is submitted . . . ." *Id.* § 5(i)(1).

In practice, the FCIC clearly operated as an auxiliary to Congress, discharging responsibilities that otherwise could have been carried out by committee staffers and/or Legislative Branch entities such as GAO, CBO and CRS. As noted above, the FCIC investigated for over a year, during which time it took testimony from more than 700 witnesses and gathered and reviewed millions of pages of documents. *See* FCIC Final Report at xi. On January 27, 2011, the FCIC submitted to Congress a voluminous final report which described in detail the

FCIC majority's findings and conclusions regarding the causes of the financial crisis, including (i) failures of corporate governance and risk management; (ii) failures in financial regulation and supervision, excessive borrowing, and risky investments; (iii) lack of systemic transparency in parts of the banking and financial sectors; and (iv) a systemic breakdown in accountability and ethics. *See id.* at xviii-xxii. The FCIC Report also included two separate dissenting opinions which articulated different views about the causes of the financial crisis. *See id.* at 413-533.

Subsequently, the FCIC and its findings were referenced by Members of Congress during floor debate on legislation and policy issues. *See, e.g.*, 157 Cong. Rec. H1745 (daily ed. Mar. 11, 2011) (statement of Rep. Frank) (debating H.R. 836, Emergency Mortgage Relief Program Termination Act); 159 Cong. Rec. S5927 (July 25, 2013) (statement of Sen. Franken) (discussing credit rating agencies).

Cause of Action now asserts that the FCIC "was not an arm of the Congress," Opening Br. of Appellant-Pet'r Cause of Action at 34 (Oct. 1, 2013), because, among other things, none of its members were Members of Congress, its offices were not located in the "Congressional complex" (by which Cause of Action presumably means the Capitol and the House and Senate office buildings),

and it provided records to Stanford University and the House Oversight Committee. *See id.* at 33.[7]

However, Cause of Action does not, because it cannot, cite any legal authority for its conclusion, and it is not apparent how any of the facts it recites bear in any way on the question of whether the FCIC "was an arm of Congress." Moreover, Cause of Action's conclusion is manifestly inconsistent with the statute that created the FCIC, *see* FERA § 5(a) (FCIC "established in the legislative branch"), and inconsistent with the manner in which the FCIC operated. As discussed above, the FCIC operated in practice as an auxiliary of the Congress by collecting evidence, analyzing facts, and submitting to Congress a comprehensive report for the specific purpose of informing the legislative debate. *See supra* at 15-16. Finally, Cause of Action's conclusion is belied by the fact that (i) no Member of Congress works for GAO, CBO or CRS, all of which indisputably are arms of Congress, *see supra* at 7-10, and (ii) GAO is located at 441 G Street, N.W., in Washington, D.C., and CRS is located in the Madison Building of the Library of Congress, neither of which is "part of the Congressional complex," at least as we understand that term.

[7] Below, Cause of Action did not "seriously dispute[] that at the time the records were created by the FCIC . . . they were congressional documents exempt from FOIA." *Cause of Action*, 926 F. Supp. 2d at 185 (App. at A393).

Accordingly, it simply is not credible to suggest, as Cause of Action now belatedly does, that the FCIC was not part of the Legislative Branch.

II. The FCIC Records Are Exempt from FOIA, Even Though Now Held by NARA.

A. The FCIC Records, Like the Records of Other Legislative Entities, Were Exempt from FOIA Prior to Their Transfer to NARA.

FOIA applies only to "agencies," which encompasses "any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f)(1). Not only does this definition of "agency" not explicitly include any Legislative Branch entity, FOIA in fact expressly incorporates the definition of "agency" contained in the Administrative Procedure Act ("APA") which unambiguously excludes "the Congress." *See* 5 U.S.C. § 551(1)(A) ("'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include – (A) the Congress").[8]

[8] Certain Legislative Branch entities, not covered by FOIA, are required by their statutory charters to disclose specified information, *see* 2 U.S.C. § 603 (requiring CBO to make certain information publicly available), or voluntarily have adopted disclosure policies, *see, e.g.*, 4 C.F.R. §§ 81.1-81.8 (GAO); 36 C.F.R. §§ 703.1-703.8 (Library of Congress).

In light of this plain language, it is no surprise that this Court has held unambiguously that "[C]ongressional documents . . . are not subject to FOIA at all . . . ." *United We Stand Am.*, 359 F.3d at 603; *see also* Order, *Smith v. U.S. Congress*, No. 95-5281, 1996 WL 523800, at *1 (D.C. Cir. Aug. 28, 1996) ("[FOIA] . . . does not apply to congressional documents." (citing *Goland v. CIA*, 607 F.2d 339, 348 (D.C. Cir. 1978))).

Moreover, both the Supreme Court and this Court have construed broadly the exclusion of "the Congress" from the APA's definition of "agency" which FOIA incorporates. For example, the Supreme Court has recognized that the Library of Congress, an entity within the Legislative Branch, is not an "agency" for FOIA purposes. *See Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 145 (1980) ("FOIA d[oes] not directly provide for relief since the records were in the custody of the Library of Congress, which is not an 'agency' under the Act."); *see also Wash. Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994) ("[W]e have interpreted the APA exemption for "the Congress' [in 5 U.S.C. § 551(1)] to mean the entire legislative branch. . . . Thus we have held that the Library of Congress (part of the legislative branch but a separate entity from 'the Congress,' narrowly defined) is exempt from the APA because its provisions do not apply to 'the Congress' – that is, the legislative branch."). So too has this Court broadly construed the APA/FOIA exemption for

"the courts of the United States, 5 U.S.C. § 551(1)(B). *See, e.g.*, *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974) ("The exemption of the [Probation Service, an entity within the Judicial Branch, from the APA] is warranted . . . by its status as an auxiliary of the courts, which, unlike agencies of the executive branch, are specifically excluded.").

It follows that the FCIC, which plainly was a Legislative Branch entity for all the reasons discussed above, *see supra* at 14-18, was exempt from FOIA, and FOIA's disclosure obligations did not apply to FCIC's records prior to their transfer to NARA.

B. Transfer of the FCIC Records to NARA Did Not Alter Their Legislative Character or Their FOIA-Exempt Status.

NARA is unique among federal Executive Branch agencies in that its "exclusive function is to store and maintain" records from all three branches of the federal government. *Cause of Action*, 926 F. Supp. 2d at 187 (App. at A396); *see also* 44 U.S.C. § 2107(1) (authorizing Archivist to accept records he deems to have "sufficient historical or other value to warrant their continued preservation by the United States Government"). As a result, the transfer of the records of the FCIC (a FOIA-exempt entity for the reasons discussed above) to NARA should not, as a matter of law, transform the FCIC's records into "agency records" subject to disclosure under FOIA, notwithstanding that NARA itself is subject to FOIA with respect to its own records.

It is true that, with respect to other Executive Branch agencies, legislative records, under certain circumstances, can become "agency records" if they are obtained by the agency and in the agency's control. For example, in *Holy Spirit Ass'n for the Unification of World Christianity v. CIA*, 636 F.2d 838, 842-43 (D.C. Cir. 1980), *vacated in part*, 455 U.S. 997 (1982), the CIA received a FOIA request for records relating to the Unification Church. *See* 636 F.2d at 839. The CIA withheld some responsive documents on the ground that they were not agency records because they were either (i) documents generated by Congress, or (ii) documents created by the CIA but related to congressional investigations, and thus exempt from FOIA. *See id*. at 840. This Court held that all of the withheld documents were "agency records" because Congress had "failed to express with sufficient clarity its intent to retain control over the documents." *Id.*

Similarly, in *Paisley v. CIA*, 712 F.2d 686, 695-96 (D.C. Cir. 1983), *vacated in part*, 724 F.2d 201 (D.C. Cir. 1984), the FOIA requester sought from the CIA, FBI and DOD "any and all records in whatever form and wherever situate with respect to . . . John A. Paisley," a former CIA employee who was found dead under suspicious circumstances. 712 F.2d at 689. The CIA withheld several responsive documents on the ground that they were congressional records. *See id.* at 690. This Court held that the withheld documents were "agency records" even though

created in response to a congressional investigation because Congress had not manifested any intent to control them. *See id.* at 693-97.

However, these holdings should not be applied to NARA. In both *Holy Spirit* and *Paisley*, the FOIA requesters sought "agency records" that reflected the functions and activities of the agency from which they were sought. Under those circumstances, it was appropriate to apply the control test inasmuch as the revelation of information about the decision-making processes of Executive Branch agencies is one of the principal objectives of FOIA. *See, e.g., Berry v. Dep't of Justice*, 733 F.2d 1343, 1349-50 (9th Cir. 1984).

Here, the exact opposite is true. The FCIC records Cause of Action seeks in no way relate to NARA's duties or functions as the repository for national documents of historical significance, nor do the records sought address the internal processes or decision-making in which NARA engages.

For these reasons, it is appropriate to treat NARA as the unique entity that it is, and to hold as a matter of law that when legislative – and judicial – records are transferred to NARA for repository purposes, those records do not thereby become "agency records" subject to disclosure under FOIA, and that the control test is inapplicable in such circumstances.

III. House Committee Access to FCIC Records Held by NARA Is Not Relevant to Cause of Action's FOIA Claim.

Cause of Action suggests, in passing, that the District Court mischaracterized NARA as "merely a repository," Br. for Appellant-Pet'r at 40, because NARA produced some FCIC records to Congress. *See id.* at 39.[9] But the fact that Congress obtained some FCIC records from NARA is neither here nor there insofar as Cause of Action's FOIA claim is concerned.

Congress's authority to obtain information in furtherance of its legislative and oversight functions – by subpoena or otherwise – is securely rooted in Article I of the Constitution, and is unlike the public's right of access to certain federal records by virtue of FOIA. *See, e.g.*, *Eastland*, 421 U.S. at 504 n.15 ("scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution" (quotation marks omitted)); *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It

[9] In February 2011, the House Committees on Oversight and Government Reform, and on Financial Services, asked the Archivist to provide them with access to certain FCIC electronic records for use by those committees in carrying out their official responsibilities. *See* Letter from Darrell Issa, Chairman, House Comm. on Oversight and Gov't Reform, and Spencer Bachus, Chairman, House Comm. on Fin. Serv., to the Hon. David Ferriero, Archivist (Feb. 18, 2011) (App. at A250-51). In response, NARA provided the two committees with copies of the requested records on March 3-4, 2011. *See* Supplemental Decl. of Robert M. Fulgham, Jr. ¶ 3 (App. at A358).

encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.").

In furtherance of its legislative and oversight responsibilities, Congress routinely requests on an informal basis information from Executive Branch agencies, and Executive Branch agencies usually – not always, but usually – cooperate because they understand that Congress requires information in order to carry out its Article I responsibilities, and that Congress possesses the power to compel the production of information if necessary. There is nothing remarkable about this. And the House Committees' receipt of information from NARA here was particularly unremarkable inasmuch as the information sought concerned a Legislative Branch entity that Congress had created to aid itself.

In short, as a legal matter, the fact that Congress obtained FCIC records from NARA is irrelevant insofar as Cause of Action's FOIA claim is concerned. *See, e.g.*, *Murphy v. Dep't of the Army*, 613 F.2d 1151, 1158 (D.C. Cir. 1979) ("If one consequence of the facilitation of such access is that some information will be disclosed to congressional authorities but not to private persons, that is but an incidental consequence of the need for informed and effective lawmakers.").[10]

[10] Cause of Action's related suggestion that "[s]ince the FCIC terminated and had no successor in function, and since the FCIC was an agency under the Federal Records Act, 44 U.S.C. § 2108(a) [("FRA")], the [FRA] gives NARA complete discretion to determine what, if any, access restrictions should be placed

(*Continued* . . .)

CONCLUSION

For all the foregoing reasons, the House respectfully urges this Court to affirm the District Court on the ground that the FCIC records at issue are exempt from FOIA because they were legislative when created or collected, and they retained their legislative character when deposited with NARA.

---

on the FCIC records," Br. for Appellant-Pet'r at 30, also is misplaced, for two reasons. First, as a legal matter, NARA does not have complete discretion to determine access restrictions for the FCIC records. The access restrictions are governed by the Agreement to Transfer Records to the National Archives of the United States (Feb. 11, 2011) (App. at A036). That agreement did not forfeit its validity simply because the FCIC ceased to exist, nor has Cause of Action cited any precedent that suggests otherwise.

Second, even if NARA had some discretion here, there is no claim in this case that NARA misused its discretion in any way. Cause of Action's only claim in this matter arises under FOIA, *see* Compl. ¶¶ 43-46 (App. at A012), and records management statutes, like the FRA, "'cannot be used as the divining rod for the meaning of agency records under FOIA.'" *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 289 (D.C. Cir. 2006) (quoting *Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1493 (D.C. Cir. 1984)); *see also id.* ("[T]he treatment of documents for disposal and retention purposes under the various federal records management statutes [does not] determine[] their status under FOIA." (quotation marks omitted)). Application of the FRA to the FCIC ensures consistent record keeping and maintenance with respect to historically important documents; it has no bearing on Cause of Action's FOIA claim.

Respectfully submitted,

KERRY W. KIRCHER, D.C. Bar # 386816
General Counsel
WILLIAM PITTARD, D.C. Bar #482949
Deputy General Counsel
CHRISTINE DAVENPORT, NJ Bar #043682000
Senior Assistant Counsel
/s/ Todd B. Tatelman
TODD B. TATELMAN, VA Bar #66008
Assistant Counsel
MARY BETH WALKER, D.C. Bar #501033
Assistant Counsel
ELENI M. ROUMEL, SC Bar #75763
Assistant Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)
Todd.Tatelman@mail.house.gov

Counsel for Amicus Curiae

November 22, 2013

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 5,999 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

/s/ Kerry W. Kircher
Kerry W. Kircher

CERTIFICATE OF SERVICE

I certify that on November 22, 2013, I filed via the Court's CM/ECF system the foregoing Brief of the Bipartisan Legal Advisory Group of the U.S. House of Representatives as Amicus Curiae Supporting Affirmance and served via the CM/ECF system all parties for whom counsel has entered an appearance by operation of the Court's CM/ECF system.

/s/ Kerry W. Kircher
Kerry W. Kircher