No. 03-475

In the Supreme Court of the United States

IN RE RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1, §§ 1 *et seq.*, can be construed, consistent with the Constitution, principles of separation of powers, and this Court's decisions governing judicial review of Executive Branch actions, to authorize broad discovery of the process by which the Vice President and other senior advisors gathered information to advise the President on important national policy matters, based solely on an unsupported allegation in a complaint that the advisory group was not constituted as the President expressly directed and the advisory group itself reported.

2. Whether the court of appeals had mandamus or appellate jurisdiction to review the district court's unprecedented discovery orders in this litigation.

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The Solicitor General, on behalf of Richard B. Cheney, Vice President of the United States, the former National Energy Policy Development Group (NEPDG), and former members and staff of the NEPDG, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 334 F.3d 1096. The orders of the district court (App., *infra*, 46a-52a) are unreported, although its earlier opinion in this case (*id.* at 53a-123a) is reported at 219 F. Supp. 2d 20.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2003. A petition for rehearing was denied on

September 10, 2002 (App., *infra*, 124a-125a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 1, are reproduced in Appendix F, *infra*, 126a-134a.

STATEMENT

1. President Bush established the NEPDG as an entity within the Executive Office of the President in a memorandum dated January 29, 2001. See C.A. App. 117. The President named the Vice President to preside over meetings and direct the work of the NEPDG and ordered that the membership of the NEPDG shall "consist[] of * * * the Vice President, Secretary of the Treasury, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Transportation, Secretary of Energy, Director of the Federal Emergency Management Agency, Administrator of the Environmental Protection Agency, Assistant to the President and Deputy Chief of Staff for Policy, Assistant to the President for Economic Policy, and Assistant to the President for Intergovernmental Affairs." *Id.* at 117-118. The President also authorized the Vice President to invite the Chairman of the Federal Regulatory Commission, the Secretary of State, and "as appropriate, other officers of the Federal Government" to participate in the work of the NEPDG. *Id.* at 118. The NEPDG's mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." *Ibid.* It was directed to "gather information,

deliberate, and, as specified in this memorandum, make recommendations to the President." *Ibid.*

On May 16, 2001, the NEPDG issued a public report containing a set of recommendations to enhance energy supplies and encourage conservation. See NEPDG, *National Energy Policy: Reliable, Affordable, and Environmentally Sound Energy for America's Future* (*NEPDG Report*) at iii (*available at* <www.whitehouse.gov/energy/National-Energy-Policy.pdf>). The report included a list of the members of the NEPDG. *Id.* at v. In accordance with the President's January 2001 memorandum, C.A. App. 117-118, all of the members identified in the NEPDG Report were "officers of the Federal Government." Indeed, the NEPDG members identified in the Report were precisely the same cabinet-level officials and assistants to the President named in the President's memorandum. The NEPDG was terminated on September 30, 2001. *Id.* at 119, 257-258.

2. Plaintiffs Judicial Watch, Inc. and Sierra Club filed these consolidated actions against the Vice President, the NEPDG, and various federal officials and private individuals, alleging that the NEPDG included private citizens as unofficial de facto members and so the NEPDG was an advisory committee subject to FACA and all its disclosure requirements. Plaintiffs requested access to NEPDG documents and a declaration that the defendants violated FACA. C.A. App. 35-36, 48, 113-115. The government filed motions to dismiss, which the district court granted in part and denied in part. App., *infra*, 121a.

The court recognized that FACA itself provides no private right of action, but it held that the statute is enforceable through either the Administrative Procedure Act (APA) or mandamus. App., *infra*, 73a-97a.

The court recognized that the Vice President is not an "agency" within the meaning of the APA, *id.* at 78a-79a, but, without deciding the question, left open the prospect that the Vice President could be sued through mandamus and therefore kept the Vice President in this litigation, *id.* at 96a-97a. It also deferred ruling on the government's contention that applying FACA to the NEPDG would violate the separation of powers and interfere with core Article II prerogatives. *Id.* at 97a-119a. Although the court acknowledged "the seriousness of the constitutional challenge raised by defendants," *id.* at 98a, and recognized that discovery could raise related constitutional questions, *id.* at 118a, it nonetheless allowed discovery to proceed in the hope that it might obviate the need to resolve the constitutional questions, *id.* at 97a-119a.

The court directed plaintiffs to submit a proposed discovery plan, which it approved on August 2, 2002, directing the government to "fully comply with" plaintiffs' discovery requests or "file detailed and precise objections to particular requests." App., *infra*, 50a-51a. Among other things, the district court approved the plaintiffs' request for the production of documents and information concerning communications between individual NEPDG members outside the context of group meetings, between members and agency personnel, and between members and outside individuals. See, *e.g.*, C.A. App. 246, 251, 253.

The government sought a protective order with respect to discovery against the Office of the Vice President and urged the district court to consider a motion for summary judgment and rule on the basis of the administrative record in accordance with established procedure that would be applicable in a suit under the APA. In addition, the government submitted an affida-

vit of Karen Knutson, the Deputy Assistant to the Vice President for Domestic Policy, who detailed attendance at all meetings of the NEPDG and of a so-called "Staff Working Group." C.A. App. 257, 260-262. Ms. Knutson confirmed that all members of the NEPDG, and persons who attended its meetings, were government officers or employees. See *id.* at 261-262. The district court denied the government's motion for a protective order, App., *infra*, 47a, and forbade the government to file a motion for summary judgment pending further order of the court, C.A. App. 264.

3. The Vice President and the other defendants filed a petition for writ of mandamus, asking the court of appeals to vacate the district court's discovery orders, direct the district court to decide the case on the basis of the administrative record and any supplemental affidavits that the court might require, and dismiss the Vice President as a defendant. The Vice President also filed a notice of appeal, invoking the court's appellate jurisdiction under 28 U.S.C. 1291, see *United States* v. *Nixon*, 418 U.S. 683 (1974).

A divided panel of the court of appeals denied relief. The panel majority held that it lacked jurisdiction to issue a writ of mandamus because the district court's refusal to proceed on the basis of the administrative record and to dismiss the Vice President "can be fully addressed, untethered by anything we have said here, on appeal following final judgment." App., *infra*, 19a. The court dismissed the Vice President's appeal for lack of jurisdiction, holding that the absence of any claim of executive privilege in this case rendered *Nixon*, *supra*, inapposite. *Id.* at 23a.

Judge Randolph dissented. He criticized the majority's reliance on the holding in *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898,

915 (D.C. Cir. 1993) (*AAPS*), that an outside consultant may "be properly described as a member of an advisory committee if his involvement and role are functionally indistinguishable from those of the other members." App., *infra*, 31a, 34a. That holding, Judge Randolph argued, makes "extensive discovery into the Executive Office of the President * * * inevitable." *Id.* at 35a. Judge Randolph concluded that "[f]or the judiciary to permit this sort of discovery, authorized in the name of enforcing FACA—a statute providing no right of action * * *—strikes me as a violation of the separation of powers." *Id.* at 37a. In order to avoid the constitutional difficulties that *AAPS* creates, Judge Randolph urged reliance on a General Services Administration regulation that, during the time period relevant to this case, defined "committee member" to mean "an individual who serves by appointment on a committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations." See *id.* at 42a-44a (quoting 41 C.F.R. 101-6.1003 (2000)).

4. On September 10, 2003, the court of appeals denied rehearing en banc, with Judges Randolph, Sentelle, and Roberts dissenting and Judge Henderson noting her recusal. App., *infra*, 124a-125a.

REASONS FOR GRANTING THE PETITION

These cases present fundamental separation-of-powers questions arising from the district court's orders compelling the Vice President and other close presidential advisors to comply with broad discovery requests by private parties seeking information about the process by which the President received advice on important national policy matters from his closest advisors. Those orders subject the Vice President and

other senior presidential advisors to discovery at least as broad and constitutionally problematic as the disclosure requirements imposed by FACA itself, in order to determine whether FACA even applies. They do so, moreover, based solely on an unsupported allegation in a complaint that the NEPDG included unauthorized de facto members—an allegation that is contradicted by the President's order creating the NEPDG, by the NEPDG's published report, and by a declaration by a top NEPDG staff person, all of which confirm that there were no non-governmental NEPDG members, de facto or otherwise.

Any construction of the FACA that would permit discovery of the Vice President and other presidential advisors in such circumstances would violate fundamental principles of the separation of powers. The court of appeals exacerbated those separation-of-powers problems by holding that it lacked mandamus and appellate jurisdiction because the orders are discovery orders that generally cannot support immediate appellate review. But those orders are far from ordinary discovery orders. They would subject the President to intrusive and distracting discovery every time he seeks advice from his closest advisors. They would open the way for judicial supervision of internal Executive Branch deliberations. Moreover, in the context of a statute that this Court has recognized raises serious constitutional concerns in large measure because of its disclosure requirements, it is no answer to say that discovery orders that are more extensive than the disclosure triggered by a statutory violation do not raise serious and ripe constitutional issues. As Judge Randolph explained in his dissenting opinion: "As applied to committees the President establishes to give him advice, FACA has for many years teetered on the edge

of constitutionality. The decision in this case pushes it over." App., *infra*, 31a (citing Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51 (1994)).

While this Court has recognized the constitutional difficulties presented by FACA and has interpreted it to avoid constitutional problems, see *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440 (1989), the decisions by the panel and the district court will routinely generate the kind of intrusions into the Executive Branch that this Court has sought to avoid. The decision below also conflicts with this Court's decisions governing judicial review of Executive Branch actions. Plenary review by this Court is warranted to resolve those conflicts and to ensure that FACA does not intrude on the President's vital interests in receiving unregulated and uninhibited advice from his closest advisors or on the unique relationship between the President and the Vice President.

A. The Decisions Below Work A Wholesale Expansion Of FACA And Conflict With This Court's Decisions Governing The Separation Of Powers And Judicial Review Of Executive Branch Actions

Throughout this litigation, the Vice President has respectfully but resolutely maintained that, in the circumstances of this case, the legislative power and judicial power cannot extend to compelling a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from the Vice President, heads of departments and agencies, and assistants to the President in the President's exercise of powers committed exclusively to the President by the Constitution, specifically by the Recommendations and Opinions Clauses. See

U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3. The district court recognized the seriousness of those concerns, but then ordered sweeping discovery raising equally serious separation-of-powers problems, and the court of appeals' decision immunizes those separation-of-powers violations from effective review. By working an unprecedented and unwarranted expansion of FACA and disregarding established principles of judicial review of Executive Branch actions, as well as interbranch comity, the decisions of the court of appeals and district court threaten substantial interference with vital Executive Branch functions.

1. The Decisions Below Effectively Eliminate Constitutionally-Necessary Limits On FACA's Reach

The orders of the court of appeals and the district court find no basis in FACA's text or purposes. Rather, they are clearly premised on the view that FACA and its disclosure requirements apply to an advisory group established by the President to consist only of full-time government employees, if the "de facto" membership deviates from that established by the President. Those decisions effectively undermine Congress's judgment that FACA is not to be applied to a group established by the President and composed entirely of "full-time, or permanent part-time, officers or employees of the Federal Government," 5 U.S.C. App. 2, § 3(2). That provision reflects Congress's own effort to limit the separation-of-powers difficulties inherent in FACA. Nevertheless, the decisions below engender those difficulties by eliminating this key textual protection as a practical matter by ordering discovery obligations at least as onerous as the disclosure obligations imposed by FACA—all upon the mere allegation that, contrary to the President's express

directive and the group's own report, there was a non-governmental member of the committee. Under the court of appeals' approach, the President and Vice President would be subject to discovery any time they sought advice from their advisors, even where, as here, the President seeks the benefits of confidential advice only from his closest advisors and expressly structures the process so that FACA does not apply. Nothing in FACA supports such a result.

Both the court of appeals and the district court based their holdings effectively repealing FACA's textual exemption for advisory groups made up exclusively of governmental officials—an exception that is necessary to avoid unconstitutional interference with the Executive—on the notion adopted by the District of Columbia Circuit in *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898 (1993) (*AAPS*), that an advisory committee could include "de facto" members. In *AAPS*, the court of appeals held that courts could look beyond formal membership to determine whether persons formally designated as "consultants" to working groups associated with First Lady Hillary Clinton's health care task force "may still be properly described as * * * member[s] of an advisory committee," because their "involvement and role are functionally indistinguishable from those of the other members." *Id.* at 915. The decisions below extend *AAPS* beyond the advisory process at issue there, which was expressly designed to include non-governmental advisors, to a committee formally established by the President as composed exclusively of government officials.

The notion of de facto membership applied below has no support in FACA's text. See App., *infra.*, 31a-38a (Randolph, J., dissenting). FACA plainly envisions only advisory committees "established or utilized by the

President" or an agency, 5 U.S.C. App. 2, § 3(2), and it expressly forbids the establishment of an advisory committee "unless such establishment is," *inter alia*, "specifically authorized by statute or by the President," 5 U.S.C. App. 5, § 9(a). Thus, by its terms, FACA recognizes that the question whether an advisory group established by the President is subject to the statute's disclosure and reporting requirements is principally determined by the group's formal structure as established by the President. Here, the record is clear that the NEPDG, as "established" by the President, was comprised wholly of government officials and employees.

In contrast to the clear implication of FACA's text, the de facto member doctrine applied below makes the President's memorandum establishing the NEPDG largely irrelevant to the question of FACA's applicability. By so doing, that doctrine also conflicts with the relevant General Services Administration regulation, 41 C.F.R. 101-6.1003 (2000), which makes clear that whether a presidential advisory group is subject to FACA turns on the formal structure given it by the President, not on some loose notion of de facto membership.[1] Moreover, as Judge Randolph explained in his dissent below—and as this case amply demonstrates—

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[1] At the time the President formed the NEPDG, the GSA regulation defined "*Committee member*" to mean "an individual who serves by appointment on an advisory committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations." 41 C.F.R. 101-6.1003 (2000). Effective August 20, 2001, the GSA revised the "*Committee member*" definition to read "an individual who serves by appointment or invitation on an advisory committee or subcommittee." 66 Fed. Reg. 37,728, 37,734 (2001) (codified at 41 C.F.R. 102-3.25).

the de facto member doctrine as applied below *inevitably* leads to constitutionally problematic discovery into the process by which the President receives advice from his closest advisors any time a plaintiff alleges that the committee's membership deviated materially from that established by the President. App., *infra*, 31a-38a, 43a-45a.

In the particular context of FACA, such discovery, far from being a preliminary step in determining the existence of a violation or the propriety of a remedy, is essentially indistinguishable—both in practical effect and in separation-of-powers difficulties—from the final relief that would follow from an adjudicated violation. That is especially true of an alleged FACA committee that has terminated, because prospective compliance with FACA's other requirements is impossible and the only potential remedy is disclosure of past proceedings. In short, while application of FACA to close presidential advisors has long raised significant separation-of-powers concerns—as this Court unanimously recognized in *Public Citizen*, see 491 U.S. at 466-467, 486-489—the court of appeals' construction of an extra-statutory de facto member doctrine and its green light for discovery upon the mere allegation of such de facto members plainly "push[] [FACA] over" the constitutional edge. App., *infra*, 31a (Randolph, J., dissenting).[2]

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[2] To be sure, no other court of appeals has expressly disagreed with the District of Columbia Circuit's approach in *AAPS*, *supra*, or the decision below. However, there is no impediment to bringing such actions in the District for the District of Columbia, and as the decisions below ensure that the mere allegation of de facto membership entitles the plaintiff to the same effective remedies as those that would apply in a final judgment, there is no reason for litigants to file suit anywhere else. In any event, the conflicts be-

2. The Expansion Of FACA Adopted Below Conflicts With This Court's Cases Interpreting The Constitution's Separation of Powers

Contrary to the approach taken by the court of appeals and the district court in this case, this Court in *Public Citizen*, *supra*, went to great lengths to impose limits on FACA to avoid an unconstitutional interference with efforts to advise the President in the discharge of his core Article II powers. This case implicates analogous—and, indeed, even more serious—separation-of-powers difficulties with the same statute. It therefore presents substantial questions warranting review.

Indeed, the court of appeals' approach is flatly at odds with the approach taken by this Court in *Public Citizen*. At issue in *Public Citizen* was the President's practice of having the Department of Justice seek advice from the Standing Committee on Federal Judiciary of the American Bar Association (ABA) to assist the President in fulfilling his constitutional duty to nominate and appoint federal judges. The plaintiffs in that case alleged that the ABA consultations were subject to the disclosure and other requirements of FACA because the Executive "utilized" the ABA committee as a non-governmental advisory group.

This Court disagreed. Although the Court acknowledged that the Executive may have "utilized" the ABA committee "in one common sense of the term," it recognized that adopting a broad understanding of the statute would raise significant separation-of-powers concerns, since "it would extend FACA's requirements to any group of two or more persons, or at least any

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tween the decisions below and this Court's precedents, discussed *infra*, are more than sufficient to warrant plenary review.

formal organization, from which the President or an Executive agency seeks advice." *Public Citizen*, 491 U.S. at 452; see *id.* at 466-467. As the Court explained, "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals; although its reach is extensive, we cannot believe that it was intended to cover every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Id.* at 453.

Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, concurred separately.[3] The concurring Justices agreed that "it is quite desirable not to apply FACA to the ABA Committee," but they concluded that "as a matter of fair statutory construction" there was no way to avoid that result. *Public Citizen*, 491 U.S. at 481. Instead, they would have held that application of FACA in the context of that case violated constitutional separation-of-powers principles. See *id.* at 482 ("The essential feature of the separation-of-powers issue in this suit, and the one that dictates the result, is that this application of the statute encroaches upon a power that the text of the Constitution commits in explicit terms to the President."). The concurring Justices explained that "[w]here a power has been committed to a particular Branch of the Government in the text of the Constitution," as had the President's nomination and appointment power, "the balance already has been struck by the Constitution itself," and the other Branches have no authority to regulate the exercise of that power. *Id.* at 486. Thus, "[t]he mere fact that FACA would regulate so as to interfere with

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[3] Justice Scalia took no part in the decision. *Public Citizen*, 491 U.S. at 467.

the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution to nominate federal judges is enough to invalidate the Act." *Id.* at 488-489.

This case involves the same statute and raises the same separation-of-powers concerns involved in *Public Citizen* and does so in a context in which the interference with the President is far more direct and the construction of the statute that avoids such difficulties is far more obvious. Both opinions in *Public Citizen* make clear that the construction of FACA adopted below is unconstitutional. Unlike the Executive's use of the ABA committee in *Public Citizen*, which did fit within the ordinary terms of the statute, the de facto member doctrine, especially as applied in this case, is inconsistent with FACA's text. Moreover, while the ABA committee in *Public Citizen* concededly involved individuals outside the government, here there is no basis in the record to suspect that a committee established by the President to consist exclusively of the Vice President, heads of departments, and assistants to the President in fact involved any "unofficial," non-governmental members. If the mere allegation of an unofficial, non-governmental member is enough to trigger discovery obligations roughly co-extensive with the available remedies for a FACA violation, then the textual exemption of advisory groups including only government officials, which is essential to the statute's constitutionality, has little or no practical effect. Thus, the decisions below will routinely generate the kind of intrusions that this Court sought to avoid in *Public Citizen* and other cases. Cf. *Franklin* v. *Massachusetts*, 505 U.S. 788, 800, 801 (1992) (holding that absent "an express statement by Congress," Court would not construe the APA's definition of "agency" as an

"authority of the Government of the United States" to include the President); *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (holding that telephone notes made by Henry Kissinger while he was serving as Assistant to the President were not "agency records" under the Freedom of Information Act's broad definition of agency to include "any * * * establishment in the executive branch of the Government (including the Executive Office of the President)").

It is equally clear that FACA, as interpreted below, is unconstitutional under the three-Justice concurring opinion in *Public Citizen*. See 491 U.S. at 467-489. The President organized the NEPDG to assist him in the exercise of his exclusive authority under the Constitution to "require" opinions from his advisers and to prepare "Measures" that he might recommend to Congress. U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3. Just like the appointment power at issue in *Public Citizen*, the authority to require opinions from his advisors and to recommend measures to Congress are "power[s] that the text of the Constitution commits in explicit terms to the President." 491 U.S. at 482. Accordingly, "[t]he mere fact" that FACA, as construed below, "would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his dut[ies] assigned under the Constitution * * * is enough to invalidate the Act." *Id.* at 488-489.

3. The Approach Adopted Below Conflicts With This Court's Cases Governing Judicial Review Of Executive Branch Actions

The decisions below also conflict with decisions of this Court affording a presumption of regularity to executive action and limiting discovery in APA and mandamus actions. Those conflicts likewise warrant this Court's review.

1. By ordering unprecedented and constitutionally troubling discovery against the Vice President based only on an unsupported—and, in fact, contradicted—allegation that the group he chaired to assist the President was not constituted as the President expressly directed and the group itself reported, the district court turned the traditional presumption of regularity applicable to Executive Branch actions on its head. Indeed, the district court did so expressly, basing its sweeping discovery orders on its suspicion that "the government doesn't always comply with the law." C.A. App. 217 (Tr. of Aug. 2, 2002 Hearing).

That approach directly conflicts with this Court's holding that "*in the absence of clear evidence to the contrary*, courts presume that [public officers] have properly discharged their official duties." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States* v. *Chemical Found.*, 272 U.S. 1, 14-15 (1926)) (emphasis added); accord *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001). As this Court explained in *Armstrong*, the presumption of regularity "rests in part on an assessment of the relative competence" of Executive Branch officials and courts, as well as on "a concern not to unnecessarily impair the performance of a core executive constitutional function." 517 U.S. at 465. Here, both of those concerns warrant strict

adherence to the presumption of regularity. The President and the Vice President, for example, are in the best position to know whether the NEPDG's advisory activities were structured to fall within FACA's disclosure requirements and whether disclosure would chill necessary candor by the President's advisors. And, for the reasons explained above, disclosure in this context would interfere with the President's exercise of "core executive constitutional function[s]," *ibid.*, specifically his powers to "require" opinions from his advisers and to prepare "Measures" that he might recommend to Congress. U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3.[4]

2. Similarly, the court of appeals and the district court failed to appreciate the significance of the district court's determination that FACA does not provide a cause of action and so that an action to enforce FACA can proceed, if at all, only as an APA or mandamus action. Accordingly, their decisions are inconsistent with this Court's holding that judicial review under the APA is generally based on an administrative record, not on discovery. See, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419 (1971). The record in this case makes clear that the NEPDG was established as a group of high-ranking government

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[4] In addition, the plaintiffs have not demonstrated any heightened showing of need, as is usually necessary—although often not sufficient—to obtain discovery into Executive Branch decisionmaking. See *Dellums* v. *Powell*, 561 F.2d 242, 245-249 (D.C. Cir.), cert. denied, 434 U.S. 880 (1977); *Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). As the record amply reflects, the President assigned the Vice President and the other members of the NEPDG the responsibility to fulfill core Executive Branch functions under Article II of the Constitution. In this context, especially, such principles of interbranch comity should preclude discovery against the President or Vice President.

officials and that it consisted only of those officials. The President's memorandum establishing the NEPDG appointed only federal officials as members and made clear that only "officers of the Federal Government" could be invited to participate. C.A. App. 117-118. Consistent with that directive, the NEPDG's final report lists only federal officials as members. See *NEPDG Report* at v; see also C.A. App. 93 (letter from David Addington, Counsel to the Vice President, to plaintiffs' counsel explaining that all of NEPDG's members were federal employees); *id.* at 261-262 (Knutson Declaration describing group membership).[5]

In addition, any review under mandamus could be no more intrusive than that under the APA. Indeed, the lower courts' treatment of the mandamus issue underscores their failure to appreciate the separation-of-powers difficulties inherent in ordering discovery

[5] *Overton Park* indicates that in certain circumstances in an APA action a further explanation by the agency may be appropriate to fill in a "gap" in the administrative record. See 401 U.S. at 419-421. But such a gap exists only where the record taken as a whole would not permit review of the agency action under 5 U.S.C. 706. Here, review is not available under Section 706, and in any event, there is no "gap." Both the President's memorandum establishing the NEPDG and the NEPDG's report speak clearly to the issue of the group's membership, and both confirm that its only members were federal officials. Indeed, any conceivable "gap" stems only from plaintiffs' unsupported allegation that somewhere there is a document that shows that the President was disobeyed and private individuals were somehow permitted to serve as NEPDG members. Such baseless allegations, however, could always be made to suggest a "gap" in any administrative record. Contrary to the court of appeals' suggestion (App., *infra*, 11a), nothing in *Overton Park* suggests that, even in an APA action, a further explanation by appropriate officials—much less discovery —would be appropriate based on such allegations. See *id.* at 38a-39a (Randolph, J., dissenting).

against the Vice President in the context of a statute that is constitutionally problematic precisely because it envisions the disclosure of the process by which the President's closest advisors furnish advice to the President. The district court recognized that FACA does not provide a cause of action and that the APA does not reach the Vice President. App., *infra*, 73a-79a. Despite this Court's cases limiting remedies not provided by Congress, see, *e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-284 (2002), the district court entertained the possibility of a mandamus remedy against the Vice President. Rather than definitely deciding whether the Vice President should remain in the case, however, it ordered extensive discovery in the hope that it could avoid deciding the difficult issues. But in the FACA context, such discovery creates rather than avoids difficult separation-of-powers concerns.

The approach adopted below stands in stark contrast not only to this Court's decision in *Public Citizen*, discussed above, but also to the approach adopted by this Court in *Franklin* v. *Massachusetts*, *supra*, and *Kissinger* v. *Reporters Committee for Freedom of the Press*, *supra*. In each of those cases, this Court took pains to construe broad statutory language regulating and requiring disclosure of Executive Branch communications to avoid direct interference with the President and his closest advisors. By requiring the Vice President to comply with broad-ranging discovery requests based on the mere assumption (and a mistaken one at that) that mandamus lies against the Vice President in this context, the courts below have invited the very separation-of-powers concerns this Court has so consistently sought to avoid.

B. The Court Of Appeals' Jurisdictional Rulings Conflict With This Court's Cases And Improperly Immunize Serious Separation-Of-Powers Violations From Meaningful Judicial Review

1. The court of appeals also erred in holding that it lacked jurisdiction to issue a writ of mandamus because the dispute was, in its view, premature. This case self-evidently involves more than an ordinary discovery dispute. Not only does this case involve intrusive and distracting discovery against the Vice President himself, but it arises in the context of FACA, in which this Court has recognized the separation-of-powers concerns presented by FACA's obligations, which are not meaningfully different from the discovery orders themselves. The distraction caused by the discovery orders that will become an inevitable feature of the scheme created by the lower courts will provide ample incentives for some to file these lawsuits. The outcome of the lawsuits will largely be beside the point, as the remedy for a proven FACA violation is not materially different from a discovery order—either in real-world effect or in the separation-of-powers concerns raised.

The procedural posture of this case in no way renders petitioners' separation-of-powers concerns premature. In *Public Citizen*, *supra*, this Court unanimously viewed the obligations imposed by FACA as giving rise to serious separation-of-powers concerns even if they were imposed as a result of a final judgment with all the attendant protections. Here, by contrast, the upshot of the decisions below is that effectively the same remedies imposed upon a final adjudication of a violation—with the same separation-of-powers difficulties—will be triggered by the mere allegation that a committee's membership deviated in practice from that established by the President. The imposition of such problematic

disclosure requirements upon mere allegations, far from rendering separation-of-powers problems premature, only exacerbates them.

Contrary to the court of appeals' decision (App., *infra*, 13a, 15a), the fact that petitioners have not yet asserted privilege over the documents subject to discovery does not render the separation-of-powers problems associated with those orders either "premature" or "hypothetical." Rather, the intrusive discovery ordered below violates the separation of powers without regard to whether privilege could or would be asserted. That is made clear in this Court's decision in *Public Citizen*. There, this Court unanimously recognized the serious separation-of-powers concerns raised by FACA, even though no privilege claim had been asserted. See 491 U.S. at 466-467, 486-489; cf. *Nader* v. *Baroody*, 396 F. Supp. 1231, 1234 & n.5 (D.D.C. 1975) (holding that fact that President had not asserted privilege "misses the point" of separation-of-powers concern).[6]

Nor can the Vice President's separation-of-powers objections be adequately addressed by the district court on remand or by appeal after final judgment, because the very essence of those objections is that *any* discovery—let alone discovery tantamount to relief for a violation—in the context of the record in this case

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[6] In this regard as well, the disclosure provided by the discovery orders mirrors the relief provided for a violation of the statute. FACA itself preserves the ability of the President or the head of a committee to close meetings to the public, see 5 U.S.C. App. 6, § 10(d), and privilege claims could preserve material from disclosure in a suit filed against a terminated committee. Accordingly, the relief ordered below is not materially different from the relief that could be ordered in a final judgment and so there is no reason to postpone plenary review until a final judgment issues.

would violate the separation of powers. Thus, the concerns here are separate from and antecedent to any claims of privilege. The court of appeals' refusal even to assert jurisdiction over these claims before an assertion of privilege is itself an erroneous decision, which merits this Court's review. The decision below would limit the Executive's ability to obtain appellate review of separation-of-powers claims that are distinct from privilege claims, unless and until privilege is invoked. That illogical requirement erects an enormous obstacle to vindicating the proper functioning of the separation of powers.[7]

2. For similar reasons, the court of appeals' denial of jurisdiction over the Vice President's appeal and its attempt to distinguish *United States* v. *Nixon*, 418 U.S. 683 (1974), are also mistaken. The majority's reading of *Nixon* as requiring the assertion of a privilege claim before an appeal may be permitted (App., *infra*, 24a-25a) is illogical. Where, as here, the separation-of-powers arguments do not take the form of—and are logically antecedent to—a privilege claim, it serves no purpose to require the President or Vice President to

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[7] Indeed, the panel majority itself recognized that petitioners' separation-of-powers arguments are both broader than and antecedent to any specific future claims of privilege, see App., *infra*, 15a (characterizing petitioners' separation-of-powers argument as more like an "immunity" than a privilege), but then failed to recognize the jurisdictional consequence of that observation. As the court of appeals had previously held, an "immunity claim has special characteristics beyond those of ordinary privilege. The typical discovery privilege protects only against disclosure; where a litigant refuses to obey a discovery order, appeals a contempt order, and wins, the privilege survives unscathed. For an immunity, this is not good enough." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998).

assert privilege claims before permitting an interlocutory appeal.

In any event, *Nixon* did not turn on the assertion of privilege, but on separation-of-powers concerns raised by forcing the President to submit to contempt proceedings merely to facilitate timely review. This Court held that "the traditional contempt avenue to immediate appeal is peculiarly inappropriate" in a case involving the President. 418 U.S. at 691. "To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government." *Id.* at 691-692. Moreover, the Court held, "a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review." *Id.* at 692. Those same considerations support permitting an appeal here by the Vice President (or, at a minimum, providing appellate review on the merits to constitutional objections raised by the Vice President). Cf. *In re Papandreou*, 139 F.3d 247, 250 (D.C. Cir. 1998) (citing *Nixon* and stating that "[m]andamus has been recognized as an appropriate shortcut when holding a litigant in contempt would be problematic").

The court of appeals did not question that the unique role of the Vice President under the Constitution places him within the *Nixon* exception to the contempt requirement. Nevertheless, under its approach, the only way that the Vice President can obtain appellate review of his constitutional objections to improper discovery would be to refuse to comply with *any* discovery on remand, suffer the indignity of a contempt citation, and appeal the order holding him in contempt. Such an

approach is clearly inconsistent with *Nixon*, not to mention the separation of powers established by the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Nos. 02-5354, 02-5355 & 02-5356

IN RE: RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

Argued: Apr. 17, 2003
Decided: July 8, 2003

Before: EDWARDS, RANDOLPH and TATEL, Circuit Judges. Opinion for the Court filed by Circuit Judge TATEL. Concurring opinion filed by Circuit Judge EDWARDS. Dissenting opinion filed by Circuit Judge RANDOLPH.

TATEL, Circuit Judge:

The Vice President of the United States and others, all defendants in this suit under the Federal Advisory Committee Act, petition for a writ of mandamus vacating the district court's discovery orders, directing the district court to rule on the basis of the administrative record, and ordering dismissal of the Vice President as a party. Petitioners, however, have failed to satisfy the heavy burden required to justify the extraordinary remedy of mandamus: Their challenges to the district court's legal rulings can be fully considered on appeal following final judgment, and their claims of harm can, at least at this stage of the litigation, be fully cured in the district court. We therefore dismiss the petition. The Vice President has also filed an interlocutory ap-

peal from the district court's rulings. We lack jurisdiction to entertain that appeal: The collateral order doctrine does not apply, nor does *United States v. Nixon*, where the Supreme Court entertained an interlocutory appeal because, unlike here, the district court had rejected a claim of executive privilege.

I.

Shortly after his inauguration, President George W. Bush issued a memorandum establishing the National Energy Policy Development Group (NEPDG), a task force charged with "develop[ing] . . . 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." Mem. Establishing National Energy Policy Development Group, Jan. 29, 2001. Established within the Office of the President and chaired by Vice President Richard B. Cheney, the task force consisted of six cabinet secretaries, as well as several agency heads and assistants to the President. *Id.* The memorandum authorized the Vice President to invite "other officers of the Federal Government" to participate "as appropriate." *Id.* Five months later, the NEPDG issued a final report recommending a set of energy policies. *See* NATIONAL ENERGY POLICY DEVELOPMENT GROUP, NATIONAL ENERGY POLICY: REPORT OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP (2001), *available at* http://www.whitehouse.gov/energy/National-Energy-Policy. pdf.

On July 16, 2001, Judicial Watch, a nonprofit organization that seeks "to promote and protect the public interest in matters of public concern," Second Am. Compl. ¶ 3 (Judicial Watch Compl.), filed suit in the

United States District Court for the District of Columbia against the NEPDG, the Vice President, other federal officials, and several private individuals, alleging that the NEPDG had failed to comply with the procedural requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. Enacted to "control the growth and operation of the 'numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government,'" *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 902-03 (D.C. Cir. 1993) (*AAPS*) (quoting 5 U.S.C. App. 2, § 2(a)), FACA requires advisory committees to make public all reports, records, or other documents used by the committee, provided they do not fall within any Freedom of Information Act exemptions. Central to this case, FACA section 3(2) exempts advisory committees "composed wholly of full-time officers or employees of the Federal Government." 5 U.S.C. App. 2, § 3(2)(iii).

Although the President appointed only federal government officials to the NEPDG and authorized the Vice President to add additional "federal officials," Judicial Watch alleges that "non-federal employees, including Thomas Kuhn, Kenneth Lay, Marc Racicot, Haley Barbour, representatives of the Clean Power Group, and other private lobbyists . . ., regularly attended and fully participated in non-public meetings of the NEPDG as if they were members of the NEPDG, and, in fact, were members of the NEPDG." Judicial Watch Compl. ¶ 25; *see AAPS*, 997 F.2d at 915 (holding that the section 3(2) exemption does not apply if non-government officials' "involvement and role are functionally indistinguishable from those of the other mem-

bers"). Brought pursuant to both the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and the All Writs Act, 28 U.S.C. § 1361, the complaint sought, among other things, a judgment declaring the defendants to be in violation of FACA and an order directing them to provide plaintiffs "a full and complete copy of all records . . . made available to or prepared for Defendant NEPDG," as well as "detailed minutes of each meeting of Defendant NEPDG . . . that contain a record of persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all report[s] received, issued, or approved by Defendant NEPDG." Judicial Watch Compl. at 22.

Before proceedings commenced in the district court, the Sierra Club, a nonprofit group seeking "to practice and promote the responsible use of the Earth's resources and ecosystems," filed a virtually identical lawsuit in the United States District Court for the Northern District of California. Compl. ¶ 3. The Sierra Club's suit was subsequently transferred to the district court here and consolidated with Judicial Watch's.

All defendants moved to dismiss, arguing, among other things, that FACA does not authorize a private cause of action, that the Vice President cannot be sued under the APA, and that "[a]pplication of FACA to the NEPDG's operations would directly interfere with the President's express constitutional authority including his responsibility to recommend legislation to Congress and his power to require opinions of his department heads." Mem. in Support of Mot. to Dismiss at 3 (D.D.C. Mar. 8, 2002). Amplifying this latter point, defendants argued that "such an expansive reading of FACA would encroach upon the President's constitutionally protected interest in receiving confidential ad-

vice from his chosen advisers, an interest that is also rooted in the principle of separation of powers." *Id.* Although the district court agreed that no private cause of action exists under FACA and recognized that the Vice President cannot be sued under the APA, it ruled that FACA could be enforceable through mandamus. *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 42 (D.D.C. 2002). Relying on the "fundamental principle of constitutional interpretation that a court should not pass on any constitutional questions that are not necessary to determine the outcome of the case or controversy before it," *id.* at 45, the district court deferred ruling on the government's separation of powers claim, explaining that "after discovery, the government may prevail on summary judgment on statutory grounds without the need for this Court to address the constitutionality of applying FACA [to the Vice President]," *id.* at 54-55. The court observed that, "while discovery in this case may raise some constitutional issues, those issues of executive privilege will be much more limited in scope than the broad constitutional challenge raised by the government here." *Id.* at 55.

After denying defendants' motion to dismiss, the district court approved plaintiffs' discovery plan and directed the government to "fully comply with the[ ] requests," "file detailed and precise objections to particular requests," or "identify and explain their invocations of privilege with particularity." Order Approving Disc. Plan at 2 (D.D.C. Aug. 2, 2002). In response and on behalf of all federal defendants except the Vice President, the government produced some 36,000 pages of documents. On behalf of the Vice President, the government filed a motion for a protective order, arguing

that discovery against the Vice President would violate the separation of powers and seeking permission to file a motion for summary judgment based on the "administrative record." According to the government, the administrative record consists of the President's memorandum creating the NEPDG, the NEPDG's final report, and an affidavit by Karen Knutson, Deputy Assistant to the Vice President for Domestic Policy. Submitted with the motion for a protective order, Ms. Knutson's affidavit declares that "[t]o the best of my knowledge, no one other than the officers of the Federal Government who constituted the NEPDG, the Federal employees whom they chose from their respective departments, agencies and offices to accompany them (all of whom were full-time Federal employees), and the Office of the Vice President personnel set forth above, attended any of the [NEPDG] meetings." Knutson Aff. ¶ 10.

Although the district court acknowledged that "[i]n APA cases, discovery is normally frowned upon," it stated that it would not consider a motion for summary judgment until after discovery, explaining that "this case isn't the typical case, where you have a significant administrative record." Tr. of Status Hr'g at 13:17-23 (D.D.C. Aug. 2, 2002). The court therefore denied the government's motion for a protective order and directed defendants to "produce non-privileged documents and a privilege log." Order Den. Mots. for Recons. and Protective Order at 1 (D.D.C. Oct. 17, 2002). The court informed the parties that it was considering either reviewing allegedly privileged information in camera or appointing a special master, such as a retired judge, to review privilege claims. Tr. of Omnibus Mots. Hr'g at 4:15-5:12 (D.D.C. Oct. 17, 2002).

Instead of responding to plaintiffs' discovery requests and filing a privilege log, defendants asked the district court to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The district court declined, Mem. Op. and Order (D.D.C. Nov. 27, 2002), and defendants filed in this court an emergency motion for writ of mandamus pursuant to 28 U.S.C. § 1651 seeking an order "vacat[ing] the discovery orders issued by the district court, direct [ing] the court to decide the case on the basis of the administrative record and such supplemental affidavits as it may require, and direct[ing] that the Vice President be dismissed as a defendant." Emergency Pet. for Writ of Mandamus at 20. The Vice President also filed a notice of appeal from the district court's order denying the motion to dismiss and from the various discovery orders. Plaintiffs opposed the mandamus petition and filed a motion to dismiss the interlocutory appeal. We granted an administrative stay and heard oral argument on April 17, 2003.

Now before us are the petition for a writ of mandamus and the plaintiffs' motion to dismiss the appeal. We address each in turn.

II.

In considering the petition for a writ of mandamus, we are bound by well-established rules of both the Supreme Court and this court. "The remedy of mandamus," the Supreme Court has explained, "is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States Dist. Court*, 426 U.S. 394, 401, 96 S. Ct. 2119, 2123, 48 L. Ed. 2d 725 (1976) (internal citations omitted). "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90, 95, 88 S. Ct. 269, 273, 19 L.

Ed. 2d 305 (1967). Emphasizing the rarity of mandamus relief, the Supreme Court has noted that "our cases have answered the question as to the availability of mandamus . . . with the refrain: 'What never? Well, *hardly* ever!'" *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S. Ct. 188, 190-91, 66 L. Ed. 2d 193 (1980) (emphasis in original).

In *Kerr*, the Supreme Court explained the policy underlying the limited nature of mandamus relief:

> [P]articularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.' A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.

Kerr, 426 U.S. at 403, 96 S. Ct. at 2124 (internal citations omitted) (ellipses in original).

Consistent with these principles, in determining whether mandamus is warranted, we consider "whether the party seeking the writ has any other adequate means, such as a direct appeal, to attain the desired relief," and "whether that party will be harmed in a way not correctable on appeal." *Nat'l Ass'n of Criminal Def. Lawyers, Inc. v. United States Dep't of Justice*, 182 F.3d 981, 986 (D.C. Cir. 1999). Petitioner "has the 'burden of showing that its right to issuance of the writ is clear and indisputable.'" *Gulfstream Aerospace Corp.*

v. Mayacamas Corp., 485 U.S. 271, 289, 108 S. Ct. 1133, 1143-44, 99 L. Ed. 2d 296 (1988).

Our recent decision in *In re Executive Office of the President*, 215 F.3d 20 (D.C. Cir. 2000), not only demonstrates the strictness of the mandamus standard, but also largely controls the disposition of this case. There, plaintiff alleged, among other things, that President Clinton's personal staff and other White House units that advise and assist the President were maintaining FBI files of former political appointees in violation of the Privacy Act. The district court denied the government's motion to dismiss, ordered discovery, and rejected the White House's assertion of the attorney client, deliberative process, and work product privileges. The government then sought a writ of mandamus to vacate the district court's discovery order with respect to one particular interrogatory. The government also argued that without mandamus relief "the President's interactions with his closest advisors will be irreparably damaged in the future, because the District Court has sought to coerce the White House, on threat of criminal sanction, into following a view of the Privacy Act to which it does not subscribe." *Id.* at 24.

Noting that "[a]lmost the entire thrust of [the government's] petition is that the District Court erred in concluding that the White House is subject to the Privacy Act," we explained that "[e]ven assuming, arguendo, that the District Court's holding on the scope of the Privacy Act is clear error, mandamus relief is not warranted in this case. This is so because, on the record at hand, there has been no showing of harm of the sort required to justify the drastic remedy of mandamus." *Id.* at 23. Further, although acknowledging that " 'disclosure [of highly privileged material] fol-

lowed by appeal after final judgment is obviously not adequate in such cases—the cat is out of the bag,'" *id.* (bracketed material in original), we observed that "[i]n the normal course, . . . mandamus is not available to review a discovery order," *id.* We then denied the request for mandamus, explaining that the government "offered . . . no argument that it is even entitled to the privileges," and that "[a]bsent a viable claim that some important privilege will be infringed if discovery is allowed to proceed, this court has no jurisdiction to review the interlocutory order on this ground." *Id.* at 23-24. As to the government's fear that the district court might hold White House staff in criminal contempt, we explained, "the District Court has no free-wheeling authority to run the affairs of the White House with respect to matters that are not related to the instant case." *Id.* at 24.

With this case law in mind, we consider the petition for writ of mandamus. Petitioners first argue that by allowing broad discovery into "the inner workings of the executive including the Vice President," Emergency Pet. for Writ of Mandamus at 12, on nothing more than a "mere allegation of . . . unofficial non-government" participation in the work of the NEPDG, the district court has "brought to the fore the substantial constitutional questions it sought to avoid," *id.* at 14. Petitioners therefore ask that we direct the district court to decide the case on the basis of the administrative record. For two reasons, we may not do so.

First, as petitioners concede, plaintiffs' cause of action against the Vice President arises not under the APA, but under the Mandamus Act. 28 U.S.C. § 1361. *Cf. Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326-28 (D.C. Cir. 1996) (explaining availability of "non-

statutory review" even in the absence of a statutory cause of action). Moreover, even if APA review standards apply to mandamus actions—a question we need not resolve here—the rule that APA review is generally limited to the administrative record has two exceptions: "when there has been a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review." *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998) (internal citation omitted). Petitioners argue that plaintiffs have not made the "strong showing" required by the first exception. This is true, but plaintiffs do not invoke the first exception. Instead, they rely on the second exception, arguing that the record is inadequate to resolve the statutory issue pending before the district court. As they point out, the President's memorandum establishing the NEPDG and the NEPDG's final report tell us only that the NEPDG's members were all federal employees. The two documents reveal nothing about whether, notwithstanding the President's appointment of only federal officials, non-federal personnel participated in the work of the NEPDG "as if they were members of the NEPDG." Judicial Watch Compl. ¶ 25. Although the Knutson affidavit does address this question, because the government submitted it during litigation, it is not itself part of the administrative record. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419, 91 S. Ct. 814, 825, 28 L. Ed. 2d 136 (1971) (administrative record does not include "litigation affidavits"); *Envtl. Def. Fund, Inc., v. Costle*, 657 F.2d 275, 286 (D.C. Cir. 1981) (rejecting creation of exception to *Overton Park* to allow parties challenging administrative action to submit affidavits addressing the merits of the agency decision).

As respondents point out, we faced a similar issue in *AAPS*. There, plaintiffs alleged that another presidential committee—President Clinton's Task Force on National Health Care Reform—failed to follow FACA's procedural requirements. We held that in determining the applicability of FACA section 3(2)'s exemption for meetings of full-time government officials, we would look beyond formal membership to whether persons described as consultants "may still be properly described as member[s] of an advisory committee if [their] involvement and role are functionally indistinguishable from those of the other members." *AAPS*, 997 F.2d at 915. To answer that question—essentially the same question the district court faces here—we remanded for "expedited discovery." *Id.* at 916.

Second, and most important given the interlocutory status of this case, even were there some doubt about the district court's refusal to rely on the administrative record—indeed, even if, as petitioners insist, *AAPS* is distinguishable from this case and the district court's ruling amounts to "clear and significant error," Emergency Pet. for Writ of Mandamus at 5—petitioners are entitled to mandamus relief only if they face a risk of harm that cannot be cured in the district court. This is the teaching of the mandamus cases discussed above. Absent harm for which there is "no other adequate means . . . [of] attain[ing] the desired relief," *Nat'l Ass'n of Criminal Def. Lawyers*, 182 F.3d at 986, appellate courts may not grant mandamus relief from a district court's legal judgment even if that judgment constitutes "clear error," *In re Executive Office of the President*, 215 F.3d at 23. "[A]ny error—even a clear one—could be corrected on appeal." *Nat'l Ass'n of Criminal Def. Lawyers*, 182 F.3d at 987. Because this

is equally true of petitioners' second challenge—that the district court erred by failing to dismiss the Vice President as a party—we turn to the key issue on which petitioners' entitlement to mandamus relief depends: Have they identified some "harm" flowing from the district court's challenged rulings that cannot be remedied either in the district court or on appeal following final judgment?

Petitioners' primary claim of harm is that "in the circumstances of this case, . . . extending the legislative and judicial powers to compel a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from the Vice President raises separation of powers problems of the first order." Emergency Pet. for Writ of Mandamus at 4. Under the circumstances of this case, however, this argument is premature. Far from "order[ing] extensive disclosure of communications between senior executive branch officials and those with information relevant to advice that was being formulated for the President," Reply to Appellees' Resp. to Emergency Pet. for Writ of Mandamus at 1, the district court ordered defendants to produce "non-privileged documents and a privilege log." Order Den. Mots. for Recons. and Protective Order at 1 (D.D.C. Oct. 17, 2002). Petitioners neither produced a privilege log nor, as directed by the district court's earlier order, did they invoke "privileges with particularity." Order Approving Disc. Plan at 2 (D.D.C. Aug. 2, 2002). If mandamus was inappropriate in *Executive Office of the President*, where the President had asserted but failed to justify asserted privileges, it is certainly unjustified here, where petitioners have yet to assert a privilege in the district court. "Absent a viable claim that some impor-

tant privilege will be infringed if discovery is allowed to proceed, this court has no jurisdiction to review the interlocutory order." *In re Executive Office of the President*, 215 F.3d at 24.

Moreover, petitioners' concerns about the potential disclosure of privileged information are fully addressable in the district court or, if necessary, in a later proceeding here. If, in response to the district court's discovery order, petitioners choose to invoke executive or any other privilege, that court, keeping in mind the need to "accord[ ] high respect to the representations made on behalf of the President," *United States v. Nixon*, 418 U.S. 683, 707, 94 S. Ct. 3090, 3107, 41 L. Ed. 2d 1039 (1974), may sustain the privilege, thus giving petitioners all the relief they seek here. *See Kerr*, 426 U.S. at 401, 96 S. Ct. at 2123 (denying mandamus petition challenging district court order rejecting broad state secrets privilege and allowing disclosure of state documents regarding prison-parole system because district court could review documents in camera to determine privilege's applicability). On the other hand, were the district court to reject a claim of executive privilege, thus creating an imminent risk of disclosure of allegedly protected presidential communications, then mandamus might well be appropriate to avoid letting "the cat . . . out of the bag." *In re Executive Office of the President*, 215 F.3d at 23-24; *see In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998) (granting mandamus relief of district court order that diplomats submit to depositions in order to review diplomats' assertion of immunity); *In re: Sealed Case*, 151 F.3d 1059 (D.C. Cir. 1998) (granting mandamus where district court's discovery order was insufficiently protective of secret grand jury information). But so long as

the separation of powers conflict that petitioners anticipate remains hypothetical, we have no authority to exercise the extraordinary remedy of mandamus. As we said in *Executive Office of the President*, "[i]n the normal course, . . . mandamus is not available to review a discovery order." 215 F.3d at 23.

Petitioners next argue that in order to protect the separation of powers, the "President should not be forced to 'consider the privilege question' in response to unnecessarily broad or otherwise improper discovery." Emergency Pet. for Writ of Mandamus at 15 (internal citation omitted). We see two answers to this argument. First, executive privilege is itself designed to protect the separation of powers. "The privilege," the Supreme Court explained in *United States v. Nixon*, "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708, 94 S. Ct. at 3107-08. Were we to hold, as petitioners and the dissent urge, that the Constitution protects the President and Vice President from ever having to invoke executive privilege, we would have transformed executive privilege from a doctrine designed to protect presidential communications into virtual immunity from suit. Yet, as the Supreme Court also held in *Nixon*, "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *Id.* at 707, 94 S. Ct. at 3107. Indeed, the Supreme Court has consistently held that because the President is not "above the law," he is subject to judicial process. *Id.* at 715, 94 S. Ct. at 3111; *see also*

Clinton v. Jones, 520 U.S. 681, 703-04, 117 S. Ct. 1636, 1648-49, 137 L. Ed. 2d 945 (1997).

The second answer to petitioners' argument is that their worry about "unnecessarily broad" discovery can be resolved in the district court. According to petitioners, discovery is excessive because (1) they have already produced some 36,000 pages worth of documents and (2) the discovery "compelled by the district court would result in even more sweeping intrusions into the Vice President's office than would result from the remedies available if plaintiffs were to prevail on the merits of their suit." Emergency Pet. for Writ of Mandamus at 4.

The district court has already addressed the first concern. In its order approving plaintiffs' discovery plan, the district court expressly stated: "[S]hould defendants believe that documents or information that they have already released to plaintiffs in different fora are responsive to these discovery requests, defendants shall bear the burden of identifying with detailed precision what information or documents have been so released, and to which discovery requests they believe the information or documents to be responsive." Order Approving Disc. Plan at 2 (Aug. 2, 2002). Petitioners have yet to avail themselves of this aspect of the district court's order.

Petitioners' second concern is well taken. If the district court ultimately determines that the NEPDG is subject to FACA, plaintiffs would be entitled to "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by [the] . . . committee." 5 U.S.C.App. 2, § 10(b). Yet plaintiffs' discovery seeks far more than these limited

items. Their third interrogatory, for example, asks for the names of "all Task Force staff, personnel, consultants, employees, and all other persons who participated, in any manner, in the activities of the Task Force or the preparation of the Report." The fourth interrogatory asks that "[f]or each person listed in response to Interrogatory 3, . . . please provide . . . a description of the person's role in the activities of the Task Force and in preparation of the Report." The requests to produce also go well beyond FACA's requirements. For example, the first request seeks "[a]ll documents identifying or referring to any staff, personnel, contractors, consultants or employees of the Task Force." As petitioners point out, if plaintiffs are entitled to "discovery . . . roughly coextensive with the available remedies for a FACA violation, then the textual exemption of advisory groups including only government officials, which presumably was designed to protect against undue interference with executive functions, has little practical effect." Emergency Pet. for Writ of Mandamus at 14.

Plaintiffs' discovery also goes well beyond what they need to prove, as they allege, that FACA applies to the NEPDG, i.e., that non-federal officials participated to the extent that they were effectively NEPDG members. For example, plaintiffs have no need for the names of "all . . . persons" who participated in the Task Force's activities, nor "a description of [each] person's role in the activities of the Task Force." They must discover only whether non-federal officials participated, and if so, to what extent. Nor do plaintiffs require "[a]ll documents identifying or referring to any staff, personnel, contractors, consultants or employees

of the Task Force." Rather, they need only documents referring to the involvement of non-federal officials.

Although petitioners did raise the question of excessive discovery in the district court, they did so in support of their plea for a "protective order relieving [defendants] of *any* obligation to respond to plaintiffs' discovery." Mem. in Supp. of Defs.' Mot. for a Protective Order and for Recons. at 21 (D.D.C. Sept. 3, 2002) (emphasis added). As far as we can tell, petitioners never asked the district court to *narrow* discovery to those matters plaintiffs need to support their allegation that FACA applies to the NEPDG. Moreover, we are confident that the district court, whose pending discovery order invites petitioners to file "objections," will, consistent with the judiciary's responsibility to police the separation of powers in litigation involving the executive, respond to petitioners' concern and narrow discovery to ensure that plaintiffs obtain no more than they need to prove their case.

In thus relying on the district court to protect petitioners from harm, we are following closely in the Supreme Court's footsteps in *Kerr*. There, the Court affirmed the Court of Appeals' denial of a writ of mandamus sought by a state agency challenging a district court's order granting a motion to compel discovery. Even though "the opinion below might be regarded as ambiguous," the Court explained, "we are fortified in our reading of it by a recognition of the serious consequences which could flow from an unwarranted failure to grant petitioners the opportunity to have the documents reviewed by the trial judge in camera before being compelled to turn them over." *Kerr*, 426 U.S. at 405, 96 S. Ct. at 2125. The Supreme Court thus read the Court of Appeals' opinion as "providing petitioners

an avenue far short of mandamus to achieve precisely the relief they seek." *Id.* at 404-05, 96 S. Ct. at 2124-25. "We are thus confident," the Court concluded, "that the Court of Appeals did in fact intend to afford the petitioners the opportunity to apply for and, upon proper application, receive in camera review." *Id.* at 406, 96 S. Ct. at 2125-26. We are equally confident that the district court here will protect petitioners' legitimate interests and keep discovery within appropriate limits—or as the district court itself put it, "tightly reined discovery." Mem. Op. and Order at 32 (D.D.C. Nov. 27, 2002).

In sum, petitioners have not satisfied the heavy burden necessary to obtain a writ of mandamus. Their legal challenges to the district court's refusal to proceed on the basis of the administrative record and to dismiss the Vice President can be fully addressed, untethered by anything we have said here, on appeal following final judgment. In the meantime, narrow, carefully focused discovery will fully protect the Vice President: Either the Vice President will have no need to claim privilege, or if he does, then the district court's express willingness to entertain privilege claims and to review allegedly privileged documents in camera will prevent any harm. Moreover, such measures will enable the district court to resolve the statutory question—whether FACA applies to the NEPDG—without "sweeping intrusions into the Presidency and Vice Presidency." Emergency Pet. for Writ of Mandamus at 8. And if after limited discovery, it turns out that no non-federal personnel participated as de facto NEPDG members, the district court will never have to face the serious constitutional issue lurking in this case—whether FACA can be constitutionally applied to the President and Vice Presi-

dent. If, on the other hand, the district court not only determines that FACA applies to the NEPDG, but also rejects petitioners' constitutional challenge to the application of the Act, both issues can be fully addressed on appeal following final judgment.

We end with some comments about the dissent. According to the dissent, *AAPS* is wrong, General Services Administration regulations preclude the de facto membership theory, the district court is without jurisdiction, and the case should be remanded with instructions to dismiss. We may not reach these issues for several reasons. To begin with, *AAPS* is circuit law binding on this panel. As we have explained:

> The "decision of a [panel]" is "the decision of the court." Were matters otherwise, the finality of our appellate decisions would yield to constant conflicts within the circuit. One three-judge panel, therefore, does not have the authority to overrule another three-judge panel of the court. That power may be exercised only by the full court, either through an *in banc* decision, or pursuant to the more informal practice adopted in *Irons v. Diamond*[, 670 F.2d 265 (D.C. Cir. 1981)].

LaShawn v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) (internal citations omitted). *See also Joo v. Japan*, 332 F.3d 679, 687, 2003 WL 21473010 (D.C. Cir. June 27, 2003) (panel of judges is bound by circuit precedent).

Even were we not bound by *AAPS*, we could not consider the dissent's arguments because petitioners raised not one of them—not in the district court, not in their appellate briefs, not even at oral argument. Instead, petitioners argue that *AAPS* is distinguishable,

not wrong; they never mention the GSA regulations; and they argue that the constitutional questions can be avoided by remanding to the district court with instructions to decide the case on the basis of the administrative record. This court has long held that "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

Recognizing that appellate courts sit to resolve only legal questions presented and argued by the parties, the dissent maintains that we must nevertheless address these new arguments because they go to the jurisdiction of the district court. Specifically, pointing out that the only viable claim against the Vice President rests on mandamus, the dissent argues that given the constitutional concerns and the GSA regulations, plaintiffs have no "'clear and indisputable' right to relief." Dissent at 2 (citation omitted). The defect in this argument is that it ignores *AAPS*. Because that decision holds that FACA permits a cause of action on the "de facto membership" theory, the district court "clear[ly]" has jurisdiction to entertain plaintiffs' mandamus action. Plaintiffs may or may not prevail, but under the law of this circuit, the district court's jurisdiction is not in doubt. According to the dissent's theory, moreover, all statutory defenses to mandamus actions become jurisdictional, allowing defendants who fail to prevail on motions to dismiss to seek immediate appellate review. Nothing in our case law supports such a result.

The arguments raised by the dissent are also premature. Following limited discovery, the district court may find, as the Knutson affidavit claims, that no non-federal personnel participated in the NEPDG's activities. That would end the case, leaving no need to address the constitutional issues raised by the dissent. If, on the other hand, discovery reveals some degree of participation by non-federal personnel, then the district court will have to decide whether that participation amounts to de facto membership. Only if the participation in fact amounts to such membership will the court have to resolve the constitutional issue—subject, of course, to appellate review following final judgment.

The dissent contends that mandamus relief is nevertheless required because even though petitioners have made no claim of privilege, the mere need to assert privilege will "distract[ ] and divert[ ] [the President] from the performance of his constitutional duties and responsibilities." Dissent at 8. This argument too is foreclosed by circuit precedent. As we held in *Executive Office of the President*, mandamus relief is inappropriate "[a]bsent a viable claim that some important privilege will be infringed if discovery is allowed to proceed." 215 F.3d at 24.

Finally, and contrary to the dissent, we are confident that this opinion fully responds to the constitutional arguments presented in this case. As we have explained, petitioners' primary argument—that the broad discovery plaintiffs seek will violate the separation of powers—is premature. Petitioners have yet to invoke executive privilege, which is itself designed to protect the separation of powers, *see infra* p. 1105, and the narrow discovery we expect the district court to allow may avoid the need for petitioners even to invoke the

privilege. Petitioners also argue that applying FACA to the NEPDG would itself violate the separation of powers. As we have explained, resolution of this issue is also premature, for it assumes the answer to the question the district court has yet to resolve: Is the NEPDG a FACA advisory committee? Not until the district court answers that question and only if it determines that the NEPDG is in fact an advisory committee will that constitutional question be ripe for resolution. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-48, 56 S. Ct. 466, 481-484, 80 L.Ed. 688 (Brandeis, J., concurring) (courts should only rule on constitutional issues as a last resort).

III.

The Vice President's appeal of the district court's denial of the motion to dismiss and discovery orders requires little discussion. In general, only final orders are appealable. 28 U.S.C. § 1291. Circuit courts have jurisdiction over interlocutory appeals if the requirements of the collateral order doctrine apply, that is, if the challenged order "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949).

Largely for the reasons given above, none of the orders the Vice President seeks to appeal satisfies the collateral order doctrine. *See In re Sealed Case*, 151 F.3d at 1063 n.4 (describing similarities between tests for appellate review of interlocutory appeals under mandamus and collateral order doctrine). The Vice

President does not argue otherwise. Instead, he asserts that we have jurisdiction to hear his appeal pursuant to *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). There, the district court had approved subpoenas for audiotapes that President Nixon claimed were protected by executive privilege. Permitting an interlocutory appeal of this otherwise non-appealable order, the Supreme Court explained that it would be "unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government," to require President Nixon to follow the traditional path for perfecting his appeal, namely, "'resist[ing] . . . [the court's] order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.'" *Id.* at 691, 692, 94 S. Ct. at 3099-3100 (quoting *United States v. Ryan*, 402 U.S. 530, 533, 91 S. Ct. 1580, 1582, 29 L. Ed. 2d 85 (1971)).

This case is very different. Because the Vice President has yet to invoke executive privilege, we are not confronted with the "unseemly" prospect of forcing him to choose between either (1) disclosing allegedly privileged information and appealing following final judgment after the "cat is out of the bag," or (2) refusing to disclose and going into criminal contempt in order to create an appealable order. Absent this constitutionally troubling choice, *Nixon* is inapplicable.

At oral argument, the government contended that applying *Nixon* to this case would amount to a "modest extension." Tr. of Oral Arg. at 5:10. We disagree. Including the Vice President's appeal within *Nixon*'s ambit would convert a narrow exception designed to protect fundamental privileges into a blanket exception to the collateral order rule in suits against the execu-

tive. This court has no authority to "extend" the law beyond its well-prescribed bounds.

IV.

The petition for mandamus is dismissed and the motion to dismiss the appeal is granted.

So ordered.

HARRY T. EDWARDS, Circuit Judge, concurring:

I concur in the majority opinion, because, in my view, it faithfully adheres to the law of the circuit and correctly decides the matter at hand. I also agree with the dissenting opinion insofar as it acknowledges that *Association of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("*AAPS*"), is the law of the circuit and that the Government's position cannot withstand scrutiny under *AAPS* We are bound to follow the law of the circuit. Therefore, the Government's petition must be denied.

The Government comes to this court seeking mandamus or collateral order review on an interlocutory appeal, to block discovery, *having never claimed that any of the disputed material is privileged and having never responded to the District Court's invitation to specify their objections to the disputed discovery orders.* The Government merely claims that interlocutory review is appropriate because this case implicates "separation of powers" issues. This is an extraordinary proposition. There is no legal authority of which I am aware—and the Government cites none—to support jurisdiction in this court.

I suspect that, on remand, the Government may be able effectively to challenge the breadth of the disputed discovery order. I also suspect that, once these objec-

tions have been raised, the District Court will tailor the discovery order. Until the Government voices its objections, however, this court has no jurisdiction to meddle in a dispute over a discovery issue that should properly be resolved by the District Court in the first instance.

Under 28 U.S.C. § 1291, discovery orders are appealable only after entry of final judgment in the underlying case, or under the "collateral order" doctrine upon entry of an order holding the litigant in criminal contempt. *See Byrd v. Reno*, 180 F.3d 298, 302 (D.C. Cir. 1999); *In re Kessler*, 100 F.3d 1015, 1016 (D.C. Cir. 1996). There clearly has been no final judgment in the underlying case here, and no criminal contempt order. The Government's only authority for asserting that the discovery order is appealable under § 1291 despite the absence of a final order is *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). But, as the majority notes, *Nixon* is inapposite, because that case involved a situation in which discovery was ordered in the face of the President's assertion of *executive privilege*. The Government has asserted no privilege in this case. There is no other basis for an invocation of the collateral order doctrine in this case and the Government does not suggest otherwise.

Rather, this case focuses principally on the Government's request for mandamus relief. Mandamus "is reserved for *extraordinary circumstances* in which the petitioner demonstrates that his right to issuance of the writ is clear and indisputable and that no other adequate means to obtain relief exist." *Byrd*, 180 F.3d at 302. "[O]nly exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Kerr v. U.S. Dist. Court*

for the N. Dist. of Cal., 426 U.S. 394, 402, 96 S. Ct. 2119, 2123-24, 48 L. Ed. 2d 725 (1976) (citation and internal quotation marks omitted). Applying this well-understood test, the Government can point to no basis for mandamus at this juncture, because it can point to no harm. And it can point to no harm because it has yet to specify any privileged materials or otherwise cite objections for consideration by the District Court. It is not enough for the Government to come to this court and claim that discovery *may* expose materials that are protected by privilege or the deliberative process. It must first specify its objections so that they may be addressed by the District Court.

The Government suggests that interlocutory review is appropriate here, because the District Court is bound to consider only the "administrative record," *sans* discovery, with respect to any of plaintiffs' claims resting on the Administrative Procedure Act ("APA"). This argument is premised on an erroneous view of the law. In the Supreme Court's seminal decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S. Ct. 814, 825-26, 28 L. Ed. 2d 136 (1971), the Court made it clear that there are circumstances in which discovery or testimony by agency officials may be necessary and appropriate to resolve an APA claim arising in District Court. In that case, the Supreme Court stated that judicial review was "to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence," the District Court could "require the administrative officials who participated in the decision to give testimony explaining their action." *Id.* And in *AAPS*, we

found it entirely appropriate to remand for expedited discovery to determine whether a working group was an advisory committee under the Federal Advisory Committee Act ("FACA"). *See AAPS*, 997 F.2d at 915-16. In short, tailored discovery may be necessary to determine the question whether a disputed committee is subject to FACA's strictures.

The decision in *AAPS* is perfectly consistent with both *Overton Park* and the law of this circuit. In *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1 (D.C. Cir. 1998), this court plainly stated that judicial review properly may involve more than just the administrative record in an APA case "when there has been a 'strong showing of bad faith or improper behavior' *or* when the record is so bare that it prevents effective judicial review." *Id.* at 7 (emphasis added) (citing *Overton Park*, 401 U.S. at 420, 91 S. Ct. at 825-26; *Community for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997-98 (D.C. Cir. 1990)). The dissent cites a Second Circuit case, *National Nutritional Foods Association v. FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974), for the proposition that discovery into the internal workings of Government is not allowed without "strong preliminary showings of bad faith." But this is an incomplete characterization of *National Nutritional Foods*, which fully recognized that *Overton Park* did not necessarily and always require a showing of bad faith. *See id.*; *see also Overton Park*, 401 U.S. at 420, 91 S. Ct. at 825-26 ("[W]here there are administrative findings that were made at the same time as the decision . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial

review is by examining the decisionmakers themselves.").

Overton Park and *Commercial Drapery* make it clear that the exception to the rule of no discovery in APA cases is wider than bad faith. Thus, the absence of any showing of bad faith in this case is immaterial, because plaintiffs here seek discovery on the ground that the administrative record is inadequate for judicial review. And there is no serious doubt here—just as there was none in *AAPS*—that the bare administrative record does not allow for meaningful judicial review of plaintiffs' claim. Therefore, reasonable and carefully tailored discovery is legally permissible and entirely appropriate in this case. *See AAPS*, 997 F.2d at 915-16.

As the opinion for the majority correctly notes, this case is controlled by our decision in *In re Executive Office of the President*, 215 F.3d 20 (D.C. Cir. 2000). The Government cannot find a way around that precedent. Thus, there is absolutely no basis for our interlocutory review of the District Court's discovery orders, either under the collateral order doctrine or on a petition for mandamus, where the Government has asserted no privilege and has failed to specify any objections to the discovery orders. If, on remand, the District Court fails to tailor discovery pursuant to valid objections or assertions of privilege by the Government, then there may be a basis for appellate review. We are far from that point at this juncture of this litigation, however. Therefore, this appeal should be dismissed, because we have no jurisdiction to consider it.

I respectfully disagree with the dissent's argument that we should instead dismiss *plaintiffs*' case because the District Court lacks mandamus jurisdiction over

plaintiffs' claim. As the dissent correctly acknowledges, *AAPS* is the law of this circuit, and we are bound by it, as is the District Court. Under *AAPS*, plaintiffs clearly had a basis for seeking relief in the District Court ordering the Government to comply with FACA. The dissenting opinion cites a General Services Administration ("GSA") regulation, 41 C.F.R. 101-6.1003 (2000), to suggest that the "*de facto* member doctrine" of *AAPS* is misguided. This argument might be tenable if the court in *AAPS* was obliged to give deference to GSA's interpretation of FACA. But the Supreme Court in *Public Citizen v. U.S. DOJ*, 491 U.S. 440, 465 n.12, 109 S. Ct. 2558, 2572 n.12, 105 L. Ed. 2d 377 (1989), made it clear that any "assertion that GSA's interpretation of FACA's provisions is 'binding' confuses wish with reality." In any event, the cited GSA regulation surely does not take precedence over the law of this circuit on the matter here at issue. Under *AAPS*' "*de facto* member doctrine"—which is indisputably the law of the circuit—plaintiffs have a legal basis for seeking mandamus relief and the District Court in turn has mandamus jurisdiction over the claim.

Finally, most of the arguments raised in the dissenting opinion have never been presented to the District Court and they were not raised for consideration in the Government's brief to this court or in the oral argument before this court. In other words, the dissent's position rests on a view of FACA that has never been urged by the Government. "Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where 'injustice might otherwise result.' Suffice it to say that this is not such a case." *Singleton v. Wulff*, 428

U.S. 106, 121, 96 S. Ct. 2868, 2877-78, 49 L. Ed. 2d 826 (1976) (citations omitted). The reason that a federal appellate court normally does not consider an issue not passed upon below is because parties, such as plaintiffs in this case, "should have the opportunity to present whatever legal arguments [they] may have in defense of the statute." *Id.* at 120., 96 S. Ct. at 2877-78. The dissent's theory of this case has not been propounded by the Government; it runs counter to the law of the circuit; and it relies on GSA regulations that the Supreme Court has said do not carry the force of law. In these circumstances, I can see no reasonable basis for this court to act *sua sponte* on a theory that has been neither raised by the parties nor addressed by the District Court.

For the foregoing reasons, I concur in the opinion for the majority.

RANDOLPH, Circuit Judge, dissenting:

My disagreement with the majority is about not only its logic but also its starting points, one of the most prominent of which is derived from *Ass'n of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (*AAPS*). There is a serious constitutional problem in *AAPS*'s interpretation of the Federal Advisory Committee Act (FACA), 5 U.S.C.App. § 1 *et seq.*—a problem this case exposes. As applied to committees the President establishes to give him advice, FACA has for many years teetered on the edge of constitutionality. *See* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994). The decision in this case pushes it over.

The case comes to us in a peculiar posture. We have mandamus on top of mandamus Both sides have invoked the All Writs Act, 28 U.S.C. § 1361. The federal officers have petitioned this court for a writ of mandamus barring discovery. In the district court, plaintiffs sought a writ of mandamus ordering the federal officers to comply with FACA.[1] Mandamus, the majority tells us, is "drastic"; it is available only in "extraordinary situations"; it is hardly ever granted; those invoking the court's mandamus jurisdiction must have a "clear and indisputable" right to relief. These words are directed at the federal officers' petition in this court, but they apply equally to plaintiffs' suits in the district court. *See Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002). In my view, the federal officers have a clear right to relief in the court of appeals because the plaintiffs do not have a clear right to relief in the district court. I would therefore grant the writ and order

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[1] Mandamus was the only basis upon which the actions could have proceeded in the district court. All agree that FACA does not itself create a cause of action. It is also clear that the Administrative Procedure Act, which plaintiffs invoked, does not apply. The alleged FACA "advisory committee" here was not an "agency" within the meaning of the APA. *See Meyer v. Bush*, 981 F.2d 1288, 1297-98 (D.C. Cir. 1993). It was part of the Executive Office of the President. The President is not subject to the APA, and neither are units within the Executive Office whose sole function is to advise the President. *See Franklin v. Massachusetts*, 505 U.S. 788, 801, 112 S. Ct. 2767, 2775-76, 120 L. Ed. 2d 636 (1992); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156, 100 S. Ct. 960, 971-72, 63 L. Ed. 2d 267 (1980).

Why the majority analyzes (maj. op. at 1103) the adequacy of the administrative record in terms of the APA is therefore a mystery. Stranger still is the majority's insistence that there even must be an administrative record. *See supra* pp. 1102-1103.

the district court not only to bar discovery but to dismiss the actions.

"The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices. . . ." U.S. Const. art. II, § 2, cl. 1.

In January 2001 President Bush sought advice on energy policy. To that end, he established, in the Executive Office of the President, the National Energy Policy Development Group. The President named to this task force the Vice President; the Secretaries of Treasury, Interior, Agriculture, Commerce, Transportation, and Energy; the Director of the Federal Emergency Management Agency; the Administrator of the Environment Protection Agency; and three Assistants to the President. The President authorized the Vice President to invite "as appropriate, other officers of the Federal Government." The Group's mission was to "develop a national energy policy designed to help the private sector" and State and local governments, "to gather information, deliberate, and . . . make recommendations to the President." In May 2001 the Group issued its recommendations to the President. The Group's final report listed, as its members, the officials the President appointed in his January directive plus the Secretary of State and the Director of the Office of Management and Budget. *See* National Energy Policy Development Group, National Energy Policy: Report of the National Energy Policy Development Group (2001), *available at* http://www.whitehouse.gov/energy/National-Energy-Policy.pdf.

If the President's Energy Policy Group were an "an advisory committee" within the meaning of FACA, the

President was required to make its membership "fairly balanced." 5 U.S.C.App. § 5(b)(2). If FACA applied, the Group should have filed a detailed "charter" with the General Services Administration (GSA) before the Group began operating. *Id.* § 9(c). It should have held its meetings open to the public and allowed interested persons to file comments. *Id.* § 10(a)(1). It should have given notice of its meetings in the Federal Register. *Id.* § 10(a)(2). It should have kept detailed minutes of each meeting and "a complete and accurate description of matters discussed and conclusions reached." *Id.* § 10(c). And it should have made available to the public its "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda" and other documents. *Id.* § 10(b).

There is no doubt that these requirements would violate the separation of powers if they were imposed on all groups formed by the President for the purpose of providing him advice. *See* Bybee, *supra*. And so FACA contains an exemption for committees "established or utilized" by the President when the committees are "composed wholly of full-time . . . officers or employees of the Federal Government." 5 U.S.C.App. § 3(2). On the face of it, the Energy Policy Group, consisting only of high-level federal officials, was thus exempt from FACA.

But plaintiffs, relying on *AAPS*, alleged that the Group nevertheless was a FACA advisory committee. *AAPS* held that an outside consultant may "be properly described as a member of an advisory committee if his involvement and role are functionally indistinguishable from those of the other members," thus rendering the entire committee subject to FACA. 997 F.2d at 915. It is far from clear where the *AAPS* court derived its

holding. No section of FACA was cited. The opinion purports to be interpreting the word "member," but the operative provision—quoted in the preceding paragraph—does not use that word. The *AAPS* court knew that an inquiry into functional equivalency would be fact-bound, and so it authorized discovery. *Id.* at 915-16.

It is this holding in *AAPS* that enabled plaintiffs—through allegations that private citizens were *de facto* members of the Energy Policy Group—to avoid a motion to dismiss, and it is this holding that led directly to the discovery order we have before us. Judicial Watch's complaint names four private individuals and alleges that they "regularly attended and fully participated in non-public meeting of the [Energy Policy Group] as if they were members." Judicial Watch Compl. at 8-9. The Sierra Club's complaint is more general: it alleges that "[e]nergy industry executives, including multiple representatives of single energy companies, and other non-federal employees, attended meetings and participated in the activities of the Cheney Energy Task Force and Task Force Sub-Groups." Sierra Club Compl. at 6. The allegations are on information and belief.

Given *AAPS*'s formulation, extensive discovery into the Executive Office of the President is inevitable. Functional equivalency, as *AAPS* contemplated, invites a comparative judgment. One cannot know whether a private individual acted like a member of a Presidential committee unless one knows how the members acted. And so plaintiffs proposed, and the district court approved, free range discovery: interrogatories asking for descriptions of all the activities of all individuals—members and staff alike—who were involved in the

work of the Energy Policy Group, and requests for documents detailing all communications between those working for the Group and their governmental departments with persons who were not full-time federal employees. The approved discovery plan also contemplates depositions.

My colleagues are confident that the district court can rein in the discovery, but I cannot see how this can be done in any non-arbitrary way. The *AAPS* opinion provides no standards. And my colleagues never articulate their conception of *de facto* membership. Left open is an extensive area to be explored in depositions, interrogatories, and document production. Consider just a few of the possibilities. Suppose it turns out that a private individual attended 6 of the Group's 12 meetings. Would that make him a *de facto* member? Would it matter if discovery revealed that some of the members the President appointed attended the same number of, or even fewer, meetings? What if the private individual attended all meetings but did not speak, or was present only for a short period each time? Would it matter whether the private individual had a place at the table or sat on the side with the Group's staff? Or whether the private individual attended only a few meetings, but was quite influential in the formulation of the final recommendations? Should there be discovery into what impact the person's presence or statements had on the other members, and how would that discovery proceed? Suppose the private individual submitted memoranda or other documents. Is there to be discovery for the purpose of determining whether the other members of the Group took those documents into account in performing their information gathering function or in formulating their view of energy policy?

(One of the complaints alleges that a corporate CEO handed the Vice President a three-page memorandum on the subject of energy.) Would it be of any consequence that the private person met individually with some of the members the President appointed? (There are also allegations to this effect.) And if so, is there to be discovery of who said what, and how this affected the work of the Group?

These problems and others are a direct result of *AAPS* and its lack of any principled standard for determining who is and who is not a *de facto* member of a Presidential committee. For the judiciary to permit this sort of discovery, authorized in the name of enforcing FACA—a statute providing no right of action, *see supra* note 1—strikes me as a violation of the separation of powers. The intrusion into the inner workings of the Presidency, the disruption this intrusion is bound to entail, the probing of the mental processes of high-level Cabinet officers inherent in the type of discovery that *AAPS* sanctions, the deleterious impact on the advice the President needs to perform his constitutional duties —all this and more present "formidable constitutional difficulties," as the Supreme Court acknowledged in *Public Citizen v. Department of Justice*, 491 U.S. 440, 466, 109 S. Ct. 2558, 2572-73, 105 L. Ed. 2d 377 (1989); *see also id.* at 488, 109 S. Ct. at 2584 (Kennedy, J., joined by the Chief Justice and O'Connor, J., concurring in the judgment). In fact, I believe the "constitutional difficulties" here are even more "formidable" than they were in *Public Citizen.* Even outside the Executive Office of the President, courts do not allow this sort of discovery into the internal workings of government departments without "strong preliminary showings of bad faith." *Nat'l Nutritional Foods Ass'n v. FDA*, 491

F.2d 1141, 1145 (2d Cir. 1974) (Friendly, J.). As we held in *Checkosky v. SEC*, 23 F.3d 452, 454, 489 (D.C. Cir. 1994) (opinion of Randolph, J.), unless there has been such a showing—here there was none—"agency deliberations, like judicial deliberations, are for similar reasons privileged from discovery," as are intra-agency memoranda and other documents recording how and why decisions or recommendations have been reached. "Requiring an agency to produce such internal materials and allowing litigants to depose agency officials ... would be warranted only in the rarest of cases." *Id.*[2]

The majority and concurring opinions, citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419, 91 S. Ct. 814, 825-26, 28 L. Ed. 2d 136 (1971), insist that discovery is permissible here because the "administrative record" is inadequate. Those who forget the reason for a rule are apt to misapply it. I can think of no better illustration than what has occurred here. My colleagues have entirely ignored *why* the Supreme Court said it might be necessary to take testimony: the administrative record in *Overton Park* was not before the Court, and the administrative officials had not explained their action. This created a gap, a gap that needed filling because § 706 of the Administrative Procedure Act, 5 U.S.C. § 706, required the reviewing

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[2] None of the material sought in discovery here would be available through the Freedom of Information Act (FOIA). The Supreme Court held in *Kissinger v. Reporters Committee for Freedom of the Press* that FOIA does not cover "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." 445 U.S. 136, 156, 100 S. Ct. 960, 971-72, 63 L. Ed. 2d 267 (1980) (internal quotation marks omitted).

court to consider "the whole record" in determining whether the agency action was supported by substantial evidence. 401 U.S. at 419-20, 91 S. Ct. at 825-26.[3] But in this case there is no gap in an administrative record. The Energy Policy Group was not an administrative agency; it was not required to make findings of fact and conclusions of law in order to enable judicial review under the APA; and the officials the President named to the group were not agency officials within the meaning of the APA. *See supra* note 1. Neither the district court nor this court would conduct judicial review under § 706 of the APA, yet that was the source of the *Overton Park* holding on which the majority relies.[4] *See supra* note 1. To state what remains of the majority's rationale is to refute it: because Presidential committees are not APA agencies there is no administrative record; therefore there must be discovery to compile an administrative record adequate for judicial review under the APA even though the APA does not apply and even though there will be no such judicial review.

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[3] "Even on those rare occasions when [discovery pursuant to *Overton Park*] is appropriate, the district court is not engaged in ordinary fact-finding, but instead is filling in gaps in the record to determine what the agency actually did." *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1227 (D.C. Cir. 1993).

[4] Even in APA cases, "if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry"—which is precisely what the majority has allowed the district court to do. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S. Ct. 1598, 1607, 84 L. Ed. 2d 643 (1985).

The majority also maintains that there is no "harm" to the Presidency, that if discovery probes too extensively, all the federal officials need do is assert executive privilege or any other privilege that might be available. Maj. op. at 1103-1105. The unstated premise of the majority's view is that the only potential harm would be in the revelation of privileged material and that the federal officers are fully capable of making sure this does not occur. If this were an adequate answer, department heads and agency officials would regularly be subject to discovery; they too could protect themselves by asserting privileges.

The majority's no-harm proposition is especially ill founded in this case. The Energy Policy Group was part of the Executive Office of the President. If executive privilege is to be asserted, it therefore appears that the President must make the decision. "There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States v. Reynolds*, 345 U.S. 1, 7-8, 73 S. Ct. 528, 531-32, 97 L.Ed. 727 (1953) (footnotes omitted); *see In re Sealed Case*, 121 F.3d 729, 744 n.16 (D.C. Cir. 1997). Already the government has voluntarily produced some 36,000 pages of documents in this matter. How many additional documents are potentially subject to discovery we do not know. But it is obvious that decisions to assert privileges must be made document by document and often line by line. With respect to interrogatories and depositions, the decisions about privilege must be made question by question. Each such assertion will trigger yet another round of proceedings in the district court, unless the plaintiffs acquiesce in the President's judgment. In all of this the President will be distracted

and diverted from the performance of his constitutional duties and responsibilities. The Supreme Court recognized as much in *Nixon v. Fitzgerald*, 457 U.S. 731, 751, 102 S. Ct. 2690, 2702, 73 L. Ed. 2d 349 (1982): "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *See also Clinton v. Jones*, 520 U.S. 681, 694 n.19, 117 S. Ct. 1636, 1644 n.19, 137 L. Ed. 2d 945 (1997) (reiterating that the President generally should not be burdened with suits challenging his official conduct).

If Congress, in order to ensure that outsiders did not have "undue influence," had passed a law requiring all groups within the Executive Office of the President to disclose publicly not only their advice to the President but also all their records, I am confident the law would be struck down as a violation of the separation of powers. My confidence in the unconstitutionality of such a law is not lessened by the prospect that the President might resist some disclosure by invoking executive privilege. *See Public Citizen*, 491 U.S. at 488-89, 109 S. Ct. at 2584 (Kennedy, J., concurring in the judgment). Discovery on the basis of allegations of *de facto* membership cannot be distinguished from such a law. Any Presidential committee that consults anyone outside of government, or is suspected to have done so, is potentially subject to discovery into its inner workings. All a plaintiff has to do is bring a mandamus action and allege that private individuals had some ill-defined role in a committee of federal officers advising the President. And according to the majority opinion, the court of appeals is powerless to prevent this.

Although more could be said, I will not dwell further on the constitutional problems raised by today's decision. I believe those problems may be avoided on the basis of a regulation apparently not brought to the court's attention in *AAPS*—a regulation that is contrary to the *de facto* member doctrine. Once that doctrine is cast aside, as it surely must be, *see McCreary v. Offner*, 172 F.3d 76, 81 (D.C. Cir. 1999), it becomes apparent that the district court did not have jurisdiction and that the complaints must be dismissed.[5]

At the time the President formed the Energy Policy Group and during the time plaintiffs allege non-federal personnel attended its meetings, a GSA regulation defined "committee member" to mean "an individual who serves by appointment on a committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations." 41 C.F.R. § 101-6.1003 (2000).[6] As in *AAPS*, the defendants in this case did not mention the

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[5] Contrary to the implication of the majority, the federal officers have repeatedly argued before the district court and this court that the discovery, as permitted by *AAPS*, violates the separation of powers. *See, e.g.*, Emergency Pet. For Writ of Mandamus at 14-15; *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 46 (D.D.C. 2002). The problem here is not that the defendants failed to make the arguments. The problem is that the majority failed to answer them.

[6] On August 20, 2001, the General Services Administration redefined "committee member" to mean "an individual who serves by appointment or invitation on an advisory committee or subcommittee." *Federal Advisory Committee Management*, 66 Fed. Reg. 37,728, at 37,734 (July 19, 2001) (codified at 41 C.F.R. § 102-3.25). FACA does not authorize retroactive rulemaking, and there is no indication that this regulation was meant to be retroactive. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 471-72, 102 L. Ed. 2d 493 (1988).

regulation in their briefs or at oral argument. Nevertheless we must deal with it, for two reasons.

First, the regulation affects the mandamus jurisdiction of the district court. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S. Ct. 1003, 1012-13, 140 L. Ed. 2d 210 (1998). Plaintiffs have not alleged that any of the private individuals they have in mind ever "serve[d] by appointment" to the Energy Policy Group. They have not alleged, in terms of the regulation, that any of these individuals had an "obligation" to serve on the Group or that any of them had the right to vote on matters coming before it.[7] As I wrote in the beginning of this opinion, in mandamus it must appear on the face of the pleadings that the plaintiffs have a "clear" right to relief. *See Power v. Barnhart*, 292 F.3d at 784; *see also Ahmed v. Dep't of Homeland Sec.*, 328 F.3d 383, 386-87 (7th Cir. 2003). In the absence of any allegations satisfying the regulatory definition of "member," plaintiffs had no clear right to relief and the district court therefore did not have jurisdiction.

The other reason is that relying on the regulation rather than the *de facto* member doctrine of *AAPS* avoids the constitutional difficulties this sort of FACA litigation poses, much in the same way the Supreme Court avoided those difficulties in *Public Citizen*, 491

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[7] If the regulation controls and if plaintiffs had made these allegations, it would have been a simple matter to determine whether evidence supported the claims. Wide ranging discovery of the sort approved here would be unnecessary and improper. For instance, only the President, and through his directive, the Vice President, had the authority to appoint members to the Group, and even then the authority was limited to full-time government employees.

U.S. at 466-67, 109 S. Ct. at 2572-73. *See Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987).[8]

The validity of GSA's definition of "member" cannot be doubted. GSA is "the agency responsible for ministering FACA." *Public Citizen*, 491 U.S. at 463 n.12, 109 S. Ct. at 2572 n.12. It is charged, in § 7(c) with the duty "to prescribe administrative guidelines," which § 8(a) refers to as "directives." And under § 4(a), regulations GSA promulgates under FACA "shall apply to each advisory committee." I recognize that the Court in *Public Citizen* gave "diminished deference" to another GSA regulation implementing FACA, without mentioning *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2781-82, 81 L. Ed. 2d 694 (1984).[9] But even if GSA's regulation is not entitled to *Chevron* deference, and should

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[8] The majority contends that the court is bound by *AAPS* to permit discovery to determine *de facto* membership. Maj op. at 1107-1108; *see also* concurring op. at 1111-1112. However, *AAPS* did not consider the GSA regulation, nor did it address the constitutional issues presented by authorizing discovery. Accordingly, *AAPS*'s holding does not preclude the court from considering these points. *See Hagans v. Lavine*, 415 U.S. 528, 533 n.5, 94 S. Ct. 1372, 1377 n.5, 39 L. Ed. 2d 577 (1974); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38, 73 S.Ct. 67, 69-70, 97 L.Ed. 54 (1952); *see also Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557, 121 S. Ct. 1043, 1057, 149 L. Ed. 2d 63 (2001) (Scalia, J., dissenting).

[9] 491 U.S. at 463 n.12, 109 S. Ct. at 2572 n.12. The Court gave several reasons, among which were that the regulation was not a "contemporaneous construction" of FACA because it was not promulgated until years after the statute came into effect, and that GSA's regulations did "carry the force of law." *Id. See generally* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

receive only whatever deference is due under *Skidmore*,[10] I would apply the regulation to this case in light of the problems of adhering to the *de facto* member doctrine of *AAPS*. *Cf. University of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002). The regulation has the added advantage of enabling the President, at the time of formation of his committee, to determine whether the committee must comply with the many requirements FACA imposes. The *de facto* membership doctrine, in contrast, will almost invariably require an after-the-fact determination, contemplating as it does an examination of what role a private individual played throughout the committee's life.

In short, I would issue the writ of mandamus and send the case back to the district court with instructions to dismiss the complaints.

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[10] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164, 89 L.Ed. 124 (1944).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY
DEVELOPMENT GROUP, DEFENDANT

Civ. Action 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, ET AL.
DEFENDANTS

Filed: Oct. 17, 2002

ORDER

Pursuant to the motion hearing held in this matter on October 17, 2002, and for the reason given in open Court and outlined in this Court's July 11, 2002 Memorandum Opinion, it is by the Court hereby

ORDERED that defendants' motion for reconsideration of the Court's August 2, 2002 order is hereby **DENIED**; and it is

FURTHER ORDERED that defendants' motion for a protective order is hereby **DENIED**; and it is

FURTHER ORDERED that the defendants who have not already done so shall produce non-privileged documents and a privilege log in compliance with this Court's August 2, 2002 Order by no later than November 5, 2002; and it is

FURTHER ORDERED that the defendants shall file any motion requesting a stay of proceedings pending appeal by no later than **October 21, 2002** at 12:00 p.m.; and it is

FURTHER ORDERED that plaintiffs shall respond in writing to the defendants' motion to stay by no later than **October 24, 2002** at 12:00 p.m.; and it is

FURTHER ORDERED that defendants shall submit a reply to plaintiffs' response by no later than **October 25, 2002** at 12:00 p.m.; and it is

FURTHER ORDERED that a hearing will be held on defendants' motion requesting a stay pending appeal on **October 31, 2002** at 1:00 p.m. in **Courtroom One**.

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
October 17, 2002

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APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Nos. Civ. Action 01-1530 (EGS),
Civ. Action 02-631 (EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY
DEVELOPMENT GROUP, DEFENDANT

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, ET AL.
DEFENDANTS

Filed: Aug. 2, 2003

ORDER

On July 11, 2002 this Court granted in part and denied in part federal defendants' motion to dismiss these consolidated cases brought by plaintiffs Judicial Watch and the Sierra Club. This court then ordered defendants to file any objections to that plan. Having considered the proposed plan and defendants' objections thereto, for the reasons given in open court today, it is hereby

ORDERED that plaintiffs' discovery plan is **APPROVED**; it is

FURTHER ORDERED that in light of plaintiffs' representations to the Court that the first set of interrogatories and first request for the production of documents will be served upon defendants today, defendants shall respond to these requests by no later than **September 3, 2002.** Defendants shall fully comply with these requests, or file detailed and precise object to any of these requests, defendants shall not make general invocations of privilege with respect to cateories of documents or questions, but must identify and explain their invocations of privilege with particularity; it is

FURTHER ORDERED that should defendants believe that documents or information that they have already released to plaintiffs in different fora are responsive to these discovery requests, defendants shall bear the burden of identifying with detailed precision what information or documents have been so released, and to which discovery requests they believe the information or documents to be responsive; it is

FURTHER ORDERED that in addition to filing any specific objections to discovery requests with this Court by September 3, 2002, defendants shall also file with the Court by that date their responses to plaintiffs' interrogatories and a summary of the documents that were produced; it is

FURTHER ORDERED that a status hearing shall be held on **September 13, 2002** at **10:00 a.m.** in **Courtroom One** to discuss defendants' discovery responses and the need for further briefing of constitutional issues raised by any invocations of privilege, if necessary.

IT IS SO ORDERED.

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
October 17, 2002

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APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Nos. Civ.A. 01-1530(EGS),
Civ.A. 02-631(EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, DEFENDANT

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, ET AL., DEFENDANTS

July 11, 2002

MEMORANDUM OPINION

SULLIVAN, District Judge.

Plaintiffs Judicial Watch, Inc. and Sierra Club filed these now-consolidated lawsuits against Vice President Richard Cheney, the National Energy Policy Development Group ("NEPDG"), various other federal officials,[1] and private individuals[2] to enforce the require-

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[1] The federal officials named in Judicial Watch's Second Amended Complaint include: Secretary of the Treasury Paul

ments of the Federal Advisory Committee Act ("FACA"), 5 U.S.C.App. 2, the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq*, and the federal mandamus statute, 28 U.S.C. 1361. While the claims raised by each plaintiff differ in relevant and important ways, there is substantial overlap between the two complaints. Both plaintiffs seek information concerning the activities of the NEPDG and its members in developing and recommending to President George W. Bush a national energy policy. Both plaintiffs allege that private individuals were given a significant role in developing this energy policy, and as a result, the confidentiality under which the NEPDG operated violated the requirements of FACA. Defendants have moved to dismiss both complaints, raising a

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O'Neill, Secretary of the Interior Gail Norton, Secretary of Agriculture Ann Veneman, Secretary of Commerce Donald Evans, Secretary of Transportation Norman Mineta, Secretary of Energy Spencer Abraham, Secretary of State Colin Powell, Director of Federal Emergency Management Joseph Allbaugh, Administrator of the Environmental Protection Agency Christine Todd Whitman, Chairman of the Federal Energy Regulatory Commission Patrick Wood, Director of the Office of Management and Budget Mitchell Daniels, Assistant to the President Joshua Bolton, and Assistant to the President Larry Lindsey. The federal officials named in Sierra Club's Complaint include: Andrew Lundquist, Executive Director of the NEPDG, Director of Energy Policy for Vice President Cheney and Senior Policy Advisor to the Department of Energy, Secretary Abraham, Secretary Evans, Secretary Norton, Secretary Veneman, Secretary O'Neill, Secretary Mineta, and Administrator Whitman.

[2] The private individuals named in Judicial Watch's Second Amended Complaint include: Mark Racicot, Haley Barbour, Kenneth Lay, Thomas Kuhn, and John and Jane Does 1-99, Certain Unknown Non-Federal Employees. Sierra Club sued no non-federal individual defendants.

number of jurisdictional, statutory, and constitutional objections to these suits.

This case comes before the Court on federal defendants' motions to dismiss the Judicial Watch and Sierra Club complaints, as well as three private defendants' motions to dismiss the Judicial Watch complaint. Upon consideration of these motions, the responses and replies thereto, the oral argument of counsel, the applicable statutory and case law, the Court grants in part and denies in part the federal defendants' motions, and grants the private defendants' motions.

BACKGROUND

I. The National Energy Policy Development Group

On January 29, 2001, President George W. Bush issued a Memorandum establishing the National Energy Policy Development Group. *See* Sierra Club Compl. at ¶ 16; Defs.' Mem. of Points & Authorities in Support of Defs.' Mot. to Dismiss filed on 3/8/2002, Attach. A ("Bush Mem."). The Presidential Memorandum mandated that the NEPDG was to be established within the Executive Office of the President and was tasked with developing a national energy plan. *Id.* The mission of the NEPDG was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." *Id.* The expressly delineated functions of the NEPDG were to gather information, deliberate, and make policy recommendations to the President. *Id.* The President assigned the [NEPDG] the task of submitting reports to the President on the difficulties in

ensuring the country's energy needs and setting forth a recommended national energy policy consistent with the group's mission. *Id.* The NEPDG was given a limited duration and was authorized to act only through the end of the 2001 fiscal year. *Id.*

Vice President Cheney was tasked with directing the group, presiding at meetings, and establishing any subordinate groups to assist the NEPDG in its work. *Id.* The memorandum appointed the following individuals as members of the group: Vice President Cheney, 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, the Director of the Federal Emergency Management Agency, the Administrator of the Environmental Protection Agency, the Assistant to the President and Deputy Chief of Staff for Policy, the Assistant to the President for Economic Policy, and the Assistant to the President for Intergovernmental Affairs. *Id.* The memorandum also stated that the Vice President could also invite, when appropriate, the Chairman of the Federal Energy Regulatory Commission to participate, as well as the Secretary of State, and "other officers of the Federal Government." *Id.* Funding and support staff were to be provided by the Department of Energy ("DOE"), and if necessary, by the National Economic Council and other appropriations available to the President.

On May 16, 2001 the NEPDG issued a public report that recommended a set of policies in the form of administrative actions and proposed legislation. *See* "Reliable, Affordable, and Environmentally Sound Energy for America's Future," Report of the National Energy Policy Development Group, available

at www.whitehouse.gov/energy/National-Energy-Policy.pdf. That report was approved by the President as the National Energy Policy. *Id.* The authority for the NEPDG terminated at the end of the 2001 fiscal year, September 30, 2001. *See* Bush Mem. at 2.

As alleged in Judicial Watch's Complaint, from the start, the [NEPDG] gained the attention of the national media. In particular, the public demand for information about the energy policy development process and identity of the participants in that process has been great. That attention has only intensified with the recent controversy over the highly publicized bankruptcy of the Enron Corporation and allegations of contacts between former Enron Chief Executive Officer Kenneth Lay and the [NEPDG]. Both plaintiffs allege that private individuals and corporations had access to the NEPDG and participated as members of the NEPDG. Sierra Club also alleges that Sub-Groups of the NEPDG were created, which also had private individual members. Both plaintiffs made requests on behalf of their members for information about the NEPDG and had those requests denied by defendants.

II. Procedural History of the Judicial Watch and Sierra Club Lawsuits

On June 25, 2001, plaintiff Judicial Watch wrote to Vice President Cheney expressing its opinion that the [NEPDG] was required to comply with FACA, asking to attend all future NEPDG meetings, and requesting copies of minutes and other documents under FACA and FOIA. Judicial Watch is a self-described non-profit public interest law firm the mission of which includes promoting open government. The Office of the Vice President responded by letter on July 5, 2001 denying Judicial Watch's request and informing Judicial Watch

that the NEPDG was not subject to either FACA or FOIA.

On July 16, 2001, Judicial Watch filed this lawsuit. Judicial Watch initially sued only the [NEPDG], alleging violations of FACA and FOIA. After receiving several extensions of time to file a responsive pleading from this Court, on October 17, 2001, defendant NEPDG moved to dismiss. Defendant NEPDG originally argued that Judicial Watch's complaint failed to state a claim under FACA because the NEPDG consisted solely of federal officials, and that it would violate Article II of the Constitution to apply FACA to this group.

On January 31, 2002, this Court issued an Order setting forth constitutional issues to be briefed in advance of a hearing on the NEPDG's motion to dismiss. That briefing was completed on February 11, 2002. On February 12, 2002, this Court held a hearing at which the Court discussed with government's counsel several problems with the briefs filed by the government in this case. First, although moving to dismiss the complaint, the government had attached and relied on evidence outside the Complaint to support its arguments. This Court inquired why it should not convert the government's motion to a motion for summary judgment pursuant to Federal Rules of Procedure 12 and 56 and proceed immediately to discovery. Furthermore, the Court discussed several serious deficiencies in the legal arguments raised by the government, particularly the government's failure to cite controlling adverse authority from the D.C. Circuit on the issue of mootness, despite government's counsel having also been counsel in those cases. In addition, the Court discussed what appeared to be government

counsel's mischaracterization of Supreme Court precedent on the constitutional separation of powers issue. Defense counsel conceded that it had argued for the application of a constitutional standard that did not reflect controlling law without informing the Court that it was doing so. *See* Tr. 2/12/2002 at 33:17 - 34:1; 35:8 - 35:23; 36:15 - 38:7; 38:20 - 39:1; 39:9 - 40:16.

At that hearing, government's counsel admitted to this Court that the briefs submitted did not represent the government's best efforts, and requested further opportunity to research and brief the important issues raised by this case. Plaintiff also requested the opportunity to amend its complaint to include additional defendants, in light of arguments made by the government with respect to the termination of the sole defendant NEPDG. Despite the serious inadequacies in the government's briefing to date, the Court found that it was in the interest of justice to allow the plaintiff to amend its complaint and the defendant to re-brief its motion to dismiss.

Judicial Watch filed its First Amended Complaint on February 15, 2002, naming Vice President Cheney, the NEPDG, several Cabinet members, and several private individuals as defendants. The federal defendants moved to dismiss the Amended Complaint. Defs.' Mot. of 3/8/02. For the first time, the federal defendants argued, among other things, that Judicial Watch's complaint should be dismissed because FACA affords no private cause of action. Three of the private defendants also moved to dismiss the Amended Complaint on the grounds that neither FACA or FOIA apply to private individuals.

On January 25, 2002, Sierra Club filed suit against Vice President Cheney, the NEPDG, and various

agency officials pursuant to the APA, the federal mandamus statute, and FACA in the United States District Court for the Northern District of California. The government moved to transfer that case to this Court. While awaiting the decision of the Northern District of California on the transfer motion, Sierra Club and Natural Resources Defense Council ("NRDC") were granted leave to file amicus briefs in the Judicial Watch case. On March 21, 2002, the Northern District of California transferred the Sierra Club case to this Court, where it was filed as a related case to the Judicial Watch case. This Court ordered the two cases consolidated under one case number and set forth an expedited briefing schedule.

On April 5, 2002, the federal defendants moved to dismiss the Sierra Club complaint, raising many of the same issues as in their motion to dismiss Judicial Watch's First Amended Complaint. Defs.' Mot. of 4/5/02. In addition, the federal defendants also argued for the dismissal of Sierra Club's claims pursuant to the APA and the federal mandamus statute. Briefing in both cases was completed on April 29, 2002.

This Court held oral argument on the federal defendants' motions to dismiss on May 23, 2002. After hearing argument from both plaintiffs, amicus NRDC, and the federal government, the Court made several rulings by Order issued that same day. First, the Court granted plaintiff Judicial Watch leave to file a second amended complaint to include claims under the APA and the federal mandamus statute that were in substance identical to Sierra Club's claims under those statutes. Second, this Court ordered that it would consider federal defendants' motion to dismiss the Sierra Club complaint and the motion to dismiss Judi-

cial Watch's Second Amended Complaint, along with any supplemental arguments the government would add in the time allotted. Third, the Court granted defendants' motion to dismiss the APA claims against Vice President Cheney and the NEPDG. Fourth, the Court denied all other aspects of the motions to dismiss at that time. Fifth, the Court ordered that this Memorandum Opinion, explaining the Court's decision on the motions to dismiss, would be issued promptly. Finally, the Court ordered the parties to begin to develop a proposed discovery plan, which would be filed soon after this Memorandum Opinion was issued.

On May 28, 2002, Judicial Watch filed a Second Amended Complaint, incorporating the language of Sierra Club's APA and mandamus claims.[3] On June 3, 2002 the federal defendants moved to dismiss, incorporating by reference the arguments made in their motions to dismiss of March 8, 2002 and April 5, 2002. Judicial Watch filed an opposition to that motion, similarly incorporating arguments made in previous filings.

III. Other NEPDG-related Cases Before this Court

In addition to the two consolidated suits before this Court, the activities of the NEPDG are the subject of several other lawsuits and congressional inquiries. Several other FOIA cases are pending before this Court. *See, e.g., Judicial Watch v. Department of Energy*, Civ.

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[3] Count III of Judicial Watch's Second Amended Complaint exceeded the scope of this Court's order permitting the amendment, as it was also brought against the private defendants who do not appear in the Sierra Club lawsuit. Consequently, this Court dismissed Count III with respect to the private defendants only. *See* Order of May 31, 2002.

Action No. 01-981 (PLF); *Natural Resources Defense Council v. Department of Energy,* Civ. Action No. 01-2545 (PLF). The agency defendants in those FOIA cases have been ordered by this Court to produce responsive documents, and have begun to do so, thereby revealing more information about the operations of the NEPDG than was available at the outset of either of these consolidated cases.

In addition, the General Accounting Office (GAO), on behalf of Congress, filed suit in this Court challenging the White House's refusal to turn over information about NEPDG to GAO pursuant to GAO's investigatory authority. *See Walker v. Cheney,* Civ. Action No. 02-0340(JDB). Information released as a result of these cases may potentially impact the statutory and constitutional issues raised by this case.

DISCUSSION

I. Standard of Review

This Court will not grant the defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Kowal v. MCI Communications Corp.,* 16 F.3d 1271, 1276 (D.C. Cir. 1994). "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974).

Furthermore, a motion to dismiss is intended to test the sufficiency of the complaint and the complaint

alone.[4] *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *Tele-Communications of Key West v. U.S.*, 757 F.2d 1330, 1335 (D.C. Cir. 1985) ("a Rule 12(b)(6) disposition must be made on the face of the complaint alone"). Accordingly, at this stage in the proceedings, the Court must accept as true all of the complaints' factual allegations. *See Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985). Plaintiffs are entitled to "the benefit of all inferences that can be derived from the facts alleged." *Kowal*, 16 F.3d at 1276.

II. Federal Defendants' Motions to Dismiss

A. Mootness

The federal defendants have moved to dismiss both complaints as moot because the NEPDG terminated pursuant to the terms of the Presidential Memorandum on September 30, 2001. Because at least two forms of relief, an injunction requiring the disclosure of records and a declaration that the government violated FACA, are available, these cases are not moot. *See Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999); *Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999). Furthermore, because Judicial Watch has alleged in its Second Amended Complaint that on information and belief the NEPDG is continuing to operate despite the termination of its

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[4] In response to the initial Judicial Watch Complaint, the NEPDG attempted to rely on facts outside the Complaint to support its motion to dismiss, *see* Defs.' Br. of 2/5/2002 at 9. However, the federal defendants do not rely on materials outside the complaints in the motion filed in response to Judicial Watch's First and Second Amended Complaints, or Sierra Club's complaint and thus this Court need no longer consider the issue of whether conversion to a summary judgment motion is appropriate pursuant to Rules 12(b)(6) and 56.

mandate in the Presidential Memorandum, Judicial Watch's claims are not moot.

It is well settled that the exercise of judicial power authorized by Article III of the U.S. Constitution depends on the existence of a case or controversy. *See, e.g., Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975). A case is moot when it "has lost its character as a present, live controversy of the kind that must exist if [the court] is to avoid advisory opinions on abstract questions of law." *Schering Corp. v. Shalala*, 995 F.2d 1103, 1106 (D.C. Cir. 1993). Article III is satisfied when, as here, the existence of a "partial remedy" is "sufficient to prevent [a] case from being moot." *Calderon v. Moore*, 518 U.S. 149, 150, 116 S. Ct. 2066, 135 L. Ed. 2d 453 (1996).

1. *Judicial Watch's Allegations of the Ongoing Existence of the NEPDG*

Judicial Watch's Second Amended Complaint alleges that "[o]n information and belief, the NEPDG is still in existence." Jud. Watch Sec. Amend. Compl. at § 38. The Complaint then alleges that NEPDG members and staff continue to meet to discuss and formulate energy policy. *Id.* However unlikely, this Court can not determine at this stage of the case whether or not this allegation is true, but rather *must* accept it as true for purposes of deciding this motion to dismiss. *Scheuer*, 416 U.S. at 236, 94 S. Ct. 1683. The federal defendants argue in response that "[t]here can be no question that, as a matter of law, the NEPDG no longer exists." Defs.' Mot. of 3/8/2002 at 9. This argument misses the mark. Plaintiff Judicial Watch is not arguing that the legal authority for the NEPDG continues, but that the NEPDG has continued to meet despite the termination of its legal authority. The continued existence of the

NEPDG is not, as defendants contend, a question of law, but is a question of fact that is clearly in dispute.

In the alternative, the federal defendants argue that even if the ongoing existence of the NEPDG is a question of fact, this Court should not accept this fact as true because it is not "well-pled." Defs.' Mot. of 3/8/2002 at 9 n.4. Defendants argue that where there is a disparity between facts alleged in a complaint, and exhibits submitted by the plaintiff in support of the complaint, the exhibit trumps the allegation. *Id.* (citing cases). Defendants point out that the letter attached to Judicial Watch's Second Amended Complaint and cited by Judicial Watch to support its allegation of an October 2001 meeting between NEPDG staff and Enron representatives actually states that the meeting occurred "after the termination of the Group." Jud. Watch Sec. Amend. Compl. Ex. 11, at 2. Defendants are correct that this letter clearly states that this meeting occurred after the NEPDG's termination. Regardless, defendants' argument that Judicial Watch's Second Amended Complaint is not well-pled fails to acknowledge that the Amended Complaint does not simply allege that this one meeting occurred, but that "[o]n information and belief, other meetings between both federal and non-federal members of the allegedly defunct NEPDG have occurred and are still occurring to this day to continue discussions on formulating a national energy policy." Jud. Watch Sec. Amend. Compl. at ¶ 38. At this stage of the proceedings, prior to any discovery, this Court *must* accept these facts as true, no matter how vigorously defendants contest the truthfulness of these allegations.

If the NEPDG does continue to exist and meet to formulate energy policy, this Court can still award the

relief requested by Judicial Watch. Therefore, because Judicial Watch has alleged the ongoing existence of this group, none of Judicial Watch's claims are moot.

2. *Even if the NEPDG no Longer Exists, These Claims are Not Moot*

Unlike Judicial Watch, Sierra Club does not allege that the NEPDG continues to exist, but concedes that the NEPDG terminated on September 30, 2001. However, even if in fact the NEPDG ceased to exist on September 30, 2001, Judicial Watch and Sierra Club's requests for documents and declaratory relief are not moot.

a. *Injunctive Relief*

Both plaintiffs have requested that this Court order the release of documents related to the NEPDG's activities as relief for the alleged violations of FACA. Jud. Watch Sec. Amend. Compl. at 22, ¶ 5, 6; Sierra Club Compl. at ¶ 36. FACA mandates public access to some records of advisory committees:

> Subject to [the requirements of FOIA] the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents, which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying . . .

5 U.S.C. App. 2 § 10(b). This provision "affirmatively obligates the Government to provide access to the identified materials." *Food Chem. News v. Dep't of Health and Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992); *see also Cummock v. Gore*, 180 F.3d 282, 289 (D.C. Cir. 1999). Furthermore, this public access provision applies even where there has been no specific

request made, unless "the agency reasonably claims [the materials] to be exempt from disclosure pursuant to FOIA." *Food Chem. News*, 980 F.2d at 1469; *see also Cummock*, 180 F.3d. at 289. However, this provision does have a time limitation: the documents, "shall be available for public inspection and copying . . . *until the advisory committee ceases to exist.*" 5 U.S.C. App. 2 § 10(b) (emphasis added).

The federal government's statutory duty under FACA to allow the public to inspect and copy documents may be limited in time by the statute, but the ability of a court to award access to the documents as relief for previous violations of that duty is limited only by the existence of the documents. The terms of the statute create the substantive requirements to which the government must adhere—the government must make documents available only while an advisory committee exists. Here, both plaintiffs have properly alleged that the government failed to make documents available during the life of the NEPDG. Whether or not plaintiffs sued before or after the group terminated does not alter the allegation that the government failed to meet the substantive requirements of the statute during the relevant timeframe. Assuming the facts in the complaints to be true, the government violated the public access provisions of the statute. Contrary to the federal defendants' argument here, the terms of the statute limit the scope of liability, not the availability of a remedy.

The Court is free to exercise its discretion to craft equitable relief addressing statutory violations. Indeed, if after discovery this Court determines that a statutory violation has occurred, the Court *must* provide some form of relief. *See, e.g., U.S. v. Oakland*

Cannabis Buyers' Cooperative, 532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001). Here, one alleged violation is a failure to provide access to documents during the lifetime of the NEPDG. This Court, in its discretion, could determine at some later date that ordering defendants to provide whatever relevant documents still exist is an appropriate remedy for that violation.

Thus, whether the relief is available is contingent not on the continued existence of the group, but on the continued existence of the records and information.[5] In other cases, plaintiffs' claims for documents pursuant to § 10(b) were eventually rendered moot not by the termination of the advisory group but only when the defendants released the documents. *See, e.g., Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999); *Physicians Comm. for Responsible Medicine v. Glickman*, 117 F. Supp. 2d 1 (D.D.C. 2000); *Ass'n of Am. Physicians and Surgeons v. Clinton*, 879 F. Supp. 103 (D.D.C. 1994).

The D.C. Circuit has held that a request for documents pursuant to FACA is not rendered moot by the termination of the advisory committee in question. *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999). In *Cummock*, the D.C. Circuit reversed a district court opinion that in part dismissed the plaintiff's claim because her request for documents was untimely. The Court held that Cummock had an enforceable right to the documents that were denied to her during the committee's existence and remanded for the District Court to determine precisely what information Cummock was

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[5] At the hearing on February 12, 2002, when government's counsel acknowledged that relevant documents still exist, this Court ordered the government to maintain those documents for the duration of this lawsuit.

entitled. 180 F.3d at 292- 93. The primary argument by the government in *Cummock* was that the plaintiff, as a member of the advisory committee in question, had no cause of action under FACA for access to records. The Court rejected the government's argument, holding that a member of an advisory committee has an even greater right of access than does the public under § 10(b), but in so holding discussed the parameters of the public's right. The Court explained:

> In any event, the Government does not dispute that committee members have at least the same rights under FACA as the public. Although we disagree with the Government's position that the rights of a committee member extend no further than the rights of a non-member, even taking only this limited view, the Government's concession is significant. *Because there is no question under our precedent that members of the public possess enforceable rights to obtain information under FACA, see Food Chem. News*, 980 F.2d at 1472, it follows a fortiori that committee members have at least these same rights. *And we have also made it clear that FACA rights are enforceable even after an advisory committee has been disbanded. See, e.g., Byrd*, 174 F.3d 239, 243-44 (rejecting argument that plaintiff's injury was not redressable where panel had already completed its work and been disbanded).

180 F.3d at 292 (emphasis added).

The holding of the D.C. Circuit in *Cummock* is clear: "Cummock clearly possesses an enforceable right to information under FACA, because any member of the public possesses such a right. Moreover, Cummock possesses an even greater right than a member of the

public, because, as a Commission member, she is entitled to fully participate. . . ." *Id.* at 292. In so holding, the D.C. Circuit was attempting to be faithful to legislative intent. With respect to the public access provision, § 10(b), the legislative history explains:

> This provision has the effect of assuring openness in the operations of advisory committees. This provision coupled with the requirement that complete and accurate minutes of committee meetings be kept serves to prevent the surreptitious use of adisory committees to further the interests of any special interest group. Along with the provisions for balanced representation contained in Sec. 4 of the bill, this requirement of openness is a strong safeguard of the public interest.

H.R. Rep. 92-1017, *reprinted in* 1972 U.S.C.C.A.N. at 3491. The surreptitious use of advisory committees by special interest groups could necessarily result in a lack of knowledge about the group's activities, as exemplified by the allegations in this case. It is entirely conceivable that only after the fact would the public become aware of a group's existence and activities, and only after the fact could the public then claim its right of access to documents. In addition, mandating that a court's ability to enforce the FACA record-keeping requirement ends with the termination of the advisory committee would create an odd incentive for the government to terminate any problematic advisory group to avoid shedding light on its activities.

Defendants try to distinguish *Cummock* by arguing that *Cummock* applies only to suits by members of an advisory committee. *See* Defs.' Mot. of 3/8/2002 at 10. But the passage cited above clearly assumes for sake of

argument that "that the rights of a committee member extend no further than the rights of a non-member," and then states that "members of the public possess enforceable rights to obtain information under FACA" and that "FACA rights are enforceable even after an advisory committee has been disbanded." 180 F.3d at 292. Furthermore, the Court held that "Cummock clearly possesses an enforceable right to information under FACA, because any member of the public possesses such a right." *Id.* Contrary to defendants' argument, these conclusions are not dicta, but are central to the D.C. Circuit's reasoning and holding. In order to determine what rights Cummock possessed, the Court reasoned that Cummock must have at least as many rights as the public, which include the right to documents after the committee has been disbanded.

Finally, defendants argue that *Cummock* cites only one case, *Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999), to support the conclusion that a claim for documents is not moot beyond the life of the committee, and therefore is limited to the scope of *Byrd*. *Byrd* held that a request for declaratory relief under FACA was not mooted by the dissolution of the advisory committee at issue. *Id.* at 244. Thus, defendants argue that *Cummock's* citation to *Byrd* "can only be understood to be a reference to the limited declaratory relief at issue in *Byrd*." Defs.' Mot. of 3/8/02 at 11 n.7. Defendants fail to recognize that the D.C. Circuit in *Cummock* extended the general proposition in *Byrd* that relief can exist beyond the life of the committee to claims for other relief. Insofar as *Cummock* is an extension of the holding in *Byrd*, it is an extension that is binding on this Court.

Defendants also argue that after the termination of an advisory committee, FOIA provides the only statu-

tory right of access to documents. In the absence of a FACA violation, this may be an accurate statement. If the government complies with FACA, and provides documents in a reading room until the committee ceases to exist, and a citizen wants to access those documents at some time after the termination of the committee, that citizen would have to file a FOIA request to a proper agency defendant for those documents. But that scenario is not what plaintiffs have alleged here. When the government violates FACA, the question is not what other statutes could also provide a right of access, but what options are available to this Court to remedy that statutory violation.

Finally, defendants also argue that plaintiffs' claims are moot because they did not request a preliminary injunction to preserve the records at issue here. Indeed, plaintiffs could have moved for a preliminary injunction to require defendants to maintain the relevant documents. However, plaintiffs were in no way required to request such preliminary relief in order to maintain the controversy. Relief is available as long as relevant documents exist.

b. *Declaratory Relief*

Defendants also argue that plaintiffs' request for a declaratory judgment that defendants violated FACA is moot. Defendants argue that, because all other claims for relief are moot, the claim for declaratory relief cannot survive alone, *citing City of Houston v. Dep't of Housing & Urban Dev.*, 24 F.3d 1421, 1429 (D.C. Cir. 994). As explained above, the claims for injunctive relief regarding the documents are not moot in this case, so this argument by defendants fails. However, even if all the other claims for relief were moot, this Court would follow the D.C. Circuit's holding in *Byrd*

that a claim for declaratory relief is not mooted by the termination of the committee. 174 F.3d 239 (D.C. Cir. 1999).

In conclusion, Judicial Watch's claims are not moot because it has alleged the ongoing existence of the NEPDG. Regardless of the likelihood of the truth of these allegations, this Court must accept them as true for purposes of deciding these motions. In addition, Sierra Club's claims are not moot because this Court can remedy any alleged violations of FACA, the APA, and the mandamus statute with injunctive and declaratory relief.

B. FACA Claims

1. *FACA Provides No Private Cause of Action*

Both Judicial Watch and Sierra Club allege that the activities of the NEPDG are subject to FACA because the group was established by the President to provide advice on energy policy, and had members who were not full-time federal employees. Both Judicial Watch and Sierra Club further allege that the activities of the NEPDG violated all the procedural requirements of FACA by failing, for example, to provide public notice of meetings, public access to meetings, and public access to minutes and documents generated by the NEPDG. Sierra Club also alleges that in addition to the NEPDG, defendants established and utilized "Sub-Groups" of the NEPDG, which also had private members and which also were subject to and violated FACA's requirements.

In response to these allegations, defendants argue that Judicial Watch and Sierra Club's claims pursuant to FACA should be dismissed because there is no

private right of action under FACA.[6] While both Sierra Club and amicus NRDC concede that there is no private cause of action under FACA, Judicial Watch contends that there is. However, in the event that this Court should be convinced by the government's argument with respect to FACA, at oral argument Judicial Watch requested and was granted leave to amend its complaint to include claims under the APA and federal mandamus statute.

Notwithstanding the many previous cases in which courts have implicitly recognized a private right of action pursuant to FACA, in light of the Supreme Court's recent decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), this Court has no choice but to hold that FACA creates no private right of action. *Sandoval* makes very clear that courts can not read into statutes a cause of action that has no basis in the statutory text. 532 U.S. at 286-87, 121 S. Ct. 1511 ("Statutory intent on this latter point is determinative. . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.") (internal citations omitted). The *Sandoval* Court rejected any attempt to "revert in this case to the understanding of private causes of action that held sway 40 years ago" that would allow courts to imply a cause of action where consistent with the purpose of the statute at issue. *Id.* Regardless of how allowing such a private cause of action may further the purposes of FACA, nothing in the text of FACA

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[6] Defendants did not make this argument in their original motion to dismiss the Judicial Watch claims, but raised it only in response to Judicial Watch's First Amended Complaint. *See* Defs.' Mot. of 3/8/02.

supports a private right to sue. The statutory language may create rights and duties that have been recognized by courts in the past. *See, e.g., Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999). However, language that creates a right is insufficient to create a right to sue. The *Sandoval* Court made clear that the statute must provide not only a private right but also a private remedy. 532 U.S. at 286-87, 121 S. Ct. 1511.

Nothing in the language of FACA evidences any intent to create such a remedy. Precedent does not require this Court to hold otherwise. It is true that several cases have been brought pursuant to FACA apparently without incorporating the FACA violation into a corresponding APA claim. *See, e.g., Public Citizen v. Dep't of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989); *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999); *Ass'n of Am. Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993). Apparently, in all of these cases, the courts assumed that FACA provided a cause of action. None of the cases addressed the issue of whether Congress created a private right to sue under FACA. This Court cannot rely on an implicit assumption, even an assumption made by the Supreme Court, when a later Supreme Court decision makes clear that the requisite statutory language is lacking here.

However, defendants overstate the amount of precedent that supports their position that a plaintiff must sue under the APA to enforce FACA. Defendants cite cases from the D.C. Circuit, *Claybrook v. Slater*, 111 F.3d 904, 908-09 (D.C. Cir. 1997), *Animal Legal Defense Fund v. Shalala*, 104 F.3d 424, 430 (D.C. Cir. 1997), *Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994), and one case from

this Court, *Fertilizer Institute v. EPA*, 938 F. Supp. 52, 54 (D.D.C. 1996), for the proposition that "judicial review of FACA claims is available only through the APA." Defs.' Reply of 4/26/02 at 5. Yet none of the D.C. Circuit cases cited by defendants hold this.[7]

The *Fertilizer Institute* case does clearly hold that "[s]ince FACA contains no provision for judicial review, the availability if such review must derive from the APA." 938 F. Supp. at 54. However, one other case from this Court, cited by plaintiff Judicial Watch, holds the opposite: that FACA does create a private cause of action. *Washington Legal Found. v. American Bar*

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[7] *Claybrook v. Slater* involved a challenge under FACA to the decision of an agency representative not to adjourn an advisory committee meeting. 111 F.3d at 906. The D.C. Circuit affirmed the District Court's dismissal of the action for lack of standing, reasoning that the plaintiff had no legally cognizable injury because the action at issue was committed to agency discretion. *Id.* In so holding, the Court stated, "the Administrative Procedure Act . . . governs judicial review of agency actions." *Id.* at 908. While the D.C. Circuit did analyze that FACA claim, brought against the Federal Highway Administration, under the APA, it did not hold that a FACA claim was *only* available under the APA. The case says nothing about whether and how FACA claims brought against entities in the government that are not agencies for APA purposes can proceed.

Neither *Animal Legal Defense Fund v. Shalala* nor *Washington Legal Foundation v. U.S. Sentencing Commission* address the availability of a private right of action under FACA. 104 F.3d 424, 17 F.3d 1446. The language with respect to the APA incorrectly cited by defendants here, comes from a discussion of whether the Sentencing Commission qualifies as an "agency" for purposes of FACA. FACA incorporates the definition of "agency" used in the APA; thus, with respect to what qualifies as an agency, the APA "determines FACA coverage." 104 F.3d at 430. Neither of these cases addresses whether FACA contains a private right to sue.

Ass'n Standing Comm. on the Fed. Judiciary, 648 F. Supp. 1353, 1361 (D.D.C. 1986).

Notwithstanding the relative confusion that exists within the FACA doctrine with respect to this question, the Supreme Court's standard is now clear: this Court cannot read into a statute a cause of action that Congress has not expressly created. *Sandoval*, 532 U.S. at 286, 121 S. Ct. 1511. Consequently, Judicial Watch and Sierra Club's claims pursuant to FACA must be dismissed.

C. APA Claims

Plaintiffs allege that by failing to comply with FACA, the defendants have acted arbitrarily and capriciously, not in accordance with law, and without observation of procedure required by law, in violation of the APA. 5 U.S.C. § 706(2)(A) and (D) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law . . . (D) without observance of procedure required by law"). Defendants argue that plaintiffs have failed to state a claim under the APA because many of the defendants are not "agencies" and therefore not liable pursuant to the APA. For those defendants that are covered by the APA, defendants argue that plaintiffs have not identified the requisite "final agency action."

Plaintiffs' APA claims against two of the named defendants, Vice President Cheney and the NEPDG, were dismissed by this Court on May 23, 2002. Plaintiffs have alleged sufficient final agency action with respect to the remaining agency defendants for this Court to deny the motions to dismiss.

1. *Non-Agency Defendants*

Judicial Watch and Sierra Club have named as defendants the following: Vice President Richard Cheney, the NEPDG, Andrew Lundquist, Executive Director of NEPDG and Director of Energy Policy for Cheney and Senior Policy Advisor to the DOE, Spencer Abraham, Secretary of DOE, Donald Evans, Secretary of Commerce, Gale Norton, Secretary of the Interior, Ann Veneman, Secretary of Agriculture, Paul O'Neill, Secretary of the Treasury, Norman Mineta, Secretary of Transportation, and Christine Todd Whitman, Administrator of the EPA. Defendants argue that the Vice President, the NEPDG, and any alleged NEPDG subgroups are not "agencies" for purposes of the APA.

a. *Vice President Cheney*

Sierra Club[8] concedes that Vice President Cheney is not an agency for purposes of the APA. Sierra Club's Opp'n at 7 n.3. Thus, this Court need not resolve the question of whether the Vice President may ever be an "agency" for purposes of the APA, thereby avoiding a difficult constitutional question. *See Public Citizen v. Dep't of Justice*, 491 U.S. 440, 466, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (emphasizing doctrine of constitutional avoidance); *cf. Franklin v. Massachusetts*, 505 U.S. 788, 800-01, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992) (holding that separation of powers concerns

[8] Judicial Watch has opposed the federal defendants' motion to dismiss its Second Amended Complaint by incorporating by reference the arguments previously made in its opposition briefs and the briefs of Sierra Club and NRDC. *See* Jud. Watch Opp'n of 6/7/02. Because Judicial Watch has adopted Sierra Club and NRDC's arguments with respect to the APA claims in their entirety, the concessions made by Sierra Club and NRDC with respect to these claims similarly apply to Judicial Watch.

prevent the application of the APA to the President); *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993) (suggesting that the Vice President should not be subject to FOIA).

b. *NEPDG*

Because Sierra Club has conceded that the NEPDG no longer exists, any APA claim brought directly against the NEPDG must be dismissed. Even though Sierra Club's FACA claims with respect to the federal defendants are not moot, if the NEPDG no longer exists, then it can not be sued as a defendant. Thus, the Court need not resolve the question of whether the NEPDG or its alleged sub-groups were sufficiently independent to qualify as an "agency" for purposes of the APA.[9]

2. *Agency Defendants and Final Agency Action*

Defendants concede that the cabinet members sued by plaintiffs are agency actors, and can generally be sued pursuant to the APA for agency action. Defs.' Mot. of 4/5/02 at 12. Section 704 of the APA states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. It is uncontested that the actions in question are not made reviewable by statute, so in order to state a claim under the APA, plaintiffs must identify a "final agency action." Defendants argue that the APA claims against these agency defendants must be dismissed because plaintiffs have not done so.

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[9] Furthermore, Sierra Club admits that it included the NEPDG as a defendant "in order to preempt any 'shell game' tactic defendants may employ to withhold Task Force records, and for the sake of clarity." Sierra Club's Opp'n of 4/16/02 at 8 n.6.

Plaintiffs argue that the agency heads named as defendants established and utilized the NEPDG and the NEPDG Sub-Groups and that the "agencies under the control of the named agency defendants have denied [plaintiffs] access to proceedings and records". Sierra Club's Opp'n of 4/16/02 at 9. To be specific, the particular FACA violations alleged to have been caused by defendants are:

- Failure to open each meeting to the public.
- Failure to publish timely notice of each meeting in the Federal Register
- Failure to allow public attendance or statements before the meetings
- Failure to make available for public inspection and copying the records of the NEPDG.
- Failure to keep detailed minutes of each meeting.
- Establishing Sub-Groups without Presidential authorization or notice in Federal Register.
- Failure to file an advisory committee charter.

Sierra Club Compl. at ¶ 31; Judicial Watch Sec. Amend. Compl. at ¶ 54.

The question before this Court is twofold: whether the actions or lack thereof that caused the alleged FACA violation are "agency action," and whether those actions or inactions are "final." Plaintiffs allege that the agency defendants were at least in part responsible for the decision-making processes that lead to the FACA violations. Specifically, Sierra Club alleges that the various agency defendants "participated in" the

NEPDG meetings and deliberations, and "gathered information, advice, and recommendations on national energy policy and supervised the work of the [NEPDG]." Sierra Club's Compl. at ¶¶ 9-15. Furthermore, "defendants arranged, participated in and exercised responsibility over meetings and other activities involving [Task Force Sub-Groups]." *Id.* at ¶ 18. In addition, Sierra Club alleges that the "participants in [NEPDG] and the Task Force Sub-Groups interacted significantly and acted collectively in expressing their viewpoints and advice on energy policy." *Id.* at ¶ 20. Sierra Club also alleges that "[t]he [NEPDG] and the Task Force Sub-Groups were established or utilized by the President and the defendants." *Id.* at ¶ 23. Finally, "defendants have refused to provide information to Congress, the General Accounting Office, or the public (including the Sierra Club) concerning" the NEPDG. *Id.* at ¶ 24.

Plaintiffs are entitled to the benefit of all inferences from the facts alleged. From the allegation that defendants caused these violations it could be possible that the group comprised of the agency defendants, the Vice President, and private individuals acted collectively to make the decisions to hold meetings that were not open to the public, to hold meetings for which minutes were not kept and were not made public, to hold meetings for which no notice was published in the Federal Register, to create draft reports and other records that were not made public, and to meet and work on policy recommendations without filing an advisory committee charter. Given the structure of the NEPDG outlined in the Presidential Memorandum, it is possible, or even likely that these decisions were not made collectively, but in fact were made by the Vice

President acting as the head of the group. However, "[i]ndeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed .2d 90 (1974). This Court will not grant a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) unless a plaintiff can prove no facts in support of his claim. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Here, if plaintiffs can prove that decisions were made collectively by this group, those can constitute agency action for purposes of the APA.

Furthermore, in addition to holding meetings of the NEPDG that allegedly violated FACA's access requirements, plaintiffs also allege that the agency defendants established and controlled the Task Force Sub-Groups. Plaintiffs allege that these Sub-Groups, comprised of NEPDG members and private individuals, also constituted advisory committees for purposes of FACA and also operated in violation of FACA and the APA. Specifically, Sierra Club alleges that "defendants arranged, participated in and exercised responsibility over meetings and other activities involving [Task Force Sub-Groups]." *Id.* at ¶ 18. Judicial Watch similarly alleges that defendants established the Sub-Groups. Jud. Watch. Sec. Amend. Compl. at ¶ 54(f). Once again, it is possible reasonably to infer from these allegations that an agency head, or a group of agency heads collectively or individually made the decision to establish and oversee particular Sub-Groups.

In response, the federal defendants argue that the decisions of the NEPDG were made by the President,

who established the group, and the Vice President, who ran the group, rather than the agency participants. The assertion that no relevant decisions were made by the agency heads is a question of fact that cannot be determined without discovery. The fact that the Presidential Memorandum that established the NEPDG delegated authority to the Vice President to head the NEPDG is not conclusive with respect to how decisions were actually made. Did the Vice President set the dates and times of the meetings? Did the group collectively come to a decision to hold a meeting or conduct other activities? If these Sub-Groups did in fact exist, who made the decision to establish them? Who made the decision as to when and where the Sub-Groups would meet, and what role they would play in the policy-making process? Construing the facts in the light most favorable to plaintiffs, this Court must assume for purposes of this motion that the decisions at issue were made in part by the agency defendants.

Thus, the question before this Court is whether collective decisions by such a group, including several agency heads, to hold meetings that allegedly violated the FACA requirements and to establish and control Task Force Sub-Groups, can be considered first, agency action, and second, final agency action pursuant to the APA. Defendants argue, "[i]n the context of advisory committees, the agency that charters a committee and to which a committee reports can engage in final agency action, but individual members of an advisory committee cannot." Defs.' Reply of 4/26/02 at 12. Defendants' primary justification for why the actions of the agency heads cannot be considered agency action is that these individuals acted only as participants in a

policy-making group, and were not making decisions on behalf of their agencies.

According to § 10 of the APA, 5 U.S.C. § 701(b)(2), "agency action" has the meaning given to it by 5 U.S.C. § 551. That definition of " 'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U.S.C. § 551(13). That section further defines "order" as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making. . . ." 5 U.S.C. § 551(6). According to the legislative history of the APA:

> The term 'agency action' brings together previously defined terms in order to simplify the language of the judicial-review provisions of section 10 and to assure the complete coverage of every form of agency power, proceeding, action, or inaction. In that respect the term includes the supporting procedures, findings, conclusions, or statements or reasons or basis for the action or inaction.

S. Doc. No. 248, 79th Cong., 2d Sess., 255 (1946). As the D.C. Circuit has explained, "the Act defines agency action as 'the whole or a part of an agency rule, order, license, sanction, relief, of the equivalent or denial thereof, or failure to act.' . . . . Id. § 551(13). These categories are imprecise, and courts have made the threshold determination of reviewable agency action on a case-by-case basis." *Industrial Safety Equipment v. EPA*, 837 F.2d 1115, 1118 (D.C. Cir. 1988).

The type of actions and inaction challenged here, creating sub-groups of the Task Force, holding meetings, refusing to disclose documents, failure to comply with FACA's other procedural requirements, certainly

fall within the broad category of "agency power" Congress intended to include in this definition of agency action. S. Doc. No. 248, 79th Cong., 2d Sess., 255 (1946) ("to assure the complete coverage of every form of agency power, proceeding, action, or inaction."). The government can not seriously challenge the type of action taken here as not the type of action covered by this definition. Whether that action can be ascribed to an agency, and whether that action is sufficiently final, are two more difficult questions.

If indeed the decisions to hold NEPDG meetings in private and to create and operate the Sub-Groups were made collectively or in part by the agency heads, can these decisions be ascribed to the agencies? This Court can not detect any case law discussing whether an action taken by a Cabinet member in an advisory capacity should be ascribed to the agency for purposes of the APA. Here, the D.C. Circuit's discussion of the difficulty of distinguishing between the dual role of policy advisor and agency head played by Cabinet officials in the context of a FOIA suit in *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980), is helpful.

The question before the D.C. Circuit in *Ryan* was whether documents within the control of the Attorney General and generated for the purpose of advising the President on judicial nominations are "agency records" for purposes of FOIA. The Circuit reversed the District Court's grant of summary judgment to defendants and ordered the court to enter summary judgment in favor of plaintiffs, holding that such documents were agency records. The D.C. Circuit held that there was no basis for "distinguishing between the Attorney General and the Department of Justice, in such a way that the former is not an 'agency' where he functions in a

purely advisory capacity to the President." 617 F.2d at 786-87. The Court emphasized the dual role played by the Attorney General as advisor to the President and administrator of the Department of Justice, and stated "[t]he same dual role would be true, to a greater or lesser extent, of all other Cabinet officers." *Id.* at 787. The Court then held that there was no "meaningful distinction" between documents generated and kept at DOJ on the basis of the dual roles. *Id.*

Similarly, with respect to the APA, there is no statutory basis for distinguishing between actions taken by an agency head as an advisor to the President and actions taken as the administrator of the agency. Just as rendering advice on judicial nominations was within the scope of the Attorney General's power both as an advisor and as the head of the Department of Justice, so too is rendering advice on energy policy within the scope of the dual roles of many of the Cabinet members sued here, particularly the Secretary of Energy. *Id.* at 787. As the D.C. Circuit explained, "[j]udicial nominations are by no means unique as an instance where normal agency functions involve some element of giving advice to the President." *Id.*

The D.C. Circuit held that "[o]nce a unit is found to be an agency, this determination will not vary according to its specific function in each individual case," and "[a]ny unit or official that is part of an agency and has non-advisory functions cannot be considered a non-agency in selected contexts on a case-by-case basis." *Id.* at 788-89. There is a compelling argument for applying this holding of *Ryan* to APA claims. The same difficulties attend to distinguishing between decisions made or actions taken by agency heads in a purely advisory context or as the head of the agency for purposes

of the APA. The Secretary of Energy provides the strongest example of such difficulty-soliciting opinions and rendering advice on energy policy to the President is part and parcel of the Secretary's duties as the head of the DOE. It would be unrealistic to say that when involved in a group designed to create energy policy the Secretary of Energy sheds his role as the head of the DOE and acts only as an advisor to the President. Furthermore, these individuals were selected to participate in this policy-making process by virtue of their positions as the various Secretaries of administrative agencies.

Moreover, in addition to the arbitrariness involved in attempting to draw a distinction between the dual roles of Cabinet members, the D.C. Circuit also rejected such line-drawing because it would undermine the purposes of FOIA. *Id.* at 788. So too would such line-drawing, in this case, undermine the purposes of the APA. Given the vast number of agency actions that include an element of advice-giving, to hold that a decision made by the head of an agency while serving in an advisory role to the President is not subject to the APA would render a large number of agency actions unreviewable. This would not comport with Congress' intent to include within the scope of the APA "every form of agency power." S. Doc. No. 248, 79th Cong., 2d Sess., at 255 (1946).

Thus, for the reasons articulated by the D.C. Circuit in *Ryan*, this Court holds that an action that otherwise would qualify for the APA's definition of "agency action" does not fall outside the coverage of the APA simply because the agency head acts in an advisory capacity to the President. The more important inquiry

is whether that action is sufficiently final for APA purposes.

The Supreme Court clearly stated the definition of "final agency action" in *Bennett v. Spear:*

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S. Ct. 431, 437, 92 L.Ed. 568 (1948)—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow," *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S. Ct. 203, 209, 27 L. Ed. 2d 203 (1970).

520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). The decisions in question—to create and supervise Task Force Sub-Groups, to hold meetings closed to the public and without complying with the various procedural requirements of FACA—were not tentative or interlocutory. Plaintiffs are not challenging decisions made by low level agency actors that were subject to the review of their supervisors. Plaintiffs are challenging decisions allegedly made on behalf of an agency by the head of that agency. Nothing in the allegations indicates that the actions challenged were later corrected or reversed by the same or other decision-makers. As decisions allegedly made by the head of an agency, these actions marked the consummation of the decision-making process.

Second, these actions determined "rights or obligations" and created "legal consequences." 520 U.S. at 178, 117 S. Ct. 1154. The decisions to hold meetings without public access to the meetings or the records created indeed had a legal consequence—the denial of the public's right of access to that information. Plaintiffs and other interested groups and citizens were prevented from enforcing their right to access information that exists pursuant to FACA. Subsequent actions taken without granting access, and the failure to grant access itself, constitute final agency action.

Defendants argue that recognizing the denial of information as a final agency action confuses the APA standard with FOIA. FACA imposes no requirements on individual committee members, argues defendants, so any denial of information by individual committee members cannot violate the law. Plaintiffs, however, are not challenging an individual denial of access to a particular information request. FACA obligates the government to make open and available to the public the meetings and records of advisory committees generally, without respect to any particular request. That general failure to do so here is what plaintiffs challenge, not the particular response to their particular requests for access. Thus, any particular denial of access to Judicial Watch or Sierra Club is only relevant insofar as it reflects a general denial of public access.

Once again, the standard to be applied by this Court is not whether the factual scenario that describes final agency action is likely to have occurred here. All that is required for plaintiffs to survive defendants' motions to dismiss is for such a factual scenario to be possible. Plaintiffs have alleged sufficiently final agency action here to survive.

3. *Andrew Lundquist*

Defendants argue that all claims against Andrew Lunquist, sued by both Judicial Watch and Sierra Club, should be dismissed because Lundquist no longer works for the government. Such a factual determination is inappropriate at this stage of this case. Defendants may be able to establish these facts through discovery. However, this Court can not accept the unsupported factual allegations of defense counsel with respect to Mr. Lundquist's employment status.

D. Mandamus Statute

Plaintiffs have also sued defendants pursuant to the federal mandamus statute, 28 U.S.C. § 1361, arguing that this Court has the authority to remedy defendants' violation of a nondiscretionary duty created by FACA. The federal mandamus statute states: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. The parties dispute the meaning of this statute. The federal defendants argue that the mandamus statute cannot provide jurisdiction to hear claims based on a violation of another statute if that other statute does not provide a private cause of action. Plaintiffs argue that the mandamus statute provides both a cause of action and jurisdiction where another statute imposes a non-discretionary duty on a federal official and where no other relief is available.

1. *Cause of Action*

Defendants argue that "[t]he federal mandamus statute may provide jurisdiction for an otherwise existing cause of action, but it does not provide a plaintiff with a

cause of action. . . . That means a statute that does not provide a right of action cannot be enforced through mandamus." Defs.' Reply of 4/26/02 at 6. While citing a case from this Court to support their argument, *Public Citizen v. Kantor*, 864 F. Supp. 208, 213 (D.D.C. 1994), defendants fail to cite controlling authority from the D.C. Circuit, *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), that holds just the opposite.

The plaintiffs in *Reich* challenged the authority of the President to issue an Executive Order authorizing the Secretary of Labor to disqualify federal employers who hire strike replacements from federal contracts, arguing that the Executive Order was preempted by the National Labor Relations Act (NLRA). The D.C. Circuit held that while the APA did not support plaintiff's challenge to the Executive Order because plaintiffs had not identified any agency action, the Court could review legality of Order on a non-statutory basis. *Id.* at 1327 (*citing* Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 HARV. L. REV. 308, 321 (1967)).[10] Specifically, the Court held, "[i]f a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action." *Id.* While the D.C. Circuit in *Reich* does not identify the "non-statutory" basis of review as a writ of mandamus or the mandamus statute, the cases

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[10] The Byse and Fiocca law review article explains that while mandamus actions in federal court are technically statutory actions pursuant to § 1361, they are commonly referred to as non-statutory judicial review actions because of the traditional availability of the writ of mandamus as a source of nonstatutory relief. *See* Byse and Fiocca, 81 Harv. L. Rev. 308, 355 n.51 (1967).

it relies upon in this discussion are mandamus cases, and a later D.C. Circuit case, *Washington Legal Foundation v. United States Sentencing Comm'n*, confirmed that indeed *Reich* concerned mandamus. 89 F.3d 897, 901 (D.C. Cir. 1996).

Neither plaintiffs nor defendants cited or discussed the *Reich* holding in their briefs, or the issue of whether *Reich* overrules the *Kantor* decision from this Court. Defendants are correct that *Kantor* clearly held that the mandamus statute does not provide a source of review where judicial review is otherwise precluded. 864 F. Supp. at 213. However, regardless of the holding of this Court in *Kantor*, *Reich* overrules that decision.

At oral argument, defendants attempted to argue that the Supreme Court's holding in *Sandoval*, 532 U.S. at 286-87, 121 S. Ct. 1511, with respect to the existence of statutory rights of action overrules *Reich.* However, *Sandoval* in no way conflicts with the holding of *Reich.* The *Sandoval* Court was concerned about the constitutionality of an Article III Court reading into a statute a cause of action that Congress had not explicitly created. *Id.* Here, there is no such concern because Congress itself created the mandamus statute.

Following *Reich*, this Court holds that the mandamus statute may provide an avenue to remedy violations of statutory duties even when the statute that creates the duty does not contain a private cause of action. Accordingly, this Court must now turn to the question of whether FACA creates such a duty.

2. *Non-Discretionary Duty*

When a federal official has an obligation to perform a ministerial or non-discretionary duty, a federal district court may issue a writ of mandamus under § 1361 to

compel that officer to fulfill the obligation. *National Wildlife Fed'n v. United States*, 626 F.2d 917, 923 (D.C. Cir. 1980). However, mandamus is a "drastic remedy, to be invoked only in extraordinary situations." *Consolidated Edison Co. of New York v. Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002); *In re Papandreou*, 139 F.3d 247, 249 (D.C. Cir. 1998). As the Supreme Court has explained, a "ministerial duty" must be "so plainly prescribed as to be free from doubt and equivalent to a positive command. . . . [W]here the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur v. United States*, 281 U.S. 206, 218-19, 50 S. Ct. 320, 74 L.Ed. 809 (1930) (*quoted in Consolidated Edison*, 286 F.3d at 605).

Plaintiff identifies several non-discretionary duties imposed by FACA. However, the only duties that are relevant here are those that are not moot. *See Gray v. Office of Personnel Management*, 771 F.2d 1504, 1514 (D.C. Cir. 1985) (holding a mandamus claim moot where requested duty was subsequently performed). With respect to plaintiff Sierra Club, because it has conceded that the NEPDG no longer exists, several of the non-discretionary duties imposed by FACA, such as opening meetings to the public, and providing notice of meetings in the Federal Register, can no longer be ordered by this Court.

As discussed above with respect to mootness, however, one claim for injunctive relief remains available to Sierra Club: the requirement that records related to the advisory committee's work be made public, 5 U.S.C. App. 2 § 10(b). In other words, the requested relief is

not rendered moot by the termination of the advisory committee or the language in the statute "until the advisory committee ceases to exist." That request for relief would only be rendered moot by the disclosure of the documents to plaintiff. *See, e.g., Gray v. Office of Personnel Management*, 771 F.2d 1504, 1514 (D.C. Cir. 1985) (holding a mandamus claim moot where requested duty was subsequently performed); *see also Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999) (FACA claim moot when government released documents); *Physicians Comm. for Responsible Medicine v. Glickman*, 117 F. Supp. 2d 1 (D.D.C. 2000) (same).

The duty to make documents related to an advisory committee available to the public is non-discretionary. Section 10(b) states:

> Subject to [the FOIA], the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

5 U.S.C. App. 2 § 10(b). The language of this section leaves no room for discretion: the records "shall be available for public inspection." *Id.* The Supreme Court has stated that by using "shall" in a civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied." *United States v. Monsanto*, 491 U.S. 600, 607, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989); *see also Pierce v. Underwood*,

487 U.S. 552, 569-70, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) (Congress' use of "shall" in a housing subsidy statute constitutes "mandatory language"); *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728, 739 n. 15, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981); Black's Law Dictionary 1233 (5th ed. 1979) ("As used in statutes . . . [shall] is generally imperative or mandatory."). The mandamus statute does allow for the possibility of invoking FOIA exemptions to protect some documents. That exception to the public disclosure rule does not, however, introduce discretion into the statutory mandate. If no FOIA exemption applies to the documents in question, the documents "shall be made available." § 10(b)

With respect to the claims made by Judicial Watch, because Judicial Watch alleges that the NEPDG continues to exist, none of the duties created by FACA are moot. In addition to the duty to make documents publically available, FACA creates several other duties, that by virtue of the use of the word shall, Congress has made nondiscretionary. *See* 5 U.S.C. App. 2 § 10(a)(1) (meetings shall be public); § 10(a)(2) (timely notice shall be published); § 10(a)(3) (interested persons shall be permitted to attend, subject to reasonable rules and regulations); § 10(b) (records shall be made public); § 10(c) (minutes shall be kept and shall contain a record of persons present, complete description of matters discussed and conclusions reached, and the accuracy of such minutes shall be certified by chairman); § 11(a) (transcripts shall be made available at cost).

Defendants' sole argument with respect to whether the duties imposed by FACA are discretionary is that FACA imposes no duty on either the Vice President or the individual members of an advisory committee.

Defs.' Mot. of 4/5/2002 at 15 ("neither the Vice President (who is not an 'agency head') nor any individual member of a FACA committee is singled out for specific duties under the statute."). Plaintiffs respond that a statute need not single out the specific official on which it imposes a duty in order for that duty to be nondiscretionary. Defendants cite no cases in support of their argument that the statute must single out the relevant individuals by name or title. This argument ignores the Supreme Court's guidance in *Marbury v. Madison:* "[i]t is not by the office of the person to whom the writ is directed, but the nature of thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." 5 U.S. (1 Cranch) at 170. The relevant question is whether, in light of the facts as alleged in the complaints, the duty to make records public or comply with any of the other above-listed duties, could have fallen on any of the defendants. The statute does not specify who shall be responsible for this duty. As discussed above, it is possible that the Vice President had final responsibility for all decisions with respect to the NEPDG, in which case, the duty to allow public access to the records would appear to fall on his shoulders. It is possible that the NEPDG made decisions collectively, in which case the responsibility could fall on the shoulders of all members.

What is clear from the statute is that some government official, whether it is the Vice President or the NEPDG participants or someone else, has a duty pursuant to FACA if the facts as alleged are proven. To whom that non-discretionary duty falls is a question to be explored in discovery. At this stage of the case, however, the Court need only acknowledge that FACA creates non-discretionary duties, and that, according to

plaintiffs' allegations, one of the defendants sued here could have violated those duties.

3. *Should This Court Exercise Its Mandamus Discretion?*

Even where a duty is clear and nondiscretionary, whether or not to issue the writ of mandamus is a determination committed to the discretion of this Court. *Cartier v. Sec. of State*, 506 F.2d 191, 199 (D.C. Cir. 1974); *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974). While mandamus is not necessarily precluded where the official is the President or Vice President of the United States, separation of powers concerns may impact the exercise of this Court's discretion. *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) (declining to issue writ of mandamus despite duty of President to issue pay raise out of respect for separation of powers).

At this stage of the case, it would be premature and inappropriate to determine whether the relief of mandamus will or will not issue. Certainly whether relief is available under the APA will be relevant to whether the mandamus relief requested will be necessary. It is sufficient to determine that plaintiffs have stated a claim for relief under the mandamus statute. Whether or not plaintiffs will prove that claim remains to be seen.

E. Constitutional Separation of Powers Concerns

The constitutional question suggested by this case is whether Congress can pass a law granting the public access to the deliberative process of a formally constituted group of the President's advisors when at least one of those advisors is a private individual without

violating Article II. The application of FACA to this group, argue defendants, interferes with the President's constitutionally protected ability to receive confidential advice from his advisors, even when those advisors include private individuals. Resolving that constitutional question, however, is premature at this stage of the proceedings. The government would have this Court answer that question in the negative now and dismiss the case without ever providing any discovery into the nature and number of the meetings at issue, the identities of the participants, the nature of the group's interaction with the President, the role of the Vice President in the group, the nature of the alleged Sub-Groups' interaction with the NEPDG, or the proximity of the NEPDG and alleged Sub-Groups to the President. The government further argues that it would violate the Constitution for this Court to even inquire into these matters.

The doctrine of constitutional avoidance counsels against answering such an important constitutional question at the motion to dismiss stage. By declining to resolve the constitutional issue at this stage of the case, this Court does not intend to suggest any doubt about the seriousness of the constitutional challenge raised by defendants to the application of FACA and the APA here. Rather, it is out of concern for the seriousness of this issue that this Court has determined that proceeding to discovery is appropriate.

It is a fundamental principle of constitutional interpretation that a court should not pass on any constitutional questions that are not necessary to determine the outcome of the case or controversy before it. *Burton v. United States*, 196 U.S. 283, 295, 25 S. Ct. 243, 49 L.Ed. 482 (1905) ("It is not the habit of the court to decide

questions of a constitutional nature unless absolutely necessary to a decision of the case."). The Supreme Court has consistently explained: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L.Ed. 101 (1944). Furthermore, it is equally fundamental that a court should not pass on a constitutional question prematurely. "It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied. . . .'" *Clinton v. Jones*, 520 U.S. 681, 690 n.11, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997) (*quoting Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461, 65 S. Ct. 1384, 89 L.Ed. 1725 (1945)).

Here, the federal defendants ask this Court to resolve a constitutional question prematurely and, in so doing, fashion a constitutional ruling broader than the precise facts underlying this case. Defendants ask this Court to hold unconstitutional the application of FACA to any facts and factual inferences permissible from the face of plaintiffs' complaints. While it may be the case that plaintiffs will be able to prove all the pled facts as true, something defendants seriously contest, it is also likely that discovery will reveal facts that narrow the issues before this Court considerably. The proof of any violation of the statutes at issue here, FACA, the APA,

and the federal mandamus statute, is contingent on development of a factual record. It is entirely possible that defendants will prevail on summary judgment on statutory grounds after proving that no private individuals participated as members of the advisory committees at issue, or that plaintiffs have failed to identify final agency action, thus rendering defendants' constitutional concerns inapplicable. Furthermore, development of the factual record will better enable this Court, if ultimately faced with deciding whether it violates separation of powers to apply the APA, FACA, or the federal mandamus statute in this context, with the information necessary to properly apply the constitutional balancing test in the nuanced, fact-intensive fashion required by precedent. *E.g.*, *Morrison v. Olson*, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) (*Nixon II*); *Ass'n of Am. Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

Defendants' justification for this Court determining the constitutional issue at this stage of the case is twofold: first, they argue that no factual development is required to determine the constitutional issue, and second, that any factual discovery would raise identical constitutional concerns. Defendants' first argument flies in the face of the precedent that has developed separation of powers doctrine as a fact-intensive, case-by-case analysis of the specific nature of the intrusion into the President's performance of his constitutional duties. *Morrison*, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569; *Nixon II*, 433 U.S. at 443, 97 S. Ct. 2777. Defendants' second argument is conclusory in nature, unsupported by precedent, and equally unpersuasive.

1. *Constitutional Balancing Test Deserves Further Factual Development*

Before explaining precisely why further factual development is necessary to effectively resolve the constitutional question here, first the Court must briefly discuss the proper legal standard to apply to separation of powers conflicts. Defendants have repeatedly invoked an incorrect constitutional standard in this case, a standard that would increase Executive power at the expense of the other branches of government. Defendants have made these arguments despite previous concessions of defense counsel that their preferred standard did not reflect the governing law. The government's oscillations before this Court reflect what appears to be a problematic and unprecedented assertion, even in the face of contrary precedent, of Executive power. To borrow the words of the D.C. Circuit in *Nixon v. Sirica*, "[s]upport for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers." 487 F.2d 700, 715 (D.C. Cir. 1973).

a. *Constitutional Standard*

The Supreme Court has affirmed time and again the importance of the allocation of governmental power by the United States Constitution into three coordinate branches. *Clinton v. Jones*, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed.2d 945 (1997); *Morrison*, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569; *Bowsher v. Synar*, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986); *Humphrey's Executor*, 295 U.S. 602, 55 S. Ct. 869, 79 L.Ed. 1611 (1935). This separation of powers was regarded by the Framers of the Constitution as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the

other." *Buckley v. Valeo*, 424 U.S. 1, 122, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *see also Mistretta v. United States*, 488 U.S. 361, 383, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) ("[c]oncern of encroachment or aggrandizement . . . has animated our separation of powers jurisprudence."). Thus, the Supreme Court has invalidated actions by one branch of government that impermissibly usurp the power of another co-equal branch. *See, e.g., Plaut v. Spendthrift Farm*, 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) (unconstitutional legislative assumption of judicial power); *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) (unconstitutional legislative assumption of executive power); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L.Ed. 1153 (1952) (unconstitutional executive assumption of legislative power). Even when a branch of government does not assume for itself a power allocated to another, "the separation of powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996); *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 856-57, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986); *Nixon II*, 433 U.S. at 443, 97 S. Ct. 2777.

If one thing is clear from these separation of powers cases, it is that the lines that divide the powers of the three branches of government are neither absolute nor "neatly drawn." *Clinton v. Jones*, 520 U.S. at 701, 117 S. Ct. 1636. "In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." *United States v. Nixon*,

418 U.S. 683, 707, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (*Nixon I*). Conflicts and overlap are necessary byproducts of the constitutional design of checks and balances among the three branches of government.

The potential application of FACA to the NEPDG may well require this Court to determine the proper boundaries between the respective spheres of the co-equal branches of government. Indeed, the Supreme Court has recognized that applying FACA to meetings among Presidential advisors "present[s] formidable constitutional difficulties." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 466, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989); *see also Ass'n of Am. Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C.Cir.1993)(*AAPS*). To be clear, defendants do not argue that the application of FACA would result in the aggrandizement of the Congressional or judicial role by usurping the powers of the Executive. Rather, the defendants contend that the application of FACA to the NEPDG encroaches on the sphere of the Executive by infringing the President's right to receive the confidential advice necessary to discharge his unique duties. In such a case, the proper test for determining whether Article II of the Constitution has been violated was first articulated by the Supreme Court in *Nixon II:*

> In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. [citing *Nixon I*]. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote

> objectives within the constitutional authority of Congress.

433 U.S. at 443, 97 S. Ct. 2777; *see also Morrison*, 487 U.S. at 695, 108 S. Ct. 2597 (1988); *AAPS*, 997 F.2d at 910. Thus, this Court would first examine whether FACA, as applied to the facts of this case, prevents the Executive Branch from accomplishing any constitutionally assigned functions. *Morrison*, 487 U.S. at 696, 108 S. Ct. 2597 (holding that the act creating the independent counsel's office did not infringe on the President's ability to "perform his constitutionally assigned duties"); *see also Clinton v. Jones*, 520 U.S. at 705-06, 117 S. Ct. 1636 (holding that civil lawsuit against sitting President did not constitute an impermissible intrusion by judiciary into ability of President to fulfill duties). If that question is answered affirmatively, this Court would then address whether that infringement is justified by the purposes of the congressional action. *Nixon II*, 433 U.S. at 443, 97 S. Ct. 2777; *AAPS*, 997 F.2d at 910.

The inconsistency in defendants' position with respect to the proper test to be applied to determine the constitutionality of an interference with Executive authority is troubling. The development of the government's constitutional arguments in this case is worth recounting. In the initial motion to dismiss the original Judicial Watch complaint, the government urged this Court to adopt a constitutional standard that has never gained the endorsement of a majority of the Supreme Court, and has recently been expressly rejected by the D.C. Circuit. Defendant argued that "[t]he Supreme Court has made clear that where, as here, the power the President is exercising is a power granted explicitly to him by the Constitution, Congress cannot interfere

with that power and any statute that purports to do so is unconstitutional." Defs.' Mot. of 10/17/02 at 14. Relying on the concurrence in *Public Citizen* rather than the majority in *Nixon II*, 433 U.S. at 443, 97 S. Ct. 2777, or *Morrison*, 487 U.S. at 696, 108 S. Ct. 2597, the government argued that where "a power has been committed to a particular Branch of Government in the text of the Constitution, the balance has already been struck by the Constitution itself." *Public Citizen*, 491 U.S. at 486, 109 S. Ct. 2558.

While conceding that the *Nixon/Morrison* balancing test applies, *See* Tr. 2/12/2002 at 33:17 - 34:1; 35:8 - 35:23; 36:15 - 38:7; 38:20 - 39:1; 39:9 - 40:16, the government urges this court nonetheless to apply the bright-line rule embraced by the *Public Citizen* concurrence. The government argued in its motions to dismiss that

> [w]hile the Court has, in other circumstances, considered the degree of intrusion into the Executive's constitutionally protected interest in light of the Congress' interest in adopting the particular legislation at issue in determining whether that legislation is valid, see *Morrison*, 487 U.S. at 695, 108 S. Ct. 2597, that approach is unnecessary where, as here, the legislation impedes the President's ability to carry out his *express* constitutional authority. Public Citizen, 491 U.S. at 484-86, 109 S. Ct. 2558 (Kennedy, J., concurring).

Defs.' Mot. of 3/8/02 at 24 (emphasis in original). Defendants have cited *no authority* other than the *Public Citizen* concurrence that explicitly holds that any infringement of a textually-authorized constitutional

duty is a *per se* violation of separation of powers, nor could they.[11]

The Executive Branch has long argued for a more formalistic understanding of the separation of powers doctrine than the Supreme Court and other courts have been willing to accept. *See Nixon I*, 418 U.S. at 706-707, 94 S. Ct. 3090; *Nixon II*, 433 U.S. at 441-44, 97 S. Ct. 2777; *AAPS*, 997 F.2d at 906 ("According to the government, [the Recommendation Clause] gives the President the sole discretion to decide what measures to propose to Congress, and it leaves no room for congressional interfeence."). In *Nixon II*, the Court rejected the government's argument for "three airtight departments" of government as "archaic." 433 U.S. at 441-44, 97 S. Ct. 2777. The Court has instead consistently embraced the view articulated by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer:*

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable gov-

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[11] To be fair, with respect to the constitutional standard, the government did brief both its preferred bright-line rule derived from the *Public Citizen* concurrence, and the application of the *Nixon/Morrison* balancing test. However, the government's brief says nothing about the fact that government's counsel conceded at oral argument to this Court that the *Public Citizen* concurrence standard is not the controlling law. Furthermore, while the government's briefs argue these two standards in the alternative, they say nothing about which alternative this Court *should* apply. If anything, the government's briefs imply that this Court should apply the *Public Citizen* test. *See* Defs.' Reply of 4/26/02 at 15 ("even assuming that *AAPS* mandates the balancing approach rather than the *Public Citizen* standard (a point Plaintiffs assert and Defendants contest) . . .").

> ernment. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

343 U.S. at 635, 72 S. Ct. 863 (Jackson, J., concurring). In *Mistretta v. United States*, the Court explained, "The Constitution imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" 488 U.S. 361, 381, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). Indeed, separation of powers principles do not mean that the branches of government "ought to have no partial agency in, or no control over the acts of each other." James Madison, The Federalist No. 47.

With this conception of the separation of powers doctrine in mind, the Supreme Court has never agreed with the position taken by the government here, that any infringement on any enumerated power in Article II is necessarily a *per se* violation of the Constitution. In *Morrison*, Justice Scalia's argument that the "executive power" described in Article II of the Constitution "does not mean *some of* the executive power, but *all of* the executive power" gained the support of no other Justice. 487 U.S. at 711, 108 S. Ct. 2597 (Scalia, J., dissenting). In his lone dissent, Justice Scalia argued for a "clear constitutional prescription that the executive power belongs to the President" and against the majority's "balancing test." *Id.* The majority of the Court opted to apply a balancing test to determine whether Congress had "impermissibly" intruded on the executive power. *Id.* at 696, 108 S. Ct. 2597. In *Public Citizen*, three other Justices argued for a bright-line rule similar to that advocated by Justice Scalia in *Morrison*. *Public Citizen*, 491 U.S. at 484-86, 109 S. Ct.

2558 (Kennedy, J., concurring).[12] Once again, that view did not persuade a majority of the Justices, who invoked the doctrine of constitutional avoidance to interpret FACA so as to avoid a constitutional challenge. *Id.* at 466, 109 S. Ct. 2558. Furthermore, in *AAPS*, the D.C. Circuit conducted a lengthy discussion of the flaws in the government's bright-line rule argument, offered by the government in that case as well.[13] 997 F.2d at 906-11.

The implications of the bright-line rule advocated by the government are stunning. Even if this Court were to consider the question of what separation of powers standard to apply without the benefit of precedent, it would reach the conclusion that the government's position is untenable. Any action by Congress or the Judiciary that intrudes on the president's ability to recommend legislation to Congress or get advice from Cabinet members *in any way* would necessarily violate the Constitution. The Freedom of Information Act and

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[12] Justice Scalia recused from the *Public Citizen* case.

[13] While the D.C. Circuit's discussion of the constitutional issue raised by the application of FACA to the Health Care Task Force was arguably dicta because the Court ultimately declined to decide the constitutional issue, the Court explained that it was necessary to determine the strength of the constitutional argument raised by the government prior to applying the doctrine of constitutional avoidance. 997 F.2d at 906 ("It is, of course, necessary before considering the maxim of statutory construction to determine whether the government's constitutional argument in this case is a powerful one. In other words, are we truly faced, as the Court thought it was in Public Citizen, with a grave question of constitutional law?"). The Court rejected the government's constitutional standard but noted that the constitutional *concerns raised* were serious. This Court agrees with and follows the reasoning of that court, *Nixon II* and *Morrison.*

other open government laws would therefore constitute an unconstitutional interference with Executive authority. Any action by a court or Congress that infringes on any other Article II power of the President, for example, the President's role as Commander in Chief of the armed forces and the national security concerns that derive from that role, would violate the Constitution. Any congressional or judicial ruling that infringes on the President's role in foreign affairs, would violate the Constitution. Clearly, this is not the law. Such a ruling would eviscerate the understanding of checks and balances between the three branches of government on which our constitutional order depends.

Finally, this is not the first case before this Judge in which the government has advocated the theory of separation of powers rejected here.[14] While the government, like any other party, is free to argue for an extension of the law, it should be forthcoming when calling for such an extension. The fact that the government may want to advocate a new theory of Executive authority and the separation of powers is its prerogative. It cannot, however, cloak what is tantamount to an aggrandizement of Executive power with the legitimacy of precedent where none exists.

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[14] In this case, and in at least one other before this Court, *Stillman v. Doe*, Civ. Action No. 01-1342 (EGS) (D.D.C.), the government has proceeded by mischaracterizing the existing standard and invoking the concurring opinion of three Justices of the Supreme Court in *Public Citizen* as controlling authority. The fact that the government has stubbornly refused to acknowledge the existing controlling law in at least two cases, does not strike this Court as a coincidence. One or two isolated mis-citations or misleading interpretations of precedent are forgivable mistakes of busy counsel, but a consistent pattern of misconstruing precedent presents a much more serious concern.

b. *Application of Constitutional Standard Requires Further Facts*

Thus, it is clear that once the question of whether applying FACA to the NEPDG violates Article II is properly before this Court, the constitutional inquiry will require balancing the following two considerations: first, this Court must inquire into whether the law's requirements would infringe the President's ability to perform constitutional functions, and second, the Court must determine whether that impairment is outweighed by any constitutionally authorized Congressional purposes. *Nixon II*, 433 U.S. at 443, 97 S. Ct. 2777; *Morrison*, 487 U.S. at 696, 108 S. Ct. 2597. It is critical to the application of this test that the Court determine the precise nature of the intrusion into Executive authority. The greater the intrusion into the Executive sphere, the greater the interest necessary to justify the intrusion.

The constitutional authority at stake here is the President's ability to receive advice that has been generated in confidence. While no clause of Article II expressly grants the President the power to acquire information or receive advice in confidence, the necessity of receiving confidential advice appears to flow from Article II. Several clauses of Article II reflect an understanding that the President will have access to information and the power to acquire it,[15] and the

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[15] For example, Article II, Section 2, grants the President the power to "require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices." In addition, the State of the Union clause, requiring the President "from time to time give to the Congress Information of the State of the Union" presupposes superior or at least different access to information than the

Supreme Court has repeatedly recognized that the importance to the Presidency of receiving candid, honest, and when necessary, unpopular, advice from "high Government officials and those who advise and assist them in the performance of their manifold duties" is paramount. *Nixon I*, 418 U.S. at 705, 94 S. Ct. 3090. Indeed, the words of the *Nixon I* Court bear repeating:

> [T]he importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.

Id. That Court went on to explain:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens, and added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to

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legislative branch. Art. II, Sec. 3. The Recommendations Clause, invoked by the government in this case, which empowers the President to "recommend to [Congress] such Measures as he shall judge necessary and expedient," similarly presupposes the ability to collect information and advice necessary to make such recommendations. Art. II, sec. 2. And as the Constitution did not presume the President to operate in a vacuum, the other powers listed in Article II, generally presuppose the President's ability to receive advice in order to exercise those powers in an informed manner.

> explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.

Id. at 708, 94 S. Ct. 3090; *see also In re Sealed Case*, 121 F.3d 729, 736-40 (D.C. Cir. 1997) (discussing the history of the protection of executive communications and the executive privilege doctrine). As the D.C. Circuit explained in *AAPS*, "The Framers thus understood that secrecy was related to the executive's ability to decide and to act quickly—a quality lacking in the government established by the Articles of Confederation. If a President cannot deliberate in confidence, it is hard to imagine how he can decide and act quickly." 997 F.2d at 909.

Thus, although there is no specific privilege for protecting the confidentiality of Presidential communications or deliberations in the text of the Constitution, "[c]ertain powers and privileges flow from the nature of the enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings." *Id.* (*citing McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819)). Equally clear, however, is that the need to maintain the confidentiality of the President's communications and deliberations is not unqualified. "The President's need for complete candor and objectivity from advisors calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values occurs." *Nixon I*, 418 U.S. at 706, 94 S. Ct. 3090.

The question raised by the application of FACA to the NEPDG and the alleged Sub-Groups is not whether

the President's constitutionally protected ability to receive advice in confidence is undermined, but whether his advisors' ability to deliberate in confidence is constitutionally protected, and how far down the line that protection extends. *Cf. In re Sealed Case*, 121 F.3d at 746 ("Does [executive] privilege only extend to direct communications with the President, or does it extend further to include communications that involve his chief advisers? And if the privilege does extend past the President, how far down into his circle of advisers does it extend?"). It is unclear from the facts pled in plaintiffs' complaints whether they allege that any of the deliberations involved communications with the President himself. Indeed, the only advice alleged to have directly been given to the President by the NEPDG, the final energy policy report, is a public document. *See* www.whitehouse.gov/energy/National-Energy-Policy.pdf.

While the Supreme Court has not reached the issue, the D.C. Circuit has held that the constitutional protection for executive communications extends beyond those communications that occur directly with the President. *See In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997). The D.C. Circuit's warning about extending that constitutional protection too far applies here as well:

> Extending presidential privilege to the communications of presidential advisers not directly involving the President inevitably creates the risk that a broad array of materials in many areas of the executive branch will become "sequester[ed]" from public view. *Wolfe*, 815 F.2d at 1533. President Nixon's attempt to invoke presidential privilege to prevent release of evidence indicating that high level execu-

> tive officers engaged in illegal acts is perhaps the starkest example of potential for abuse of the privilege. And openness in government has always been thought crucial to ensuring that the people remain in control of their government . . . The very reason that presidential communications deserve special protection, namely the President's unique powers and profound responsibilities, is simultaneously the very reason why securing as much public knowledge of presidential actions as is consistent with the needs of governing is of paramount importance.

Id. at 749. Indeed, according to James Madison,

> [a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt, ed. 1910). The D.C. Circuit in *In re Sealed Case* did specifically limit its analysis to the context before it:

> Our determination of how far down into the executive branch the presidential communications privilege goes is limited to the context before us, namely where information generated by close presidential adviser is sought for use in a judicial proceeding, and we take no position on how the institutional needs of Congress and the President should be balanced.

121 F.3d at 753 (D.C. Cir. 1997). However, despite the limitation on its holding, *In re Sealed Case* makes clear that determining how far down the line of advisors constitutional protection should extend in the context of balancing the needs of the Executive and Congress will be a fact-intensive inquiry.

Determining who participated in the deliberations of the NEPDG and the alleged Sub-Groups, whether in fact those Sub-Groups existed, and who interacted with the private individuals involved, the role played by private individuals, and the number of meetings and interactions will affect this Court's determination of the impact that revealing such activities to the public would have on the President's ability to perform his Executive functions. Furthermore, the role of the Vice President in the NEPDG is to be determined. The fact that the Vice President was tasked with leading the NEPDG does not mean that in fact he participated in all aspect of the NEPDG or the meetings of the alleged Task Force Sub-Groups. These Sub-Groups could have been much less operationally proximate to the President, and revealing their activities would arguably infringe the President's Executive authority to a much lesser degree.

Furthermore, no case has directly decided whether revealing the identity or nature of advice given by private individuals to the President or the President's advisors would "impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691, 108 S. Ct. 2597. However, two cases have looked at the role of private individuals in advising the President and have suggested that constitutional protection would extend to such advice. *See Public Citizen*, 491 U.S. at 466, 109 S. Ct. 2558; *AAPS*, 997 F.2d at 910. In

Public Citizen the Supreme Court recognized the "formidable constitutional difficulties" that would be raised by applying FACA to the Justice Department's consultations with the committee of the American Bar Association that evaluates the qualifications of federal judicial nominees. 491 U.S. at 466, 109 S. Ct. 2558. In discussing the constitutional issue raised by the application of FACA to President Clinton's Heath Care Task Force, the D.C. Circuit stated: "A statute interfering with a President's ability to seek advice directly from private citizens as a group, intermixed, or not, with government officials, therefore raises Article II concerns." *AAPS*, 997 F.2d at 910. After noting the constitutional concern, both courts declined to resolve the question of whether applying FACA to a group that includes governmental and private advisors prevents the President from accomplishing his constitutionally assigned functions. Thus, the question of whether granting public access to the deliberations of high level officials of government, presidential advisors, and private individuals intrudes upon the ability of the President to conduct his official duties is unresolved. The extent of the constitutional protection for those deliberations will turn in large part on the proximity of those advisors to the President. The fact that the group was established to deliver a final report to the President is not determinative.

Additionally, this Court would be careful when applying the *Morrison* balancing test to look at those specific requirements of FACA that would have applied to the NEPDG and its alleged Sub-Groups, and determine whether applying those requirements would have infringed on the President's ability to do his job. The question here is not only whether releasing the names

of the participants, or the documents generated by the group would so infringe, but rather would applying all of the FACA requirements to the NEPDG run afoul of the separation of powers. Amicus correctly points out that the imposition of the FACA requirements is less onerous than portrayed by the government. FACA has two very important exceptions to the requirement that the public have access to meetings and documents. Pursuant to various FOIA exemptions, which include deliberative process and national security concerns, documents may be withheld from the public. 5 U.S.C. App. 2 § 10(b). Furthermore, pursuant to the exceptions listed in 5 U.S.C. § 552b, the President or an agency head can close advisory committee meetings to the public. These exceptions should be considered when determining the actual impact that FACA would have on the confidentiality of advice to the President.

All of these questions are better addressed only after discovery into the activities and composition of the NEPDG and the alleged Sub-Groups. Contrary to defendants' argument, it would be inappropriate for this Court to conduct the fact-intensive inquiry demanded by separation of powers precedent by considering only the Presidential Memorandum that established the NEPDG.

2. *Discovery in this Case Will Raise Fewer and Different Constitutional Concerns*

Defendants' second argument against proceeding to discovery, that discovery raises identical constitutional issues as does this motion to dismiss, is both conclusory and belied by precedent. Defendants, in a footnote, state in a conclusory manner "that these constitutional arguments apply to prevent discovery in this case." Defs.' Mot. of 4/5/02 at 19 n.17. Further, in response to

an Order from this Court requiring defendants to identify with precision the constitutional concerns raised by discovery into particular factual issues, *see* Order of 1/31/02, defendants simply reasserted the troubling statutory and constitutional arguments that had prompted this Court's Order in the first place. Defs.' Mem. of 2/5/2002 at 1 ("it is unnecessary for the Court to address the constitutional issues [raised by discovery] for five compelling reasons"). Thus, while defendants have consistently asserted that discovery would implicate constitutional concerns, they have also consistently failed to explain or provide legal support for those conclusions.

Contrary to defendants' arguments, discovery in this case will potentially raise related, but different, constitutional questions than does the application of FACA to the NEPDG. In particular, the constitutional question raised by the application of a statute to Executive action, reflects a conflict between the Executive and Congressional branches of government, and must be balanced as such. Any potential intrusion into the President's constitutional authority that occurs because of specific requests for documents or information during the course of discovery must be analyzed as a conflict between the needs of the Executive and Judicial branches, and will involve the application of different precedent. *See, e.g., In re Sealed Case*, 121 F.3d at 753. Furthermore, the breadth and scope of the constitutional issue raised by applying the requirements of FACA to advisory committees established by the President dwarfs the particular, specific questions that will be raised by a very tightly-reigned discovery process. Whether revealing a particular document or piece of information will impermissibly interfere with

the President's constitutional authority is a much more narrow inquiry than whether the application of all the FACA procedural requirements to the deliberative process of Presidential advisors will violate the Constitution. Rather than address this broad constitutional question in a factual vacuum, this Court will address the particular questions generated by discovery requests.

In conclusion, there are three primary reasons why postponing consideration of defendants' constitutional challenge is warranted here. First, after discovery, the government may prevail on summary judgment on statutory grounds without the need for this Court to address the constitutionality of applying FACA. Second, even if this Court were to attempt to apply the *Nixon/Morrison* balancing test, further factual development is necessary to clearly determine the extent to which applying FACA to the NEPDG and its alleged Sub-Groups will intrude on the President's constitutional authority. Third, while discovery in this case may raise some constitutional issues, those issues of executive privilege will be much more limited in scope than the broad constitutional challenge raised by the government here. All of these reasons weigh heavily in favor of considering any applicable constitutional questions after a factual record has been more fully developed, and requiring the government to raise specific constitutional objections to the discovery process as it proceeds.

F. Judicial Watch's FOIA Claim

Judicial Watch has also sued the Vice President pursuant to FOIA. On June 25, 2001, Judicial Watch wrote to the Vice President and requested certain records related to the NEPDG pursuant to FOIA. *See* Jud.

Watch Sec. Amend. Compl., Ex. 8. On July 5, 2001, the Counsel to the Vice President responded on behalf of the Vice President, declining the request on the grounds that FOIA does not provide for disclosure of the requested material. *See* Jud.Watch Sec. Amend. Compl., Ex. 9.

FOIA is only applicable to "agencies" and "agency records." *See generally* 5 U.S.C. § 552. Entities within the Executive Office of the President whose "sole function is to advise and assist the President" are not agencies for purposes of FOIA. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 155-56, 100 S. Ct. 960, 63 L. Ed. 2d 267 (1980); *Meyer v. Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1993). Defendants persuasively argue that the Vice President and his staff are not "agencies" for purposes of FOIA. *See Meyer v. Bush*, 981 F.2d at 1294 (expressing doubt as to whether FOIA applies to Vice President); *cf. Armstrong v. Bush*, 924 F.2d 282, 286 n. 2 (D.C. Cir. 1991) (President and Vice President subject only to Presidential Records Act, not Federal Records Act).[16] The FOIA claim against the Vice President is therefore dismissed.

Both Judicial Watch and the federal defendants assume that Judicial Watch's Second Amended Complaint also states a FOIA claim against the NEPDG. *See* Defs.' Mot. to Dismiss of 3/8/02 at 15; Jud. Watch Opp'n of 3/21/02 at 14-15 (arguing that further discovery is necessary before determining whether the NEPDG is an "agency" for FOIA purposes). However, Count II of the Complaint does not state that plaintiff filed a FOIA

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[16] Like the D.C. Circuit in *Meyer*, 981 F.2d at 1294 n.7, this Court does not decide whether the Vice President could ever act as the head of a agency subject to FOIA.

request to the NEPDG, but rather that plaintiff sent a request letter to Vice President Cheney and that counsel on behalf of Vice President Cheney responded. The request letter in question, attached as Exhibit 8 to Judicial Watch's Second Amended Complaint, confirms that the request for records was indeed made only to the Vice President. For this reason, there is no need for this Court to address whether the NEPDG is an "agency" for purposes of FOIA. Judicial Watch has stated a FOIA claim only against the Vice President, and that claim is dismissed.

III. Private Defendants' Motions to Dismiss

In addition to suing the Vice President, the NEPDG, and other federal officials, Judicial Watch has sued several private individuals, including Mark Racicot, Haley Barbour, Kenneth Lay, Thomas Kuhn, and John and Jane Does 1-99. These individuals are named as defendants only with respect to Count I of Judicial Watch's Second Amended Complaint, which alleges violations of FACA.[17] For the reasons discussed above, FACA provides no private cause of action and therefore these claims are dismissed.

CONCLUSION

For the foregoing reasons, the federal defendants' motions to dismiss are granted in part and denied in part and the private defendants' motions to dismiss are granted. An appropriate Order accompanies this Memorandum Opinion.

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[17]. The private individuals were initially named as defendants in Count III as well, but that claim against these defendants was dismissed on May 31, 2002. *See* Order of 5/31/02. Only federal defendants are named in Counts II and IV.

IT IS SO ORDERED.

ORDER

For the reasons stated in the accompanying Memorandum Opinion issued this same day, it is hereby

ORDERED that this Order shall supercede the Order issued by this Court on May 23, 2002; it is

FURTHER ORDERED that the federal defendants' motions to dismiss plaintiff Judicial Watch's Second Amended Complaint and plaintiff the Sierra Club's Complaint are **GRANTED IN PART AND DENIED IN PART**; it is

FURTHER ORDERED that the motions to dismiss filed by Mark Racicot, Haley Barbour, and Thomas Kuhn are **GRANTED**; it is

FURTHER ORDERED that Count I of Judicial Watch's Second Amended Complaint is **DISMISSED** with respect to all defendants; it is

FURTHER ORDERED that Count II of Judicial Watch's Second Amended Complaint is **DISMISSE**D with respect to all defendants; it is

FURTHER ORDERED that plaintiffs' APA claims with respect to Vice President Richard Cheney and the National Energy Policy Development Group (NEPDG) are **DISMISSED**; it is

FURTHER ORDERED that the federal defendants' motion to dismiss Counts III and IV of Judicial Watch's Second Amended Complaint is **DENIED** with respect to the remaining defendants; it is

FURTHER ORDERED that the federal defendants' motion to dismiss the Sierra Club's First and Second

Claims for Relief is **DENIED** with respect to the remaining defendants; it is

FURTHER ORDERED that plaintiffs shall jointly submit a proposed discovery plan by no later than 5 p.m. on Friday, July 19, 2002; it is

FURTHER ORDERED that defendants shall file any objections to the proposed discovery plan by no later than 5 p.m. on Friday, July 26, 2002; it is

FURTHER ORDERED that plaintiffs shall file a joint reply by no later than 5 p.m. on Tuesday, July 30, 2002; it is

FURTHER ORDERED that a status hearing shall be held on Friday, August 2, 2002 at 9 a.m. in Courtroom One to discuss the proposed discovery plan and any objections thereto and to determine whether further briefing is necessary with respect to any claims of privilege asserted by the government.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUBMIA

September Term, 2003
No. 00-5354
Consolidated with 02-5355, 02-5356

IN RE RICHARD B CHENEY, VICE PRESIDENT OF THE UNITED STATES ET AL., PETITIONERS

Filed: Sept. 10, 2003

ORDER

Before: GINSBURG, Chief Judge, and EDWARDS, SENTELLE,* HENDERSON,** RANDOLPH,* ROGERS, TATEL, GARLAND, ROBERTS,* Circuit Judges

Petitioners' petition for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

* Circuit Judges Sentelle, Randolph, and Roberts would grant the petition for rehearing en banc.

** Circuit Judge Henderson did not participate in this matter.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ MICHAEL C. MCGRAIL
MICHAEL C. MCGRAIL
Deputy Clerk

APPENDIX F

The pertinent provision of the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (5 U.S.C. App. 1) are as follows:

§ 2. Findings and purpose

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that—

(1) the need for many existing advisory committees has not been adequately reviewed:

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

§ 3. Definitions

For the purpose of this Act—

(1) The term "Administrator" means the Administrator of General Services.

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.

(3) The term "agency" has the same meaning as in section 551(1) of title 5, United States Code.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

* * * * *

§ 6. Responsibilities of the President; report to Congress; annual report to Congress; exclusion

(a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than December 31 of each year, make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abol-

ished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

§ 7. Responsibilities of the Administrator of General Services; Committee Management Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations

(a) The Administrator shall establish and maintain within the General Services Administration a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Administrator shall, immediately after October 6, 1972, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine—

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether it should be abolished.

The Administrator may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Administrator's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Administrator shall carry out a similar review annually. Agency heads shall cooperate with the Administrator in making the reviews required by this subsection.

(c) The Administrator shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Administrator shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

* * * * *

§ 9. Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy

(a) No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, with timely notice pub-

lished in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

§ 10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a)(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory

committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.