No. 03-475

In the Supreme Court of the United States

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

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 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 case.

PARTIES TO THE PROCEEDINGS

The petitioners are Richard B. Cheney, Vice President of the United States; John W. Snow, Secretary of the Treasury; Gale A. Norton, Secretary of the Interior; Ann M. Veneman, Secretary of Agriculture; Donald L. Evans, Secretary of Commerce; Norman Y. Mineta, Secretary of Transportation; Spencer Abraham, Secretary of Energy; Colin L. Powell, Secretary of State; Joseph L. Allbaugh, Director, Federal Emergency Management Agency; Michael O. Leavitt, Administrator, Environmental Protection Agency; Patrick H. Wood, III, Chairman, Federal Energy Regulatory Commission; Joshua B. Bolten, Director, Office of Management and Budget; Stephen Friedman, Assistant to the President for Economic Policy; Andrew Lundquist, former Executive Director of the now defunct National Energy Policy Development Group; and John D. Ashcroft, U.S. Attorney General.

The plaintiffs below, Judicial Watch, Inc. and the Sierra Club, are respondents here. Because this case involves a mandamus action, the United States District Court for the District of Columbia is also a respondent.

The following individuals were named as defendants but were dismissed from the case prior to the petition/appeal: Mark Racicot, Haley Barbour, and Thomas Kuhn. Another individual, Kenneth Lay, was named as a defendant in the Complaint but did not appear. The National Energy Policy Development Group, which ceased to exist on September 30, 2001, was also named as a defendant, but was subsequently dismissed by the district court. The following individuals were named as defendants in their official capacities and have subsequently been succeeded in office by the individuals identified above: Paul O'Neill, Secretary of the Treasury; Christine Todd Whitman, Administrator, Environmental Protection Agency; Mitchell E. Daniels, Jr.,

Director, Office of Management and Budget; Larry Lindsey, Assistant to the President for Economic Policy.

The National Resources Defense Council appeared as amicus curiae in the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 334 F.3d 1096. The orders of the district court (Pet. App. 46a-52a) are unreported, although its earlier opinion in the case (Pet. App. 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, 2003 (Pet. App. 124a-125a). The petition for a writ of certiorari was filed on September 30, 2003, and certiorari was granted on December 15, 2003. This Court has jurisdiction pursuant to 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 the appendix to the petition (Pet. App. 126a-134a).

STATEMENT

A. The Federal Advisory Committee Act

Congress enacted the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (FACA), in an effort to stem the proliferation of advisory committees composed of non-government experts established to advise the Executive Branch. See 5 U.S.C. App. 2, at 1. Congress was concerned with certain "specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 453 (1989). There was also a concern that committees of purportedly "neutral" outside experts were sometimes selected with the purpose of endorsing and legitimating pre-determined government policies. See Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51, 58 (1994).

FACA establishes uniform standards and procedures for the creation and public operation of advisory committees subject to the Act. 5 U.S.C. App. 2(b)(4)-(6), at 1. They must file a charter, hold their meetings in public, make all documentation and records available to the public under the terms of the Freedom of Information Act, and operate within regulatory guidelines promulgated by the General Services Administration. 5 U.S.C. App. 7, 9, 10, 11, at 4-6. Furthermore, "[t]o the extent * * * applicable," presidential advisory committees must have a "fairly balanced" membership and be free of "inappropriate[] influence[] by the appointing authority." 5 U.S.C. App. 5(b)(2), (3), and (c), at 3. The President must explain to Congress his proposals for

action based on, or reasons for rejecting, the recommendations of any presidential advisory committee 5 U.S.C. App. 6(b), at 3.

Congress did not seek through FACA to regulate "every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Public Citizen*, 491 U.S. at 453. Moreover, FACA specifically excludes groups "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." 5 U.S.C. App. 3(2), at 2. See *Public Citizen*, 491 U.S. at 457-458; *Food Chemical News* v. *Young*, 900 F.2d 328, 332-333 (D.C. Cir.) (opinion by Ginsburg, J.), cert. denied, 498 U.S. 846 (1990).

B. The National Energy Policy Development Group

Less than ten days after taking office, President Bush established the National Energy Policy Development Group (NEPDG) as an entity within the Executive Office of the President to advise the President in formulating energy policy. See J.A. 156-159. The President named the Vice President to preside over meetings and to direct the work of the NEPDG and ordered that the membership of the NEPDG shall "consist[] of the following officers of the Federal Government: 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 157. The President also authorized the Vice President to invite the Chairman of the Federal Energy Regulatory Commission, the Secretary of State, and "as appropriate, other officers of the Federal Government" to

participate in the work of the NEPDG. *Ibid.* 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." *Id.* at 157-158.

On May 16, 2001, the NEPDG submitted to the President, and with his approval published, its report containing 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 ii (2001) (*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, J.A. 157, all of the members identified in the NEPDG Report were "officers of the Federal Government." See J.A. 123 (letter from David Addington, Counsel to the Vice President, to respondents' counsel explaining that all of NEPDG's members were officers of the federal government). Indeed, the NEPDG members identified in the Report were precisely the same high-ranking government officials named in the President's memorandum. The NEPDG was terminated on September 30, 2001. *Id.* at 159, 235-236.

On June 28, 2001, the President transmitted to Congress the NEPDG Report and, according to the accompanying message, its "proposals * * * that require legislative action." 37 Weekly Comp. Pres. Doc. 988. In his message, the President stated that "[o]ne of the first actions" he took as President "was to create the [NEPDG] to examine America's energy needs and to develop a policy to put our Nation's energy future on sound footing." *Ibid.* He explained that

the "legislative initiatives" included in the report would help address energy challenges with "enormous implications for our economy, our environment, and our national security." *Ibid.*

C. The Litigation Below

1. Respondents Judicial Watch, Inc. and Sierra Club (hereinafter respondents) filed these consolidated actions against Vice President Cheney, the NEPDG, and various federal officials and private individuals, alleging that the NEPDG included private citizens as unofficial, de facto members and that the NEPDG was therefore an advisory committee subject to FACA and its disclosure and membership requirements. Respondents requested access to NEPDG documents and a declaration that the defendants violated FACA. J.A. 21-23, 39, 151-153. The government filed motions to dismiss, which the district court granted in part and denied in part. Pet. App. 121a.

2. The district court recognized that FACA itself provides no private right of action, but concluded that the statute is enforceable through either the Administrative Procedure Act (APA) or mandamus. Pet. App. 73a-97a. The court also 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, *id.* at 96a-97a. The court therefore refused to dismiss the Vice President from this case. *Ibid.* 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 on

the premise that it might obviate the need to resolve the constitutional questions, *id.* at 97a-119a.

The court directed respondents to submit a proposed discovery plan, which it approved on August 2, 2002, directing that the government either "fully comply with" respondents' discovery requests or "file detailed and precise object[ions] to any of these requests." Pet. App. 50a-51a. The district court approved the respondents' 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 non-government individuals, thereby allowing respondents to pursue discovery on their theory that the NEPDG included unofficial, de facto members. See, *e.g.*, J.A. 220-221, 225, 227-228.

The agency defendants complied with the district court's discovery orders and produced more than 36,000 pages of documents related to the NEPDG. See Pet. App. 5a-6a. Those documents had previously been released in response to requests made under the Freedom of Information Act (FOIA), 5 U.S.C. 552, to the various departments and agencies headed by members of the NEPDG. With respect to the Vice President, however, the government sought a protective order against discovery from the Office of the Vice President and urged the district court to consider a motion for summary judgment and to rule on the basis of the administrative record and the presumption of regularity afforded Executive action. In addition, the government submitted a declaration of Karen Knutson, the Deputy Assistant to the Vice President for Domestic Policy, who detailed attendance at all meetings of the NEPDG. J.A. 235, 238-241. Ms. Knutson confirmed that all members of the NEPDG, and persons who attended its meetings, were government officers or employees. See *id.* at 239-241. Ms. Knutson also stated that the Vice President had not formed any "subordi-

nate working groups" to assist the NEPDG, *id.* at 240, and that the "staff-level Federal employees" that helped to prepare the group's report, referred to as the "Staff Working Group," were each "full-time Federal employees of the departments," *ibid.*

The district court denied the government's motion for a protective order, Pet. App. 47a, and barred the government from filing a motion for summary judgment pending further order of the court, J.A. 242-243.

3. The Vice President and the other non-agency defendants filed a petition for a 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, the Knutson Declaration, and any supplemental declarations that the court might require, and to 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) (*Nixon I*).

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." Pet. App. 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 I*, *supra*, inapposite. Pet. App. 23a.

Judge Randolph dissented. He emphasized that "[a]s applied to committees the President establishes to give him advice, FACA has for many years teetered on the edge of constitutionality," but that "[t]he decision in this case pushes it over." Pet. App. 31a. Specifically, Judge Randolph criticized the majority's reliance on the holding in *Association of*

American Physicians & Surgeons, Inc. v. *Clinton*, 997 F.2d 898 (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." Pet. App. 31a, 34a. That holding, Judge Randolph observed, 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 an advisory 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. Pet. App. 124a-125a.

SUMMARY OF ARGUMENT

I. This case presents 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 official 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 the NEPDG had no non-governmental members, de facto or otherwise. Interpreting FACA to authorize such wide-ranging discovery based solely on a naked assertion of unofficial, de facto members would render the statute plainly unconstitutional. This Court recognized the potential constitutional problems raised by FACA in *Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989), and interpreted the statute to avoid those difficulties. Here, the constitutional difficulties raised by the lower courts' view of FACA are more profound, and the construction of the statute that avoids those difficulties is more straightforward.

a. The lower courts' notion of de facto membership has no support in FACA's text and is inconsistent with Congress's judgments that advisory groups under FACA must be "specifically authorized * * * by the President," 5 U.S.C. App 9(a), at 5, and that the statute does not reach groups composed entirely of "full-time, or permanent part-time, officers or employees of the Federal Government," 5 U.S.C. App. 3(2), at 2. Those provisions limit the separation-of-powers difficulties inherent in FACA by giving the President substantial discretion to determine whether an advisory group he establishes is subject to the statute's disclosure and other requirements. Here, the record is clear that the NEPDG, as "established" by the President, was composed wholly of government officials and employees, and

therefore comes within the statutory exemption of all-government-member advisory groups.

b. The court of appeals' application of the de facto member doctrine effectively eliminates these key textual limitations. By combining the de facto member doctrine with principles of notice pleading and ignoring the presumption of regularity afforded Executive action and the limited availability of discovery in APA and mandamus actions, the courts below would allow plaintiffs to force the opening of sensitive Executive Branch deliberations upon the barest allegation of a deviation from the official membership list. Moreover, in the context of a statute that raises separation-of-powers concerns precisely because of its potential interference with Executive Branch deliberations through, *inter alia*, disclosure, a regime that allows discovery too permissively creates separation-of-powers problems that are not different in kind from those created by a final interpretation of the statute that allows disclosure too permissively.

Moreover, any doubts about FACA's proper interpretation would have to be resolved against a construction that permits almost automatic intrusion on the Executive, in order to avoid serious constitutional difficulties. While this Court has recognized the constitutional problems raised by FACA and has interpreted it to avoid them, see *Public Citizen*, *supra*, 491 U.S. 440 (1989), the decisions by the panel and the district court will routinely generate constitutionally problematic intrusions into the Executive Branch.

c. If FACA does require the kind of judicial inquiry approved by the courts below, then it is unconstitutional as applied to advisory committees established by the President. The President established the NEPDG to obtain from his most senior advisors, including numerous heads of departments, their advice regarding legislation that he should propose to Congress and administrative actions that the Executive Branch should take. The President's ability to com-

municate freely with those advisors relates to his specific constitutional authority under both the Opinion and Recommendations Clauses to request the opinions of department heads and to propose such legislation as the President may deem necessary. Neither Congress nor the judiciary may interfere with or supervise communications among a group consisting of the Vice President and high-level presidential subordinates assigned to assist the President in deciding what measures to propose to Congress or to order administratively, nor may the other Branches require that those officials be independent of the President or that they include members who disagree with the President's policy priorities.

II. The separation-of-powers violations stemming from the unprecedented discovery ordered below are exacerbated by the court of appeals' erroneous jurisdictional rulings, which would improperly immunize those violations from effective appellate review. Although the court of appeals viewed this case as an ordinary discovery dispute, it is not. The discovery that has been ordered raises the same separation-of-powers problems as the statutorily mandated disclosures that would follow from a final determination that FACA applied to the NEPDG. Thus, treating the orders at issue here as ordinary discovery orders would render unavoidable the kind of separation-of-powers difficulties addressed by this Court in *Public Citizen*.

Nor is the availability of Executive privilege as a basis for opposing release of particular documents adequate protection for the separation-of-powers interests at stake. As this Court's decision in *Public Citizen* recognized, the President's constitutional interests in being able to obtain confidential advice regarding his constitutionally assigned responsibilities is not coextensive with, nor fully protected by the possibility of invoking, Executive privilege.

Nor should the Vice President be required to submit to contempt proceedings before obtaining appellate review of

his constitutional claims. This Court has recognized the separation-of-powers problems inherent in forcing the President to subject himself to contempt in order to obtain appellate review. Those same considerations justify permitting the Vice President to pursue an interlocutory appeal in this case.

ARGUMENT

I. The Construction Of FACA Adopted Below Has No Basis In The Text Of The Statute And Would Violate Fundamental Principles Of 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 be utilized to require the Vice President to disclose to private litigants the substance or 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 exercise of powers committed exclusively to the President by the Constitution, including by the Recommendations and Opinion Clauses. See U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3. Those Clauses allow the President a zone of autonomy in obtaining advice, including with respect to formulating proposals for legislation. Congress, in turn, has ample opportunity to evaluate and respond to the President's legislative recommendations and administrative actions in any manner it sees fit, consistent with the Constitution. But Congress does not have the power to inhibit, confine, or control the process though which the President formulates the legislative measures he proposes or the administrative actions he orders.

The district court recognized the seriousness of these constitutional concerns, Pet. App. 98a, but then ordered sweep-

ing and intrusive discovery into that process—thereby raising equally serious separation-of-powers problems—based solely on unsupported allegations that, contrary to the President's express directive in establishing the NEPDG, individuals not employed by the government participated as members of the group. By working an unwarranted and textually unsupported expansion of FACA and disregarding established principles of the separation of powers and judicial review of Executive Branch actions, the court of appeals' decision intrudes on vital Executive Branch functions and should be rejected.

A. The Decisions Below Expand FACA's Requirements Beyond The Limits Set By Congress

The court of appeals and the district court read FACA to apply to an advisory group established by the President to consist only of full-time government employees, if a court determines after extensive discovery that the "de facto" membership of the group deviated from that established by the President. That construction has no basis in FACA's text. Indeed, it contradicts Congress's judgments that the "establishment" of a FACA advisory group must be "specifically authorized * * * by the President," 5 U.S.C. App. 9(a), at 5, and that FACA does not apply to groups composed entirely of "full-time, or permanent part-time, officers or employees of the Federal Government," 5 U.S.C. App. 3(2), at 2. Those provisions are critical to minimizing the separation-of-powers difficulties inherent in FACA, especially with respect to a group established by the President to advise him on important legislative proposals and administrative initiatives.

1. By Its Terms, FACA's Application Turns On The Formal Membership Of An Advisory Group, As Defined By The President

Congress enacted FACA to stem the proliferation of advisory committees established to advise the Executive Branch. See 5 U.S.C. App. 2, at 1. Congress recognized, however, that such regulation of the process by which the President and other Executive Branch officials obtain information necessary to the performance of functions assigned to the Executive Branch by the Constitution implicated important and difficult issues related to the separation of powers. Congress therefore included in FACA two important limitations necessary to avoid unconstitutional interference with core Executive Branch functions.

First, Congress explicitly exempted entirely from FACA's reach all advisory groups composed solely of "full-time, or permanent part-time, officers or employees of the Federal Government." 5 U.S.C. App. 3(2), at 2. Second, it left to the President or his subordinates the choice of whether a given advisory group would include outside members and thereby be subject to FACA's balance and disclosure requirements. FACA explicitly envisions *only* advisory committees "established or utilized by the President" or by an agency, *ibid.*, 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. 9(a), at 5. FACA thus expressly forbids the creation of unauthorized, de facto advisory committees. Accordingly, by its terms, FACA recognizes that the question of whether a group established by the President to give him advice is subject to FACA's requirements is to be determined by the group's formal membership as defined by the President. The relevant General Services Administration regulation, 41 C.F.R. 101-6.1003 (2000), also

makes clear that whether a presidential advisory group is subject to FACA turns on the formal structure given it by the President, including those he designates to participate as members of the group.[1]

Together, these two provisions limit the obvious constitutional difficulties with congressional efforts to regulate the process through which the President obtains advice. Any attempt by Congress to regulate the President's ability to obtain advice from officials in the Executive Branch would unconstitutionally interfere with powers expressly reserved to the President by the Constitution. See, *e.g.*, U.S. Const. Art. II, § 2, Cl. 1 ("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."); see also Part I.C., *infra*. By exempting advisory groups composed exclusively of government officials, FACA avoids obviously unconstitutional applications, such as imposing balance and disclosure obligations on the President's meetings with his own Cabinet. See Pet. App. 41a (Randolph, J., dissenting); *AAPS*, 997 F.2d at 925 (Buckley, J., concurring). Likewise, by ensuring that the President—according to the manner in which he structures the group—has the ability to control whether FACA's disclosure and other requirements apply, FACA contains its own built-in limitations that reduce the potential for unconstitutional interference with core Executive Branch functions.

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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 General Services Administration 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) (41 C.F.R. 102-3.25).

These provisions reflect Congress's limited concern in enacting FACA. Congress did not seek to regulate all aspects of the process by which the President seeks advice to formulate policies or legislative proposals, especially when the advice comes from government officials. Congress enacted FACA to address "specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 453 (1989). Specifically, Congress reacted to a perceived practice of creating "blue-ribbon" committees of purportedly "neutral" outside experts that would "validate [the] conclusion" that the agency decisionmaker had already reached. See Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51, 58 (1994). Accordingly, in explaining why FACA excludes from its coverage advisory groups composed solely of government officials, the Senate Report states that "[a]fter analysis of the hearings and background material, it was felt that the main problems of proliferation, confusion and operational abuse lay with those advisory committees whose membership in whole or in part comes from the public sector." S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972). The report further explained that "it was felt that the matter of controlling the number and activities of inside-government committees was better left to the President, the OMB and the agencies, which had sufficient legislative and administrative authority to deal with the problem." *Ibid.*

2. The De Facto Member Doctrine Is Inconsistent With FACA's Text

The NEPDG, as "established" by the President, was carefully designed with the foregoing textual limitations in mind so as not to trigger FACA's requirements. The President established the NEPDG, appointed as its members only

federal officials, and made clear that only "officers of the Federal Government" could be invited to participate in the work of the group. J.A. 156-158. Consistent with that directive, the NEPDG's final report listed only federal officials as members. See *NEPDG Report* at v; see also J.A. 123 (letter from David Addington, Counsel to the Vice President, to respondents' counsel explaining that all of NEPDG's members were federal employees); *id.* at 239-241 (Knutson Declaration describing membership of NEPDG and staff-level working group). Indeed, the members identified in the NEPDG's report coincide precisely with those officials named in the President's memorandum establishing the group. At the time he established the NEPDG, therefore, and throughout the process, the President neither invoked FACA's provisions nor had any reason to think them applicable to the NEPDG.

The court of appeals, relying on its prior decision in *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993) (*AAPS*), ignored these facts and held that FACA's application to a working group established by the President is determined not by the President's directions in establishing the group, but through an indeterminate, post-hoc calculus assessing whether any persons outside the government should be deemed to have participated as "de facto" members. In *AAPS*, the court of appeals held that courts could look beyond formal membership to determine whether persons designated as short-term "special government employees" or "consultants" to working groups associated with President 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* far beyond the advisory process at issue in *AAPS*, which expressly included non-governmental advisors, to the NEPDG

—a group of advisors formally, explicitly, and categorically established by the President to be composed exclusively of government officials.

The de facto member doctrine, particularly as applied in this case, has no support in FACA's text. Indeed, such a doctrine, especially when combined with notice pleading and disregard for the presumption of regularity, would effectively repeal both FACA's textual exemption for advisory groups made up exclusively of governmental officials, see 5 U.S.C. App. 3(2), at 2, and its requirement that the "establishment" of a FACA advisory group must be "specifically authorized * * * by the President," 5 U.S.C. App. 9(a), at 5. In disregard of the clear implication of FACA's text and the relevant General Services Administration regulation, such an approach would limit the President's ability to collect advice from selected members of his own Administration and would make the President's memorandum establishing the NEPDG largely irrelevant to the question of FACA's applicability. Instead, courts would undertake a standardless, amorphous, post-hoc review in every case to decide whether contacts between government officials and private persons or entities might render a committee or working group an "advisory committee."

The notion that FACA's application would turn on such a formless, post-hoc judicial inquiry is impossible to square with the statute's text. First, the express statutory exclusion for advisory groups consisting only of government officers would have little practical value if a mere allegation of an unofficial member could subject any all-government-group—from the Cabinet on down—to intrusive discovery that raises the same constitutional concerns as would a final judicial determination that FACA applies. Moreover, FACA's focus on the need for the President to establish an advisory committee, as defined by the Act, and its prohibition on unauthorized advisory committees are plainly

inconsistent with the concept that such committees can retroactively spring to life by virtue of a post-hoc judicial determination that unauthorized members participated in the group's deliberations. Likewise, a statute that focuses on the President's official actions in establishing a committee and does not create a private cause of action should not be construed to invite litigation concerning whether the committee somehow deviated from the official directive of the President.

Finally, FACA's emphasis on membership and the official actions required to establish an advisory committee obviated the need for Congress to include a definition of membership. The courts are accordingly without direction in devising standards of how much participation makes someone a "de facto member."

Nor is the de facto member concept necessary to address the concerns that led to FACA's enactment. As a matter of logic, an advisory committee that does not even acknowledge the participation of outside experts cannot simultaneously use the participation of outside experts to bolster the legitimacy of the advisory committee's conclusions. To the contrary, when the President limits participation in an advisory group to government officials, the President and those officials alone remain responsible and accountable for any proposals or orders that result.

Congress manifested no intention to regulate every Executive Branch meeting or to guard against the possibility that Executive Branch officials will absorb information from outside sources when forming the views they share with their colleagues and, ultimately, the President. It has always been understood that FACA does not regulate "every formal and informal consultation between the President or an Executive agency and a group rendering advice." *Public Citizen*, 491 U.S. at 453. See *Nader* v. *Baroody*, 396 F. Supp. 1231 (D.D.C. 1975) (meetings between presidential assistant,

federal officials and varying private sector groups not subject to FACA). It is therefore plain that Congress did not intend to preclude federal employees from meeting with private persons or to trigger FACA's requirements when such meetings occur.

The proposition urged by respondents, and accepted by the courts below, is that at some unidentifiable point, meetings with one or more private persons may become sufficiently frequent that the private persons should be judicially vested with the attributes of membership. Nothing in the language, structure or purpose of FACA suggests that Congress would have intended this standardless inquiry with obvious constitutional ramifications, particularly where, as here, the President expressly establishes the group as composed solely of government officials. Accordingly, this Court should reject the de facto member doctrine.

3. This Court Should Reject The De Facto Member Doctrine To Avoid A Construction Of FACA That Would, At A Minimum, Raise Serious Constitutional Concerns

As this case amply illustrates, and as Judge Randolph explained in his dissent below, see Pet. App. 31a-38a, 43a-45a, even if a court were ultimately to determine that no outsider served as a "de facto member" on a presidential advisory group, the litigation process approved by the district court itself creates an unwarranted intrusion into Executive Branch affairs that is not permitted by the Constitution and that was never intended by Congress. Because the de facto member doctrine, as applied below, requires a court to disregard the Executive's own description of its committee, discovery into the operations of the group is virtually inevitable. That consequence is particularly anomalous in the FACA context, because discovery obligations may, as in this case, be at least as intrusive as the disclosure

obligations imposed by FACA itself. While FACA requires the disclosure only of the committee's deliberations in its meetings and (subject to FOIA exemptions) its records, a standardless search for de facto members can lead to a broader inquiry into whether any outside individual, whether intentionally or not, crossed a poorly-defined line and became a de facto member. Even if that discovery confirms (as it would in this case) the President's account of the committee he created, the intrusion on the Executive Branch will be complete. The government will have been required to submit to intrusive, invasive, and burdensome discovery into documents and information concerning communications between individual NEPDG members outside the context of group meetings, between members and agency personnel, and between members and non-government individuals. See, *e.g.*, J.A. 220-221, 225-226, 227-228.

Application of FACA to close presidential advisors has long raised significant separation-of-powers concerns—as the members of this Court unanimously recognized in their opinions in *Public Citizen*. See 491 U.S. at 466-467, 486-489. The court of appeals' extra-statutory de facto member doctrine plainly "pushes [FACA] over" the constitutional edge. Pet. App. 31a (Randolph, J., dissenting); *id.* at 41a (noting that "[d]iscovery on the basis of allegations of *de facto* membership" is indistinguishable from "a [patently unconstitutional] 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"). The inevitability of such constitutionally problematic discovery is a sufficient basis to reject the de facto member doctrine under the canon of constitutional avoidance. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Indeed, contrary to the approach taken by the court of appeals and the district court in this case, this Court in

Public Citizen 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. 491 U.S. at 466-467. This case implicates analogous —indeed, even more serious—separation-of-powers difficulties with the same statute. See Part I.C.2, *infra.* Those difficulties can be avoided by simply interpreting the statute as written to exclude committees established by the President with only governmental members.

B. The Approach Adopted Below Violates The Presumption Of Regularity And Other Settled Principles Governing Judicial Review Of Executive Branch Actions

The courts below exacerbated the difficulties caused by the de facto member doctrine by ignoring decisions of this Court affording a presumption of regularity to Executive action and limiting discovery in APA and mandamus actions. The separation-of-powers problems inherent in the discovery ordered below could have been avoided by proper application of those longstanding principles of judicial review of Executive actions.

1. The Discovery Ordered Below Was Precluded By The Constitutionally Grounded Presumption Of Regularity Applicable To Executive Branch Actions

By ordering broad 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 was explicit on this point, basing its sweeping discovery orders on its observation that "the government doesn't always comply with the law." J.A. 196-197 (8/2/02 Hearing Tr.).

That approach is flatly inconsistent 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). That presumption has particular force with respect to actions of the President and Vice President. 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.

Those concerns warrant strict adherence to the presumption of regularity in this case. The President and the Vice President are in the best position to know how the NEPDG's advisory activities were structured. Moreover, ignoring the presumption of regularity and routinely ordering intrusive discovery to determine whether FACA even applies would unnecessarily impair the performance of core Executive responsibilities and raise serious constitutional questions. Applying the presumption of regularity and requiring the plaintiff to come forth with "clear evidence"—not mere allegations—before assuming a deviation from the President's directions would avoid the difficulties engendered by the approach of the courts below.[2]

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[2] In addition, respondents 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). That is particularly true in light of the uncontradicted administrative record and the Knutson Declaration establishing that the NEPDG was constituted precisely as the President mandated. Even after the government turned over more than 36,000 pages of

2. Other Principles Of Judicial Review Of Executive Branch Actions Precluded The Constitutionally Problematic Discovery Ordered Below

The court of appeals' analysis also fails to appreciate the significance of Congress's decision not to include in FACA a private cause of action to enforce its requirements. As a result, an action to enforce FACA can proceed in the ordinary case only as an APA action. But, as the district court recognized, neither the President nor Vice President is subject to the APA. Pet. App. 73a-78a; see *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992) (holding, in light of APA's silence on whether President was within scope of the statute, that President was not covered, "[o]ut of respect for the separation of powers"). Instead, this case proceeded on the assumption that mandamus might be available against the Vice President. See Pet. App. 96a-97a.

That assumption is fundamentally mistaken. When a statute, such as FACA or the APA, does not provide for a cause of action, this Court has carefully limited the available relief. See, *e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-284 (2002) (where no private right of action existed directly under the Family Educational Rights and Privacy Act of 1974, plaintiff could not look to 42 U.S.C. 1983 to supply a cause of action absent an "unambiguously conferred right"); cf. *Starbuck* v. *City & County of San Francisco*, 556 F.2d 450, 459 n.18 (9th Cir. 1977) (holding that mandamus does not "provide an independent ground for jurisdiction" where

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documents related to the NEPDG through discovery in this case, respondents have pointed to no evidence to substantiate their baseless assertion that non-governmental persons participated as members of the NEPDG. To the contrary, as the record amply reflects, the President assigned the Vice President and the other members of the NEPDG to fulfill core Executive Branch functions under Article II of the Constitution. In this context, especially, such principles should preclude discovery against the President or Vice President.

plaintiff failed to state a claim under the Raker Act or APA). The terms of the federal mandamus statute, 28 U.S.C. 1361, furnish no basis for the relief respondents seek under FACA.[3]

Moreover, it is clear that mandamus would not lie against the President to force compliance with FACA. Cf. *Franklin*, 505 U.S. at 803-805; *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866). And the President is in many respects the real party in interest here: The President established the NEPDG to assist him in the exercise of his exclusive Article II powers, and it is the process by which he obtains advice from his closest advisors that is threatened by the discovery orders in this case. The limitation on the availability of mandamus actions against the President cannot be evaded merely by naming the Vice President as the party to the action. The same considerations that would preclude a mandamus action against the President in the circumstances of

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[3] The federal mandamus statute confers jurisdiction on the district courts over actions in the nature of mandamus to compel an officer of the United States "to perform a duty *owed to the plaintiff*." 28 U.S.C. 1361 (emphasis added); see *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984) (holding that Section 1361 codifies common law writ of mandamus and provides a remedy only if a plaintiff "has exhausted all other avenues of relief and only if the defendant *owes him* a clear nondiscretionary duty") (emphasis added). In adopting that language, Congress expressly rejected proposals to extend Section 1361 to the enforcement of duties owed by government officials to the general public, rather than to an individual plaintiff. See S. Rep. No. 1992, 87th Cong., 2d Sess. 6 (1962); 108 Cong. Rec. 18,783-18,784, 20,079, 20,093-20,094 (1962). That language precludes mandamus in this case. The requirements of FACA in no way establish a "duty owed to the plaintiff" in the sense envisioned by Section 1361. Respondents do not have any personal or individualized "rights" under FACA that could be enforced in a mandamus action. Compare, *e.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 162 (1803); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 543 (1838). They instead are no different than any other member of the public vis-a-vis the information they seek. The text and purposes of Section 1361, therefore, preclude any recognition of mandamus jurisdiction in this case.

this case also would preclude an action against the Vice President.

In any event, even if a mandamus action could be brought against the Vice President (which it cannot), it would not permit the kind of discovery authorized here. To obtain mandamus, plaintiffs must establish a clear right to the relief sought, see *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 121 (1988) ("The extraordinary remedy of mandamus under 28 U.S.C. § 1361 will issue only to compel the performance of a 'clear nondiscretionary duty.'") (quoting *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984)), which respondents plainly cannot do. The complaints in this case fail to allege facts that would establish a clear and indisputable right to mandamus relief. See Pet. App. 32a & n.1, 43a (Randolph, J., dissenting). Rather, at most, they seek to initiate a fishing expedition through discovery to determine whether any statutory rights *might* have been violated.

Indeed, the discovery ordered here would be inappropriate in a normal APA action. As this Court's decisions make clear, 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). Here, the materials that would constitute the administrative record—consisting of the documents establishing the NEPDG, the NEPDG's Report, the letter of the Vice President's counsel regarding the status of the NEPDG, and the Knutson Declaration—establish that the NEPDG consisted entirely of federal officers or employees. And the complaints in this case, even viewed in respondents' favor, allege no more than episodic, intermittent contacts between individual members of the NEPDG and private parties, J.A. 21-23 (Judicial Watch 2d Amend. Compl. ¶¶ 26-30), to which respondents append conclusory allegations, based on "information and belief," that there were further contacts that rose to the level of de facto membership in

the NEPDG or in some unspecified subgroup, J.A. 21, 3335, 43 (Judicial Watch 2d Amend. Compl. ¶¶ 25, 38); *id.* at 146 (Sierra Club Compl. ¶¶ 18-21). Even under ordinary principles of APA review, therefore, the district court should have denied respondents' claims without ordering discovery.

The district court, however, refused to reject respondents' allegations as a matter of law or to rule on the basis of the administrative record, and, instead, proceeded to order discovery, which would under any circumstances be inappropriate under the APA absent "strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420; *Commercial Drapery Contractors, Inc.* v. *United States*, 133 F.3d 1, 7 (D.C. Cir. 1998).[4]

Such discovery was particularly inappropriate where, as in the case of the Vice President, the APA does not apply. See Pet. App. 39a (Randolph, J., dissenting) (concluding that the NEPDG "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 [especially the

[4] *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 respondents' 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 (Pet. App. 11a), even in an APA action, nothing in *Overton Park* suggests that a further explanation by appropriate officials—much less discovery—would be appropriate based on such allegations. See Pet. App. 38a-39a (Randolph, J., dissenting).

Vice President] were not agency officials within the meaning of the APA"). Because neither FACA, nor the APA, nor mandamus, nor any combination thereof provide respondents with a cause of action against the Vice President—or the President, who in the context of this case is in many respects the real party in interest—the lower courts should have dismissed the Vice President from the case.

C. The Expansion Of FACA Adopted Below Violates The Constitutional Doctrine Of Separated Powers

As the discussion above demonstrates, the court of appeals' analysis would transform a statute designed to regulate the establishment of blue-ribbon committees into a general warrant to search Executive Branch groups and committees for contacts with outsiders who might be deemed de facto "members." It would make FACA—which expressly exempts advisory groups made up exclusively of government employees—an intrusive and unconstitutional interference with core Executive Branch functions. For the reasons set forth above, such a construction of FACA should be rejected because it fundamentally misunderstands the statute and would violate the presumption of regularity and other principles of judicial review of Executive actions. Moreover, if any doubt existed on this score, it should be resolved, as in *Public Citizen*, to avoid serious constitutional difficulties. However, if the Court concludes that the statute in fact authorizes the approach adopted below, then it should hold that the application of FACA to the NEPDG is unconstitutional.

1. The NEPDG's Information-Gathering And Policy-Developing Activities For The President Are Within His Exclusive Responsibilities Under Article II And Beyond Congress's Legislative Powers

Article II, section 1 of the Constitution vests "[t]he executive Power" in the President of the United States. In

order to fulfill his Executive duties, the President must be able to consult with his advisors and to obtain their candid guidance and expertise. Both the Opinion Clause and the Recommendations Clause reflect this need and provide specific textual foundations for the President's powers to gather information and develop policy—and both clauses are manifestly not subject to manipulation or interference by Congress.

During the Constitutional Convention of 1787, the Framers considered several times whether to provide the President with some form of advisory council that included representatives of the Legislature or Judiciary. See James Madison, *Notes of Debates in the Federal Convention of 1787*, at 487-488, 509-510, 569, 598-602 (W.W. Norton & Co. 1966) (debates of Aug. 20, 22, and 31 and Sept. 7, 1787). Each such proposal was rejected. The Framers chose instead to enshrine in Article II the President's power to seek advice from those under his direct control. As Alexander Hamilton subsequently explained, the unity of the Executive would be destroyed if the President were "subject[ed] in whole or in part to the controul and co-operation of others, in the capacity of counsellors to him." *The Federalist*, No. 70, at 472-473 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) . The Opinion Clause thus explicitly confirms the President's authority to gather information and opinions from his subordinates. The history of that provision, the structure of Article II, and the obvious constraints of the separation of powers make it clear that the President's authority to receive opinions from Executive officers is not subject to interference from or control by the other Branches. The President may, of course, enlist the Vice President in the process of obtaining those opinions, as Congress has explicitly recognized. See 3 U.S.C. 106.

The Recommendations Clause (along with the State of the Union Clause) provides further textual evidence of the

President's powers to gather information and develop and propose policy. Those clauses expressly contemplate that the President will, "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. Const. Art. II, § 3. The President's duties to inform Congress and to recommend measures for its consideration presuppose that the President "must possess more extensive sources of information * * * than can belong to [C]ongress." Joseph Story, *Commentaries on the Constitution of the United States*, at § 807 (Ronald D. Rotunda & John E. Nowak eds., Carolina Acad. Press 1987) (1833). Those duties also presuppose, of course, that the President will be able to cultivate his sources of information, and also to develop for himself the "measures" that he will recommend, because the quality of his recommendations will be commensurate with his ability to inform himself and deliberate about them.[5] Most importantly, the Recommendations Clause expressly vests the exercise of those powers in the President's own discretion. Because the President's duty requires him to recommend only what "*he* shall judge necessary and expedient" (U.S. Const. Art II, § 3 (emphasis added)), the Constitution indicates clearly that this exclusively Executive power must remain free from interference. They are the President's recommendations, not the recommendations forced upon him according to some system subject to congressional or judicial control.

Thus, the powers in both the Opinion and Recommendations Clauses are entrusted exclusively to the President

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[5] An earlier draft of the Recommendations Clause had referred to "Matters" rather than "Measures." "The greater presidential participation needed to submit 'measures' implicitly presumes that there exist presidential prerogatives of investigation, inquiry, and advocacy by which to formulate and articulate such proposed solutions." J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2084 (1989).

—and are textually committed to his discretion. Congress cannot regulate the exercise of those functions. As this Court explained in *Barenblatt* v. *United States*, 360 U.S. 109 (1959): "Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." *Id.* at 111-112. If Congress cannot "inquire into matters which are within the exclusive province" of the Executive, then, *a fortiori*, it cannot empower the public to force disclosure of such matters. This is true, moreover, without regard to the assertion of a claim of Executive privilege. The Constitution vests no power in Congress to regulate such exclusively Executive functions. For this reason, this Court has consistently refused to tolerate legislative intrusions on the Executive's express powers and duties. See *INS* v. *Chadha*, 462 U.S. 919 (1983) (Presentment Clause); *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 148 (1871) ("[I]t is clear that the legislature cannot change the effect of * * * a pardon."); *Public Citizen*, 491 U.S. at 482 (Kennedy, J., concurring) (Congress cannot "encroach[] upon a power that the text of the Constitution commits in explicit terms to the President.").

Interference with the President's advice- and information-gathering activities is no less unconstitutional when it affects the exercise of his Recommendations or Opinion Clause authority than when it touches on his power to grant pardons, nominate judges, or have legislation presented for his approval or veto. Indeed, the interference with his Recommendations Clause and Opinion Clause authority is particularly grave because both of those clauses directly implicate the information-gathering and policy-development process itself. Although the Recommendations Clause contemplates the transfer of information to Congress, it expressly leaves to the President the judgment of what measures

warrant recommending as "necessary and expedient." In that sense, the Recommendations Clause is directly analogous to the power to nominate judges and Executive Branch officials. In both cases, a transfer of a proposal to Congress is envisioned, at which point Congress has a constitutionally authorized role. But the process of formulating that proposal is granted exclusively to the President and is beyond Congress's power. Indeed, Congress's ability to address the nominee or recommendation directly renders Congressional intrusion into the pre-nomination or pre-recommendation process unnecessary as well as unconstitutional. As this Court's decision in *Barenblatt* shows, Congress simply lacks authority to inquire into—and by necessary implication to empower anyone with a filing fee to force disclosure of—the NEPDG's activities, because they are "matters * * * within the exclusive province" of the Executive. 360 U.S. at 111-112; see *Schick* v. *Reed*, 419 U.S. 256, 266 (1974) (pardon power "flows from the Constitution * * * and * * * cannot be modified, abridged, or diminished by the Congress"); cf. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (Congress cannot interfere with Judiciary's power to issue final judgments).

Application of FACA to the NEPDG would violate these separation-of-powers principles in a most direct way. As Judge Buckley observed in his concurring opinion in *AAPS*, "[i]t is hard to imagine conditions better calculated to suppress the 'candid, objective, and even blunt or harsh opinions' that the President [i]s entitled to receive from" those he selects to help develop legislation than the application of FACA's public meeting and disclosure requirements. 997 F.2d at 925 (quoting *Nixon I*, 418 U.S. at 708). The President's charge to the NEPDG puts the group at the very heart of these textually committed powers. The President specifically named to the NEPDG the heads of the Departments of the Treasury, the Interior, Agriculture, Commerce,

Transportation, and Energy, as well as the Director of the Federal Emergency Management Agency, Administrator of the Environmental Protection Agency, and other high-ranking presidential advisors. He explicitly sought their views regarding matters relating to their respective agencies, and did so to obtain advice on administrative actions and legislative proposals that he judged necessary and expedient. In fact, the President submitted the NEPDG Report directly to Congress for action by it.

Indeed, even if (contrary to fact) the NEPDG had included non-governmental employees among its members, FACA could still not constitutionally require the NEPDG to disclose the process by which the group developed recommendations for the President. Congress cannot interfere with the development of the President's proposals by requiring disclosure of the advice he solicits in formulating them, even if (as was not the case with the NEPDG) some of the individuals who participate in advising the President come from outside the government. See *AAPS*, 997 F.2d at 925 (Buckley, J., concurring) (application of FACA to President's Task Force on National Health Care Reform, charged with developing legislative proposals, unconstitutional). Indeed, both opinions in *Public Citizen* expressed constitutional concerns with regulating the advice received from an outside group consisting only of non-governmental members. See, *e.g.*, *Public Citizen*, 491 U.S. at 487 (Kennedy, J., concurring) (noting a similar allocation of responsibilities in the Appointments Clause: "The President has the sole responsibility for nominating these officials, and the Senate has the sole responsibility of consenting to the President's choice."). Nothing in the Appointments Clause or the Recommendations Clause limits the President to input from government employees.

Moreover, beyond the ways in which FACA, as construed by the courts below, would interfere with the President's

ability to obtain advice, including from his senior governmental advisors on legislative proposals, FACA would also purport to require the President to make the NEPDG "fairly balanced in terms of the points of view" of its membership and to prohibit "inappropriate[] influence[]" over the group by the President. 5 U.S.C. App. 5(b)(2), (3), and(c), at 3. Plainly, such interference by Congress in the composition of the group selected by the President to provide advice on administrative actions to order and legislation to propose, or on his ability to interact with his senior governmental advisors, would constitute an unconstitutional encroachment by Congress on the President's ability to "accomplish[] [his] constitutionally assigned functions." *Morrison* v. *Olson*, 487 U.S. 654, 695 (1988) (quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (*Nixon II*)).

For the reasons set forth above, the Constitution, by its textual commitment of "executive Power" to the President and by the Opinion and Recommendations Clauses, has struck any balance that there is to be struck—the Constitution preserves the zone of autonomy for the President in obtaining advice he seeks to perform his duties. Even if, however, this Court were to determine that the balance was not struck by the Constitution itself, and that weighing the balance is somehow appropriate, it is clear that any such balance would weigh heavily in favor of forbidding the discovery at issue here. Cf. *Morrison*, 487 U.S. at 695; *Nixon II*, 433 U.S. at 443.

As an initial matter, Congress's legitimate interests are non-existent when it comes to investigating the discharge of functions within the exclusive province of another Branch. See *Barenblatt*, 360 U.S. at 111-112. Congress could not validly regulate the process by which the President gathers advice and information to formulate his policies and recommendations, and it has no greater legislative authority to empower private individuals to intrude into that process.

Nor do respondents have any meaningful need for the information that they seek. The discovery process would only confirm that the NEPDG was organized as the President directed and the group itself reported, that FACA does not apply, and that respondents, therefore, are not entitled to any of the information that they seek. Moreover, even if contrary to fact, FACA did apply to the NEPDG, a mere interest in disclosure for its own sake could not remotely counterbalance the extreme interference with core Article II responsibilities authorized by the decisions below.

***2. The Decisions Below Cannot Be Reconciled With* Public Citizen**

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 the 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 it acknowledged that the Executive may have "utilized" the ABA committee "in one common sense of the term," the Court recognized that interpreting the statute to have broad coverage 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 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.[6] 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 the Constitution's separation of powers. 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 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 it does so in a context in which the interference with the

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

role and responsibility of the Executive 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 fundamentally flawed. Unlike the Executive's use of the ABA committee in *Public Citizen*, which could be said to be well within the plain terms of the statute, the de facto member doctrine, especially as applied in this case, is plainly inconsistent with FACA's text.

Moreover, the ABA committee in *Public Citizen* concededly involved individuals outside the government and so did not implicate the Opinions Clause. Here, by contrast, the President established a committee of his closest advisors such that the process is protected by the Recommendations Clause, which is analogous to the power at issue in *Public Citizen*, *and* the Opinion Clause, which protects the President's authority to compel advice from his closest government advisors. If the mere assertion of the existence 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 consisting of only government officials and the requirement that the President must specifically authorize the establishment of a FACA committee—limitations essential to the statute's constitutionality in this context—have 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. By rejecting the de facto membership doctrine and applying a straightforward interpretation of FACA's text, the Court can avoid those constitutional difficulties. 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 if FACA necessarily includes a de facto member doctrine and somehow authorizes wide-ranging discovery despite presumptions in favor of administrative regularity, then application of the statute here would be unconstitutional. See Part I.C.1, *supra*; *Public Citizen*, 491 U.S. at 467-489 (Kennedy, J., concurring). 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; see U.S. Const. Art. II, § 2, Cl. 1; *id.* Art. II, § 3. 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." *Public Citizen*, 491 U.S. at 488-489.

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

The court of appeals also erred in holding that it lacked mandamus and appellate jurisdiction because the dispute was premature. This case self-evidently involves more than an ordinary discovery dispute. The decisions below impose intrusive and distracting discovery obligations on the Vice

President himself. Moreover, the dispute arises in the context of FACA, in which this Court has recognized the serious separation-of-powers concerns presented by FACA's disclosure obligations. But FACA's disclosure obligations are not meaningfully different from the discovery orders in this case. Indeed, the relatively unbounded inquiry into whether a committee may have had unauthorized, de facto members may result in more disclosure concerning the actions of a committee that is ultimately determined not to be covered by FACA than the disclosure that would be mandated by the statute if it applied. To treat the former as a completely unreviewable order blinks reality and invites abuse. The distraction—not to mention the impediments to candid advice—caused by the discovery orders that will become an inevitable feature of the scheme created by the lower courts will provide ample incentives 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. The court of appeals' refusal to consider any separation-of-powers objections prior to the assertion of Executive privilege claims is inconsistent with this Court's decision in *Public Citizen*, and would pose an unacceptable barrier to appellate review of separation-of-powers claims that are broader than or antecedent to claims of privilege. Nothing in this Court's case law supports such an illogical result.

Respondent Sierra Club's belated argument that petitioners' separation-of-powers claims are stale (in addition to being premature) is equally flawed. The Sierra Club contends that because petitioners' separation-of-powers arguments have been consistent throughout this litigation, petitioners were somehow obligated to seek appellate review of the district court's partial denial of their motion to dismiss, rather than seek review of the district court's discovery orders. But the district court's unprecedented discovery

orders violate the separation of powers regardless of whether the court should have granted petitioners' motion to dismiss. Indeed, rather than providing a ground for affirming the court of appeals' erroneous jurisdictional holding, the Sierra Club's staleness argument only confirms that petitioners' separation-of-powers arguments are broader than claims of Executive privilege over individual documents and are therefore not rendered premature by the absence of such privilege claims.

A. The Court Of Appeals Had Mandamus Jurisdiction

Contrary to the court of appeals' decision (Pet. App. 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 sweeping discovery ordered below violates the separation of powers without regard to whether privilege could or would be asserted. That is made clear by this Court's decision in *Public Citizen*. In *Public Citizen*, there was no assertion of Executive privilege, yet the Court, without deciding the issue, acknowledged "the seriousness of the[] constitutional challenge[]" to applying FACA to a private group formed "to render confidential advice with respect to the President's constitutionally specified power to nominate federal judges." 491 U.S. 457, 466-467. Similarly, despite the absence of a privilege claim, the three concurring justices would have held that application of FACA to the ABA committee was unconstitutional because it posed "a direct and real interference with the President's exclusive responsibility to nominate federal judges." *Id.* at 488 (Kennedy, J., concurring). Accordingly, the Court unanimously recognized the serious separation-of-powers concerns raised by FACA, even in the absence of a privilege claim. 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).[7]

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 would violate the separation of powers. That is so for two reasons. First, petitioners contend that because the exercise of the President's authority under the Opinions and Recommendations Clauses at issue in this case involves powers expressly committed by the Constitution to the Executive, Congress lacks any authority to regulate the President's exercise of those powers. Thus, any application of FACA to the NEPDG—even if only in the form of preliminary discovery to determine whether FACA, by its terms, applies—would constitute an impermissible encroachment by Congress into exclusively Executive functions.

Second, petitioners' objections are not limited to the content of particular documents, but rather relate to the impropriety of ordering intrusive discovery (and thereby requiring assertions of Executive privilege) based solely on unsupported—and, indeed, contradicted—allegations of unauthorized, de facto members. At least until a plaintiff overcomes the constitutionally grounded presumption of regularity that

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[7] 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. 10(d), at 6, and privilege claims could preserve material from disclosure in a suit filed against a terminated committee. Because the relief ordered below is not materially different from the relief that could be ordered in a final judgment, there is no reason to postpone plenary review until a final judgment issues and every reason not to wait until the constitutional damage is done before taking the steps necessary to prevent it.

applies to all Executive Branch actions (and with particular force to the President and the Vice President), see Part I.B., *supra*, separation-of-powers principles preclude all discovery into the process by which the President received advice in the exercise of his Article II powers, not merely discovery of matters protected by a separate Executive privilege.

Indeed, the panel majority itself recognized that petitioner's separation-of-powers arguments are both broader than and antecedent to any specific future claims of privilege, see Pet. App. 15a (characterizing petitioner's 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).

Contrary to the court of appeals' decision, moreover, a President should not be forced to conduct an extensive—and distracting—line-by-line review of materials related to the advice he received from his closest advisors and assert privilege claims as a defense against improper or overly broad discovery. Requiring such claims of Executive privilege itself implicates important separation-of-powers concerns. As the district court explained in *United States* v. *Poindexter*, 727 F. Supp. 1501, 1509 (D.D.C. 1989), "the constitutional clash which would be precipitated by an invocation of executive privilege should be avoided if that may reasonably be done." Accordingly, the court in *Poindexter* held that it was inappropriate to require the President even to "consider the privilege question" until after other means were taken to limit and narrow discovery, thereby limiting interference

with the Executive's other activities. *Id.* at 1504. In contrast, the courts below treated claims of Executive privilege as the Executive's first, and only, line of defense against improper discovery. That approach turns traditional separation-of-powers concerns on their head, and would eliminate 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. Such a requirement has no basis in law or logic and would erect an enormous obstacle to vindicating the proper functioning of the separation of powers.

B. The Court Of Appeals Had Appellate Jurisdiction

For similar reasons, the court of appeals' denial of jurisdiction over the Vice President's appeal and its attempt to distinguish this Court's decision in *United States* v. *Nixon*, 418 U.S. 683 (1974) (*Nixon I*) are also mistaken. The majority's reading of *Nixon I* as requiring the assertion of a privilege claim before an appeal may be permitted (Pet. App. 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 assert privilege claims before permitting an interlocutory appeal.

In any event, *Nixon I* 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, especially where, as here, the Vice President acted in aid of the President, who established the NEPDG, is the ultimate custodian of its records, and would surely have a right to appeal under 28 U.S.C. 1291. Cf. *In re Papandreou*, 139 F.3d 247, 250 (D.C. Cir. 1998) (citing *Nixon I* 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, but the court of appeals (wrongly, in petitioners' view) nevertheless concluded that invocation of privilege with respect to particular documents is a prerequisite to such an appeal. Under the court of appeals' 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, submit to the indignity of a contempt citation, and appeal the contempt citation. Such an approach—particularly in a case such as this where the President is in many respects the real party in interest—is clearly inconsistent with *Nixon*.

C. Petitioners' Separation-Of-Powers Claims Are Not Stale

The Sierra Club argues, for the first time in its brief in opposition to certiorari, that the court of appeals lacked jurisdiction because petitioners' separation-of-powers claims were not only premature, but stale. It contends that because petitioners' separation-of-powers arguments throughout this litigation have been essentially the same—namely, that in

the circumstances of this case, the legislative and judicial powers cannot extend to compelling a Vice President to disclose to private litigants the details of the process by which a President obtains information and advice from the Vice President and other senior presidential advisors—petitioners were required to seek appellate review of the district court's denial of their motion to dismiss, rather than waiting to challenge subsequent discovery orders on related constitutional grounds.

That contention is meritless. Petitioners' argument in their motion to dismiss that application of FACA's disclosure requirements would violate fundamental separation-of-powers principles does not preclude them from arguing—either in the district court or in the court of appeals on mandamus or appellate review—that discovery orders requiring even more disclosure than the statute itself based on a mere allegation, as opposed to an adjudication, of unauthorized de facto members violates the separation of powers, *a fortiori*. The district court's unprecedented discovery orders violate the Constitution's separation of powers, without regard to whether the court should have granted petitioners' motion to dismiss. And it was those discovery orders—not the denial of the motion to dismiss—that gave rise to the need for immediate mandamus and appellate review by the court of appeals. Indeed, petitioners contended below, after denial of the motion to dismiss, that the district court could resolve this case on the merits based on the available administrative record, without any discovery. See Pet. 18-20.

While meritless, the Sierra Club's misplaced staleness argument does serve to demonstrate the folly of respondents' prematurity arguments. It makes clear, for example, that petitioners' separation-of-powers arguments are broader than claims of privilege to individual documents, and instead are more in the nature of a claim of immunity from discovery, at least where the plaintiff fails to overcome the

well-established presumption of regularity afforded to Executive Branch actions. See, *e.g.*, Sierra Club Br. in Opp. 11 (acknowledging that petitioners have consistently argued that they "have a constitutional right not to submit to any discovery in cases of this kind, presumably on some kind of immunity theory").

The staleness argument also makes clear that the questions presented in the petition for certiorari were fully raised below. See Sierra Club Br. in Opp. 11 (petitioners' discovery objections in district court "were identical to the ones that they had previously raised—no discovery was proper and the burden of even having to respond with specific claims of privilege would violate principles of separation of powers"); *ibid.* ("the basis of the Government's claims never changed —no discovery is permitted in this case"). As Judge Randolph observed in his dissenting opinion, "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. * * * The problem here is not that the defendants failed to make the arguments. The problem is that the majority failed to answer them." Pet. App. 42a n.5.[8]

In this case, federal agencies have produced tens of thousands of pages of materials in response to respondents' discovery requests. Petitioners, however, have resisted dis-

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[8] Citing *AAPS*'s de facto membership doctrine, the Sierra Club asserts that "when these complaints were filed, the law was clear in the District of Columbia Circuit that the formal membership of an advisory committee [was] not conclusive on the applicability of FACA's exemption for committees composed entirely of federal officials." Br. in Opp. 2. It is therefore odd that on the next page of its brief in opposition, it faults petitioners for allegedly failing to "attack the continued validity of *AAPS*" in the lower courts. *Id.* at 3. In fact, petitioners argued below that *Public Citizen*, rather than *AAPS*, provides the appropriate constitutional standard and that *AAPS* was wrongly decided. See, *e.g.*, 3/8/02 Mem. in Support of Mot. to Dismiss at 18-23.

covery against the Vice President and the President's immediate subordinates into the President's exercise of powers committed exclusively to the President by Article II of the Constitution, including the Opinion and Recommendations Clauses. Because the very essence of petitioners' separation-of-powers objections is that *any* discovery against the Vice President and immediate assistants to the President—let alone discovery tantamount to relief for a proven FACA violation—in the context of the record in this case would violate the separation of powers, petitioners' arguments are neither premature nor stale. Accordingly, the court of appeals' jurisdictional holding should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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