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 OF RESPONDENT SIERRA CLUB

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QUESTIONS PRESENTED

Because this Court is obligated to consider jurisdictional questions first, and because respondent believes that the questions presented by petitioners do not properly present the issues before this Court, respondent has re-ordered and re-stated the questions presented as follows:

1. Did the court of appeals correctly conclude that it lacked appellate jurisdiction over petitioners' collateral order appeal and petition for a writ of mandamus where (a) petitioners' primary objection was that the district court improperly failed to dismiss these complaints and, therefore, allowed limited discovery to proceed, and (b) there is no reasonable likelihood that any petitioner would be held in contempt or will be deprived of a meaningful opportunity to obtain appellate review over the alleged errors of the district court?

2. Did the district court correctly refuse to dismiss these Federal Advisory Committee Act cases where it concluded that the factual record put forth by petitioners was insufficient to decide the issues presented?

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STATEMENT OF THE CASE

Petitioners' brief accurately describes the basic events that occurred in the courts below. However, it omits a number of significant matters that demonstrate why there was no appellate jurisdiction in the court of appeals (and hence no jurisdiction in this Court), and why the issues that petitioners contend are presented on the merits were properly resolved at this stage of the proceedings and/or should not be resolved by this Court at this time, if ever.

At issue are two cases raising claims under the Federal Advisory Committee Act, 5 U.S.C. App. 1 ("FACA"). Among the Act's stated purposes are ensuring that "Congress and the public . . . be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees," and establishing "standards and uniform procedures" to govern committee proceedings. *Id.* § 2. Beyond these administrative goals, FACA prominently reflects Congress's concern with the threats of undue influence on advisory committees:

> One of the great dangers in [the] unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns. Testimony received at hearings . . . pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests.

H. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972), *reprinted in* 1972 U.S. Code. Cong. & Admin. News 3491. The Act applies to committees established by the President or by an agency, and it imposes a series of requirements governing their formation, operation, and termination. *See id.* §§ 9(c) & 10. It requires that advisory committees meet certain formal

procedural requirements and conduct their business in public, subject to certain significant exceptions. As the House Report for the Act explained, these provisions "serve[] to prevent the surreptitious use of advisory committees to further the interests of any special interest group." H. Rep. No. 1017 at 6.

There is a specific exemption in FACA for committees "composed wholly" of federal officers and employees. § 3(2) (the "federal officials exemption"). Petitioners relied on this exception to claim that the National Energy Policy Development Group ("NEPDG" or the "Task Force") and its subordinate groups, which were specifically contemplated by the President's memorandum creating the Task Force (JA 157, ¶1), were not subject to FACA. There is no dispute that the order creating the Task Force and the list of members set forth in its final report are limited to federal officials, although neither document mentions members of the sub-groups that are a major focus of respondent Sierra Club's complaint. It is also undisputed that, when these complaints were filed and indeed today, under the law of the District of Columbia Circuit, the formal membership of an advisory committee is not conclusive on the applicability of the federal officials exemption. *Association of Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("*AAPS*"). In addition, under *AAPS*, a plaintiff is entitled to discovery to determine whether, as a factual matter, non-federal officials regularly participated in the work of an advisory committee – here the Task Force or its sub-groups -- in such a manner as to become de facto members of the committee; if so, the Government may not claim the federal officials exemption. *Id*. at 915.

Prior to filing its lawsuit, respondent Judicial Watch wrote to the Office of the Vice President, citing news reports, and claiming that private persons from the energy industry had participated so extensively in the work of the Task Force that the Task Force had operated in violation of FACA. The Counsel to the Vice President responded with a brief letter denying the factual allegations, but providing no specifics to support that position. JA 123. Judicial Watch then filed suit in

the United States District Court for the District of Columbia alleging that the Task Force had operated in violation of FACA, asking for a declaratory judgment to that effect, and seeking an order that the Task Force and the other defendants comply with its requirements, including making its records available to the extent required by FACA. Several months later, respondent Sierra Club filed a similar suit in the Northern District of California, which was transferred to the District of Columbia and consolidated with the Judicial Watch case. The Sierra Club complaint specifically alleged that non-federal officials participated extensively in the work of various sub-groups, which assisted the Task Force with gathering information and making recommendations. JA 146-148. Because the sub-groups were not mentioned in the letter from Judicial Watch, the denials from the Counsel to the Vice President did not mention them or deny that their participants included non-federal personnel.

All of the defendants moved to dismiss the complaints in their entirety under Rule 12(b)(6), relying on the order creating the Task Force, its final report listing its members, and the response of the Counsel to the Vice President. In the district court petitioners did not attack the validity of *AAPS*; they simply asserted, as a matter of statutory and constitutional law, that the district court was required to dismiss the cases. They did not cite to any special or heightened pleading rules or claim any constitutional immunity from suit. Their claim was that respondents' claims must be dismissed without allowing respondents any discovery and that failure to do so would give rise to serious separation of powers issues.

After extensive briefing and full oral argument, the court issued a careful and lengthy opinion, declining to dismiss the complaint. Pet. App. 53a-123a. It agreed with the Government that FACA did not provide for an implied cause of action (*id.* at 77a) and that the Vice President was not an agency and hence could not be sued under the Administrative Procedure Act ("APA") (*id*. at 78a-79a), although the Cabinet officer defendants could. However, the court allowed the

action to proceed against the Vice President and other non-agency defendants under the mandamus statute, 28 U.S.C. § 1361, which is not limited to agency officials, because the Vice President may be responsible for actions of the Task Force. *Id.* at 90a-97a.

The court also recognized that, in some situations, demanding compliance with FACA or requiring the Vice President to disclose internal communications might violate principles of separation of powers. *Id.* at 103a. The district court concluded that, in order to decide the separation of powers issues, at least some discovery on the threshold factual question of whether private persons had participated extensively in the work of the Task Force or its sub-groups was necessary. *Id.* at 110a-117a. The district court noted that its constitutional analysis on the merits would vary, depending on whether FACA were to be applied to the Task Force or to its sub-groups, because the latter "could have been much less operationally proximate to the President, and revealing their activities would arguably infringe the President's Executive authority to a much lesser degree." *Id.* at 115a. Furthermore, the court observed, discovery might show no factual basis for respondents' claims, in which case there would be no need to decide any separation of powers issues. *Id.* at 119a.

The district court did not simply turn the plaintiffs loose to embark on whatever discovery they chose, but stated that any discovery would be "very tightly-reined." *Id.* at 118a. Thus, as part of its July 11, 2002 order denying in large part the motion to dismiss, it directed plaintiffs to submit a discovery plan in 8 days, gave defendants a week to reply, and set a hearing for August 2, 2002. *Id.* at 123a. Instead of merely submitting a plan for discovery, which would then have to be fleshed out, plaintiffs submitted a joint set of nine interrogatories and eight requests to produce documents. They are mainly directed to gathering information on the threshold issue of the extent to which private parties participated in the Task Force and its sub-groups, an inquiry that does not require the production of deliberative materials of the kind normally

exempt from public disclosure.

The position of petitioners in response to respondents' plan was the same as before: no discovery was appropriate. They did not object to specific interrogatories or requests to produce on grounds of overbreadth or intrusivness, and did not assert Executive privilege as to any of the requests. Nor did they then file an appeal, seek a writ of mandamus in the court of appeals, or ask the district court for a certification under 28 U.S.C. § 1292(b). Instead, they continued to insist that the district court was required to dismiss the case without permitting any discovery. Petitioners asserted that the APA required the district court to decide the case on the basis of what they claimed to be the "administrative record", primarily the President's memorandum announcing the Task Force's formation and the Task Force's final report.

Not surprisingly in the face of the same opposition that it had previously found wanting, the district court permitted plaintiffs to serve their proposed discovery. But when it came time to answer or object, petitioners moved for a protective order, applicable to respondents' entire discovery. Again, the objection was across-the-board, and there was no specific privilege claim or an assertion that the request was overbroad or otherwise improper. That motion also was denied, although the district court offered to review materials – or even a privilege log – in camera. JA 247-248.

Once again petitioners refused to respond or raise specific objections. This time, however, petitioners announced that they were going to the court of appeals, which they finally did on November 7, 2002, when the Vice President filed a notice of appeal and all of the defendants filed a writ of mandamus, both premised on the argument that the district court should have decided the case on the administrative record that petitioners presented. They also asked for a stay of discovery, even though they had not answered or objected to a single item of discovery, or even prepared a privilege log. The district court denied the stay motion, but extended the time to

reply once again to allow petitioners to seek a stay from the court of appeals, which granted one on December 6, 2002. While the petition for a writ of mandamus and the appeal were pending, petitioners also asked for certification under 28 U.S.C. § 1292(b), which the district court denied on November 26, 2002. JA 383-413.

After hearing oral argument, the court of appeals dismissed the appeal and writ of mandamus on July 8, 2003. The court concluded that it lacked jurisdiction because there was no final judgment and no exception applied to these interlocutory orders. In particular, the court rejected petitioners' claim that they required immediate review or they would be faced with an intolerable choice of complying with discovery that they believed was improper -- which would moot the controversy -- or being held in contempt for failing to do so. The court of appeals correctly noted that, given the stage of discovery below, petitioners were faced with no such choice at this time, if they would ever be placed in such a position. Thus, the attempt to obtain review of the district court's ruling was premature, and the court of appeals had no jurisdiction to entertain it.[1]

Judge Randolph in his dissent sided with petitioners, because he concluded that the decision in *AAPS* was wrong and should be overturned, in which case the district court would be required to dismiss the complaint. He did not explain how the court of appeals could surmount the final judgment rule to achieve that result, let alone how a panel could overturn a decision of a prior panel. Nor did he contend that, if *AAPS* was still good law, the district court acted improperly in allowing the discovery that was permitted.

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[1] Both judges in the majority observed that the discovery served by respondents could be read to extend beyond the facts necessary to establish their claims of de facto membership by private persons on the Task Force and/or its sub-groups. However, they both expressed confidence that the district court would narrow the discovery – if petitioners ever asked the court to do that. Pet. App. 16a-19a; 25a-27a.

SUMMARY OF ARGUMENT

In order to obtain interlocutory review of these admittedly non-final orders, petitioners claim that the discovery permitted by the district court is "intrusive, invasive, and burdensome" (Br. 21), to the point where it is "at least as intrusive as the disclosure obligations imposed by FACA itself" (Br. 20-21). They recognize that intrusiveness alone would not suffice to justify interlocutory review, and so they further contend that, absent review now, the discovery orders would be "completely unreviewable" (Br. 39), with the result that the decision of the court of appeals "would improperly immunize [constitutional] violations from effective appellate review" (Br. 11). This attempted end run on the final judgment rule fails because the district court's discovery orders do not remotely resemble petitioners' characterizations of them. Moreover, there are more than adequate means of obtaining full and complete review of all the rulings that petitioners claim are in error, at the conclusion of the case in the district court. Furthermore, review can be undertaken without any reasonable likelihood that any of the petitioners will be forced to choose between compliance with what they believe to be unlawful discovery orders and being held in contempt of court.

There are two reasons why petitioners' intrusiveness arguments cannot stand analysis. First, the discovery itself is very limited, consisting of just nine interrogatories and eight requests for production of documents with respect to a committee whose life was less than nine months. In the main, those discovery requests seek the basic information needed to determine the threshold question of whether non-government persons participated in the work of the Task Force and its sub-groups, and if so, in what manner and to what extent. The information sought is likely to be contained in portions of documents showing who was invited to meetings, who attended, who was sent drafts of the final report, and who commented on them. Not only would production of such records not be burdensome, but they could readily be redacted

to delete any arguably deliberative or otherwise privileged information.

Second, although the district court has allowed respondents to initiate discovery, the court has been clear beyond a doubt that none of its orders will preclude petitioners from claiming any kind of privilege or arguing that particular requests are too broad or too burdensome to be required to answer fully. All that the district court ruled was that petitioners' across-the-board refusal to respond to all discovery is not proper. The district court has emphasized its willingness to limit discovery or utilize *in camera* procedures, if necessitated by any undue burden on petitioners, and its readiness to entertain any specific objections or privilege claims by petitioners. JA 247-48, 288-92, 405. Therefore, none of petitioners' claims of excessive discovery is even ripe, let alone well-taken.

Nor do petitioners fare any better on the second essential prong of their request for interlocutory review. They seek to equate the discovery orders here with the order to President Nixon requiring him to turn over tapes of some of his conversations to the grand jury. In *United States v. Nixon*, 418 U.S. 683 (1974), this Court ruled that no order actually holding the President in contempt was necessary to obtain appellate review of the production order where a contempt order was the only step required to perfect his appeal. Here, by contrast, the discovery process has just been allowed to start, and no one, let alone the Vice President, is anywhere close to being sanctioned, not to mention being held in contempt of court.

Even if petitioners were to persist in their refusal to comply with the discovery orders, a whole range of non-contempt sanctions would be available under Rule 37(b) of the Federal Rules of Civil Procedure. For example, a court could enter a default judgment against petitioners, from which they could then take an appeal and have all their claims about discovery and the failure to grant their motion to dismiss heard. Indeed, in *United States v. Armstrong*, 517 U.S. 456 (1996), a

case relied on by petitioners in their merits argument (Br. 23), a district court ordered discovery against the United States in a criminal case on the issue of selective prosecution. When the Government refused to comply, the indictment was dismissed, and the discovery issue was resolved in the Government's favor on its appeal from the final judgment dismissing the case. Far from being "completely unreviewable," petitioners' discovery arguments can be heard on appeal though this well-established means, should they persist in their current position. Moreover, there is no substantial risk that they will be held in contempt or have to comply with the discovery order before that review can take place. Thus, whether the request for interlocutory review is based on the collateral order doctrine or mandamus, its essential predicate -- the absence of other adequate means of obtaining review of the order being challenged -- is lacking.

In fact, petitioners' fundamental claim has nothing to do with the breadth or intrusiveness of discovery or the divulging of privileged information. Rather, it is that "*any* discovery . . . in the context of the record in this case would violate the separation of powers" (Br. 41, emphasis in original). Had the case run its course in the district court, petitioners' demand that there be a halt to all discovery would have made it easier to proceed to the next steps under Rule 37 and that would have enabled petitioners to take that clean issue promptly to the court of appeals once a final judgment had been entered. And their no-discovery position further shows that their claim that the allegedly intrusive discovery here is tantamount to relief on the merits is irrelevant to their legal arguments.

Petitioners' arguments on the merits, which occupy three-quarters of their brief and which precede the jurisdictional arguments that the court of appeals found dispositive, should also be rejected. Each of petitioners' claims has far-reaching implications, and the court of appeals has passed on none of them. Therefore, should the Court accept any of petitioners' jurisdictional claims, it should remand the case to the court of appeals to allow it to consider these questions in the first instance.

In any event, petitioners' merits arguments rest on no firmer ground than do their jurisdictional claims. All of them are essentially claims that the district court erred in not granting petitioners' motion to dismiss, which is the classic non-final order for which interlocutory review is never available except under the collateral order doctrine. Moreover, mandamus requires a showing of a "clear and indisputable" right, *Gulfstream Aerospace Corp. v. Mayacamas Corp*., 485 U.S. 271, 289 (1988), and none of petitioners' arguments has any precedent to support it that rises to that level.

Their contention that a court may look no further than the order establishing an advisory committee to determine whether it is "composed wholly" of federal officials, and hence is exempt from FACA, is an open invitation to massive evasion of FACA, not just for Presidential committees, but for those established by federal agencies since the same exemption applies to all committees. It would even apply to sub-groups that operate at a considerable distance from the main committee and hence raise none of the separation of powers concerns on which petitioners place such emphasis.

Petitioners' claim that no discovery is available in this case is simply to say that almost no one will have an enforceable FACA claim. Unlike other actions under the APA, where there are opportunities for interested persons to make a record at the administrative level and to gain some access to the evidence and arguments of the agency, here the Task Force and its sub-groups operated entirely in secret, with no opportunity for public input of any kind. If there can be no discovery in this case, there can be none in any FACA case, and the law will become essentially a dead letter.

Finally, petitioners argue that the application of FACA to the Task Force or its sub-groups would violate separation of powers. But as the district court recognized, that claim is premature because there may be no need to decide it. Thus, if petitioners' position that no private persons participated extensively in the work of the Task Force or its sub-groups is

sustained, they will prevail on the merits of their statutory exemption. Furthermore, as *Nixon v. General Services Admin*., 433 U.S. 425, 443 (1977) requires, the outcome of the separation of powers balancing test will almost certainly be affected by the facts found, and yet discovery has not yet begun. But as the record stands, there is no basis for finding that applying FACA here would not satisfy that test.

Moreover, this Court has long held that constitutional claims should be decided as a last resort, not, as petitioners urge here, before a court determines whether the case can be resolved on statutory or other grounds. This case is unlike *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), in which three Justices found the application of FACA unconstitutional on the facts stipulated in that case. However, in *Public Citizen* there was a final judgment, and the three Justices concluded that FACA, as they interpreted it, did not allow them to avoid the constitutional issues presented. Whether any court will find it necessary to reach the constitutional issues in this case is unclear, but it is clear that there is no reason for any court to reach them now.

ARGUMENT

Introduction

Petitioners' principal objection to the decisions of the district court is to the discovery that it authorized. Their first question presented calls the discovery "broad," and their brief refers to it, in ever-escalating adjectives, as "wide-ranging" (Br. 38), "relatively unbounded (Br. 39) "sweeping" (Br. 40), and "intrusive" (Br. 41), not to mention "intrusive, invasive, and burdensome" (Br. 21). The question presented also claims that the discovery would intrude into "the process by which the [Task Force] gathered information to advise the President," (Br. I), incorrectly suggesting that, even at the preliminary stage of the litigation, the district court has allowed respondents to probe the thinking of the Task Force members ("force the opening of sensitive Executive Branch deliberations"- Br. 10)

as they compiled their recommendations.[2] Petitioners' claims with respect to the discovery allowed are crystallized in their oft-repeated assertion that the discovery that the district court permitted, simply to determine whether FACA applies, is "tantamount to relief for a [FACA] violation" (Br. 41).[3]

Despite this bluster, petitioners' own brief concedes – indeed embraces – the proposition that it is not the breadth of discovery to which they object, but any discovery at all, to the point where they refused to make specific objections or raise any claim of privilege. According to petitioners, "*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" (Br. 41, emphasis in original).[4] To be sure, at some points in their brief, petitioners are less than clear as to whether their "no discovery" rule applies just to the Vice President and other staff assigned to the Task Force, or whether Cabinet officers, who were Task Force

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[2] *See also* Br. at 33 (Task Force cannot be required to "disclose the process by which the group developed recommendations for the President"); *id.* at 34 (Congress cannot "regulate the process .. . [or] intrude into that process"); *id*. at 42 (separation of powers precludes "all discovery into the process by which the President received advice [from the Task Force]"); *id.* at 36 (discovery into "manner" of obtaining information); and *id.* at 45 ("details of the process").

[3] *See also id.* at 9 ("discovery at least as broad and constitutionally problematic as the disclosure requirements imposed by FACA itself, in order to determine whether FACA even applies"); *id.* at 20-21 (discovery "at least as intrusive as the disclosure obligations imposed by FACA itself"); *id* at. 37 ("discovery obligations roughly co-extensive with the available remedies for a FACA violation"); *id*. at 39 ("remedy for a proven FACA violation is not materially different from a discovery order"); and *id*. at 41 n. 7 ("discovery order [ ] mirrors the relief provided for a [FACA] violation").

[4] *Id.* at 42 (separation of powers precludes "all discovery" in this case); *id*. at 45 (district court should have resolved case "without any discovery"); *id.* at 47 ("the very essence of petitioners' separation-of-powers objections is that *any* discovery against the Vice President and immediate assistants to the President" is unconstitutional) (emphasis in original).

members, and agency staff would be permitted to provide discovery concerning the Task Force and its sub-groups. But the overall thrust of their position is clear, and indeed necessary to sustain any arguable claim for interlocutory review: no discovery should have been granted. Thus, it borders on the disingenuous for petitioners to seek to paint a picture of a district judge run amok since their legal claim is that, even if the judge ordered only the production of lists showing attendees at meetings of the Task Force and its sub-groups, that would have been improper.[5]

Moreover, the district court did not authorize any discovery remotely resembling what is alleged in petitioners' brief. The court-directed joint discovery plan submitted by respondents on July 19, 2002, is very short. JA 160-163. On August 2, 2002, the district court approved the plan and nine interrogatories and eight requests for production of documents, totaling less than 5 printed pages, after instructions and definitions are excluded. JA 215-229. In the main, this discovery seeks only basic information about who, other than government officials, participated in the activities of the Task Force and its sub-groups. Respondents' discovery could be largely answered by staff producing documents, such as minutes of meetings, lists of invitees or attendees, and cover memoranda showing to whom drafts were sent and/or from whom comments were received, none of which would reveal internal deliberations. Nonetheless, petitioners go so far as to suggest that the President, who is not even a party, may be the subject of discovery in this case (Br. 24, n.2). Given this record, it is difficult to fathom the basis on which petitioners contend that the "decisions below impose intrusive and

[5] The second question presented also asserts that the discovery orders here are "unprecedented," a charge repeated in the body of the brief at 39-40 and 45. Here too the Government's hyperbole has gotten the better of it: petitioners may disagree with the discovery permitted below, but it is precisely the same kind of discovery that the court of appeals allowed with respect to the sub-groups in *AAPS*. 997 F.2d at 901, 915-916. However one might characterize the discovery allowed here, it is surely not "unprecedented."

distracting discovery obligations on the Vice President himself" (Br. 38-39). *Compare Clinton v. Jones*, 520 U.S. 681 (1997) (allowing discovery that could only be answered by sitting President).

Of course, at some point discovery could seek additional information, perhaps even privileged materials, but the district judge has made it clear that there will be "a very tightly-reined discovery process" (Pet App. 118a), and that he remains open to pass on all claims of privilege or any specific objections petitioners might have. JA 288-292, 405. The court of appeals even suggested that the discovery requests as written may be overbroad (*see* note 1*, supra*). However, since petitioners had made no request to narrow them, that could not be a basis for issuing a writ of mandamus. In short, the record is clear both that petitioners contend that any discovery is impermissible and that respondents have made quite modest discovery requests to which petitioners have made no specific objections, no claims of privilege, and no particularized claims of burdensomeness or overbreadth.

I. THE COURT OF APPEALS LACKED JURISDICTION OVER THE QUESTIONS THAT PETITIONERS PRESENTED TO IT.

A. Petitioners' Claims Of Error.

The court of appeals did not reach the merits of petitioners' claims because it concluded that there was no final judgment and that, therefore, it lacked jurisdiction over the interlocutory appeals under either 28 U.S.C. § 1291 or appellate mandamus. Accordingly, this Court is also without jurisdiction. *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). However, in order to decide the jurisdictional questions, which this Court is required to decide first, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), we will briefly describe petitioners' claims.

Petitioners' merits arguments are really one argument:

the district court should have dismissed the complaint instead of allowing any discovery. In Point II, respondent will discuss the reasons given by petitioners for their conclusion, but for now they can be said to fall into three somewhat overlapping categories. First, the complaint fails to state a claim for relief under FACA because, in determining whether an advisory committee qualifies for the exception for committees composed wholly of federal officers and employees, the courts may look no further than the documents establishing the committee.

Second, even if the courts may look behind those documents to determine whether the exemption applies, petitioners assert that there is no right to any discovery or, in the alternative, that a plaintiff making such a challenge must present some unspecified quantity and quality of evidence – something more than "unsubstantiated allegations in a complaint" (Question Presented 1) – in order to survive a motion to dismiss. Their position is at bottom a contention that, in FACA cases, there is either no discovery or there is some form of heightened pleading or early proof requirement before any discovery can be allowed because, according to petitioners, this is principally an APA case, in which the claim is ordinarily decided on the administrative record, with no discovery allowed.

Third, as applied to Presidential committees, if the de facto membership doctrine applies, even to sub-groups such as were present in *AAPS* and are present here, FACA is unconstitutional as a violation of principles of separation of powers. The constitutional argument is an independent claim, but petitioners also rely on it to bolster their statutory arguments.

Importantly, petitioners overlook the fact that a substantial part of the complaint of respondent Sierra Club is directed at private participation in the groups subordinate to the Task Force. JA 146-153. This is significant both because petitioners' "administrative record" contains nothing regarding those sub-groups and because the discovery and separation of

powers concerns are much less significant the further away the process is from the Vice President and his immediate staff, as is alleged to be the case for the sub-groups. Yet despite the significance of these distinctions, petitioners' brief essentially disregards the allegations regarding the sub-groups.

B. The Court of Appeals Lacked Jurisdiction Under Section 1291.

In contrast to *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), there is no final judgment in this case. Thus, there was no basis for an interlocutory appeal unless an exception to the final judgment rule applied. Vice President Cheney and the non-agency petitioners tried to obtain certification under 28 U.S.C. § 1292(b) (JA 279-281), but the district court wrote a lengthy and thoughtful opinion explaining why interlocutory review was not appropriate. *Id*. at 383-415. Only the Vice President filed a Notice of Appeal, *id.* at 337-338, and he has not relied on a claim of absolute or even qualified immunity, based on cases such as *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), or *Mitchell v. Forysth*, 472 U.S. 511 (1985), although the brief describes his position as an "immunity" from discovery (Br. 42). Even assuming that the Vice President will ever have to personally respond to discovery, it is hard to imagine how that would violate the constitution, given this Court's decision in *Clinton v. Jones*, 520 U.S. 681 (1997), in which a sitting President was held not to be immune from extensive personal discovery in a private damages action. Furthermore, as this Court ruled in *Midland Asphalt Co. v. United States*, 489 U.S. 794, 800-801 (1989), the collateral order exception to the final judgment rule for claims of immunity is a narrow one, and it would not apply here.

Instead, the Vice President relies almost entirely on *United States v. Nixon*, 418 U.S. 683 (1974), which sustained jurisdiction under section 1291 and the collateral order doctrine. There are a number of reasons why the court of appeals did not have jurisdiction on that basis, with the first being that the appeal was not timely. The notice of appeal,

which was filed on November 7, 2002 (JA 9), purports to appeal from the orders entered on November 1, October 17, and September 9, 2002, in which case the filing would be within the 60 days provided by Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure. Petitioners do not contest that the 60 days applies to collateral order appeals such as the Vice President's, and the cases so hold. *See e.g., Weir v. Propst*, 915 F.2d 283, 286 (7th Cir. 1990), *cert. denied*, 514 U.S. 1035 (1995); *United States v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992); C. Wright, A. Miller, & E. Cooper, 15A Federal Practice & Procedure § 3911 at 357 (1992).

The problem for the Vice President is that, based on his theory on the merits – the motion to dismiss should have been granted and hence no discovery should have been allowed – it was not the orders cited in the notice of appeal that finally determined that question, but the district court's order denying the motion to dismiss, which was entered on July 11, 2002. Even giving petitioner Cheney the benefit of the doubt, the district court's order approving the discovery plan and allowing respondents to serve their interrogatories and request for production of documents was entered on August 2, 2002 (*see* JA 3), and the notice of appeal was filed more than 90 days later. In fact, the appeal would still have been timely had it been filed immediately after the entry of the September 9th order, from which the Vice President eventually sought to appeal. What he could not do was to wait four months from the denial of the motion to dismiss, and then seek to take an interlocutory appeal from that adverse ruling.

The principal response in petitioners' brief to the staleness claim is that they did not forfeit their right to appeal the denial of their motion to dismiss by making further objections to the actual discovery orders (Br. 45). The response misses our point. Petitioners could have continued to object in the district court, as they did, but since their claim is that any discovery in these circumstances was improper, they had only 60 days from the time that some discovery became inevitable to file an interlocutory appeal. If the Vice President did not file

within that time, he would not lose his right to appeal from the denial of the motion to dismiss, but he (and the other petitioners) would have to wait until an adverse final judgment to do so.

Even if the appeal were timely, it would not be covered by the special circumstances that gave rise to an interlocutory appeal in *United States v. Nixon*, as the court of appeals properly concluded. There are four principal distinctions between *Nixon* and this case that explain why even a timely appeal from the July 11th order (or from any of the orders entered thereafter) would not fall within the *Nixon* rationale. First, the party opposing discovery in *Nixon* had already raised a procedurally proper claim of Executive privilege as to the specific tapes being sought, and that claim had been definitively rejected by the district court. Here, no claim of privilege for any document or for any answer to any question has been raised, let alone rejected. Second, President Nixon was not a party to the underlying proceeding before the grand jury. Therefore, there would be no other "final judgment" against him from which he could take an appeal, in contrast to this and other civil cases, in which the persons subject to discovery orders are parties to the underlying proceedings.

Third, the only other step needed to perfect the interlocutory appeal in *Nixon* was an order holding the President in contempt. In this case, however, the district court is several steps away from any possible contempt ruling. For example, on remand petitioners may choose to answer certain questions and produce unprivileged documents that may satisfy respondents, or the district court may conclude that such production constitutes sufficient compliance in this case. Or petitioners may file claims of privilege that the district court may sustain, or the privilege log or an *in camera* inspection may reveal to the district court that the information sought is not relevant or may be withheld for some other reason. As the Seventh Circuit recently observed in rejecting a writ of mandamus, "[i]nstead of trying to predict how the trial will play out, we defer review until the end, when we can see how

matters *did* play out." *In re Lewis*, 212 F.3d 980, 985 (2000) (emphasis in original).

Fourth, and most significantly, petitioners present this case as if the trial judge had already rejected all of petitioners' privilege claims and other objections applicable to particular documents or interrogatories and issued an order compelling petitioners to respond. They further assume that the judge would force the Vice President and perhaps others to comply with the order or be held in contempt, with jail and/or daily fines to follow, as day follows night. And if petitioners wished to avoid contempt, they would be compelled to comply, thereby mooting any claim that the discovery order was improper because the cat would already be out of the bag.

But the Federal Rules do not limit a trial judge's options in that way, nor do they result in procedures that deny parties resisting discovery a meaningful opportunity to obtain appellate court review of allegedly unlawful discovery orders. Rule 37(b)(2) provides for a wide range of sanctions short of contempt, such as (A) ordering that certain facts be taken as having been established for purposes of the case; (B) precluding a disobedient party from opposing certain claims or introducing certain evidence; or (C) striking parts of the pleadings or rendering a default judgment. Although respondents have asked the district court to impose sanctions against petitioners for their refusal to comply with discovery, the district court has declined to do so. More importantly, it is nothing short of premature speculation that the district court will choose a contempt option in lieu of other sanctions, if the discovery proceedings ever reach that point. *See United States v. Moussaoui*, 333 F.3d 509, 515-16 (4th Cir. 2003) (it is "not enough that the Government's noncompliance with the order is anticipated or even certain, especially when it is unknown what sanction, if any, may be imposed by the district court.")[6]

[6]Even in *Nixon*, where the only feasible remedy was contempt, this Court made clear that ordinarily it would require a person refusing to comply with (continued...)

If one of the non-contempt sanctions were chosen, the worst that could happen to petitioners is that the district court would enter judgment that they had violated FACA and order them to comply by making certain disclosures. Even then, the status quo would almost certainly be maintained pending appeal because either the district court or the court of appeals would stay the disclosure portions of the order. *See Center for National Securities Studies v. Department of Justice*, 217 F.Supp. 2d 58 (D.D.C. 2002) (stays "routinely granted"); *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (stay granted to avoid mootness). At that time, there would be an appealable final judgment, and as part of that appeal, petitioners could ask the court of appeals to review the previously non-reviewable order of July 11, 2002, as well as any other interlocutory orders, such as any sanctions under Rule 37(b), that would merge into the final judgment. That is precisely what happened in *United States v. Armstrong*, 517 U.S. 456 (1996), where the district court dismissed an indictment when the Government refused to respond to discovery on the issue of selective prosecution, and the Government obtained a reversal of the discovery order when it appealed the final judgment against it.

Thus, far from denying petitioners an appeal over discovery and other orders that they consider unlawful, the district court has provided more than ample procedures that assure that petitioners will ultimately have the right to one appeal, from a final judgment, that includes any otherwise

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[6](...continued)
a discovery order to be held in contempt, but that insisting on such a requirement for the President would be "peculiarly inappropriate due to the unique setting in which the question arises." 418 U.S. at 691. As the D.C. Circuit has pointed out, relying on Winston Churchill, there is a vast difference between the number one person and those immediately under him. *In re Papandreou*, 139 F.3d 247, 251 n.1 (1998). *See also Clinton v. Jones*, 520 U.S. 681, 698 (1997) (pointing out unique roles for President, most of which are inapplicable to the Vice President).

non-moot order made along the way. Petitioners are simply mistaken in the assertion that, if the decision below is sustained, "the only way that the Vice President [or anyone else] 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" (Br. 44 emphasis in original). What has actually happened is that petitioners have interrupted the orderly process for resolving civil cases against the Government by seeking writs of mandamus and taking an interlocutory appeal of non-final orders, instead of either answering the discovery, or standing on what they believe to be the correct view of the law and allowing the court of appeals to decide whether they are right once a final judgment has been entered against them.

To be sure, if petitioners were to follow the path of insisting on their no-discovery position, and the district court entered a preclusion order, they would run the risk that the court of appeals might disagree with them on the merits. In that case they would lose the opportunity to answer the discovery and then perhaps prove that, in fact, private persons were not de facto members of the Task Force and/or its sub-groups. But that is the inevitable consequence of the final judgment rule and the operation of Rule 37(b) in cases where a party refuses to respond to discovery, whether on principle or for any other reason. Petitioners are represented by sophisticated counsel, and they will surely be advised of the consequences of their choice once the case is back in the district court. But if they decide to answer the discovery, and not continue their massive resistance, the choice to forgo their appellate rights on the discovery, but not the merits, issues, will be theirs. Unlike *Nixon*, it is not "now or never" for appellate review, nor is there any immediate or even any realistic possibility that the Vice President or any other defendant will "be required to submit to contempt proceedings before obtaining appellate review of" their claims that there was no basis for ordering discovery (Br. 11). Therefore, even if the appeal here had been timely, there would be no basis to apply the collateral order doctrine to

rescue the Vice President from the choices that he will have to make in the district court on remand.

Petitioners' principal response is that the court of appeals rejected their jurisdictional claims only because petitioners had not raised a claim of Executive privilege in the district court, thereby making any appeal premature (Br. 40-43). We do not read the opinion below in that limited way (Pet App. 24a), but we agree with petitioners that the presence (or absence) of a claim of Executive privilege is neither a necessary nor sufficient basis for an exception to the final judgment rule. Surely, the jurisdictional issue in *United States v. Nixon* would have been resolved in the same way if the privilege being asserted were attorney-client or spousal. Conversely here, if the Vice President had also raised a claim that some of the materials sought in discovery were privileged, but no orders beyond those issued by the district court here had been issued, there would still be no interlocutory appellate jurisdiction because he would not yet be in realistic danger of being forced to comply with a discovery order or be held in contempt of court. But the fact that there is no claim of Executive privilege only underscores why discovery should proceed and why there is no basis for appellate court intervention at this time.[7]

C. There Was No Mandamus Jurisdiction in the Court of Appeals.

The court of appeals also lacked mandamus jurisdiction over petitioners' attempt to obtain interlocutory review of the district court's refusal to dismiss the complaint before allowing respondents any discovery. Once again, as with the attempt to use the collateral order doctrine to obtain an appeal, mandamus was either too late or premature. To the extent that mandamus

[7] Respondent is at a loss to understand the basis on which petitioners purport to rely on this Court's decision in *Public Citizen, supra*, on the jurisdictional issue (Br. 39), since that case involved a final decision in the district court, followed by a direct appeal to this Court. 491 U.S. at 448.

might lie over a denial of a motion to dismiss, the writ should have been filed promptly after the July 11, 2002 order was entered and not months later. Although FRAP Rule 4(a) does not apply to mandamus petitions, the absence of a specific limitations period for mandamus relief does not permit petitioners to evade the 60-day rule by recasting their appeal as a writ of mandamus. *Helstoski v. Meanor*, 442 U.S. 500, 508 n.4 (1979).

Prohibiting such evasion is particularly appropriate here where, if any review is proper at this stage of the case, it is because the order being reviewed is similar to orders falling within the collateral order doctrine. *Id*. at 505-06 (mandamus available only when there is no other practical remedy). As petitioners admit, and indeed embrace (Br. 40), they did not seek mandamus on the ground that the lower court ordered them to provide specific information that is subject to Executive privilege or otherwise exempt from discovery. Rather, they sought a much "broader and antecedent" form of discovery immunity (Br. 42) – a claim that would be reviewable at this stage only if it fell within the collateral order doctrine, which is subject to the 60-day rule.

Even if the 60-day rule did not apply, petitioners' mandamus claim should be barred by laches. *In the Matter of the Eastern Cherokees,* 220 U.S. 83 (1911). For nearly four months after petitioners knew that discovery was inevitable, they continued to delay and obstruct the proceedings in an effort to postpone having to respond or even object to specific items of discovery. So successful were they that, more than a year and a half after they were directed to provide documents and answers to interrogatories, the non-agency petitioners have not produced a single piece of paper, responded to a single interrogatory, or even provided a single specific objection to any of respondents' discovery requests. And the voluminous documents that the agency petitioners have provided are virtually useless in determining the extent of private party involvement in the workings of the Task Force and its sub-groups. *See* note 18 *infra*. Instead, petitioners waited four

months before going to the court of appeals on a claim that, on petitioners' theory, was as ripe as it would ever be on July 11, 2002. It has always been clear to all parties and the lower courts that respondents seek access to information about what roles private parties played in the work of the Task Force and its sub-groups. By their tactics, petitioners have significantly thwarted the efforts of respondents to reach the merits and eventually to make that information public. If there were ever a case for applying laches to a request for a writ of mandamus to the district court, this is surely it.

As with the collateral order argument, the crux of petitioners' mandamus claim is that, if interlocutory review is not forthcoming now, review at the end of the case will be meaningless. The same reasons that demonstrate why petitioners' defenses will not become moot, nor will they be forced to be held in contempt, apply equally whether the basis for appellate jurisdiction is the collateral order doctrine or mandamus, and we will not repeat those reasons here.

Furthermore, even if this dispute were truly about discovery and not a claimed immunity, there would still be no basis for mandamus in the court of appeals because there is no order compelling specific discovery that might arguably form the basis for such a writ. Petitioners cite no authority for the proposition that orders rejecting blanket objections to discovery are properly the subject of writs of mandamus in the courts of appeals or of claims of immunity of any kind, let alone the unique variety asserted here. Even if mandamus might be available to protect against the violation of a claim of privilege with respect to a specific disclosure, which has not yet occurred, it has never been invoked in this situation in which petitioners seek to use the writ as an end-run on the prohibition against interlocutory appeals of discovery orders.

Finally, mandamus also must be rejected because it puts the cart before the horse. To be entitled to mandamus, a party must establish a "clear and indisputable" right, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289

(1988). Yet there is no authority creating an immunity from discovery of the kind sought here, and hence no basis for a court of appeals to find that a district court has acted in clear derogation of such a non-existent rule of law. At the very least, the failure of the district court to interrupt discovery before petitioners have even filed a single specific objection is not clear error as to warrant the use of mandamus, particularly since petitioners will be able to obtain full appellate review of their legal claims after entry of a final judgment in the district court.

* * *

Petitioners' jurisdictional arguments are less an attempt to show why section 1291 or mandamus applies, and more an effort to convince the Court that an appellate court *ought* to step in now because the district court was wrong in not dismissing the case and wrong in allowing any discovery, and those errors, in petitioners' view, rise to the level of violations of principles of separation of powers. That is the kind of argument that the law allows a party to present to a district court as a basis for discretionary review of an interlocutory order under 28 U.S.C. § 1292(b), and indeed petitioners made such an argument, but the district court firmly rejected it. JA 383-413. Congress has made the choice that decisions of district courts are not appealable until there is a final judgment, unless a specific exception applies, in order to discourage "piecemeal litigation." *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976); *United States v. Nixon*, 418 U.S. 683, 690 (1974) (noting "strong congressional policy against piecemeal reviews" and observing that following the final judgment rule "ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation.")

As respondent has demonstrated, neither mandamus, collateral order, nor any other exception applies, and therefore it is wholly irrelevant to the jurisdictional question whether the district court was in error and even whether any error was a constitutional one. There are more than ample means by which

petitioners can preserve their legal arguments, without providing the requested discovery or being held in contempt of court, if they choose that path. What they cannot do is obtain appellate review of the decision to deny the motion to dismiss when none of the exceptions to the final judgment rule applies, simply because they are making separation of powers claims in support of their position. In any event, as we now show, petitioners' claims of error on the merits are as flawed as their jurisdictional arguments.

II. THE DISTRICT COURT PROPERLY DENIED PETITIONERS' MOTION TO DISMISS.

Although petitioners mainly object to the discovery allowed against them, the only legal basis on which the district court could have denied respondents any discovery would have been to dismiss the complaints. Thus, assuming some basis for interlocutory review, the question presented on the merits is whether respondents' complaints should have been dismissed without allowing them any opportunity to prove their case. To support that contention, petitioners raise three arguments that we address in turn.

A. The Document Establishing an Advisory Committee Does Not Conclusively Determine Its Membership.

Assuming that this Court finds that there was jurisdiction in the court of appeals, it is surely open to this Court to remand the case to that court for its initial consideration of the merits. That option has particular appeal on the de facto membership issue because it is the D.C. Circuit's prior decision in *AAPS* on which respondents relied in filing their complaints and on which the district court relied in denying the motion to dismiss.

If the Court decides to consider this issue without the benefit of the views of the D.C. Circuit, the fact that the case is on interlocutory appeal, under an exception to the final

judgment rule, bears on the light in which the district court decision should be viewed. Thus, if interlocutory review is based on mandamus, which is the only basis for review for anyone except the Vice President, that writ is available only if there is a "clear and indisputable" right to the relief. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). Thus, on mandamus, the issue would not be whether the district court was right or wrong, as it would be if an interlocutory appeal were granted under section 1292(b), or if there were a final judgment with an appeal under section 1291, but only whether the district court committed plain error in failing to dismiss.

This distinction is important in this case because, at the time that the district court denied the motion to dismiss, the law as to de facto membership in federal advisory committees, and its impact on the right to claim the exemption for committees composed solely of federal officials, was clearly established by *AAPS*. That decision held that, if there were private members of the sub-groups there, whose roles were "functionally indistinguishable" from those of designated members, the exemption was lost, even though all of the members of the main committee were federal officials. 997 F.2d at 915. To be sure, the defendants in *AAPS* did not contest that the allegedly non-government persons were working on the sub-groups, but instead argued that in fact they were federal officers. Nonetheless, the underlying principle of *AAPS* is that what actually happens with an advisory committee and its sub-groups determines the applicability of FACA, and not merely what the documents that formed the committee say.

Petitioners argued in the district court that *AAPS* did not create a de facto membership doctrine and that nothing in it allowed a court to go beyond the face of what the federal officials said was being done and who was a member of the committee. That is a conceivable reading of *AAPS* only because the court of appeals there was not directly confronted with a claim that persons other than those officially stated to be members were acting as members. But even Judge Randolph in

his dissent in this case thought that respondents and the district court properly read *AAPS* (Pet. App. 35a), which is why he would have overruled it. *Id.* at 44a-45a. At the very least, the contrary position – that it was "clear" that there is no such doctrine under FACA as de facto membership – was not the law in July 2002 when the motion to dismiss was denied. Therefore, because interlocutory review under mandamus provides the standard of review on the merits, there was not such "clear error" as to grant mandamus relief. Put another way, it is one thing for district courts to be reversed after final judgment when a higher court disagrees on the merits, but their decisions should not be set aside on mandamus unless they are plainly wrong under existing law, which is surely not the situation here. Otherwise, there would be no difference between mandamus and direct appeal after a final judgment, except that the former would be available sooner than the latter, and, very quickly, there would be little left of the final judgment rule. *In re Papandreou*, *supra*, at 250 (warning against undue expansion of mandamus jurisdiction that would circumvent bounds of collateral order doctrine).

Even viewed de novo, the answer to the question of whether FACA should be construed to include de facto membership, or only formally designated membership, favors inclusion of de facto members. The exception relied on by petitioners excludes "any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government" (5 U.S.C. App. 1, § 3 (2) (Pet. App. 127a)). There are two words in section 3(2) that support the de facto interpretation. The first is "composed." According to Webster's Third New International Dictionary (1993), and using the meaning of "compose" closest to this context, composed means "to form the substance of: CONSTITUTE. now used chiefly in the passive < a soup is *composed* of many ingredients>." Surely, if one wanted to know what a soup was composed of, one would not just look at the recipe, but would ask what the chef put in the pot. The use of composed is also important because it contrasts with the term "established" used in that same section to describe the creation of advisory

committees. Using "established" in the exemption would have been proper if Congress wanted to focus solely on who was named to the committee, and not who actually provided the advice and recommendations, *i.e.*, "any committee that is *established* wholly" with federal officials or "any committee that is wholly *established*" with federal officials.[8]

Second, the inclusion of the term "wholly" appears largely superfluous except to emphasize that the exception is narrow. If "wholly" were not included, the natural reading of the exemption would still be that it was available only if 100% of the committee were qualifying federal officials, and that even one non-federal person would destroy the exemption.[9] Thus, to deny the de facto membership doctrine would require a court to assume that, although Congress denied an exemption if the formal membership of a committee had one non-federal official out of a membership of 25, the same exemption would be kept if there were 100 private persons regularly participating in the work of an advisory committee, so long as they were not formally designated as members by the official who established the committee. Such a result may not be absurd, but it is far from the natural reading of this language, and it is difficult to see how it fits with one of the core purposes underlying FACA, which is to help assure that the advice that federal officials receive is balanced and does not come entirely from "special interest groups." H. Rep. No. 1017, *supra,* at 6; *see generally* Brief Amicus Curiae of Natural Resources Defense Council

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[8] Petitioners place great reliance on the use of "established," contending that it requires the Court to focus on what the President did at the outset. Respondent agrees that the creation of a committee has significance, but not to the exclusion of the committee's operation, which is petitioners' view. Since "established" deals only with the former, it cannot be dispositive unless the Court accepts the notion that FACA is blind to what the committee does once it begins its work.

[9] There is a further limitation that such officials must be "full-time or permanent part-time" federal officials, so that special government employees and even state officials could not be members for the exemption to remain. This limitation provides further evidence that the exemption is narrow.

("NRDC Brief") at 4-6. That goal would be undermined if, as respondents have alleged, the committee was populated by persons having a decided bias in their outlook – here the energy industry – with no input from the other side.

This case involves a presidential committee, but the exemption applies to all federal advisory committees, most of which are established by agencies, not the President. Therefore, to deny the de facto membership doctrine would create a potentially gigantic loophole for every agency in the federal government, as petitioners seem to acknowledge – "de facto member doctrine … requires a court to disregard the Executive's [not just the President's] own description of its committee" (Br. 20). Congress passed FACA because it wanted closer supervision of advisory committees, but if agencies know that no court can go behind the formal designation of a committee's membership to determine even whether FACA applies, that will provide a huge opportunity to render FACA almost meaningless. That effect is even more pronounced because petitioners claim that even the sub-groups of the Task Force, on which the Sierra Club has focused its attention, are also not subject to the de facto membership requirement.

The Task Force here operated in almost complete secrecy, and its report was issued less than four months after its creation. As a result, there was little opportunity to gather direct evidence of the role of private parties in its operation, but that will not always be the case. The involvement of what the plaintiffs in *AAPS* contended were private parties was not in dispute, although their legal status was. Suppose in this very case, respondents had obtained a sworn affidavit from someone on the Task Force that stated that "ten energy industry executives regularly participated in all the meetings, regularly received drafts of the report and recommendations, and regularly submitted comments on those drafts, which staff often accepted." If petitioners are correct in their statutory interpretation, the district court would have had no choice, even in that situation, but to grant a motion to dismiss because such

an affidavit would be legally irrelevant. However, as this Court has observed recently in two constitutional cases, the law does not allow to be done indirectly that which it forbids from being done directly, where there is no functional difference between the two situations. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 831 (1995), and *Clinton v. City of New York*, 524 U.S. 417, 442 (1998).

Respondent recognizes that a committee does not lose its exemption by seeking the advice of private persons of its choosing. What the Government may not do and retain the exemption is, for example, to permit private parties to participate in the committee deliberations or drafting of recommendations in roles that are indistinguishable from those of formally designated committee members. Thus, on remand, it will not be enough for respondents to show that the Task Force and its sub-groups received extensive input from the energy sector (even though it received none from environmental groups or consumers); respondents must also show that private persons actively participated in the preparation of the collective advice of the Task Force or its sub-groups.

As the Fourth Circuit observed in a portion of an opinion quoted by this Court, if an administrative proceeding "'walks, talks, and squawks very much like a lawsuit,' it should be treated like a lawsuit for 11th Amendment purposes." *Federal Maritime Comm'n v. South Carolina Ports Authority*, 536 U.S. 743, 751 (2002), *quoting* 243 F.3d 165, 174 (2001). If a committee established to render advice to the President or a federal agency, walks, talks, and squawks like a non-exempt advisory committee, save for the formal designation of its membership, it should be treated as if the de facto members were formally designated to be on the committee and the exemption is lost.[10]

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[10] Petitioners rely on a General Services Administration regulation (actually an "administrative guideline," *see* FACA § 7(c)), that was in effect while the (continued...)

B. There Are No Special Hurdles for a Plaintiff to Overcome In Order to Obtain Discovery in a FACA Case.

In contrast with the prior argument, for which there is some language in FACA that provides some guidance, there is nothing in FACA at all that suggests that it limits the circumstances under which a plaintiff can obtain discovery. Undaunted, petitioners argue that since this is principally an APA case, and that ordinarily in APA cases there is no discovery, there should be no discovery here. Instead, they argue, the district court should have decided the APA claims on the administrative record. They make similar contentions for the mandamus claim under section 1361, although they do not identify an ordinary practice under that statute. Petitioners argue that, at the very least, before discovery can be allowed in a case like this, a plaintiff must make a special showing of some unspecified kind, presumably more than what petitioners' first question describes as "an unsupported allegation in a complaint." *But see Leatherman v. Tarrant County*, 507 U.S. 163 (1993) (courts not free to impose heightened pleading requirements except as provided by rules or statutes).[11]

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[10](...continued)
Task Force was doing its work, which focuses on the appointment of the members. Br. 15, n.1. That guideline, which was first mentioned in this case by Judge Randolph in his dissent (Pet. App. 42a), was amended in August 2001 to be consistent with *AAPS*, and now defines a committee member as one "who serves by appointment or invitation," which is essentially our position. *Id.* This Court in *Public Citizen* gave little weight to a different GSA regulation, and under these circumstances respondent suggests that no weight be given to either version of the guideline, except to note that the current version is an appropriate exposition of the de facto member position.

[11] The complaint of respondent Judicial Watch, but not that of the Sierra Club, alleged a private cause of action based on FACA, but the district court dismissed that portion of the complaint. Pet. App. 73a-77a. Because there is no final judgment, that ruling was not before the court of appeals. As a practical matter, the only reason to allow such a claim is that any discovery (continued...)

According to petitioners, the administrative record includes the presidential memorandum establishing the Task Force and Task Force's final report, both of which list only federal officials as members, but neither of which sets forth the membership of the sub-groups, which is a major focus of the Sierra Club complaint. In some places in their brief, petitioners suggest that the record would also include the letter from a lawyer for the Task Force, simply asserting that there were no private members, and an affidavit from a Task Force staff member, Karen Knutson, in which she makes similar, although more detailed assertions. The Knutson affidavit, which petitioners invoke on at least four separate occasions (Br. 6-7, 9, 23 n.2, & 26), was prepared during the litigation and was not even submitted until September 3, 2002 (JA 4), nearly two months after the district court denied the motion to dismiss. Timing aside, the rule that petitioners wish to establish seems to be that, if a defendant wishes to supplement, or confirm, the facts in the administrative record, the APA allows that, but if a plaintiff wishes to discover facts that are not discussed in the existing record, the APA forbids that. Petitioners cite no

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[11](...continued)
limits imposed by the APA would not apply to a direct action under FACA. As we explain in the text *infra*, discovery is essential to prove most FACA claims, whether allowed under the APA or a direct or mandamus action. For this reason, respondents do not concede the correctness of the district court ruling, but do not contest it in this Court. In this connection, we note that section 10(b) of FACA (Pet. App. 133a) makes available records of all advisory committees, subject to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), in turn, contains a provision for de novo review of denials of requests for records (§ 552 (a)(4)(B)), which is one of the requests in both complaints. Therefore, it seems quite plausible that a claim under FOIA for records of the Task Force would be entitled to the same de novo review, including on the threshold question of whether the Task Force is an advisory committee and hence whether section 10(b) applies. Again, that argument was not made in the district court, but could be made on remand. In any event that issue is not before this Court, except as an additional reason for this Court not to decide the discovery issue, assuming the Court has jurisdiction at all.

authority for that proposition, undoubtedly because there is none that would support such a fundamentally unfair rule. If their case must rest on "the administrative record," then that record consists solely of the memorandum creating the Task Force and its final report. Or, as the D.C. Circuit put it in the context of evaluating the impact of ex parte contacts on an FCC proceeding, "even the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable." *Home Box Office v. Federal Communications Comm'n*, 567 F.2d 9, 54 (1977).

Respondent does not disagree that discovery is not available in most APA cases, but the reasons for that practice do not apply in this case and many, if not most, others based on FACA. In formal rulemakings or adjudications, conducted under 5 U.S.C. § 556, the proceedings are "on the record," which eliminates the need for discovery, let alone additional evidence. The same is true of other non-556 adjudications, such as those conducted by the Social Security Administration or the Immigration and Naturalization Service. Similarly, in informal notice and comment rulemaking under 5 U.S.C. § 553, although the record is less defined than in adjudications, there is no basis to go beyond that record.

Even in informal adjudications, to which the proceeding here is most analogous, there is typically an administrative record of some kind that formed the basis of the decision. Thus, in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the "record" on which the agency was supposed to make its decision included submissions by the City, which wanted the highway, and by the objectors, who did not, as well as whatever materials the agency and other interested persons had produced. The so-called "gap" in that case was not in the facts that led to the decision, but in the reasons that the Secretary approved the location of the highway in the face of the objections made by the plaintiffs. But even *Overton Park* recognized that de novo review (which would inevitably involve discovery) is available where "the agency's factfinding

procedures are inadequate" or "when issues that were not before the agency are raised in a proceeding to enforce non adjudication agency action." *Id.* at 415. The Court there rejected do novo review principally because "there is an administrative record that allows the full, prompt review of the Secretary's action." *Id.* at 419.

By way of contrast here, neither respondent, nor any other member of the general public, had any input into the "decision" that the Task Force and its sub-groups were exempt from FACA because they were composed wholly of federal officials. There was no proceeding of any kind, regardless of the level of formality, by which their views could be heard, nor was there any opportunity to see the evidence on which the exemption decision was made, let alone an opportunity to contest it at the administrative level. The reason why courts in APA cases generally do not allow discovery, and hence supplementation of the record, is that the objecting party generally has had a full opportunity to make its position known to the agency, and it is the decision of the agency that is under judicial review. As *Overton Park* makes clear, when there has been a proceeding before an agency, however informal it may have been, it is not the job of the courts to make an independent determination on the issue, but to review what the agency has done.

Plainly, that rationale has no applicability to this case. Respondents had no opportunity to make legal arguments or present evidence on the issue before the Task Force, and they surely had no opportunity to attend meetings of the Task Force and /or its sub-groups so that they could offer direct evidence in the district court as to who was present and in what capacities they served. Indeed, the whole point of the asserted exemption was to enable the Task Force to operate in secret so that outsiders could not learn the extent of industry involvement in its operations. Under these circumstances, it is noteworthy how much respondents were able to learn and include in their complaints, even if what they have produced would not be

admissible in court. JA 43-138 & 145-148.[12]

Even the general practice of not having discovery in APA cases has exceptions, principally in circumstances where the party wishing to introduce additional evidence did not have a reasonable opportunity to do so at the administrative level. Thus, in a series of cases in the D.C. Circuit, dealing generally with the issue of whether ex parte discussions with the agency decision-maker improperly affected the process, the court of appeals has gone outside the administrative record to enable it to perform its mission. *See e.g., Professional Air Traffic Controllers Org. v. Federal Labor Relations Authority*, 685 F.2d 547, 556-557 (D.C. Cir. 1982); *Home Box Office v. Federal Communications Comm'n*, 567 F.2d 9, 51-53 (D.C. Cir. 1977); and *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959). The *Air Traffic Controllers* case was an on the record adjudication, and the others were rulemakings, although conducted on a quite judicial-like basis. Yet in all three cases, and others, the court allowed the APA record to be supplemented because the issue of ex parte contacts had not been vetted at the administrative level. That is precisely the situation here with respect to the federal officials exemption, and these cases show that petitioners' "no-discovery in APA cases" rule is nowhere near as firm as they suggest and does not apply, as here, where the district court specifically found that discovery was necessary because "the administrative record [offered by petitioners] is 'so bare that it prevents effective judicial review.'" JA 411

[12] Their allegations have been confirmed by former Treasury Secretary Paul O'Neill in the recently published book by Ron Suskind, *The Price of Loyalty* (Simon & Schuster, 2004), in particular at pages 153-156. The most telling statement is on page 154: "'This is a slaughter,' said [former EPA Administrator Christie] Whitman to O'Neill after one meeting. 'It's ten on two, not counting White House people and all the advisers to the group from the various industries.'" Under petitioners' theory, respondents would also be barred from deposing Ms. Whitman and Mr. O'Neill to amplify their statements, although neither is any longer in the Government.

(citation omitted).[13]

Petitioners' alternative argument – that some kind of proof is needed before discovery can be commenced – is also without basis in the APA or the Federal Rules of Civil Procedure. *See Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (court may not use "blunt instrument" of creating rules limiting discovery, absent statute or rule authorizing it). We leave to one side the issue of how much more proof is needed before discovery is allowed, or how that is measured. Instead, the Court should reject this contention because none of the cases on which petitioners rely (Br. 23), all of which involve the "presumption of regularity," arise in contexts remotely similar to this case. One was a criminal case in which the defendant sought to go behind a decision to prosecute based on a suspicion of selective prosecution.[14] Another involved an adjudication before the Merit Systems Protection Board,[15] another sought third party discovery of the tapes of former President Nixon in a civil damages action against a former Attorney General,[16] and the last one involved a formal hearing on an occupational safety complaint where the defendant sought to subpoena top agency officials regarding their discretionary enforcement decisions.[17] Whatever the legal rules enunciated by those decisions, they have no bearing on this FACA case under the APA and 28 U.S.C. § 1361.[18]

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[13] Because the D.C. Circuit reviews so many APA cases, and because it has not yet passed on this discovery issue, it would be advisable to allow that court to consider this issue as well as the de facto membership issue.

[14] *United States v. Armstrong*, 517 U.S. 456 (1996).

[15] *United States Postal Service v. Gregory*, 534 U.S. 1 (2001).

[16] *Dellums v. Powell,* 561 F.2d 242 (D.C. Cir.), *cert. denied sur nom Nixon v. Dellums*, 434 U.S. 880 (1977).

[17] *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985).

[18] The agency defendants produced some 36,000 pages of supposedly "related" records (Br. 6), many of which were heavily redacted, and all of which had been previously released pursuant to an FOIA request by other persons. Contrary to the inferences raised by petitioners' brief (Br. 23, n.2),

(continued...)

Although this case involves a presidential advisory committee, the no-discovery rule that petitioners espouse would be equally applicable to actions involving advisory committees established by agencies. If the APA is the only basis for court review of FACA claims, and since FACA does not distinguish in any way material to this issue between agency and presidential committees, the "administrative record" would be the sole basis for judicial review in any FACA case, not just those where the President established the committee. Moreover, the logic of petitioners' no-discovery argument would extend beyond the issue of whether the committee was subject to the Act, and would apply to any other claims of non-compliance for which discovery is needed to prove the plaintiff's case. And since most advisory committees operate with a premium on secrecy, unless compelled to do otherwise, the no-discovery rule will spell the death knell on FACA compliance through private actions. Surely, the Congress that wrote FACA to control federal advisory committees cannot have meant to shackle the enforcement of FACA by making it impossible to take the discovery needed to win a case. While the extent of permissible discovery under FACA, especially with presidential committees, is surely an issue on which reasonable people can differ, the right to take at least some minimal discovery of the kind contemplated here should not be debatable.

As an alternative, petitioners urge that at least the Vice President should be dismissed because a mandamus claim involving FACA does not lie against the Vice President (Br. 28). *But see Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996)

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[18](...continued)
none of those records describes anything material about the operation of the Task Force or its sub-groups. Although the non-agency defendants may have some documents not in the possession of agency personnel, respondents intend, on remand, to seek to compel the agency defendants to comply fully with the existing requests to them. If, as petitioners allege, the 36,000 pages did relate to the Task Force or its sub-groups, the claim that no discovery can be permitted even from the agency defendants, who are among the petitioners in this Court, would be inconsistent with their having produced those documents.

(action directly against President); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1325-1332 (D.C. Cir. 1996) (Presidential Executive Order challengeable in non-APA case brought against Secretary who enforces the Order). It is difficult to understand what jurisdictional basis there could be to obtain interlocutory review on that issue, but it is even more difficult to understand why petitioners care so deeply about his dismissal. As we have shown above, there is no imminent likelihood that he will have to respond to any discovery personally, and the district court has been clear that it will closely monitor all discovery. The current discovery can almost certainly be answered by staff and/or agency personnel, and while there may come a time when certain key information is known only to the Vice President, he could not be deposed, either as a party or as a third party witness, unless respondents made a substantial showing of need to the district court. Respondent Sierra Club named the Vice President because he is the person responsible for the operation of the Task Force, and so was a logical defendant, to the point where it would have been odd if he had *not* been named. The principal reason why he should be retained as a party (aside from the fact that he is doing his best to be dismissed for reasons that do not comport with the likely course of discovery) is that he may be needed to assure that complete relief can be obtained, as the district court recognized. Pet. App. 96a-97a. Practicalities aside, the Vice President has shown no more reason why this Court should order his dismissal than have any of the other petitioners, and so the case should go forward against him as well.

C. Applying FACA to a Presidential Committee to Which Private Persons Are Invited to Participate Does Not Violate Principles of Separation of Powers.

The district court was correct in declining to decide the constitutional issue at this stage of proceedings, and this Court should do the same. As the district court properly recognized, this case may be resolved on purely factual grounds –

respondents may not be able to prove that private persons were de facto members of the Task Force or its sub-groups --- or on legal grounds – some participation may be shown, but it may not rise to the level of de facto membership – or, although the district court did not specify this ground, settlement is always a possibility. This Court has long held that constitutional issues should be decided only as a last resort, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, concurring); petitioners ask this Court to decide them as a first resort.[19]

One possible basis for deciding the constitutional issue now would be if the very discovery process that might produce a decision on non-constitutional grounds was itself fraught with constitutional infirmities that would simply trade one constitutional issue for another. In this case, petitioners claim that the discovery that is being sought by respondents at this stage is "at least as intrusive as the disclosure obligations imposed by FACA itself" (Br. 20-21). But as respondent has demonstrated above, that assertion seriously mischaracterizes the discovery request currently authorized and the assurances given by the district judge that respondents will be kept under a very tight rein during discovery. Of course, it is possible that specific discovery may raise separation of powers or Executive privilege issues, but if that should occur, petitioners can move the district court for appropriate relief, and, if that avenue is exhausted, seek a writ of mandamus. But, as of this time, there is nothing but speculation that discovery will inevitably lead to further constitutional confrontations, and there is surely nothing to support petitioners' claims about the extent of the discovery sought by respondents or allowed by the trial court.

Petitioners argue that it would be a violation of separation of powers for FACA to create a situation in which

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[19] Paradoxically, petitioners insist that discovery "would in this case" confirm that there were no private members (Br. 21), while also insisting that this Court decide a major constitutional question before discovery is begun.

the President is unable to determine whether a committee that he wished to create would be exempt from FACA. The Court need not pass on such a hypothetical because the line drawn in section 3(2) is crystal clear, or at least it will be once the de facto member doctrine is settled: if the President wishes to have a committee that provides him advice without having to comply with FACA, he must include only federal officials on the committee (and any sub-groups that it sets up), and he must instruct his subordinates that no private persons may be invited to participate in roles functionally indistinguishable from those undertaken by federal officials.

There are decided benefits from having an exempt committee, but there are drawbacks as well. If a President wants to obtain "independent" advice to support his program – as President Bush attempted to do with his Social Security commission or the recently-formed commission on intelligence breakdowns (*see* NRDC Brief at 7) -- he cannot obtain that detachment in-house. Similarly, a President may have to go outside the Government when there is a need for particular expertise or points of view on an advisory committee, or when the work will consume a substantial amount of time that most high level federal officials cannot spare. But under FACA, that choice is his, so long as he abides by the clear line that in-house committees must be "wholly" in-house, and that a single private member causes the exemption to be lost.

Petitioners also appear to argue that it would violate separation of powers to apply FACA to a committee composed of some federal officials and some private parties. It is unclear whether that argument depends on the private members having their status as a result of the de facto member doctrine, or whether it would apply even if the President named them to the committee. It is also unclear whether the number of private members is of any significance, or whether the ratio of public to private members matters. In our view those, and perhaps other, distinctions may well matter in making the proper separation of powers balancing analysis, using the "more pragmatic, flexible approach" required by *Nixon v. General*

Services Admin., 433 U.S. 425, 442-443 (1977), a case heavily relied on by the district court (Pet. App. 100a), but cited by petitioners only on page 34, and then only because it was quoted in *Morrison v. Olson*, 487 U.S. 654, 695 (1988).[20]

There are also strong interests of Congress that must be considered in such a separation of powers analysis. These include assuring that taxpayer funds are wisely spent. Whether private parties are paid or receive reimbursement for expenses (a common feature of advisory committees), their presence is never cost-free, either because of additional out-of-pocket expenses that must be incurred, or simply because agency officials will have to devote additional time to providing them with materials and information so that they can perform their advisory duties properly. In addition, Congress has a recognized interest in seeing that taxpayer-funded and/or government sponsored advisory committees provide unbiased advice, so that Congress and the public can consider their recommendations with reasonable certainty that they are not simply the views of one side in a debate. Of course, if the President does not want to receive balanced advice, he can limit the members of a committee to federal officials, or rely on private advice outside the committee structure, with all of the downsides those alternatives bring. Thus, FACA was not passed to burden the President in his efforts to gather advice, but to lay down some quite modest rules if the President chooses to obtain collective advice from persons outside the government. *See* NRDC Brief at 5-6.[21]

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[20] The cases cited by petitioners on page 32 of their brief all involve actions by Congress that directly interfered with the operation of another branch. Because this case involves at most indirect interference with the powers of the President, the fact-dependent balancing test applied in *Nixon v. GSA*, *supra*, is the appropriate one to use, and it is dependent on the facts, which have yet to be established.

[21] Petitioners do not take a clear position on whether it would be unconstitutional if FACA were applied to a committee appointed by the President entirely of private individuals. In light of these congressional purposes, that argument would be very difficult to sustain, and yet, unless

(continued...)

But before that balancing could be done, it would also be necessary to identify the portion of FACA that was alleged to burden the President's power to gather advice from others. Surely, it cannot be the requirement of a charter because the President's memorandum establishing the Task Force comes close to satisfying that mandate. It is also difficult to see how making public a list of a committee's members would inevitably and substantially interfere with the President's role as chief executive, or how a requirement that there be a public announcement of all meetings, whether open or closed, would be an impediment to the functioning of his office. In addition, many committee documents may also be in the possession of agency officials, and hence be subject to FOIA that way. Thus, although some documents from some committees might be properly withheld, there is no reason to think that every document held by every presidential advisory committee would raise issues of Executive privilege or be otherwise properly kept secret. And even the open meeting rule, with its generous exceptions, would not cause serious separation of powers concerns in most cases, as indeed many presidential advisory committees have had their meetings open to the public since FACA was passed with no obvious problems.[22]

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[21](...continued)
petitioners are prepared to take that position, it is almost impossible to know where they would draw the line between valid and invalid presidential committees.

[22] Respondent recognizes that the three-Justice concurring opinion in *Public Citizen v. Department of Justice*, *supra*, did not examine the elements of FACA separately before reaching its conclusion that it was unconstitutional as applied to the ABA Committee before it. Respondent believes that an all-or-nothing approach is in error because it is inconsistent with the way that this Court normally reviews the constitutionality of statutes. *Watson v. Buck*, 313 U.S. 387, 402 (1941). That approach may have been justified in *Public Citizen* where the power at issue – to nominate federal judges – was exclusively that of the President (*see* 491 U.S. at 482-488), the plaintiffs invoked FACA because the President had "utilized" but not "established" the ABA Committee, and there was a final judgment with all of the relevant facts established. By contrast, here, there has been no discovery, and the (continued...)

The bottom line is that whatever constitutional problems there may be for some aspects of FACA as applied in some situations to some presidential advisory committees, there is no basis for this Court to rule on the truly sweeping claims of unconstitutionality raised by petitioners. That is particularly true with respect to sub-groups since, as the D.C. Circuit noted in *AAPS*, 997 F.2d at 913, if the main committee is exempt, there is even more reason to be concerned about sub-groups, and, we submit, even less of a reason to think that applying FACA to such sub-groups will interfere in any way with the President's powers. Indeed, there are insufficient grounds to call into question the constitutionality of FACA -- as applied to presidential advisory committees and their sub-groups with a mix of public and private members – to construe FACA as petitioners urge in order to avoid constitutional problems.

* * *

We conclude with the same point we made to begin each of the arguments in Point II: the record is undeveloped, the lower courts have not had an opportunity to consider the merits, and petitioners' legal arguments are very broad and may never have to be decided at all, let alone in this case. Accordingly, even if this Court has jurisdiction to decide any of petitioners' claims on the merits -- and it does not -- it should decline to do so, and at most direct the court of appeals to consider the statutory arguments, leaving the constitutional claims for another day, and perhaps another case.

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[22](...continued)
subject of the Task Force's deliberations -- proposals for energy policies -- could emanate not only from the President, but from Congress, from a state, from an energy company, or from the Sierra Club, and in each case the consequences would be the same: nothing would happen unless Congress enacted the recommendations into law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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