NO. 03-475

IN THE

Supreme Court of the United States

October Term, 2003

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

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS SIERRA CLUB AND JUDICIAL WATCH, INC.

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Four national library associations, along with five public interest groups and one national archival association, respectfully submit this brief *amici curiae* in support of respondents Sierra Club and Judicial Watch, Inc. Pursuant to Supreme Court Rule 37.2(a), counsel for the parties have consented to the filing of this amicus brief.[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

INTEREST OF *AMICI CURIAE*

All ten *amici curiae* represented in this brief have a significant interest in open government laws, including the Federal Advisory Committee Act ("FACA"). *Amici* share the conviction that broad access to government records protects values essential to representative democracy. *Amici* employ and rely on open government laws, including FACA, to facilitate full democratic participation. Public participation in government can be meaningful only if the people know what officials are doing and how they are doing it. Equally, without that information the people cannot hold public officials accountable. *Amici* urge that this Court reject the petitioners' claim that they may conduct the public's business in secret, and embrace the principle articulated by James Madison two centuries ago (9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed., G.P. Putnam's Sons 1910)):

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[1] Pursuant to Rule 37.6, the *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief.

> A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. . . . . And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.

The American Association of Law Libraries is a nonprofit educational organization with over 5000 members nationwide whose mission is to promote and enhance the value of law libraries, to foster law librarianship, and to provide leadership and advocacy in the field of legal information and information policy.

The American Library Association is the oldest and largest library association in the world, with some 65,000 members and a mission to provide leadership in the development, promotion and improvement of library and information services in order to enhance learning and ensure access to information for all.

The Association of Research Libraries, a nonprofit organization of 123 research institutions, is dedicated to promoting equitable access to and effective use of recorded knowledge in support of teaching, research, scholarship and community service.

The Center for American Progress is a nonpartisan research and educational institute dedicated to promoting a strong, just and free America that ensures opportunity for all people.

Common Cause is a nonpartisan citizen activist group, with more than 250,000 members and 37 state chapters, which advocates for honest, open and accountable government, as well as citizen participation in government.

The National Security Archive is a nongovernmental research institute and library that collects and publishes declassified documents, obtained through the Freedom of Information Act and other open government laws, concerning United States foreign policy and national security matters.

OMB Watch is a nonprofit research and advocacy organization dedicated to promoting government accountability and citizen participation in policy decisions.

People for the American Way Foundation is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights, including the right of all citizens to an open government that avoids excessive and improper secrecy.

The Society of American Archivists provides services to and represents the professional interests of 3700 individual archivists and institutions as they work to identify, preserve and ensure access to the nation's historic record.

The Special Libraries Association is a nonprofit organization for information professionals and their strategic partners, and serves more than 12,000 members in the information profession, including corporate, academic and government information specialists.

SUMMARY OF THE ARGUMENT

Petitioners strain to conjure a constitutional collision among the branches of government from an unremarkable discovery dispute over records of the 2001 proceedings of the National Energy Policy Development Group ("NEPDG"). In so doing, they demand a broad executive prerogative to defy both the Federal Advisory Committee Act and judicial orders that require disclosure of formalized private participation in domestic policy making. Because the Vice President has refused to participate in discovery even to

assert executive privilege, this unprecedented assertion of executive prerogative arises virtually in the abstract, with neither an adequate factual record nor any meaningful consideration by the courts below of petitioners' insistence that the public has no right to know how its business is conducted.

This Court should not abandon for this case its ordinary standards for deciding constitutional questions, certainly not to serve petitioners' goal of making government less accountable. This brief examines three reasons why the decision below should be affirmed.

First, the goals of FACA, its mechanisms, and its underlying principles complement our constitutional plan of a democratic government protected by checks and balances among three coordinate branches. The Framers did not intend for any single branch to emerge triumphant over the others. Each branch is accountable to the others and to the people in some significant fashion – an accountability that is powerfully reinforced by the open government policies of FACA.

Second, although we do not understand why petitioners are so plainly spoiling for this constitutional confrontation, the emaciated record in this case provides a uniquely poor context in which to resolve large constitutional issues. Ordinary judicial processes allow the lower courts to supervise staged discovery that is sensitive to assertions of executive privilege. Petitioners have not even attempted to resolve through these ordinary judicial processes the dispute over what should be limited discovery into the threshold questions of whether and how FACA applies to the NEPDG. Instead, they press in a headlong rush for this Court to decide largely abstract constitutional issues, based on an incomplete and one-sided record. This Court should insist that petitioners engage the ordinary processes for the resolution of discovery disputes.

Third, were this Court to reach the separation of powers issue raised by petitioners, FACA should not be found unconstitutional. Requiring the executive to respond to judicial process works no material diminution of executive power. Nor is the executive branch improperly hobbled by having to disclose the identity of private citizens who serve on advisory committees and thus become part of the government's formal making of public policy. Such disclosures and accountability are not inconsistent with the very modest powers conferred by the Opinions and Recommendations Clauses of Article II, and disturb no essential executive functions.

ARGUMENT

I. The Open Government Values of FACA Support Our Constitutional Democracy.

Petitioners ignore the democratic values embodied in the Constitution when they disdain ordinary judicial process, asserting that "respondents [do not] have any meaningful need for the information that they seek." Br. for Petitioners at 46. Public accountability – not executive prerogative – is the genius of our constitutional system. *See Nixon v. United States*, 418 U.S. 683, 706 (1974). The Framers intended that government should operate in secret only "when it would be fatal and pernicious to publish the schemes of government." 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 233 (J. Marshall) (J. Elliot ed., 1901). FACA supports and strengthens that core constitutional value of an open, accountable democracy.

A. The Constitutional Structure Is Based on Open Government.

In eighteenth-century America, the view was widely held that public participation in government could check the behavior of political actors. *See* Vincent Blasi, *The*

Checking Value in First Amendment Theory, 1977 AM. BAR FOUND. RES. J. 521, 529; BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 167 (1967). The legislative need for access to public records was known well to the signers of the Declaration of Independence. In its specification of King George's "repeated injuries and usurpations," that document listed the practice of convening legislatures "at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

The Constitution incorporates the idea that representative democracy can succeed only if information about government is broadly available. *See* Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 6-14 (1957); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 13-16 (1948). The Framers understood that secrecy is antithetical to representative government: "In Governments like ours, where all political power is derived from the people, and whose foundations are laid in public opinion, it is essential that the people be truly informed of the proceedings, the motives, and views of their constituted authorities." 10 ANNALS OF CONGRESS 930-31 (1798) (statement of Mr. Rutledge).

The public's right to know, inherent in any system of self-governance, is reflected in the structure of the Constitution. Refusing to grant absolute power to any office or person, the Framers chose a system of balanced tension among the branches of government (*Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)):

> The doctrine of the separation of powers was adopted by the convention of 1787, not to

> promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

The First Amendment also is designed to check governmental power. Among the most influential political sources in the colonial period were the pseudonymous essays of Cato. *See* CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC 141 (1953); BAILYN, *supra* p. 6, at 36. Cato's celebrated letter "Of Freedom of Speech" stressed how important transparency in public affairs is for representative government:

> And as it is the Part and Business of the People, for whose Sake alone all publick Matters are, or ought to be, transacted, to see whether they be well or ill transacted; so it is the Interest, and ought to be the Ambition, of all honest Magistrates, to have their Deeds openly examined, and publickly scanned.

Cato's Letters No. 15, Of Freedom of Speech: That the same is inseparable from Public Liberty (Feb. 4, 1720), *reprinted in* CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS 97 (Trenchard ed., 1971).

Madison, draftsman of the First Amendment, stressed that public access to government information safeguards popular sovereignty: "[T]he right of freely examining public characters and measures, and of free communication thereon, is the only effective guardian of every other right." 6 THE WRITINGS OF JAMES MADISON 398 (G. Hunt ed., G.P. Putnam's Sons 1906). Writing for the Virginia General Assembly, Madison condemned the Alien and Sedition Acts

of 1798 as "a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." *Id.* at 359; *see also New York Times v. Sullivan*, 376 U.S. 254, 274-76 (1964) (public hostility to Alien and Sedition Acts).

This Court has long acknowledged that access to information is necessary to our democracy. *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 41-43 (1971) (discussing relationship between access to information and self-governance); *Thornhill v. Alabama*, 310 U.S. 88, 95, 102 (1940) (same). As cautioned in *Grosjean v. American Press Co.*, 297 U.S. 233, 247 (1936), "'The liberty of opinion keeps governments themselves in due subjection to their duties.'" (quoting Erskine's Speeches, High's Ed., Vol. I at 525). Madison, again, captured the essence of the experiment in democracy in which he played so great a role (4 ANNALS OF CONGRESS 934 (1794)):

> If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.

B. FACA Aims To Secure Public Confidence in the Integrity of Governmental Processes.

FACA fortifies the constitutional commitment to open government, serving as "one of the four pillars of open-government laws." *Hearings on the FACA and the President's AIDS Comm'n before the Senate Comm. on Global Affairs,* 100th Cong., 1st Sess. 67 (1987) (statement of Sen. Glenn) (referring also to the Freedom of Information Act, the Administrative Procedure Act, and the Sunshine Act). Congress intended that FACA would, with certain

specified exceptions, keep the public informed of advisory committee activities by requiring committees to give advance notice of meetings, hold all meetings in public, keep detailed minutes, and make their records available to the public. 5 U.S.C. App. 2, §§ 2(b), 10(a)-(c). The requirements of FACA thus directly reinforce the representative democracy embraced by the Framers.

1. FACA Aims To Prevent Private Groups From Exerting Secret Influence on Public Programs.

Beginning in the 1940s and 1950s, the Department of Justice implemented guidelines, and Congress considered legislation, addressing advisory committees that often were convened by federal agencies. *See* Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, 33 ADMIN. L. REV. 1, 2 (1981); FEDERAL ADVISORY COMMITTEE ACT: SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 46-48 (1978) [hereinafter FACA Source Book]. An apprehension grew that industry participation on certain advisory committees was fostering private dominance over public business. This apprehension – focused on the Advisory Council on Federal Reports, the National Industrial Pollution Control Council, and the National Petroleum Council – spurred enactment of FACA.[2] Before FACA, critics charged that private interests were secretly capturing public policy by controlling the flow of advice and

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[2] *See Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the Comm. on Government Operations on S. 1637, S. 1964, and S. 2064,* 92nd Cong., 1st Sess. 345-402, 555-79 (1971) ["Sen. Hearings"]; H.R. Rep. No. 92-1017, at 4 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491, 3496; Stephen P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 462-64 (1997).

knowledge to policymakers. *See, e.g.*, Sen. Hearings at 346-47, 350-52, 372, 411-12, 495.

Opening the hearings that led to the passage of FACA, Senator Metcalf stated (FACA Source Book 154):

> What we are dealing with, in these hearings, goes to the bedrock of Government decision making. Information is an important commodity in this capital. Those who get information to policymakers, or get information from them, can benefit their cause, whatever it may be. Outsiders can be adversely and unknowingly affected. And decision-makers who get information from special interest groups who are not subject to rebuttal because opposing interests do not know about meetings – and could not get in the door if they did – may not make tempered judgments. We are looking at two fundamentals, disclosure and counsel, the rights of people to find out what is going on and, if they want, to do something about it.

Before approving FACA, Congress made extensive findings about the advisory committee process. Congressional testimony disclosed that many advisory committees "operate[d] in a closed environment," affording the public little or no opportunity to learn about their deliberations or recommendations. S. Rep. No. 92-1098, at 6 (1972), *reprinted in* FACA Source Book 156. This "lack of public scrutiny of the activities of advisory committees . . . pose[d] the danger that subjective influences not in the public interest could be exerted on the Federal decision-makers." *Id.* A 1972 House report found (1972 U.S.C.C.A.N. 3491, 3496):

> [O]ne of the great dangers in this unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns. Testimony . . . 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.

With FACA, Congress pulled aside the veil of secrecy, opening "to public scrutiny the manner in which government agencies obtain advice from private individuals." *National Anti-Hunger Coalition v. President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1072 (D.C. Cir. 1983). The statute improves the ability of citizens and their representatives to participate in public discussions concerning government policy and to hold officials accountable for their decisions.

2. FACA Provides the Public Accurate Information Concerning Executive Actions.

The powers of the modern Executive Branch exceed anything the Framers could have imagined. *See generally* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996). As the executive branch has grown, the public increasingly has come to rely on the media and citizen organizations to maintain vigilance over official misconduct. Open government statutes such as FACA are indispensable aids to historians, journalists, and watchdog and advocacy groups that serve as the contemporary analogue to Hamilton's "citizens who inhabit the country at and near the seat of government . . . [and who] stand ready to sound the alarm when necessary, and to point out the actors in any

pernicious project." THE FEDERALIST No. 84, at 516 (Hamilton) (Clinton Rossiter ed., 1961).

Prior to FACA, "the interested public often couldn't even find out about the activities of a committee supposedly representing their views to the Federal Government." *Federal Advisory Committee Act Amendments of 1989: Hearing on S.444,* 101st Cong., 1st Sess. 6 (1989) (statement of Sen. Heinz). The absence of specified repositories for advisory committee materials meant that often their records were "lost" to the public and to history. *See Senate Hearings Before the Subcomm. on Intergovernmental Relations of the Comm. on Government Operations on S. 3067*, 91st Cong., 2nd Sess. 32 (1970). As then-EPA Administrator William Ruckleshaus observed in 1971, some advisory committees adopted the attitude of reaching decisions from a "quiet spot" beyond the public view, neglecting any obligation to justify their decisions to other officials and to the public. *See Senate Hearings*, *supra* p. 9 n.2, at 776.

FACA has proved an effective tool for securing public access to advisory committee meetings and for making their records readily accessible to the public and researchers. Advisory committees convened under FACA have grappled with a wide range of public issues, including epidemiological surveys of Vietnam veterans exposed to Agent Orange, the prevention of mad cow disease, ethical issues in stem-cell research, and the safety of dietary supplements.[3] FACA ensures that the deliberations and

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[3] *See* Testimony on "Agent Orange: Status of the Air Force Ranch Hand Study" by Ronald Coene (Mar. 15, 2000), *available at* http://www.hhs.gov/asl/testify/t000315a.html; GAO Report, Mad Cow Disease, Improvements in the Animal Feed Ban and Other Regulatory Areas Would Strengthen U.S. Prevention Efforts 28 (January 2002); National Bioethics Advisory Commission 1998-1999 Biennial Report, at 1, *available at* http://www.fda.lgov/bbs/topics/NEWS/NEW00517.html.

conclusions of those and other advisory committees are subject to public scrutiny and inform public debate.[4] Public meeting minutes provide information about agency priorities, resource allocation, and practices. *See, e.g.*, Environmental Management Advisory Board, Public Meeting Minutes (Nov. 20-21, 2002), *available at* http://web.em.doe.gov/emab/Nov2002min.html (Department of Energy environmental cleanup policies and strategies).[5]

3. FACA Does Not Impede Advisory Committees.

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[4] *Compare* The National Coal Council, Increasing Electricity Availability from Coal-Fired Generation in the Near-Term (May 2001), *available at* http://www.nationalcoalcouncil.org/Documents/May2001report-revised.pdf *with* Clean Air Task Force, Scraping the "Bottom of the Barrel" for Power: A Rebuttal to the National Coal Council's Electricity Availability Report (November 2001), *available at* http://www.catf.us/publications/reports/bottom_of_the_barrel.php; *compare* National Petroleum Council, Balancing Natural Gas Policy: Fueling the Demands of a Growing Economy (Sept. 25, 2003), *available at* http://www.npc.org/ *with* Defenders of Wildlife, What the National Petroleum Council Won't tell You About a Natural Gas "Crisis" (Sept. 25, 2003), *available at* http://www.defenders.org/releases/pr2003/pr092503a/html; *see also* Department of Energy, National Petroleum Council Meeting Transcript 60-61 (June 6, 2001) (describing public interest in Natural Gas Policy report; on file with counsel for *amici*); Department of Energy, Environmental Management Advisory Board, Public Meeting Minutes (Nov. 21-22, 2002), *available at* http://web.em.doe.gov/emab/Nov2002min.html.

[5] Advisory committee information, including charters and member lists, is available online at www.fido.gov/facadatabase (last visited Mar. 10, 2004).

The rules established by FACA are straightforward. With exceptions not applicable here, an "advisory committee" "established or utilized by the President" (i) must provide timely notice of its meetings, which (ii) must be open to the public, with (iii) all transcripts and records of its actions preserved. 5 U.S.C. App. 2, §§ 3(2), 10(a)(1)&(2); 10(b).

Advisory committees convened to analyze energy issues regularly comply with FACA. *See, e.g.*, Advisory Committee on Reactor Safeguards, 68 FR 59644 (Nuclear Reg. Comm'n Oct. 16, 2003); Environmental Management Advisory Board Meeting 67 FR 5799 (Dep't of Energy Feb. 7, 2002) (Alternative Technologies to Incineration Committee); National Petroleum Council, Securing Oil and Natural Gas Infrastructures in the New Economy 1 (June 2001) (report of FACA-governed committee originally chaired by petitioner Cheney while still in private industry); National Petroleum Council, 66 Fed. Reg. 27495 (May 17, 2001) (notice of public meeting to consider proposed final national energy infrastructure report). Moreover, FACA has applied to numerous high-profile commissions – without any recorded injury to the executive branch – such as studies of nuclear nonproliferation programs with Russia,[6] and the Challenger space shuttle explosion.[7]

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[6] Department of Energy, Secretary of Energy Advisory Board, A Report Card on the Department of Energy's Nonproliferation Programs with Russia (Jan. 10, 2001) (co-chaired by Howard Baker and Lloyd Cutler).

[7] *See* Exec. Order No. 12,546, 51 Fed. Reg. 4475 (Feb. 3, 1986); Report of the Presidential Commission on the Space Shuttle Challenger Accident, *available at* http://history.nasa.gov/rogersrep/51lcover.htm.

That the issues addressed by the NEPDG are of vital public interest is no ground for excluding it from compliance with FACA. Indeed, high public interest in the NEPDG sharpens the need for public access to information about it. By providing for public oversight of advisory committees, FACA aims to prevent "uninformed speculation" about the membership, cost, and recommendations of advisory committees. *See Federal Advisory Committee Act Amendments of 1989: Hearing on S.444,* 101st Cong., 1st Sess. 6 (statement of Sen. Heinz). In most cases – though, sadly, not in this one – such disclosures will eliminate the need for litigation to learn about the actions of public officials. *See* Br. for Petitioners at 15. In all of these aspects, FACA serves the constitutional democracy that the Framers built on three coordinate branches of government. All of these considerations counsel strongly against petitioners' attempt to circumvent the law by raising separation of powers issues, and counsel in favor of returning the case to the district court for the threshold determination whether the NEPDG is covered by FACA.

II. The Court Should Decline the Government's Invitation To Address The Separation of Powers Issue.

Although petitioners devote most of their brief to the separation of powers, that constitutional question is poorly presented on a record that is sharply limited by the Vice President's refusal to engage in ordinary discovery processes. The Court should follow here its usual policy of not "pronounc[ing] upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so." *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989).

Discovery is needed because the scanty record, including the affidavit of Karen Knutson offered by petitioners, does not "resolve the question of whether and

how FACA is applicable to NEPDG." *Judicial Watch, Inc. v. NEPDG*, 233 F. Supp. 2d 16, 30 (D.D.C. 2002). Discovery might be quite limited. *See In re Cheney*, 334 F.3d 1096, 1105-07 (D.C. Cir. 2003). Plaintiffs' allegations might be answered by a document production (subject to a suitable protective order) consisting only of attendance-related records for the NEPDG meetings. Any supposedly privileged records could be reviewed first *in camera*. Petitioners' refusal to participate in the judicial process necessarily precipitated a collision with the other two branches, but the actual confrontation is too contrived and too poorly grounded for this Court to decide it responsibly.

A. This Court Has Never Recognized the Immunity from Judicial Process That Petitioners Seek.

As the trial court recognized, the government's position is that it may skip ordinary judicial process through the *ipse dixit* of its officials: "What you're telling me is that there are no factual disputes of any kind here because we say there's no factual dispute. . . . . That's an incredible statement." *Judicial Watch, Inc. v. NEPDG*, No. CA 01-1530 (EGS), Hr. Trans. at 22 (Feb. 13, 2002). The government's position ignores this Court's rulings on the amenability of Executive officials to judicial process. "[T]he regulation and mandatory disclosure of documents in the possession of the Executive Branch . . . has never been considered invalid as an invasion of [executive] autonomy." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977).

Even the President cannot avoid judicial process by invoking an undifferentiated claim of burden on executive operations. *See Clinton v. Jones*, 520 U.S. 681 (1997). Officials inferior to the President certainly enjoy no greater rights to evade judicial process. *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953) ("Judicial control over the evidence

in a case cannot be abdicated to the caprice of executive officers . . . .").

By disdaining judicial processes, petitioners have ensured that the only materials in the impoverished "record" are either untested affidavits crafted by executive officials and their counsel, or documents from non-White House offices that have been heavily redacted by executive officials and counsel. It is no surprise that petitioners argue that such a one-sided record supports their position. All litigants would covet the right asserted by petitioners to control everything the courts may know about the facts of a case.

Petitioners attempt to justify this idiosyncratic version of the adversary process by claiming they are entitled to a presumption of regularity in their actions. They seek to employ that presumption to prevent any judicial inquiry into the performance of executive functions. Br. for Petitioners at 28. The case principally cited for this supposed presumption provides little support for it. *United States v. Armstrong*, 517 U.S. 456, 465 (1996), stated two reasons for courts to defer to prosecutorial discretion in bringing a criminal action. First, the Court observed that such deference flowed from the "relative competence of prosecutors and courts" in evaluating the "strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Id.* at 465. Second, the Court expressed concern that judicial intrusion into prosecutorial decision-making could "chill law enforcement." *Id.*

For federal advisory committees, in contrast, there is no question of relative competencies of the Congress and the President. After decades of oversight, Congress directed in FACA that in specified circumstances, advisory committees should meet public-access and reporting requirements. Congress was entirely competent to do so. Moreover, nothing in FACA should "chill" the exercise of executive

functions. The President remains free to obtain confidential advice from executive branch officials, or from private individuals. FACA applies only if he or other executive officials choose to establish a formal policy-advising body with private participants. This imposes no material burden on Article II powers. *See* pp. 22-26, *infra*.[8]

As the Framers surely would have, this Court should take a skeptical view of any presumption that an executive officer will never seek to circumvent judicial process through artful affidavits. *See* Br. for Petitioners at 28-29. In *Reynolds*, 345 U.S. at 4-6, this Court relied on affidavits filed by Air Force officials that disclosure of certain documents would compromise national security. As described in a Motion for Leave to file a Petition for Writ of Error *Coram Nobis* filed fifty years later, the now-declassified documents reveal that the affidavits were false, and the documents nowhere referred to national security matters.[9] Without suggesting that the factual statements made by government officials in this case are accurate or not, *Reynolds* underscores the profound importance of adversarial testing of government claims that information may be withheld from disclosure. *See also Association of Am. Phys.*

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[8] In any event, the government may well be wrong in equating prosecutorial discretion in *Armstrong* with core executive branch activities. Prosecution was not a "core" executive function within the original meaning of the Constitution. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 14-22 (1994) (prosecutors were not necessarily answerable to President until at least 1861; prosecutorial authority was not within the exclusive domain of the executive branch during early period of republic).

[9] *See Herring v. United States*, Civ. No. 2:03-05500-LDD (E.D. Pa. Oct. 1, 2003) (Complaint ¶¶ 23-30); *In re Herring*, 123 S. Ct. 2633 (2003) (denying motion).

& Surgeons, Inc. v. Clinton, 989 F. Supp. 8, 9-12 (D.D.C. 1997) (finding that White House official's affidavit was misleading).

B. Discovery Can Accommodate Separation of Powers Concerns.

Even if this Court were to determine that the district court's discovery plan implicates separation of powers concerns, discovery should proceed under court supervision. Any risk of intruding on executive powers must be balanced against the important goals of FACA. *Cf. Public Citizen v. DOJ*, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring); *Morrison v. Olson*, 487 U.S. 654, 695 (1988). That balance can be achieved by affording plaintiffs limited discovery to resolve the threshold questions of whether and how FACA applies to the NEPDG. *Cf. Natural Res. Def. Council v. Pena*, 147 F.3d 1012, 1024 (D.C. Cir. 1998) (permitting limited discovery in FACA action to resolve standing issue). Disclosure of who participated in NEPDG meetings would threaten no material encroachment on executive deliberations.

Judicial application of the Freedom of Information Act illustrates how courts can shape discovery to avoid unnecessary burdens. To permit challenges to exemptions claimed under that statute without compromising the assertedly confidential nature of materials at issue, courts require that the government provide an itemized "index" of withheld documents that describes each record or withheld portion and the grounds for withholding each. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). *Vaughn* stressed that "It is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information." *Id.* at 826.

Courts can follow analogous discovery procedures under FACA. Threshold discovery can permit disclosure of very specific aspects of an advisory committee's operation without disclosing the content of any discussions. In this case, for example, discovery could begin with the disclosure of records that would reflect whether private parties such as energy company executives attended NEPDG meetings. Such initial disclosures might well provide sufficient information for the parties and the District Court to determine whether FACA applies, or whether some further discovery is warranted.

The government misunderstands FACA when it insists that this case must be dismissed unless plaintiffs can present verifiable proof – before any discovery – that industry executives and lobbyists participated in NEPDG. FACA places the burden of disclosure on the government. By starting with discovery of who attended NEPDG meetings, the trial court may be able to resolve the case entirely, or may determine to allow further discovery, subject to any assertions of executive privilege. Such a deliberate course would balance the open government principles of FACA and of the Constitution against any legitimate executive branch concerns.

III. Application of FACA to the NEPDG Would Not Disrupt the Separation of Powers.

Even if this Court were to reach the separation of powers issue raised by Petitioners, FACA should not be found unconstitutional. By refusing to participate in ordinary judicial processes, the government claims an unprecedented authority in the domestic arena. There is no textual basis in the Constitution for the government's contention – without any assertion of executive privilege – that compliance with discovery necessarily will injure the separation of powers. To the contrary, in inter-branch disputes this Court has long approved the assertion of

executive privilege through ordinary litigation processes, thereby providing a sufficient vehicle for assertion of executive interests. Petitioners offer no adequate basis for the Court to repudiate this deliberate approach in favor of the blanket executive prerogatives they demand.

A. The Separation of Powers Is Based on Checks and Balances, Not Executive Primacy.

In responding to claims of executive power in the domestic sphere, this Court has employed a balancing approach. "[S]eparation of powers does not mean that the branches 'ought to have no partial agency in, or no control over the acts of each other.'" *Clinton v. Jones*, 520 U.S. at 703 (quoting THE FEDERALIST No. 47 (Madison) (J. Cooke ed., 1961)); *see also Loving v. United States*, 517 U.S. 748, 773 (1996) ("Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes."); *Morrison*, 487 U.S. at 693-94 (rejecting rigid division of powers between branches). Instead, the Court examines whether the challenged act of a co-equal branch impermissibly undermines the power of the executive to accomplish its constitutional functions.

In *Mistretta v. United States*, this Court summarized the "pragmatic, flexible view" of the separation of powers (488 U.S. 361, 381 (1989) (citing THE FEDERALIST No. 51, at 349 (Madison) (J. Cooke ed., 1961)):

> In adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny — the accumulation of excessive authority in a single Branch — lies not in a hermetic

> division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.

The Framers believed that individuals, motivated by self-interest and the force of faction, are often untrustworthy. THE FEDERALIST No. 10 (Madison). "If men were angels, no government would be necessary"; indeed, "If angels were to govern men, neither external nor internal controls on government would be necessary." THE FEDERALIST No. 51, at 319 (Madison) (Clinton Rossiter ed., 1961).

Consequently, the Framers refused to entrust absolute power to a single individual like the English King. By dividing the federal government into three branches, each with its own sphere of powers and interests and each with some means of checking and balancing the others, the Framers sought to prevent the exercise of arbitrary power. *See Loving*, 517 U.S. at 756-57; *New York Times v. Sullivan*, 376 U.S. at 269-76. Indeed, viewing secrecy in government as an instrument of tyranny, the Framers insisted that representative government must be open to public observation. *See* pp. 5-7, *supra*. Thus, the separation of powers was first and foremost a reaction *against* the concentration of power. Congress enacted FACA to ensure public oversight of executive functions, consistent with Madison's admonition that "ambition must be made to counteract ambition" in order that one branch not usurp the powers of the others. THE FEDERALIST No. 51, at 319 (Madison) (Clinton Rossiter ed., 1961).

B. The Constitutional Text Does Not Support Petitioners' Asserted Executive Prerogatives.

The constitutional text provides no basis for the government's assertion that the executive is free to ignore FACA. As held in *Clinton v. New York*, 524 U.S. 417, 438

(1998), "There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." To support their bid to expand executive prerogatives, petitioners turn to the Recommendations and Opinions Clauses of Article II. Those modest textual provisions reinforce the view that nothing in this case threatens harm to valid executive interests.

The Recommendations Clause states that the President "shall . . . recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient." U.S. CONST., art. II, § 3. This unremarkable power – which certainly would exist even if not included in the text – is in no way threatened by announcing those private individuals who participate on advisory committees, or disclosing the proceedings of such groups. Moreover, as Judge Silberman wrote in *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 908 (D.C. Cir. 1993), the Recommendations Clause provides a "somewhat artificial" basis for challenging the constitutionality of FACA, as almost any policy advice to the President carries with it the possibility of legislative recommendation.

Petitioners nonetheless assert that application of FACA to the NEPDG would "inhibit, confine, or control the process th[r]ough which the President formulates the legislative measures he proposes or the administrative actions he orders." Br. for Petitioners at 15. This assertion is a false alarm. The statute provides solely that the public must know when private interests become part of a formal process for recommending public policy, so it can follow that process. *See* J. Gregory Sidak, *The Recommendations Clause*, 77 GEO. L. REV. 2079, 2091-92 (1989). Nothing in those elements of FACA has a material impact on the President's ability to make recommendations to Congress.

Rather, FACA achieves the public accountability that Hamilton recognized is essential for representative government:

> It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, but the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.

THE FEDERALIST No. 70, at 426 (Hamilton) (Clinton Rossiter ed., 1961). As Judge Silberman noted, for thirty years since FACA was enacted, Presidents have received confidential advice and proposed legislation without complaint about FACA-imposed procedures. *See* 997 F.2d at 908.

The Opinions Clause provides even less support for petitioners, stating only that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. CONST., art. II, § 2. As Justice Jackson wrote, this describes a "trifling" power which is "inherent in the Executive if anything is." *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 & n.9 (1952) (Jackson, J., concurring). Hamilton concurred

in this view: "This [the Opinions Clause] I consider as a mere redundancy in the plan, as the right for which it provides would result of itself from the office." THE FEDERALIST No. 74, at 447 (Clinton Rossiter ed., 1961).

FACA in no way prevents the President from exercising his Opinions Clause powers. The Act applies only where advisory committees are composed of members *other* than public officials, leaving the President entirely free to obtain written opinions from his cabinet officers. Indeed, the Act specifically exempts from its coverage any "individuals" and committees composed solely of "principal" officers of agencies.

Because these textual provisions are so mild, petitioners here can assert only "general" or "inherent" executive powers.[10] As Justice Kennedy observed in his concurring opinion in *Public Citizen*, 491 U.S. at 484, where only such general executive powers are asserted, the appropriate question is whether the challenged legislation is justified to promote objectives within the authority of

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[10] The Appointments Clause, referred to by petitioners in a glancing manner, is actually protected and reinforced by plaintiffs' suit. Plaintiffs do not challenge the President's appointment of cabinet-level and other executive branch employees to the NEPDG. Rather, they have acted out of concern that de facto committee members may have improperly influenced the advice to the President. Thus, they seek to vindicate his formal appointments and determine whether they were undermined by de facto members. *Cf. Public Citizen*, 491 U.S. at 467 (Kennedy, J., concurring) (separation of powers inquiry depends on nature of executive power at issue).

Congress. FACA's open government objective plainly is within the authority of Congress.[11]

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[11] Petitioners' constitutional claims could be resolved by the analysis in *Nixon v. Administrator of General Services., supra*, where former President Nixon challenged legislation seizing his official papers, contending that the statute interfered in executive branch matters. *See* 433 U.S. at 440. Rejecting that argument, this Court stressed that the executive branch (though not Nixon) would retain custody and screening of the materials, allowing disclosures to be opposed on the basis of legal rights or privileges. *See id.* at 443-44. FACA provides analogous protections. The executive branch initially determines whether to apply the Act, whether to invoke its explicit exemptions from coverage, or whether to assert executive privilege.

CONCLUSION

For all of these reasons, *amici* respectfully urge the Court to return the matter to the district court for discovery to proceed.

Respectfully submitted,

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