

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	C.A. No. 01-1530 (EGS)
NATIONAL ENERGY POLICY)	
DEVELOPMENT GROUP, et al.,)	
)	
Defendants.)	
_____)	
)	
SIERRA CLUB,)	
)	
Plaintiff,)	
)	
v.)	
)	C.A. No. 02-631 (EGS)
VICE PRESIDENT RICHARD)	
CHENEY, in his official capacity, et al.,)	
)	
Defendants.)	
_____)	

**MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION
FOR A PROTECTIVE ORDER AND FOR RECONSIDERATION**

PRELIMINARY STATEMENT

Defendants have now responded to plaintiffs’ discovery requests by supplying a wealth of information regarding the operations of the National Energy Policy Development Group (“NEPDG”) and the agencies whose heads participated in the NEPDG. In accordance with this Court’s August 2, 2002 order, the agency-head defendants collectively have produced thousands of pages of documents in response to plaintiffs’ First Set of Document Requests. These defendants also have answered plaintiffs’ First Set of Interrogatories, including those

interrogatories relating to the core issue of membership.

Together with that information, defendants, as an attachment to this motion, submit the sworn declaration of Karen Knutson, the former NEPDG Deputy Director. Ms. Knutson's declaration – along with the President's memorandum establishing the NEPDG and specifying its membership and the final report submitted to the President by the NEPDG – provides the administrative record on the membership issue as it relates to the NEPDG. Specifically, Ms. Knutson's declaration provides a list of NEPDG members and support staff and their employment status; the number and dates of NEPDG meetings; a description of who attended those meetings (including NEPDG support staff and certain other staff of the Office of the Vice President); and the employment status of the attendees. Ms. Knutson's declaration also provides the administrative record on the membership issue as it relates to the staff-level group of federal employees with whom the NEPDG's Executive Director worked in drafting the NEPDG report.¹

Defendants file this motion for a protective order, however, because further responses to plaintiffs' discovery requests would impose upon the Executive unconstitutional burdens similar to those which would be imposed by application of the Federal Advisory Committee Act ("FACA") itself to the NEPDG.² Indeed, those burdens appear even more substantial here, for

¹While not part of discovery, defendants are providing the Knutson declaration at this time because, as the administrative record on critical aspects of membership, it contains information relevant to plaintiffs' discovery requests.

²This motion is directed to plaintiffs' discovery requests to the extent they seek information or documents from the *non*-agency-head defendants: *i.e.*, the NEPDG, Vice President Cheney, Assistant to the President Joshua Bolton, Assistant to the President Larry Lindsey, and Andrew Lundquist, former Executive Director of the NEPDG (collectively "the moving defendants"). These are the defendants for whom plaintiffs' discovery raises the most serious constitutional concerns.

responding to the pending discovery would require the Executive Branch to disclose *more information* than it would have to disclose if this Court ultimately concludes that FACA applies to the NEPDG. As a general matter, it makes little sense to allow discovery that is more intrusive than the remedy available for a FACA violation. Moreover, to give effect to this Court's interest in having "tightly reined" discovery that might allow the Court to *avoid* addressing difficult separation-of-powers questions, it is critical that the discovery process not proceed in a manner that creates more significant separation-of-powers problems than those implicated by a finding that FACA indeed applies. Thus, to the extent plaintiffs seek discovery against the Vice President and the other moving defendants that discovery should not be permitted now.³

In response to the complaints filed in this consolidated action, defendants filed a motion to dismiss, which challenged the legal sufficiency of the complaints and argued, in part, that, even accepting the facts in the complaints as true, application of FACA to the NEPDG would unconstitutionally interfere with the Executive Branch's authority to gather information and advice and to perform the President's constitutionally-assigned powers to recommend measures to Congress as he judges necessary and expedient and to obtain the opinions of his principal

Of course, defendants continue to believe that the application of FACA to the NEPDG and the Vice President and related discovery against the moving defendants, especially the Vice President, is precluded by fundamental principles of separation of powers and interferes with the President's authority to receive candid advice from his principal advisors and make recommendations to Congress. Defendants recognize that this Court disagrees, at least with respect to discovery. Therefore, without abandoning their more fundamental objections, the moving defendants object to discovery against them without a predicate showing of strong need, as developed *infra*.

³The filing of this motion stays any obligation by the moving defendants to respond to plaintiffs' discovery. See Fed. R. Civ. P. 37(d).

officers. The Court denied that motion, in part, out of a desire to avoid premature resolution of the important separation-of-powers questions presented by this case. The Court further authorized plaintiffs to conduct discovery.

Because plaintiffs' discovery requests against the Vice President and the other moving defendants implicate the same constitutional concerns the Court sought to avoid in denying defendants' motion to dismiss, the Court is now squarely presented with the serious separation-of-powers issues at the core of this case. In light of the Court's concern for avoiding unnecessary constitutional questions, however, the moving defendants submit that the Court should first assess the need for discovery against the Vice President and other moving defendants prior to imposing these (unconstitutional) discovery burdens on defendants.

In order to aid the court in this assessment, defendants will file a motion for summary judgment within 10 days (by September 13, 2002, the date of the next status conference in this case), based on the record now before the Court. Plaintiffs may then file their opposition and proffer the facts known to them which supported the allegations of their complaint, as well as any facts culled from the information provided by the agency-head defendants in discovery, or any other record evidence in this case. The Court can then assess from those submissions whether there are any controverted facts material to the resolution of this dispute. Plaintiffs' claims of need for discovery against the Vice President and the other moving defendants (as well as the degree of its intrusiveness into the prerogatives of the Executive Branch) can then be determined in a concrete way. But unless plaintiffs can demonstrate a strong showing of need for the requested discovery, this Court need not inquire further into the appropriate balancing of interests and should not permit any discovery against those defendants.

The moving defendants recognize that this procedure may not have been contemplated by the Court in approving plaintiffs' discovery plan. They further recognize that the Court's statements at the August 2, 2002 status hearing and its August 2, 2002 order may cast doubt on certain constitutional arguments raised in this motion and might be read to reject, outright or implicitly, certain other arguments against discovery raised in this motion.⁴ But see Tr. of Aug. 2, 2002 hearing at 29 ("recogniz[ing] that there may be legitimate objections to the [plaintiffs' discovery] plan that raise constitutional concerns and that raise concerns of executive privilege").

But because the Court has not compelled or otherwise ordered the moving defendants to answer specific interrogatories or produce specific documents, they believe that any effort to seek appellate review of the Court's rulings on any of these points would have been premature prior to this motion. Thus, the moving defendants are filing this motion to both (a) maintain the integrity of these defendants' legal position in a procedurally appropriate manner, and (b) if necessary, obtain a clear ruling on the core issues relating to the circumstances under which the President, the Vice President, and their advisers may be subjected to discovery in this case, so that defendants may consider appropriate appellate options to protect the Executive's core constitutional interests in this case.

⁴The moving defendants understand the Court was contemplating that they would raise any constitutional (or other) objections as part of responses to plaintiffs' specific discovery requests. The moving defendants did not understand the Court, however, to preclude them from moving for reconsideration or for a protective order. See Tr. of Aug. 2, 2002 hearing at 30 ("I'm not going to sit up here and tell the government how to respond to discovery"). Moreover, the moving defendants have attempted, in this memorandum, to provide the detailed and precise bases for their discovery objections that the Court has requested (objections which apply equally to each of plaintiffs' document and interrogatory requests directed to the moving defendants). See Aug. 2, 2002 Order at 2; Tr. of Aug. 2, 2002 hearing at 30.

ARGUMENT

A. A Protective Order is Appropriate Pending Resolution of Defendants' Soon-To-Be Filed Motion for Summary Judgment

Defendants plan to file in the next ten days their motion for summary judgment under Fed. R. Civ. P. 56(b) on all counts of plaintiffs' complaints. This motion will show that, based on the factual record in this case, defendants are entitled to judgment as a matter of law because neither the NEPDG, nor the interagency working group, nor groups of employees designated within a particular agency to assist the agency head in connection with his or her membership on the NEPDG had non-governmental members. See 5 U.S.C. app. § 3. This has important implications for the pending discovery.

Under standard summary judgment practice, it would be inappropriate to require defendants to answer plaintiffs' discovery in these circumstances. Once defendants' motion for summary judgment is filed, plaintiffs, to avoid summary judgment, will be required to set forth (by affidavit or other appropriate evidence) specific facts demonstrating there is a genuine issue for trial. See Fed. R. Civ. P. 56(d). If plaintiffs "cannot for reasons stated present by affidavit facts essential to justify [their] opposition," then they can seek relief (including discovery) under Fed. R. Civ. P. 56(f).

The extensive discovery responses by the agency-head defendants, the Knutson declaration, the President's memorandum, the NEPDG report, and defendants' impending motion for summary judgment provide a complete and adequate basis for granting a protective order against discovery of the moving defendants – the Vice President, two Assistants to the President, the Executive Director of the NEPDG, and the Presidentially-established NEPDG

itself. A strict application of Rule 56 is particularly appropriate here, where, as discussed below, substantial constitutional issues are presented. As the Court has already acknowledged, well-established principles counsel against the unnecessary adjudication of constitutional issues. And the Supreme Court has called for a “particularly meticulous” application of procedural rules when faced with attempts to intrude upon Executive Branch confidentiality. United States v. Nixon, 418 U.S. 683, 702 (1974). Thus, defendants’ constitutional concerns (to which we now turn) strongly counsel in favor of granting this motion.

B. Requiring the Vice President or His or the President’s Advisers to Answer Plaintiffs’ Discovery at this Time Would Present Serious Constitutional Problems The Court Can and Should Avoid

While a protective order would be appropriate in a routine case where summary judgment is pending, a protective order is especially warranted here because requiring the moving defendants to respond to plaintiffs’ discovery would present serious constitutional problems. While this argument is set forth in detail below, it is important, at the outset, to emphasize two points critical to approaching the constitutional issues.

First, as this Court has recognized, “[i]t is entirely possible that defendants will prevail on summary judgment on statutory grounds after proving that no private individuals participated as members of the advisory committees at issue . . . thus rendering defendants’ constitutional concerns inapplicable.” See Judicial Watch, Inc. v. National Energy Policy Dev. Group, – F.Supp.2d –, 2002 WL 1483891 at *23 (July 11, 2002). While the Court was discussing defendants’ constitutional argument on the merits, it is equally true that a ruling for defendants on summary judgment could avoid the constitutional concerns raised by the instant discovery – concerns that, in some respects, are even greater than the concerns that are raised by plaintiffs’

claims on the merits, which are substantial. See Association of Am. Physicians and Surgeons, Inc. v. Clinton, 997 F.2d. 898, 909 (D.C. Cir. 1993) (“AAPS”). Thus, principles of constitutional avoidance counsel in favor of granting a protective order here and deferring (potentially forever) a ruling on the constitutional issues raised by discovery against the moving defendants.

Second, as a constitutional matter, because the discovery at issue seeks information from senior presidential advisers, it seeks information under the direct control of – and therefore *from* – the President of the United States. President Bush created the NEPDG by Presidential memorandum and established it within the Executive Office of the President. See Memorandum at 1 (Jan. 29, 2001). Pursuant to his constitutional⁵ and statutory⁶ authority, the President specifically requested Vice President Cheney to “lead” the NEPDG, “preside” at its meetings, and “direct its work.” See id. at 1-2. Moreover, the President specifically charged the (Vice President-led) NEPDG to “gather information,” “deliberate,” and “make recommendations to the President.” See id. at 2.⁷

A request for information gathered by the Vice President and the NEPDG under authority of the President’s memorandum manifestly goes to the President’s interest as the person in ultimate control of that information.⁸ Cf. United States ex rel. Touhy v. Ragen, 340 U.S. 462

⁵See U.S. Const. art. II, § 2 (Opinion Clause); U.S. Const. art. II, § 3 (Recommendations Clause).

⁶See 3 U.S.C. § 106.

⁷That plaintiffs’ discovery request implicates information and communications belonging to the President is equally apparent with respect to the two moving defendants who serve as presidential assistants, Messrs. Bolten and Lindsey.

⁸Moreover, as the D.C. Circuit explained in In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997), the presidential communications privilege protects the presidential decision-making

(1951). In these circumstances, the Vice President may be subject to discovery to no greater extent than the President would (or could) be subject himself (which, as explained below, also has implications for plaintiffs' mandamus claim). See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803) (with respect to persons appointed by the President to aid him in the performance of his core duties, their "acts are his acts"). With these principles in mind, the moving defendants turn to the constitutional issues.

1. Plaintiffs Must Make a Strong Showing Of Need Before Obtaining Discovery Directed at the President, the Vice President, or their Advisers

The Supreme Court has recognized that the separation of powers under our Constitution is directly implicated by subjecting the President – or the Vice President, especially when assisting the President in the performance of Executive functions specifically assigned to him by the President (see 3 U.S.C. § 106) – to judicial process in matters arising out of the performance of their official duties. See Nixon v. Fitzgerald, 457 U.S. 731, 748-55 (1982). While the President is, of course, subject to process in "appropriate circumstances," see Clinton v. Jones, 520 U.S. 681, 703 (1997), "it does not follow that a court may 'proceed against the president as against an ordinary individual.'" Id. at 704 n.39 (quoting United States v. Nixon, 418 U.S. at 715) (other internal citation omitted); see also Nixon v. Fitzgerald, 457 U.S. at 761 (Burger, C.J., concurring) ("the Judiciary always must be hesitant to probe into the elements of Presidential decision making"); United States v. Burr, 25 F.Cas. 187, 192 (CC Va. 1807). Rather, "[s]pecial caution is appropriate if the materials or testimony sought by the court relate to a President's

process, including communications by presidential advisers in the course of preparing advice to the President even when those communications are not made directly to the President. See id. at 751-52.

official activities.” See Clinton, 520 U.S. at 704 n.39.

Consequently, courts have required a heightened showing of need to overcome the President’s interest in protecting the confidentiality of Executive communications:

[T]he presumption that the public interest favors confidentiality can be defeated *only by a strong showing of need* by another institution of government – a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President’s deliberations

Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730 (D.C.

Cir. 1974) (emphasis added). Even in criminal cases, where there is a countervailing constitutional interest in the integrity and fairness of the criminal process, courts have demanded a high threshold showing of need to rebut the presumption of privilege for such communications. See, e.g., Nixon v. Sirica, 487 F.2d 700, 719 (1973) (en banc) (to overcome privilege, evidence must be “directly relevant” to a grand jury decision).⁹

And in a civil case brought to vindicate constitutional rights, the D.C. Circuit has held that the plaintiff must make a strong showing of need even to seek presumptively privileged Presidential communications. As the court explained in such a case involving a request for information of then-former President Nixon, there is a

⁹Most cases subjecting a President to judicial process have arisen in the criminal context, where “the powerful interest in the ‘fair administration of criminal justice’ requires that the evidence be given under appropriate circumstances lest the ‘very integrity of the judicial system’ be eroded.” See Clinton, 520 U.S. at 704 n.39 (quoting United States v. Nixon, 418 U.S. at 709, 711-12). Even in that context, however, the President has been accorded special deference. In United States v. Nixon, the Supreme Court deviated from the usual “final order” rule to allow President Nixon to appeal a court order upholding a subpoena without requiring him to first violate the order and be held in contempt. The Court found that to require a President to go into contempt “merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government.” See 418 U.S. at 691-92.

strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages, *at least where, as here*, the action is tantamount to a charge of civil conspiracy among high officers of government to deny a class of citizens their constitutional rights and where *there has been sufficient evidentiary substantiation to avoid the inference that the demand [for presumptively privileged material] reflects mere harassment*.

See Dellums v. Powell, 561 F.2d 242, 247 (D.C. Cir.) (emphasis added), cert. denied, 434 U.S. 880 (1977).

Even when not directed against the President, the Supreme Court has recognized the need for caution in allowing judicial process that could impair the exercise of core Executive Branch functions. In United States v. Armstrong, 517 U.S. 456 (1996), for example, the Court, citing constitutional considerations, held that discovery on an equal protection challenge to an allegedly selective prosecution could not proceed absent credible evidence in support of the claim. See id. at 463-65, 468-70. And in Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court, again citing in part constitutional considerations (see id. at 817 n.28), held that discovery on a qualified immunity claim could not proceed absent sufficient allegations that the challenged conduct violated “clearly established statutory or constitutional rights of which a reasonable person would have known.” Id. at 818.¹⁰

Thus, given that discovery against ordinary government officials may require a threshold showing of need, it is plainly inappropriate and, indeed, inconsistent with the separation-of-

¹⁰Moreover, while not based expressly on constitutional principles, courts also require a threshold showing of need before high-ranking government officials may be subject to deposition. See Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985) (“top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions”) (citing United States v. Morgan, 313 U.S. 409, 422 (1941)).

powers doctrine to compel discovery against the President and Vice President absent a strong threshold showing of need (at least in an official capacity suit). See Nixon v. Fitzgerald, 457 U.S. at 761 (Burger, C.J., concurring) (“the Judiciary always must be hesitant to probe into the elements of Presidential decision making”); Clinton, 520 U.S. at 704 n.39 (“[s]pecial caution is appropriate if the materials or testimony sought by the court relate to a President’s official activities”).

Indeed, requiring a showing of need is consistent with the well-established presumption of regularity accorded official acts, see United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926), which surely implicates the separation-of-powers doctrine when applied by federal courts to acts of the President and Vice President. Compare Armstrong, 517 U.S. at 464 (suggesting the presumption of regularity has constitutional underpinnings when applied to the acts of the President’s delegates).

The presumption of regularity requires that, “in the absence of *clear evidence to the contrary*, courts presume that [government officials] have properly discharged their official duties.” Chemical Foundation, 272 U.S. at 14-15 (emphasis added). At a minimum, then, the presumption should require some strong showing of need (deviation from procedural regularity) before discovery relating to official acts may be directed to the President or the Vice President. Cf. American Fed’n of Gov’t Employees v. Reagan, 870 F.2d 723, 728 (D.C. Cir. 1989) (“We cannot allow a breach of the presumption of regularity by an unwarranted assumption that the President was indifferent to the purposes and requirements of the Act, or acted deliberately in contravention of them”).

Moreover, even beyond these general principles, a special need requirement is

particularly appropriate in *this* case for three additional reasons. *First*, the requested discovery concerns conduct central to the President’s constitutional authority (i.e., the President’s authority to control exclusively the development of his policies and legislative proposals in connection with the discharge of his constitutional responsibilities under the Recommendations and Opinion Clauses). See Armstrong, 517 U.S. at 465 (requirement that a criminal defendant must make a threshold showing to obtain discovery on a selective-prosecution claim stems in part “from a concern not to unnecessarily impair the performance of a core executive constitutional function”).

Second, the requested discovery inevitably would embrace sensitive deliberations at the highest levels of the Executive Branch, including presumptively privileged presidential communications. See Dellums, 561 F.2d at 247 (requiring “sufficient evidentiary substantiation” of need for presumptively privileged presidential communications); cf. Senate Select Comm., 498 F.2d at 729-30 (“protection of the presidential decision-making process requires a promise that, as a general matter, its confidentiality would not be invaded, *even to the limited extent of a judicial weighing in every case of a claimed necessity for confidentiality against countervailing public interests of the moment*”) (emphasis added).

Third, a need requirement is consistent with FACA itself. By its very terms, FACA does not reach any committees, deliberations, or communications *within* the government, see 5 U.S.C. app. § 3, much less those in close proximity to the President. Indeed, notwithstanding its seemingly extensive reach, FACA was not “intended to intrude upon the day-to-day functioning of the presidency,” or “in any way to impede casual, informal contacts by the President or his immediate staff with interested segments of the population” *outside* the government. Nader v.

Baroody, 396 F.Supp. 1231, 1234 (D.D.C. 1975). Thus, courts consistently have given a limited interpretation to FACA in light of its purposes when a broad interpretation would present “difficult constitutional questions.” Public Citizen v. United States Dep’t of Justice, 491 U.S. 440, 452-55 (1989) (adopting narrow interpretation of FACA in light of constitutional concerns); AAPS, 997 F.2d. at 910-11 (same).

Given the unique and serious constitutional questions that application of FACA would raise, it is fully consistent with FACA to require a plaintiff to make a strong showing of need before seeking discovery from the highest levels of the Executive Branch.¹¹ This is particularly true where, as here, the Executive contends that application of FACA in that setting would be unconstitutional, and, as demonstrated above, discovery would raise the very constitutional concerns that application of FACA would raise in the first instance. Indeed, the concerns posed by discovery are even *greater* than those posed by application of FACA, for, in their discovery requests, plaintiffs seek information to which they would not be entitled even if FACA were deemed to apply to the NEPDG.¹²

¹¹Indeed, while the President’s memorandum and the Knutson declaration make clear that the NEPDG established by the President did *not* include members from outside the government, even if (contrary to fact) the NEPDG *did* include members from outside the government, see AAPS, 997 F.2d at 910; Public Citizen, 491 U.S. at 467, it *still* would be appropriate to require a plaintiff to make a strong showing of need before seeking discovery from the highest levels of the Executive Branch.

¹²For example, plaintiffs seek information about any one-on-one contact between a private citizen and a member of the NEPDG relating to the “activities” of the NEPDG. See Request for Production No. 5. Such contacts between a member and non-member of an advisory committee are not covered by FACA, and compelled disclosure of such contacts would clearly implicate separation-of-powers concerns. See AAPS, 997 F.2d at 915 (stating, as a necessary condition of FACA membership, that a person “regularly attends and fully participates” in committee meetings “as if he were a ‘member’”). Moreover, this is precisely the type of information FACA is not intended to cover: information the release of which would “intrude

Finally, it is no answer to say that these constitutional concerns can be satisfied by simply invoking executive privilege in response to plaintiffs' specific discovery requests. See Judicial Watch, 2002 WL 1483891 at *31 (suggesting this approach). As explained above, plaintiffs must make a strong threshold showing of need before the Executive Branch can be required to formally assert privilege with respect to information that is, as a *categorical* matter, within the direct control of the President and presumptively beyond compelled disclosure or inquiry by the other Branches.¹³ Under our constitutional framework of separated powers, Congress could not intrude upon the constitutionally-protected sphere of confidentiality by passing an open-government law categorically declaring some or all matters within that sphere to be matters of public concern requiring public disclosure, remitting the President, Vice President, or officials in immediate proximity to them to a case-by-case assertion of "privilege" in response to each demand for disclosure pursuant to that open-government policy. Congress's purported interest in open government would be nothing more than a naked disagreement with Executive confidentiality, and entitled to no weight as a countervailing interest to overcome the Executive's

upon the day-to-day functioning of the presidency," and "impede casual, informal contacts by the President or his immediate staff with interested segments of the population." Nader, 396 F.Supp. at 1234.

¹³A contrary rule also would make little sense, for a civil litigant could simply propound discovery seeking presumptively-privileged information, file a motion to compel, and thereby trigger a formal decision-making process requiring consultations at the highest levels of the White House, causing substantial and unnecessary burdens on the Office of the President. Moreover, it ignores reality to suggest that a request for materials that are all presumptively privileged because they all involve sensitive communications between and among the President and his closest advisers does not raise separation-of-powers concerns because of the possibility of raising executive privilege. The fact that all or nearly all of the requested information in a given case might be privileged suggests the presence, not the absence, of a separation-of-powers problem.

constitutionally-based interest in confidentiality. So too here, Congress's enactment of FACA to promote public disclosure of matters involving outside bodies that advise the government cannot overcome the core Executive interest of maintaining confidentiality within the constitutionally-protected sphere. *A fortiori*, a discovery request by private plaintiffs seeking to enforce such a statute by intruding into that same sphere of confidentiality cannot be granted.

Thus, as Judge Gesell observed, a claim that no constitutional questions are raised if the President has not invoked an executive privilege "misses the point." Nader, 396 F.Supp. at 1234 n.5. "It is not that the construction of the Act plaintiff urges would impinge on the privilege of confidentiality for executive communications itself, but that it might impinge on the effective discharge of the President's powers, the interest necessitating the privilege, which raises constitutional questions." See id.

In other words, constitutional separation-of-powers concerns are often broader than specific executive privilege concerns. See Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 935 (D.C. Cir. 1982) ("We express no view with regard to any constitutional issue of Executive privilege, a question which is narrower than the Commission's general claim based on separation of powers"). Indeed, in both Public Citizen and AAPS, the Supreme Court and the D.C. Circuit based their holdings on constitutional concerns about impinging on the confidentiality of executive-branch consultations (see Public Citizen, 491 U.S. at 466-67; AAPS, 997 F.2d at 909-911), even though there had been no assertion of executive privilege in either case.

In any event, it would be inappropriate to require the moving defendants to assert executive privilege in response to specific discovery requests in light of defendants' expressed

intention to move for summary judgment.¹⁴ Under standard summary judgment practice, filing a summary judgment motion should stay any obligation to respond to plaintiffs' discovery, let alone to assert – potentially unnecessarily – constitutional privileges.

2. Plaintiffs Have Made No Showing that Would Justify Discovery Here

The agency-head defendants collectively have produced thousands of pages of documents in response to plaintiffs' First Set of Document Requests, and have answered plaintiffs' First Set of Interrogatories, including on the core issue of membership. Defendants also have submitted a sworn declaration providing detailed information relating to meetings of the NEPDG and the staff-level group of federal employees with whom the NEPDG's Executive Director worked in drafting the NEPDG report. These materials are voluminous, and provide (in large part) the factual record on which defendants will soon be asking the Court to grant summary judgment in their favor.

Plaintiffs have offered *no* reason why they should be permitted to go behind this

¹⁴Defendants, of course, reserve their right to assert particular privileges in the event they are subsequently compelled to respond to plaintiffs' discovery. The Vice President, a constitutionally unique officer, has respectfully but resolutely maintained, in the circumstances of this case, that extending the legislative and judicial powers to compel a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from, *inter alia*, the Vice President raises separation of powers problems of the first order. Moreover, the principles that generally provide a presumptive privilege to Executive Branch communications apply with special force to communications among the President, the Vice President, and their close advisers relating to the President's exercise of his core powers. The special nature of the Vice Presidency and his special need to communicate candidly with the President is reflected in Congress' statutory recognition of the importance of enabling the Vice President (separately from his capacity as President of the Senate) to provide assistance to the President in connection with the performance of functions specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities. See 3 U.S.C. § 106.

information and seek discovery against the moving defendants. To be sure, plaintiffs have alleged, on information and belief, that non-governmental individuals were members of the NEPDG. See, e.g., Sierra Club Complaint at ¶ 18. But that unsubstantiated allegation cannot justify discovery. And it is contradicted by the President's memorandum establishing the NEPDG and specifying its membership, the final report of the NEPDG, and the information and documents defendants have provided both in response to plaintiffs' discovery and as part of the record in this case. Accordingly, because plaintiffs have made no showing whatsoever of need, much less the strong threshold showing that would be a necessary condition to the sort of discovery they seek from the moving defendants, the protective order should be granted.

C. Discovery on Plaintiffs' APA Claim Is Inappropriate

In objecting to plaintiffs' proposed discovery plan ("Def. Obj."), defendants argued that discovery in this case would be inappropriate to the extent plaintiffs' claims arise under the APA. See Def. Obj. at 4-7, 10-11. Specifically, defendants argued that: (i) review under the APA ordinarily is limited to the administrative record (which defendants offered to supplement); and (ii) plaintiffs had made no showing of bad faith or improper behavior to justify discovery in this case. See Def. Obj. at 7. Defendants also argued that review, at least initially, should be limited to the potentially dispositive issue of membership.

The moving defendants understand the Court (at least implicitly) to have rejected this position as a complete response to plaintiffs' discovery requests in its August 2, 2002 order approving plaintiffs' discovery plan, and respectfully request the Court to reconsider its ruling. Specifically, for all of the reasons articulated in their prior submission, defendants submit the plaintiffs simply have made no showing that would justify going beyond the record in this case,

and certainly no reason to go beyond that record as now supplemented by the discovery responses and the Knutson declaration. Moreover, as explained in Part B supra, such a showing is particularly appropriate insofar as the moving defendants are concerned, given the serious constitutional concerns further discovery against them raises and the responses to discovery that have been furnished by the agency-head defendants.

D. Discovery on Plaintiffs' Mandamus Claim Is Inappropriate

Defendants' motion to dismiss argued that plaintiffs could not sue the Vice President under the mandamus statute because neither FACA (the statute with respect to which plaintiffs claim the Vice President owes them an obligation) nor the APA (the statutory vehicle for enforcing FACA) provide a cause of action against the Vice President. See Defendants' Motion to Dismiss at 8-11, 14-15 (filed Apr. 5, 2002). In its July 11, 2002 order, the Court did not accept these arguments as requiring dismissal of the case at that time,¹⁵ and, in its August 2, 2002 order, the Court approved plaintiffs' discovery plan (including, over defendants' objection (see Def. Obj. at 7-10) discovery on plaintiffs' mandamus claims).

Defendants continue to maintain that the Court cannot order discovery against the Vice President because plaintiffs have stated no cause of action against him. Understanding that the Court has rejected this position as a basis for dismissing the claim at this stage, defendants reincorporate their prior arguments, see Defendants' Motion to Dismiss at 8-11, 14-15; Def. Obj. at 7-10, and respectfully ask the Court to reconsider its ruling, especially in light of the substantial materials defendants have now provided to plaintiffs.

¹⁵The Court did, however, dismiss plaintiffs' claims against the Vice President under the APA, FOIA, and FACA. See Judicial Watch, 2002 WL 1483891 at *4, 11-12, 32.

In further support of this request for reconsideration, defendants note the following additional four points: *First*, the Vice President’s position that mandamus review is precluded is supported by Gonzaga Univ. v. Doe, 122 S.Ct. 2268 (2002), decided by the Supreme Court on June 20, after the oral argument on defendants’ motions to dismiss. In Gonzaga the Court held the Family Educational Rights and Privacy Act (“FERPA”) could not be enforced under 42 U.S.C. § 1983 (which, like the mandamus statute, merely provides a remedy for vindicating rights secured by other federal statutes) because FERPA was not intended to create enforceable rights. See 122 S.Ct. at 2277. Similarly, because, as the Court has held, neither FACA nor the APA create enforceable rights against the Vice President, see Judicial Watch, 2002 WL 1483891 at *4, 11-12, FACA cannot be enforced through the mandamus statute.

Second, because the conduct plaintiffs challenge was undertaken by the Vice President by special assignment from the President (see 3 U.S.C. § 106) and in the President’s exercise of his constitutional powers under the Recommendations and Opinion Clauses, the Vice President should be subject to mandamus to no greater extent than the President would (or could) be subject himself.

Third, AAPS itself makes clear that “it is a rare case when a court holds that a particular group is a FACA advisory committee over the objection of the executive branch.” AAPS, 997 F.2d at 914. That is because “the government has a good deal of control over whether a group constitutes a FACA advisory committee.” Id. Consequently, in considering mandamus, it is difficult to see how, at least in the absence of the most unambiguous circumstances, the President (or the Vice President, acting on his behalf) could have a “clear duty” – necessary to support mandamus relief – to treat a group as an advisory committee when the group was not set up by

the President to be one.

Fourth, compelling discovery from the Vice President would effectively decide the difficult constitutional issue whether mandamus is available in this case, and, moreover, would raise all of the constitutional problems discussed supra Part B.

CONCLUSION

For all of the foregoing reasons, the moving defendants respectfully request that the Court enter a protective order relieving them of any obligation to respond to plaintiffs' discovery.

Respectfully submitted,

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

SHANNEN W. COFFIN
Deputy Assistant Attorney General

THOMAS MILLET
D.C. Bar #204405
CRAIG BLACKWELL
D.C. Bar # 438758
JENNIFER PAISNER
D.C. Bar # 472407
Attorneys, Civil Division
Department of Justice
901 E St., N.W.
Room 812
Washington, DC 20530
Tel: (202) 616-8268
Fax: (202) 616-8460