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P R O C E E D I N G S

[10:01 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument now on number 03-472 -- 475, Richard B. Cheney vs. United States District Court. General Olson?

ORAL ARGUMENT OF THEODORE B. OLSON
ON BEHALF OF PETITIONERS

GENERAL OLSON: Mr. Chief Justice, and may it please the Court:

This is a case about the separation of powers. The Constitution explicitly commits to the President's discretion the authority to obtain the opinions of subordinates and to formulate recommendations for legislation. Congress may neither intrude on the President's ability to perform these functions, nor authorize private litigants to use the courts to do so.

As this Court has construed the Federal Advisory Committee Act to avoid what the Court regarded and described as formidable constitutional questions, FACA does not permit the litigation and discovery the Respondents wish to pursue.

QUESTION: Would you say it's also a separation of powers question, Mr. Olson, to the

1 extent that it involves the ability of the courts to
2 formulate rules to prevent them from deciding
3 questions unnecessarily?

4 GENERAL OLSON: I'm not sure I understand
5 the thrust of your question.

6 QUESTION: Well, you said this is a case
7 about separation of powers. And I wanted -- I asked
8 whether or not the authority of the courts is not
9 also involved here, because there is a concern that
10 we should have rules designed to prevent us from
11 unnecessarily deciding questions.

12 GENERAL OLSON: Well, with respect to
13 the -- I'm not sure whether you are asking a question
14 about the jurisdiction of the Court, because that's
15 an issue that's before the Court, or with respect to
16 construing the Federal Advisory Committee Act to
17 avoid the constitutional questions that are implicit
18 in that statute.

19 We think that there is jurisdiction in
20 this Court. We think that what the Court did in
21 Public Citizen was make it very clear that because of
22 the formidable constitutional questions, in fact, the
23 Court referred to the constitutional questions in
24 that case as undeniable.

25 The Court construed the Federal Advisory

1 Committee Act not to apply in that case. If that
2 same rationale is applied here, the Court will not
3 get to the constitutional question which FACA would
4 inevitably raise if it intruded upon the President's
5 power to obtain opinions from his subordinates, and
6 to make recommendations to Congress with respect to
7 legislation.

8 QUESTION: General Olson, we would also
9 not get to it if we adhered to the firm final
10 judgment rule which is the first hurdle that you have
11 to overcome. You wouldn't get to the merits if there
12 is no jurisdiction for us to review at this point.

13 GENERAL OLSON: That's true, Justice
14 Ginsburg. This case fits squarely, we submit, within
15 what the Court decided unanimously in the United
16 States vs. Nixon for two reasons. In the first
17 place, a denial of immediate review would render
18 impossible any review whatsoever of the claims, the
19 separation of powers claims that are being made here,
20 because the Vice President -- and the Vice President
21 is acting as the subordinate and surrogate for the
22 President here. This is the President's authority.

23 QUESTION: Well, of course, in the Nixon
24 case, the President exercised his privilege and it
25 was overruled.

1 GENERAL OLSON: Yes, Justice Kennedy

2 QUESTION: So it's not, it's not on all
3 fours in that sense.

4 GENERAL OLSON: Well, it's not all fours
5 in that sense, but the principle as articulated by
6 the Court on pages 683 -- I mean 691 to 692. What
7 the Court was concerned about there is that the
8 traditional contempt avenue or any aspect of what
9 would be required of the President of the United
10 States to defy a court order would be both unseemly
11 and would unnecessarily provoke a constitutional
12 confrontation.

13 What the Court said in that case, when we
14 are talking about, when the Court is talking about
15 important separation of powers questions, the
16 President is in the position of having to defy a
17 court order, risk sanctions of some sort.

18 QUESTION: But you are not defying a court
19 order if you exercise a privilege. Or if you assert
20 a privilege.

21 GENERAL OLSON: With respect, Justice
22 Kennedy, this case, the separation of powers issue in
23 this case goes far beyond the assertion of executive
24 privilege. Executive privilege concerns itself with
25 particular documents or a concern over the

1 relationship that particular documents refer to. The
2 objection here is to the process.

3 The President and the Vice President are
4 being subjected to litigation and discovery which
5 goes far beyond what the statute would require here.

6 QUESTION: It's essential to the
7 Government's position, I take it, that this Court
8 reject the de facto doctrine that was developed by
9 the Court of Appeals.

10 GENERAL OLSON: We think, Mr. Chief
11 Justice, that the de facto doctrine is wrong. It's
12 inconsistent with Public Citizen, and if the Court
13 were to construe -- find that somehow that the
14 statute could be construed to create a de facto
15 doctrine, which no court has ever done, finally done
16 in connection with a case, that the case, the statute
17 would be unconstitutional as it applied to these
18 circumstances.

19 However, Mr. Chief Justice, we believe
20 that the Court does not need to get there by
21 construing the statute narrowly, as the Court did in
22 Public Citizen, unanimously, I might say, because
23 three of the eight justices felt that the statute, if
24 it were construed any other way, would be
25 unconstitutional. Construing the statute in that

1 fashion --

2 QUESTION: When you say construe it
3 narrowly, but nonetheless, retain the de facto
4 doctrine?

5 GENERAL OLSON: No. Not deal with it at
6 all. I mean, the statute itself, we submit,
7 addresses -- I think in the context of this case,
8 Mr. Chief Justice, the statute may be construed in
9 the context of a Presidential advisory group
10 explicitly excluding a committee that's formed of all
11 government employees, and as construed by the Court
12 in that case, either -- the words used in the statute
13 are established or utilized. As construed by that
14 case, this commission was established by the
15 President. It would be exempt on its face from
16 application of FACA.

17 QUESTION: But what if it's, what if
18 it's -- what if the manner in which it's utilized is
19 that, in fact, outsiders, nongovernment employees,
20 were actually given a vote, that when the committee
21 took a vote, there were some nongovernment employees
22 who were counted?

23 GENERAL OLSON: We submit, Justice Scalia,
24 that that would raise very serious constitutional
25 questions. As an antecedent to that, there was no

1 intention when Congress passed a statute to prohibit
2 or regulate ex parte communications between the
3 executive branch and members of the public.

4 QUESTION: Well, this is, this is more
5 than ex parte communications. It's that the
6 committee is in fact, as utilized, not a committee
7 composed exclusively of government employees. All
8 I'm saying is the people voting, the people voting,
9 why would that be such an intrusion upon the
10 executive? Simply to require knowledge of whether
11 anybody that voted on the various recommendations of
12 the commission was a nongovernment employee. Why
13 would that be such a terrible --

14 GENERAL OLSON: Well, I'm going to, I'm
15 going to quote from the Public Citizen decision
16 itself, which authoritatively and specifically
17 defined the term or utilized in a way which would be
18 flatly inconsistent with this question that you just
19 raised.

20 But I also want to mention, and would want
21 to go on to say, that would require that the courts
22 ignore the presumption of regularity which applies to
23 the executive, particularly when the executive is
24 performing core executive branch functions, which it
25 clearly is in this case.

1 But to get back to your question, the
2 court in Public Citizen, on page 462, specifically
3 defined what or utilized meant in that case. And
4 defined it in this way, in order to avoid the
5 undeniable formidable constitutional questions that
6 would be raised if it was defined as you suggested.
7 The Court said --

8 QUESTION: General Olson, would you
9 clarify why we are dealing with the merits. I
10 thought, and correct me if I misunderstand this, that
11 the merits will have to be resolved in the first
12 instance by the court below. If we find that there
13 is jurisdiction, if we agree with you, for example,
14 that this discovery should not have been allowed,
15 then why should we take the first view of the merits
16 of this case?

17 GENERAL OLSON: It seems to me in the
18 context of this case, Justice Ginsburg, that once
19 jurisdiction is acknowledged, the context of the
20 case, the administrative record, which specifically
21 contains within it the Presidential directive which
22 created the advisory committee only to include
23 members of the executive branch. The report of the
24 committee, which specifically identifies as members
25 only members of the executive branch, and the

1 affidavit or declaration that's on file from the
2 deputy director, which said that the only
3 participants were members of the executive branch,
4 and the presumption of reliability, of regularity
5 that the Court consistently, U.S. vs. Armstrong is
6 one case, the Court consistently, absent clear
7 evidence to the contrary, accords executive branch
8 action --

9 QUESTION: But you would still be asking
10 us to resolve the merits in the first instance, not
11 to review any lower court decision because they said
12 there ought to be discovery first.

13 GENERAL OLSON: Well, but we are
14 submitting that the discovery itself violates the
15 Constitution, violates FACA as properly construed.

16 QUESTION: All discovery, not -- you are
17 not --

18 GENERAL OLSON: Yes, because --

19 QUESTION: But isn't that simply the basic
20 argument on the merits again. The reason -- I think
21 you're saying the reason we can't have discovery is
22 because the whole statute is unconstitutional as
23 applied to the President.

24 GENERAL OLSON: Unconstitutional if it --
25 if applied in these circumstances. Now, it may be

1 construed --

2 QUESTION: Yes. If we go -- I mean, if we
3 do what Justice Ginsburg is trying to do, and that is
4 get to the jurisdictional issue without passing, in
5 the first instance, as accord in the first instance
6 on the merits, then it seems to me that the
7 jurisdictional question, boils down to me at least
8 to this. Why should we accept your position on
9 jurisdiction when jurisdiction goes to the propriety
10 with constitutional overtones, of course, of
11 discovery, and we don't have the discovery order
12 refined yet.

13 If this case goes back or if it had indeed
14 not been appealed in the first place, you would have
15 been fighting with your colleagues on the other side
16 about what specific discovery to allow. Once we knew
17 what the District Court specifically was going to
18 allow, we would have a fairly sharply focused
19 question, and that arguably would be subject to an
20 appeal regardless of the final judgment rule. But we
21 don't have that focus yet.

22 GENERAL OLSON: Well, there is two answers
23 to that -- at least two, Justice Souter. In the
24 first place, the discovery was ordered by the
25 District Court. It may be found at pages 215 to 220.

1 QUESTION: But you never came down -- I
2 realize that, I have read the orders. But you never
3 came back, or the Government never came back and
4 said, well, that order is too broad because, and we
5 think it could be allowed to this extent, and there
6 was -- there was no, as I understand it, there was no
7 process of trying to refine the discovery order down
8 to anything beyond the generalities that we have on
9 the record.

10 GENERAL OLSON: Every effort was made with
11 respect to the actions of the litigants in the
12 District Court to refine it as much as possible. The
13 District Court finally said this is what I order. I
14 order the Petitioners not to file any dispositive
15 motions. I order the Petitioners to respond to the
16 discovery, to reply to nonprivileged discovery
17 requests and assert executive privilege, which we are
18 saying --

19 QUESTION: And you did not assert any
20 executive privilege.

21 GENERAL OLSON: No. We did not. We did
22 not.

23 QUESTION: So we don't know what might be
24 subject to executive privilege, and sustained,
25 perhaps, and what would not be. And it's the what

1 would not be that would raise the constitutional
2 issue that you are trying to raise. And it seems to
3 me, until we know exactly what that is, there is a
4 pretty good argument that the final judgment rule
5 should not be subject to exception at this point.

6 GENERAL OLSON: Well, I think that there
7 is a very strong case that it should be, Justice
8 Souter. The Court of Appeals addressed this issue,
9 too, and said, well, the District Court might have
10 been too broad. In fact, the Circuit Court, the
11 Court of Appeals recognized the constitutional
12 implications and then said, but maybe that can be
13 narrowed down, but that the Respondents should be
14 entitled to whatever discovery they need to prove
15 their case.

16 QUESTION: Was the District, was the
17 District Court's discovery order unconditional?

18 GENERAL OLSON: Well, it was -- I don't
19 know what you mean by --

20 QUESTION: Well, I mean, did it say, you
21 know, the Government must produce thus and so, thus
22 and so, thus and so?

23 GENERAL OLSON: Yes, it did, Mr. Chief
24 Justice, although it did say that the Government
25 could assert privileges with respect to burden or

1 executive privilege, and so forth. But if one looks
2 at those discovery orders and they are in the joint
3 appendix, they were much broader than the statute
4 itself, broader than the relief that possibly could
5 --

6 QUESTION: But now we are dealing with the
7 situation at the two, the two justices, judges on the
8 Court of Appeals both said, this is too, this
9 discovery order was too broad. It ought to be
10 trimmed. Now the District judge would have that
11 message, so you could have gone back there and said
12 see, District judge, this has to be narrowed.

13 GENERAL OLSON: Inevitably what would have
14 happened, because what the Court of Appeals said, and
15 this is at Petition appendix 18-A of the Court of
16 Appeals decision is that however refined the District
17 Court's order would be, they would be, the
18 Respondents would be entitled to whatever discovery
19 they needed to prove their case.

20 Now, what they need to prove their case,
21 notwithstanding the presumption of regularity that
22 the Court has always applied to the executive, absent
23 clear evidence to the contrary, there is no clear
24 evidence to the contrary here, Justice Ginsburg. All
25 there is is a pure unadorned allegation which the

1 Respondents say they get from media reports that
2 there were contacts, nothing beyond that.

3 But what they would need to prove, to
4 prove their case is precisely what the District Court
5 was going to allow them to utilize.

6 QUESTION: Well, can we get to --

7 GENERAL OLSON: In the form of --

8 QUESTION: Can we get to the jurisdiction
9 point? Why is it that you went to -- that you are
10 justified in going to the Court of Appeals? Because
11 there is a new exception to the collateral order
12 doctrine, or because you are seeking mandate?

13 GENERAL OLSON: Both, Justice Kennedy.

14 QUESTION: What is the exception? Is it
15 something new under Cox or is it on one of the before
16 Cox exceptions?

17 GENERAL OLSON: This fits squarely within
18 Nixon. When the Court said to require the President,
19 and remember, we are talking about the President as
20 the real party in interest, to place himself in the
21 posture of disobeying a court order, merely to
22 trigger the procedural mechanism.

23 QUESTION: We have already discussed that
24 he did not -- the Vice President in this case did not
25 exercise his privilege. Wasn't close to being held.

1 GENERAL OLSON: What we are dealing with
2 here is the President --

3 QUESTION: How do you describe the general
4 exception that you want us to have for discovery
5 disputes in the District Courts?

6 GENERAL OLSON: When the --

7 QUESTION: When it involves the Vice
8 President, it's different?

9 GENERAL OLSON: Well, it certainly does
10 when it involves the President or the Vice President
11 in core constitutional functions. And U.S. vs. Nixon
12 stands for the proposition when the President must
13 choose between submission to an unconstitutional
14 order, which participation in this discovery, the
15 process of participation, having to prove every time
16 the President consults with someone, to submit to
17 litigation, and potentially submit to discovery, to
18 submit to the violation of the separation of powers,
19 or, or violate or challenge either sanctions or some
20 order from the District Court.

21 QUESTION: You wouldn't have to do that if
22 you just asserted executive privilege as to each
23 discovery request that you thought would be
24 burdensome. And then if that's granted, you have no
25 problem. And if it's denied, you immediately come up

1 on that.

2 GENERAL OLSON: Justice Breyer --

3 QUESTION: Why not do that?

4 GENERAL OLSON: We believe that it's much
5 broader than executive --

6 QUESTION: I know that's your legal
7 argument, and you may be right about that. But
8 assuming you are right about that, you bring up the
9 broader issue on an appeal from the case. See if you
10 lose it. And as to your being right, being right I
11 guess isn't enough to get you to appeal a discovery
12 order if -- but maybe you can if you really need to.

13 So my question is, why did you really need
14 to since you could have asserted executive privilege
15 as to each individual.

16 GENERAL OLSON: Because the act of forcing
17 the President to invoke executive privilege every
18 time someone files a lawsuit, notwithstanding the
19 presumption of regularity which was completely
20 ignored here, that means that FACA would be used in
21 every case to file a lawsuit to challenge the
22 President and the Vice President's ability to --

23 QUESTION: Well, let me --

24 GENERAL OLSON: To obtain opinions --

25 QUESTION: Let me ask you this. At some

1 point, I think the Government made a Section 12(b)(6)
2 motion to dismiss this suit because the statute was
3 unconstitutional. And that was denied.

4 Now, could the Government not have sought
5 review either under the collateral order doctrine at
6 that time, or even by mandamus to address directly
7 whether the statute is constitutional?

8 GENERAL OLSON: Potentially, Justice
9 O'Connor.

10 QUESTION: Why didn't the Government do
11 that?

12 GENERAL OLSON: Because the Government was
13 anxious -- because there was another way to resolve
14 this whole problem, notwithstanding the denial of the
15 12(b)(6) motion to dismiss.

16 QUESTION: But wouldn't that have given
17 the courts a chance to go directly to the issue of
18 whether the statute is constitutional?

19 GENERAL OLSON: We submit that what the
20 Government did here was try to work out the delicate
21 constitutional problems that were involved here, the
22 balancing of the executive's prerogative with the
23 litigation function and that sort of thing, and to go
24 the extra mile. I don't think the Court would want
25 to encourage filing a mandamus or collateral order

1 appeals every time there is a denial of a motion to
2 dismiss.

3 QUESTION: I take it, General Olson, that
4 from the rest of your argument that traditional
5 executive privilege doctrine would not cover all of
6 the constitutional issues that you think exist here?

7 GENERAL OLSON: That's precisely correct,
8 Mr. Chief Justice. The forcing of the President to
9 submit to litigation and discovery, which if
10 permitted in this case could be in any case
11 comparable to it, any time advice is being sought
12 from a citizen or from subordinates who may have then
13 talked to citizens, notwithstanding the clear four
14 corners of the directive when the President created
15 the body within his own Administration from which he
16 sought advice, every time there would be a lawsuit,
17 every time they would say, well, Mr. President, come
18 into court and claim executive privilege.

19 QUESTION: I see that. I see that. But
20 that's an argument which you made in response to my
21 question which is an argument on the merits. And I
22 want you to focus on the fact that -- assume I agree
23 with you on the merits. You will have a chance to
24 make that argument on the merits, even if you lose
25 here and if you lose the case.

1 Now, my question is addressed to the need
2 for an interim appeal from the discovery. And as to
3 that, what is your response to the fact that you
4 could get your interim appeal or at least preserve
5 yourself from harm if you had asserted executive
6 privilege to the individual bits of the discovery
7 order with which you disagreed.

8 GENERAL OLSON: There is two answers to
9 that, one of which the Chief Justice suggested in his
10 question. Executive privilege may not have covered
11 every scrap of paper. It would have required the
12 President and the Vice President to spend time with
13 documents deciding whether or not to assert executive
14 privilege.

15 And it is the process -- more importantly
16 than that, it is the process itself of submitting, as
17 it would be if someone, if the Congress had applied
18 this statute to the Supreme Court of the United
19 States or even to itself, and then allowed litigants
20 to bring the Court or members of Congress into court
21 to explain why they wouldn't produce information with
22 respect to who they talked to.

23 QUESTION: Well, but Mr. Olson you know better than
24 most the dynamics -- than most attorneys, the dynamics of
25 the discovery system. I hear in your argument echoes

1 of every discovery dispute I've ever listened to.

2 GENERAL OLSON: Yes. There are several
3 differences, Justice Kennedy. As I said at the very
4 beginning, this discovery dispute involves bringing
5 the President and the Vice President of the United
6 States into court to defend themselves with respect
7 to textually committed obligations and
8 responsibilities that they have under the
9 Constitution.

10 Every other discovery dispute that I have
11 experienced, and I submit this Court has experienced
12 except for perhaps U.S. vs. Nixon, maybe another
13 case, did not involve those circumstances. This is
14 at -- this puts the President, in order to challenge
15 the constitutionality of a process that's invasive to
16 fundamental Presidential prerogatives and
17 responsibilities into court to defend himself,
18 notwithstanding the questionable constitutionality of
19 the statute that triggers it, that mandamus may not
20 be brought against the Vice President which is the --
21 the Federal Advisory Committee Act, it's worth
22 mentioning, does not create a private right of
23 action. The APA did not create a right of action
24 against the Vice President here.

25 So the litigants in this case, not having

1 a right to even bring this case under the statute,
2 then sought mandamus, it's important to mention.

3 QUESTION: Well, then why did the
4 Government turn over 36,000 pages of paper from the
5 agencies that were also a part of this action if the
6 whole thing is so misguided, if the application of
7 this Act violates the separation of powers, why did
8 the Government respond to the request for information
9 from the agencies?

10 GENERAL OLSON: There are several answers
11 to that. One, the agencies occupy a different
12 statute under the APA. They occupy a different
13 position under the Freedom of Information Act. And
14 therefore, the obligations were different with
15 respect to the President's core function. Arguments
16 --

17 QUESTION: But those documents that were
18 turned over were, as I recall, documents that would
19 have been available under FOIA, is that right?

20 GENERAL OLSON: Yes, Mr. -- Justice
21 Scalia, they would have been arguably available under
22 FOIA, and they were produced under FOIA.

23 QUESTION: But you didn't get, you didn't
24 make the argument that no discovery, you are very
25 clear about that, no discovery is appropriate under

1 this statute. And yet you didn't, whether -- whether
2 the information that was turned over could have been
3 gotten under FOIA, this wasn't a FOIA suit.

4 GENERAL OLSON: There was more than one
5 action, Justice Ginsburg. There were several FOIA
6 actions brought against the various different
7 departments.

8 QUESTION: Well, specifically, these pages
9 that had been previously disclosed to other
10 requesters under FOIA. The request in this case,
11 wasn't it made to them under the FACA?

12 GENERAL OLSON: Yes. But the documents
13 having already been produced and made available to
14 the public under FOIA, it seemed to the government
15 that would be foolhardy and unnecessarily
16 confrontational and would serve no purpose whatsoever
17 to withhold producing another set of those documents.
18 Again, this is effort --

19 QUESTION: General Olson, would you
20 clarify one thing for me? Were these documents
21 produced by agencies or were they produced by the
22 energy policy group.

23 GENERAL OLSON: They were produced by
24 agencies.

25 QUESTION: So there has been no discovery

1 at all from the policy group, and you claim, of
2 course, that they are totally exempt under the plain
3 language of the statute.

4 GENERAL OLSON: Yes. And Mr. Chief
5 Justice, if I may reserve the balance of my time.

6 QUESTION: Very well. Very well, General
7 Olson. Mr. Morrison, we'll hear from you.

8 ORAL ARGUMENT OF ALAN B. MORRISON
9 ON BEHALF OF RESPONDENT SIERRA CLUB

10 MR. MORRISON: Mr. Chief Justice, and may
11 it please the Court:

12 The threshold question before this Court
13 is whether the Court of Appeals correctly ruled that
14 it lacked jurisdiction over Petitioners' attempt to
15 obtain interlocutory review of the District Court's
16 order.

17 In seeking review in this Court,
18 Petitioners paint the picture of having been backed
19 into a corner. They claim that if they do not obtain
20 immediate appellate review that they will lose all
21 meaningful opportunity to obtain review of the legal
22 positions that they have taken in the District Court.

23 The basis for this claim, as the Solicitor
24 General said, is United States against Nixon. The
25 Court of Appeals correctly distinguished that case,

1 and said that under neither mandamus or the
2 collateral order was review proper.

3 The Petitioners --

4 QUESTION: The Court of Appeals based
5 that, as I recall, on the fact that in Nixon,
6 executive privilege had been asserted, right?

7 MR. MORRISON: They certainly made that
8 observation, but that was not the only reason relied
9 upon by the Court of Appeals. There is some question
10 as to the extent to which the Court of Appeals
11 opinion can be read in that regard. We do not rely
12 on the fact that executive privilege was not claimed
13 because here the Government's position is that no
14 discovery of any kind whatsoever, other than the
15 previously produced documents, is available here.

16 QUESTION: I'm surprised to hear that. I
17 was, I was going to talk to you about executive
18 privilege, because I thought that your briefs did
19 rely on the fact that executive privilege was not
20 claimed, and that doesn't seem to me a very
21 significant factor.

22 MR. MORRISON: I thought I had been pretty
23 clear in my brief saying that executive privilege was
24 certainly something that could be claimed down the
25 road. And we certainly -- the District judge had not

1 precluded that from happening. But as far as we were
2 concerned --

3 QUESTION: It should make no difference to
4 the outcome of this.

5 MR. MORRISON: It makes no difference. It
6 makes no difference.

7 QUESTION: But there is an interim
8 position in which one would say, well, it makes a
9 difference to this extent, that until the executive
10 privilege has been claimed and has been ruled upon,
11 the extent of -- to which they have a plausible
12 separation of powers argument is not clear.

13 I mean, we could take that position, I
14 take it, you would agree?

15 MR. MORRISON: Yes. That would require
16 accepting the notion that -- that everything else
17 that they can -- they can refuse to turn over
18 everything else, which is essentially their position
19 here. The Solicitor General's brief is very clear,
20 no discovery, period, in this case.

21 QUESTION: It would also require
22 acceptance of the position that executive privilege
23 is a definable doctrine only applicable to certain
24 matters, and that it is, it is the function of this
25 court to decide what it can be asserted for and what

1 it can't be asserted for. And that is not my view of
2 executive privilege.

3 I think executive privilege means whenever
4 the President feels that he is threatened, he can
5 simply refuse to comply with a court order. And the
6 same thing with Congress. And it ends up in a, you
7 know, a struggle of the two branches. I don't view
8 that as some legal doctrine that enables him to
9 withhold certain documents.

10 He is, he has the power as an independent
11 branch to say, no, this intrudes too much upon my
12 powers, I will not do it. And after that, it's a,
13 it's a struggle between two branches. And if you
14 view executive privilege that way, forcing him to
15 assert executive privilege is really pushing things
16 to an extreme that should not very often occur in
17 this Republic.

18 MR. MORRISON: Well, leaving aside the
19 question of the interpretation of the United States
20 against Nixon as to whether that decision agrees with
21 Your Honor's interpretation, we don't have to get to
22 that issue in this case, and -- and the --

23 QUESTION: I don't want to delay this.
24 But to me this is important. Assume that their
25 interpretation of the statute is completely right.

1 Assume that.

2 MR. MORRISON: Yes.

3 QUESTION: I know you don't want to, but
4 for argument's sake, then what they are really asking
5 for is a separate exception from the collateral
6 order. I mean, and a separate exception that allows
7 them, the Vice President and the President, and
8 nobody else, to take an appeal from discovery.

9 Now, executive privilege in my mind came
10 in by asking, well, shouldn't they at least have to
11 assert that it's that kind of imposition upon the
12 President's office prior to being able to carve out,
13 under whatever name, a separate exception that would
14 permit an appeal.

15 MR. MORRISON: I don't read the
16 Government's brief as being that narrow. But to the
17 extent that what they are saying is that they have
18 some kind of special immunity from discovery, it
19 would, as Justice O'Connor suggested earlier, have
20 been perfectly apparent the day of July 11th when the
21 court denied the motion to dismiss, and ordered that
22 discovery is going to take place. That that was the
23 time in which the Government should have taken an
24 appeal if they claimed some sort of immunity like --

25 QUESTION: What kind of a --

1 QUESTION: Mr. Morrison --

2 QUESTION: You can't appeal from, you
3 can't appeal from the denial of the motion to
4 dismiss. That's really interlocutory.

5 MR. MORRISON: Well, Your Honor, but --
6 the notion that there is a special kind of immunity
7 from discovery of the President and Vice President, a
8 situation like this which is what I understand their
9 argument to be, that's the functional equivalent of
10 an immunity defense for which there is an exception
11 under the collateral order rule. I disagree with the
12 merits of that, but if that's their argument, that's
13 when they should have taken the appeal.

14 QUESTION: Are you saying --

15 QUESTION: I wonder about that. I can see
16 you coming up here and saying, everyone knows that
17 the motion to dismiss was denied is not
18 interlocutory. There has been no discovery yet.
19 There's been no order. They haven't been heard. I
20 can hear that.

21 MR. MORRISON: But nothing has happened of
22 any legal significance in the case from that time on.
23 The Solicitor General said the Government was trying
24 to work things out.

25 QUESTION: Discovery order. That's

1 significant. The mere denial of the motion to
2 dismiss did not automatically determine that there
3 would be a discovery order. The court, the court
4 might have found, in accordance with the arguments of
5 the Government, that discovery would be
6 inappropriate.

7 MR. MORRISON: Your Honor, with all
8 respect --

9 QUESTION: And so that is a new injury to
10 the, to the executive which they are trying to bring
11 up here.

12 MR. MORRISON: With all respect, Your
13 Honor, if you read the District Court's opinion, the
14 principal grounds on which the District Court refused
15 to dismiss the case was that discovery was required
16 both with respect to the de facto officer issue and
17 with respect to --

18 QUESTION: Ordinarily, that would be
19 summary judgment, not motion to dismiss. Motion to
20 dismiss just deals with the pleadings. You are not
21 talking about discovery at that stage.

22 MR. MORRISON: Well, the Government, Your
23 Honor, had offered in evidence the Executive Order
24 creating the task force and a copy of the final
25 report. The Knutson affidavit did not come in until

1 three months later.

2 QUESTION: Then why wasn't that the end of
3 the case? Because as I understand it, discovery is
4 just what you want at the end of the case.

5 MR. MORRISON: No, Your Honor.

6 QUESTION: What relief can you get if you
7 win the lawsuit?

8 MR. MORRISON: Well, if Your Honors will
9 look --

10 QUESTION: No. Tell me what relief you
11 can get if you win the lawsuit?

12 MR. MORRISON: We can get a declaration
13 that it was -- that de facto has to apply. We then
14 get access to all the drafts.

15 QUESTION: So you get discovery.

16 MR. MORRISON: No, Your Honor. What we
17 get -- some of the things we would have gotten --

18 QUESTION: You get more discovery, or what
19 did you get if you win the lawsuit? That's the thing
20 I hadn't really been understanding.

21 MR. MORRISON: We get copies of all the
22 papers that were exchanged in the entire advisory
23 committee process.

24 QUESTION: Have you not asked for those in
25 discovery?

1 MR. MORRISON: We have asked for
2 document -- for discovery requests which the
3 Government contends are very broad and could include
4 some of those things. Our discovery plan --

5 QUESTION: And are they right?

6 MR. MORRISON: They could be interpreted
7 as being right, but not in light of what the District
8 Court said in his order denying the motion to
9 dismiss. He said, we are going to have very narrow,
10 tailored discovery designed to find out first and
11 foremost is the de facto officer applicable. If you
12 look at our plan of discovery, which is in the joint
13 --

14 QUESTION: What is this de facto officer?
15 Where does that come from?

16 MR. MORRISON: It comes from a case that
17 was decided in the D.C. Circuit in 1993.

18 QUESTION: It did not involve this
19 particular exception from the FACA, though.

20 MR. MORRISON: Yes, it did, Your Honor.

21 QUESTION: It did not involve -- it did
22 not involve a committee composed entirely of
23 government employees.

24 MR. MORRISON: Oh, yes, it did, Your
25 Honor. It was alleged that -- the first place, the

1 Hillary Clinton task force was composed entirely of
2 government employees and the working subgroups were
3 also composed entirely of government employees. The
4 first question was, was the First Lady a government
5 employee.

6 QUESTION: Yes. I understand. But the --
7 as to the working groups, they were found not to be
8 government employees?

9 MR. MORRISON: No, Your Honor. They were
10 found sufficiently unclear that the Court of Appeals
11 sent the matter back for discovery.

12 QUESTION: And they were defined, they
13 were identified in the order appointing the
14 committee, the working groups. Do you contend that
15 any of the people named in the order appointing this
16 committee are not the people they purport to be?

17 MR. MORRISON: Not in the order appointing
18 the committee, Your Honor. But we do contend that
19 the subgroups --

20 QUESTION: That people not named in the
21 order are really members.

22 MR. MORRISON: Which were specifically
23 authorized --

24 QUESTION: Which is different from that
25 other case.

1 MR. MORRISON: It is arguably different.
2 But as Justice Ginsburg suggested earlier, since the
3 Court of Appeals was the one who created this
4 doctrine to begin with, it would seem inappropriate
5 for this Court to try to distinguish this case from
6 that one on the basis of when we, A, don't have a
7 record, and B, when the Court of Appeals had never
8 been allowed to pass on that particular issue.

9 QUESTION: That's a rather strange
10 doctrine, that we can't tinker with what the Court of
11 Appeals has done, even though we disagree with it.

12 MR. MORRISON: No. It hadn't done
13 anything, Your Honor. It has not ruled on that
14 doctrine in this case at all. It hasn't reached the
15 merits. The Court of Appeals decided nothing but
16 jurisdiction.

17 QUESTION: And so you say that we then are
18 prohibited from saying the Court of Appeals de facto
19 doctrine is wrong?

20 MR. MORRISON: I didn't say prohibiting,
21 Your Honor. I said in the exercise of your
22 discretion, it would be appropriate to allow the
23 Court of Appeals in the first instance to pass on it.

24 Judge Randolph, by the way, Justice
25 Stevens, thought in his dissenting opinion that the

1 only way he could distinguish the two cases was to
2 overrule the prior decision. He may or may not be
3 right, but it suggests to me --

4 QUESTION: Well, why isn't it wrong? Why
5 isn't, why isn't the Court of Appeals wrong on that,
6 the argument being that this is not a discovery
7 statute. This is not an ex parte communications
8 statute. This is not a Freedom of Information Act
9 statute. This is a blue ribbon committee statute.

10 MR. MORRISON: No, Your Honor --

11 QUESTION: And if you turn it into the
12 latter, you will stop --

13 MR. MORRISON: It is partially --

14 QUESTION: -- you will stop every --
15 you'll stop every lower level official in government
16 when he is creating legislative policy from getting
17 on the phone and calling up whoever he pleases. You
18 understand that argument. I want your response.

19 MR. MORRISON: All right. Two responses.
20 First, to some extent, it is an open government
21 statute because part of the relief under FACA is
22 getting access to all the documents that the
23 committee prepares, including its minutes.

24 Second is that this statute does not
25 apply, except to committees. A committee under the

1 Public Citizen case requires a substantial level of
2 formality. We concede that both this committee and
3 the Executive Office of the President and anyone else
4 can call anyone they want at any time without
5 triggering FACA. Only if you have a formalized
6 committee and if you bring people in to participate
7 in the same manner as other committee members --

8 QUESTION: That would require voting.

9 MR. MORRISON: Not necessarily, Your
10 Honor.

11 QUESTION: I have -- I have always been
12 puzzled by that in your briefs, to participate in the
13 same manner as other committee members. It seems to
14 me the essence of being a committee member is having
15 a vote in the outcome. So it seems to me the only
16 discovery you would need is discovery as to whether
17 anybody who was not a government employee voted.

18 MR. MORRISON: That, Your Honor, I suggest
19 is a question of law as to whether voting is
20 required, but we believe that if outsiders
21 participated in the marking up of drafts, they had
22 input into the drafts, particularly at the subgroup
23 level, even though they had no formal vote --

24 QUESTION: Why is that? If I bring
25 somebody else from my agency with me, I expect all of

1 these cabinet members didn't come to the meetings
2 alone. They certainly had assistants with them.
3 Were those assistants members of the committee?

4 MR. MORRISON: They were --

5 QUESTION: Certainly not.

6 MR. MORRISON: They didn't lose the
7 exception, Your Honor, because they were full-time
8 government employees.

9 QUESTION: I'm not asking whether they
10 lost the exception. I'm asking whether they were
11 members of the committee, and the answer has to be
12 no. Now, suppose I bring instead of another
13 government employee with me to give me advice, I
14 bring a private individual with me to give me advice.
15 Suddenly, that private member becomes -- private
16 individual becomes a member of the committee even
17 though a government agency member --

18 MR. MORRISON: It is certainly a plausible
19 interpretation, Your Honor.

20 QUESTION: Not plausible to me.

21 MR. MORRISON: Well, the statute says the
22 exception is composed of, wholly composed of
23 full-time government employees. Congress was well
24 aware of this problem and it decided that it wanted
25 to have a very narrow exception. At least it's an

1 arguable basis and we are now here on interlocutory
2 appeal without any facts in the record whatsoever as
3 to how these committees operated, how the subgroup
4 operated. They may have had a vote at the subgroup
5 level.

6 QUESTION: What do you say about the
7 presumption that high officials of the government
8 obey the statutory provisions that they are supposed
9 to follow?

10 MR. MORRISON: Well --

11 QUESTION: You don't have any information
12 and belief that the people who are said to have been
13 appointed were really not appointed, do you?

14 MR. MORRISON: They were appointed. If I
15 may, Your Honor, a quote from the staff director's
16 affidavit, which appears in the, in the joint
17 appendix on page 76. He admits, and the Government
18 admits, that there were substantial numbers of
19 meetings between outside people and the task force.

20 The question is what happened at those
21 meetings, and that's what we seek discovery. This is
22 not simply an allegation. The General Accounting
23 Office --

24 QUESTION: But that's all you would get if
25 you won the suit, and it goes back to Justice

1 Stevens' question. Isn't the posture of this case
2 one in which what happens at the end of discovery if
3 you prevail and get discovery is substantially the
4 same as if you won the suit.

5 MR. MORRISON: Your Honor, we would get
6 properly reined in discovery, as the District Court
7 understood it, we would get the basic information
8 about who went to the meetings, who had access to the
9 drafts, whether anybody had the right to vote. At
10 that stage of the proceeding, that's all the
11 discovery we think we are entitled to.

12 QUESTION: Do you think those are fairly
13 concluded within the separation of powers privilege
14 that the Government is asserting?

15 MR. MORRISON: I do not think that the
16 Government has any right to withhold that kind of
17 information in this kind of case. And if the
18 Government makes --

19 QUESTION: But that's, but that's the
20 issue.

21 MR. MORRISON: Yes. And if the Government
22 asserts that it has the right to withhold that
23 information, it may continue to assert that right.
24 The District Court will then proceed under Rule 37,
25 enter an order against it. It can then take an

1 appeal from a final judgment and the question --

2 QUESTION: Only if the District judge
3 enters a default judgment, but that's just one of
4 many options. The District judge isn't required to
5 take that --

6 MR. MORRISON: No. That is correct. And
7 get -- the question is, should we try to anticipate
8 what the District Court, District judge will do.

9 QUESTION: Thank you, Mr. Morrison.
10 Mr. Orfanedes, we'll hear from you.

11 ORAL ARGUMENT OF PAUL J. ORFANEDES
12 ON BEHALF OF RESPONDENT JUDICIAL WATCH, INC.

13 MR. ORFANEDES: Mr. Chief Justice, and may
14 it please the Court:

15 Judicial Watch submits there was no
16 jurisdiction in the Court of Appeals to review the
17 District Court's discovery orders, but assuming for
18 purposes of argument that there was jurisdiction, we
19 respectfully submit that the District Court properly
20 denied Petitioners' motion to dismiss, both as a
21 matter of statutory construction and consistent with
22 Circuit precedent and separation of powers.

23 QUESTION: Well, that surely is one thing
24 that's not before us, is it, is the District Court's
25 denial of the motion to dismiss?

1 MR. ORFANEDES: Well, no --

2 QUESTION: I mean, it's not appealable.

3 MR. ORFANEDES: That's correct. The
4 Government is arguing, however, that the discovery
5 that the District Court did order should not have
6 been ordered because of the underlying merits of the
7 motion to dismiss is my understanding of the
8 Government's argument. We submit that that's a --

9 QUESTION: They are arguing that it's not
10 before us -- what they are arguing is that this
11 statute doesn't apply, so therefore there was no
12 discovery. The statute isn't one under which you can
13 go behind the certification of the President, the
14 Vice President, et cetera. We both read their
15 briefs.

16 MR. ORFANEDES: I think that's
17 indistinguishable from arguing --

18 QUESTION: Okay. Well then go ahead and
19 make the argument.

20 MR. ORFANEDES: If you could allow me to
21 proceed. The District Court ordered discovery
22 because it believed that it was necessary in order to
23 avoid the constitutional issues that the Government
24 is raising in their briefs. In denying the motion,
25 the District Court properly applied what was Circuit

1 precedent at the time and is Circuit precedent, the
2 AAPS case, allowing for this de facto membership
3 doctrine that we have talked about.

4 The District Court thought that if
5 discovery yielded information that would show there
6 were no, there was no involvement of private
7 individuals in the task force, then there would be no
8 reason, no reason to even reach the constitutional
9 issues.

10 QUESTION: Involvement of private
11 individuals in the task force does not equate with
12 membership of private individuals in the task force,
13 and I wonder what your view is about the question
14 that I asked to Mr. Morrison. What, what is it that
15 makes you a de facto member? It surely can't be just
16 sitting there next to somebody else who is even at a
17 full committee meeting. It can't be sitting next to
18 the cabinet member.

19 MR. ORFANEDES: I think the court in the
20 AAPS case, that the District Court was relying on,
21 and that the Circuit Court was also --

22 QUESTION: Yes. Well, that case may be
23 wrong. What is it that makes you de facto member?
24 What -- I assume it's the same thing that makes you a
25 member, that is the power to determine the action the

1 committee will take. That is the power to vote.

2 MR. ORFANEDES: I think it's not looking
3 just at voting, but whether or not there is anything
4 that functionally distinguishes the members, the de
5 facto members from the actual members.

6 QUESTION: There is. The vote. Let's
7 assume that's the only thing that distinguishes them,
8 the vote. Isn't that enough?

9 MR. ORFANEDES: It could be a vote. But
10 there could also be -- it could also be more than
11 that, in this particular instance --

12 QUESTION: If it's more than that, you are
13 not talking about de facto members. You are talking
14 about de facto participants, and that's a different
15 --

16 MR. MORRISON: In this particular
17 instance, there was one allegation we set forth in
18 our complaint of policy recommendations that were
19 conveyed to the Vice President and those
20 recommendations did end up mirroring recommendations
21 that were --

22 QUESTION: Exactly. Now, their problem
23 with your interpretation of the statute, I take it,
24 is the following. Forget the Vice President. You
25 are Assistant Secretary of Antitrust.

1 MR. ORFANEDES: That's correct.

2 QUESTION: You are Assistant Secretary of
3 HHS in charge of drug policy. You are trying to
4 develop a legislative proposal. Every staff person
5 in the Congress, given such a task, would phone
6 everyone in sight who knows about it outside the
7 Congress to try to develop sound proposals.

8 And if it's a serious matter, they'd have
9 50 meetings with everybody under the sun. And if you
10 assigned the same thing, try to do the same thing
11 under your interpretation of the Act, every one of
12 those outside people could be hit with a discovery
13 order, what meetings did you go to, what did you say,
14 what did you do.

15 And their final point is that Congress
16 could not possibly have intended in this statute to
17 have created that circumstance, putting government in
18 a cocoon when it develops legislative policy. Now, I
19 have overstated what they said, but I'm trying to get
20 a response from you as to what I take is their basic
21 point.

22 MR. ORFANEDES: I think that's correct,
23 Justice Breyer. I don't think --

24 QUESTION: Well, you don't think it's
25 correct.

1 MR. ORFANEDES: I don't think -- I don't
2 think Congress would have created such a statute, and
3 I don't think they did create such a statute.

4 QUESTION: Cause.

5 MR. ORFANEDES: The case law that has
6 interpreted the statute and the statute themselves
7 requires a certain degree of formality, structure and
8 continuity to an advisory committee before, before
9 the requirements of the statute begin to apply.
10 Circuit Court precedent, including the Nader vs.
11 Barody case, that I think all the parties have cited
12 in their brief held exactly that. That there has to
13 be -- there cannot be ad hoc committee meeting or ad
14 hoc committee members.

15 QUESTION: Explain the degree of formality
16 that you think triggers the statute.

17 MR. ORFANEDES: Well, certainly there has
18 to be an establishing document, according to FACA. I
19 think there has to be some degree of understanding of
20 what the membership of the committee is going to be.
21 There talks about an end point to the committee as
22 well.

23 QUESTION: The Attorney General of the
24 United States turns to the head of the Antitrust
25 Division and says I want a legislative proposal about

1 Webb-Pomerene acts. You get together with your
2 counterpart at State, create an interagency task
3 force and give me a document, and he announces the
4 whole thing in a public speech. Now, do we have the
5 application, in your opinion, of FACA that would
6 trigger the questions I mentioned?

7 MR. ORFANEDES: That, that may trigger the
8 questions that we made. And I think there is one
9 thing that's important about this particular
10 committee, and the document that established it.
11 It's a January 29th memorandum from the President.
12 It's in the appendix at 157, I believe.

13 And in that document, the Vice President
14 was given the discretion to create subordinate
15 working groups. There is nothing in that document
16 that limits subordinate working groups to consisting
17 only of private employees.

18 QUESTION: If the interagency task force
19 creates the FACA situation in your view, imagine that
20 I have repeated my first question, but simply applied
21 it to interagency task forces. If you remember my
22 first question, it had to do with the cocoon.

23 MR. ORFANEDES: Sorry.

24 QUESTION: All right. Now, what is your
25 response?

1 MR. ORFANEDES: I think again what becomes
2 important is the membership of that task force. And
3 if that, if the idea behind creating that task force
4 allowed for, in the AAPS case, outside consultants or
5 consultants of undetermined origin, in this instance
6 subgroups, without any limitation as to whether or
7 not they would be Federal employees or not Federal
8 employees, in that instance, the requirements of the
9 statute could be triggered.

10 QUESTION: Those subgroups would report to
11 the full committee, I assume, they would not have any
12 dispositive authority over what the report of the
13 committee says, would they?

14 MR. ORFANEDES: Well, there was nothing in
15 the originating document that described who those
16 subgroups would report to.

17 QUESTION: Well, they are called
18 subgroups, aren't they?

19 MR. MORRISON: That's whether or not --

20 QUESTION: That seems to indicate that
21 they are under somebody. And I gather what they are
22 under is the committee.

23 MR. ORFANEDES: It could very well be
24 whether they reported to the committee as a whole or
25 to the executive --

1 QUESTION: Well, that's fine. I don't
2 care who they report to. They are not the committee.

3 MR. ORFANEDES: They are not the
4 committee, but FACA includes within its definition of
5 an advisory committee any subgroups or working groups
6 of a committee.

7 QUESTION: Well, if the, if the statute
8 requires disclosure of all these things, at the end
9 of the day, as a final order, and discovery, when
10 they are hit with a discovery order, it gives them
11 all the same information, why isn't the Government
12 right, that this really is the essence of the suit
13 and we should hear the merits of it now.

14 MR. ORFANEDES: I don't think it is the
15 essence of the suit. I think the appellate court
16 gave some strong advice to the District Court to
17 limit discovery to two points, really. Number one,
18 being the involvement, whether there were private
19 individuals involved.

20 QUESTION: I don't know how the Court of
21 Appeals --

22 MR. ORFANEDES: -- and to what extent --

23 QUESTION: -- can give any advice at all
24 if it says it has no jurisdiction or the case is
25 improperly before it.

1 MR. MORRISON: Well, I think -- and also a
2 significant point to be considered in that regard is
3 that the Government did not object to the scope of
4 this, of the discovery that it was -- as it was
5 served. They had the opportunity, they had every
6 opportunity to submit particularized objections,
7 including privileges, but not just privileges, also
8 objections as to scope, relevance, materiality. The
9 usual long litany of discovery objections that any
10 party is able to. They declined that opportunity.

11 The District Court was very careful. I
12 think he bent over backwards in inviting them to
13 assert objections on several occasions. They chose
14 not to do so. So for them to come back --

15 QUESTION: Suggesting that they -- they
16 consented to the discovery, but just they did not
17 make specific objections?

18 MR. ORFANEDES: They did not make specific
19 objections. No. I'm not saying they consented to
20 it. They were, they were clear in their objections
21 to any discovery whatsoever, discovery that the
22 District Court felt it needed as a means of
23 constitutional avoidance in order to determine, first
24 of all, whether the statute applies. And secondly,
25 in order to narrow any constitutional issues that it

1 might have to consider if the statute did apply.

2 QUESTION: In any case, they did not avail
3 themselves of the opportunity that the Court of
4 Appeals has clearly given them now to whittle that
5 order down.

6 MR. ORFANEDES: That's correct. They have
7 not.

8 QUESTION: But you are -- am I correct in
9 thinking your case in the District Court was just a
10 mandamus action, right? There is no cause of action
11 under the statute. And so in order to establish
12 relief on mandamus, you have to show a clearly, clear
13 right to relief and jurisdictional defect, something
14 along that kind. You don't normally file a mandamus
15 action and then get discovery to see whether you are
16 entitled to mandamus.

17 MR. ORFANEDES: Justice Stevens, we had
18 actually several different counts in our complaint,
19 which included, first of all, we did assert a count
20 under FACA. That was dismissed. We also asserted a
21 --

22 QUESTION: The FACA doesn't create a
23 private cause of action.

24 MR. ORFANEDES: That was ultimately the
25 basis for the dismissal.

1 QUESTION: That's why it was dismissed.

2 MR. ORFANEDES: But we also had an -- an
3 APA claim. And then ultimately --

4 QUESTION: But you don't -- that also has
5 no merit because the Vice President is not an agency,
6 and neither is the group.

7 MR. ORFANEDES: Well, the reasoning behind
8 the APA claim --

9 QUESTION: The only viable claim you had
10 was the mandamus claim, as I understand it.

11 MR. ORFANEDES: Well, the APA claim is
12 continuing with respect to the agency defendants.
13 The heads -- I shouldn't say the agency defendants.

14 QUESTION: And they have given you
15 the discovery you asked for, if I understand it?

16 MR. ORFANEDES: Actually, they have --

17 QUESTION: It's only the group itself that
18 refuses to give any discovery. And if I understand
19 their position, if we give you discovery, that's just
20 the same as giving you a victory in the lawsuit.

21 MR. ORFANEDES: The agency defendants have
22 given us some discovery, but at the same time, they
23 also asserted objections as to executive privilege
24 and deliberative process in answering our questions.
25 They did not give us any information about what role,

1 if any, independent individuals, private individuals
2 played in the deliberations of the task force.

3 QUESTION: Could you just embellish your
4 answer to Justice Stevens' question a little bit?
5 And that is, if you, if you get some discovery, and
6 you win your case, what do you get when you win that
7 you will not already have gotten by the discovery?

8 MR. ORFANEDES: I guess I just want to --
9 is this as a comparison to the discovery that, that
10 was ordered?

11 QUESTION: Whatever the discovery is.
12 Whatever the discovery is. You got enough discovery
13 to win your case, you win it. What do you get then
14 besides a statement saying they were wrong, you win.

15 MR. ORFANEDES: If discovery is limited to
16 the narrowing that the appellate court suggested,
17 none of that information, I believe, would be
18 something that we would get under the statute if we
19 were to win. Under the statute, we are entitled to
20 basically the documents of the committee as limited
21 by any properly applied exemptions of FOIA.

22 QUESTION: You are saying you get more
23 discovery?

24 MR. ORFANEDES: I wouldn't -- no, we don't
25 get more discovery.

1 QUESTION: What are these documents that
2 you would get that you would not already have gotten
3 at the discovery stage?

4 MR. ORFANEDES: Well, the documents the
5 appellate court was talking about, and in addition to
6 interrogatories which we don't get -- and actually,
7 at one point the Government actually suggested that
8 discovery take place on the basis of interrogatories.
9 We wouldn't get any interrogatory answers.

10 QUESTION: So you would get documents?

11 MR. ORFANEDES: We would get documents.

12 QUESTION: And what documents would you
13 get?

14 MR. ORFANEDES: We would get, I believe
15 the statute allows disclosure of all of the documents
16 of the task force subject to the limitations of FOIA.
17 The documents are produced as if the task force was
18 an agency subject to FOIA, and all the exemptions
19 that FOIA applies, I believe, apply to these
20 documents.

21 QUESTION: So you'd get a broad disclosure
22 is what you are saying?

23 MR. ORFANEDES: That's right. I think the
24 discovery as suggested or as narrowed by the
25 appellate court is a much smaller subset of the

1 information we would get if we were entitled to -- if
2 we ultimately prevail on the merits of the lawsuit.

3 There has been a couple of statements with
4 respect to our complaint being based on nothing more
5 than mere unsupported allegations. That is a false
6 statement, in our view. In order to support our
7 claims, we are relying first and -- first and
8 foremost on the statement in the memorandum creating
9 the document that says the Vice President has
10 discretion to create subordinate working groups.

11 Then we also attach several statements,
12 acknowledgments by the Government, that describe
13 meetings between task force representatives and
14 representatives of Enron and representatives of other
15 working groups. I believe the Government itself
16 acknowledged there were at least five such meetings.
17 We know that the Vice President met with the chairman
18 of Enron, Ken Lay. The Vice President himself in an
19 interview he gave on Nightline said we met with all
20 kinds of folks, we met with energy groups, we met
21 with environmental groups --

22 QUESTION: When does that -- I don't see
23 how that's --

24 QUESTION: What does that prove?

25 MR. ORFANEDES: The point is that this

1 shows the involvement of outside --

2 QUESTION: They talked to a lot of people,
3 got a lot of advice, but does that make them de facto
4 members of the committee?

5 MR. ORFANEDES: Well, that's the question
6 that we are seeking to answer through our discovery.
7 The point is that this is not an unsupported, these
8 are not mere unsupported allegations.

9 QUESTION: Well, I'm not sure that's
10 right. Just because you said they talked to a lot of
11 people doesn't really prove anything, it doesn't seem
12 to me.

13 MR. ORFANEDES: Well, if you put that
14 together, the allegations of the individuals that
15 were met with, with the statement in the memorandum
16 that allows the Vice President discretion to create
17 working groups, we think it does at least raise a
18 significant question as to whether outside
19 individuals were participating in these working
20 groups and participating in the committee as a whole.

21 In any event, the District Court firmly
22 believes that it needed this discovery in order to
23 answer these questions. I see my time is up.

24 QUESTION: Yes. Thank you, Mr. Orfanedes.
25 General Olson, you have five minutes left.

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REBUTTAL ARGUMENT OF THEODORE B. OLSON
ON BEHALF OF PETITIONERS

QUESTION: General Olson, I hope you'll address the point whether you'll, whether you'll have to disclose anything more at the end of the suit than you will under the discovery. Is there a big difference between what they get under the discovery order and what they would get if they win the suit?

GENERAL OLSON: Thank you, Justice Scalia. I was going to address that point because it's been addressed by Justice Souter, Justice Stevens, Justice Kennedy. What the discovery -- and I don't have time to read the interrogatories or the requests for admissions, but those require the production of all information with respect to any contacts at all between any member of the task force or any government employee that assisted with it or any agency --

QUESTION: Those were all within the scope of the order that the District Court gave?

GENERAL OLSON: Yes. Those were the discovery and requests for admissions. Now, the Court of Appeals didn't refine that. It said that, well, that's pretty broad, and it should be narrowed down, but it should be whatever is necessary to prove

1 their case.

2 They thought what was necessary to prove
3 their case was to have all outside contacts. FACA
4 does not require the production of that degree or
5 that scope of documents. It has to do with minutes
6 and drafts and things that were actually considered
7 by the committee. So the discovery is vastly broader
8 than the relief that would be available if FACA
9 existed. Secondly --

10 QUESTION: General Olson, I thought that
11 the, what the Court of Appeals said is there could be
12 discovery on two issues. And one was what
13 non-Federal offices participated, and two, to what
14 extent. Judge Tattle and Judge Edwards were both
15 pretty clear on that, that that would be the nature
16 of the discovery permissible.

17 MR. ORFANEDES: Well, of course. But
18 that's exactly what those requests for admissions in
19 those interrogatories seek. All contacts between any
20 member of the committee or any other government
21 employee and any outside person. And then what Judge
22 Tattle and what -- went on to say at page 18-A, that
23 is to say the discovery they need to prove their
24 case.

25 QUESTION: The point is it's different,

1 isn't it?

2 GENERAL OLSON: It's --

3 QUESTION: They want stuff on discovery
4 that has to do with who said what to who. And if
5 they win, they get a different set of things which
6 are the documents of agendas, et cetera.

7 GENERAL OLSON: Well, it's --

8 QUESTION: Is that right?

9 GENERAL OLSON: It's different, but it --
10 everything that they have asked for in those requests
11 for admissions and those interrogatories, Justice
12 Breyer, include everything they would get under FACA
13 and a whole lot more. So -- and there is no question
14 about that.

15 Now, with respect to the subordinate
16 working groups, a point was made with respect to the
17 President's directive, that the President said the
18 Vice President may establish subordinate working
19 groups to assist. The declaration that's in the file
20 at page 240 of the Joint Appendix specifically says
21 that the Vice President authorized that, but the Vice
22 President did not establish any such subordinate
23 working groups.

24 And then the declaration goes on to say
25 that there was only a public citizen that was

1 involved in developing graphics and that sort of
2 thing. And that was the only person that was
3 involved. No such individuals, the individuals named
4 in the litigation, participated in the working group
5 formulation.

6 What we are saying here is that the
7 constitutional immunity from discovery that we are
8 talking about here is rooted in the overriding
9 presumption of regularity, which, if repealed in this
10 case, would repeal -- if overridden in this case
11 would repeal the exemption under FACA for all
12 government working groups.

13 And these are exclusive functions,
14 textually committed to the President of the United
15 States getting opinions from his subordinates. As
16 your question suggested, Justice Breyer, virtually
17 anything that the President might do, asking the
18 Attorney General or the Assistant Attorney General
19 for this or that to formulate something, and they go
20 out to talk to people, that could be a -- that would
21 be a FACA lawsuit in a heartbeat.

22 There is no statute that creates the right
23 that the Petitioners seek here. There is no, there
24 is no cause of action under FACA, and there is, no,
25 Justice Stevens, no clear remedy, no clear right to

1 which they are entitled to ministerial duty and
2 therefore a remedy. And they just jumped over the
3 fact that the statute didn't give them the right to
4 bring this case and brought it in the form of
5 mandamus.

6 Mandamus is no substitute. It's not
7 appropriate here. It's a pure circumvention of the
8 statute. There is, we submit, no such thing as a de
9 facto member of an advisory group under FACA. FACA
10 was intended to address the creation of de jure
11 working groups where the President would cloak
12 himself in the benefit of public citizens who have
13 come up with this proposal. It's not, I think your
14 question, Justice Breyer, it's not a FOIA case. It's
15 not a --

16 CHIEF JUSTICE REHNQUIST: Thank you,
17 General Olson. The case is submitted.

18 (Whereupon, at 11:01 a.m., the case in the
19 above-entitled matter was submitted.)
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