No. 03-475

In the
Supreme Court of the United States

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, ET AL.,
Respondents.

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

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

U.S. Constitution, Statutes and Rules

INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation since 1970.

The American Society of Newspaper Editors is a non-profit organization founded in 1922. It has a nationwide membership of approximately 800 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

The media groups' interest in this case is in preserving the uninhibited exchange of information and access to federal government records. *Amici* submit this brief in support of the respondents' argument that the Federal Advisory Committee Act, 5 U.S.C. App. 1, is not unconstitutional as applied to the activities of the National Energy Policy Development Group. *Amici* also support respondents' argument that jurisdiction need not lie with the Supreme Court at this time, and that the case should be remanded to the District Court for development of these issues.

SUMMARY OF ARGUMENT

Amici support respondents Judicial Watch's and Sierra Club's argument that application of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 1, to the National Energy Policy Development Group ("NEPDG") is not unconstitutional. *Amici* further urge that the administrative record is an inadequate basis upon which to decide this case, and that the case be remanded to the District Court to proceed with discovery and resolution of the constitutional issues.

Open government laws such as the Freedom of Information Act and the Federal Advisory Committee Act are of vital importance to an informed citizenry and a free press. These laws provide two of the only windows into the actions of the federal government that acts in the public's name and with the public's funds. To a great extent, the public relies on the press as a conduit for this information.

Although the Federal Advisory Committee Act as interpreted by the courts imposes at most a minimal infringement upon confidential executive communications, the petitioners have launched a broad constitutional attack on the Act as a

violation of the doctrine of separation of powers. This argument ignores the precedents of this Court, which require that the Act's slight intrusion on executive communications be weighed against its vital importance to the press and the public.

ARGUMENT

I. The public's and news media's substantial interest in the application of the Federal Advisory Committee Act to the National Energy Policy Development Group outweighs the minimal infringement FACA places on executive power.

The public's interest in the workings of the NEPDG is very great. As discussed in I.B. below, this is both so that the public may be properly informed about the recommended energy policy, and so that it may be assured that the policy is not the subject of undue influence from any particular interest. The news media's interest is therefore also great as they are the public's primary means of access to this information.

In contrast, as discussed in I.A. below, the petitioners' interest – in not just withholding information on the basis of executive privilege, but in being wholly exempted from discovery – is very slight. Such an interpretation of the doctrine of separation of powers and executive privilege not only totally ignores the doctrine of checks and balances, but would render FACA ineffective or useless. All the government would have to do to hide the activities of an advisory committee from the news media and the public would be to associate it with upper-level executive officials, and no court could even look behind that assertion into the actual workings of the committee.

A. The application of FACA to the NEPDG is not unconstitutional.

The application of the Federal Advisory Committee Act to the National Energy Policy Development Group is not an "extreme interference with core Article II responsibilities," as petitioners assert. Brief of petitioners, at 43. This application of FACA to the NEPDG is only a minimal infringement on powers that are not exclusive to the President under Article II.

Furthermore, there are a number of protections of these executive powers available in this case, other than a complete bar on discovery. These protections include, but are not limited to, executive privilege and all of the normal litigation mechanisms designed to protect parties from abuse of discovery, such as *in camera* review, sealing and sanctions. The existence of these protections makes the broad immunity from discovery requested by petitioners unnecessary and inappropriate.

In cases such as this, where the constitutional power in question is minimally infringed, the Court has held that a balancing test between the asserted executive interest and the legislative interest in the conflicting statute is appropriate. *United States v. Nixon*, 418 U.S. 683, 706 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); *Morrison v. Olson*, 487 U.S. 654, 691-5 (1988).

1. Not every interference with executive power is a violation of the principle of separation of powers.

The principle of separation of powers is not implicated by every statute that works some interference, no matter how

minor, with executive power. This Court has established that a balancing test between the legislative interest in enacting the infringing statute and the infringement on executive power is appropriate.

In *United States v. Nixon*, 418 U.S. 683 (1974)(*Nixon I*), the Court rejected a broad claim of executive immunity similar to the one asserted by petitioners in this case. President Richard Nixon had been issued a subpoena in a criminal trial to produce executive papers and records of meetings, and attempted to quash the subpoena on the grounds that it was an unconstitutional judicial infringement on executive privilege. *Id.* at 688.

The Court first rejected President Nixon's contention that it was beyond the power of the judiciary to review a claim of executive privilege, holding that "any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *Id.* at 703-4.

The Court held that executive privilege was subject to balancing against other interests, and that, while important, confidentiality in executive privilege was not absolutely protected by the Constitution. *Id.* at 705-6.

> [N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality

> of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security interests, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

Id. at 706. The Court specifically did not address the balance between executive privilege and the need for relevant evidence in civil litigation, *Id.* at 712, n.19, but it remains that executive privilege must be weighed against other interests.

The Court reiterated this balancing of interests in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (*Nixon II*), when President Nixon invoked separation of powers and executive privilege in opposition to the application of the Presidential Recordings and Materials Preservation Act. "[T]he proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its Constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Id.* at 443 (internal citation omitted).

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court again rejected the idea that any infringement on executive power by the legislature or the judiciary violated the principle of separation of powers. While the Ethics in Government Act placed limits on the executive control over the independent counsel, an executive official, when taken as whole the Act did not violate separation of powers because it did not involve

an attempt to increase legislative or judicial power at the expense of the executive. *Id.* at 693-5. "The final question to be addressed is whether the Act, taken as a whole, violates separation of powers by *unduly* interfering with the role of the Executive Branch." *Id.* (emphasis added).

Lower courts have followed this lead in applying a balancing test when legislation works some infringement upon executive communications. In *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977)(*Dellums I*)(*cert. denied*, *Nixon v. Dellums*, 434 U.S. 880 (1977)), the U.S. Court of Appeals for the District of Columbia Circuit weighed President Nixon's interest in executive privilege against the plaintiff's need for evidence in a civil trial. The Court rejected the argument that "a formal claim of executive privilege based on the generalized interest of presidential confidentiality, without more, works an absolute bar to discovery of presidential conversations in civil litigation, regardless of the relevancy or necessity of the information sought." *Id*. at 245-6. *See also Dellums v. Powell*, 642 F.2d 1351, 1354 (D.C. Cir. 1980) (*Dellums II*); *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1980)("The privilege is qualified, not absolute, and can be overcome by an adequate showing of need.").

Petitioners' arguments that any infringement, no matter how minor, upon the President's constitutional powers or upon executive privilege is an unconstitutional violation of the principle of separation of powers are unfounded. To focus on separation of powers alone is to miss half of the equation, for there is also a concern with the principle of checks and balances. *Nixon I*, 418 U.S. at 703-4. Because both the values of executive autonomy and oversight by the other branches are implicated in this case, a balancing test between those conflicting interests is appropriate.

2. The executive interest in receiving confidential advice is only minimally infringed by the application of FACA to the NEPDG.

FACA as applied to the NEPDG is not an unconstitutional infringement upon the power granted to the President by the Recommendation and Opinion Clauses of the United States Constitution. Under the Recommendation Clause, the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. Const. Art. II, § 3. Under the Opinion Clause "he may require the Opinion, in writing, of the principal Officer in each of the executive Departments." U.S. Const. Art. II, § 2, Cl. 1.

The ability to recommend legislation to Congress is not an exclusive power granted to the President. Anyone in the country may propose legislation. *Association of American Physicians v. Clinton*, 997 F.2d 898, 908 (D.C. Cir. 1993) ("*AAPS*"). The D.C. Circuit noted in *AAPS* that according to the notes of James Madison, the "shall" language of Article II was included only to make clear that the President *could* recommend legislation and to prevent "umbrage or cavil" on the part of Congress when he did. *Id.* at 908, n.8. The power to recommend legislation is not comparable to the "need to protect military, diplomatic, or sensitive national security interests" cited by the Court in *Nixon I*, and not of such overwhelming importance that it may not be weighed against other interests.

FACA does not prevent the President from recommending legislation to Congress, thus, on its face, FACA does not directly interfere with the Recommendation Clause. To the

extent that FACA does interfere with the President's recommendation powers, it is a slight and indirect interference. Petitioners assert that FACA interferes with the President's ability to receive candid advice, which in turn harms the quality of the legislation the President recommends to Congress. This interference therefore only indirectly affects the President's Article II power.

Additionally, FACA's indirect influence only implicates a small, narrowly circumscribed category of advice to the President. FACA does not affect individual communications the President has with government advisors or with members of the public, nor does it affect advisory committees established by the President that consist solely of government officers or employees. 5 U.S.C. App. 1 § 3(2). FACA's openness provisions only apply to Presidential advisory committees that include members of the public. Consistent with FACA, the President is fully free to receive candid and confidential advice from individual government officials and members of the public, and from advisory committees composed entirely of government employees. *National Anti-Hunger Coalition v. Executive Committee*, 711 F.2d 1071, 1073 n.3 (D.C. Cir. 1983).

Because FACA does not interfere with the President's ability to receive the individual written opinion of the heads of the executive departments, the Opinion Clause is not implicated.

Furthermore, what is at stake in this case is not necessarily direct advice to the President, but advice to lower-level executive officers. To the extent that any sub-groups of the NEPDG may have included non-governmental employees, their input would have been to the lower-level executive members of the NEPDG. "Extending presidential privilege to

the communications of presidential advisers not directly involving the President inevitably creates the risk that a broad array of materials in many areas of the executive branch will become sequestered from public view." *In re Sealed Case*, 121 F.3d at 749 (internal quotation omitted).

The minimal interference with Article II powers in this case is not comparable to the legislative interference with presidential appointments in *Public Citizen v. United States Department of Justice*, 491 U.S. 400 (1989), relied on repeatedly by the petitioners. The majority in *Public Citizen* did not even reach the question of the constitutionality of applying FACA to the President's use of the American Bar Association to recommend judicial nominees, ruling entirely on statutory grounds. *Id.* at 443. Only the concurrence reached that question, and its concerns are distinguishable from those in this case. *Id*. at 467-8

According to the *Public Citizen* concurrence, the application of FACA to the President's use of the ABA to recommend judicial nominees was unconstitutional because it conflicted with the President's appointment power under Article II. *Id.* at 487. "He shall have power ... and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court, and all other Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2. As the concurrence in *Public Citizen* recognized, the power to appoint judges belongs exclusively to the President, and the role of Congress is clearly delineated. 491 U.S. at 483-5. It was upon this basis that the *Public Citizen* concurrence rejected the balancing approach of *Nixon* and *Morrison* to the President's appointment power. *Id*. Referring to *Nixon II* and *Morrison* the concurrence wrote, "In each of these cases, the power at issue was not explicitly assigned by the text of the Constitution to

be within the *sole province* of the President." *Id.* (emphasis added).

As discussed above, the power to recommend legislation is not exclusive to the President, and Congress' role is not so clearly circumscribed as with the appointment power. Much as *Morrison* was "not a case in which the power to remove an executive official has been completely stripped from the President," 487 U.S. at 692, in this case the President's ability to obtain the opinion of executive officers and recommend legislation has only been slightly and indirectly affected.

3. Complete immunity from discovery is unnecessary because there are other means of protecting the executive interest.

Blanket refusal to respond to discovery in this case is both unnecessary and inappropriate. A number of other protections exist to protect the confidentiality of executive communications, including the invocation of executive privilege and all of the normal protections that exist in civil discovery to protect litigants from abuses of discovery.

The proper remedy when the executive believes that a discovery order will damage confidential communications is to invoke a claim of executive privilege. "If a President concludes that compliance with a subpoena would be injurious to the public interest he may properly ... invoke a claim of privilege on the return of the subpoena." *Nixon I*, 418 U.S. at 713. *See also Nixon II* 433 U.S. at 443. Once executive privilege has been invoked, it then becomes the duty of the opposing party to demonstrate that the privileged material is essential to the just disposition of the case. *Id. See also In re Sealed Case*, 121 F.3d at 744-5.

Even where executive privilege has been overcome by the need for relevant evidence in a case, protections still exist to maintain the confidentiality of executive communications when necessary and appropriate. Allowing discovery to proceed is not, as petitioners assert, the same as mandating that records be open as required by FACA. Brief of petitioners at 48. "Disclosure because of the potential needs of litigation need not be made to the public." *Dellums I*, 561 F.2d at 249.

In camera review, as provided for by Fed. R. Civ. Pro. 26(c), is the proper protection in these circumstances. *Nixon I*, 418 U.S. at 713-4. "If a court believes that an adequate showing of need has been demonstrated, it should then proceed to review the documents *in camera* to excise non-relevant material." *In re Sealed Case*, 121 F.3d at 745. *See also Dellums I*, 561 F.2d at 251.

Other protections include limiting the scope of discovery and sealing necessary portions of the record upon a showing of good cause. Fed. R. Civ. Pro. 26(b)(2); Fed. R. Civ. Pro. 26(c). Finally, where claims or discovery requests in a case are improper or unwarranted, sanctions are available. Fed. R. Civ. Pro. 11(c); Fed. R. Civ. Pro. 26(g).

Because of the existence of these other protections, the petitioners' requested immunity from discovery is unnecessary and an inappropriate expansion of executive power. The problem in this case is not that appropriate protections for executive communications do not exist, but that the petitioners either failed, or refused, to ask for them. *In re Cheney*, 334 F.3d 1096, 1104-6 (D.C. Cir. 2003).

B. The public and the news media have an important interest in the application of FACA to NEPDG meetings.

In a democracy the public has an undoubted interest in access to the workings of the government that acts in the public's name and with public funds. According to James Madison, "popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And people who mean to be their own Governors, must arm themselves with the power which knowledge gives." *In re Sealed Case*, 121 F.3d at 749 (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822)).

The news media fill a vital role in providing that knowledge to the public. For many people, media access in the form of press reports, trade journals, and television and radio broadcasts is their only conduit for information about the workings of government in general, and advisory committees in particular. *Food Chemical News, Inc. v. Davis*, 378 F. Supp. 1048, 1052 (D.D.C. 1974). The news media have a "statutory right under [FACA] as well as a First Amendment privilege to report on the manner in which Government affairs are conducted." *Id*.

To that end, Congress enacted the Federal Advisory Committee Act, mandating that the records and meetings of certain advisory committees be open to the public that they serve. "[T]he Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees." 5 U.S.C. App. 1 § 2(b)(5). "Congress was concerned with the proliferation of unknown and sometimes secret 'interest groups' or 'tools' employed to promote or endorse agency policies." *Gates v.*

Schlesinger, 366 F. Supp. 797, 799 (D.D.C. 1973). "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals." *Public Citizen*, 491 U.S. at 453.

There is a further interest in access to advisory committees because of the legitimacy bestowed upon legislation when it was recommended by a group that conferred and considered the issue. "The group's activities are expected to, and appear to, benefit from the interaction among the members both internally and externally. Advisory committees not only provide ideas to the government, they also often bestow political legitimacy on that advice." *AAPS*, 997 F.2d at 913. Members of the public therefore have an interest in knowing who was on the committee, so that they might know if the resulting legislation and advice is truly the product of learned consideration, or if one viewpoint or another was given undue weight and consideration. This group-bestowed legitimacy differentiates the interest in access to an advisory committee under FACA from the interest in executive communications with individual members of the public or individual government officials.

The national energy policy discussed and recommended by the NEPDG is a matter of great public interest and importance. *Judicial Watch, Inc. v. National Energy Policy Development Group*, 219 F. Supp.2d 20, 25 (D.D.C. 2002). The NEPDG was charged by President Bush with "develop[ing] ... a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future." *In re Cheney*, 334 F.3d at 1098 (quoting Mem. Establishing National Energy Policy Development Group, Jan. 29, 2001). The NEPDG was thus charged

with balancing the oft-conflicting interests of business and environment, and of crafting a nationwide energy policy that would sustain the entire country into the future.

The public interest intensified with allegations that Kenneth Lay, the former CEO of the bankrupt energy company Enron, had contacts with the NEPDG. *Judicial Watch*, 219 F. Supp.2d at 25. Allegations that members of the energy industry may have had influence, improper or otherwise, on the recommendations of the NEPDG call into question the legitimacy bestowed by the group. This is amplified by the fact that national energy policy concerns matters of scientific and technical knowledge that the lay public must rely upon the NEPDG to evaluate for it.

The public's interest in the workings of the NEPDG is therefore very great, both so that the public may be properly informed about the recommended energy policy, and so that it may be assured that the policy is not the subject of undue influence from any particular interest. Thus the news media's interest is also great as they provide the public its primary means of access to this information.

II. The administrative record is not an adequate basis upon which to decide this case.

The administrative record is just a reiteration of the petitioners' disputed claims, and thus it is not an adequate basis upon which to decide this case. Petitioners argue that in order to avoid their asserted constitutional objections to the application of FACA to the NEPDG, the Court should instead decide this case on the basis of the administrative record and the Declaration of Karen Y. Knutson, Deputy Director of the NEPDG. Brief of petitioners at 8, 11-12. To decide the case

on this basis is to decide the case on nothing more than the petitioners' untested assertions that the NEPDG did not violate FACA.

Because FACA provides no private cause of action, this case is before the Court under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*.(APA), and a petition for *writ of mandamus* under the All Writs Act, 28 U.S.C. § 1361. *In re Cheney*, 334 F.3d at 1099.

Normally cases brought under the APA should be decided on the basis of the administrative record alone. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971). However there is an exception to this rule "where there has been a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents affective judicial review." *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998). *See also Overton Park*, 401 U.S. at 420; *Community for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997 (D.C. Cir. 1990).

The administrative record in this case is less than bare. The ultimate question before the District Court is whether non-governmental individuals were members of the NEPDG or participated regularly in its meetings, thus implicating FACA's openness requirements. But the dispute extends to what the appropriate definitions of "meeting" and "member" are under the Act. *See* Defendants' Responses to Plaintiffs' First Set of Interrogatories and Requests for Production, J.A. at 233. When the very definitions of what constitutes a "meeting" and who is a "member" are disputed, petitioners' declarations of who were and were not members are merely reiterations of their side of the argument and do not answer the questions. Deciding the case on the basis of the administrative record is to simply allow the petitioners to make an

unsupported claim that they did not break the law, without ever allowing a court to examine the validity of that claim.

Reliance on the Declaration of Karen Y. Knutson is also insufficient as such affidavits may be "merely 'post-hoc' rationalizations which have traditionally been found to be an inadequate basis for review." *Overton Park*, 401 U.S. at 419 (internal citation omitted). *See also Commercial Drapery*, 133 F.3d at 7. Furthermore, with regard to the staff-level sub-groups, Ms. Knutson could not recall how many meetings occurred or precisely who attended, and could only assert "[t]o the best of my knowledge" that only full-time federal employees attended. *See* Declaration of Karen Y. Knutson, J.A. at 240-1.

The case involving former President Clinton's health care task force provides an example of why such reliance on the administrative record and an affidavit is insufficient. In that litigation, Ira Magaziner, Senior Advisor to the President for Policy Development, signed a declaration under penalty of perjury stating that only government employees served as "members" of the working group of the President's Task Force on National Health Care Reform. *Association of American Physicians v. Clinton*, 879 F. Supp. 106, 107 (D.D.C. 1994). As in this case, the definition of "members" was in question. *Id*. Once the litigation proceeded, it was discovered that "numerous individuals who were never federal employees did much more than just attend working group meetings on an intermittent basis" and that "some of these individuals even had supervisory or decision-making roles." *Id*. at 108. *See also National Anti-Hunger Coalition*, 711 F.2d at 1074-77 (Cir. Ct. was unable to review new evidence of the activities of an advisory body where the new evidence was not in the record before the District Court).

Finally, remanding this case to the District Court will allow the courts to refine – based on a fact-specific record – how questions of what constitute "meetings" and "members" under FACA that have been at issue since *AAPS* and before are to be answered. 997 F.2d at 914. This is precisely what both the District Court and Court of Appeals attempted to do in this case. *Judicial Watch*, 219 F. Supp.2d at 53-4; *In re Cheney*, 334 F.3d at 1108-9. As the Court said in *Nixon II* in reference to the Presidential Recordings and Materials Preservation Act, "If the broadly written protections of the Act should nevertheless prove inadequate to safeguard appellant's rights or to prevent usurpation of executive powers, there will be time enough to consider that problem in a specific factual context." 433 U.S. at 455.

CONCLUSION

Amici respectfully ask the Court to weigh the minimal infringement the Federal Advisory Committee Act makes upon confidential executive communications against the Act's vital importance to the news media and the public. In so doing, the Court should find in favor of the respondents by affirming the decisions of the lower courts, and remand this case to the District Court to proceed with discovery and resolution of the constitutional issues.

Respectfully submitted,

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March 11, 2004

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