

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUDICIAL WATCH, INC., and SIERRA CLUB,	)	
	)	
Appellees,	)	
	)	
v.	)	No. 02-5355
	)	
RICHARD B. CHENEY, VICE PRESIDENT OF	)	
THE UNITED STATES, et al.,	)	
	)	
Appellants.	)	
_____	)	

**APPELLEES' RESPONSE TO PETITIONERS' EMERGENCY
MOTION FOR STAY PENDING APPEAL**

Petitioners Vice President Richard B. Cheney, Andrew Lundquist, Joshua Bolten and Lawrence Lindsey (collectively, "Petitioners") seek a stay of a District Court order requiring them to submit a privilege log and produce any documents for which no legitimate claim of privilege can be made. Order of October 17, 2002.¹ Appendix 313-14 ("App."). Petitioners have shown neither the irreparable injury nor the likelihood of success necessary to justify a stay of that order pending appeal. Preparing a privilege log will cause Petitioners no harm, and this Court has specifically held that production of non-privileged material – even by the White House – does not constitute irreparable injury. In re Executive Office of the President, 215 F.3d 20, 23 (D.C. Cir. 2000). Petitioners avoid any discussion of the practical impact of the District Court's orders, resorting instead to unsubstantiated claims that discovery against them, in the abstract,

¹Petitioners do not specify which order they seek to have stayed, instead referring generally to "the district court's orders permitting discovery against them." Stay Motion, p. 1. The October 17 Order contains the only tasks that Petitioners might have to perform during the pendency of this appeal: preparing a privilege log and producing any non-privileged documents, by December 9, 2002. (The December 9 date was set in an order dated November 13, 2002.)

will cause irreparable injury. As the District Court recognized, those bare assertions do not suffice. App. 370. "To constitute irreparable harm, [a party's] alleged injury must be 'certain and great,' not theoretical." Tenacre Found. v. Immigration & Naturalization Serv., 78 F.3d 693, 695 (D.C. Cir. 1996) (citation omitted).

Petitioners are also highly unlikely to prevail on the merits; even if any of the District Court's orders were subject to interlocutory appeal (which they are not), the District Court's rulings were correct. Petitioners' accompanying Petition for Mandamus alleges that: (a) discovery against any of the Petitioners is barred by both the Constitution and the Administrative Procedure Act, so that the District Court should be limited to review of only such evidence that Petitioners see fit to disclose; and, (b) FACA cannot be enforced against the Vice President because it does not contain its own independent cause of action.

Petitioners are wrong. In Clinton v. Jones, 520 U.S. 681, 705 (1997), the Supreme Court emphatically rejected the notion that discovery against the White House violates separation of powers: "the Judiciary may severely burden the Executive Branch by reviewing the legality of the President's official conduct, and . . . may direct appropriate process to the President himself." Nor does the Administrative Procedure Act bar discovery. See Community for Creative Non-Violence v. Lujan, 908 F.2d 992, 997 (D.C. Cir. 1990). And this Court has held that the federal mandamus statute, 28 U.S.C. § 1361, permits a Court to enforce a statute when the statute does not contain its own cause of action. Chamber of Commerce v. Reich, 74 F.3d 1322, 1327-28 (D.C. Cir. 1996). See also Center for Auto Safety v. Tiemann, 414 F. Supp. 217, 217 (D.D.C. 1976) (jurisdiction over FACA claims under APA and mandamus statute); Food Chem. News, Inc. v. Davis, 378 F. Supp. 1048, 1050 (D.D.C. 1974) (same); Washington Legal Found. v. U.S. Sentencing Comm'n, 89 F.3d 897, 901-02 (D.C. Cir. 1996) (holding that when "the Government

has a duty to the plaintiff . . . to allow it access to certain government records” mandamus statute allows court to take jurisdiction).

Finally, as the District Court recognized, “the harm to both the plaintiffs and the public of granting the stay is substantial, likely, and adequately proven.” App. 371. For these reasons, this Court should not stay the October 17 Order.

SUMMARY OF FACTS AND PROCEEDINGS

The National Energy Policy Development Group (“Task Force”) was convened to review U.S. energy policies. That review was conducted by a broad array of federal officials and agencies. The Task Force formed an independent Working Group to assist it; the Working Group delegated various tasks to its members and to assorted federal agencies. Those agencies in turn designated numerous personnel and sub-groups to address them. This process culminated in the Task Force’s final report, published in May 2001. The report contained a series of regulatory and legislative proposals constituting the Bush Administration’s energy policy, which the Administration is currently seeking to implement. App. 123-24.

Representatives of major coal, oil, natural gas, and nuclear energy companies, as well as their corporate trade associations, participated in Task Force’s proceedings. App. 124. Plaintiffs have alleged that their participation was sufficiently extensive to render the Task Force, or sub-groups that assisted the Task Force, an advisory committee or committees subject to FACA. See Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 921-22 (D.C. Cir. 1993) (by requiring that agency deliberations “be conducted in the open,” when they involve non-federal parties, FACA prevents “special interest groups” from promoting their private concerns through participation in government policy-making).

Along with the other defendants, Petitioners filed a motion to dismiss this case on assorted constitutional and jurisdictional grounds, arguing, inter alia, that in any event discovery against them was impermissible. Defendants' Consolidated Reply Memorandum in Support of Motion to Dismiss (April 26, 2002) at 21-28. In a 78-page opinion, the District Court denied that motion, and held that it would permit "a very tightly-reined discovery process" in order to develop an appropriate factual record. App. 193. The Court then requested a Discovery Plan from plaintiffs and ordered defendants to present their objections to any proposed discovery. App. 200.

Rather than present such objections, defendants responded to plaintiffs' Discovery Plan by asserting that discovery was barred by the Constitution (as they had argued in their motion to dismiss) and by the Administrative Procedure Act. Defendants' Objections to Plaintiffs' Proposed Discovery Plan (July 29, 2002). The District Court disagreed, approved the proposed Discovery Plan, and ordered defendants to "file detailed and precise objections to particular requests." App. 239. Having twice rejected their arguments that discovery was impermissible, the Court specifically cautioned defendants "not [to] make general invocations of privilege . . . but [to] identify and explain their invocations of privilege with particularity." Id.

In lieu of responding to the Court-approved discovery, Petitioners filed a Motion for Protective Order contending, now for the third time, that discovery against them was categorically inappropriate. The District Court disagreed and (yet again) ordered Petitioners to "produce non-privileged documents and a privilege log" in accordance with its prior orders. App. 313. Those materials are now due on December 9, 2002. Rather than comply, Petitioners first sought a stay in the District Court, and asked the District Court to certify its decisions for interlocutory appeal under 28 U.S.C. § 1292(b). The District Court denied the stay (App. 364-

74), and will rule on the 1292(b) motion on or before November 26. Petitioners have also appealed the District Court's rulings as "final orders" under 28 U.S.C. § 1291 (Docket No. 02-5355), and filed an emergency petition for writ of mandamus (Docket No. 02-5354). In this motion they seek a stay pending those appeals.

THIS COURT SHOULD DENY A STAY

To receive a stay pending appeal, Petitioners must demonstrate that four factors favor its issuance: (1) the likelihood that they will prevail on the merits; (2) the prospect of irreparable injury absent a stay; (3) the possibility of substantial harm to other parties absent a stay; and, (4) the public interest. Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). As this Court has recently emphasized, these are "stringent standards." Summers v. Howard Univ., 2002 WL 31269623 (D.C. Cir. 2002) (citing Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (1958)). Petitioners have not met them.

I. PETITIONERS WILL NOT SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY

A. Preparing A Privilege Log And Producing Non-Privileged Materials Do Not Create Irreparable Harm

Absent a stay, Petitioners will need to prepare a privilege log and produce those documents, if any, that Petitioners believe to be non-privileged. These are the most mundane of litigation tasks. They will inflict no more irreparable injury than writing a brief, appearing at a hearing, or any other basic lawyering task. The October 17 Order demands only the time of Petitioners' counsel and, as such, inflicts no irreparable harm. Renegotiations Bd. v. Bannerkraft Clothing Co., 415 U.S. 1, 24 (1974) (citation omitted) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.") Submitting a privilege log and producing any non-privileged documents should require minimal further effort. As of October

29, Petitioners' counsel had completed their privilege review of 2 out of the 12 boxes of responsive documents. Defendants' Response to Order of Oct. 28 (Oct. 29, 2002) at 2. Given that review of each box of documents and preparation of a privilege log required "one to two attorney days," and that "eight attorneys are participating in the review process," *id.*, by now – some three weeks later – the Department of Justice has surely completed the process.

In the words of the District Court:

[T]here is insufficient likelihood of "irreparable harm" to defendants to justify a stay. Both the Circuit and the U.S. Supreme Court have approved the very "harm" defendants point to: discovery procedures in which a request for documents from a member of the Executive is made in the context of judicially supervised discovery, the document is either produced or a privilege is asserted with respect to the document, and, in the latter case, the party seeking the document must demonstrate that the public need for the document outweighs the interests underlying the privilege in order to obtain production of the document. *See, e.g., Clinton v. Jones*, 520 U.S. at 704-705; *In Re Executive Office of the President*, 215 F.3d 20, 22, 24 (D.C. Cir. 2000); *Dellums v. Powell*, 561 F.2d 242, 247, 248 (D.C. Cir. 1977); *see also Nixon v. Administrator of General Services*, 433 U.S. 425, 439-455 (1977).

App. 370-71. Sidestepping the practical impact of the District Court's orders, and the settled law approving the District Court's decisions, Petitioners instead attempt to construct "irreparable harm" from two purely abstract contentions. Neither has merit.

B. Disclosure of Non-Privileged Material and a Privilege Log Will Not Affect This Court's Ability to Provide "Meaningful Appellate Review"

Petitioners first argue that, "[a]bsent a stay, the government will be unable to obtain meaningful appellate review of the serious constitutional and statutory issues implicated by the court's rulings," and that a stay "is essential to maintain the appellate court's ability to exercise its proper authority over lower court rulings." Stay Motion, p. 9. That contention has no basis. Discovery orders are, as this Court has repeatedly recognized, fully subject to review on appeal from a final judgment. *Byrd v. Reno*, 180 F.3d 298, 302-03 (D.C. Cir. 1999); *In re Kessler*, 100 F.3d 1015, 1017 n.2 (D.C. Cir. 1996); *In re United States*, 872 F.2d 472, 479-80 (D.C. Cir.

1989). See Appellees' Response to Emergency Petition for Writ of Mandamus at 6-10 (filed in Docket No. 02-5354). The only exception to that rule is a discovery order that threatens to disclose "highly privileged material." In re Executive Office of the President, 215 F.3d at 23. Such orders can let "the cat . . . out of the bag" in a manner that vitiates later review, and therefore may be effectively unreviewable on appeal from a final judgment. Id. The October 17 Order, in contrast, does not require the disclosure of a single document that Petitioners believe to be privileged; it asks only that Petitioners assert privileges. See App. 227.

Petitioners cite two cases for the proposition that review of the District Court's order after final judgment will, nevertheless, not suffice. Both cases actually illustrate why the disclosure of the information sought here does not rise to the level of irreparable injury. John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1308-09 (1989) concerned the release of information pursuant to the Freedom of Information Act, after the Justice Department submitted testimony that the disclosure of that specific information would "interfere with an ongoing law enforcement investigation by apprising the targets of that investigation of the nature of the grand jury's inquiry." Not surprisingly, Justice Marshall stayed disclosure, agreeing that this information "posed a substantial risk of jeopardizing an important ongoing grand jury investigation." Id. at 1308. In Providence Journal Co. v. Federal Bureau Investigation, 595 F.2d 889 (1st Cir. 1979), the Court of Appeals stayed production of specific documents that "reflect the results of an unauthorized and illegal [FBI] wiretap." As the Court observed, a stay pending appeal was proper because, "[o]nce the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored." Id. at 890.

In contrast, the October 17 Order requires disclosure of no information that Petitioners believe to be privileged or confidential; again, it asks only that Petitioners specify the

information that they wish to withhold, and release non-privileged documents. Doing so presents no harm comparable to that occasioned by the release of information that would jeopardize an ongoing criminal investigation, or the release of transcripts of an illegal wiretap. Indeed, Petitioners do not contend that the District Court's orders will result in the disclosure of specific privileged or otherwise sensitive information. They assert, instead, that if one "accept[s]" their premise that discovery offends separation of powers, then complying with District Court's orders will harm them in a manner that will be irreparable upon later appeal. Stay Motion, p. 9.

This is baseless. Every party who disagrees with a lower court order is, by definition, "injured" in some sense by having to comply with that order until an appellate court rules upon its propriety. See People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 540 (7th Cir. 1997) (noting that all procedural discovery orders "order a party to do or not do something," but "for obvious reasons" can be reviewed at a later time). However, appellees know of no case – and Petitioners cite none – holding that the bare allegation that a decision violates the Constitution creates an "irreparable" injury warranting a stay. As the District Court observed:

Defendants cannot be permitted to manufacture irreparable harm by simply stating a legal principle with no precedential support whatsoever, and then claiming irreparable harm if they believe a court order violates that principle.

App. 370.

This Court's decision in Executive Office of the President, 215 F.3d at 23 is directly on point. There, the White House sought mandamus in order to avoid responding to discovery. The Court noted that mandamus requires the petitioner to show it "will be harmed in a way not correctable on appeal," as Petitioners claim they will be harmed by the October 17 Order. However, this Court held that "even assuming, arguendo, that the District Court's holding . . . is

clear error,” there was “no showing of harm of the sort required” for mandamus because there was no “viable claim that some important privilege will be infringed if discovery is allowed to proceed.” Id. at 23-24. Thus this Court has established that even a “clearly erroneous” order requiring the White House to disclose non-privileged information does not create irreparable injury, or otherwise affect this Court’s ability to provide “meaningful appellate review.”

C. The October 17 Order Does Not and Will Not Incapacitate the Executive Branch

Next, Petitioners rely on two very dramatic, but totally conclusory, assertions. Neither has any merit. First, Petitioners assert that this discovery “imposes a significant burden on the Vice President and officials in his office.” Stay Motion, p. 9. Petitioners do not, however, describe the nature of this “burden” on the Vice President or the unnamed officials. In fact, the only burden imposed by the October 17 Order is: (a) being shouldered by the Department of Justice, and (b) limited to review of a few boxes of documents, a review that should, by now, be complete. See Section I.A, above.

Second, Petitioners make an equally unsubstantiated claim that the District Court’s decision to permit discovery in a FACA case will, absent a stay, result in the “chilling [of] intra-Executive Branch efforts to advise the President.” Stay Motion, p. 9. However, the October 17 Order does not govern or implicate the Executive branch’s conduct in any matters except this case. The White House made the same argument in Executive Office of the President, 215 F.3d at 24, claiming that “the President’s interactions with his closest advisors will be irreparably damaged in the future, because the District Court has sought to coerce the White House . . . into following a view of the Privacy Act to which it does not subscribe.” As this Court pointed out:

District Court decisions do not establish the law of the circuit, nor, indeed, do they even establish “the law of the district.” . . . In activities unrelated to the instant case, the White House, as it has done for many years on the advice and counsel of the Department of Justice, remains free to adhere to the position that the Privacy Act does not cover members of the White House Office. The District

Court's view on this matter will be subject to review on appeal following final judgment in this case.

Id. at 24-25 (citations omitted). Substitute the words "discovery is improper in a FACA case" for "the Privacy Act does not cover members of the White House Office," and that holding adequately disposes of Petitioners' argument.

Petitioners' predictions of "significant burden[s]" and "chilling" contrast sharply with the practical, and minimal, impact of the October 17 Order: it does no more than require Petitioners to produce non-privileged materials and assert privileges as to the rest. The District Court has certainly not held that "efforts to advise the President" must be disclosed in this case; Petitioners remain free to assert a claim of privilege over such documents. See, e.g., In re Sealed Case, 121 F.3d 729, 752-53 (D.C. Cir. 1997) (holding that "communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege"). The mere fact of discovery is not irreparable harm; even "[s]itting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty." Clinton v. Jones, 520 U.S. at 704.

II. PETITIONERS ARE NOT LIKELY TO SUCCEED ON THE MERITS

Petitioners are unlikely to prevail on appeal for two reasons. First, they seek interlocutory review of discovery orders and denial of their Motion to Dismiss. Those orders are entirely reviewable following entry of a final judgment in this matter, and accordingly are not subject to review via either 28 U.S.C. § 1291, see Sierra Club's Motion to Dismiss Appeal at 13-14 (filed in Docket No. 02-5355), or a writ of mandamus, See Appellees' Response to Emergency Petition for Writ of Mandamus 6-10 (filed in Docket No. 02-5354). And, second, the District Court's decisions are correct; the Executive branch is subject to FACA, and it is

subject to discovery. See id. at 10-20. Because those briefs address the merits of Petitioner's arguments in detail, appellees will not repeat that discussion here.

III. A STAY THREATENS HARM TO BOTH PLAINTIFFS AND THE PUBLIC

The delay occasioned by a stay will, in contrast, harm both plaintiffs and the public.

Judicial Watch's lawsuit has been pending for eighteen months, Sierra Club's for a year. As the District Court recognized:

Congress, Executive agencies, and the public have been debating the energy policy developed by defendants without the benefit of the information sought by plaintiffs in this case. In some instances, final actions have already been taken. As time proceeds, the value of the information sought by plaintiffs . . . declines substantially, thereby effectively denying plaintiffs the relief to which they contend they are entitled.

App. 371.

Petitioners have compounded the harm of that delay by waiting five months to bring this appeal. The District Court decided in July that Petitioners would have to respond to discovery in this case and "raise specific constitutional objections to the discovery process as it proceeds."

App. 194. See also App. 171 (describing possible scope of discovery in this case). After spending the remainder of this year refusing to present those objections, Petitioners now appeal what they contend to be unfairly broad and "far-ranging discovery." Stay Motion, p. 1.² That breadth has been manufactured by Petitioners' refusal to respond to the District Court's efforts to define the scope of appropriate discovery. The result has been a judicial process that has slowed to a glacial pace, and which defendants here seek to delay further. See Clinton v. Jones, 520 U.S. at 707-08 (noting "respondent's interest in bringing the case to trial" and finding that stay

² The authorized discovery is not particularly far-ranging; plaintiffs seek basic information regarding the structure of the groups that assisted the Task Force, and communications with non-federal parties. Plaintiffs' Proposed Discovery Plan (July 19, 2002) at 1.

was abuse of discretion when based solely on "the fact that a trial may consume some of the President's time and attention").

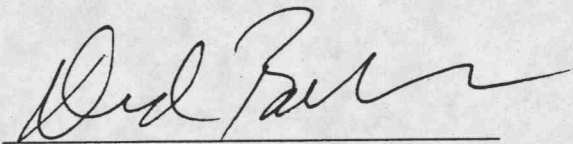
That delay affects the public interest as well as plaintiffs'. This lawsuit raises important questions regarding the propriety of the Administration's actions. The public has a right to have those questions answered and this litigation resolved – whether for or against the Administration – in a timely fashion. Further, Congress and the Supreme Court have both established the public interest in avoiding "piecemeal litigation." Kerr v. United States District Court, 426 U.S. 394, 403 (1976). A stay here threatens to break this litigation into far more than two pieces, for this is unlikely to be defendants' only attempt at interlocutory appeal.

CONCLUSION

In essence, the District Court has asked for specificity – for Petitioners to identify the specific documents that they believe to be privileged, and provide specific reasons why those materials should be kept secret. Doing so will cause Petitioners no harm requiring a stay and will provide the District Court (and, if necessary, this Court) with a record sufficient to allow it to rule intelligently on Petitioners' confidentiality concerns. Denial of the proposed stay threatens Petitioners with no irreparable harm, while issuance will harm plaintiffs and disserve the public interest. The District Court has issued no orders subject to interlocutory review, and no orders that contradict the well-established law governing FACA and discovery of the Executive. Petitioners' motion should be denied.

Dated: November 18, 2002

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "David Bookbinder", written over a horizontal line.

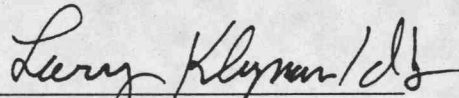
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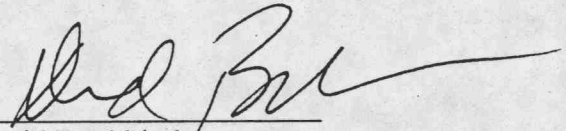
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CERTIFICATE OF SERVICE

I certify that on November 18, 2002, I served the foregoing "Appellees' Response to Petitioners' Emergency Motion for Stay Pending Appeal" by hand on counsel for Petitioners at the address given below:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. _____
(District Court Nos. 01cv1530 and 02cv00631)

JUDICIAL WATCH, INC. AND SIERRA CLUB,
Appellees,

v.

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES,
Appellant.

SIERRA CLUB'S MOTION TO DISMISS APPEAL

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Filed on November 13, 2002

GROUND AND RELIEF SOUGHT

Sierra Club seeks dismissal of Vice President Richard Cheney's appeal on the grounds that the Court of Appeals lacks jurisdiction over the orders appealed under 28 U.S.C. § 1291.

ARGUMENT

By Notice of Appeal filed with the District Court on November 7, 2002, appellant Vice President Cheney appeals three orders: a discovery order requiring specific assertions of privilege from appellant, an order denying a stay pending appeal, and a scheduling order. None are final orders subject to appeal under 28 U.S.C. § 1291.

I. SUMMARY OF FACTS AND PROCEEDINGS

A. Introduction

Sierra Club alleges that the defendants have denied it access to the proceedings and records of the National Energy Policy Development Group ("Task Force") and related proceedings in assorted federal agencies, in violation of the Federal Advisory Committee Act, 5 U.S.C. App. § 2 (2002) ("FACA"). The focal point of the case is the participation of non-federal parties in those proceedings; Sierra Club alleges that representatives of the energy industry participated in a manner that made the Task Force, or sub-groups assisting the Task Force, subject to FACA's requirements. See Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 901 & 915 (D.C. Cir. 1993).

B. The Task Force

The Task Force was created by President George W. Bush in January 2001, and instructed to develop a national energy policy. The Task Force included the Secretaries of Energy, Commerce, Interior, Agriculture, Treasury, and Transportation, the Administrator of the

Environmental Protection Agency, and Energy Department employee Andrew Lundquist (all of whom are defendants below). Vice-President Cheney served as the Task Force's chairman.

A substantial infrastructure assisted the Task Force. Mr. Lundquist was the director of a separate "Working Group," which including several lower-level agency and White House personnel. The Working Group delegated particular tasks to various federal agencies, who formed their own teams and committees to fulfill those tasks. Representatives of major coal, oil, natural gas, and nuclear energy companies, as well as corporate trade associations, participated in the process by which the Task Force, Working Group, and agencies developed the energy policies contained in the Task Force's final report (published in May 2001). See U.S. HOUSE OF REPRESENTATIVES, 107TH CONG., WHITE HOUSE ENERGY PLAN RECOMMENDATIONS BENEFIT CAMPAIGN CONTRIBUTORS 1-3 (Mar. 22, 2002) (attached as Ex. A) (describing participation of industry representatives and noting plan's inclusion of provisions benefiting represented industries).

Congress enacted FACA to regulate precisely this sort of special interest influence over advisory groups convened to formulate government policy. H.R. REP. NO. 92-1017, at 5 (1972) ("One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns.") FACA seeks to prevent such private interest groups from "exercis[ing] undue influence upon the Government," by ensuring that the proceedings of advisory committees are conducted in an open, inclusive, and public fashion. Id.

C Proceedings Below

Judicial Watch filed its complaint in January 2001, in the District of Columbia. Sierra Club filed a separate action in the Northern District of California in July 2001. Upon

defendants' motion Sierra Club's case was transferred to the District of Columbia, where the two cases were consolidated. Defendants moved to dismiss both cases in their entirety, arguing, inter alia, that discovery of the Vice-President would violate the Constitution. The District Court denied that motion on July 11, 2002. Judicial Watch, Inc. v. National Energy Policy Dev. Group, Civ. No. 01-1530 (consolidated with Civ. No. 02-631) at 78 (July 11, 2002). Defendants did not seek to appeal that decision.

At the Court's request, plaintiffs filed a Discovery Plan. Defendants objected. On August 2, 2002, the District Court approved plaintiffs' discovery plan, including an initial set of interrogatories and document requests. Instead of responding to the Court-ordered discovery, Vice President Cheney, together with three other defendants¹, filed a Motion for Protective Order and Reconsideration (the remaining defendants responded to plaintiffs' discovery requests). The Vice President did not assert any privilege, or identify any specific materials that might be privileged. He argued, instead, that requiring him "to assert executive privilege . . . would itself raise constitutional questions." Memorandum of P. & A. in Reply to Pls.' Prelim. Opp'n Defs. Mot. Protective Order 5. The orders appealed each relate to that motion.

D. Orders Appealed

1. September 9 Scheduling Order

On September 9, 2002, the District Court issued an order setting a briefing schedule and hearing for the Motion for Protective Order. The court ordered that "no potentially dispositive motions shall be filed in this matter until further order of the Court," in effect postponing summary judgment motions until it had resolved initial discovery matters. Judicial Watch, Inc.

¹ Those three defendants are Andrew Lundquist, Joshua Bolten, and Lawrence Lindsey. They are not parties to this appeal.

v. National Energy Policy Dev. Group, Civ. No. 01-1530 (consolidated with Civ. No. 02-631) at 2 (Sept. 9, 2002).

2. October 17, 2002 Order Denying Motion for Protective Order and Reconsideration

On October 17, 2002, the District Court issued an order denying appellant's Motion for Protective Order and Reconsideration, ordering appellant to "produce non-privileged documents and a privilege log." Judicial Watch, Inc. v. National Energy Policy Dev. Group, Civ. No. 01-1530 (consolidated with Civ. No. 02-631) at 1 (Oct. 17, 2002). The Order did not prevent the Vice President from asserting any applicable privileges, nor did it compel the production of any specific materials that the Vice President had identified as sensitive or confidential. The October 17 order required only that the Vice President prepare a privilege log identifying the specific materials that he believes to be privileged, and produce any remaining, non-privileged documents.

3. November 1, 2002 Order Denying Motion for Stay Pending Appeal

Defendants moved for a stay pending appeal of the October 17, 2002 order. Following expedited briefing and a hearing, the District Court held, first, that defendants had failed to demonstrate a likelihood of success on the merits:

[D]efendants . . . assert that court orders requiring them to respond in *any* fashion to plaintiffs' discovery requests creates an "unconstitutional burden" on the Executive Branch unless plaintiffs are first required to demonstrate "compelling need" for the discovery sought. Defendants have cited no authority, and indeed this Court knows of none, which supports this proposition. . . .

Notwithstanding . . . the absolute dearth of authority supporting their arguments, defendants nevertheless contend that requiring them to review documents responsive to plaintiffs discovery requests, disclose those for which no viable claim of privilege exists, and assert any applicable privileges with respect to specific documents, impermissibly interferes with "core Article II" functions and imposes an unconstitutional burden on the Executive Branch. The Court rejects these arguments and is not persuaded by defendants' assertion that they have

demonstrated a likelihood of success on the merits of their appeal of this Court's orders.

Judicial Watch, Inc. v. National Energy Policy Dev. Group, Civ. No. 01-1530 (consolidated with Civ. No. 02-631) at 3-5 (Nov. 1, 2002).² The District Court also found that the effect of its order – requiring the White House to review responsive documents, make specific assertions of privilege where appropriate, and produce those documents for which no viable claim of privilege exists – did not constitute irreparable harm. Id. at 8. Accordingly, the Court denied the motion and ordered the Vice President and other resisting defendants to respond to plaintiffs' discovery requests by December 9, 2002.³

E. Other Proceedings

In addition to this appeal, Vice President Cheney, Mr. Lundquist, Mr. Bolten, and Mr. Lindsey have filed a separate petition for a writ of mandamus to this Court, challenging the same orders. In re: Vice President Richard B. Cheney et al., Docket No. 02-5354.⁴ They have also filed a motion for a stay pending appeal.⁵ And those defendants have asked the District Court to certify its September 9, October 17, and November 1 orders for interlocutory review under 28 U.S.C. § 1292(b).⁶ Vice President Cheney, alone, has filed this appeal, claiming that the District Court – at least insofar as its orders affect him – has made a decision subject to appeal under 28 U.S.C. § 1291.

² The District Court issued an amended order, with technical revisions only, on November 13, 2002.

³ The District Court originally set a deadline of November 29, 2002. The District Court changed the date to December 9, 2002 by order of November 13, 2002.

⁴ This Motion to Dismiss does not address that petition, though the availability of the writ is governed by standards effectively identical to those of the collateral order doctrine. In re Kessler, 100 F.3d 1015, 1016 (D.C. Cir. 1996).

⁵ Docket No. 02-5355. This Court has requested responses to both the stay motion and petition by November 18, 2002. Replies are due November 20.

⁶ The District Court has indicated that it will rule on the certification motion by November 26, 2002.

II. LEGAL ARGUMENT

The orders appealed taken together: (1) require the Vice-President to prepare a privilege log and produce any documents for which there is no viable claim of privilege; (2) refuse to stay that decision pending appeal; and (3) set matters on the District Court's calendar. They are self-evidently not "final" orders subject to appeal under 28 U.S.C. § 1291. Cobbledick v. United States, 309 U.S. 323, 325-26 (1940). See Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) ("Federal appellate jurisdiction generally depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" (citation omitted)). Nor are they subject to appeal under the "collateral order" exception to the rule of finality. See In re Sealed Case, 237 F.3d 657, 664 (D.C. Cir. 2001). And they do not fall within the ambit of section 1291 by virtue of the fact that appellant is Vice President of the United States.

A. The District Court's Discovery Decision is Not Subject to Appeal Under the Collateral Order Doctrine

The District Court's orders will not result in the disclosure of any allegedly privileged materials; they simply require the Vice-President to assert specific privileges with regard to specific documents. As such, the court's orders cannot be appealed under the collateral order doctrine.

Under that doctrine, an order is appealable if it "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, *and* [is] effectively unreviewable on appeal from a final judgment.

In re Sealed Case, 237 F.3d at 664. "If the order at issue fails to satisfy any one of these requirements, it is not appealable under the collateral-order exception to § 1291." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 276 (1988).

Like most discovery orders, the District Court's orders regarding the terms of appropriate discovery in this case "involve[] considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" Coopers & Lybrand, at 437 U.S. at 469. Moreover, the District Court's discovery decisions – again, like most discovery orders – can be reviewed upon entry of final judgment. See Byrd v. Reno, 180 F.3d 298, 302-03 (D.C. Cir. 1999). The District Court's orders do not, therefore, meet the definition of an appealable interlocutory order. See In re Kessler, 100 F.3d 1015, 1016 & 1017 n.2 (D.C. Cir. 1996) (order permitting discovery is not appealable under collateral order doctrine or mandamus where there is no privilege at issue).

A discovery order against a party qualifies for appeal under the collateral order doctrine only when it threatens to disclose "highly privileged material." In re Executive Office of the President, 215 F.3d 20, 23 (D.C. Cir. 2000). The rationale for that rule is that disclosure would let "the cat . . . out of the bag" in a manner that vitiates later review, and that an order threatening such disclosure is therefore effectively unreviewable on appeal from a final judgment. Id. Both rule and rationale are inapplicable here. The Vice President did not assert, much less substantiate, any claim of privilege. Indeed, the White House has not even completed a review of responsive documents to determine whether any privileges apply (or, conversely, whether there are any documents for which a privilege cannot be claimed). Memorandum Supp. of Defs.' Mot. Stay Pending Appeal 9. There is consequently no jurisdiction for an interlocutory appeal.

This Circuit and the Supreme Court have established that an interlocutory appeal of a discovery order is not appropriate absent a specific and well-substantiated "claim that some important privilege will be infringed if discovery is allowed to proceed." Executive Office of the President, 215 F.3d at 24. See also Kerr v. U.S. District Court, 426 U.S. 394, 404-06 (1976).

Plaintiffs in Executive Office of the President had propounded discovery in support of a case under the Privacy Act, 5 U.S.C. § 552a (1994). 215 F.3d at 21-22. The White House objected on the basis of assorted privileges. The Court rejected the claims of privilege. The White House sought interlocutory appeal of that decision.

This Circuit rejected the appeal:

[The White House] has not met its burden of showing the need for mandamus relief to overturn the District Court's denial of the asserted privileges, *because it has offered us no argument that it is even entitled to the privileges*. In fact, [the White House] presents no substantive argument whatsoever [regarding privilege]. . . . *Absent a viable claim that some important privilege will be infringed if discovery is allowed to proceed, this court has no jurisdiction to review the interlocutory order on this ground.*

Id. at 23-4 (emphasis added).⁷

As in Executive Office of the President, the Vice-President's arguments can be heard, if necessary, on appeal from the District Court's final judgment. While the defendants in Executive Office at least claimed privileges, here the moving defendants have not done that; they have not even reviewed the documents to make "individual privilege determinations." Memorandum Supp. of Defs.' Mot. Stay Pending Appeal 9. There is no claim, viable or otherwise, that "some important privilege will be infringed if discovery is allowed," and therefore no danger of allowing any cat to escape any bag in a manner that would justify immediate review. Executive Office of the President, 215 F.3d at 24. As with most discovery orders, there is accordingly no jurisdiction for appellate review. Id. See also Byrd, 180 F.3d at 302 (noting that a "challenge to [a] discovery order does not fall within the collateral order

⁷ While Executive Office of the President applied mandamus standards, rather than those of the collateral order doctrine, the Circuit has held that in this context the difference between the two sets of standards is "mainly 'semantic,'" and uses them interchangeably. In re Sealed Case II, 151 F.3d 1059, 1063 n.4 (D.C. Cir. 1998) (citations omitted). See also In re Kessler, 100 F.3d at 1016 ("It does not matter, however, whether the appeal is evaluated under the principles of [the collateral order doctrine] governing interlocutory appeals, or of mandamus").

doctrine,” and finding no appellate jurisdiction of discovery order even after party held in civil contempt).

Similarly, in Kerr defendants sought an appeal to prevent discovery, arguing that it would “result in substantial injury to the State’s prison-parole system” by “unjustifiably compromising the confidentiality of the system’s records and personnel files.” 426 U.S. at 405. The lower court allowed discovery “on the grounds that the governmental privilege had not been personally asserted by anyone eligible to assert it, and that it had not been asserted with the requisite specificity.” Id. at 404. The court “left open the opportunity for petitioners to return to the District Court, [and] assert the privilege more specifically,” noting that “there may be information in the requested documents which should be protected” and “the petitioners may assert a privilege to a particular document or class of documents, and perhaps seek *In camera* inspection, at the time the documents are discovered.” Id. (citation omitted).

The Supreme Court rejected the appeal:

[P]articularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress’ determination since the Judiciary Act of 1789 that as a general rule “appellate review should be postponed . . . until after final judgment has been rendered by the trial court.”

Id. at 403 (omission in original and citation omitted). The District Court’s order, like the court’s order in Kerr, requires only that defendants assert specific privileges with regard to specific documents. As in Kerr, “the weight to be accorded [the claims of privilege] will inevitably vary with the nature of the specific documents in question.” Id. at 405. The District Court has left open the possibility of *in camera* review, if defendants demonstrate that it is necessary. An interlocutory appeal under these circumstances would only serve to promote the “piecemeal litigation” that the Supreme Court and Congress have forbidden.

B. The Denial of a Stay Pending Appeal and Scheduling Orders Are Not Subject to Appeal

The remaining decisions contained in the appealed orders – denial of defendants’ motion for stay pending appeal and arranging matters on the District Court’s calendar – are likewise not subject to appeal. Those actions meet none of the standards of the collateral order doctrine. Scheduling decisions are hardly “important issues,” and they are eminently subject to ongoing modification by the District Court. They do not warrant immediate appeal. See In re Recticel Foam Corp., 859 F.2d 1000, 1004-05 (1st Cir. 1988).

The District Court’s decision denying a stay is intimately intertwined with “the merits of the action.” See Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (granting or denial of stay depends upon likelihood of success on the merits). The Vice President can, and has, sought a stay pending appeal directly from this Court. As a practical matter, he can thereby achieve effective review of the District Court’s decision denying the stay. See In re Sealed Case II, 151 F.3d 1059, 1062 n.4 & 1063 (D.C. Cir. 1998) (determining right of appeal under both collateral order doctrine and mandamus by asking whether “other adequate means to attain the relief exist” (citations omitted)).

C. The Appellant’s Status as Vice President Does Not Confer Jurisdiction Under Section 1291

The status of the appellant as Vice President does not provide this Court with jurisdiction over the District Court’s otherwise non-appealable decisions. Appellant has suggested that the Supreme Court’s decision in United States v. Nixon, 418 U.S. 683 (1974), provides him a right of appeal. He contends that Nixon establishes that “under the circumstances of this case, an order compelling discovery against the Executive is a ‘final’ order for purposes of section 1291.” Reply Mem. Supp. Defs.’ Mot. Stay Pending Appeal at 3 n.1. That contention goes well beyond the rule established in Nixon.

1. Nixon Addresses Only the Necessity of Contempt

The Supreme Court held in Nixon that a contempt citation against the President is not required to render “final” a discovery order that otherwise qualifies for appeal as a collateral order. 418 U.S. at 683-84. The Court did not hold that all discovery orders against the Executive are subject to appeal under section 1291; Nixon does not address or adjust the basic elements of the collateral order doctrine. Those elements must be independently satisfied to confer jurisdiction in this Court. Absent those prerequisite elements, an interlocutory order is not subject to appeal under section 1291 regardless of whether the District Court has issued a contempt order. Byrd, 180 F.3d at 303.

In Nixon, the United States sought specific tapes and documents from the President – who was not a party to the underlying criminal prosecution – via a subpoena duces tecum. 418 U.S. at 686. Although the President claimed that the requested materials were privileged, the district court refused to quash the subpoena. That decision met all the requirements of the collateral order doctrine. It conclusively determined whether the requested materials would be produced, and resolved an important issue that was separate from the merits of the action. Most importantly, for present purposes, the decision could not be reviewed upon appeal from a final judgment of the underlying proceeding. See id. at 691 (relying on “cases where denial of immediate review would render impossible any review whatsoever of an individual’s claims”). That was so, first, because the President was not a party and hence had no right to appeal a final

judgment in the underlying decision.⁸ See Nixon, 418 U.S. at 691 (relying on Perlman v. United States, 247 U.S. 7 (1918), dealing with finality of discovery orders directed towards non-parties). And second, the district court's order would have resulted in the actual disclosure of materials the President alleged to be privileged; it thus fell under the general rule allowing interlocutory review where "the cat [will be] out of the bag" by the final judgment. Executive Office of the President, 215 F.3d at 23.

The Court in Nixon was faced with a narrow issue: whether the court of appeals nevertheless lacked jurisdiction over the district court's order because the President had not submitted to contempt. 418 U.S. at 690-91. See United States v. Ryan, 402 U.S. 530, 532-33 (1971) (non-party may not appeal refusal to quash subpoena without first refusing to comply and facing "the concomitant possibility of an adjudication of contempt"). It did not address the remaining elements of the collateral order doctrine, nor did it suggest that a discovery order against the President is "final" where those basic requirements have not been met. See United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1296 & n.55 (D.C. Cir. 1980) (citing Nixon for proposition that discovery orders must be reviewed under the collateral order doctrine); Devlin v. Scardelletti, 122 S. Ct. 2005, 2014 (2002) (noting that cases have allowed "appeal from a *collateral order* holding [non-party witnesses] in contempt for their failure to comply with a subpoena addressed to them" (emphasis added)).

The Court held that the absence of a civil contempt citation did not preclude review.

⁸ A subpoena to a non-party meets, almost by definition, the requirements of the collateral order doctrine. See Devlin v. Scardalletti, 122 S. Ct. 2005, 2014 (2002). It is separate from the merits, and the subpoenaed witness cannot appeal the final judgment in the underlying matter because they are not parties to the underlying matter. See Cobbledick, 309 U.S. at 326 (noting that "a witness who is a stranger to the litigation could not be party to an appeal taken at the conclusion of the main cause"). A party, in contrast, can achieve review of both discovery orders and, if necessary, contempt orders issued by the District Court. Byrd, 180 F.3d at 300-01.

[T]he traditional contempt avenue to immediate appeal is peculiarly inappropriate here due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court *merely to trigger the procedural mechanism for review* of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government. . . . The issue of whether a President can be cited for contempt could itself engender protracted litigation, and would further delay review on the merits of his claim. . . and the ultimate termination of the underlying criminal action for which his evidence is sought. These considerations lead us to conclude that the order of the District Court was an appealable order.

Nixon, 418 U.S. at 691-92 (emphasis added).

The Supreme Court's holding in Nixon was thus based upon two premises: that the basic requirements of the collateral order doctrine had been met, and in particular that "denial of immediate review would render impossible any review whatsoever," id. at 691; and that a contempt citation was "merely . . . the procedural mechanism for review of the ruling," id. Neither of those premises applies here.

2. The District Court's Orders Are Not Final Because They Can Be Reviewed Upon Entry of Final Judgment

Unlike the district court's decision in Nixon, the District Court's orders here do not meet the most basic requirement of the collateral order doctrine: they will be fully reviewable upon entry of a final judgment. Two critical facts separate this appeal from President Nixon's. First, there is no claim of privilege at issue here. The "government does not contend that [the matters] on which it relies to oppose discovery[] amounts to a privilege." In re Kessler, 100 F.3d at 1017 n.2. Accordingly, there is no danger that allegedly privileged materials will be disclosed in a manner that vitiates later review. Id., see Section II.A, above. And, unlike Nixon, here the Vice-President is a party. He will therefore be able to seek appropriate review upon entry of a final

judgment in this case. See Byrd, 180 F.3d at 302-3 (order requiring release of even privileged materials from a party “will be reviewable after entry of final judgment”).

The jurisdictional issue here is therefore entirely distinct from that in Nixon. In Nixon, the absence of a contempt order was the only barrier to review; all other requirements of section 1291 had been met. In contrast, the obstacles to review in this case have nothing to do with the Vice-President’s failure to risk civil contempt. Review is barred because the District Court’s orders are reviewable upon entry of a final judgment, and fully intertwined with the merits of the action. Nixon (which addresses only the issue of contempt) does not allow the Vice President to overcome those separate obstacles (which Nixon left untouched) in order to create appellate jurisdiction over the District Court’s orders.

3. Contempt Is Irrelevant to the Appellate Jurisdiction over the District Court’s Orders.

Indeed, the absence or presence of a contempt order – the only issue addressed by Nixon – is entirely irrelevant to this Court’s jurisdiction. A civil contempt order against a party, like a discovery order against a party, is generally not reviewable under section 1291. Byrd, 180 F.3d at 301-03.⁹ In holding that the absence of a contempt citation did not bar review, the Supreme Court in Nixon assumed that the presence of a contempt citation would confer appellate jurisdiction. That is not so here. Even if the District Court issued a citation for civil contempt against the Vice President, this Court would not have jurisdiction to hear an appeal. Id. (where District Court’s orders can be reviewed upon entry of final judgment, they are not subject to interlocutory review even if party has been held in contempt). A contempt order is not “the procedural mechanism for review,” as it was in Nixon, 418 U.S. at 691; it is irrelevant to review.

⁹ Nixon – like the civil contempt requirement itself – thus pertains to a non-party’s right to appeal. See Byrd, 180 F.3d at 300-01 (concluding that Supreme Court precedent holds that only a “non-party to a proceeding can obtain immediate review of a civil contempt order”).

It is true, of course, that the District Court might issue a civil contempt citation if the Vice President fails to comply with its orders. And the District Court might not; the Civil Rules offer trial courts a broad array of alternative mechanisms to force parties to abide by their case-management decisions. See Fed. R. Civ. P. 37(b)(2) (2002) (District Court may “make such orders in regard to the failure as are just” including imposition of evidentiary presumptions or exclusions, striking pleadings, staying matter until order is obeyed, and default judgment). Civil contempt is simply one option, as it always is. The District Court could issue a civil contempt order if the Vice President chooses to disobey the most mundane of scheduling decisions. See Cobbledick, 309 U.S. at 327 (noting that “finality can be asserted of [any] order of a court” in that any order “leav[es] . . . no alternative but to obey or be punished”). That possibility does not create appellate jurisdiction over those orders.

If the possibility of a contempt sanction made any order against a member of the Executive Branch “final” under section 1291, the Court of Appeals would have jurisdiction over every decision made by the District Court in a case involving the Executive – for civil contempt exists as a possible enforcement mechanism for every such decision.¹⁰ Such a rule would be contrary to the basic policies of the Judiciary Act:

Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

¹⁰ Of course, the Court of Appeals can exercise jurisdiction by a writ of mandamus, where necessary. The only issue presented here is whether the Vice-President has an automatic right to appeal under section 1291.

Cobbledick, 309 U.S. at 325. Nixon did not abrogate those rules wholesale. The threat of civil contempt, and the Supreme Court's decision in Nixon, is irrelevant to the Court of Appeals' jurisdiction over the District Court's orders.

III. CONCLUSION

The Vice President seeks to appeal District Court orders that represent the most basic case-management decisions. The District Court's discovery rulings request only specific claims of privilege with regard to specific documents. The District Court has, in essence, decided to address the Vice President's confidentiality concerns on a document-by-document basis, rather than placing wholesale restrictions upon discovery based solely on the Vice President's status. See Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982) ("[A]n executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station."). That approach is fully in keeping with the Circuit's and Supreme Court's decisions, and well within the District Court's discretion. Kerr, 426 U.S. at 404.

The District Court's orders setting schedules to resolve the matters pending before it, and postponing dispositive motions until those matters are resolved, are likewise the most quotidian of case-management decisions. Discretion to make these decisions is a necessary component of the trial court's ability to control proceedings before it. The mere fact that this case involves the Executive Branch is not good reason to transfer that control to the Court of Appeals. See Clinton v. Jones, 520 U.S. 681, 704-5 (1997) (noting that litigation against the Executive, even the President, is hardly unusual). The District Court has indicated that it will make every effort to respect the Executive Branch's need for confidentiality, and its actions thus far have imposed no significant burden on the functioning of the Executive Branch.

In sum, nothing has occurred to justify the exercise of appellate jurisdiction, and Sierra Club requests that this appeal be dismissed.

Respectfully submitted,

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Counsel for Appellee Sierra Club

RULE 26.1 CERTIFICATE

Pursuant to Rule 26.1, Fed. R. App. P., appellee Sierra Club, Inc. states that it is a non-profit corporation, does not have any parent corporations, and no publicly held company owns 10% or more of Sierra Club stock.

David Bookbinder
Sierra Club
408 C Street, NE
Washington, DC 20002
202-548-4598

CERTIFICATE OF SERVICE

I certify that on November 13, 2002, I served the foregoing "Motion to Dismiss Appeal" on counsel for all parties at the addresses, and by the means specified, below:

By Email and Federal Express

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Counsel for Appellant Vice President Richard Cheney

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David Bookbinder

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5354

September Term, 2002

01cv01530

02cv00631

Filed On: December 6, 2002 [718152]

In re: Richard B. Cheney, Vice President of the United
States et al.,

Petitioners

No. 02-5355

Judicial Watch, Inc.,
Appellee

v.

National Energy Policy Development Group, et al.,
Appellees

Richard B. Cheney, Vice President of the United
States,

Appellant

Consolidated with 02-5356

BEFORE: Edwards, Sentelle, and Tatel, Circuit Judges

ORDER

Upon consideration of the petition for writ of mandamus, the response thereto, and the reply; the motions to dismiss, the response thereto, and the reply; the motion for stay pending appeal, the response thereto, and the reply, it is

ORDERED, on the court's own motion, that the above-captioned cases be consolidated. It is

FURTHER ORDERED, on the court's own motion, that the Clerk schedule these cases for oral argument in the normal course. The cases will be considered on the basis of the pleadings previously filed by the parties. It is

United States Court of Appeals

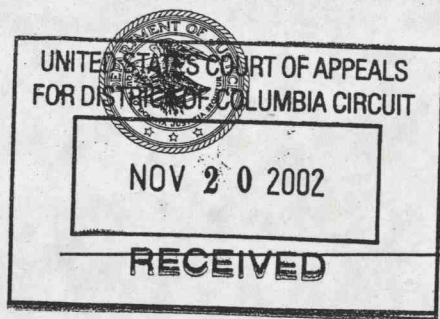
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5354

September Term, 2002

FURTHER ORDERED, on the court's own motion, that the district court's orders under review in these actions be stayed pending further order of the court. The purpose of this administrative stay is to give the court sufficient opportunity to consider the merits of the case and should not be construed in any way as a ruling on the merits. See D.C. Circuit Handbook of Practice and Internal Procedures 32-33 (2002).

Per Curiam



U.S. Department of Justice
Civil Division, Appellate Staff
601 "D" Street, N.W., Rm: 9113
Washington, D.C. 20530-0001

(202) 514-5089 (tel.)
(202) 514-9405 (fax)

November 20, 2002

VIA HAND DELIVERY

Re: In re Richard B. Cheney, 02-5354; 02-5355; 02-5356 (D.C. Cir.)
[Civil Action Nos. 01-1530, 02-631 (EGS)]

Mr. Mark J. Langer
Clerk, United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
Room 5423
Third & Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Mr. Langer:

Please find enclosed for filing

(1) an original and four copies of the Reply to Appellees' Response to Emergency Petition for Writ of Mandamus;

(2) an original and four copies of the Reply to Appellees' Response to Emergency Motion for Stay Pending Appeal; and

(3) an original and four copies of the Opposition to Appellees' Motions to Dismiss the Appeal of the Vice President.

Thank you for your attention to this matter.

Sincerely,

Mark B. Stern

Enclosures

cc: Counsel Listed on Certificates of Service

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5355

September Term, 2002

01cv01530

Filed On: November 13, 2002

[713686]

Judicial Watch, Inc.,
Appellee

v.

National Energy Policy Development Group, et al.,
Appellees

Richard B. Cheney, Vice President of the United
States,
Appellant

No. 02-5356

02cv00631

Sierra Club,
Appellee

v.

Richard B. Cheney, Vice President of the United
States,
Appellant

National Energy Policy Development Group, et al.,
Appellees

ORDER

It is **ORDERED**, on the court's own motion, that the above-captioned cases be consolidated.

FOR THE COURT:
Mark J. Langer, Clerk

BY:

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5355

September Term, 2002

Scott H. Atchue
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5355

September Term, 2002

01cv01530

Filed On:

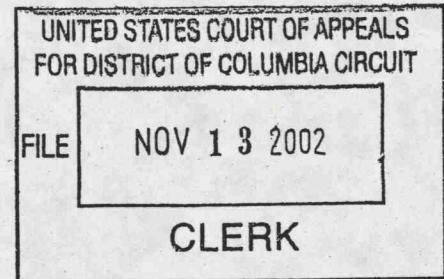
Judicial Watch, Inc.,
Appellee

v.

National Energy Policy Development Group, et al.,
Appellees

Richard B. Cheney, Vice President of the United
States,

Appellant



No. 02-5356

02cv00631

Sierra Club,
Appellee

v.

Richard B. Cheney, Vice President of the United
States,

Appellant

National Energy Policy Development Group, et al.,
Appellees

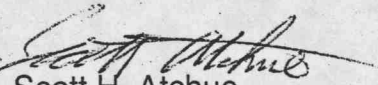
ORDER

It is **ORDERED**, on the court's own motion, that the above-captioned cases be consolidated.

FOR THE COURT:

Mark J. Langer, Clerk

BY:


Scott H. Atchue
Deputy Clerk



Judicial Watch

Because no one is above the law!

November 14, 2002

VIA HAND DELIVERY

Clerk of Court
Attn: Scott Atchue, Deputy Clerk
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, NW
Washington, DC 20001

Re: Judicial Watch, Inc. and Sierra Club v.
National Energy Policy Development Group, et al.,
(District Court C.A. No. 01-1530).

Dear Mr. Atchue:

Please find enclosed the original and four copies of Judicial Watch, Inc.'s Motion to Dismiss Appeal. Thank you for your assistance.

Sincerely,

James F. Peterson
(202) 646-5175

cc: David Bookbinder (Sierra Club)
Mark Stern (DOJ)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUDICIAL WATCH, INC. AND SIERRA CLUB,)

Appellees,)

v.)

RICHARD B. CHENEY, VICE PRESIDENT
OF THE UNITED STATES,)

Appellant.)

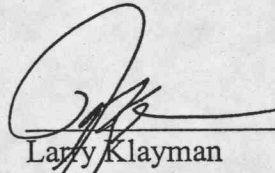
No. _____

(District Court C.A. No. 01-1530)

JUDICIAL WATCH, INC.'S MOTION TO DISMISS APPEAL

Appellee Judicial Watch, Inc., hereby moves to dismiss the appeal of Vice President Richard B. Cheney, and joins with and adopts the reasoning set forth in Appellee Sierra Club's Motion to Dismiss Appeal.

Respectfully submitted,



Larry Klayman
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501 School Street, S.W.
Washington, DC 20024
(202) 646-5172

Judicialwatchinc@hotmail.com

Counsel for Appellee Judicial Watch, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP Rule 26.1, Appellee Judicial Watch, Inc., states that it is a nonprofit corporation, does not have any parent corporations, and that no publicly held company owns 10 percent or more of Judicial Watch, Inc., stock.



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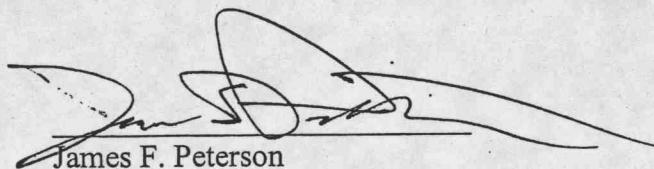
CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2002 a true and correct copy of the foregoing JUDICIAL WATCH, INC.'S MOTION TO DISMISS APPEAL was served, via e-mail and overnight mail, on the following:

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November 12, 2002

VIA HAND DELIVERY

Re: In re Richard B. Cheney, 02-_____ (D.C. Cir.)
[Civil Action Nos. 01-1530, 02-631 (EGS)]

Mr. Mark J. Langer
Clerk, United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
Room 5423
Third & Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Mr. Langer:

Please find enclosed for filing

(1) an original and four copies of the Emergency Petition for Writ of Mandamus and accompanying Appendix

(2) an original and four copies of the Emergency Motion for Stay Pending Appellate Review.

Thank you for your attention to this matter.

Sincerely,

Mark B. Stern

Enclosures

cc: Counsel Listed on Certificate of Service

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re: RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES

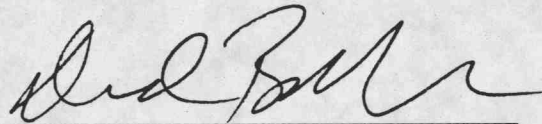
Nos. 02-5354
02-5355
02-5356

NOTICE OF RELEVANT DECISION

Plaintiff Sierra Club hereby notifies this Court of the November 27, 2002 Order of the District Court denying Vice President Cheney's motion for certification pursuant to 28 U.S.C. § 1292(b). A copy of the decision is attached.

Dated: November 27, 2002

Respectfully submitted,



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Attorneys for Sierra Club

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	Civ. Action. 01-1530 (EGS)
NATIONAL ENERGY POLICY	)	
DEVELOPMENT GROUP,	)	
	)	
Defendant.	)	
	)	
SIERRA CLUB,	)	
	)	
Plaintiff,	)	
v.	)	Civ. Action 02-631 (EGS)
	)	
VICE PRESIDENT RICHARD	)	
CHENEY, et al.	)	
	)	
Defendants,	)	
	)	

MEMORANDUM OPINION AND ORDER

Pending before this Court is non-agency defendants' motion for certification of interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Upon careful consideration of this motion, the responses and reply thereto, the applicable statutory and case law, and for the following reasons, the defendants' motion is hereby **DENIED**.

I. BACKGROUND

Defendants Vice-President Richard B. Cheney, the National Energy Policy Development Group ("NEPDG"), Andrew Lundquist,

Joshua Bolten, and Larry Lindsay¹ have recently filed with the United States Court of Appeals for the District of Columbia Circuit a series of appeals of this Court's July 11, 2002, August 2, 2002, September 9, 2002, October 17, 2002, and November 1, 2002 Orders.

On November 7, 2002, defendant Vice-President Richard Cheney filed a notice of appeal of this Court's November 1, 2002, October 17, 2002, and September 9, 2002 Orders approving discovery of him by plaintiffs. These Orders, *inter alia*, require him to produce non-privileged documents responsive to plaintiffs' First Request for Production of Documents or file detailed and precise objections to particular requests with the Court. The defendant was also directed to produce a privilege log identifying with specificity the documents or categories of documents withheld pursuant to an asserted privilege, as well as the grounds therefor. Mr. Cheney appeals these Orders as "final orders" under what defendants have dubbed the "Nixon rule." Defs.' Mot. at 3. Defendant premises the Court of Appeals' jurisdiction for such an appeal on the Supreme Court's ruling in *United States v. Nixon* deeming a discovery Order denying a motion to quash a subpoena *duces tecum* directed to the President of the

¹For ease of reference, these individuals will be referred to throughout this opinion as either "non-agency defendants," or "defendants," to distinguish them from the federal agency defendants who have not joined in this motion.

United States a "final order" for the purpose of bringing its appeal within the reach of 28 U.S.C. § 1291. *United States v. Nixon*, 418 U.S. 683, 690-92, 94 S. Ct. 3090, 3098-99 (1974). This narrow rule was adopted by the Nixon Court to avoid the "unseemly" circumstance in which the President of the United States would be forced to disobey the Judicial Branch to obtain appellate review of its orders. *Id.* at 692.

The so-called "Nixon rule" appears to have been applied only in *United States v. Nixon*, and defendants seem to concede that it has never been applied to the Office of the Vice-President. See Defs.' Reply in Supp. of Mot. for a Stay at 3. Mr. Cheney argues for an extension of Nixon's holding to this case, contending that the underlying rationale applies with equal force to the Vice-President, rendering this Court's discovery Orders "final orders" subject to appellate review pursuant to § 1291, at least as applied to Vice-President Cheney. *Id.*

Additionally, on November 12, 2002, all five non-agency defendants filed an Emergency Petition for Writ of Mandamus with the Circuit Court, seeking review of this Court's Orders authorizing discovery of them. Defendants allege that these Orders reflect "clear error" on this Court's part, and urge the Court of Appeals to order this Court to dismiss Vice President Cheney from this action, and to decide this case on the basis of the administrative record alone, without the benefit of further

discovery. Emergency Mot. for Stay at 2; Emergency Pet. for Writ of Mandamus at 1, 8.

Notwithstanding this flurry of appellate activity, non-agency defendants have also filed a motion before this Court to certify three issues for interlocutory appeal to the United States Court of Appeals for the D.C. Circuit. Defendants argue that they are entitled to pursue all three avenues of appeal, but urge this Court to grant their motion for certification pursuant to § 1292(b) in order to afford the Court of Appeals "more options to consider in determining whether and how . . . it is going to take the case, because interlocutory appeal would be a more traditional way for the Court to examine the issues rather than the Nixon theory or mandamus." Tr. 11/13/02 Hr'g. at 28:22 - 29:5; Defs.' Reply in Supp. of Mot. for Stay at 2-4. However, as plaintiffs correctly point out, convenience alone is not a ground for granting certification under § 1292(b). See Tr. 11/13/02 Hr'g. at 33:11 - 33:17. A party must establish a factual and legal predicate under the standard set forth in 28 U.S.C. § 1292(b) in order for a question to be properly certified for interlocutory appeal, a prerequisite defendants have failed to satisfy in this case.

II. Motion for certification pursuant to 28 U.S.C. § 1292(b)

Defendants contend that they are entitled to certification of this Court's July 11, 2002, August 2, 2002, September 9, 2002,

and October 17, 2002 Orders for immediate appeal pursuant to 28 U.S.C. § 1292(b) to resolve the following questions of law:

1) whether the Federal Advisory Committee Act ("FACA") is enforceable against the Vice President through an action for *mandamus*;

2) whether a private plaintiff may obtain discovery of the Vice President and other non-agency defendants in a civil case "absent any showing of need;"

3) whether, "in light of principles of judicial review established by the Administrative Procedure Act ("APA"), and in light of the constitutional concerns raised by plaintiffs' suit and requests for discovery, this case should be dismissed or resolved on the basis of the administrative record."

Defs.' Mot. for Certification at 2.

A. *Standard of Review*

A District Court may certify an interlocutory order for immediate appeal if it concludes that it

involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation.

28 U.S.C. § 1292(b); *Trout v. Garrett*, 891 F.2d 332, 335 n.5 (D.C. Cir. 1989). Through § 1292(b), "Congress . . . chose to confer on District Courts first line discretion" and "circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 46, 47, 115 S. Ct. 1203, 1210 (1995).

In an opinion relied upon by both parties, the Seventh Circuit described a "controlling" question of law as one which will determine the outcome or even the future course of the litigation . . . a question is controlling, even though its decision might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants.

Johnson v. Burken, 930 F.2d 1202, 1206 (7th Cir. 1991). One

District Court within this Circuit has held:

Under section 1292(b), a controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources.

In re Vitamins Antitrust Litigation, Civ. A. No. 99-197, 2000 WL 673936 at *2 (D.D.C. Jan. 27, 2000).

The threshold for establishing the "substantial ground for difference of opinion" with respect to a "controlling question of law" required for certification pursuant to § 1292(b) is a high one. The parties cite to only one instance within this Circuit in which a court found that it had been met, based on the existence of an apparent inconsistency between a position taken by one panel of the Court of Appeals when remanding to the District Court and that set forth in a prior Circuit opinion. See *Johnson v. Wash. Metro Area Trans. Auth.*, 773 F. Supp. 459, 460 (D.D.C. 1991). In another case, not cited by either party, a District Court found that, although the plain statutory language governing a jurisdictional issue could be read consistently with a prior

Circuit opinion, certain language in the appellate court opinion "could be seen as in tension with the plain wording of the statute," thereby creating the factual and legal predicates for certification for interlocutory appeal pursuant to § 1292(b). *Carr Park, Inc. v. Tesfaye*, 229 F.3d 1192, 1193-94 (D.C. Cir. 2000). In the more traditional case, such as this one, where the party moving for certification pursuant to § 1292(b) disagrees with a court's order denying a motion to dismiss and granting discovery, other District Courts within this Circuit have stated unequivocally that

Mere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish a "substantial ground for difference of opinion" sufficient to satisfy the statutory requirements for an interlocutory appeal.

First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1116 (D.D.C. 1996); see also *In re Vitamins Antitrust Litigation*, 2000 WL 673936 at *3.

A party seeking certification pursuant to § 1292(b) must meet a high standard to overcome the "strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *United States v. Nixon*, 418 U.S. at 690. "Although courts have discretion to certify an issue for interlocutory appeal, interlocutory appeals are rarely allowed . . . the movant 'bears the burden of showing that exceptional circumstances justify a

departure from the basic policy of postponing appellate review until after the entry of final judgement.'" *Virtual Def. and Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 22 (D.D.C. 2001) (quoting *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107 (D.D.C. 1996)). The "law is clear that certification under § 1292(b) is reserved for truly exceptional cases." *In re Vitamins Anti-Trust Litigation*, 2000 WL 673936 at *1 (citing *Tolson v. United States*, 732 F.2d 998, 1002 (D.C. Cir. 1984)). Defendants have fallen far short of demonstrating that the questions of law presented by the challenged Orders arise under such exceptional circumstances as to warrant disruption of the favored process of appellate review following final judgment.²

B. *Enforcement of FACA against Vice-President through mandamus relief*

Defendants contend that "it is appropriate to allow the court of appeals at this time to determine" the question of whether FACA is enforceable against the Vice President by way of an action for *mandamus* because early dismissal of the Vice President from this action would eliminate thorny constitutional

² It is significant that this Circuit has commented, in *dicta*, that certification pursuant to § 1292 is particularly appropriate "when claims of immunity" are at issue. *McSurely v. McClellan*, 697 F.2d 309, 316 n.12 (D.C. Cir. 1982). Nevertheless, given that it is executive privilege, not immunity from suit, which is at issue here, even if this statement were not *dicta*, it still would not bring this case within the realm of "exceptional circumstances" justifying certification for interlocutory appeal.

issues posed by his presence. See Defs.' Mot. for Certification at 7. Defendants further argue that dismissal of the Vice-President, in turn, would "materially advance" the litigation, thus rendering this question a "controlling" one for the purposes of § 1292(b) analysis under the case law cited by both parties. *Id.*

As an initial matter, while dismissal of the Vice-President at this point in the litigation would certainly bring the litigation to a swift conclusion as to this particular defendant, it does not appear that it would eliminate constitutional concerns from this case altogether, nor materially advance the litigation. Defendants have continuously and vehemently contended that discovery is inappropriate as to all non-agency defendants, and not just the Vice-President, due to the separation of powers concerns defendants maintain are triggered by any and all discovery of the National Energy Policy Development Group ("NEPDG") and other non-agency defendants. Assuming the non-agency defendants other than the Vice-President do not change their position in this regard, dismissal of the Vice-President as a defendant from this case would neither remove nor expedite the resolution of the complex constitutional issues presented.

Moreover, because the Orders defendants seek to certify for appeal concern only discovery reasonably calculated to ascertain whether FACA is even applicable here, it is premature to

characterize the question of whether this Court can grant *mandamus* relief ordering compliance with FACA as a "controlling" question of law. Additionally, the Court's July 11, 2002 Memorandum Opinion & Order did not resolve the question of whether *mandamus* relief was available against the Vice-President for a violation of FACA. *Judicial Watch v. Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530, 2002 WL 1483891 at *21-22 (D.D.C. Jul. 11, 2002). The Court deferred a decision on that issue until it could be ascertained, by means of carefully limited discovery, whether FACA's non-discretionary duties fell exclusively on the Vice-President's shoulders, and, if so, whether issuance of a writ of *mandamus* to him would be an appropriate exercise of this Court's discretion in light of the facts unearthed through discovery. *Id.* Furthermore, "since the controlling question of law ha[s] not yet been resolved by the court . . . [n]o substantial ground for difference of opinion exist[s]." *In re Vitamins Anti-Trust Litigation*, 2000 WL 673936 at *1.

Even if the issue were before the Court at this stage of the litigation, it is quite clear that the question defendants seek to certify is not one as to which, at least in the hypothetical presented in the absence of a more developed factual record, there is "substantial ground for difference of opinion." See *Judicial Watch v. Nat'l Energy Policy Dev. Group*, 2002 WL 1483891

at *21-22 ("Defendants cite no cases in support of their argument . . . [and] ignore[] the Supreme Court's guidance . . . "). Defendants correctly state that *mandamus* review is a "'drastic' remedy, 'to be invoked only in extraordinary situations.'" *Consolidated Edison Co. v. Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002). However, the fact that invocation of a procedure is highly unusual does not, in and of itself, create a "substantial ground for difference of opinion" on the question of its potential applicability under certain circumstances. Additionally, precedent from this Circuit has consistently held that *mandamus* relief against Executive Officers, up to and including the President of the United States, is available to enforce performance of non-discretionary statutory duties. See, e.g., *Nat'l Wildlife Fed'n v. United States*, 626 F.2d 917, 923 (D.C. Cir. 1980) ("Where a federal official has a clear obligation to perform a ministerial duty, a federal district court may issue a writ of *mandamus* under 28 U.S.C. section 1361 to compel the fulfillment of the obligation. *Mandamus* is not precluded because the federal official at issue is the President of the United States."); *Nat'l Treasury Employees' Union*, 492 F.2d 587 (D.C. Cir. 1974). Defendants have not yet established, as a matter of law, that the requisite conditions for *mandamus* relief do not and cannot exist in this case. Accordingly, this Court has held that discovery is necessary to assist in determining whether the

particular factual circumstances presented by these cases justify issuance of the writ notwithstanding its "drastic" nature. See *Judicial Watch v. Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at * 21-22. Defendants have failed to even suggest that there is a "substantial ground for difference of opinion," based on controlling authority, as to the propriety of such a course of action.

Defendants' reliance on cases from other Circuits holding *mandamus* relief to be unavailable where a statute creating a non-discretionary duty does not provide for a private right of action does not change this result. See Defs.' Mot. for Certification at 8. It is not unusual that Circuits differ with respect to the proper resolution of legal issues deemed controlling in a particular case. If interlocutory appeals were to be granted in every such instance, our system's strong preference for appeal only upon final judgment would be severely undermined. Indeed, in view of this Circuit's opinion in *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), which represents the current, undisputed law of this Circuit, there is no "substantial ground for difference of opinion" on this question for the purposes of § 1292(b) analysis. Even if defendants' assertion that there is a need for further clarification of the limits of *mandamus* review within this Circuit is accepted as true, defendants have offered no reason why such clarification cannot

take place upon appellate review after final judgment rather than through the disruptive process of interlocutory appeal.

See Defs.' Mot. at 8.

Defendants' citation to the recently decided case of *Gonzaga University v. Doe* for the proposition that mandamus relief is unavailable as a matter of law in this case is equally unpersuasive. See Tr. 11/13/02 Hr'g. at 28:17 - 28:21; Defs.' Mot. for Certification at 8. In *Gonzaga*, the U.S. Supreme Court clarified its precedent with respect to enforcement, through actions brought under 42 U.S.C. § 1983, of conditions placed on receipt of federal funding in federal statutes enacted pursuant to the Spending Clause. *Gonzaga Univ. v. Doe*, ___ U.S. ___, 122 S. Ct. 2268, 2272-75 (2002). *Gonzaga's* expansion of the discussion in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), regarding the recognition of implied private rights of action in the absence of express statutory language or Congressional intent, does not create a "substantial ground for difference of opinion" with respect to the approach adopted by this Court in the present case. See *Gonzaga Univ. v. Doe*, 122 S. Ct. at 2277. In fact, this Court expressly followed *Sandoval* in holding that no private right of action can be implied under FACA, thereby adhering to the very line of cases defendants now point to as creating a sufficient basis for interlocutory appeal.

Judicial Watch v. Nat'l Energy Policy Dev. Group, 2002 WL 1483891 at *10-12.

Furthermore, the Supreme Court opinion in *Gonzaga*, at its core, concerned the entirely distinct question of how courts should go about ascertaining whether a personal right triggering the application of 42 U.S.C. § 1983 exists. *Gonzaga Univ. v. Doe*, 122 S. Ct. at 2276-77. While instructive, this discussion has little or no application to the question of whether a statute creates a non-discretionary duty triggering the potential application of the federal *mandamus* statute, 28 U.S.C. § 1361. Defendants' efforts to equate implied personal rights, or implied rights of action, the subjects of the *Gonzaga* opinion, with an action pursuant to the federal *mandamus* statute for failure to perform a non-discretionary duty created by statute represent, at best, an argument by analogy for extension of the law, and are insufficient to create a "substantial ground for difference of opinion," as that term is used in § 1292(b), justifying immediate resolution of the applicability of the *mandamus* statute in this case.

Defendants have failed to establish the existence of a "substantial ground for difference of opinion" with respect to the question of whether the federal *mandamus* statute offers a means by which FACA could be enforced against the Vice President. Accordingly, certification of this question is inappropriate

under § 1292, given the conspicuous absence of one of the policy considerations favoring application of the exceptional procedure of interlocutory review prior to final judgment.

C. *Availability of Discovery "Absent Any Showing of Need"*

Defendants also contend that the second question for which they seek certification, "whether a private plaintiff may obtain discovery . . . absent any showing of need," is "substantial and controlling," and therefore meets the standard for certification under § 1292(b). Once again, defendants fail to establish the factual and legal predicates for interlocutory appeal of this Court's discovery Orders pursuant to § 1292(b).

As an initial matter, the parties disagree as to whether a District Court's discovery orders are, as a general rule, the proper subject of an interlocutory appeal. Plaintiff Sierra Club contends that they are not, relying on the Eighth Circuit's opinion in *White v. Nix*, which suggests that discovery orders "generally never will involve a controlling question of law." *White v. Nix*, 43 F.3d 374, 377 (8th Cir. 1994) (citation omitted). In *Nix*, the Eighth Circuit denied, as improvidently granted, review under § 1292(b) of a District Court order requiring production of documents under conditions set out in a protective order. The court held that because the nature and scope of discovery is committed to the sound discretion of the

trial court, allegations of abuse of that discretion do not create legal issues or raise the types of legal questions for which interlocutory review pursuant to § 1292(b) would be appropriate. *Id.* Defendants counter that there is no "blanket rule" precluding interlocutory appeal of discovery orders, reasoning that this Circuit has found such orders to be a potentially appropriate subject of the far more drastic remedy of *mandamus*. Tr. 11/13/02 Hr'g. at 30:1 - 30:3; Defs.' Reply at 4, both citing *In re Executive Office of the President*, 215 F.3d 20, 23 (D.C. Cir. 2000) [hereinafter "*EOP*"]. Defendants further argue that interlocutory review is particularly appropriate where, as here, interlocutory orders raise complex and "serious" constitutional issues. Defs.' Mot. at 5; *Cf. EOP*, 215 F.3d at 23 ("disclosure of highly privileged material followed by appeal after judgment is obviously not adequate in such cases - the cat is out of the bag.").

This Court does not dispute that defendants' constitutional challenges to the application of FACA and the APA in this case are "serious." See *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *22. "Rather, it is out of concern for the seriousness of this issue that this Court has determined that proceeding to discovery is appropriate." *Id.* The Court has held development of the factual record through the discovery

ordered in this case necessary to decide the serious issues before it. *Id.* at *31-32.

However, § 1292 jurisprudence does not appear to equate any issue susceptible to a separation of powers argument with a "controlling" question of law as that language is used in § 1292(b). If an argument, even one that invokes separation of powers doctrine, is without support in existing case law, then the questions of law raised thereby are neither substantial nor controlling for the purposes of § 1292(b) analysis. See *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *26, 27. Moreover, even if defendants' arguments for a dramatic expansion of the current separation of powers doctrine are ultimately found to be persuasive, § 1292(b) "was not intended merely to provide review of difficult rulings in hard cases." *United States ex rel Hollander v. Clay*, 420 F. Supp. 853, 859 (D.D.C. 1976). Defendants' legal arguments, and this Court's rulings on these serious constitutional questions, can just as easily, and more appropriately, be reviewed upon entry of final judgment.

Interlocutory appeal is reserved for "extraordinary cases," and not every case presenting constitutional questions, nor every case permitting discovery requests to be made of Executive Officers, meets this admittedly high standard. See *Clinton v. Jones*, 520 U.S. 681, 702, 705, 117 S. Ct. 1636, 1648, 1650

(1997); *EOP*, 215 F.3d at 23. For instance, in *EOP*, the Court of Appeals declined to hear an interlocutory appeal, pursuant to § 1292(b), of the District Court's denial of a motion to dismiss premised on the argument that the Privacy Act did not apply to the Executive Office of the President. *Id.* at 23. In so doing, the Circuit impliedly held that allowing such a case to proceed to discovery and follow established appellate procedures was appropriate notwithstanding the parties involved or the constitutional issues presented. *Id.* The Circuit also denied the government's petition for *mandamus* review of a subsequent discovery order, expressly commenting on the sufficiency of appellate review upon final judgment to resolve the "serious" constitutional issues presented. See *id.* at 25.

The Circuit's reasoning in *EOP* is applicable to the motion currently before this Court. In both cases the Executive Branch contends that it is not properly subject to a statute, and that discovery in an action brought to enforce the statute is improper. See *id.* at 21. In *EOP*, defendants had asserted privileges which both the District and Circuit Courts found to be without merit. *Id.* at 22. In the present case, defendants have refused to even review responsive documents and make specific objections and assertions of privilege. Notwithstanding this difference in the underlying facts, in both cases defendants offered "no argument that [they] are even entitled to the

privileges." *Id.* at 23-24. Accordingly, these cases are sufficiently analogous for this Court to conclude that there are no "extraordinary circumstances" here requiring resolution on interlocutory appeal.

Additionally, defendants have not succeeded in establishing that there is a "substantial ground for difference of opinion" on the question of whether any discovery requests can be made of presidential advisors or the Vice-President without first showing "any need." As this Court has repeatedly stated, defendants mischaracterize the authority they cite for the proposition that a private party seeking discovery from the Vice-President and presidential advisors must first show a "compelling need," beyond the "mere allegations" sufficient to survive a motion to dismiss, for the information sought. After considerable briefing by all parties, this Court concludes that there is no legal precedent for defendants' position that the discovery procedures adopted by this Court place an unconstitutional burden on them. Thus, there can be no "substantial ground for difference of opinion" justifying interlocutory appeal on this issue. Moreover, defendants appear to have conceded, both at oral argument on this motion and in their recent briefings, that the real difference of opinion lies between the defendants themselves and the Court, rather than within precedential authority. Tr. 11/13/02 Hr'g. at 30:21 - 30:25. As noted by the District Court in *Al-Nahyan*,

"[t]he mere claim that a decision has been wrongly decided is not enough to justify an interlocutory appeal." *First Am. Corp v. Al-Nahyan*, 948 F. Supp. at 1117.

Defendants argue that this Court has failed to consider two D.C. District Court opinions which create the requisite "substantial difference of opinion" on the question of whether executive privilege must first be asserted before a party seeking discovery is required to show "need." Defs.' Reply at 2-4, 5 citing *United States v. Poindexter*, 732 F. Supp. 142, 146 (D.D.C. 1990) [hereinafter "*Poindexter II*"]; *United States v. Poindexter*, 727 F. Supp. 1501, 1507-08, 1509 (D.D.C. 1989) [hereinafter "*Poindexter I*"]. In fact, the Court has simply found them inapposite, and easily distinguishable from the facts before it. It is true that, in the two *Poindexter* opinions cited by defendants, executive privilege had not first been asserted before a party seeking discovery was required to make any showing prior to obtaining discovery. However, the showing the party seeking discovery was required to make was not one of "need," but rather one of materiality and relevance pursuant to the applicable federal rules. See *Poindexter I*, 727 F. Supp. at 1509, *Poindexter II*, 732 F. Supp. at 147, both citing Fed. R. Crim. P. 17(c). The party seeking discovery in that case was never required to do anything more than plaintiffs were required to do here with respect to submission of a proposed discovery plan:

demonstrate that the documents and information sought are material and relevant to the legal questions before the Court. Additionally, the *Poindexter II* opinion expressly rejects a position similar to that taken by defendants here, stating

Equally erroneous is the argument of counsel for former President Reagan and Department of Justice counsel acting on behalf of President George Bush . . . [who] assert that, in addition to showings of relevancy, materiality, and other incidents of admissibility, defendant is required to demonstrate that the testimony of the former President is central to his defense, and that a substitute from any other source would be inadequate. . . the precedents cited for this proposition do not support it. ***The proposed standard would be extraordinary in a case where executive privilege has been invoked; it is particularly so in a non-privilege situation.*** [emphasis added].

Id. at 146-47. Once again, the defendants have misrepresented precedent in order to fit it within their theory that a party must make some showing of "need" before an Executive Branch defendant should be even required to review documents responsive to a Court-approved discovery request, and to determine if viable grounds for assertion of a privilege exists.

The most recent *Poindexter* opinion sets forth the appropriate standard to be applied when deciding whether a criminal defendant's *subpoena* of both former and current Presidents to testify at trial should be honored. *Poindexter II*, 732 F. Supp. at 146. The District Court held that

While the former President has not claimed executive privilege, he will only be compelled to testify at the trial of this case if the Court is satisfied that his testimony

would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested. [emphasis added]

Id. at 147. The District Court reasoned that a contrary holding could infringe on the Executive Branch's deliberative processes if the President could subsequently be compelled to testify "with frequency and for non-essential or relatively trivial reasons." *Id.* at 147-48. Further, because the testimony subpoenaed might involve both privileged and non-privileged conversations, the District Court was mindful of the potential consequences of establishing a rule effectively requiring the President to assert executive privilege with respect to all conversations in order to avoid being called to testify, particularly in light of the Supreme Court's cautionary instruction that the executive privilege should not be "lightly invoked." *Id.* at 148 (citing cases).

The circumstances before the court in *Poindexter II* are easily distinguishable, on several grounds, from those extant in this case. A decision by the District Court in *Poindexter II* to enforce a subpoena requiring the President to testify at a trial would be analogous to a decision in this case requiring defendants to produce forthwith all of the documents requested by plaintiffs. No such Order has been entered in this case. In fact, this Court has made it abundantly clear that it is not, at this

stage, requiring production of any privileged documents. With respect to document production and responses to interrogatories, as opposed to subpoenas for live testimony, courts have approved, and this Court has adopted, procedures which allow the President and Executive Branch officials to first identify which documents are properly the subject of an invocation of executive privilege and which are not, and to produce the latter, but not the former. See *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530, 2002 WL 31519674 at *3 (D.D.C. Nov. 13, 2002) (citing cases).

Second, the implications of honoring a subpoena requiring the President to physically appear and testify before a Court are significant in terms of potential interference with the Presidential function, as noted by the *Poindexter II* opinion. Such a requirement is substantially different from an order requiring Executive Branch staff members to review documents responsive to a discovery request, identify those which are privileged, and produce non-privileged documents and a privilege log, a procedure approved by the Supreme Court. See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 425, 439-55 (1977). Moreover, this Court has already determined, both in its July 11, 2002 Order, and at a subsequent hearing with respect to plaintiffs' proposed discovery plan, that the discovery sought is material and necessary, and therefore meets the standard

enunciated in *Poindexter II*, which defendants seek to apply in this case under dramatically different circumstances. See Tr. 08/02/02 Hr'g. at 19:1 - 19:3; *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *31-32.

In the first *Poindexter* opinion, addressing subpoenas for a President's diaries and personal notes in a criminal prosecution, the District Court also did not, as defendants contend, require that the party seeking enforcement of the subpoena establish a "compelling need" for the documents before the subpoena could issue. See *Poindexter I*, 727 F. Supp. at 1507-08, 1509. Rather, proceeding expressly pursuant to the Federal Rules of Criminal Procedure, as it would with respect to any other request for a subpoena not involving the President, the court simply narrowed the scope of subpoenas "to eliminate demands that request documents defendant can obtain from other sources, that are unduly broad or oppressive, or that ask for documentary evidence that is clearly not material to the defense" before issuing them. *Id.* Where portions of the subpoenas were quashed, the *Poindexter I* court did so largely because the information requested was no longer in the President's possession, had already been provided to the defendant, or was available from other sources. *Id.* at 1508-10. Where the defendant was unable to provide sufficient specificity to establish materiality of documents requested because the documents themselves were not available to him, the

Poindexter I court conducted an *in camera* examination of the former President's diaries, notes, and notebooks to determine whether they contained relevant evidence which should be produced.³ *Id.* at 1510.

The equivalent of this process has already occurred in this case, as demonstrated by the Court's July 11, 2002 Order and its evaluation of plaintiff's proposed discovery plan. See *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530 (D.D.C. Aug. 8, 2002) (Order approving plaintiffs' proposed discovery plan and setting forth discovery procedures); Tr. 08/02/02 Hr'g. at 19:1 - 19:3; *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *31-32. In other words, this Court has already done essentially what the *Poindexter* court did: it has determined what precise discovery is

³*In camera* inspection of documents to determine relevance and admissibility in a criminal prosecution after assertion of presidential privilege and presentation of sufficient evidence to rebut the presumption of privilege which attends such an assertion was approved by the U.S. Supreme Court in *United States v. Nixon*, 418 U.S. at 713-14. This Circuit has approved *in camera* inspection of documents to determine the propriety of a President's assertions of executive privilege after they were made, as well as the relevance of the materials to grand jury proceedings. *Nixon v. Sirica*, 487 F.2d 700, 718-721 (D.C. Cir. 1973). This Court has repeatedly offered defendants the option of offering responsive documents to the Court for *in camera* review, prior to assertion of any privilege with respect to the documents, thereby offering defendants exactly the same procedure followed by the *Poindexter II* court. Defendants have not accepted this proposal by the Court.

both material and necessary to resolve the threshold issues presented in this case and subsequently approved it.

Where, as here, "other than their interpretation" of cases, and citation to cases the court has found to be inapposite, defendants "have offered little to support their desired result and they have not persuaded the Court that conflicting authority exists on the issue presented" as applied to the relevant facts, interlocutory appeal pursuant to § 1292(b) has been held to be unwarranted. See *First Am. Corp v. Al-Nahyan*, 948 F. Supp. at 1117. Furthermore, "neither unusual facts nor legal issues of first impression require, or in this instance justify, certification of an interlocutory appeal." *Id.*

Moreover, in their motion for certification, defendants persist in conflating within the term "discovery" the notion of requiring production of documents and the far less drastic result of this Court's Orders, which simply require that defendants produce non-privileged documents and make particularized assertions of privilege where appropriate. See *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530, 2002 WL 31519674 at *3 (D.D.C. Nov. 13, 2002); *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530 (D.D.C. Oct. 17, 2002) (Order denying motion for protective order); *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, Civ. A. No. 01-1530 (D.D.C. Aug. 8, 2002) (Order approving plaintiffs' proposed

discovery plan and setting forth discovery procedures). Compliance with the Court's Orders will not necessarily result in plaintiffs "obtaining" any discovery, as it is entirely conceivable that defendants could assert specific viable claims of privilege for every responsive document or category of documents. Only then would the question defendants seek to certify for interlocutory appeal, whether discovery should be provided to plaintiffs without demonstrating "any need" for the documents requested, be ripe for judicial review.

This Court has already answered that question in the affirmative, in a manner consistent with existing authority, which establishes that the appropriate stage at which to require a party seeking discovery to demonstrate "need" arises only after the opposing party has asserted a privilege, even where that party is a member of the Executive Branch, up to and including the President of the United States. *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *26, 27, see also *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 2002 WL 31519674 at *3 (citing cases).

Therefore, by mischaracterizing the intent and effect of this Court's Orders, defendants have created a legal question, for which they now seek certification, where none exists. Where "it is only against a mischaracterization of the Court's holdings that the plaintiff can identify substantial ground for a

difference of opinion," a motion to certify under § 1292(b) is properly denied. See *Foster v. United States*, 926 F. Supp. 199, 203 (D.D.C. 1996).

Finally, this Court's discovery Orders would not require reversal if decided incorrectly, nor would such a finding materially alter the course of litigation. See *Johnson v. Burken*, 930 F.2d at 1206. The Eighth Circuit has held that "resolution of a discovery dispute does little to advance the ultimate termination of litigation and results only in delay." *White v. Nix*, 43 F.3d at 378-79 (reasoning that plaintiff would press his claim regardless of whether or not he obtained the files the court had ordered produced, potentially seeking to discover the same information through alternate means; "[w]hen litigation will be conducted in substantially the same manner regardless of our decision, the appeal cannot be said to materially advance the ultimate termination of the litigation."). None of the circumstances present in cases where interlocutory appeal has been justified on this ground exist here. See, e.g., *Johnson v. Wash. Metro Area Trans. Auth.*, 773 F. Supp. at 461 (resolution of an "apparent intra-circuit split" might negate the need for a jury trial). Conversely, untimely interlocutory appeal of orders can "prolong and substantially delay the litigation," causing all parties to incur greater expense, and thus do not "materially advance the litigation." See *In re Vitamins Antitrust Litigation*,

2000 WL 673936 at *3; *Brown v. Pro Football, Inc.* 812 F. Supp. 237, 239 (D.D.C. 1992).

Defendants' contention that certification of this Court's Orders for interlocutory appeal will materially advance this litigation necessarily assumes that they will prevail on appeal. This result is far from certain. As noted by one District Judge, "[w]hile certainly the ultimate termination of this litigation would be advanced if the Court of Appeals heard and sustained defendant's defense at this time, the court is not of the opinion that this is a likely course of events. Therefore, the court will not invoke its discretionary authority to certify the issues decided in [its] Order to the Court of Appeals under section 1292(b)." *U.S. ex rel Hollander*, 420 F. Supp. at 859; see *Nix*, 43 F.3d at 378-79.

Defendants also assume that a ruling in their favor on all three issues at the Circuit level will result in dismissal of the action as to them, or at least relieve them of the burden of participating in discovery. However, a number of substantive questions were left unresolved by this Court's July 11, 2002 Order which would require further litigation before this Court, with or without the benefit of discovery of non-agency defendants. See Tr. 11/13/02 Hr'g. at 33:23-24. In fact, a ruling favorable to the defendants on this issue could conceivably result in more arduous proceedings for all parties, as the Court

and the parties struggle to find other ways of establishing whether or not the predicate facts for the application of FACA exist, and moving this litigation forward. Accordingly, defendants have not carried their burden of demonstrating that interlocutory appeal of this question at this point in time would materially advance the litigation as a whole.

D. *Availability of discovery in action pursuant to the APA or mandamus statutes*

The third question defendants seek to certify for interlocutory appeal concerns the availability of discovery under the APA or the federal *mandamus* statute. Defendants contend that it is "well settled" that judicial review pursuant to the APA must be limited to the administrative record absent "exceptional circumstances," which only arise upon a "strong showing of bad faith or improper behavior" or "when the record is so bare that it prevents effective judicial review." Defs.' Mot. at 6, 8; Defs.' Reply at 6, citing *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998). They further hypothesize, citing only to their own arguments in objection to the plaintiffs' proposed discovery plan, that the scope of discovery in a *mandamus* action should be no greater than that permitted under the APA. See Defs.' Mot. at 6, Defs.' Reply at 6.

The question of the scope of permissible discovery in a *mandamus* or APA action is not controlling, and its resolution will not materially advance this litigation. As plaintiff Sierra

Club correctly points out, if this Court has reached an incorrect conclusion under either the *mandamus* statute or the APA with respect to the propriety of limited discovery this case, then the Court of Appeals is free, upon review of final judgment, to make its ruling on the APA record alone, or to remand to this Court for such a review of plaintiffs' claims. Additionally, as defendants have repeatedly stated, agency defendants, who are the only defendants against whom discovery was sought under the APA, have already provided plaintiffs with discovery, thereby rendering the question moot for purposes of interlocutory appeal. See Tr. 11/13/02 Hr'g. at 32:24 - 33:2.

Moreover, with respect to the proper scope of discovery in a *mandamus* action, defendants' citation to their own arguments, without more, is simply insufficient to create the requisite "substantial ground for difference of opinion" on this issue. A litigant cannot create a "substantial ground for difference of opinion" justifying interlocutory appeal simply by arguing for a particular interpretation or extension of existing law. Furthermore, as defendants themselves concede, what authority they do rely on with respect to this question actually suggests that, under certain circumstances, discovery is appropriate in a *mandamus* action. See Defs.' Objections to Plaintiffs' Proposed Discovery Plan at 9 n.6, citing *Conservation Law Foundation of New England, Inc. v. Clark*, 590 F. Supp. 1467, 1472-73 (D. Mass.

1984) ("Courts have indicated that independent fact finding under mandamus is appropriate in some circumstances even where agency action is under review."). Although discovery in a *mandamus* action may not be appropriate where the statute governing agency action provides significant discretion, or where relevant regulatory issues are particularly within the agency's competence and expertise, courts have found discovery to be appropriate where an agency has either completely abrogated its enforcement responsibilities or acted clearly outside the bounds of relevant statutes. *Id.* at 1473 (citing cases). None of these factors counseling either for or against discovery in a *mandamus* action are necessarily present in the current case. However, both the contemplated review of agency action and the "record" in this case are decidedly unconventional. This Court has identified compelling reasons in favor of allowing tightly reined discovery on threshold issues, which, in light of the absence of authority holding such discovery unavailable, it deems sufficient to justify the discovery contemplated by the Orders here challenged. See *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *31, 32.

As for the proper scope of discovery in an APA action, this Court has impliedly held that this case does in fact present the type of "exceptional circumstances" in which discovery beyond the administrative record is required to assist the Court in

adjudicating the questions before it. See *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *23 (stating that defendants' argument that no further factual development is required "flies in the face of the precedent that has developed separation of powers doctrine as a fact-intensive, case-by-case analysis of the specific nature of the intrusion into the President's performance of his constitutional duties."); Tr. 08/02/02 Hr'g. at 19:1 - 19:11. This Court has already concluded that, in light of the delicate balancing of constitutional concerns required of the Court in this case, more information than is contained in the scant administrative record currently available, which consists in its entirety of the President's memorandum to the Vice-President establishing the NEPDG, the NEPDG's final report, and the affidavit of the NEPDG's former Deputy Director, is necessary to resolve the question of whether and how FACA is applicable to the NEPDG. See *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at *31-32.

This conclusion is not inconsistent with the precedent cited by defendants in support of their contention that, as a general rule, no discovery beyond the administrative record should be permitted in an APA case. See Defs.' Mot. at 8, Defs.' Reply at 6. The facts of the case currently before this Court most certainly do not present circumstances analogous to those present in the APA cases cited by defendants, in which an agency's

adjudicative or legislative processes were the subject of judicial review. See, e.g., *Camp v. Pitts*, 411 U.S. 138, 141-142, 93 S. Ct. 1241, 1243-44 (1973) (adjudicative process); *Marshall Co. Health Care v. Shalala*, 988 F.2d 1221, 1226-27 (D.C. Cir. 1993) (rulemaking); see also *Conservation Law Foundation of New England, Inc.*, 590 F. Supp. at 1474-75 (recognizing, in the context of rulemaking, a number of exceptions to the general rule that a court's inquiry in administrative review cases is "confined to the full record before the agency at the time the decision is made"); see also Tr. 08/02/02 Hr'g. at 13:16 - 14:25. Additionally, this Court has already concluded that the administrative record here is "so bare that it prevents effective judicial review." See Tr. 08/02/02 Hr'g. at 19:1 - 19:3; *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 2002 WL 1483891 at 31 ("it would be inappropriate for this Court to conduct the fact-intensive inquiry demanded by separation of powers precedent by considering only the Presidential Memorandum that established the NEPDG."); see also *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998); *Conservation Law Foundation of New England, Inc.*, 590 F. Supp. at 1474-75 (most exceptions to the rule confining APA review to the record before the agency "involve instances where the record submitted by the agency is self-serving, incomplete or unclear."). Therefore, this Court has found, consistent with controlling and persuasive

precedent, that circumstances exist in this case warranting limited discovery into matters outside the scant administrative record.

In light of the foregoing, it is clear that defendants have failed to carry their burden of establishing the existence of a "controlling question of law" as to which there is a "substantial ground for difference of opinion" with respect to the permissible scope of discovery under the federal *mandamus* statute or the APA. At most, they have argued for a different application of the law to the facts before the Court, and specifically for application of the general rule rather than the permissible exception. Defendants can advance such arguments on appeal after final judgment, but they have not established the basis for doing so at this time under § 1292(b).

With respect to all three questions for which they seek certification, defendants have not met their burden of establishing that exceptional circumstances justifying interlocutory appeal exist under the standard set forth by § 1292(b). Defendants have, throughout this litigation, zealously advocated in favor of, at best, a different interpretation, and at most, a dramatic extension of existing precedent with respect to each of the three legal questions they seek to certify. However, defendants' conviction of the correctness of their position is insufficient to carry them over the high threshold posed by the standard governing certification for interlocutory

appeal. Defendants have simply failed to establish the factual and legal predicates justifying interlocutory review pursuant to § 1292(b).

Accordingly, it is by the Court hereby

ORDERED that defendants' motion for certification of interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is hereby **DENIED**.

Signed: **EMMET G. SULLIVAN**
UNITED STATES DISTRICT JUDGE
November 26, 2002

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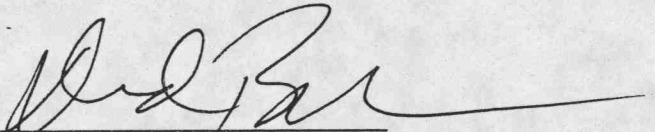
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CERTIFICATE OF SERVICE

I certify that on November 27, 2002, I served a copy of the foregoing "Notice of Relevant Decision" on counsel for all parties by email and first-class mail at the addresses given below:

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