

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 ----- X  
4 ELECTRONIC PRIVACY :  
5 INFORMATION CENTER, :  
6 Petitioner, :  
7 v. : Docket No. 17-5171  
8 PRESIDENTIAL ADVISORY :  
9 COMMISSION ON ELECTION :  
10 INTEGRITY, et al., :  
11 Respondents. :  
12 ----- X

11 Tuesday, November 21, 2017  
12 Washington, D.C.

13  
14 The above-entitled matter came on for oral  
15 argument pursuant to notice.

16 BEFORE:

17 CIRCUIT COURT HENDERSON, and SENIOR CIRCUIT COURT  
18 JUDGES WILLIAMS AND GINSBURG

19 APPEARANCES:

20 ON BEHALF OF THE PETITIONER:

21 MARC ROTENBERG, ESQ.

22 ON BEHALF OF THE RESPONDENT:

23 DANIEL TENNY (DOJ), ESQ.  
24  
25

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C O N T E N T S

ORAL ARGUMENT OF:

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Marc Rotenberg, Esq.  
On Behalf of the Petitioner

3; 26

Daniel Tenny, Esq.  
On Behalf of the Respondent

15



1 likelihood of success, irreparable harm, balance of equities  
2 and also the public interest.

3 JUDGE WILLIAMS: You are going to get standing?

4 MR. ROTENBERG: TO the extent that you have a  
5 question on standing, yes, the lower court found that EPIC  
6 had both organizational standing and informational standing  
7 relying on this --

8 JUDGE WILLIAMS: Well is the organization a  
9 suitable plaintiff for a violation of a requirement that  
10 appears to be aimed at protecting the privacy of people who  
11 get these questionnaires?

12 MR. ROTENBERG: Judge Williams, we believe that  
13 yes.

14 JUDGE WILLIAMS: Or whose names? Whose names are  
15 communicated --

16 MR. ROTENBERG: Yes.

17 JUDGE WILLIAMS: -- in the questionnaires.

18 MR. ROTENBERG: So to your point, the statute set  
19 out an obligation for government agencies to undertake the  
20 privacy impact assessment for the purpose of protecting  
21 privacy and to promote transparency and accountability in  
22 Government practices. Our organization, Electronic Privacy  
23 Information Center was established to focus public attention  
24 on emerging privacy and civil liberties issues.

25 JUDGE WILLIAMS: I understand that. But the

1 Supreme Court seems to take the view that in assessing  
2 standing, particularly standing which is created by a  
3 Congressional mandate one should look, I'm thinking of the  
4 Specako (phonetic sp.) case.

5 MR. ROTENBERG: Yes.

6 JUDGE WILLIAMS: I may not be pronouncing that  
7 right, which was clearly designed to protect people from  
8 misinformation in their credit files, but it doesn't protect  
9 everybody against all misinformation.

10 MR. ROTENBERG: Certainly that's --

11 JUDGE WILLIAMS: So that it does seem to be  
12 question of degree and I have to say that EPIC does not seem  
13 central to the particular interests protected here.

14 MR. ROTENBERG: Well, as I indicated earlier our  
15 mission is to inform and to educate the public about  
16 emerging privacy issues. We are named the Privacy  
17 Information Center, but a third point is that we have  
18 previously pursued the privacy impact assessments issued by  
19 other federal agencies. In fact, there are two opinions  
20 from District Courts in this Circuit concerning our Freedom  
21 of Information Act cases precisely to obtain the type of  
22 information that we saw here. What was of such great  
23 concern to us and the reason that we brought the action is  
24 that the Presidential Advisory Commission simply failed to  
25 undertake the privacy impact assessment and to public the

1 privacy impact assessment, which we would routinely be able  
2 to access under Section 208. And to the standing point also  
3 under this Circuit's previous decision in PETA, which was  
4 just two years ago, we have both the type of harm that the  
5 statute contemplates and of course we also had to expend  
6 additional resources because the Commission failed to do  
7 what they're supposed to do.

8 Now the second --

9 JUDGE WILLIAMS: Yes, I think if you're injured in  
10 your mission, the spending of resources to offset that  
11 injury is unnecessary, and cases have so said, but anyway,  
12 go ahead.

13 MR. ROTENBERG: Well I take your point and the  
14 other standing issue before the Court today is informational  
15 standing. Which we think is established under both of the  
16 Circuit's recent opinion in Friends of Animals versus Jewel.  
17 The lower court relied on the second case which in fact did  
18 not find standing, but it was sufficient in terms of the  
19 test that was set out to find informational standing to  
20 EPIC. We also argue in our briefs that under the first  
21 Friends of Animals case where standing was found under  
22 Section 10 of the Endangered Species Act, we would certainly  
23 have standing as well.

24 The third standing --

25 JUDGE WILLIAMS: Yes, the Court there said it

1 appeared that this would be of real use to the plaintiff and  
2 the plaintiff's role in the enforcement of that statute  
3 seemed to be much more central than your role in the  
4 enforcement of this particular provision.

5 MR. ROTENBERG: Well as to our interest, it is  
6 central to our mission and I will say that this data  
7 collection undertaken by the Presidential Advisory  
8 Commission was absolutely unprecedented. There has never  
9 been a similar effort to gather a state load of records,  
10 detailed records, social security numbers, military service,  
11 home address, prior voting information.

12 JUDGE WILLIAMS: Well you speak of its breadth and  
13 perhaps you're right on that. But it's potency seems to be  
14 very low. You speak of demands, but they requested and they  
15 seem to have no power to do anything more than request.

16 MR. ROTENBERG: Well under the terms of the  
17 privacy impact assessment coming back to Section 208, those  
18 factors which I just described, which concern the scope of  
19 the request and the detail of the request and the risk of  
20 harm, are precisely the factors that the Commission was  
21 expected to consider prior to the collection of data.

22 JUDGE WILLIAMS: I understand that.

23 MR. ROTENBERG: So that would be another key  
24 consideration in this case. The Section 208 obligation to  
25 publish the privacy impact assessment is an obligation that

1 occurs before the data collection takes place and that  
2 simply did not happen here. So --

3 JUDGE GINSBURG: Mr. Rotenberg, if you do have  
4 standing, am I correct in thinking whether the Advisory  
5 Committee has an obligation to issue a PIA, depends upon  
6 whether it's an agency within the meaning --

7 MR. ROTENBERG: Yes.

8 JUDGE GINSBURG: -- of the Government Act, right?

9 MR. ROTENBERG: Well that's correct and we think  
10 that's the core issue here. Because the lower court relied  
11 on the 2009 crew test which was a Freedom of Information Act  
12 case that had incorporated the Susi Doctrine (phonetic sp.),  
13 which looks at the substantial independent authority of an  
14 agency. We think that wasn't necessary here, in fact, it  
15 was incorrect, the relevant definition for the privacy  
16 impact assessment obligation is found in Title 44, and there  
17 in 3502 in the Code it says simply an establishment in the  
18 Executive Branch of Government.

19 JUDGE GINSBURG: Well we've already said though  
20 that 3502 clarifies 551 and essentially equates, I think,  
21 3502 and 552.

22 MR. ROTENBERG: Well, no.

23 JUDGE GINSBURG: Why?

24 MR. ROTENBERG: In fact, we think there's a sharp  
25 distinction between the Title 44 definition and the 552(f)



1 definition which the Government relies upon in its briefing --

2 JUDGE GINSBURG: What's the sharp distinction?

3 MR. ROTENBERG: Well the sharp distinction is that  
4 the 552(f) definition relies on the Susi Doctrine and  
5 emerges in Freedom of Information Act cases, where's there's  
6 a competing constitutional concern about the ability of  
7 people close to the President to give confidential advice to  
8 the President.

9 And so when in Susi, a Freedom of Information Act  
10 case, the Court said we have to look to that interest, that  
11 doctrine was incorporated by means of the 1974 legislative  
12 history as to 552(f). But it did not touch 551 and it most  
13 certainly did not touch Title 44. There's no competing  
14 interest here in the confidential advice to the President.  
15 In fact, as this Court I'd suggested in Nesbi (phonetic sp.)  
16 quite the opposite --

17 JUDGE GINSBURG: In which?

18 MR. ROTENBERG: I'm sorry Nesbi is a 1996 opinion  
19 of the Circuit and the Court actually draws the distinction  
20 and says whereas in the Freedom of Information Act realm  
21 we're concerned about the confidential advice to the  
22 President and we look more closely at the nature of the  
23 Agency. That issue is simply not present here, presumably  
24 whatever the Commission is doing its doing subject to FACA  
25 (phonetic sp.) and the recommendations we'll make will be

1 public recommendations.

2           So we think this is the mistake of the lower court  
3 and also the Government's arguments can largely be  
4 distinguished, it went down to 552(f) road, it didn't need  
5 to. You have judicial review in Chapter 7, you have review  
6 under Section 701 and 702. We think that's sufficient to  
7 reach the outcome which we're seeking which is the issuance  
8 of the preliminary injunction.

9           Just to go --

10           JUDGE GINSBURG: Well I mean --

11           MR. ROTENBERG: Yes?

12           JUDGE GINSBURG: -- when you say may be sufficient  
13 that's because of the trial that got you there. But my  
14 question was really, and I think you've already answered it,  
15 but the question goes right to whether there's any  
16 difference between 552 and 3502.

17           MR. ROTENBERG: Well, Judge Ginsburg, I think the  
18 differences in part found in two cases in which you were on  
19 the panel, Armstrong 1, the 1991 case and Armstrong 3, the  
20 1996.

21           JUDGE GINSBURG: You only pounced on three, right?

22           MR. ROTENBERG: Right.

23           JUDGE GINSBURG: Yes, okay. That's latter didn't  
24 play much role in your arguments as I recall.

25           MR. ROTENBERG: Well, only two establish --

1 JUDGE GINSBURG: In fact, I kept saying Armstrong  
2 1 without reference to the other one.

3 MR. ROTENBERG: Right. Well, Armstrong 1 is  
4 significant because you found judicial review under Chapter  
5 7 which is to say through 701 of the record keeping  
6 practices of the National Security Council, which  
7 subsequently you decided in Armstrong 3 was nonetheless not  
8 subject to obligations under the Freedom of Information Act.

9 JUDGE GINSBURG: Well there have been some  
10 intervening changes from the situation.

11 MR. ROTENBERG: Well, yes, but I believe that  
12 Armstrong 1 is still good law, and I believe it established  
13 that you can have an agency subject to judicial review under  
14 Chapter 7 even though it may not be subject to review  
15 through the agency definition in 552(f).

16 And if I may make a final point here, of course  
17 the four factor test was briefly considered by the lower  
18 court. The lower court looked simply at the question of  
19 whether the Commission had an obligation under Section 208  
20 of the Government Act under the take the privacy impact  
21 assessment, the lower court concluded that the Commission  
22 was not an agency and therefore did not have that  
23 obligation.

24 But of course in addition to the fact we think  
25 that holding was incorrect, we think the other three factors

1 also weigh in EPIC's interest. There's clearly the  
2 irreparable harm by the failure to publish the privacy  
3 impact assessment. The balance of equities in this case is  
4 not simply EPIC's interest in obtaining the privacy impact  
5 assessment as against the Commission's interest in doing its  
6 work. The balance of equities must also necessarily  
7 consider the privacy interest of the voters whose personal  
8 data is being collected by the Commission. So you see, if  
9 you look at the balance of equities analysis it's not just  
10 the Commission versus EPIC, it's the privacy.

11 JUDGE GINSBURG: The information in question is  
12 already publically available, right?

13 MR. ROTENBERG: Well we dispute that  
14 characterization.

15 JUDGE GINSBURG: Well the request is for  
16 publically available information.

17 MR. ROTENBERG: We understand that but the request  
18 is also for detailed voter history information. It's also  
19 for social security numbers.

20 JUDGE GINSBURG: Regardless of whether it's  
21 publically available?

22 MR. ROTENBERG: It's ambiguous, Your Honor. The  
23 procedure that the States would normally follow for a  
24 similar request is quite elaborate. If you or I or even a  
25 political committee wanted to get this type of voter data

1 from a state agency or state election official, we would  
2 have to fill out forms, we'd have to establish security  
3 procedures for receiving the data and those requests would  
4 then be reviewed by the election official to determine which  
5 information the state could release.

6 JUDGE GINSBURG: Well is there any indication that  
7 any state will provide non-public information in response to  
8 this request?

9 MR. ROTENBERG: It's a difficult determination for  
10 us to make because we don't know in fact which data the  
11 states have provided to the Commission, which is of course,  
12 part of the purpose of the privacy impact assessment.

13 JUDGE GINSBURG: Do we know that any state had  
14 provided information?

15 MR. ROTENBERG: I believe some states have  
16 provided. Certainly Arkansas in the first instance --

17 JUDGE GINSBURG: Yes.

18 MR. ROTENBERG: -- provided the data and when we  
19 filed the initial complaint we had also established that the  
20 technique of the Commission had used to receive the data was  
21 not secure. In fact, if you went to the website --

22 JUDGE GINSBURG: That's been changed.

23 MR. ROTENBERG: Yes.

24 JUDGE GINSBURG: Thank you for your pointing it  
25 out to the agency.

1           MR. ROTENBERG: We appreciate that, but you see  
2 that demonstrates on the record in this case that the  
3 concern we have is not theoretical, we're not talking about  
4 what might happen to data that is not protected under the  
5 requirements of a privacy impact assessment. We can  
6 actually point to the record in this case and show what  
7 happened when the Commission collected the data. And we are  
8 still in the dark. We still don't know if the Commission  
9 has answered the questions that Section 208 requires. How  
10 will the data be used? Who will have access to it? For  
11 what purpose is it being collected? Have they created a  
12 Privacy Act system of records that requires a Privacy Act  
13 notice? None of these questions have been answered by the  
14 Commission. And we think this is precisely the reason that  
15 the preliminary injunction is necessary.

16           If I may go --

17           JUDGE GINSBURG: Well it makes it difficult for  
18 you to show irreparable harm if you don't know what's  
19 happened.

20           MR. ROTENBERG: Well, the irreparable harm flows  
21 from the informational injury which was the failure to  
22 obtain the privacy impact assessment which would have  
23 detailed the Commission's compliance with all of these  
24 requirements.

25           JUDGE GINSBURG: Well I guess we're coming to the

1 balance of equities then.

2 MR. ROTENBERG: Yes. That's also in the balance  
3 of equities and finally if I may just speak to the fourth  
4 factor. As I said the Court below barely touched upon these  
5 issues but they're all relevant to your consideration for a  
6 preliminary injunction. And the public interest here,  
7 frankly, is quite substantial. As we wrote in our initial  
8 complaint to the Court, this nation doesn't face a crisis of  
9 data breaches and identity theft. We open the paper the  
10 everyday and we read about the improper breach of personal  
11 data.

12 This data, voter data, is the most sensitive data  
13 in our form of government and we know on the record that was  
14 also the target of a foreign adversary during the 2016  
15 election. It's actually difficult for us to imagine a case  
16 where there's a more compelling claim to undertake complete  
17 and publish the privacy impact assessment at Section 208 of  
18 the Government Act requires. That of course is the reason  
19 that we brought this case and that's the reason that we're  
20 seeking the preliminary injunction.

21 JUDGE HENDERSON: All right. Thank you.

22 MR. ROTENBERG: Thank you.

23 JUDGE HENDERSON: MR. Tenny?

24 ORAL ARGUMENT OF DANIEL TENNY, ESQ.

25 ON BEHALF OF THE APPELLEE/RESPONDENT

1           MR. TENNY: Thank you. May it please the Court,  
2 I'd like to start on the standing issue. EPIC is not  
3 injured by the agency, not agency, the Commission action  
4 that it is seeking to enjoin in this case. And so it's  
5 claim is that it has an independent injury from the process  
6 that would have in its view appropriately led up to that  
7 decision and as the earlier colloquy pointed out in such  
8 circumstances the Supreme Court and this Court have demanded  
9 that the cognizable injury that you claim an information be  
10 one that specifically granted to someone in your position.

11           And the Supreme Court said in Luhan (phonetic sp.)  
12 for example, that if you're seeking standing because you  
13 think it an environmental impact statement should have been  
14 prepared and you live on the opposite side of the country  
15 from the proposed facility that would be created, then  
16 that's not a sufficient basis for standing.

17           And in this case, EPIC because they've in this  
18 Court not asserted that they have any interest in the actual  
19 action that is at issue, that they're seeking to enjoin  
20 here, they're quite similarly situated to an entity that  
21 lives on the opposite end of the country from an  
22 environmental project.

23           JUDGE WILLIAMS: Suppose they had members, I  
24 understand they don't have members, but suppose they had  
25 members whose information as voters was being collected.



1           MR. TENNY: Well I mean the District Court held in  
2 the alternative that those members might not have standing  
3 to challenge the action because any harm to them would be  
4 speculative based on the publically available nature of the  
5 data. But if your question goes to suppose they had a  
6 member who actually would have standing to enjoin or to  
7 challenge the action that they're trying to enjoin, then of  
8 course they could, they could say one of the reasons that  
9 that action was unlawful was the failure to publish a  
10 privacy impact assessment and they could raise their  
11 challenge that way. The Supreme Court and this Court have  
12 made quite clear that if you assert this sort of procedural  
13 injury the redressability prong of standing is relaxed such  
14 that you don't have to demonstrate that if they had done the  
15 assessment they wouldn't have collected the data at the end  
16 of the day.

17           JUDGE WILLIAMS: But some of the cases do say seem  
18 to allow an organization to have organizational standing  
19 because it's interested in some way in the activity of the  
20 agency in question. And EPIC seems to be interested and has  
21 manifested its interest.

22           MR. TENNY: Yes, I mean there are cases that have  
23 held that there is standing for informational purposes. A  
24 mere interest in the subject matter of the agency or  
25 Commission in this case, proceeding has not been sufficient.

1 So you can draw contrast you know if you start from, I'm  
2 sorry, I don't --

3 JUDGE WILLIAMS: Go ahead.

4 MR. TENNY: -- want to cut you off.

5 JUDGE WILLIAMS: I'm just, I'm --

6 MR. TENNY: I mean the informational injury cases  
7 began with or at least are now reliant on the Supreme  
8 Court's decision in FEC v. Akins, which was an election case  
9 in which there were people who wanted to participate in the  
10 election and Congress had made quite clear that there were  
11 certain disclosures that should be made so that voters and  
12 other participants in the electoral process would have the  
13 information they need to cast an informed ballot. And  
14 similarly --

15 JUDGE WILLIAMS: Yes, that's obviously the strong  
16 case. But then the usual evolution of judicial decisions it  
17 goes down, down, down in terms of the degree of concern that  
18 a plaintiff party has.

19 MR. TENNY: I mean I do think that's a strong  
20 case. I mean at the other end of the spectrum which I think  
21 is much closer to where we are here, of course you have the  
22 discussion in Luhan v. Defenders of Wildlife about an  
23 organization that has an interest in the environment but  
24 lives on the opposite end of the country from the project  
25 that's at issue. Or some private institute where someone

1 had an interest again in the agency engaging in a notice and  
2 comment process and providing more information. But that  
3 wasn't held to be sufficient. And obviously you have to you  
4 know align the cases in the middle, but you know  
5 (indiscernible) v. FEC is a case from this Court which also  
6 involved elections but it was somebody who wasn't trying to  
7 participate, but was trying to sort of get more enforcement  
8 and this Court held that that was insufficient as a basis  
9 for standing.

10           Then there's the Friends of Animals case that was  
11 cited earlier. And there too, a key distinction is that  
12 Congress made quite clear that it wanted to facilitate  
13 participation in this process, you know the agency's process  
14 in that case of granting permit and it wanted to facilitate  
15 participation by the sorts of groups who were filing that  
16 lawsuit, you know by you know advocates for animals and  
17 Congress had strong language repeated several times in the  
18 statute which was quoted and italicized by this Court about  
19 how the information should be made available at every stage  
20 of the process that both the application for the permit and  
21 the agency's determination of how to look at that  
22 information would be made available. And you contrast that  
23 here, we have a statute whose express statement of purpose  
24 is to ensure sufficient privacy for personal information.

25           And you have a plaintiff whose personal

1 information is not at issue. And you know it's clear that  
2 the purpose of the privacy impact assessment is not to  
3 provide information to the public. This isn't fundamentally  
4 a disclosure statute. This is a statute to make sure that  
5 the Government you know, when it applies, we don't think it  
6 does apply here, but when taking their allegations as true  
7 for standing purposes, this is a provision that applies to  
8 require the Government to take into account these privacy  
9 concerns when the Government is making its own decisions,  
10 all to the end of getting better Government decisions and  
11 having better decisions that make sure that the Government  
12 is accounting for the interests of individuals who are not  
13 before the Court in this case. Individuals whose privacy  
14 would be at issue with these statements. And there's not a  
15 case like that in which somebody has not had, in which there  
16 is something that's made for internal government decision  
17 making on an issue in which the plaintiff does not have a  
18 cognizable interest and informational standing for that.  
19 You can't come into court, you know, if you say I'm  
20 interested in small business, the agency has to prepare a  
21 regulatory flexibility statement and you know, I'd like to  
22 look at that and make some arguments about that.

23           You know it's never been thought that you could  
24 come into court and challenge an agency action that doesn't  
25 actually cause you any cognizable injury with a claim like

1 that and that's really what's happening here. This is a  
2 much more in the category of generalized grievance. They  
3 have an interest in what's going on and they want to weigh  
4 in. But they're just not the appropriate plaintiffs here

5 JUDGE HENDERSON: How about their argument about  
6 their self-inflicted budget choices, as I see it anyway. I  
7 see a world of difference between this case and PETA.

8 MR. TENNY: I agree with that. I mean one, there  
9 are several differences, one obvious differences, in PETA at  
10 least they were trying to, that was a cause of action for  
11 agency action unlawfully withheld and they were saying the  
12 agency has to do something affirmative and if they do that  
13 then there's this, you know, there's all this work that the  
14 agency would be doing that we have to sort of substitute for  
15 because we're doing all this other work. There is nothing  
16 like that here. This is, you know, they're trying to  
17 prevent the Commission from doing something. And they're  
18 not, they haven't taken on, you know, some burden so I agree  
19 those cases are quite different.

20 I don't have --

21 JUDGE WILLIAMS: I take it their argument is that  
22 in terms of protecting privacy generally the activities of  
23 the Commission represent regardless of what they do a set  
24 back to that mission.

25 MR. TENNY: Right. I mean to their sort of

1 abstract mission but I, I don't think that, they don't have  
2 something concrete that they're doing that's being  
3 interfered with. You know, I mean if it were true that any  
4 time you said you know we're an agency, we're an  
5 organization that likes privacy and this is a setback to  
6 privacy so we have standing, I mean then all the  
7 environmental plaintiffs would say we're environment, we  
8 support a better environment and this agency is, you know,  
9 taking steps that will make the environment worse, so we  
10 have standing. I mean at that level of generality they  
11 really can't, you know, they can't really fit themselves in  
12 any of the cases.

13 I see my time is almost up. I don't have a lot to  
14 say on the merits. I guess I would just mention the effort  
15 to draw a distinction between the E-government Act and the  
16 FOIA, those statutes I have reproduced on pages A-7 and A-8  
17 of our appendix and you'll see the language there and you  
18 can't draw you know five lines between those. It's quite  
19 clear, I mean just in any context, forgetting which of these  
20 statutes we're talking about, federal advisory committees  
21 have never been thought to be agencies that are subject to  
22 you know, to suit under the APA, to the FOIA or to any other  
23 statutes that are applicable to agencies and this is just a  
24 classic advisory committee it says in the Executive Order  
25 itself that it's solely advisory and they are tasked with

1 preparing a report for the precedent. So we think that, you  
2 know, although we differ with the District Court on  
3 standing, we think the District Court was quite right if you  
4 do reach the merits.

5 JUDGE GINSBURG: What's your answer to Mr.  
6 Rotenberg's point about it's really Chapter 7 we should look  
7 to here for agency definition?

8 MR. TENNY: I mean he's talking about the, I mean  
9 the APA uses the same words in Section 551 and Section 701,  
10 I believe. Those were originally actually literally the  
11 same language and then they were split and a non-substantive  
12 amendment when the judicial review provisions and the  
13 substantive provisions were split up. There's no indication  
14 that Congress intended to take the 551 definition which was  
15 the very definition that was at issue in Susi which  
16 established the substantial independent authority test.  
17 There is no indication that Congress intended to jettison,  
18 just when it recodified it into two separate sections and  
19 they haven't cited any case for that.

20 JUDGE GINSBURG: Why is your prince of reliance  
21 then not on Susi but on Myer v. Bush and Armstrong and so  
22 on?

23 MR. TENNY: Well, I mean Susi set out the test,  
24 substantial independent authority, that test was applied in  
25 those other cases. And I mean either way you look at it --

1           JUDGE GINSBURG: I think the way your brief  
2 portrays them I think correct, there are difference in the  
3 elements in between Susi on the one hand and the other  
4 cases.

5           MR. TENNY: I mean if anything the other cases and  
6 I think this was discussed in the Dong v. Smithsonian  
7 Institute case, if anything, you know, the FOIA definition  
8 says for purposes of the FOIA the term agency shall include  
9 and then it rattles off a new list of things. And so you  
10 know if anything the FOIA cases are adding something, I  
11 think was how this Court put it in Dong, but you know under  
12 any of these definitions, the reason we set up the brief  
13 that way is that Susi said substantial independent  
14 authority.

15           JUDGE GINSBURG: Right.

16           MR. TENNY: We don't think this agency has  
17 substantial independent authority, whichever statute you put  
18 that under, we think the result is quite the same. There is  
19 no case under any of these provisions. There's citation of  
20 Armstrong, Armstrong did not say anything like you could  
21 have a cause of action under the APA against someone who  
22 doesn't have substantial independent authority. There is no  
23 language, anything like that in Armstrong. Armstrong was a  
24 cause of action among others against the Archivist of the  
25 United States for not taking action to address alleged



1 deficiencies in record keeping. The Archivist of the United  
2 States is an agency for purposes of the APA. So there  
3 wasn't a fight in that case about whether the APA Section  
4 701 applied. There's no holding there to talk about.

5 JUDGE GINSBURG: Wasn't the NSC in that case?

6 MR. TENNY: The NSC was involved, but you know the  
7 way the Federal Records Act works the head of a government  
8 entity has some responsibilities and then the Archivist also  
9 has responsibilities and so if you thought that the  
10 Archivist was inadequately doing what the Archivist was  
11 supposed to do, you could file an APA cause of action  
12 against the Archivist. So there's no discussion in the case  
13 about whether you could file a cause of action against the  
14 NSC under Section 701. Again, if you look at the case, you  
15 won't find that.

16 JUDGE GINSBURG: And then Armstrong 3?

17 MR. TENNY: I mean these are all follow lines of  
18 the same case.

19 JUDGE GINSBURG: I thought that made it more clear  
20 that the director was not (indiscernible) that the NSC was  
21 not an agency.

22 MR. TENNY: It has been made clear, I forget in  
23 which case and I apologize for that. But I mean our  
24 fundamental point here is just that advisory committees have  
25 never, under any of these statutes are not agencies and the

1 District Court was quite right to hold that, if you reach  
2 the question. Unless there are any further questions.

3 JUDGE TATEL: All right. Thank you.

4 MR. TENNY: Thank you.

5 JUDGE TATEL: Does Mr. Rotenberg have any time?

6 THE CLERK: There is no time remaining.

7 JUDGE TATEL: All right. Why don't you take a  
8 minute.

9 ORAL REBUTTAL OF MARC ROTENBERG, ESQ.

10 ON BEHALF OF THE APPELLANTS/PETITIONER

11 MR. ROTENBERG: Thank you. Three brief points  
12 contrary to counsel's claim in fact, this Court has found  
13 that a Presidential Advisory Commission is subject to the  
14 APA, that was the FACA enforcement in Comic v. Gore, which  
15 was 1999.

16 Secondly, counsel is describing a privacy act  
17 style statute to argue that EPIC doesn't have standing.  
18 Section 208 has a very different purpose, it's the  
19 publication about the Government's practices that are at  
20 issue in Section 208 and that's of course core to EPIC's  
21 mission, which goes to my third point regarding the  
22 application of PETA to this case.

23 It wasn't a generalized harm or self-inflicted  
24 expenditure when we learned that the Commission had not  
25 undertaken the privacy impact assessment, not only did we

1 seek related information through the FOIA, we contacted the  
2 state's secretaries to warn them that this action had not  
3 been completed and we also launched an internet based  
4 campaign to alert voters that their information was not  
5 being protected as required by Section 208. So we believe  
6 that we fall quite clearly in the PETA zone for standing as  
7 an organization and also under Friends of Animals for  
8 informational standing. Thank you.

9 JUDGE HENDERSON: All right. Next case.

10 (Whereupon, the proceedings were concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



\_\_\_\_\_  
Diane Wilson

November 27, 2017  
Date

DEPOSITION SERVICES, INC.