SUPREME COURT OF THE UNITED STATES

No. 03–475

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 24, 2004]

JUSTICE KENNEDY delivered the opinion of the Court.

The United States District Court for the District of Columbia entered discovery orders directing the Vice President and other senior officials in the Executive Branch to produce information about a task force established to give advice and make policy recommendations to the President. This case requires us to consider the circumstances under which a court of appeals may exercise its power to issue a writ of mandamus to modify or dissolve the orders when, by virtue of their overbreadth, enforcement might interfere with the officials in the discharge of their duties and impinge upon the President's constitutional prerogatives.

I

A few days after assuming office, President George W. Bush issued a memorandum establishing the National Energy Policy Development Group (NEPDG or Group). The Group was directed to "develo[p] . . . a national energy policy designed to help the private sector, and government

at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future." App. 156–157. The President assigned a number of agency heads and assistants—all employees of the Federal Government—to serve as members of the committee. He authorized the Vice President, as chairman of the Group, to invite "other officers of the Federal Government" to participate "as appropriate." *Id.*, at 157. Five months later, the NEPDG issued a final report and, according to the Government, terminated all operations.

Following publication of the report, respondents Judicial Watch and the Sierra Club filed these separate actions, which were later consolidated in the District Court. Respondents alleged the NEPDG had failed to comply with the procedural and disclosure requirements of the Federal Advisory Committee Act (FACA or Act), 5 U. S. C. App. §2, p. 1.

FACA was enacted to monitor the "numerous committees, boards, commissions, councils, and similar groups [that] have been established to advise officers and agencies in the executive branch of the Federal Government," §2(a), and to prevent the "wasteful expenditure of public funds" that may result from their proliferation, *Public Citizen* v. *Department of Justice,* 491 U. S. 440, 453 (1989). Subject to specific exemptions, FACA imposes a variety of open-meeting and disclosure requirements on groups that meet the definition of an "advisory committee." As relevant here, an "advisory committee" means

> "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . , which is—
>
> . . . . .
>
> "(B) established or utilized by the President, . . .
>
> except that [the definition] excludes (i) any committee

> that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government . . . ." 5 U. S. C. App. §3(2).

Respondents do not dispute the President appointed only Federal Government officials to the NEPDG. They agree that the NEPDG, as established by the President in his memorandum, was "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." *Ibid.* The complaint alleges, however, that "non-federal employees," including "private lobbyists," "regularly attended and fully participated in non-public meetings." App. 21 (Judicial Watch Complaint ¶25). Relying on *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F. 2d 898 (CADC 1993) *(AAPS)*, respondents contend that the regular participation of the non-Government individuals made them *de facto* members of the committee. According to the complaint, their "involvement and role are functionally indistinguishable from those of the other [formal] members." *Id.*, at 915. As a result, respondents argue, the NEPDG cannot benefit from the Act's exemption under subsection B and is subject to FACA's requirements.

Vice President Cheney, the NEPDG, the Government officials who served on the committee, and the alleged *de facto* members were named as defendants. The suit seeks declaratory relief and an injunction requiring them to produce all materials allegedly subject to FACA's requirements.

All defendants moved to dismiss. The District Court granted the motion in part and denied it in part. The court acknowledged FACA does not create a private cause of action. On this basis, it dismissed respondents' claims against the non-Government defendants. Because the NEPDG had been dissolved, it could not be sued as a defendant; and the claims against it were dismissed as

well. The District Court held, however, that FACA's substantive requirements could be enforced against the Vice President and other Government participants on the NEPDG under the Mandamus Act, 28 U. S. C. §1361, and against the agency defendants under the Administrative Procedure Act (APA), 5 U. S. C. §706. The District Court recognized the disclosure duty must be clear and nondiscretionary for mandamus to issue, and there must be, among other things, "final agency actions" for the APA to apply. According to the District Court, it was premature to decide these questions. It held only that respondents had alleged sufficient facts to keep the Vice President and the other defendants in the case.

The District Court deferred ruling on the Government's contention that to disregard the exemption and apply FACA to the NEPDG would violate principles of separation of powers and interfere with the constitutional prerogatives of the President and the Vice President. Instead, the court allowed respondents to conduct a "tightly-reined" discovery to ascertain the NEPDG's structure and membership, and thus to determine whether the *de facto* membership doctrine applies. *Judicial Watch, Inc.* v. *National Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 54 (DC 2002). While acknowledging that discovery itself might raise serious constitutional questions, the District Court explained that the Government could assert executive privilege to protect sensitive materials from disclosure. In the District Court's view, these "issues of executive privilege will be much more limited in scope than the broad constitutional challenge raised by the government." *Id.*, at 55. The District Court adopted this approach in an attempt to avoid constitutional questions, noting that if, after discovery, respondents have no evidentiary support for the allegations about the regular participation by lobbyists and industry executives on the NEPDG, the Government can prevail on statutory grounds. Further-

more, the District Court explained, even were it appropriate to address constitutional issues, some factual development is necessary to determine the extent of the alleged intrusion into the Executive's constitutional authority. The court denied in part the motion to dismiss and ordered respondents to submit a discovery plan.

In due course the District Court approved respondents' discovery plan, entered a series of orders allowing discovery to proceed, see CADC App. 238, 263, 364 (reproducing orders entered on Sept. 9, Oct. 17, and Nov. 1, 2002), and denied the Government's motion for certification under 28 U. S. C. §1292(b) with respect to the discovery orders. Petitioners sought a writ of mandamus in the Court of Appeals to vacate the discovery orders, to direct the District Court to rule on the basis of the administrative record, and to dismiss the Vice President from the suit. The Vice President also filed a notice of appeal from the same orders. See *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541 (1949); *United States* v. *Nixon*, 418 U. S. 683 (1974).

A divided panel of the Court of Appeals dismissed the petition for a writ of mandamus and the Vice President's attempted interlocutory appeal. *In re Cheney*, 334 F. 3d 1096 (CADC 2003). With respect to mandamus, the majority declined to issue the writ on the ground that alternative avenues of relief remained available. Citing *United States* v. *Nixon, supra*, the majority held that petitioners, to guard against intrusion into the President's prerogatives, must first assert privilege. Under its reading of *Nixon*, moreover, privilege claims must be made "'with particularity.'" 334 F. 3d, at 1104. In the majority's view, if the District Court sustains the privilege, petitioners will be able to obtain all the relief they seek. If the District Court rejects the claim of executive privilege and creates "an imminent risk of disclosure of allegedly protected presidential communications," "mandamus might well be

appropriate to avoid letting 'the cat . . . out of the bag.'" *Id.*, at 1104–1105. "But so long as the separation of powers conflict that petitioners anticipate remains hypothetical," the panel held, "we have no authority to exercise the extraordinary remedy of mandamus." *Id.*, at 1105. The majority acknowledged the scope of respondents' requests is overly broad, because it seeks far more than the "limited items" to which respondents would be entitled if "the district court ultimately determines that the NEPDG is subject to FACA." *Id.*, at 1105–1106; *id.*, at 1106 ("The requests to produce also go well beyond FACA's requirements"); *ibid.* ("[Respondents'] discovery also goes well beyond what they need to prove"). It nonetheless agreed with the District Court that petitioners "'shall bear the burden'" of invoking executive privilege and filing objections to the discovery orders with "'detailed precision.'" *Id.*, at 1105 (quoting Aug. 2, 2002, Order).

For similar reasons, the majority rejected the Vice President's interlocutory appeal. In *United States* v. *Nixon*, the Court held that the President could appeal an interlocutory subpoena order without having "to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review." 418 U. S., at 691. The majority, however, found the case inapplicable because Vice President Cheney, unlike then-President Nixon, had not yet asserted privilege. In the majority's view, the Vice President was not forced to choose between disclosure and suffering contempt for failure to obey a court order. The majority held that to require the Vice President to assert privilege does not create the unnecessary confrontation between two branches of Government described in *Nixon*.

Judge Randolph filed a dissenting opinion. In his view *AAPS*' *de facto* membership doctrine is mistaken, and the Constitution bars its application to the NEPDG. Allowing discovery to determine the applicability of the *de facto*

membership doctrine, he concluded, is inappropriate. He would have issued the writ of mandamus directing dismissal of the complaints. 334 F. 3d, at 1119.

We granted certiorari. 540 U. S. ___ (2003). We now vacate the judgment of the Court of Appeals and remand the case for further proceedings to reconsider the Government's mandamus petition.

II

As a preliminary matter, we address respondents' argument that the Government's petition for a writ of mandamus was jurisdictionally out of time or, alternatively, barred by the equitable doctrine of laches. According to respondents, because the Government's basic argument was one of discovery immunity—that is, it need not invoke executive privilege or make particular objections to the discovery requests—the mandamus petition should have been filed with the Court of Appeals within 60 days after the District Court denied the Government's motion to dismiss. See Fed. Rule App. Proc. 4(a)(1)(B) ("When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered"). On this theory, the last day for making any filing to the Court of Appeals was September 9, 2002. The Government, however, did not file the mandamus petition and the notice of appeal until November 7, four months after the District Court issued the order that, under respondents' view, commenced the time for appeal.

As even respondents acknowledge, however, Rule 4(a), by its plain terms, applies only to the filing of a notice of appeal. Brief for Respondent Sierra Club 23. Rule 4(a) is inapplicable to the Government's mandamus petition under the All Writs Act, 28 U. S. C. §1651. Because we vacate the Court of Appeals' judgment and remand the case for further proceedings for the court to consider

whether a writ of mandamus should have issued, we need not decide whether the Vice President also could have appealed the District Court's orders under *Nixon* and the collateral order doctrine. We express no opinion on whether the Vice President's notice of appeal was timely filed.

Respondents' argument that the mandamus petition was barred by laches does not withstand scrutiny. Laches might bar a petition for a writ of mandamus if the petitioner "slept upon his rights . . . , and especially if the delay has been prejudicial to the [other party], or to the rights of other persons." *Chapman* v. *County of Douglas,* 107 U. S. 348, 355 (1883). Here, the flurry of activity following the District Court's denial of the motion to dismiss overcomes respondents' argument that the Government neglected to assert its rights. The Government filed, among other papers, a motion for a protective order on September 3; a motion to stay pending appeal on October 21; and a motion for leave to appeal pursuant to 28 U. S. C. §1292(b) on October 23. Even were we to agree that the baseline for measuring the timeliness of the Government's mandamus petition was the District Court's order denying the motion to dismiss, the Government's active litigation posture was far from the neglect or delay that would make the application of laches appropriate.

We do not accept, furthermore, respondents' argument that laches should apply because the motions filed by the Government following the District Court's denial of its motion to dismiss amounted to little more than dilatory tactics to "delay and obstruct the proceedings." Brief for Respondent Sierra Club 23. In light of the drastic nature of mandamus and our precedents holding that mandamus may not issue so long as alternative avenues of relief remain available, the Government cannot be faulted for attempting to resolve the dispute through less drastic means. The law does not put litigants in the impossible

position of having to exhaust alternative remedies before petitioning for mandamus, on the one hand, and having to file the mandamus petition at the earliest possible moment to avoid laches, on the other. The petition was properly before the Court of Appeals for its consideration.

III

We now come to the central issue in the case—whether the Court of Appeals was correct to conclude it "ha[d] no authority to exercise the extraordinary remedy of mandamus," 334 F. 3d, at 1105, on the ground that the Government could protect its rights by asserting executive privilege in the District Court.

The common-law writ of mandamus against a lower court is codified at 28 U. S. C. §1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U. S. 258, 259–260 (1947). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 26 (1943). Although courts have not "confined themselves to an arbitrary and technical definition of 'jurisdiction,'" *Will* v. *United States*, 389 U. S. 90, 95 (1967), "only exceptional circumstances amounting to a judicial 'usurpation of power,'" *ibid.*, or a "clear abuse of discretion," *Bankers Life & Casualty Co.* v. *Holland,* 346 U. S. 379, 383 (1953), "will justify the invocation of this extraordinary remedy," *Will*, 389 U. S., at 95.

As the writ is one of "the most potent weapons in the judicial arsenal," *id.*, at 107, three conditions must be satisfied before it may issue. *Kerr* v. *United States Dist.*

Court for Northern Dist. of Cal., 426 U. S. 394, 403 (1976). First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," *ibid.*—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process, *Fahey*, *supra*, at 260. Second, the petitioner must satisfy "'the burden of showing that [his] right to issuance of the writ is "clear and indisputable."'" *Kerr, supra,* at 403 (quoting *Banker's Life & Casualty Co.*, *supra*, at 384). Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Kerr, supra,* at 403 (citing *Schlagenhauf* v. *Holder,* 379 U. S. 104, 112, n. 8 (1964)). These hurdles, however demanding, are not insuperable. This Court has issued the writ to restrain a lower court when its actions would threaten the separation of powers by "embarrass[ing] the executive arm of the Government," *Ex parte Peru,* 318 U. S. 578, 588 (1943), or result in the "intrusion by the federal judiciary on a delicate area of federal-state relations," *Will, supra*, at 95, citing *Maryland* v. *Soper (No. 1)*, 270 U. S. 9 (1926).

Were the Vice President not a party in the case, the argument that the Court of Appeals should have entertained an action in mandamus, notwithstanding the District Court's denial of the motion for certification, might present different considerations. Here, however, the Vice President and his comembers on the NEPDG are the subjects of the discovery orders. The mandamus petition alleges that the orders threaten "substantial intrusions on the process by which those in closest operational proximity to the President advise the President." App. 343. These facts and allegations remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise. It is well established that "a President's communications and

activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual.'" *United States* v. *Nixon*, 418 U. S., at 715. Chief Justice Marshall, sitting as a trial judge, recognized the unique position of the Executive Branch when he stated that "[i]n no case . . . would a court be required to proceed against the president as against an ordinary individual." *United States* v. *Burr*, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807). See also *Clinton* v. *Jones*, 520 U. S. 681, 698–699 (1997) ("We have, in short, long recognized the 'unique position in the constitutional scheme' that [the Office of the President] occupies" (quoting *Nixon* v. *Fitzgerald*, 457 U. S. 731, 749 (1982))); 520 U. S., at 710–724 (BREYER, J., concurring in judgment). As *United States* v. *Nixon* explained, these principles do not mean that the "President is above the law." 418 U. S., at 715. Rather, they simply acknowledge that the public interest requires that a coequal branch of Government "afford Presidential confidentiality the greatest protection consistent with the fair administration of justice," *ibid.*, and give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties.

These separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President. Accepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities. See *Ex parte Peru*, *supra*, at 587 (recognizing jurisdiction to issue the writ because "the action of the political arm of the Government taken within its appropriate sphere [must] be promptly recognized, and . . . delay and inconvenience of a prolonged litigation [must] be avoided by prompt termination of the proceedings in the district court"); see also *Clinton* v. *Jones*, *supra,* at 701

("We have recognized that '[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.'" (quoting *Loving* v. *United States*, 517 U. S. 748, 757 (1996))).

IV

The Court of Appeals dismissed these separation-of-powers concerns. Relying on *United States* v. *Nixon*, it held that even though respondents' discovery requests are overbroad and "go well beyond FACA's requirements," the Vice President and his former colleagues on the NEPDG "shall bear the burden" of invoking privilege with narrow specificity and objecting to the discovery requests with "detailed precision." 334 F. 3d, at 1105–1106. In its view, this result was required by *Nixon*'s rejection of an "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." 418 U. S., at 706. If *Nixon* refused to recognize broad claims of confidentiality where the President had asserted executive privilege, the majority reasoned, *Nixon* must have rejected, *a fortiori*, petitioners' claim of discovery immunity where the privilege has not even been invoked. According to the majority, because the Executive Branch can invoke executive privilege to maintain the separation of powers, mandamus relief is premature.

This analysis, however, overlooks fundamental differences in the two cases. *Nixon* cannot bear the weight the Court of Appeals puts upon it. First, unlike this case, which concerns respondents' requests for information for use in a civil suit, *Nixon* involves the proper balance between the Executive's interest in the confidentiality of its communications and the "constitutional need for production of relevant evidence in a criminal proceeding." *Id.*, at 713. The Court's decision was explicit that it was "not . . . concerned with the balance between the President's gen-

eralized interest in confidentiality and the need for relevant evidence in civil litigation . . . . We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials." *Id.*, at 712, n. 19.

The distinction *Nixon* drew between criminal and civil proceedings is not just a matter of formalism. As the Court explained, the need for information in the criminal context is much weightier because "our historic[al] commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.'" *Id.*, at 708–709 (quoting *Berger* v. *United States,* 295 U. S. 78, 88 (1935)). In light of the "fundamental" and "comprehensive" need for "every man's evidence" in the criminal justice system, 418 U. S., at 709, 710, not only must the Executive Branch first assert privilege to resist disclosure, but privilege claims that shield information from a grand jury proceeding or a criminal trial are not to be "expansively construed, for they are in derogation of the search for truth," *id.*, at 710. The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*. As *Nixon* recognized, the right to production of relevant evidence in civil proceedings does not have the same "constitutional dimensions." *Id.*, at 711.

The Court also observed in *Nixon* that a "primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions." *Id.*, at 707. Withholding materials from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks "conflict[s] with the function of the courts under Art. III." *Ibid.* Such an impairment of the "essential functions of [another] branch," *ibid.*, is impermissible. Withholding the information in this case, however, does not hamper another branch's ability to perform

its "essential functions" in quite the same way. *Ibid.* The District Court ordered discovery here, not to remedy known statutory violations, but to ascertain whether FACA's disclosure requirements even apply to the NEPDG in the first place. Even if FACA embodies important congressional objectives, the only consequence from respondents' inability to obtain the discovery they seek is that it would be more difficult for private complainants to vindicate Congress' policy objectives under FACA. And even if, for argument's sake, the reasoning in Judge Randolph's dissenting opinion in the end is rejected and FACA's statutory objectives would be to some extent frustrated, it does not follow that a court's Article III authority or Congress' central Article I powers would be impaired. The situation here cannot, in fairness, be compared to *Nixon*, where a court's ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction hinges on the availability of certain indispensable information.

A party's need for information is only one facet of the problem. An important factor weighing in the opposite direction is the burden imposed by the discovery orders. This is not a routine discovery dispute. The discovery requests are directed to the Vice President and other senior Government officials who served on the NEPDG to give advice and make recommendations to the President. The Executive Branch, at its highest level, is seeking the aid of the courts to protect its constitutional prerogatives. As we have already noted, special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated. This Court has held, on more than one occasion, that "[t]he high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery,"

Clinton, 520 U. S., at 707, and that the Executive's "constitutional responsibilities and status [are] factors counseling judicial deference and restraint" in the conduct of litigation against it, *Nixon* v. *Fitzgerald*, 457 U. S., at 753. Respondents' reliance on cases that do not involve senior members of the Executive Branch, see, *e.g.*, *Kerr* v. *United States Dist. Court for Northern Dist. of Cal.,* 426 U. S. 394 (1976), is altogether misplaced.

Even when compared against *United States* v. *Nixon*'s criminal subpoenas, which did involve the President, the civil discovery here militates against respondents' position. The observation in *Nixon* that production of confidential information would not disrupt the functioning of the Executive Branch cannot be applied in a mechanistic fashion to civil litigation. In the criminal justice system, there are various constraints, albeit imperfect, to filter out insubstantial legal claims. The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice. The rigors of the penal system are also mitigated by the responsible exercise of prosecutorial discretion. In contrast, there are no analogous checks in the civil discovery process here. Although under Federal Rule of Civil Procedure 11, sanctions are available, and private attorneys also owe an obligation of candor to the judicial tribunal, these safeguards have proved insufficient to discourage the filing of meritless claims against the Executive Branch. "In view of the visibility of" the Offices of the President and the Vice President and "the effect of their actions on countless people," they are "easily identifiable target[s] for suits for civil damages." *Nixon* v. *Fitzgerald*, *supra*, at 751.

Finally, the narrow subpoena orders in *United States* v. *Nixon* stand on an altogether different footing from the

overly broad discovery requests approved by the District Court in this case. The criminal subpoenas in *Nixon* were required to satisfy exacting standards of "(1) relevancy; (2) admissibility; (3) specificity." 418 U. S., at 700 (interpreting Fed. Rule Crim. Proc. 17(c)). They were "not intended to provide a means of discovery." 418 U. S., at 698. The burden of showing these standards were met, moreover, fell on the party requesting the information. *Id.,* at 699 ("[I]n order to require production prior to trial, the moving party must show that the applicable standards are met"). In *Nixon*, the Court addressed the issue of executive privilege only after having satisfied itself that the special prosecutor had surmounted these demanding requirements. *Id.*, at 698 ("If we sustained this [Rule 17(c)] challenge, there would be no occasion to reach the claim of privilege asserted with respect to the subpoenaed material"). The very specificity of the subpoena requests serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President.

In contrast to *Nixon*'s subpoena orders that "precisely identified" and "specific[ally] . . . enumerated" the relevant materials, *id.*, at 688, and n. 5, the discovery requests here, as the panel majority acknowledged, ask for everything under the sky:

> "1. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of the Task Force.
>
> "2. All documents establishing or referring to any Sub-Group.
>
> "3. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of any Sub-Group.
>
> "4. All documents identifying or referring to any other persons participating in the preparation of the Report or in the activities of the Task Force or any Sub-

Group.

"5. All documents concerning any communication relating to the activities of the Task Force, the activities of any Sub-Groups, or the preparation of the Report . . . .

"6. All documents concerning any communication relating to the activities of the Task Force, the activities of the Sub-Groups, or the preparation of the Report between any person . . . and [a list of agencies]." App. 220–221.

The preceding excerpt from respondents' "*First* Request for Production of Documents," *id.*, at 215 (emphasis added), is only the beginning. Respondents' "First Set of Interrogatories" are similarly unbounded in scope. *Id.*, at 224. Given the breadth of the discovery requests in this case compared to the narrow subpoena orders in *United States* v. *Nixon*, our precedent provides no support for the proposition that the Executive Branch "shall bear the burden" of invoking executive privilege with sufficient specificity and of making particularized objections. 334 F. 3d, at 1105. To be sure, *Nixon* held that the President cannot, through the assertion of a "broad [and] undifferentiated" need for confidentiality and the invocation of an "absolute, unqualified" executive privilege, withhold information in the face of subpoena orders. 418 U. S., at 706, 707. It did so, however, only after the party requesting the information—the special prosecutor—had satisfied his burden of showing the propriety of the requests. Here, as the Court of Appeals acknowledged, the discovery requests are anything but appropriate. They provide respondents all the disclosure to which they would be entitled in the event they prevail on the merits, and much more besides. In these circumstances, *Nixon* does not require the Executive Branch to bear the onus of critiquing the unacceptable discovery requests line by line. Our

precedents suggest just the opposite. See, *e.g., Clinton* v. *Jones*, 520 U. S. 681 (1997); *id.*, at 705 (holding that the Judiciary may direct "appropriate process" to the Executive); *Nixon* v. *Fitzgerald*, 457 U. S., at 753.

The Government, however, did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored. See App. 167, 181–183 (arguing "this case can be resolved far short of the wide-ranging inquiries plaintiffs have proposed" and suggesting alternatives to "limi[t]" discovery); *id.*, at 232 ("Defendants object to the scope of plaintiffs' discovery requests and to the undue burden imposed by them. The scope of plaintiffs' requests is broader than that reasonably calculated to lead to admissible evidence"); *id.*, at 232, n. 10 ("We state our general objections here for purposes of clarity for the record and to preclude any later argument that, by not including them here, those general objections have been waived"). In addition, the Government objected to the burden that would arise from the District Court's insistence that the Vice President winnow the discovery orders by asserting specific claims of privilege and making more particular objections. App. 201 (Tr. of Status Hearing (Aug. 2, 2002)) (noting "concerns with disrupting the effective functioning of the presidency and the vice-presidency"); *id.*, at 274 ("[C]ompliance with the order of the court imposes a burden on the Office of the Vice President. That is a real burden. If we had completed and done everything that Your Honor has asked us to do today that burden would be gone, but it would have been realized"). These arguments, too, were rejected. See *id.*, at 327, 329 (Nov. 1, 2002, Order) (noting that the court had, "on numerous occasions," rejected the Government's assertion "that court orders requiring [it] to respond in any fashion to [the] discovery requests creates an 'unconstitutional burden' on the Executive Branch").

Contrary to the District Court's and the Court of Ap-

peals' conclusions, *Nixon* does not leave them the sole option of inviting the Executive Branch to invoke executive privilege while remaining otherwise powerless to modify a party's overly broad discovery requests. Executive privilege is an extraordinary assertion of power "not to be lightly invoked." *United States* v. *Reynolds,* 345 U. S. 1, 7 (1953). Once executive privilege is asserted, coequal branches of the Government are set on a collision course. The Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives. This inquiry places courts in the awkward position of evaluating the Executive's claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These "occasion[s] for constitutional confrontation between the two branches" should be avoided whenever possible. *United States* v. *Nixon*, *supra,* at 692.

In recognition of these concerns, there is sound precedent in the District of Columbia itself for district courts to explore other avenues, short of forcing the Executive to invoke privilege, when they are asked to enforce against the Executive Branch unnecessarily broad subpoenas. In *United States* v. *Poindexter*, 727 F. Supp. 1501 (1989), defendant Poindexter, on trial for criminal charges, sought to have the District Court enforce subpoena orders against President Reagan to obtain allegedly exculpatory materials. The Executive considered the subpoenas "unreasonable and oppressive." *Id.*, at 1503. Rejecting defendant's argument that the Executive must first assert executive privilege to narrow the subpoenas, the District Court agreed with the President that "it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents." *Ibid.* The court decided to narrow, on its own, the scope of the subpoenas to allow the

Executive "to consider whether to invoke executive privilege with respect to . . . a smaller number of documents following the narrowing of the subpoenas." *Id.*, at 1504. This is but one example of the choices available to the District Court and the Court of Appeals in this case.

As we discussed at the outset, under principles of mandamus jurisdiction, the Court of Appeals may exercise its power to issue the writ only upon a finding of "exceptional circumstances amounting to a judicial 'usurpation of power,'" *Will,* 389 U. S., at 95, or "a clear abuse of discretion," *Bankers Life*, 346 U. S., at 383. As this case implicates the separation of powers, the Court of Appeals must also ask, as part of this inquiry, whether the District Court's actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties. This is especially so here because the District Court's analysis of whether mandamus relief is appropriate should itself be constrained by principles similar to those we have outlined, *supra*, at 9–11, that limit the Court of Appeals' use of the remedy. The panel majority, however, failed to ask this question. Instead, it labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections.

V

In the absence of overriding concerns of the sort discussed in *Schlagenhauf*, 379 U. S., at 111 (discussing, among other things, the need to avoid "piecemeal litigation" and to settle important issues of first impression in areas where this Court bears special responsibility), we decline petitioners' invitation to direct the Court of Appeals to issue the writ against the District Court. Moreover, this is not a case where, after having considered the issues, the Court of Appeals abused its discretion by failing to issue the writ. Instead, the Court of Appeals, rely-

ing on its mistaken reading of *United States* v. *Nixon*, prematurely terminated its inquiry after the Government refused to assert privilege and did so without even reaching the weighty separation-of-powers objections raised in the case, much less exercised its discretion to determine whether "the writ is appropriate under the circumstances." *Ante*, at 10. Because the issuance of the writ is a matter vested in the discretion of the court to which the petition is made, and because this Court is not presented with an original writ of mandamus, see, *e.g.*, *Ex parte Peru*, 318 U. S., at 586, we leave to the Court of Appeals to address the parties' arguments with respect to the challenge to *AAPS* and the discovery orders. Other matters bearing on whether the writ of mandamus should issue should also be addressed, in the first instance, by the Court of Appeals after considering any additional briefs and arguments as it deems appropriate. We note only that all courts should be mindful of the burdens imposed on the Executive Branch in any future proceedings. Special considerations applicable to the President and the Vice President suggest that the courts should be sensitive to requests by the Government for interlocutory appeals to reexamine, for example, whether the statute embodies the *de facto* membership doctrine.

The judgment of the Court of Appeals for the District of Columbia is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 03–475

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 24, 2004]

JUSTICE STEVENS, concurring.

Broad discovery should be encouraged when it serves the salutary purpose of facilitating the prompt and fair resolution of concrete disputes. In the normal case, it is entirely appropriate to require the responding party to make particularized objections to discovery requests. In some circumstances, however, the requesting party should be required to assume a heavy burden of persuasion before any discovery is allowed. Two interrelated considerations support taking that approach in this case: the nature of the remedy respondents requested from the District Court, and the nature of the statute they sought to enforce.

As relevant here, respondents, Judicial Watch, Inc., and Sierra Club, sought a writ of mandamus under 28 U. S. C. §1361. Mandamus is an extraordinary remedy, available to "a plaintiff only if . . . the defendant owes him a clear nondiscretionary duty." *Heckler* v. *Ringer,* 466 U. S. 602, 616 (1984). Thus, to persuade the District Court that they were entitled to mandamus relief, respondents had to establish that petitioners had a nondiscretionary duty to comply with the Federal Advisory Committee Act (FACA), 5 U. S. C. App. §1 *et seq*., p. 1, and in particular with FACA's requirement that "records related to the advisory commit-

tee's work be made public"—the only requirement still enforceable if, as respondent Sierra Club concedes, the National Energy Policy Development Group (NEPDG) no longer exists. See *Judicial Watch, Inc.* v. *National Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 42 (DC 2002). Relying on the Court of Appeals' novel *de facto* member doctrine, *ante*, at 3, respondents sought to make that showing by obtaining the very records to which they will be entitled if they win their lawsuit. In other words, respondents sought to obtain, through discovery, information about the NEPDG's work in order to establish their entitlement *to the same information*.

Thus, granting broad discovery in this case effectively prejudged the merits of respondents' claim for mandamus relief—an outcome entirely inconsistent with the extraordinary nature of the writ. Under these circumstances, instead of requiring petitioners to object to particular discovery requests, the District Court should have required respondents to demonstrate that particular requests would tend to establish their theory of the case.* I therefore think it would have been appropriate for the Court of Appeals to vacate the District Court's discovery order. I nevertheless join the Court's opinion and judgment because, as the architect of the *de facto* member doctrine, the Court of Appeals is the appropriate forum to direct future proceedings in the case.

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*A few interrogatories or depositions might have determined, for example, whether any non-Government employees voted on NEPDG recommendations or drafted portions of the committee's report. In my view, only substantive participation of this nature would even arguably be sufficient to warrant classifying a non-Government employee as a *de facto* committee member.

SUPREME COURT OF THE UNITED STATES

No. 03–475

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 24, 2004]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in part and dissenting in part.

I agree that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr* v. *United States Dist. Court for Northern Dist. of Cal.,* 426 U. S. 394, 402 (1976). In framing our review of the Court of Appeals' judgment, the Court recognizes this hurdle, observing that "the petitioner must satisfy 'the burden of showing that [his] right to issuance of the writ is clear and indisputable.'" *Ante*, at 10 (quoting *Kerr*, *supra*, at 403 (internal quotation marks omitted)). But in reaching its disposition, the Court barely mentions the fact that respondents, Judicial Watch, Inc., and Sierra Club, face precisely the same burden to obtain relief from the District Court. The proper question presented to the Court of Appeals was not only whether it is clear and indisputable that petitioners have a right to an order "'vacat[ing] the discovery orders issued by the district court, direct[ing] the court to decide the case on the basis of the administrative record and such supplemental affidavits as it may require, and direct[ing] that the Vice President be dismissed as a defendant.'" 334 F. 3d 1096, 1101 (CADC 2003) (quoting Emergency Pet. for Writ of Mandamus in *In re Cheney*, in No. 02–5354 (CADC)). The question with

which the Court of Appeals was faced also necessarily had to account for the fact that respondents sought mandamus relief in the District Court. Because they proceeded by mandamus, respondents had to demonstrate in the District Court a clear and indisputable right to the Federal Advisory Committee Act (FACA) materials. If respondents' right to the materials was not clear and indisputable, then petitioners' right to relief in the Court of Appeals was clear.

One need look no further than the District Court's opinion to conclude respondents' right to relief in the District Court was unclear and hence that mandamus would be unavailable. Indeed, the District Court acknowledged this Court's recognition "that applying FACA to meetings among Presidential advisors 'present[s] formidable constitutional difficulties.'" *Judicial Watch, Inc.* v. *National Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 47 (DC 2002) (quoting *Public Citizen* v. *Department of Justice,* 491 U. S. 440, 466 (1989)).

Putting aside the serious constitutional questions raised by respondents' challenge, the District Court could not even determine whether FACA applies to the National Energy Policy Development Group (NEPDG) as a statutory matter. 219 F. Supp. 2d, at 54–55 (noting the possibility that, after discovery, petitioners might prevail on summary judgment on statutory grounds). I acknowledge that under the Court of Appeals' *de facto* member doctrine, see *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F. 2d 898, 915 (CADC 1993), a district court is authorized to undertake broad discovery to determine whether FACA's Government employees exception, 5 U. S. C. App. §3(2)(C)(i), p. 2, applies. But, application of the *de facto* member doctrine to authorize broad discovery into the inner-workings of the NEPDG has the same potential to offend the Constitution's separation of powers as the actual application of FACA to the NEPDG itself. 334

F. 3d, at 1114–1115 (Randolph, J., dissenting). Thus, the existence of this doctrine cannot support the District Court's actions here. If respondents must conduct wide-ranging discovery in order to prove that they have *any* right to relief—much less that they have a clear and indisputable right to relief—mandamus is unwarranted, and the writ should not issue.

Although the District Court might later conclude that FACA applies to the NEPDG as a statutory matter and that such application is constitutional, the mere fact that the District Court *might* rule in respondents' favor cannot establish the clear right to relief necessary for mandamus. Otherwise, the writ of mandamus could turn into a free-standing cause of action for plaintiffs seeking to enforce virtually any statute, even those that provide no such private remedy.

Because the District Court clearly exceeded its authority in this case, I would reverse the judgment of the Court of Appeals and remand the case with instruction to issue the writ.

SUPREME COURT OF THE UNITED STATES

No. 03–475

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 24, 2004]

JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, dissenting.

The Government, in seeking a writ of mandamus from the Court of Appeals for the District of Columbia, and on brief to this Court, urged that this case should be resolved without *any* discovery. See App. 183–184, 339; Brief for Petitioners 45; Reply Brief 18. In vacating the judgment of the Court of Appeals, however, this Court remands for consideration whether mandamus is appropriate due to the *overbreadth* of the District Court's discovery orders. See *ante*, at 1, 16–20. But, as the Court of Appeals observed, it appeared that the Government "never asked the district court to *narrow* discovery." *In re Cheney*, 334 F. 3d 1096, 1106 (CADC 2003) (emphasis in original). Given the Government's decision to resist all discovery, mandamus relief based on the exorbitance of the discovery orders is at least "premature," *id.*, at 1104. I would therefore affirm the judgment of the Court of Appeals denying the writ,[1] and allow the District Court, in the first in-

[1]The Court of Appeals also concluded, altogether correctly in my view, that it lacked ordinary appellate jurisdiction over the Vice President's appeal. See 334 F. 3d, at 1109; cf. *ante*, at 7–8 (leaving appel-

stance, to pursue its expressed intention "tightly [to] rei[n] [in] discovery," *Judicial Watch, Inc.* v. *National Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 54 (DC 2002), should the Government so request.

I

A

The discovery at issue here was sought in a civil action filed by respondents Judicial Watch, Inc., and Sierra Club. To gain information concerning the membership and operations of an energy-policy task force, the National Energy Policy Development Group (NEPDG), respondents filed suit under the Federal Advisory Committee Act (FACA), 5 U. S. C. App. §1 *et seq.;* respondents named among the defendants the Vice President and senior Executive Branch officials. See App. 16–40, 139–154; *ante*, at 1–3. After granting in part and denying in part the Government's motions to dismiss, see 219 F. Supp. 2d 20, the District Court approved respondents' extensive discovery plan, which included detailed and far-ranging interrogatories and sweeping requests for production of documents, see App. to Pet. for Cert. 51a; App. 215–230. In a later order, the District Court directed the Government to "produce non-privileged documents and a privilege log." App. to Pet. for Cert. 47a.

The discovery plan drawn by Judicial Watch and Sierra

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late-jurisdiction question undecided). In its order addressing the petitioners' motions to dismiss, the District Court stated "it would be premature and inappropriate to determine whether" any relief could be obtained from the Vice President. *Judicial Watch, Inc.* v. *National Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 44 (DC 2002). Immediate review of an interlocutory ruling, allowed in rare cases under the collateral-order doctrine, is inappropriate when an order is, as in this case, "inherently tentative" and not "the final word on the subject." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.,* 485 U. S. 271, 277 (1988) (internal quotation marks omitted).

Club was indeed "unbounded in scope." *Ante*, at 17; accord 334 F. 3d, at 1106. Initial approval of that plan by the District Court, however, was not given in stunning disregard of separation-of-powers concerns. Cf. *ante*, at 16–20. In the order itself, the District Court invited "detailed and precise object[ions]" to any of the discovery requests, and instructed the Government to "identify and explain . . . invocations of privilege with particularity." App. to Pet. for Cert. 51a. To avoid duplication, the District Court provided that the Government could identify "documents or information [responsive to the discovery requests] that [it] ha[d] already released to [Judicial Watch or the Sierra Club] in different fora." *Ibid.*[2] Anticipating further proceedings concerning discovery, the District Court suggested that the Government could "submit [any privileged documents] under seal for the court's consideration," or that "the court [could] appoint the equivalent of a Special Master, maybe a retired judge," to review allegedly privileged documents. App. 247.

The Government did not file specific objections; nor did it supply particulars to support assertions of privilege. Instead, the Government urged the District Court to rule that Judicial Watch and the Sierra Club could have no discovery at all. See *id.*, at 192 ("the governmen[t] position is that . . . no discovery is appropriate"); *id.*, at 205 (same); 334 F. 3d, at 1106 ("As far as we can tell, petitioners never asked the district court to *narrow* discovery to those matters [respondents] need to support their allegation that FACA applies to the NEPDG." (emphasis in original)). In the Government's view, "the resolution of the case ha[d] to flow from the administrative record" *sans*

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[2] Government agencies had produced some relevant documents in related Freedom of Information Act litigation. See 219 F. Supp. 2d, at 27.

discovery. App. 192. Without taking up the District Court's suggestion of that court's readiness to rein in discovery, see 219 F. Supp. 2d, at 54, the Government, on behalf of the Vice President, moved, unsuccessfully, for a protective order and for certification of an interlocutory appeal pursuant to 28 U. S. C. §1292(b). See 334 F. 3d, at 1100; see App. to Pet. for Cert. 47a (District Court denial of protective order); 233 F. Supp. 2d 16 (DC 2002) (District Court denial of §1292(b) certification).[3] At the District Court's hearing on the Government's motion for a stay pending interlocutory appeal, the Government argued that "the injury is submitting to discovery in the absence of a compelling showing of need by the [respondents]." App. 316; see 230 F. Supp. 2d 12 (DC 2002) (District Court order denying stay).

Despite the absence from this "flurry of activity," *ante*, at 8, of any Government motion contesting the terms of the discovery plan or proposing a scaled-down substitute plan, see 334 F. 3d, at 1106, this Court states that the Government "did in fact object to the scope of discovery and asked the District Court to narrow it in some way," *ante*, at 18. In support of this statement, the Court points to the Government's objections to the proposed discovery plan, its response to the interrogatories and production requests, and its contention that discovery would be unduly burdensome. See *ante*, at 18; App. 166–184, 201, 231–234, 274.

True, the Government disputed the definition of the term "meeting" in respondents' interrogatories, and

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[3] Section 1292(b) of Title 28 allows a court of appeals, "in its discretion," to entertain an appeal from an interlocutory order "[w]hen a district judge . . . shall be of the opinion that such order 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 the litigation."

stated, in passing, that "discovery should be [both] limited to written interrogatories" and "limited in scope to the issue of membership." *Id.*, at 179, 181, 233.[4] But as the Court of Appeals noted, the Government mentioned "excessive discovery" in support of its plea to be shielded from any discovery. 334 F. 3d, at 1106. The Government argument that "the burden of doing a document production is an unconstitutional burden," App. 274, was similarly anchored. The Government so urged at a District Court hearing in which its underlying "position [was] that it's not going to produce anything," *id.*, at 249.[5]

The Government's bottom line was firmly and consistently that "review, limited to the administrative record, should frame the resolution of this case." *Id.*, at 181; accord *id.*, at 179, 233. That administrative record would "consist of the Presidential Memorandum establishing NEPDG, NEPDG's public report, and the Office of the Vice President's response to . . . Judicial Watch's request for permission to attend NEPDG meetings"; it would not include anything respondents could gain through discov-

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[4] On limiting discovery to the issue of membership, the Court of Appeals indicated its agreement. See 334 F. 3d, at 1106 ("[Respondents] have no need for the names of all persons who participated in [NEPDG]'s activities, nor a description of each person's role in the activities of [NEPDG]. They must discover only whether non-federal officials participated, and if so, to what extent." (internal quotation marks, ellipsis, and brackets omitted)).

[5] According to the Government, "24 boxes of documents [are] potentially responsive to [respondents'] discovery requests. . . . The documents identified as likely to be responsive from those boxes . . . are contained in approximately twelve boxes." App. 282–283. Each box "requires one or two attorney days to review and prepare a rough privilege log. Following that review, privilege logs must be finalized. Further, once the responsive emails are identified, printed, and numbered, [petitioners] expect that the privilege review and logging process [will] be equally, if not more, time-consuming, due to the expected quantity of individual emails." *Id.*, at 284.

ery. *Id.*, at 183. Indeed, the Government acknowledged before the District Court that its litigation strategy involved opposition to the discovery plan as a whole in lieu of focused objections. See *id.*, at 205 (Government stated: "We did not choose to offer written objections to [the discovery plan] . . . .").

Further sounding the Government's leitmotif, in a hearing on the proposed discovery plan, the District Court stated that the Government "didn't file objections" to rein in discovery "because [in the Government's view] no discovery is appropriate." *Id.*, at 192; *id.*, at 205 (same). Without endeavoring to correct any misunderstanding on the District Court's part, the Government underscored its resistance to any and all discovery. *Id.*, at 192–194; *id.*, at 201 (asserting that respondents are "not entitled to discovery to supplement [the administrative record]"). And in its motion for a protective order, the Government similarly declared its unqualified opposition to discovery. See Memorandum in Support of Defendants' Motion for a Protective Order and for Reconsideration, C. A. Nos. 01–1530 (EGS), 02–631 (EGS), p. 21 (D. D. C., Sept. 3, 2002) ("[Petitioners] respectfully request that the Court enter a protective order relieving them of *any obligation* to respond to [respondents'] discovery [requests]." (emphasis added)); see 334 F. 3d, at 1106 (same).[6]

The District Court, in short, "ignored" no concrete pleas to "narrow" discovery. But see *ante*, at 18. That court did,

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[6]The agency petitioners, in responses to interrogatories, gave rote and hardly illuminating responses refusing "on the basis of executive and deliberative process privileges" to be more forthcoming. See, *e.g.*, Defendant Department of Energy's Response to Plaintiff's First Set of Interrogatories, C. A. Nos. 01–1530 (EGS), 02–631 (EGS) (D. D. C., Sept. 3, 2002); Defendant United States Office of Management and Budget's Response to Plaintiff's First Set of Interrogatories, C. A. Nos. 01–1530 (EGS), 02–631 (EGS) (D. D. C., Sept. 3, 2002).

however, voice its concern about the Government's failure to heed the court's instructions:

> "I told the government, if you have precise constitutional objections, let me know what they are so I can determine whether or not this [discovery] plan is appropriate, and . . . you said, well, it's unconstitutional, without elaborating. You said, because Plaintiff's proposed discovery plan has not been approved by the court, the Defendants are not submitting specific objections to Plaintiff's proposed request. . . . My rule was, if you have objections, let me know what the objections are, and you chose not to do so." App. 205.

B

Denied §1292(b) certification by the District Court, the Government sought a writ of mandamus from the Court of Appeals. See *id.*, at 339–365. In its mandamus petition, the Government asked the appellate court to "vacate the discovery orders issued by the district court, direct the court to decide the case on the basis of the administrative record and such supplemental affidavits as it may require, and direct that the Vice President be dismissed as a defendant." *Id.*, at 364–365. In support of those requests, the Government again argued that the case should be adjudicated without discovery: "The Constitution and principles of comity preclude discovery of the President or Vice President, especially without a demonstration of compelling and focused countervailing interest." *Id.*, at 360.

The Court of Appeals acknowledged that the discovery plan presented by respondents and approved by the District Court "goes well beyond what [respondents] need." 334 F. 3d, at 1106. The appellate court nevertheless denied the mandamus petition, concluding that the Government's separation-of-powers concern "remain[ed] hypo-

thetical." *Id.*, at 1105. Far from ordering immediate "disclosure of communications between senior executive branch officials and those with information relevant to advice that was being formulated for the President," the Court of Appeals observed, the District Court had directed the Government initially to produce only "non-privileged documents and a privilege log." *Id.*, at 1104 (citation and internal quotation marks omitted); see App. to Pet. for Cert. 47a.[7]

The Court of Appeals stressed that the District Court could accommodate separation-of-powers concerns short of denying all discovery or compelling the invocation of executive privilege. See 334 F. 3d, at 1105–1106. Principally, the Court of Appeals stated, discovery could be narrowed, should the Government so move, to encompass only "whether non-federal officials participated [in NEPDG], and if so, to what extent." *Id.*, at 1106. The Government could identify relevant materials produced in other litigation, thus avoiding undue reproduction. *Id.*, at 1105; see App. to Pet. for Cert. 51a; *supra*, at 3. If, after appropriate narrowing, the discovery allowed still impels "the Vice President . . . to claim privilege," the District Court could "entertain [those] privilege claims" and "review allegedly privileged documents in camera." 334 F. 3d, at 1107. Mindful of "the judiciary's responsibility to police the separation of powers in litigation involving the executive," the Court of Appeals expressed confidence that

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[7] The Court suggests that the appeals court "labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections." *Ante*, at 20. The Court of Appeals, however, described the constitutional concern as "hypothetical," not merely because no executive privilege had been asserted, but also in light of measures the District Court could take to "narrow" and "carefully focu[s]" discovery. See 334 F. 3d, at 1105, 1107.

the District Court would "respond to petitioners' concern and narrow discovery to ensure that [respondents] obtain no more than they need to prove their case." *Id.*, at 1106.

II

"This Court repeatedly has observed that the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.,* 485 U. S. 271, 289 (1988) (citing *Kerr* v. *United States Dist. Court for Northern Dist. of Cal.,* 426 U. S. 394, 402 (1976)); see *ante*, at 9–10 (same). As the Court reiterates, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires." *Kerr*, 426 U. S., at 403 (citing *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 26 (1943)); *ante*, at 9–10.

Throughout this litigation, the Government has declined to move for reduction of the District Court's discovery order to accommodate separation-of-powers concerns. See *supra*, at 3–7. The Court now remands this case so the Court of Appeals can consider whether a mandamus writ should issue ordering the District Court to "explore other avenues, short of forcing the Executive to invoke privilege," and, in particular, to "narrow, on its own, the scope of [discovery]." *Ante*, at 19–20. Nothing in the District Court's orders or the Court of Appeals' opinion, however, suggests that either of those courts would refuse reasonably to accommodate separation-of-powers concerns. See *supra*, at 3, 7–8. When parties seeking a mandamus writ decline to avail themselves of opportunities to obtain relief from the District Court, a writ of mandamus ordering the same relief—*i.e.*, here, reined-in discovery—is surely a doubtful proposition.

The District Court, moreover, did not err in failing to narrow discovery on its own initiative. Although the Court cites *United States* v. *Poindexter*, 727 F. Supp. 1501 (DC 1989), as "sound precedent" for district-court nar-

rowing of discovery, see *ante*, at 19–20, the target of the subpoena in that case, former President Reagan, unlike petitioners in this case, affirmatively requested such narrowing, 727 F. Supp., at 1503. A district court is not subject to criticism if it awaits a party's motion before tightening the scope of discovery; certainly, that court makes no "clear and indisputable" error in adhering to the principle of party initiation, *Kerr*, 426 U. S., at 403 (internal quotation marks omitted).[8]

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[8]The Court also questions the District Court's invocation of the federal mandamus statute, 28 U. S. C. §1361, which provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." See *ante*, at 20; 219 F. Supp. 2d, at 41–44. See also *Chandler* v. *Judicial Council of Tenth Circuit,* 398 U. S. 74, 87–89, and n. 8 (1970) (holding mandamus under the All Writs Act, 28 U. S. C. §1651, improper, but expressing no opinion on relief under the federal mandamus statute, §1361). On the question whether §1361 allows enforcement of the FACA against the Vice President, the District Court concluded it "would be premature and inappropriate to determine whether the relief of mandamus will or will not issue." 219 F. Supp. 2d, at 44. The Government, moreover, contested the propriety of §1361 relief only in passing in its petition to the appeals court for §1651 mandamus relief. See App. 363–364 (Government asserted in its mandamus petition: "The more general writ of mandamus cannot be used to circumvent . . . limits on the provision directly providing for review of administrative action."). A question not decided by the District Court, and barely raised in a petition for mandamus, hardly qualifies as grounds for "drastic and extraordinary" mandamus relief, *Ex parte Fahey,* 332 U. S. 258, 259–260 (1947).

JUSTICE THOMAS urges that respondents cannot obtain §1361 relief if "wide-ranging discovery [is needed] to prove that they have *any* right to relief." *Ante*, at 3 (opinion concurring in part and dissenting in part) (emphasis in original). First, as the Court of Appeals recognized, see *supra*, at 8–9; *infra*, at 11, should the Government so move, the District Court could contain discovery so that it would not be "wide-ranging." Second, all agree that an applicant seeking a §1361 mandamus writ must show that "the [federal] defendant owes him a clear, *nondiscretionary* duty." *Heckler* v. *Ringer,* 466 U. S. 602, 616 (1984) (emphasis

* * *

Review by mandamus at this stage of the proceedings would be at least comprehensible as a means to test the Government's position that *no* discovery is appropriate in this litigation. See Brief for Petitioners 45 ("[P]etitioners' separation-of-powers arguments are . . . in the nature of a claim of immunity from discovery."). But in remanding for consideration of discovery-tailoring measures, the Court apparently rejects that no-discovery position. Otherwise, a remand based on the overbreadth of the discovery requests would make no sense. Nothing in the record, however, intimates lower-court refusal to reduce discovery. Indeed, the appeals court has already suggested tailored discovery that would avoid "effectively prejudg[ing] the merits of respondents' claim," *ante*, at 2 (STEVENS, J., concurring). See 334 F. 3d, at 1106 (respondents "need only documents referring to the involvement of non-federal officials"). See also *ante*, at 2, n. (STEVENS, J., concurring) ("A few interrogatories or depositions might have determined . . . whether any non-Government employees voted on NEPDG recommendations or drafted portions of the committee's report"). In accord with the Court of Appeals, I am "confident that [were it moved to do so] the district court here [would] protect petitioners' legitimate interests and keep discovery within appropriate limits." 334 F. 3d,

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added). No §1361 writ may issue, in other words, when federal law grants discretion to the federal officer, rather than imposing a duty on him. When federal law imposes an obligation, however, suit under §1361 is not precluded simply because facts must be developed to ascertain whether a federal command has been dishonored. Congress enacted §1361 to "mak[e] it more convenient for aggrieved persons to file actions in the nature of mandamus," *Stafford* v. *Briggs,* 444 U. S. 527, 535 (1980), not to address the rare instance in which a federal defendant, upon whom the law unequivocally places an obligation, concedes his failure to measure up to that obligation.

at 1107.[9] I would therefore affirm the judgment of the Court of Appeals.

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[9] While I agree with the Court that an interlocutory appeal may become appropriate at some later juncture in this litigation, see *ante*, at 21, I note that the decision whether to allow such an appeal lies in the first instance in the District Court's sound discretion, see 28 U. S. C. §1292(b); *supra*, at 4, n. 3.

SUPREME COURT OF THE UNITED STATES

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

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03–475. Decided March 18, 2004.

Memorandum of JUSTICE SCALIA.

I have before me a motion to recuse in these cases consolidated below. The motion is filed on behalf of respondent Sierra Club. The other private respondent, Judicial Watch, Inc., does not join the motion and has publicly stated that it "does not believe the presently-known facts about the hunting trip satisfy the legal standards requiring recusal." Judicial Watch Statement 2 (Feb. 13, 2004) (available in Clerk of Court's case file). (The District Court, a nominal party in this mandamus action, has of course made no appearance.) Since the cases have been consolidated, however, recusal in the one would entail recusal in the other.

I

The decision whether a judge's impartiality can "'reasonably be questioned'" is to be made in light of the facts as they existed, and not as they were surmised or reported. See *Microsoft Corp.* v. *United States*, 530 U. S. 1301, 1302 (2000) (REHNQUIST, C. J.) (opinion respecting recusal). The facts here were as follows:

For five years or so, I have been going to Louisiana during the Court's long December-January recess, to the duck-hunting camp of a friend whom I met through two hunting companions from Baton Rouge, one a dentist and

the other a worker in the field of handicapped rehabilitation. The last three years, I have been accompanied on this trip by a son-in-law who lives near me. Our friend and host, Wallace Carline, has never, as far as I know, had business before this Court. He is not, as some reports have described him, an "energy industry executive" in the sense that summons up boardrooms of ExxonMobil or Con Edison. He runs his own company that provides services and equipment rental to oil rigs in the Gulf of Mexico.

During my December 2002 visit, I learned that Mr. Carline was an admirer of Vice President Cheney. Knowing that the Vice President, with whom I am well acquainted (from our years serving together in the Ford administration), is an enthusiastic duck-hunter, I asked whether Mr. Carline would like to invite him to our next year's hunt. The answer was yes; I conveyed the invitation (with my own warm recommendation) in the spring of 2003 and received an acceptance (subject, of course, to any superseding demands on the Vice President's time) in the summer. The Vice President said that if he did go, I would be welcome to fly down to Louisiana with him. (Because of national security requirements, of course, he must fly in a Government plane.) That invitation was later extended—if space was available—to my son-in-law and to a son who was joining the hunt for the first time; they accepted. The trip was set long before the Court granted certiorari in the present case, and indeed before the petition for certiorari had even been filed.

We departed from Andrews Air Force Base at about 10 a.m. on Monday, January 5, flying in a Gulfstream jet owned by the Government. We landed in Patterson, Louisiana, and went by car to a dock where Mr. Carline met us, to take us on the 20-minute boat trip to his hunting camp. We arrived at about 2 p.m., the 5 of us joining about 8 other hunters, making about 13 hunters in all; also present during our time there were about 3 members

of Mr. Carline's staff, and, of course, the Vice President's staff and security detail. It was not an intimate setting. The group hunted that afternoon and Tuesday and Wednesday mornings; it fished (in two boats) Tuesday afternoon. All meals were in common. Sleeping was in rooms of two or three, except for the Vice President, who had his own quarters. Hunting was in two- or three-man blinds. As it turned out, I never hunted in the same blind with the Vice President. Nor was I alone with him at any time during the trip, except, perhaps, for instances so brief and unintentional that I would not recall them—walking to or from a boat, perhaps, or going to or from dinner. Of course we said not a word about the present case. The Vice President left the camp Wednesday afternoon, about two days after our arrival. I stayed on to hunt (with my son and son-in-law) until late Friday morning, when the three of us returned to Washington on a commercial flight from New Orleans.

II

Let me respond, at the outset, to Sierra Club's suggestion that I should "resolve any doubts in favor of recusal." Motion to Recuse 8. That might be sound advice if I were sitting on a Court of Appeals. But see *In re Aguinda*, 241 F. 3d 194, 201 (CA2 2000). There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case. Thus, as Justices stated in their 1993 Statement of Recusal Policy: "[W]e do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnec-

essary recusal impairs the functioning of the Court." (Available in Clerk of Court's case file.) Moreover, granting the motion is (insofar as the outcome of the particular case is concerned) effectively the same as casting a vote against the petitioner. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all.

Even so, recusal is the course I must take—and will take—when, on the basis of established principles and practices, I have said or done something which requires that course. I have recused for such a reason this very Term. See *Elk Grove Unified School District* v. *Newdow*, 540 U. S. ___ (cert. granted, Oct. 14, 2003). I believe, however, that established principles and practices do not require (and thus do not permit) recusal in the present case.

A

My recusal is required if, by reason of the actions described above, my "impartiality might reasonably be questioned." 28 U. S. C. §455(a). Why would that result follow from my being in a sizable group of persons, in a hunting camp with the Vice President, where I never hunted with him in the same blind or had other opportunity for private conversation? The only possibility is that it would suggest I am a friend of his. But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer.

A rule that required Members of this Court to remove themselves from cases in which the official actions of

friends were at issue would be utterly disabling. Many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials—and from the earliest days down to modern times Justices have had close personal relationships with the President and other officers of the Executive. John Quincy Adams hosted dinner parties featuring such luminaries as Chief Justice Marshall, Justices Johnson, Story, and Todd, Attorney General Wirt, and Daniel Webster. 5 Memoirs of John Quincy Adams 322–323 (C. Adams ed. 1969) (Diary Entry of Mar. 8, 1821). Justice Harlan and his wife often "'stopped in'" at the White House to see the Hayes family and pass a Sunday evening in a small group, visiting and singing hymns. M. Harlan, Some Memories of a Long Life, 1854–1911, p. 99 (2001). Justice Stone tossed around a medicine ball with members of the Hoover administration mornings outside the White House. 2 Memoirs of Herbert Hoover 327 (1952). Justice Douglas was a regular at President Franklin Roosevelt's poker parties; Chief Justice Vinson played poker with President Truman. J. Simon, Independent Journey: The Life of William O. Douglas 220–221 (1980); D. McCullough, Truman 511 (1992). A no-friends rule would have disqualified much of the Court in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952), the case that challenged President Truman's seizure of the steel mills. Most of the Justices knew Truman well, and four had been appointed by him. A no-friends rule would surely have required Justice Holmes's recusal in *Northern Securities Co.* v. *United States,* 193 U. S. 197 (1904), the case that challenged President Theodore Roosevelt's trust-busting initiative. See S. Novick, Honorable Justice: The Life of Oliver Wendell Holmes 264 (1989) ("Holmes and Fanny dined at the White House every week or two . . .").

It is said, however, that this case is different because the federal officer (Vice President Cheney) is actually a

named party. That is by no means a rarity. At the beginning of the current Term, there were before the Court (excluding habeas actions) no fewer than 83 cases in which high-level federal Executive officers were named in their official capacity—more than 1 in every 10 federal civil cases then pending. That an officer is named has traditionally made no difference to the proposition that friendship is not considered to affect impartiality in official-action suits. Regardless of whom they name, such suits, when the officer is the plaintiff, seek relief not for him personally but for the Government; and, when the officer is the defendant, seek relief not against him personally, but against the Government. That is why federal law provides for *automatic substitution* of the new officer when the originally named officer has been replaced. See Federal Rule of Civil Procedure 25(d)(1); Federal Rule of Appellate Procedure 43(c)(2); this Court's Rule 35.3. The caption of Sierra Club's complaint in this action designates as a defendant "Vice President Richard Cheney, *in his official capacity* as Vice President of the United States and Chairman of the National Energy Policy Development Group." App. 139 (emphasis added). The body of the complaint repeats (in paragraph 6) that "Defendant Richard Cheney is sued *in his official capacity* as the Vice President of the United States and Chairman of the Cheney Energy Task Force." *Id.*, at 143 (emphasis added). Sierra Club has *relied* upon the fact that this is an official-action rather than a personal suit as a basis for denying the petition. It asserted in its brief in opposition that if there was no presidential immunity from discovery in *Clinton* v. *Jones,* 520 U. S. 681 (1997), which was a private suit, "[s]urely . . . the Vice President and subordinate White House officials have no greater immunity claim here, especially when the lawsuit relates to their official actions while in office and the primary relief sought is a declaratory judgment." Brief in Opposition 13.

Richard Cheney's name appears in this suit only because he was the head of a Government committee that allegedly did not comply with the Federal Advisory Committee Act (FACA), 5 U. S. C. App. §2, p. 1, and because he may, by reason of his office, have custody of some or all of the Government documents that the plaintiffs seek. If some other person were to become head of that committee or to obtain custody of those documents, the plaintiffs would name that person and Cheney would be dismissed. Unlike the defendant in *United States* v. *Nixon,* 418 U. S. 683 (1974), or *Clinton* v. *Jones*, *supra*, Cheney is represented here, not by his personal attorney, but by the United States Department of Justice in the person of the Solicitor General. And the courts at all levels have referred to his arguments as (what they are) the arguments of "the government." See *In re Cheney*, 334 F. 3d 1096, 1100 (CADC 2003); *Judicial Watch, Inc.* v. *Nat. Energy Policy Development Group*, 219 F. Supp. 2d 20, 25 (DC 2002).

The recusal motion, however, asserts the following:

> "Critical to the issue of Justice Scalia's recusal is understanding that this is not a run-of-the-mill legal dispute about an administrative decision. . . . Because his own conduct is central to this case, the Vice President's 'reputation and his integrity are on the line.' (Chicago Tribune.)" Motion to Recuse 9.

I think not. Certainly as far as the legal issues immediately presented to me are concerned, this *is* "a run-of-the-mill legal dispute about an administrative decision." I am asked to determine what powers the District Court possessed under FACA, and whether the Court of Appeals should have asserted mandamus or appellate jurisdiction

over the District Court.[1] Nothing this Court says on those subjects will have any bearing upon the reputation and integrity of Richard Cheney. Moreover, even if this Court affirms the decision below and allows discovery to proceed in the District Court, the issue that would ultimately present itself *still* would have no bearing upon the reputation and integrity of Richard Cheney. That issue would be, quite simply, whether some private individuals were *de facto* members of the National Energy Policy Development Group (NEPDG). It matters not whether they were caused to be so by Cheney or someone else, or whether Cheney was even aware of their *de facto* status; if they *were de facto* members, then (according to D. C. Circuit law) the records and minutes of NEPDG must be made public.

The recusal motion asserts, however, that Richard Cheney's "reputation and his integrity are on the line" because

> "respondents have alleged, *inter alia*, that the Vice President, as the head of the Task Force and its subgroups, was responsible for the involvement of energy industry executives in the operations of the Task Force, as a result of which the Task Force and its subgroups became subject to FACA." *Ibid.*

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[1] The Questions Presented in the petition, and accepted for review, are as follows:

"1. Whether the Federal Advisory Committee Act (FACA), 5 U. S. C. App. 1, §§1 *et seq*., can be construed . . . to authorize broad discovery of the process by which the Vice President and other senior advisors gathered information to advise the President on important national policy matters, based solely on an unsupported allegation in a complaint that the advisory group was not constituted as the President expressly directed and the advisory group itself reported.

2. Whether the court of appeals had mandamus or appellate jurisdiction to review the district court's unprecedented discovery orders in this litigation." Pet. for Cert. (I).

As far as Sierra Club's *complaint* is concerned, it simply is not true that Vice President Cheney is singled out as having caused the involvement of energy executives. But even if the allegation had been made, it would be irrelevant to the case. FACA assertedly requires disclosure if there were private members of the task force, *no matter who* they were—"energy industry executives" or Ralph Nader; and *no matter who* was responsible for their membership—the Vice President or no one in particular. I do not see how the Vice President's "reputation and integrity are on the line" any more than the agency head's reputation and integrity are on the line in virtually all official-action suits, which accuse his agency of acting (to quote the Administrative Procedure Act) "arbitrar[ily], capricious[ly], [with] an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. §706(2)(A). Beyond that always-present accusation, there is nothing illegal or immoral about making "energy industry executives" members of a task force on energy; some people probably think it would be a good idea. If, in doing so, or in allowing it to happen, the Vice President went beyond his assigned powers, that is no worse than what every agency head has done when his action is judicially set aside.

To be sure, there could be political consequences from disclosure of the fact (if it be so) that the Vice President favored business interests, and especially a sector of business with which he was formerly connected. But political consequences are not my concern, and the possibility of them does not convert an official suit into a private one. That possibility exists to a greater or lesser degree in virtually all suits involving agency action. To expect judges to take account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do. It seems to me quite wrong (and quite impossible) to make recusal depend upon what degree of political damage a particular case can be

expected to inflict.

In sum, I see nothing about this case which takes it out of the category of normal official-action litigation, where my friendship, or the appearance of my friendship, with one of the named officers does not require recusal.

B

The recusal motion claims that "the fact that Justice Scalia and his daughter [sic] were the Vice President's guest on Air Force Two on the flight down to Louisiana" means that I "accepted a sizable gift from a party in a pending case," a gift "measured in the thousands of dollars." Motion to Recuse 6.

Let me speak first to the value, though that is not the principal point. Our flight down cost the Government nothing, since space-available was the condition of our invitation. And, though our flight down on the Vice President's plane was indeed free, since we were not returning with him we purchased (because they were least expensive) round-trip tickets that cost precisely what we would have paid if we had gone both down and back on commercial flights. In other words, none of us saved a cent by flying on the Vice President's plane. The purpose of going with him was not saving money, but avoiding some inconvenience to ourselves (being taken by car from New Orleans to Morgan City) and considerable inconvenience to our friends, who would have had to meet our plane in New Orleans, and schedule separate boat trips to the hunting camp, for us and for the Vice President's party. (To be sure, flying on the Vice President's jet was more comfortable and more convenient than flying commercially; that accommodation is a matter I address in the next paragraph.)[2]

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[2] As my statement of the facts indicated, by the way, my daughter did not accompany me. My married son and son-in-law were given a ride—

The principal point, however, is that social courtesies, provided at Government expense by officials whose only business before the Court is business in their official capacity, have not hitherto been thought prohibited. Members of Congress and others are frequently invited to accompany Executive Branch officials on Government planes, where space is available. That this is not the sort of gift thought likely to affect a judge's impartiality is suggested by the fact that the Ethics in Government Act of 1978, 5 U. S. C. App. §101 *et seq.*, p. 38, which requires annual reporting of transportation provided or reimbursed, excludes from this requirement transportation provided by the United States. See §109(5)(C); Committee on Financial Disclosure, Administrative Office of the U. S. Courts, Financial Disclosure Report: Filing Instructions for Judicial Officers and Employees, p. 25 (Jan. 2003). I daresay that, at a hypothetical charity auction, much more would be bid for dinner for two at the White House than for a one-way flight to Louisiana on the Vice President's jet. Justices accept the former with regularity. While this matter was pending, Justices and their spouses were invited (*all* of them, I believe) to a December 11, 2003, Christmas reception at the residence of the Vice President—which included an opportunity for a photograph with the Vice President and Mrs. Cheney. Several of the Justices attended, and in doing so they were fully in accord with the proprieties.

III

When I learned that Sierra Club had filed a recusal

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not because they were relatives and as a favor to me; but because they were other hunters leaving from Washington, and as a favor to them (and to those who would have had to go to New Orleans to meet them). Had they been unrelated invitees to the hunt, the same would undoubtedly have occurred. Financially, the flight was worth as little to them as it was to me.

motion in this case, I assumed that the motion would be replete with citations of legal authority, and would provide some instances of cases in which, because of activity similar to what occurred here, Justices have recused themselves or at least have been asked to do so. In fact, however, the motion cites only two Supreme Court cases assertedly relevant to the issue here discussed,[3] and nine Court of Appeals cases. Not a single one of these even involves an official-action suit.[4] And the motion gives not a single instance in which, under even remotely similar circumstances, a Justice has recused or been asked to recuse. Instead, the Argument section of the motion consists almost entirely of references to, and quotations from, newspaper editorials.

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[3] The motion cites a third Supreme Court case, *Public Citizen* v. *Department of Justice*, 491 U. S. 440 (1989), as a case involving FACA in which I recused myself. It speculates (1) that the reason for recusal was that as Assistant Attorney General for the Office of Legal Counsel I had provided an opinion which concluded that applying FACA to presidential advisory committees was unconstitutional; and asserts (2) that this would also be grounds for my recusal here. My opinion as Assistant Attorney General addressed the precise question presented in *Public Citizen:* whether the American Bar Association's Standing Committee on Federal Judiciary, which provided advice to the President concerning judicial nominees, could be regulated as an "advisory committee" under FACA. I concluded that my withdrawal from the case was required by 28 U. S. C. §455(b)(3), which mandates recusal where the judge "has served in governmental employment and in such capacity . . . expressed an opinion concerning the merits of the particular case in controversy." I have never expressed an opinion concerning the merits of the present case.

[4] *United States* v. *Murphy*, 768 F. 2d 1518 (CA7 1985), at least involved a judge's going on vacation—but not with the named defendant in an official-action suit. The judge had departed for a vacation with the prosecutor of Murphy's case, immediately after sentencing Murphy. Obviously, the prosecutor is personally involved in the outcome of the case in a way that the nominal defendant in an official-action suit is not.

The core of Sierra Club's argument is as follows:

> "Sierra Club makes this motion because . . . damage [to the integrity of the system] is being done right now. As of today, 8 of the 10 newspapers with the largest circulation in the United States, 14 of the largest 20, and 20 of the 30 largest have called on Justice Scalia to step aside . . . . Of equal import, there is no counterbalance or controversy: not a single newspaper has argued against recusal. Because the American public, as reflected in the nation's newspaper editorials, has unanimously concluded that there is an appearance of favoritism, any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned. These facts more than satisfy Section 455(a), which mandates recusal merely when a Justice's impartiality 'might reasonably be questioned.'" Motion to Recuse 3–4.

The implications of this argument are staggering. I must recuse because a significant portion of the press, which is deemed to be the American public, demands it.

The motion attaches as exhibits the press editorials on which it relies. Many of them do not even have the facts right. The length of our hunting trip together was said to be several days (San Francisco Chronicle), four days (Boston Globe), or nine days (San Antonio Express-News). We spent about 48 hours together at the hunting camp. It was asserted that the Vice President and I "spent time alone in the rushes," "huddled together in a Louisiana marsh," where we had "plenty of time . . . to talk privately" (Los Angeles Times); that we "spent . . . quality time bonding together in a duck blind" (Atlanta Journal-Constitution); and that "[t]here is simply no reason to think these two did not discuss the pending case" (Buffalo News). As I have described, the Vice President and I were never in the same blind, and never discussed the case.

(Washington officials know the rules, and know that discussing with judges pending cases—their own or anyone else's—is forbidden.) The Palm Beach Post stated that our "transportation was provided, appropriately, by an oil services company," and Newsday that a "private jet . . . whisked Scalia to Louisiana." The Vice President and I flew in a Government plane. The Cincinnati Enquirer said that "Scalia was Cheney's guest at a private duck-hunting camp in Louisiana." Cheney and I were Wallace Carline's guest. Various newspapers described Mr. Carline as "an energy company official" (Atlanta Journal-Constitution), an "oil industrialist," (Cincinnati Enquirer), an "oil company executive" (Contra Costa Times), an "oilman" (Minneapolis Star Tribune), and an "energy industry executive" (Washington Post). All of these descriptions are misleading.

And these are just the inaccuracies pertaining to the *facts*. With regard to the *law*, the vast majority of the editorials display no recognition of the central proposition that a federal officer is not ordinarily regarded to be a personal party in interest in an official-action suit. And those that do display such recognition facilely assume, contrary to all precedent, that in such suits mere political damage (which they characterize as a destruction of Cheney's reputation and integrity) is ground for recusal. Such a blast of largely inaccurate and uninformed opinion cannot determine the recusal question. It is well established that the recusal inquiry must be "made from the perspective of a *reasonable* observer who is *informed of all the surrounding facts and circumstances*." *Microsoft Corp.* v. *United States*, 530 U. S. 1301, 1302 (2000) (REHNQUIST, C. J.) (opinion respecting recusal) (emphases added) (citing *Liteky* v. *United States,* 510 U. S. 540, 548 (1994)).

IV

While Sierra Club was apparently unable to summon

forth a single example of a Justice's recusal (or even motion for a Justice's recusal) under circumstances similar to those here, I have been able to accomplish the seemingly more difficult task of finding a couple of examples establishing the negative: that recusal or motion for recusal did *not* occur under circumstances similar to those here.

Justice White and Robert Kennedy

The first example pertains to a Justice with whom I have sat, and who retired from the Court only 11 years ago, Byron R. White. Justice White was close friends with Attorney General Robert Kennedy from the days when White had served as Kennedy's Deputy Attorney General. In January 1963, the Justice went on a skiing vacation in Colorado with Robert Kennedy and his family, Secretary of Defense Robert McNamara and his family, and other members of the Kennedy family. Skiing Not The Best; McNamara Leaves Colorado, Terms Vacation "Marvelous," Denver Post, Jan. 2, 1963, p. 22; D. Hutchinson, The Man Who Once Was Whizzer White 342 (1998). (The skiing in Colorado, like my hunting in Louisiana, was not particularly successful.) At the time of this skiing vacation there were pending before the Court at least two cases in which Robert Kennedy, in his official capacity as Attorney General, was a party. See *Gastelum-Quinones* v. *Kennedy,* 374 U. S. 469 (1963); *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963). In the first of these, moreover, the press might have said, as plausibly as it has said here, that the reputation and integrity of the Attorney General were at issue. There the Department of Justice had decreed deportation of a resident alien on grounds that he had been a member of the Communist Party. (The Court found that the evidence adduced by the Department was inadequate.)

Besides these cases naming Kennedy, another case pending at the time of the skiing vacation was argued to

the Court *by Kennedy* about two weeks later. See *Gray* v. *Sanders,* 372 U. S. 368 (1963). That case was important to the Kennedy administration, because by the time of its argument everybody knew that the apportionment cases were not far behind, and *Gray* was a significant step in the march toward *Reynolds* v. *Sims,* 377 U. S. 533 (1964). When the decision was announced, it was front-page news. See High Court Voids County Unit Vote, N. Y. Times, Mar. 19, 1963, p. 1, col. 2; Georgia's Unit Voting Voided, Washington Post, Mar. 19, 1963, p. A1, col. 5. Attorney General Kennedy argued for affirmance of a three-judge District Court's ruling that the Georgia Democratic Party's county-unit voting system violated the one-person, one-vote principle. This was Kennedy's only argument before the Court, and it certainly put "on the line" his reputation as a lawyer, as well as an important policy of his brother's administration.

Justice Jackson and Franklin Roosevelt

The second example pertains to a Justice who was one of the most distinguished occupants of the seat to which I was appointed, Robert Jackson. Justice Jackson took the recusal obligation particularly seriously. See, *e.g.*, *Jewell Ridge Coal Corp.* v. *United Mine Workers*, 325 U. S. 897 (1945) (Jackson, J., concurring in denial of rehearing) (oblique criticism of Justice Black's decision not to recuse himself from a case argued by his former law partner). Nonetheless, he saw nothing wrong with maintaining a close personal relationship, and engaging in "quite frequen[t]" socializing with the President whose administration's acts came before him regularly. R. Jackson, That Man: An Insider's Portrait of Franklin D. Roosevelt 74 (J. Barrett ed. 2003).

In April 1942, the two "spent a weekend on a very delightful house party down at General Watson's in Char-

lottesville, Virginia. I had been invited to ride down with the President and to ride back with him." *Id.*, at 106 (footnote omitted). Pending at the time, and argued the next month, was one of the most important cases concerning the scope of permissible federal action under the Commerce Clause, *Wickard* v. *Filburn,* 317 U. S. 111 (1942). Justice Jackson wrote the opinion for the Court. Roosevelt's Secretary of Agriculture, rather than Roosevelt himself, was the named federal officer in the case, but there is no doubt that it was important to the President.

I see nothing wrong about Justice White's and Justice Jackson's socializing—including vacationing and accepting rides—with their friends. Nor, seemingly, did anyone else at the time. (The Denver Post, which has been critical of me, reported the White-Kennedy-McNamara skiing vacation with nothing but enthusiasm.) If friendship is basis for recusal (as it assuredly is when friends are sued personally) then activity which suggests close friendship must be avoided. But if friendship is *no* basis for recusal (as it is not in official-capacity suits) social contacts that do no more than evidence that friendship suggest no impropriety whatever.

Of course it can be claimed (as some editorials have claimed) that "times have changed," and what was once considered proper—even as recently as Byron White's day—is no longer so. That may be true with regard to the earlier rare phenomenon of a Supreme Court Justice's serving as advisor and confidant to the President—though that activity, so incompatible with the separation of powers, was not widely known when it was occurring, and can hardly be said to have been generally approved before it was properly abandoned. But the well-known and constant practice of Justices' enjoying friendship and social intercourse with Members of Congress and officers of the Executive Branch has *not* been abandoned, and ought not

to be.

V

Since I do not believe my impartiality can reasonably be questioned, I do not think it would be proper for me to recuse. See *Microsoft*, 530 U. S., at 1302. That alone is conclusive; but another consideration moves me in the same direction: Recusal would in my judgment harm the Court. If I were to withdraw from this case, it would be because some of the press has argued that the Vice President would suffer political damage *if* he should lose this appeal, and *if*, on remand, discovery should establish that energy industry representatives were *de facto* members of NEPDG—and because some of the press has elevated that possible political damage to the status of an impending stain on the reputation and integrity of the Vice President. But since political damage often comes from the Government's losing official-action suits; and since political damage can readily be characterized as a stain on reputation and integrity; recusing in the face of such charges would give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official. That is intolerable.

My recusal would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons. The Los Angeles Times has already suggested that it was improper for me to sit on a case argued by a law school dean whose school I had visited several weeks before—visited not at his invitation, but at his predecessor's. See New Trip Trouble for Scalia, Feb. 28, 2004, p. B22. The same paper has asserted that it was improper for me to speak at a dinner honoring Cardinal Bevilaqua given by the Urban Family Council of Philadelphia because (ac-

cording to the Times's false report)[5] that organization was engaged in litigation seeking to prevent same-sex civil unions, and I had before me a case presenting the question (whether same-sex civil unions were lawful?—no) whether homosexual sodomy could constitutionally be *criminalized*. See *Lawrence* v. *Texas,* 539 U. S. ___ (2003). While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults.

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As I noted at the outset, one of the private respondents in this case has not called for my recusal, and has ex-

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[5]The Times's reporter had interviewed the former President of the Urban Family Council, who told him categorically that the Council was neither a party to, nor had provided financial support for, the civil-union litigation. The filed papers in the case, publicly available, *showed* that the Council was not a party. The Los Angeles Times nonetheless devoted a lengthy front-page article to the point that (in the words of the lead sentence) "Justice Antonin Scalia gave a keynote dinner speech in Philadelphia for an advocacy group waging a legal battle against gay rights." Serrano and Savage, Scalia Addressed Advocacy Group Before Key Decision, Mar. 8, 2004, at A1. Five days later, in a weekend edition, the paper printed (at the insistence of the Council) a few-line retraction acknowledging that this asserted fact was wrong—as though it was merely one incidental fact in a long piece, rather than the central fact upon which the long piece was based, and without which *there was no story*. See For the Record, Mar. 13, 2004, at A2. Other inaccurate facts and insinuations in the article, brought to the paper's attention by the Council, were not corrected. See e-mail from Betty Jean Wolfe, President, Urban Family Council, to Richard Serrano, Los Angeles Times (Mar. 8, 2004) (available in Clerk of Court's case file).

pressed confidence that I will rule impartially, as indeed I will. Counsel for the other private respondent seek to impose, it seems to me, a standard regarding friendship, the appearance of friendship, and the acceptance of social favors, that is more stringent than what they themselves observe. Two days before the brief in opposition to the petition in this case was filed, lead counsel for Sierra Club, a friend, wrote me a warm note inviting me to come to Stanford Law School to speak to one of his classes. (Available in Clerk of Court's case file.) (Judges teaching classes at law schools normally have their transportation and expenses paid.) I saw nothing amiss in that friendly letter and invitation. I surely would have thought otherwise if I had applied the standards urged in the present motion.

There are, I am sure, those who believe that my friendship with persons in the current administration might cause me to favor the Government in cases brought against it. That is not the issue here. Nor is the issue whether personal friendship with the Vice President might cause me to favor the Government in cases in which *he* is named. None of those suspicions regarding my impartiality (erroneous suspicions, I hasten to protest) bears upon recusal here. The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I *cannot* decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.

As the newspaper editorials appended to the motion make clear, I have received a good deal of embarrassing criticism and adverse publicity in connection with the matters at issue here—even to the point of becoming (as the motion cruelly but accurately states) "fodder for late-

night comedians." Motion to Recuse 6. If I could have done so in good conscience, I would have been pleased to demonstrate my integrity, and immediately silence the criticism, by getting off the case. Since I believe there is no basis for recusal, I cannot. The motion is

Denied.