

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

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

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

No. 03–475. Argued April 27, 2004—Decided June 24, 2004

The President established the National Energy Policy Development Group (Group) to give him advice and make recommendations on energy policy, assigning a number of federal agency heads and assistants to serve as Group members and authorizing the Vice President, as Group chairman, to include other federal officers as appropriate. After the Group issued a final report and, according to the Government, terminated all operations, respondents filed these separate actions, later consolidated in the District Court, alleging that the Group had not complied with the Federal Advisory Committee Act (FACA), which, *inter alia*, imposes a variety of open-meeting and disclosure requirements on entities meeting the definition of “advisory committee.” As relevant here, such a committee is an entity or “subgroup . . . , which is . . . established or utilized by the President, . . . exclud[ing] . . . any committee . . . composed wholly of full-time, or permanent part-time, [federal] officers or employees.” 5 U. S. C. App. §2(B)(i). The complaint alleged that, because nonfederal employees and private lobbyists regularly attended and fully participated in the Group’s non-public meetings as *de facto* Group members, the Group could not benefit from the §2(B) exemption and was therefore subject to FACA’s requirements. The suit sought declaratory relief and an injunction requiring the defendants—including the Vice President and the Government officials serving on the Group—to produce all materials allegedly subject to FACA’s requirements.

Among its rulings, the District Court granted the defendants’ mo-

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tion to dismiss as to some of them, but denied it as to others. The Court held that FACA's substantive requirements could be enforced against the Vice President and the other Government participants under the Mandamus Act, 28 U. S. C. §1361, and against the agency defendants under the Administrative Procedure Act, 5 U. S. C. §706. It deferred ruling on whether the FACA disclosure duty was sufficiently clear and nondiscretionary for mandamus to issue. It also deferred ruling on the Government's contention that to disregard the §2(B) exemption and apply FACA to the Group would violate separation-of-powers principles and interfere with the President's and Vice President's constitutional prerogatives. Instead, the court allowed respondents to conduct a "tightly-reined" discovery to ascertain the Group's structure and membership, and thus to determine whether the *de facto* membership doctrine applied. While acknowledging that discovery itself might raise serious constitutional questions, the court explained that the Government could assert executive privilege to protect sensitive materials from disclosure. The court noted that if, after discovery, respondents had no evidentiary support for their allegations about *de facto* members in the Group, the Government could prevail on statutory grounds. Even were it appropriate to address constitutional issues, the court explained, its discovery orders would provide the factual development necessary to determine the extent of the alleged intrusion into the Executive's constitutional authority. The court then ordered respondents to submit a discovery plan, approved that plan in due course, entered orders allowing discovery to proceed, 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 and for other relief, but the court dismissed the mandamus petition on the ground that alternative avenues of relief remained available. Citing *United States v. Nixon*, 418 U. S. 683, the court held that petitioners, in order to guard against intrusion into the President's prerogatives, must first assert executive privilege with particularity in the District Court. If the lower court sustained the privilege, the appeals court observed, petitioners would be able to obtain all the relief they sought; but if the District Court rejected the claim, mandamus might well be appropriate. So long as the separation-of-powers conflict remained hypothetical, the court held, it had no authority to exercise the extraordinary remedy of mandamus. Although acknowledging that the scope of respondents' discovery requests was overly broad, the appeals court nonetheless agreed with the District Court that petitioners should bear the burden of invoking executive privilege and of objecting to the discovery orders with detailed precision.

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*Held:*

1. Respondents' preliminary argument that the mandamus petition was jurisdictionally out of time is rejected. Respondents assert that, because the Government's basic argument was one of discovery immunity—*i.e.*, it need not invoke executive privilege or make particular objections to the discovery requests—the mandamus petition should have been filed within 60 days after the District Court denied the motion to dismiss under Federal Rule of Appellate Procedure 4(a)(1)(B). On this theory, the last day for any filing in the appeals court was September 9, 2002, whereas the mandamus petition and notice of appeal were not filed until November 7. However, Rule 4(a), by its plain terms, applies only to the filing of a notice of appeal. It is inapplicable to the mandamus petition under the All Writs Act, 28 U. S. C. §1651. Respondents' alternative argument that the mandamus petition was barred by the equitable doctrine of laches also fails. Laches might be a bar where the petitioner slept on his rights and especially if the delay was prejudicial. *Chapman v. County of Douglas*, 107 U. S. 348, 355. Here, however, the flurry of motions the Government filed after the District Court denied the dismissal motion overcomes respondents' argument. Nor does the Court accept their argument that laches should apply because those Government motions amounted to little more than dilatory tactics. Given the drastic nature of mandamus and this Court's holdings that the writ may not issue while alternative avenues of relief remain available, the Government cannot be faulted for attempting to resolve the dispute through less drastic means. Pp. 7–9.

2. The Court of Appeals erred in concluding it lacked authority to issue mandamus because the Government could protect its rights by asserting executive privilege in the District Court. Pp. 9–21.

(a) Mandamus is a “drastic and extraordinary” remedy “reserved for really extraordinary causes.” *Ex parte Fahey*, 332 U. S. 258, 259–260. While the conditions for obtaining it may be demanding, they are not insuperable. This Court has issued mandamus to, *inter alia*, restrain a lower court whose actions would threaten the separation of powers by embarrassing the Executive Branch. *Ex parte Peru*, 318 U. S. 578, 588. Were the Vice President not a party, the argument that the Court of Appeals should have entertained a mandamus action might present different considerations. Here, however, the Vice President and his Group comembers are the subjects of the discovery orders. The mandamus petition alleges that the orders threaten substantial intrusions on the process by which those closest to the President advise him. These facts and allegations remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise. A

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President's communications and activities encompass a vastly wider range of sensitive material than would be true of any ordinary individual. *Nixon*, 418 U. S., at 715. While the President is not above the law, the Judiciary must afford Presidential confidentiality the greatest possible protection, *ibid.*, recognizing 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 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. Pp. 9–12.

(b) The Court of Appeals labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections. In its view, the requirement that the Vice President and his Group colleagues bear the burden of invoking executive privilege with narrow specificity and objecting to the discovery requests with detailed precision was mandated by *Nixon*'s rejection of an "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances," 418 U. S., at 706. The appeals court's analysis overlooks fundamental differences between this case and *Nixon*, which cannot bear the weight the court put on it. Unlike this case, which concerns requests for information for use in a civil suit, *Nixon* involved 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 distinction between criminal and civil proceedings is not just a matter of formalism in this context. The right to production of relevant evidence in civil proceedings does not have the same "constitutional dimensions" as it does in the criminal context. *Id.*, at 711. Withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch's "essential functions." *Id.*, at 711. Withholding the information in this case does not hamper such "essential functions" in quite the same way. The District Court ordered discovery here, not to remedy known statutory violations, but to ascertain whether FACA's disclosure requirements apply to the Group at all. This situation 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 hinged on the availability of certain indispensable information. Another important factor here is the burden imposed by the discovery orders. This is not a routine discovery dispute. The discovery re-

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quests are directed to the Vice President and other senior Government officials who served on the Group to give advice and make recommendations to the President. Special considerations control when the Executive's interests in maintaining its autonomy and safeguarding its communications' confidentiality are implicated. See, e.g., *Clinton v. Jones*, 520 U.S. 681, 707. Even when compared against *Nixon's* criminal subpoenas involving the President, the civil discovery here militates against respondents' position. There are no checks in civil discovery analogous to the constraints imposed in the criminal justice system to filter out insubstantial legal claims. Federal Rule of Civil Procedure 11 sanctions and private attorneys' obligation of candor to the judicial tribunal have proved insufficient to discourage the filing of meritless claims against the Executive Branch. Finally, the narrowly tailored subpoena orders in *Nixon*, which "precisely identified" and "specific[ally] . . . enumerated" the relevant materials, 418 U.S., at 688, and n. 5, stand in marked contrast to the overly broad discovery requests approved by the District Court. Given that disparity, this Court's precedents provide no support for the appeals court's requirement that the Executive Branch bear the burden of invoking executive privilege with sufficient specificity and of making particularized objections. Indeed, those precedents suggest just the opposite. See, e.g., *Clinton*, *supra*, at 705. Contrary to their conclusions, *Nixon* did not leave the lower courts the sole option of inviting the Executive Branch to invoke executive privilege. Rather, they could have narrowed the scope of the discovery orders on their own. In deciding whether to issue mandamus, the Court of Appeals must not only determine whether there are exceptional circumstances amounting to a judicial usurpation of power, *Will v. United States*, 389 U.S. 90, 95, or "a clear abuse of discretion," *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, but must also ask whether the District Court's actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties. Pp. 12–20.

(c) Absent overriding concerns such as the need to avoid piecemeal litigation, see *Schlagenhauf v. Holder*, 379 U.S. 104, 111, the Court declines to direct the Court of Appeals to issue mandamus against the District Court. This is not a case where, having considered the issues, the appeals court abused its discretion by failing to issue the writ. Instead, it relied on its mistaken reading of *Nixon* and prematurely terminated its inquiry without even reaching the weighty separation-of-powers objections raised in the case or exercising its discretion to determine whether mandamus is appropriate under the circumstances. Because issuance of the writ is vested in the discretion of the court to which to petition is made, this Court

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leaves it to the Court of Appeals to address the parties' arguments and other matters bearing on whether mandamus should issue, bearing in mind the burdens imposed on the Executive Branch in any future proceedings. Special considerations applicable to the President and the Vice President suggest that the lower courts should be sensitive to Government requests for interlocutory appeals to reexamine, *e.g.*, whether the statute embodies the *de facto* membership doctrine. Pp. 20–21.

334 F. 3d 1096, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and BREYER, JJ., joined, and in which SCALIA and THOMAS, JJ., joined as to Parts I, II, III, and IV. STEVENS, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined.