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.