# 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.