

GINSBURG, J., dissenting

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-

¹The 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-

GINSBURG, J., dissenting

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

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).

GINSBURG, J., dissenting

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*

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

GINSBURG, J., dissenting

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

³Section 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.”

GINSBURG, J., dissenting

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-

⁴On 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)).

⁵According 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.

GINSBURG, J., dissenting

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,

⁶The 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).

GINSBURG, J., dissenting

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-

GINSBURG, J., dissenting

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

⁷The 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.

GINSBURG, J., dissenting

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-

GINSBURG, J., dissenting

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

⁸The 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

GINSBURG, J., dissenting

* * *

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,

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.

GINSBURG, J., dissenting

at 1107.⁹ I would therefore affirm the judgment of the Court of Appeals.

⁹While 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.