CHENEY v. UNITED STATES DISTRICT COURT

SUPREME COURT OF THE UNITED STATES
542 US 367
June 24, 2004

OPINION: Justice Kennedy...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.

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 "develop...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." 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." 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).

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" and **to prevent the "wasteful expenditure of public funds"** that may result from their proliferation. 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**–
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> "(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** . . . ."

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." The complaint alleges, however, that "**non-federal employees**," including "private lobbyists," "**regularly attended and fully participated in non-public meetings.**" Relying on *Association of American Physicians & Surgeons, Inc. v. Clinton (CADC 1993)*, **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." 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 and against the agency defendants under the Administrative Procedure Act. 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 (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." 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. Furthermore, 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 and denied the Government's motion for certification...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...

We granted certiorari [and] now vacate the judgment of the Court of Appeals and remand the case for further proceedings to reconsider the Government's mandamus petition...

We now come to the central issue in the case--whether the Court of Appeals was correct to conclude it "had no authority to exercise the extraordinary remedy of mandamus" 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 (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 Ass'n (1943)*. Although courts have not "confined themselves to an arbitrary and technical definition of 'jurisdiction,'" *Will v. United States (1967)*, "only exceptional circumstances amounting to a judicial 'usurpation of power'" or a "clear abuse of discretion" "will justify the invocation of this extraordinary remedy."

As the writ is one of "the most potent weapons in the judicial arsenal," three conditions must be satisfied before it may issue. First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires"--a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy "'the burden of showing that [his] right to issuance of the writ is "clear and indisputable." 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. 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 "embarrassing the executive arm of the Government" or result in the "intrusion by the federal judiciary on a delicate area of federal-state relations."

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." 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*[1]...As *United States* v *Nixon* explained, these principles do not mean that the "President is above the law." 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," 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**. (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

[1]Case 2-2 on this website.

Clinton v. Jones[2] ("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'").

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." 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." If *Nixon* refused to recognize broad claims of confidentiality where the President had asserted executive privilege, the majority reasoned, *Nixon* must have rejected 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**." The Court's decision was explicit that it was "not...concerned with the balance between the President's generalized 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."

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 historical 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.'" In light of the "fundamental" and "comprehensive" need for "every man's evidence" in the criminal justice system, 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." 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."

The Court also observed in *Nixon* that a "primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions." Withholding materials from a tribunal in an ongoing criminal

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[2]Case 2-3 on this website.

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." Such an impairment of the "essential functions of [another] branch" 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. 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" and that the Executive's "constitutional responsibilities and status [are] factors counseling judicial deference and restraint" in the conduct of litigation against it. Respondents' reliance on cases that do not involve senior members of the Executive Branch 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 targets for suits for civil

damages."

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." They were "not intended to provide a means of discovery." The burden of showing these standards were met, moreover, fell on the party requesting the information. ("In 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. ("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, the discovery requests here, as the panel majority acknowledged, ask for everything under the sky...

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. 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. 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. (holding that the Judiciary may direct "appropriate process" to the Executive).

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...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...

Contrary to the District Court's and the Court of Appeals' 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 (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 "occasions for constitutional confrontation between the two branches" should be avoided whenever possible.

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 (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." 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." 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." This is but one example of the choices available to the District Court and the Court of Appeals in this case...

We note only that all courts should be mindful of the burdens imposed on the Executive Branch in any future proceedings...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.

CONCURRENCE: Justice Stevens...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...

Relying on the Court of Appeals' novel *de facto* member doctrine, 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.

DISSENT: Justice Ginsburg/Souter...The Government...urged that this case should be resolved without *any* discovery. 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. But, as the Court of Appeals observed, it appeared that the Government "never asked the district court to *narrow* discovery." Given the Government's decision to resist all discovery, mandamus relief based on the exorbitance of the discovery orders is at least "premature." I would therefore affirm the judgment of the Court of Appeals denying the writ, and allow the District Court, in the first instance, to pursue its expressed intention "tightly to rein in discovery," should the Government so request...

CONCURRENCE & DISSENT: Justice Thomas/Scalia. [Not Provided.]