

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	C.A. No. 01-1530 (EGS)
NATIONAL ENERGY POLICY)	
DEVELOPMENT GROUP, et al.,)	
)	
Defendants.)	
_____)	
SIERRA CLUB,)	
)	
Plaintiff,)	
)	
v.)	
)	C.A. No. 02-631 (EGS)
VICE PRESIDENT RICHARD)	
CHENEY, in his official capacity, et al.,)	
)	
Defendants.)	
_____)	

DEFENDANTS' MOTION FOR A STAY PENDING APPEAL

Defendants National Energy Policy Development Group, Richard B. Cheney, Andrew Lundquist, Joshua Bolten, and Larry Lindsey ("the moving defendants") hereby move for a stay of this Court's October 17, 2002 Order pending appellate review of that Order. As explained in more detail in the accompanying memorandum of law, a stay is appropriate because (i) the moving defendants' appeal will present serious legal questions; and (ii) absent a stay the moving defendants will suffer irreparable injury.

In the event the Court denies this motion at the October 31 hearing, defendants

respectfully request that the date of compliance with the Court's October 17, 2002 Order be extended to allow the defendants to present their stay request to the Court of Appeals and still have time to comply with the October 17 Order, if necessary. Defendants thus respectfully request an extension of the November 5 deadline to a date two weeks past the later of (a) the date of any order of this Court denying defendants' motion for a stay of this Court's October 17, 2002 Order; or (b) the date of any order of the Court of Appeals denying any motion for a stay of this Court's October 17, 2002 Order.

Respectfully submitted,

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

SHANNEN W. COFFIN
Deputy Assistant Attorney General

THOMAS MILLET
D.C. Bar #294405
CRAIG BLACKWELL
JENNIFER PAISNER
Attorneys, Civil Division
Department of Justice
901 E St., N.W.
Room 812
Washington, DC 20530
Tel: (202) 616-8268
Fax: (202) 616-8460

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VICE PRESIDENT RICHARD)	
CHENEY, in his official capacity, et al.,)	
)	
Defendants.)	
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[PROPOSED] ORDER

Upon consideration of the motion of defendants National Energy Policy Development Group, Richard B. Cheney, Andrew Lundquist, Joshua Bolten, and Larry Lindsey for a stay of this Court's October 17, 2002 Order pending proceedings in the Court of Appeals relating to that order, it is hereby ORDERED that:

this Court's October 17, 2002 Order and any obligation of the above-named defendants to respond to discovery are STAYED pending these appellate proceedings.

Date: _____, 2002

Emmet G. Sullivan
United States District Judge

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**MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR STAY PENDING APPEAL**

The Vice President of the United States and the other defendants who were parties to the September 3, 2002 Motion for a Protective Order (the "Moving Defendants") respectfully move this Court for a stay of its October 17, 2002 Order denying that motion and any discovery against those moving defendants, in order to permit an appeal of the important constitutional and statutory issues decided by this Court. The Moving Defendants easily satisfy this Circuit's standards for a stay.

First, the issues decided by the Court in permitting discovery to proceed against the Moving Defendants involve matters of substantial gravity and raise significant constitutional and statutory questions. The cases cited by the Moving Defendants in their papers suggest that the discovery at issue should not proceed, especially absent the requisite compelling showing of need by the plaintiffs. The Moving Defendants also raised substantial statutory issues regarding: (1) the ability of this Court to issue mandamus relief against the Vice President (and other non-agency defendants) where the Federal Advisory Committee Act ("FACA") and the Administrative Procedure Act ("APA") do not provide a provide remedy; and (2) the availability of discovery in an APA-type case. While this Court may have rejected the Vice President's argument with respect to these issues, there is no question that they are substantial enough to merit the attention of the Court of Appeals. Indeed, for similar reasons, courts have granted stays to permit appeals of orders compelling discovery against the Executive in cases cited by the Moving Defendants. See, e.g., Dellums v. Powell, 561 F.2d 242, 245 (D.C. Cir.) (stay of order denying motion to quash subpoena against former President), cert. denied, 434 U.S. 880 (1977).

Second, the Moving Defendants will be irreparably harmed in the absence of a stay. Because the arguments before this Court include the issue of whether complying with discovery orders itself imposes an unconstitutional burden on the effective functioning of the Presidency and Vice Presidency, compliance with those orders during the pendency of an appeal would moot the issue, thus denying the Moving Defendants effective review of this Court's discovery order and imposing the very harms the Moving Defendants seek to avoid. Those harms will be irreversible in the absence of a stay. On the other hand, plaintiffs will, at worst, experience the possible delay occasioned by an appeal. Any possible delay, however, would affect only

discovery relating to the Moving Defendants. Discovery against all of the agency-head defendants can proceed on the schedule set by this Court.

By no later than October 23, 2002, the Moving Defendants will present this Court with a motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b). In the absence of timely certification by this Court, however, defendants will also seek appellate review of this Court's rulings both by petition for mandamus under 28 U.S.C. § 1651(a), and, at least with respect to the Vice President, by direct appeal under 28 U.S.C. § 1291. See United States v. Nixon, 418 U.S. 683, 690-92 (1974).¹ However this matter proceeds to the Court of Appeals, a stay should be granted to preserve effective review of the important issues at stake in this controversy.

ARGUMENT

THE COURT'S ORDER DENYING THE MOVING DEFENDANTS' MOTION FOR A PROTECTIVE ORDER AND FOR RECONSIDERATION SHOULD BE STAYED PENDING APPELLATE REVIEW

The propriety of a stay pending appellate review turns on: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." Cuomo v. United States

¹The Nixon Court concluded that an order refusing to quash a subpoena directed at the President is a "final" order for purposes of permitting an appeal under 28 U.S.C. § 1291, reasoning that "[t]o require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government." 418 U.S. at 691-92. This reasoning applies with equal force to the Vice President, the only other officer named in Article II, especially where, as here, he acted at the express request of the President. The Moving Defendants seek certification, however, to avoid the unnecessary invocation of the Nixon rule.

Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985) (citing Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)); accord Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

These factors are not prerequisites to be met, but rather considerations to be balanced. Thus, "[a] stay may be granted with either a high probability of success and some injury, or vice versa." Cuomo, 772 F.2d at 974. Where the movant has established substantial irreparable harm and the balance of harms weighs heavily in its favor, it need only raise "serious legal questions going to the merits" to obtain a stay pending appeal. Population Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (quoting Washington Metro. Area Transit Comm'n, 559 F.2d at 844); see also Providence Journal Co. v. Federal Bureau of Investigation, 595 F.2d 889, 890 (1st Cir. 1979) (where "the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay").

As is demonstrably clear in this case, the government's appeal will present serious legal questions, and the government will suffer irreparable harm if a stay is not issued; on the other hand, a stay while the government pursues an expedited appeal will have little to no impact on plaintiffs' current position and would be in the public interest. A stay, therefore, is fully warranted here.

I. The Government's Appeal Presents Serious Legal Questions

As this Court indicated when defendants' counsel orally moved for stay pending appeal, the legal issues addressed in its October 17 Order are substantial. See Washington Metro. Area Transit Comm'n, 559 F.2d at 844 (stay appropriate where there is "a serious legal *question*" in the

case) (emphasis added). The issues raised by the Moving Defendants go to the heart of the proper constitutional separation of powers among the Executive Branch, Congress and the Courts. They also raise substantial statutory questions regarding the proper use of the federal mandamus statute in light of the Supreme Court's recent decision in Gonzaga Univ. v. Doe, 122 S. Ct. 2268 (2002), and the proper method of APA review in a FACA case.

These issues also merit appellate attention. The cases cited by the Moving Defendants in their papers suggest that the discovery at issue should not proceed, especially absent a compelling showing of need by the plaintiffs. See Def. Mem. at 9-17; Def. Reply at 5-9; Def. Surreply at 4-10. The precise contours of the Executive's obligation to respond to such broad-ranging discovery requests, however, have never been clearly defined by higher courts in the context of civil litigation. The D.C. Circuit has addressed this issue only briefly, in Dellums, where the court, in a civil case brought to vindicate constitutional rights, held that the plaintiff must make a showing of need to seek discovery from a *former* President. See Dellums, 561 F.2d at 247. Further guidance from the Court of Appeals plainly is warranted, on these issues and the issues raised in the Moving Defendants' motion for reconsideration.

Defendants have briefed the legal arguments in support of their motion for a protective order and for reconsideration at length, and will not repeat those arguments here. See Def. Mem. at 9-17; Def. Reply at 5-9; Def. Surreply at 4-10. Suffice it to say, defendants' arguments draw support from numerous decisions of the U.S. Supreme Court, the D.C. Circuit, and courts within this District. See id. Defendants' arguments are substantial, and concern core issues of constitutional law relating to presidential power, executive privilege, and the separation-of-powers doctrine. As noted, they also involve substantial statutory issues that might obviate the

need to resolve the constitutional issues related to discovery against the Moving Defendants. Moreover, these issues are of great importance to the Executive Branch, not only in this case, but in future cases in which civil litigants may seek intrusive discovery into the inner workings of the Presidency and Vice Presidency. Whatever the ultimate judicial resolution of these separation-of-powers questions, it would clearly promote comity between the Judiciary and the Executive to allow a definitive, expeditious and orderly resolution of these questions of critical importance to the Executive Branch.

II. Absent a Stay, Defendants Will Suffer Irreparable Injury

In their protective order papers, the Moving Defendants argued that any discovery directed at them would be unconstitutional and otherwise inappropriate, especially where plaintiffs have not made a strong threshold showing of need for discovery. See Def. Mem. at 9-17; Def. Reply at 5-9; Def. Surreply at 4-10. The Court rejected that argument, and ordered the moving defendants to produce, by November 5, 2002, all non-privileged documents responsive to plaintiffs' discovery requests, as well as a privilege log with respect to all privileged responsive documents. See Order dated October 17, 2002.

Complying with this Court's October 17, 2002 Order plainly will moot the relief defendants sought by filing a motion for protective order. The Moving Defendants have argued that any discovery directed at them is inappropriate (especially absent a finding of need), and they will not be able to correct on appeal the negative effects sustained as a result of complying with this Court's Order (including by producing any non-privileged documents). Indeed, once the Moving Defendants comply with this Court's order, the harm is irreversible. See John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (in staying

order to disclose documents in Freedom of Information Act suit, noting: "[t]he fact that disclosure would moot that part of the Court of Appeals' decision requiring disclosure of the Vaughn index would also create an irreparable injury"). Where, as here, the denial of a stay will "entirely destroy [a defendant's] rights to secure meaningful review," the irreparable injury standard for obtaining a stay is satisfied. Providence Journal, 595 F.2d at 890.

Consequently, courts routinely grant stays pending appeal when complying with a court order effectively will moot the relief the appealing party seeks. See, e.g., John Doe Agency, 488 U.S. at 1309; Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969, 973-74 (3d Cir. 1981) (stay granted where "compliance with the order [requiring production of documents] would effectively moot [agency's] claim that the documents are in fact exempt"); Providence Journal Co., 595 F.2d at 890 (noting that "[a]ppellants' right of appeal . . . will become moot unless the stay is continued pending determination of the appeals"); Center for National Security Studies v. Department of Justice, No. 01-2500, Order (D.D.C. Aug. 15, 2002) (Kessler, J.) (granting stay where disclosure of information subject to order requiring release "would effectively moot any appeal").

The ability to assert privilege over specific responsive documents will not alleviate this injury. Defendants have argued that they are not required to assert privilege absent a showing of need. See, e.g., United States v. Poindexter, 732 F.Supp. 142, 147 (D.D.C. 1990); United States v. Poindexter, 727 F.Supp. 1501, 1504-07 (D.D.C. 1989); see also Def. Surreply at 5-6 (discussing these cases). If defendants are right that, because of separation-of-powers concerns, they should not be required to assert privilege, see id., then requiring defendants to invoke privilege (by way of a privilege log) will moot defendants' legal argument, and will

impermissibly (and irreparably) intrude on the effective functioning and core constitutional prerogatives of the Offices of the Presidency and Vice Presidency. Moreover, the disclosure of materials that may not be technically privileged but that still reveal aspects of the President's and Vice President's discharge of core Article II functions results in a harm to the interests of the Executive Branch.

Finally, in practical terms, requiring the government to prepare a privilege log will burden the Offices of the Presidency and the Vice Presidency. Preparing a privilege log is a time-consuming task, and should not be required unless constitutionally permissible and absolutely necessary. Cf. United States v. Poindexter, 732 F.Supp. at 148 (executive privilege should not be lightly invoked). Thus, the time and expense of preparing a (potentially unnecessary) privilege log is yet another irreparable injury the government will suffer if the Court's order is not stayed.

Against these injuries, the most plaintiffs will suffer is the possible delay occasioned by an appeal. As noted above, however, a large portion of the discovery in this case (i.e., the agency-head discovery) is moving forward, and will be unaffected by a stay of the Court's October 17 Order.² Moreover, any possible delay will be mitigated if the Court of Appeals grants the government's motion to expedite review in that court. At bottom, then, the serious irreparable harm to defendants of denying this motion far outweighs the relatively slight harm to plaintiffs of granting it.

²The agency-head defendants have produced approximately 36,000 pages of documents in response to plaintiffs' discovery requests. Plaintiffs filed a motion to compel with respect to certain of defendants' responses, and that motion will be argued on November 13, 2002. Again, these proceedings will be unaffected by defendants' motion for a stay.

CONCLUSION

For all of these reasons, defendants respectfully request that the Court stay its October 17, 2002 Order pending resolution of the government's appeal.

In the event the Court denies this motion at the hearing currently scheduled for October 31 (and the matter is not stayed by a higher court), however, defendants will need more than five additional days to process fully documents subject to this Court's October 17, 2002 Order. While that effort is underway, the large volume of those documents, affecting several offices, will require concentrated efforts to make individual privilege determinations, prepare privilege logs, and produce non-privileged documents. Accordingly, in the event the Court denies this motion at the October 31 hearing, defendants respectfully request that the date of compliance be extended to allow the defendants to present their stay request to the Court of Appeals and still have time to comply with the October 17 order, if necessary. Defendants thus respectfully request an extension of the November 5 deadline to a date two weeks past the later of (a) the date of any order of this Court denying defendants' motion for a stay of this Court's October 17, 2002 Order; or (b) the date of any order of the Court of Appeals denying any motion for a stay of this Court's October 17, 2002 Order.³

³At the October 17, 2002 hearing, plaintiffs' counsel cited In re Executive Office of the President, 215 F.3d 20 (D.C. Cir. 2000) ("EOP"), as a reason for denying defendants' motion for a stay. In EOP, the Court of Appeals denied the government's emergency petition for mandamus from a district court order requiring the government to answer an interrogatory over the government's privilege objection. Putting aside the fact that EOP did not involve a stay request, the case has no bearing here for at least two reasons. First, the court found the government had failed to establish irreparable injury because it "present[ed] no substantive argument whatsoever in opposition to the trial court's [privilege rulings]." See id. at 24. Second, the court found that some of the government's claimed injury resulted from dicta in the trial court's opinion, which the court deemed "of no moment." See id. Neither of these concerns is present in this case.

Respectfully submitted,

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

SHANNEN W. COFFIN
Deputy Assistant Attorney General

THOMAS MILLET
D.C. Bar #294405
CRAIG BLACKWELL
JENNIFER PAISNER
Attorneys, Civil Division
Department of Justice
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Room 812
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Tel: (202) 616-8268
Fax: (202) 616-8460