IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, et al., Plaintiffs, v. THE HONORABLE RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES OF AMERICA, et al., Defendants.	Civil Action No.: 08-1548 (CKK)

DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER

Defendants Vice President Richard B. Cheney, the Executive Office of the President (EOP), and the Office of the Vice President (OVP) will file this afternoon a petition for a writ of mandamus from this Court's Minute Order of September 23, 2008 and Discovery Order [20] of September 24, 2008 ordering David Addington, Chief of Staff to the Vice President, and Nancy Smith, Director of the Presidential Materials Staff in the Office of Presidential Libraries at the National Archives and Records Administration, to appear at a deposition on or before October 6, 2008. Defendants now respectfully request a stay of those two orders during the pendency of the petition.

As explained below, the four factors in analyzing whether to grant a stay weigh in favor of one here pending resolution of the petition for writ of mandamus. First, and most fundamentally, the orders violate well-established limitations on third-party inquiry into the Vice President's recordkeeping practices. The D.C. Circuit has squarely held that "the PRA precludes judicial review of the President's recordkeeping practices and decisions," and that allowing

review at the behest of private litigants "would substantially upset Congress' carefully crafted balance of presidential control of records creation, management, and disposal during the President's term of office and public ownership and access to the records after the expiration of the President's term." Armstrong v. Bush, 924 F.2d 282, 290 (D.C. Cir. 1991). In so holding, the court stressed that Congress was "keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations," and "therefore sought assiduously to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President's term in office." Id. Yet that is precisely what the Court's orders permitting "factual, legal, or hybrid factual/legal" questions about the day-to-day functioning of the Vice Presidency threatens to do, notably through the deposition of the Vice President's most senior aide and the Archivist's staff. See Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586-87 (D.C. Cir. 1985); Peoples v. United States Dep't of Agriculture, 427 F.2d 561, 567 (D.C. Cir. 1970) ("subjecting a cabinet officer to oral deposition is not normally countenanced").

Second, defendants would suffer immediate and irreparable harm if a stay is not granted. The time and burden of sitting through a deposition bounded only loosely by six broad topics would impermissibly impose burdens on the Chief of Staff, and by extension on the Vice President himself. See, e.g., Cheney v. United States District Court for the District of Columbia, 542 U.S. 367, 385 (2004). Those burdens are only magnified by the absence of any need for the depositions or the Court's authority to issue the orders probing into the Vice President's recordkeeping practices.

Third, plaintiffs would not incur harm by any delay occasioned by a stay: the Court has issued a preliminary injunction, atop representations that the Office of Vice President treats the documentary material created or received by the Office of Vice President, including the Vice President and vice presidential personnel, relating to or having an effect upon ***each*** of the Vice President's governmental functions as vice presidential records covered under section 2207. Notwithstanding plaintiffs' claimed need for resolution of this matter in advance of January 20, 2009 when the Administration concludes, the representations by the Office of Vice President (as well as the issuance of a preliminary injunction) assure that the Office of Vice President applies section 2207 to all vice presidential records. Thus, any delay in discovery would not result in meaningful, let alone, substantial harm to plaintiffs.

Finally, the public interest clearly favors orderly litigation processes without undue imposition on the Vice President through his closest adviser, or through depositions that run headlong into the "stark separation of powers questions implicated by" depositions that inquire into the "conduct of the [Vice] President's daily operations." Armstrong, 924 F.2d at 292.

In the event the Court denies the motion to stay, and the D.C. Circuit similarly rejects an emergency request for a stay, defendants respectfully request the issuance of a protective order to ensure that the discovery process does not devolve into a process for plaintiffs' harassment purposes only. Specifically, defendants request an order requiring plaintiffs to conduct the deposition at the courthouse and to prohibit plaintiffs from videorecording any depositions.

ARGUMENT

I. A STAY OF THE COURT'S ORDERS IS APPROPRIATE

A stay pending the petition for writ of mandamus is appropriate because defendants can show (1) a "substantial case on the merits"; (2) a likelihood that it will be irreparably harmed

absent a stay; (3) a diminished prospect that other parties will be substantially harmed if the court grants a stay; and (4) a public interest in granting a stay. Hilton v. Braunskill, 481 U.S. 770, 778 (1987); see also Holiday Tours, 559 F.2d at 843. None of the factors is dispositive; "a stay may be granted with either a high probability of success and some injury, or vice versa." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985). Thus, a stay is justified where a party can show the possibility of irreparable injury in combination with "'questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'" Holiday Tours, 559 F.2d at 844 (quoting with approval Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953)); see also Ctr. for Int'l Environ. Law v. OSTR, 240 F. Supp. 2d 21, 22 (D.D.C. 2003) (granting a stay pending appeal where case presented novel and "admittedly difficult legal question" of first impression). Those factors counsel a stay here.

A. Defendants Present A Substantial Case On The Merits That The Discovery Orders Intrude Into Inner Workings of the Vice Presidency In Violation Of The Presidential Records Act

The Court's orders permit inquiry into the precise "records management practices" and "records creation, management and disposal decisions" that have been held off limits under the Presidential Records Act. Armstrong, 924 F.2d at 290. Indeed, in addition to the fact that the Office of Vice President has represented that it has been carrying out its obligations under section 2207, neither "the Archivist nor the Congress has the authority to veto the [Vice President's] disposal decision" or even merely to "survey the [Vice President's] records management practices." Id. By permitting far-reaching discovery into these matters at the behest of a private litigant, the Court will permit plaintiffs to interfere with the "intricate statutory scheme" set forth in the PRA as well as "the day-to-day operations of the [Vice

President] and his closest advisors[.]" Id. For that reason, plaintiffs' claims about the Vice President's recordkeeping practices are not even judicially reviewable and would be dismissed if defendants were permitted to file their motion to dismiss before the Court issued any discovery orders.[1] Accordingly, there exists no basis for the lawsuit, let alone inquiry into the sweeping topics permitted by the Court.

The discovery orders also violate the well-settled rule that high-ranking federal officials may not be involuntarily deposed absent extraordinary circumstances, and that their testimony may be compelled only as a last resort. See, e.g., Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985) ("[T]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions'"); In re FDIC, 58 F.3d 1055, 1060 (5th Cir. 1995); In re United States, 985 F.2d 510, 512 (11th Cir. 1993). No circumstances permit the broad-reaching discovery permitted by the Court, particularly in light of the sworn representations already provided to the Court, and from the most senior Vice Presidential aide no less.

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[1] The Court did not reverse course subsequently in Armstrong v. Bush, 1 F.3d 1274, 1294 (D.C. Cir. 1993), which held only that a President's guidelines into "what is, and what is not, a 'presidential record'" may be permissible to "ensure that materials ***that are not subject to the PRA*** are not treated as presidential records." Id. That is because guidelines could otherwise immunize records that are properly subject to the FRA from FOIA requests by virtue of being improperly classified as PRA records. The concerns animating the court's analysis there, of course, do not exist here. Plaintiffs do not claim that federal records are being treated as Vice Presidential records under the Presidential Records Act, but that the Vice President has been unlawfully disposing of records that should be maintained under the PRA. Those "disposal" decisions are plainly not judicially reviewable. Id. at 1293 ("The Armstrong I opinion addressed the question whether the courts could review the decision to erase materials designated by the government as presidential records within the meaning of the PRA. We held that judicial review was not available to monitor disposal and emphasized that Congress drafted the PRA in a manner that would 'ensure executive branch control over presidential records during the President's term in office.'").

B. Denying A Stay Would Cause Defendants Irreparable Harm

A stay is also necessary to prevent irreparable harm to defendants. In light of this Circuit's proscription on intrusion into the Vice President's recordkeeping practices, discovery into those topics through depositions should be prohibited. By allowing depositions into those topics, the Court runs headlong into the "stark separation of powers questions implicated by legislation regulating the conduct of the [Vice] President's daily operations." Armstrong, 924 F.2d at 292. As in Cheney, this Court should not permit highly intrusive discovery into conduct and opinions of the Vice President and his closest advisors on the basis of an incorrect legal premise.

The consequences of imposing those burdens here, on the closest Vice Presidential adviser and the Archivist's staff, illustrates precisely why there exists a well-established practice of staying discovery before the anticipated filing of, and during the pendency of, a dispositive motion. See, e.g., Klingschmitt v. Winter, Civ. No. 06-1832, Slip. Or. (D.D.C. Feb. 28, 2007) (HHK) (granting motion for protective order to stay discovery during pendency of motion to dismiss); Chavous v. Dist. of Columbia Fin. Responsibility & Mgmt. Assistance Auth., 201 F.R.D. 1, 2 (D.D.C. 2001) ("It is well settled that discovery is generally considered to be inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending.").

C. Plaintiffs Will Not Be Substantially Harmed

Plaintiffs would not be prejudiced by any delay to discovery occasioned by a stay. First, as demonstrated above, plaintiffs are not entitled to discovery at all because they raise no claims upon which relief may be granted or over which the district court could appropriately assert

jurisdiction. Denial of discovery to which plaintiffs are not entitled cannot constitute substantial harm.

In any event, even delay to discovery occasioned by a stay would not pose substantial harm: the Court has issued a preliminary injunction, atop representations that the Office of Vice President treats the documentary material created or received by the Office of Vice President, including the Vice President and vice presidential personnel, relating to or having an effect upon ***each*** of the Vice President's governmental functions as vice presidential records covered under section 2207. Notwithstanding plaintiffs' claimed need for resolution of this matter in advance of January 20, 2009 when the Administration concludes, the representations by the Office of Vice President (as well as the issuance of a preliminary injunction) assure that the Office of Vice President applies section 2207 to all vice presidential records. Thus, any delay in discovery would not result in meaningful, let alone, substantial harm to plaintiffs. In addition, plaintiffs' asserted harms, which are not irreparable, do not begin to "outweigh" the harm that defendants will incur if a stay is not granted and they are forced to answer onerous discovery demands when the lawsuit should be dismissed outright.

D. The Public's Interest In Ensuring An Orderly Litigation Process Is Well-Served By A Stay

The public's interest would also be served by granting a stay. Providing defendants the opportunity to seek further review of the discovery orders would well serve an orderly litigation process. Moreover, the stay would permit time for consideration into the separation of powers concerns that counseled hesitation in crafting the Presidential Records Act in the first instance. See Armstrong, 924 F.2d at 290; Cheney, 542 U.S. at 385 ("special considerations" also "control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated").

II. IN THE ALTERNATIVE, A PROTECTIVE ORDER SHOULD ISSUE

In the alternative, should the Court deny the stay (and the Court of Appeals likewise denies a stay), defendants request that any deposition be conducted pursuant to a protective order, see Federal Rule of Civil Procedure 26(c), prohibiting plaintiffs from videotaping any deposition and requiring plaintiffs to conduct any deposition at the courthouse. Given plaintiffs' stated "limited purpose" for the discovery, there is no legitimate purpose for video-recording the depositions in aid of plaintiffs' presentation to the Court. Parties and counsel will be present at the depositions, and the deposition transcripts will be available to both sides for their use in the litigation. Also, if depositions are held at the courthouse as suggested by the Court, a Magistrate Judge would be available to resolve issues that may arise during the course of the deposition. Accordingly, it is evident that plaintiffs seek to preserve a video-recording for harassment and publicity purposes only and not in aid of litigation. A protective order should therefore be entered to prevent abuses of the discovery process.

A. The Depositions – Should They Go Forward – Should Be Held In The Courthouse

Plaintiffs' counsel noticed the deposition of Ms. Smith for October 1, 2008 at plaintiffs' counsel office, despite defendants' counsel's representation that October 1 was not available for Ms. Smith's deposition, and that October 2 and 3 were available for scheduling. Plaintiffs similarly noticed the deposition of David Addington for October 3, 2008 at plaintiffs' counsel's office. Despite the Court's express invitation for plaintiffs to conduct the depositions at the courthouse, see Discovery Order [20] at 19, plaintiffs' counsel has refused to entertain the offer, instead noticing the deposition of Ms. Smith for October 1, 2008 – when defendants' counsel indicated that they were unavailable -- and at plaintiffs' counsel's office. Moreover, plaintiffs' counsel rejected defendants' request to contact chambers together to schedule a time for the

deposition. Plaintiffs' refusal even to conduct the deposition at the courthouse illustrates why it is necessary to conduct the deposition in the courthouse in order to ensure an orderly discovery process. Defendants respectfully request that the Court make a room at the courthouse available for a deposition when the parties and counsel are available, and to modify the terms of the subpoenas to schedule the depositions for a time when the courthouse and the parties are all available and after this protective order request has been resolved.

B. The Court Should Prohibit the Video-Recording of Depositions

Plaintiffs have stated that they seek to videotape the depositions. Although the Federal Rules of Civil Procedure contemplate the opportunity to videotape ordinary depositions, see Fed. R. Civ. P. 30(b)(2), the Rules do not provide plaintiffs a right to videotape a deposition and otherwise prohibit the harassment or annoyance of deposition witnesses. Fed. R. Civ. P. 26(c) (authorizing the Court to issue a discovery order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"). Given the purported nature of this discovery – which comes prematurely, but for a "limited" purpose – videotaping would provide no benefit in addition to the deposition and transcription itself, but rather significant opportunity for abuse.[2] See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34-36 (1984) (stating that "pretrial discovery by depositions . . . has a significant potential for abuse," and noting that the powers of a district judge to prevent abuse are "ample," and that "[t]he prevention of the abuse . . . is sufficient justification for the authorization of protective orders"). Accordingly, the Court should issue a protective order prohibiting video recording of any depositions.

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[2] For this reason, the analysis in cases like Convolve, Inc. v. Compaq Computer Corp., 223 F.R.D. 162, 182 (S.D.N.Y. 2004), permitting videotaped depositions is unpersuasive. In those cases, courts view videotaped depositions as a means by which to "enhance[] parties' presentation at trial, particularly before juries, of deposition testimony which historically was limited in form to 'readings from cold, printed records.'" Similar considerations are absent here.

Plaintiffs' stated purpose for the depositions is to "seek discovery on defendants' policies as to how . . . categories of documents are treated for the purposes of the Presidential Records Act." Dkt. 18. A videotape is not necessary for the gathering of this factual information. The courts must "preserve the integrity of the discovery system and protect litigants from 'annoyance, embarrassment, oppression, or undue burden or expense,' [Fed. R. Civ. P.] 26(c), and must guard against abuse of their own processes." Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 912 (E.D. Pa. 1981). The Supreme Court has held that discovery could be properly denied altogether "when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit," or when the party's aim is to "embarrass or harass the person from whom he seeks discovery." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 352 n.17 (1978); see also Westmoreland v. CBS, Inc., 584 F. Supp. 1206, 1213 (D.D.C. 1984) (same). The Supreme Court has noted the "danger that the court could become a partner in the use of [discovery] material 'to gratify private spite or promote public scandal,' [citation omitted] with no corresponding assurance of public benefit." Nixon v. Warner Communications, Inc., 435 U.S. 589, 603 (1978); see also Word of Faith World Outreach Center Church, Inc. v. Morales, 143 F.R.D. 109, 113 (W.D. Tex. 1992) ("To allow a party to use that information for purposes unrelated to the litigation and in a manner which harms the giver of that information is abusive, and courts have a significant interest in preventing such usage"). A protective order should be entered here that will protect against misuse of any videotape to achieve improper aims when a transcript will wholly satisfy any legitimate need.

Under circumstances analogous to those in the present case, the court in Westmoreland denied permission to a news organization to videotape the deposition of a public figure where the deponent suspected that CBS wanted to videotape in order to accumulate potentially attractive

broadcast material for its archives, and CBS would not agree unequivocally never to broadcast the tape. 584 F. Supp. at 1213. The deponent submitted that the spectacle of a former Director of the CIA and U.S. ambassador being interrogated, under oath, in the quasi-adversarial setting of a discovery deposition would be, inter alia, "both demeaning of him and inimical to the national interest . . . ." Id. The court denied CBS permission to videotape the deposition, finding no "exclusively case-oriented reason to find CBS' interest in videotaping Ambassador Helms' deposition sufficient to overcome his own well-founded objections to it."[2] Id.; see also Westmoreland v. CBS, Inc., 770 F.2d 1168, 1175 (D.C. Cir. 1985) (sanctioning CBS for seeking to have Helms held in civil contempt because of his refusal to be videotaped during his deposition); see also Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Nat'l Caucus of Labor Comm., 525 F.2d 323 (2d Cir. 1975) (denying mandamus where district court barred videotaping deposition in view of potential abuse); Posr v. Roadarmel, 466 F. Supp. 2d 527, 529 (N.D.N.Y. 2006) (noting that Court issued protective order to prevent videotaped deposition because of a "significant risk that plaintiff would misuse the videotape"). Similar circumstances compel restrictions on the use of any videotape in this case, where plaintiffs have not shied from going to the press and could use any videotape to distort testimony and demean these proceedings.

The potential for exploitation of the discovery process exists here, where plaintiffs have vaunted this lawsuit on their websites and could acquire further publicity from the dissemination of any videotape. Discovery is "not intended to be a vehicle for generating content for broadcast and other media." Paisley Park Enterprises, Inc. v. Uptown Productions, 54 F. Supp. 2d 347, 349

[2] Although Westmoreland predates the amendment of the Federal Rules permitting parties to videotape depositions, the principles of the decision and its rationale remain the same and are applicable here.

(S.D.N.Y. 1999) (granting protective order limiting the use of deposition videotape in light of defendants' apparent intention to post the video recording on their website); see also Drake v. Benedek Broadcasting Corp., 2000 WL 156825 (D. Kan. 2000) (same). A protective order should be issued to prevent it from becoming such a vehicle here.[3]

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion for Stay Pending Petition for Writ of Mandamus, or, in the alternative, grant defendants' request for a protective order.

Respectfully submitted this 30th day of September, 2008.

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[3] Alternatively, defendants request a protective order limiting use of any video-recording for litigation-related purposes only and requiring plaintiffs otherwise to maintain any video-recording confidentially.