UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 08-1548 (CKK)
THE HON. RICHARD B. CHENEY, et al.,	:	
Defendants.	:	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING PETITION FOR WRIT OF MANDAMUS ORDER

PRELIMINARY STATEMENT

Creating an emergency by their own behavior, defendants seek an immediate stay of discovery pending the D.C. Circuit's consideration of defendants' petition for a writ of mandamus, also filed late yesterday afternoon. Defendants' mandamus petition rests on claims that they failed to raise in this Court, despite multiple opportunities to do so, and ignores that the current posture of the case is of defendants' own making. While defendants elected not to press jurisdictional arguments, they now fault this Court for failing to recognize the claimed jurisdictional deficiencies. As to the stay motion itself, defendants failed to act promptly to protect their interests and instead engaged in a pattern of delay, leading plaintiffs down false paths and interposing objections to discovery that were clearly calculated to give them time to consider their appellate options. On this basis alone the Court should deny the stay.

Beyond these threshold problems, defendants' motion should be denied because they have no likelihood of success on the merits of their mandamus petition. That petition is premised on a shockingly inaccurate presentation of how this case has transpired before this

Court and the nature of and bases for this Court's rulings on discovery. Like the Presidential Records Act ("PRA") on which it is based, the court-authorized discovery implicates no separation of powers concerns. And that discovery, contrary to defendants' characterization, is narrowly tailored to address factual questions that are raised by defendants' very own declarations. Quite simply, defendants made a litigation decision to defend this case on the merits based on facts outside the pleadings, asked this Court to rule based on those factual submissions, and have no legitimate complaint with discovery that is necessitated by the insufficiencies of their own factual submissions.

Nor have defendants demonstrated harm absent a stay. Deposing NARA official Nancy Smith raises no constitutional concerns, as she operates far outside the presidential orbit. Indeed, defendants have already offered a declaration by Ms. Smith, implicitly conceding the relevance of her testimony. As for David Addington, defendants' objections rest primarily on an argument that he is the equivalent of the vice president and that discovery will somehow intrude into the inner workings of the vice presidency, both of which are untrue.

The remaining factors also tip in favor of denying the stay. This Court has properly recognized that briefing on the merits cannot proceed until certain factual prerequisites are established. Any delay in that briefing will raise the likelihood that this case cannot be decided before the presidential transition. While the Court's preliminary injunction goes a long way in preserving the records at issue, the transition will raise difficult and complex issues about how the records are to be treated should this case still be pending. And the public interest clearly favors a prompt resolution of this case given that defendants' policies threaten the completeness of our national history.

ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO A STAY BECAUSE THE CURRENT STATUS OF THE CASE AND THE PURPORTED EMERGENCY ARE OF THEIR OWN MAKING.

Both defendants' mandamus petition and their motion for a stay before this Court are premised on the proposition that this Court committed a plain error of law by failing to afford them an opportunity to file a motion to dismiss and determining, instead, that further fact gathering and fact finding are necessary to resolve both issues of standing and the merits of plaintiffs' claims. Defendants ignore, however, the multiple opportunities they had to present threshold legal issues and their own litigation choice to forego those opportunities in favor of making a fact-based argument, relying on facts outside the pleadings.

First, defendants had numerous opportunities to raise all of their jurisdictional arguments but, by their own choice, failed to do so. Defendants certainly could have responded to the motion for a preliminary injunction with the litany of defenses they now claim they have, but declined to do so. Indeed, plaintiffs' brief in support of their request for a preliminary injunction essentially invited defendants to address issues such as ripeness and standing, by raising those issues preemptively and demonstrating why none has merit. Rather than join issue on these grounds, defendants made a litigation decision to defend the motion -- and the lawsuit -- on the merits based on self-selected facts outside the pleadings that they unilaterally introduced into the record. From these factual submissions (the declarations of Claire O'Donnell and Nancy Smith), defendants argued that because, *as a matter of fact*, they were complying fully with their obligations under the PRA, plaintiffs had no case on the merits, had no standing and were not entitled to a preliminary injunction.

Likewise, defendants could have moved to dismiss the complaint simultaneously with their opposition or filed such a motion in the alternative, but declined to do so. And when the Court found defendants' factual submissions lacking defendants moved to reconsider. Once again they could have premised that motion on the panoply of threshold defenses they now say are waiting in the wings, and once again they declined to do so pursuing instead a fact-based motion. In short, despite multiple opportunities to present any and all arguments on jurisdiction and whether plaintiffs have a cause of action subject to judicial review, defendants opted to rest on fact-based arguments both on the merits and on standing.

Second, the emergency nature of the relief defendants seek -- a stay on the eve of the first scheduled deposition -- is entirely of their own making and the result of conduct that borders on the sanctionable. Defendants waited a week after this Court's ruling authorizing discovery before seeking a stay and, in the interim, refused to cooperate with discovery, following instead a clear strategy of delay. The following summary of events evidences this conduct:

- On Monday, September 22, plaintiffs advised defendants of their intent to request leave to depose Nancy Smith and David Addington and requested that defendants advise them by the following day of the deponents' availability in light of the Court's stated need for expedition. Defendants refused to supply this information.

- On Tuesday, September 23, following a conference call at which the Court granted plaintiffs leave to depose Ms. Smith and Mr. Addington, plaintiffs requested by email that defendants advise plaintiffs of the deponents' availability by close of business the following day. Defendants refused to supply this information.

- On Wednesday, September 24, after plaintiffs advised defendants that without the requested information they would have no choice but to notice the depositions unilaterally, defendants advised plaintiffs only that Ms. Smith was available on October 3, but said nothing about her availability on any other day or the availability of Mr. Addington. Defendants failed to respond to a follow-up email requesting that information.

- On Thursday morning, September 25, plaintiffs sent notices of depositions and deposition subpoenas to defendants' counsel, noticing Ms. Smith's deposition for October 1 at 10:00 a.m. and Mr. Addington's deposition for October 3 at 10:00 a.m.

- On Friday, September 26, after the close of business, defendants' counsel sent plaintiffs an email in which she stated "We will proceed with Ms. Smith's deposition on Friday, October 3." Counsel also indicated that Ms. Smith was available on October 2, but "not October 1."

- Plaintiffs responded later that evening, requesting additional information on why Ms. Smith could not attend her deposition as scheduled, and noting that October 3 was the date for which Mr. Addington was to be deposed.

- Defendants' follow-up response did not come until Monday, September 29, just before the close of business and on the eve of a Jewish holiday. Defendants claimed that Ms. Smith was not available for her deposition on October 1 for the stated reason that "counsel for NARA is not available before then to assist with her preparation, owing to religious holidays." Of note, by this time discovery had been authorized for almost a week, with a discovery cut-off of October 6.

- After stalling for nearly a week, defendants finally admitted on Tuesday, September 30 -- on the eve of Ms. Smith's scheduled deposition -- that they would be seeking a stay of all discovery pending a mandamus petition they intended to file later that day.

As this time-line illustrates, defendants refused to cooperate in scheduling the court-authorized depositions, stonewalling at every turn, refused to acknowledge the legally binding nature of the subpoenas that underlay the depositions, interposed objections for the clear purpose of delay while they considered their appellate options, and waited a full week before filing their mandamus papers, which they filed along with a stay motion less than 24 hours before the first deposition was scheduled to begin. Similarly, although defendants first raised last Friday their objections to videotaping Ms. Smith's deposition and to having Ms. Smith's deposition at CREW's offices (objections to which plaintiffs responded immediately), by yesterday morning they were still merely threatening to file a motion for a protective order. This conduct violates at

least the spirit of the Court's discovery orders and reveals that the claimed emergency is of the defendants' own making, due to their failure to act promptly in seeking a stay.[1]

II. DEFENDANTS HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR MANDAMUS PETITION.

While defendants, through their own conduct, afforded themselves a week to finalize their appellate options, plaintiffs have had only a few hours to review the mandamus petition. Nevertheless, a few points bear emphasis. The mandamus petition that defendants filed in the D.C. Circuit paints a picture of defendants vigorously attempting to persuade this Court at every turn of existing threshold, jurisdictional issues that must first be addressed, and being rebuffed at every turn by an obstinate Court focused instead, and improperly, on factual issues. As discussed above, this could not be farther from the truth.

Moreover, defendants opened the door to the record keeping policies of the vice president and the Office of the Vice President ("OVP") through their submission of three declarations from Claire O'Donnell. Having themselves requested that the Court engage in fact finding based on a record that the Court properly found inadequate -- and after being afforded multiple opportunities to supplement the record -- defendants cannot legitimately complain about the court-authorized discovery on those policies. The inadequacies of defendants' own factual submissions, which are the underpinnings to their legal arguments, amply justify the discovery this Court deemed necessary before deciding the merits of defendants' defenses.

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[1] After the Court issued its discovery orders defendants had a range of available options, including seeking reconsideration or modification of the orders. That they did nothing and impeded plaintiffs' ability to act on the discovery rights afforded them by the Court undermines any good faith claim that a stay is warranted now, on the eve of the first deposition. This course of conduct also suggests that defendants' real goal here was delay, hoping to run out the clock to allow defendants to leave office unencumbered by any restrictions on their PRA policies.

Defendants also argue that the discovery orders are improper because they authorize the depositions of "high-ranking federal officials." First, with all due respect to Nancy Smith, she hardly qualifies as the kind of high-ranking official to whom courts display caution in the area of discovery as she is well below the rank of a cabinet official. That defendants chose to rely on the declaration of Ms. Smith only underscores the appropriateness of her deposition.

Second, with respect to David Addington, he is not -- as defendants suggest -- being deposed regarding his reasons for taking some official action. Rather, he is the most appropriate deponent other than the vice president himself to testify to the vice president's preservation policies under the PRA. At present there is a complete dearth of evidence in the record as to the vice president's policies, as distinguished from those of the OVP and, in particular, the impact of the vice president's view that he is not part of the executive branch (a view Mr. Addington shares) on those policies. Moreover, this lawsuit involves the Presidential Records Act, which -- as its name suggests -- of necessity directly implicates the president and vice president. It is not mere happenstance or overreaching on plaintiffs' part that Vice President Cheney is a named defendant in this lawsuit. The preservation responsibilities under the PRA run directly to the vice president, putting his policies directly at issue here. Mr. Addington, as his chief of staff, is best placed to answer questions on those policies.[2]

III. DEFENDANTS WILL NOT SUFFER IRREPARABLE HARM ABSENT A STAY.

Defendants pay mere lip service to the harm requirement for a stay, while suggesting that

[2] Also noteworthy is the fact that despite being provided an opportunity to state their objections to the requested discovery, defendants were virtually silent until now as to any specific concerns with either deponent, beyond requesting the opportunity to select an appropriate deponent under Rule 30(b)(6) of the Federal Rules of Civil Procedure.

nothing less than the constitutionally required separation of powers hangs in the balance. This argument, divorced from any legal support, also rests on an incorrect characterization of the authorized discovery as probing into "conduct and opinions of the Vice President and his closest advisors . . ." Defendants' Emergency Motion at 6. To the contrary, the six areas of discovery authorized by the Court stay far away from any privileged conversations between the vice president and his close advisors, focusing instead on the functions of the vice president and the kinds of documents he generates in performance of those functions.

At bottom, the defendants' harm argument seems to rest on the notion that every action and every thought of the vice president, as well as every action and thought of his close advisors, are absolutely beyond reach no matter how probative or necessary. Not surprisingly defendants cite no case in support of this extraordinarily unprecedented view of executive privilege, and plaintiffs know of none. The law, in fact, is to the contrary. See, e.g., Nixon v. Administrator, 433 U.S. 425, 450 (1977) (in upholding the constitutionality of the predecessor statute to the PRA the Court noted that "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding.").

Submitting to a deposition on six narrowly tailored areas of inquiry will not cause either deponent irreparable harm, nor will it harm any core or sensitive institutional interests of the defendants. And defendants still have a full range of procedural protections, including assertion of privilege, and have made no showing why those protections are inadequate here. Moreover, in light of the Court's ruling this morning -- based on all parties' agreement -- that the depositions will be conducted at the courthouse, with ready access to the Court to resolve any privilege claims, there simply is no harm that will flow to the defendants from these two

depositions, much less irreparable harm.

IV. PLAINTIFFS AND THE PUBLIC WILL SUFFER HARM IF THE COURT STAYS ITS DISCOVERY ORDERS.

While defendants cannot articulate any concrete harm they will suffer absent a stay, plaintiffs and the public will suffer harm if denied an opportunity to conduct discovery. Nothing less than the public's ability to access the full historical record of this presidency is at stake.

As this Court has properly noted, discovery is necessary to establish certain factual predicates, a need made apparent by the factual deficiencies in defendants' declarations. Until these prerequisite factual questions are answered, the litigation is at a standstill. At the same time, however, the presidential transition is only months away. And while the Court's preliminary injunction goes a long way in preserving the records at issue, the transition will raise difficult and complex issues about how the records are to be treated should this case still be pending. For example, it is far from certain what will happen to the records that the vice president himself retains -- whether in his White House office, his legislative offices, or his residence -- after January 20, 2009. The Court's preliminary injunction ensures their preservation, but not where they will be preserved and under whose custody and control. These are just some of the myriad issues that the transition will raise.[3] And it is for these reasons that this Court properly placed this litigation on a fast track, recognizing the need to complete discovery in a timely fashion so that briefing can proceed at a pace that will ensure a merits

[3] In arguing that plaintiffs will suffer no harm from a stay, defendants rely primarily on the Court's issuance of a preliminary injunction. Still unknown, however, is whether defendants will seek to get out of that obligation as well by filing an appeal with the D.C. Circuit.

decision before the transition.[4]

CONCLUSION

Regrettably, defendants have asked this Court to decide the merits of their stay motion at such a late date that both the Court and the plaintiffs are afforded little time to fully evaluate and address the merits of the motion. But even a cursory review shows it is long on rhetoric and short on substance. Beyond the sweeping assertions of harm to inchoate interests, the mandamus petition rests on a gross mischaracterization of this Court's actions, the nature of the plaintiffs' claims and the procedural history of this case. Lacking a legitimate foundation, defendants' stay motion should therefore be denied.

Respectfully submitted,

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[4] While defendants continue to complain about the so-called "hyper-accelerated" pace of the litigation, under the current schedule briefing on the merits will not be complete until well over two months after plaintiffs filed their complaint.

Dated: October 1, 2008 Attorneys for Plaintiffs