

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rule 26.1, plaintiffs Citizens for Responsibility and Ethics in Washington, American Historical Association, Organization of American Historians, Society of American Archivists and Society for Historians of American Foreign Relations submit their corporate disclosure statements.

(a) None of the above-listed plaintiffs has a parent company, and none has a publicly-held company with a 10% or greater ownership interest.

(b) Citizens for Responsibility and Ethics in Washington (CREW) is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. CREW has an interest in accessing historical presidential and vice presidential records in a timely fashion through the Freedom of Information Act (FOIA), including the records of the current administration when they become available for public review.

The American Historical Association (AHA) is a non-profit membership organization for the promotion of historical studies, the collection and preservation of historical documents and artifacts, and the dissemination of historical research.

As a part of their historical research activities, AHA's members regularly request and make use of presidential and vice presidential records held by the National Archives and Records Administration (NARA).

The Organization of American Historians (OAH) is a non-profit membership organization devoted to promoting the study and teaching of American history and the widest possible access to historical sources and scholarship. OAH supports the preservation, dissemination and exhibition of historical sources. As part of their historical research activities, OAH's members regularly request and make use of presidential and vice presidential records held by NARA.

The Society of American Archivists (SAA) is North America's oldest and largest national archival professional association, with a mission to serve the education and information needs of its individual and institutional members and to provide leadership to ensure the identification, preservation and use of records of historical value. SAA officers and leaders have testified before Congress and interacted with government leaders on a range of issues, including citizens' rights to access records of former presidents.

The Society for Historians of American Foreign Relations (SHAFR) is a non-profit professional society of historians for the study, advancement and dissemination of a knowledge of American foreign relations. SHAFR's members, which include university and college faculty, graduate and undergraduate students,

government historians and officials, and interested private citizens, regularly request and make use of presidential and vice presidential records held by NARA.

INTRODUCTION AND SUMMARY

Petitioners Vice President Richard B. Cheney, the Office of the Vice President (OVP), and the Executive Office of the President (EOP)¹ have asked this Court to issue a writ of mandamus to overturn the district court's discovery order authorizing the depositions of David S. Addington, chief of staff and counsel to the vice president, and Nancy Kegan Smith, director of the Presidential Materials Staff at the National Archives and Records Administration (NARA). They also seek a stay pending the Court's resolution of the mandamus petition.

As the district court noted in denying defendants' motion for a stay, the mandamus petition and stay motion "contain content that bears no resemblance to what has actually transpired in this case." Memorandum Opinion, October 5, 2008 (Stay Mem. Op.) at 2.² Defendants have substituted their own version of the facts and procedural history of this case for what actually transpired in a transparent attempt to mask their complete failure to raise below claims they now seek to litigate in the first instance before this Court. Defendants made a litigation decision to defend this case on the merits based on facts outside the pleadings,

¹ Petitioners take issue with the complaint's denomination of the OVP as part of the EOP, claiming the OVP is a separate entity. Emergency Petition for Writ of Mandamus and Motion for Stay Pending Mandamus (Pet.) at 1 n.1. The White House's own website, however, includes the OVP as an entity within the EOP. See www.whitehouse.gov/government/eop-foia.html.

² For the Court's assistance, we attach this opinion to this response.

asked the district court to deny the requested preliminary injunction based on those factual submissions, and have no legitimate complaint with discovery necessitated by the insufficiencies and factual ambiguities of their own submissions.

Granting the district court the substantial deference to which it is owed, the requested writ of mandamus must be denied. The district court committed no abuse of discretion in determining, as a factual matter, that the record submitted by the defendants in support of their merit-based arguments opposing a preliminary injunction raised additional factual questions that are best resolved through depositions.

Further, the narrowly tailored discovery authorized by the district court, which focuses on six discrete areas of inquiry based on the factual disputes created by the defendants' declarations and representations to the court, raises no separation of powers concerns. The likelihood of any privilege claim here is remote given the tightly circumscribed areas of inquiry, which do not come close to questions of executive privilege. Thus, this case differs radically from the case before the Supreme Court in Cheney,³ a case on which defendants place almost exclusive reliance. Here, unlike Cheney, defendants are not facing unbounded discovery that threatens separation of powers concerns.

³ Cheney v. United States District Court, 542 U.S. 367 (2004).

Moreover, applying Cheney here to hold that the discovery cannot go forward would effectively transform that ruling into a grant of absolute immunity for both the vice president and his staff. Nothing in the Supreme Court's decision even hints at such a dramatic impact, which otherwise contravenes established Supreme Court precedent.

Finally, through the vehicle of a mandamus petition defendants are attempting to raise a threshold non-jurisdictional argument that they have yet to raise in the district court, specifically whether plaintiffs have a cause of action under this Circuit's Armstrong precedent. The district court's opinion denying a stay correctly notes that the instant lawsuit fits within the category of cases for which there is a private right of action under Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993) (Armstrong II). But this issue, never raised below, is not properly before this Court in the first instance, particularly through the vehicle of a petition for a writ of mandamus.

BACKGROUND⁴

Plaintiffs, two individual historians and groups of historians, archivists, and

⁴ For ease of reference, citations in the background section are to the district court's Memorandum Opinion of October 5, 2008 denying defendants' motion for a stay.

an ethics watchdog group, filed the complaint in this action on September 8, 2008,⁵ alleging that defendants have adopted policies and guidelines that improperly and unlawfully limit the scope of vice presidential records subject to the Presidential Records Act (PRA). In particular, plaintiffs allege that Vice President Cheney, the OVP and the EOP have or will “improperly and unlawfully exclude from the PRA records created and received by the vice president in the course of conducting activities related to, or having an effect upon, the carrying out of his constitutional, statutory, or other official [or] ceremonial duties.” Stay Mem. Op. at 4-5. Plaintiffs also challenge the policies and practices of the Archivist and NARA “to exclude from the reach of the PRA those records that a vice president creates and receives in the performance of his legislative functions and duties.” Id. at 5.

Simultaneously with their complaint plaintiffs sought a preliminary injunction requiring the defendants to preserve all records at issue pending the resolution of this litigation. Defendants opposed the motion for a preliminary injunction on the factual ground that the vice president and the OVP “have been carrying out since January 20, 2001 - and intend to carry out - their obligations under the [PRA].” Id. Of particular relevance here and contrary to defendants’

⁵ On September 15, 2008, plaintiffs filed an amended complaint adding another organizational plaintiff.

representations in this Court, defendants never argued in response to plaintiffs' motion for a preliminary injunction "that private plaintiffs cannot obtain judicial review of the Vice President's compliance with the PRA . . ." Pet. at 2.

Defendants' opposition "did *not* oppose the Motion on jurisdictional grounds," but instead raised a merit-based argument based on facts outside the pleadings. Stay Mem. Op. at 5 (emphasis in original). In support of this argument defendants submitted the declarations of Claire M. O'Donnell, assistant to the vice president, and NARA official Nancy Smith.

Ms. O'Donnell's declaration raised a key factual dispute concerning the defendants' definition of "vice presidential records" and the extent to which the two delineated categories of records -- those related to "the functions of the Vice President as President of the Senate" and those related to "the functions of the Vice President specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities" -- encompass all records at issue. Stay Mem. Op. at 6. To resolve this ambiguity, the district court ordered defendants to file a supplemental declaration. Id.

Even then, ambiguities remained and the district court issued an order on September 20, 2008, granting the preliminary injunction. Id. at 7. The Court's order explained its conclusion that "Defendants apply a narrowing interpretation"

to their obligations under the PRA and noted the complete absence of “any legal analysis demonstrating that Defendants’ interpretation [was] correct as a matter of law or any identification of legal authority that would allow Defendants to place limitations on the PRA’s statutory language.” Id. The Court further identified the numerous factual questions raised by defendants’ declarations and pleadings. Stay Mem. Op. at 7.

Defendants then moved for reconsideration, based almost exclusively on the fact-based argument that because the defendants were complying fully with their obligations under the PRA, the district court erred in entering the preliminary injunction. This motion also was supported by an additional declaration from Claire O’Donnell but, like defendants’ earlier submissions, “failed to provide any legal analysis supporting their position that the two sub-definitions were legally appropriate interpretations of the PRA’s broad language.” Id. at 8. Notably, defendants’ motion for reconsideration also did not raise jurisdictional arguments beyond a brief argument that plaintiffs lacked standing predicated on their “*ipse dixit* that Plaintiffs lack injury because Defendants are complying with the PRA.” Stay Mem. Op. at 11 n.6.

As the district court explained in denying defendants’ stay motion, even after this motion “[t]he seminal legal question in the case . . . remained: whether

Defendants' interpretation of the PRA's language is supported as a matter of law.”

Id. at 9. Also remaining are related factual disputes including “whether Defendants are correctly classifying documentary materials by applying their narrowing definitions of the PRA's language.” Id.

Only after the district court expressed its inability to rule on the reconsideration motion without additional facts did defendants suggest there were as yet unidentified threshold legal defenses they wished to raise in a new round of briefing. But, as the district court noted, “Defendants failed to explain what jurisdictional grounds they would pursue and how those grounds were unrelated to the factual disputes in the record that prevented the case from moving forward.” Stay Mem. Op. at 10-11. Moreover, “[t]his lack of specificity was also reflected in Defendants' submissions to the Court, none of which had raised any jurisdictional arguments.” Id. at 11. And the Court noted timing problems with accommodating yet another round of briefing that might not prove dispositive given the stated need -- raised at the outset of this case -- to issue a ruling before the presidential transition on January 20, 2009. See id. at 12.

In response to a district court order requiring the parties to discuss whether narrow and expedited discovery was needed and to submit a joint status report setting forth a proposed schedule, id. at 12, plaintiffs requested leave to depose

Nancy Smith and David Addington. Defendants for their part articulated only a general objection to any discovery based on their pending motion for reconsideration. During a follow-up conference call with the Court, defendants requested that they be permitted to designate a deponent pursuant to Rule 30(b)(6) in lieu of David Addington's deposition, but otherwise noted no new objections to plaintiffs' requested discovery.

On September 24, 2008, the district court issued its discovery order explaining in detail the bases for authorizing the depositions of Ms. Smith and Mr. Addington and outlining six areas of permissible inquiry "to resolve the parties' specific factual, legal, or hybrid factual/legal disputes." Stay Mem. Op. at 16.

Those six areas are:

1. The interpretation and application of the PRA by any Defendant, and any policies or record keeping practices related thereto or derived therefrom.
2. The existence, and any Defendant's custody or control of, individual records or categories of records that are or are not covered by the PRA, including but not limited to documentary material in the possession, custody or control of the Vice President, including records in his Senate office.
3. The functions of the Vice President that have generated, or that could generate, documentary materials covered or not covered by the PRA, including but not limited to any functions that are not "specially assigned" by the President.
4. The documentary materials that NARA has received or has not received from Defendants.

5. The interactions between any Defendant and NARA, which includes communications to or from employees working within the office of any named non-individual Defendant, concerning documentary materials covered or not covered by the PRA.

6. The basis for the knowledge of any deponent or Claire M. O'Donnell.

Stay Mem. Op. at 16-17.

On the eve of the first scheduled deposition, defendants filed an emergency petition for a writ of mandamus and a motion for a stay pending this Court's resolution of the mandamus petition. On October 5, 2008, the district court issued a 26-page memorandum opinion denying defendants' motion to stay based on its findings that defendants have no likelihood of success on the merits of their mandamus petition, defendants will not suffer irreparable harm absent a stay, plaintiffs may suffer prejudice if a stay is granted, and the public interest is not served by granting a stay. The district court suspended the depositions pending this Court's resolution of defendants' petition for a writ of mandamus and stay motion.

ARGUMENT

- I. THE DISTRICT COURT DID NOT ABUSE ITS CONSIDERABLE DISCRETION IN AUTHORIZING NARROW DISCOVERY TO RESOLVE FACTUAL ISSUES RAISED BY DEFENDANTS' SUBMISSIONS.**
- A. A Writ Of Mandamus Is Warranted Only To Prevent A Clear Abuse Of Discretion.**

The Supreme Court has emphasized repeatedly that a writ of mandamus,

authorized by the All Writs Act, 28 U.S.C. § 1651(a), is “a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes.’” Cheney v. United States District Court, 542 U.S. 367, 381 (2004) (quoting Ex parte Fahey, 332 U.S. 258, 259-60 (1947)). Moreover, while mandamus is rooted in a common law writ, it is treated like an equitable remedy to be administered in the court’s discretion. Ex parte Peru, 318 U.S. 578, 584 (1943). As a result, “‘only exceptional circumstances amounting to a judicial ‘usurpation of power,’ or a ‘clear abuse of discretion,’ ‘will justify the invocation of this extraordinary remedy.’” Cheney, 542 U.S. at 381 (quotations omitted).

Unlike a direct appeal, where “a simple showing of error may suffice to obtain a reversal,” more is required for the issuance of a writ of mandamus, Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661 (1978), which is no substitute for an appeal. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953). Thus, even in cases involving jurisdictional questions, “appellate courts are reluctant to interfere with the decision of a lower court,” given that such rulings “are reviewable in the regular course of appeal.” Roche v. Evaporated Milk Ass’n, 319 U.S. 21, 26 (1943) (citations omitted).

A petitioner seeking a writ of mandamus must satisfy three conditions. First, the petitioner must have no other means to obtain the relief it seeks. Second, the

petitioner must show a “clear and indisputable” right to the relief. And third, the court “must be satisfied that the writ is appropriate under the circumstances.”

Cheney, 542 U.S. at 380-81 (citations omitted).

As discussed below, petitioners satisfy none of the criteria for the issuance of a writ of mandamus. Far from a “clear and indisputable” right to the requested relief, defendants have no legal basis to avoid the authorized discovery. Issuing a writ that would interfere directly with the district court’s proper exercise of its power and discretion to manage its docket and resolve factual disputes is neither justified nor appropriate.⁶

B. The District Court’s Discovery Order Is Well Within Its Discretion To Resolve Disputed Issues Of Fact And Manage Its Docket.

As set forth in the district court’s memorandum opinion denying the defendants a stay, the discovery authorized here was necessary to resolve factual ambiguities and disputes raised by defendants’ own declarations and factual representations to the district court. Despite multiple opportunities, defendants failed to address the central question voiced repeatedly by that court -- are defendants preserving all documents at issue? Inexplicably defendants instead

⁶ Moreover, defendants at least arguably have the alternative remedy of filing an appeal from the district court’s entry of a preliminary injunction and seeking a stay of the litigation until such an appeal is resolved.

adopted narrow and facially under-inclusive language,⁷ borrowed from an appropriations law, to describe the functions of the vice president and relied on this patently deficient language to support their claim of full compliance with the PRA. Defendants' circular logic was "bereft of any legal analysis," Stay Mem. Op. at 7, and simply did not provide the district court with an adequate basis from which to conclude that defendants were, in fact, preserving all documents covered by the PRA.

Under these circumstances it was hardly an abuse of discretion for the district court to conclude that discovery is necessary to resolve factual ambiguities of defendants' own making. Indeed, given that the *only* issue defendants raised below was a fact-based merits argument, the district court literally had no other choice but to find an effective mechanism by which to resolve disputed and unclear factual issues at the center of that argument.⁸

⁷ For example, defendants' two categories of records did not account for records generated by statutorily-assigned functions the vice president performs.

⁸ Defendants also suggested that plaintiffs lack standing based on defendants' claim that because they are complying fully with their obligations under the PRA, plaintiffs have suffered no harm. Given that this jurisdictional claim is "inextricably intertwined with the merits of the case," the district court properly deferred ruling until it could resolve the factual issues that underlie both claims. See *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 198 (D.C. Cir. 1992). Further, the D.C. Circuit has suggested that deciding a Rule 12(b)(1) motion to dismiss for lack of standing "may be improper before the plaintiff has had a chance

Defendants identify no alternative other than discovery to accomplish this end and argue instead that they should have been given an opportunity to first file a motion to dismiss. As the district court explained, however, after several rounds of briefing this course provided no guarantee that it would dispose of all claims. Moreover, defendants failed to explain which specific jurisdictional defenses they wished to pursue that were unrelated to any disputed factual issues, an especially acute problem given defendants' failure at any earlier point to raise any jurisdictional argument. Stay Mem. Op. at 10-11.

In addition, defendants ignore the pressing time limitations that the district court identified for all parties at the outset of this case. The district court's other trial commitments, the novelty and complexity of the issues raised here, and the need to resolve this dispute prior to the presidential transition on January 20, 2008, all necessitated expedited treatment -- something neither party disputed. Stay Mem. Op. at 21. Accordingly, as the district court properly concluded, "Defendants' assertion that the Court should have waited for Defendants to divine a jurisdictional argument so that they could file a Motion to Dismiss prior to moving the case forward, particularly given the time constraints at issue, is as unreasonable as it is

to discover the facts necessary to establish jurisdiction." *Id.*, citing Collins v. New York Cent. Sys., 327 F.2d 880 (D.C. Cir. 1963).

illogical.” Id.

Under these circumstances, a writ of mandamus is plainly not appropriate to upset the district court’s appropriate exercise of discretion in authorizing narrow, targeted discovery under a time-frame that accommodated the Court’s other judicial commitments. See In re United States Dep’t of Defense, 848 F.2d 232, 238 (D.C. Cir. 1988) (affirming district court’s “broad discretion over trial-management tactics” in denying petition for writ of mandamus). While defendants argue that the authorized discovery “would serve no legitimate purpose,” Pet. at 18, this claim is both false and an inadequate basis on which to base a mandamus request. And more significantly, the argument fails to take into account that it was the defendants that set the district court on this course, opting to mount a fact-based merits defense that failed of its own accord.

II. ARMSTRONG DOES NOT PROVIDE A BASIS TO GRANT THE REQUESTED MANDAMUS PETITION.

Running throughout the mandamus petition is the claim that the district court erred by failing to permit defendants to file a motion to dismiss in advance of any discovery and that this error is of such a magnitude as to justify the extraordinary writ of mandamus. Defendants buttress this claim by citing to Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991) (Armstrong I), from which they argue that the categorical preclusion of judicial review enunciated therein bars the inquiry

authorized by the court’s discovery order. See Pet. at 15. Defendants essentially ask this Court to bypass the district court completely and rule de novo that this suit is barred by Armstrong I.

What defendants ignore, however, is that Armstrong I does not raise a jurisdictional issue that this Court may properly consider even if never raised below. The issue of whether there is judicial review over plaintiffs’ PRA claims is, at bottom, the issue of whether plaintiffs have a cause of action under the PRA. But the question of whether plaintiffs “may enforce in court legislatively created rights or obligations” is analytically distinct from the question of the court’s jurisdiction, i.e., “whether a federal court has the power, under the Constitution or laws of the United States, to hear a case.” Davis v. Passman, 442 U.S. 228, 240 (1979) (citations omitted).⁹ It is entirely proper and indeed essential for this Court to consider de novo a jurisdictional question. See, e.g., Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006). But the question of whether plaintiffs have a cause of action under the PRA is a different question entirely that goes to their claim for relief, Settles v. U.S. Parole Comm’n, 429 F.3d 1098, 1104-05 (D.C. Cir. 2005), and is one that the district court should rule on in the first instance once properly raised by the

⁹ Whether or not plaintiffs have a cause of action is also analytically distinct from the issue of plaintiffs’ standing, which focuses on “whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy.” Id.

defendants.¹⁰ See United States v. British Am. Tobacco (Invs.) Ltd., 387 F.2d 884, 888 (D.C. Cir. 2004) (“As we have repeatedly held, parties may not raise claims for the first time on appeal.”), citing Krieger v. Fadely, 211 F.3d 134, 135-36 (D.C. Cir. 2000).¹¹ Under these circumstances, this Court should not use its equitable powers to resolve an issue that defendants have yet to raise in the district court.

Moreover, as the district court correctly concluded in denying the stay motion, petitioners have no likelihood of success on the merits of their mandamus petition for the “central reason” that Armstrong II -- a decision defendants virtually ignore --

¹⁰ These differences are not merely matters of nomenclature; a motion to dismiss for lack of jurisdiction would be brought under Rule 12(b)(1) of the Federal Rules of Civil Procedure, while a motion to dismiss for failure to state a claim would be brought under Rule 12(b)(6). Moreover, reliance on facts outside the record would transform a Rule 12(b)(6) motion into a Rule 56 motion for summary judgment, which must be based on a lack of disputed material facts. Haase v. Sessions, 835 F.2d 902, 905-10 (D.C. Cir. 1987). And even some issues of subject-matter jurisdiction “turn[] on contested facts” that “the trial judge may be authorized to review . . . and resolve,” Arbaugh v. Y & H Corp., 546 U.S. at 514, and that are subject to review under a “clearly erroneous” standard. Herbert v. Nat’l Acad. of Scis., 974 F.2d at 197. See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

¹¹ While this case is before this Court on a mandamus petition rather than an appeal, the same principles apply given that mandamus exists to protect appellate jurisdiction that can later be perfected. Cf. In re Halkin, 598 F.2d 176 (D.C. Cir. 1979). Indeed, defendants’ failure to raise an argument in district court that they now seek to litigate for the first time in this Court amplifies why defendants are not entitled to mandamus relief: they still have the alternative of raising in a motion to dismiss all of their threshold legal defenses, and the district court has committed to deciding such issues before reaching any merits arguments. Stay Mem. Op. at 11.

both authorizes the court's review and the scope of discovery. Stay Mem. Op. at 15.

In a series of cases, the D.C. Circuit addressed the interplay between the PRA and the Federal Records Act ("FRA") and the degree to which courts could review a president's decisions and actions under both statutes. Starting with Armstrong I, the Court found an implied preclusion of judicial review in the PRA "of the President's recordkeeping practices and decisions," reasoning:

[a]llowing judicial review of the President's general compliance with the PRA 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.

924 F.2d at 291.

Subsequently in Armstrong II, the D.C. Circuit clarified that its ruling in Armstrong I did not render all decisions made pursuant to the PRA "immune from judicial review." 1 F.3d at 1293. Rather, Armstrong I dealt with "only the 'creation, management, and disposal decisions,'" but not "the initial classification of materials as presidential records." Id. at 1294. The Armstrong II Court accordingly held that guidelines "describing which *existing* materials will be treated as presidential records in the first place are subject to judicial review." Id. (D.C. Cir. 1993)

(emphasis in original).¹²

That is precisely the suit plaintiffs have brought here: not an attempt to challenge the vice president’s “creation, management, and disposal decisions,” but rather a challenge to guidelines designating which materials the vice president will treat as subject to the PRA in the first place. Without judicial review, the vice president will have “carte blanche” to shield materials from the public, Armstrong II, 1 F.3d at 1292, a result not countenanced by either the PRA or prior Circuit precedent. See also Stay Mem. Op. at 15-16.¹³

Moreover, the discovery authorized by the district court relates directly to the scope of judicial review that Armstrong II carves out. The six delineated areas of inquiry were crafted to resolve factual issues concerning “core classification issues,”¹⁴ specifically whether the defendants’ guidelines defining “which existing materials will be treated as presidential records in the first place,” Armstrong II, 1 F.3d at 1294, square with the PRA’s definition of vice presidential records.

¹² Stated differently, “the courts may review what is, and what is not, a ‘presidential record . . .’” 1 F.3d at 1294.

¹³ At a minimum, defendants do not have a “clear and indisputable” right to dismissal based on their claim that plaintiffs have no cause of action under Armstrong, which alone is reason to deny the requested mandamus petition. This Court should be especially wary of resolving this complex, non-jurisdictional issue on the basis of truncated mandamus briefing.

¹⁴ Stay Mem. Op. at 16.

III. CHENEY DOES NOT PROVIDE A BASIS TO GRANT DEFENDANTS' REQUESTED WRIT OF MANDAMUS.

Defendants' mandamus petition otherwise rests almost entirely on the Supreme Court's decision in Cheney and the claimed similarities between the discovery authorized here and that authorized by the district court in Cheney. But these efforts to shoehorn this case into the rubric of Cheney ignore the fundamental factual differences between the two cases. Those differences, as the district court properly identified, include a fundamental difference in the nature of the authorized discovery. The discovery requests at issue in Cheney were "anything but appropriate" and asked "for everything under the sky," 542 U.S. at 387-88. By contrast, the narrowly tailored discovery here involves six discrete areas of inquiry that are "based on the factual disputes created by Defendants' Declarations and representations to the Court" and that "concern the types of classification decisions that are judicially reviewable . . ." Stay Mem. Op. at 19-20.

At issue in Cheney was broad discovery authorized by the district court over the defendants' repeated objections and after the defendants had moved unsuccessfully to dismiss the lawsuit, brought under the Federal Advisory Committee Act (FACA), on the grounds that FACA did not create a cause of action and applying FACA to the committee at issue "would violate principles of separation of powers and interfere with the constitutional prerogatives of the

President and the Vice President.” 542 U.S. at 375.¹⁵ Although the district court acknowledged “that discovery itself might raise serious constitutional questions,” id., it deemed the defendants’ ability to assert executive privilege sufficient to accommodate these constitutional concerns.

The precise issue before the Supreme Court was whether mandamus relief was potentially available to the defendants to challenge the district court’s discovery rulings. In concluding that mandamus might lie under these circumstances, the Court was swayed by the nature of the discovery itself, which allegedly “threaten[ed] ‘substantial intrusions on the process by which those in closest operational proximity to the President advise the President,’” id. at 381 (citation omitted), and which, “as the Court of Appeals acknowledged,” was “anything but appropriate.” Id. at 388. The discovery in Cheney also would have given the plaintiffs the ultimate remedy they could secure under the FACA, access to documents and information about the functioning of the challenged presidential committee.

Here, by contrast, neither plaintiffs’ lawsuit nor the authorized discovery raises separation of powers concerns, the discovery does not follow or bypass a

¹⁵ Here, unlike Cheney, defendants have yet to raise an argument that the PRA does not create a cause of action. As discussed *supra*, this failure requires this Court to refrain from ruling on this issue in the first instance.

pending motion to dismiss raising serious constitutional concerns or threshold legal defenses, the discovery is unrelated to the relief plaintiffs seek, and the six narrowly tailored areas of inquiry steer far clear of any constitutionally sensitive functions of the president and vice president. In addition, the depositions will be conducted at the courthouse under conditions that assure strict compliance with the district court's discovery parameters. And unlike Cheney, defendants here, "rather than raising any objections to the six areas of inquiry identified in the Court's Discovery Order . . . have inappropriately decided to develop such objections in the first instance through a Petition for Writ of Mandamus." Stay Mem. Op. at 20.

Defendants' rhetoric aside,¹⁶ the discovery authorized here simply does not compare to that at issue in Cheney. Ascertaining the guidelines that the vice president and OVP use to decide "what is, and what is not, a presidential record,"¹⁷ does not in any way intrude on the constitutional prerogatives of the president. As the district court properly found, defendants' arguments to the contrary are "disingenuous" and distort the actual language used by the district court in its discovery order to define the scope of permissible inquiry. Stay Mem. Op. at 17.

¹⁶ See, e.g., Pet. at 11-12 (arguing discovery here "represents an even greater intrusion into the Vice President's conduct of his office than the discovery order at issue in Cheney").

¹⁷ Armstrong II, 1 F.3d at 1294.

At bottom defendants' objection seems to be that simply requiring the deponents to appear at depositions is so burdensome as to warrant this Court's exercise of its extraordinary mandamus authority. Unlike Cheney, however, the discovery is not addressed directly to the vice president. Moreover, neither deponent is a cabinet-level official. Ms. Smith, who submitted a declaration in this case, is the Director of NARA's Presidential Materials Staff, a position far below the level of official protected from the normal processes of discovery. See Stay Mem. Op. at 18. And while, as the district court noted, David Addington is "a senior advisor to the Vice President," "he is not a cabinet-level officer, and he is uniquely qualified to address the areas of inquiry identified as appropriate for discovery in this case." Id. Tellingly, defendants have neither offered anything to counter these conclusions nor identified any other individuals better qualified than the two designated deponents to answer the district court's questions. Defendants rely instead on Mr. Addington's mere proximity to the vice president, which alone is patently insufficient to ask this Court to issue the requested extraordinary writ.

Moreover, applying Cheney here to hold that the discovery cannot go forward simply because it is directed in part at a close presidential advisor would effectively transform that ruling into a grant of absolute immunity for the vice president, his staff, and any other individual who might have information bearing on the actions of

the vice president. Nothing in the Supreme Court's decision even hints at such a dramatic impact, which otherwise contravenes established Supreme Court precedent. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982) (senior aides and advisors to president entitled to qualified, not absolute immunity).

This lawsuit concerns obligations that Congress has imposed on the vice president through the PRA. Judicial review of classification decisions, authorized by Armstrong II, necessarily requires inquiry into the classification decisions of the vice president. Granting his chief of staff immunity from such discovery merely because of his proximity to the vice president would be the equivalent of granting him absolute immunity. Nothing in Cheney or any other decision provides such sweeping protection.¹⁸

IV. DEFENDANTS HAVE NOT DEMONSTRATED AN ENTITLEMENT TO A STAY PENDING THIS COURT'S CONSIDERATION OF THE MANDAMUS PETITION.

Mindful that denying the requested stay would effectively moot the

¹⁸ Defendants' objection to the deposition of NARA official Nancy Smith, based on the possibility that it may touch on communications with the vice president or OVP, see Pet. at 17, illustrate even more vividly the over breadth of defendants' Cheney arguments. Accepting the suggestion that executive privilege prevents discovery of any contacts between any agency employee and any component of the White House effectively would negate decades of established principles concerning executive privilege in civil discovery. Nothing in Cheney even hints at such an absurd result.

mandamus petition, the district court nevertheless concluded that defendants meet none of the prerequisites for the issuance of a stay. Plaintiffs hereby incorporate the district court’s reasoning on all four factors.

First, as discussed above, defendants’ mandamus petition is completely without merit. Defendants have no entitlement to the requested relief, much less a “clear and indisputable” right. Cheney, 542 U.S. at 380. Second, defendants will suffer no irreparable harm if the discovery goes forward, as the depositions on narrowly tailored topics raise no separation of powers concerns. The district court properly “is running on ground that has already been cleared by the D.C. Circuit in Armstrong II,” and not “‘headlong’ into a separation of powers issue . . .” Stay Mem. Op. at 19. By contrast, delay will harm the plaintiffs and the public, both of which are best served by a resolution of the important issues raised by this case and the defendants’ conduct, which quite literally risks a loss of our nation’s history.

CONCLUSION

For the foregoing reasons, the Court should deny the request for a writ of mandamus and should deny a stay of the district court order authorizing the depositions of David S. Addington and Nancy Kegan Smith.

Respectfully submitted,

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October 7, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2008, by 4:00 p.m., I caused copies of the foregoing response to the emergency petition for writ of mandamus and motion for stay to be filed with the Court by hand delivery, and to be served upon the following counsel by hand delivery and electronic mail:

Mark R. Freeman
U.S. Department of Justice, Civil Division
Appellate Staff
950 Pennsylvania Avenue, N.W.
Room 7538
Washington, D.C. 20530

and upon the District Court, by hand delivery, at the following address:

Honorable Colleen Kollar-Kotelly
United States District Court
for the District of Columbia
3rd and Constitution Avenue, N.W.
Washington, D.C. 20001

Anne L. Weismann