

IN THE SUPREME COURT OF THE UNITED STATES

No. A-_____

UNITED STATES OF AMERICA, APPLICANT

v.

ALLAN J. FAVISH

APPLICATION FOR AN EXTENSION OF TIME WITHIN
WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Office of the Independent Counsel, respectfully requests a 30-day extension of time, to and including December 14, 2002, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The court of appeals entered its judgment on June 6, 2002, and the government's petition for rehearing was denied on August 16, 2002. Therefore, unless extended, the time within which to file a petition for a writ of certiorari will expire on November 14, 2002. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). Copies of the opinions of the court of appeals and the order denying rehearing are attached.

1. This is a Freedom of Information Act (FOIA) suit arising from the July 1993 suicide of Deputy White House Counsel

Vincent Foster. Mr. Foster was found dead in Fort Marcy Park, in McLean, Virginia. The United States Park Police conducted the initial investigation of Mr. Foster's death and took color photographs of the death scene, including ten pictures of Mr. Foster's body. The Office of Independent Counsel, among others, subsequently investigated Mr. Foster's death and concluded, consistent with the other investigations, that he committed suicide.¹

The group Accuracy in Media filed a FOIA request with the Park Police seeking the autopsy and death-scene photographs of Mr. Foster. The government declined to provide the photographs and the Court of Appeals for the District of Columbia Circuit affirmed that decision, holding that the photographs are exempt under FOIA Exemption 7(C). Accuracy in Media v. National Park Service, 194 F.3d 120 (1999). Exemption 7(C) protects from disclosure "law enforcement records or information" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

2. Allan Favish, counsel of record for Accuracy in Media in the D.C. Circuit case, then filed a second FOIA request for the ten death-scene photographs, seeking them from the Office of

¹ The Park Police, FBI, and congressional committees reached the same conclusion. Favish v. Office of Indep. Counsel, 217 F.3d 1168, 1170 (9th Cir. 2000).

Independent Counsel. The Office withheld them under Exemption 7(C). Favish then filed this suit in California. The district court initially sustained the government's invocation of Exemption 7(C).

A divided Court of Appeals for the Ninth Circuit remanded for the district court to balance "the effect of [the photographs'] release on the privacy of the Foster family against the public benefit to be obtained by their release." Favish v. Office of Independent Counsel, 217 F.3d 1168, 1174 (2000). Judge Pregerson filed a lengthy dissent, reasoning that the government's Vaughn index was sufficiently elaborate to make a remand for in camera review unnecessary, and that the "pain and anguish" that Favish concedes Mr. Foster's family would suffer outweighs the public interest in obtaining those particular photographs to facilitate a sixth investigation into the cause of Mr. Foster's death. Id. at 1176, 1183-1186.

On remand, the district court construed the court of appeals' ruling as permitting the withholding under Exemption 7(C) only of those photographs that are "graphic, explicit and extremely upsetting." Favish v. Office of the Indep. Counsel, No. CV 97-1479, 2001 WL 770410, at *1 (C.D. Cal. Jan. 11, 2001). Applying that standard, the district court sustained the

withholding of five of the photographs and ordered the release of the other five.²

The government appealed, and the Foster family intervened on appeal. In a one-sentence unpublished disposition, the court of appeals affirmed the district court's judgment insofar as it sustained the withholding of five of the photographs and required the release of four others, but held that the remaining photograph - which the district court had ordered released - had been properly withheld by the Office of Independent Counsel. Favish v. Office of Indep. Counsel, Nos. 01-55487, 01-55788, 01-55789, 2002 WL 1263948, at *1 (9th Cir. June 6, 2002). Judge Pregerson dissented on the ground that the nine "never-before-released" photographs were properly withheld under Exemption 7(C). Ibid.³ The court of appeals' denied the government's and the Foster family's petitions for rehearing and for rehearing en banc. Judge Pregerson would have granted panel rehearing.

Favish has filed a petition for a writ of certiorari from that aspect of the court's opinion denying disclosure of six of the photographs. Favish v. Office of Indep. Counsel, No. 02-

² Those five included one photograph of a gun in Mr. Foster's hand that had been obtained and published by Time magazine.

³ Judge Pregerson agreed with the ordered release of the one photograph obtained by Time magazine. See n. 2, supra.

409. The Foster family has filed a petition for a writ of certiorari from the court of appeals' ruling insofar as it orders disclosure of the remaining photographs. Sheila Foster Anthony, et al. v. Favish, No. 02-599.

3. The court of appeals' decision squarely conflicts with the decision of the D.C. Circuit exempting from disclosure the same photographs that the Ninth Circuit in this case has ordered released. Accuracy in Media v. National Park Serv., 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000). Yet the court of appeals' opinion fails even to address the D.C. Circuit's contrary holding.

The court of appeals also wrongly focused the public interest inquiry under Exemption 7(C) on the general interest in investigation into Mr. Foster's suicide, and not on whether release of the particular photographs would materially advance the public interest. In addition, by limiting the protected privacy interest to photographs that are "graphic, explicit and extremely upsetting," the court skewed the balance of interests against legitimate privacy interests. The court of appeals also failed to evaluate any incremental public interest in disclosure in light of the substantial information that has already been disclosed to the public about Mr. Foster's death, as required by Department of State v. Ray, 502 U.S. 164 (1991).

4. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. The additional time sought in this application is needed to complete consultation with the Office of Independent Counsel and other interested agencies and Justice Department components regarding the legal and practical impact of the court's ruling, and, if a petition is authorized, to see to its preparation and printing. The time is also needed to coordinate the government's position in this case with the government's pending certiorari petition in United States Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms v. City of Chicago, No. 02-322, which also concerns, inter alia, the interpretation and application of FOIA Exemption 7(C).

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
Counsel of Record

NOVEMBER 2002

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

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November 5, 2002

Mr. Allan J. Favish
22406 Holly Court
Santa Clarita, CA 91390-4202

Re: Office of Independent Counsel
v. Allan J. Favish
Application No. 02A370

Dear Mr. Favish:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on November 5, 2002, extended the time to and including December 14, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By


Jeffrey D. Atkins
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

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NOTIFICATION LIST

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