

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Allan J. Favish, )  
)  
Plaintiff-Appellant/Cross-Appellee,, )  
)  
v. )  
)  
Office Of Independent Counsel, )  
)  
Defendant-Appellee/Cross-Appellant, )  
and )  
)  
Sheila Foster Anthony, et al. )  
)  
Defendants-in-intervention- )  
Appellees/Cross-Appellants. )  
\_\_\_\_\_ )

No. 01-55487, 01-55788, 01-55789

MOTION FOR STAY OF THE MANDATE

Pursuant to Fed.R.App. P. 41(d)(2), the Office of Independent Counsel and the United States of America respectfully move for a stay of the mandate for ninety (90) days, to preserve the status quo and prevent disclosure of the documents at issue in this case. On August 16, 2002, this Court denied the government's petition for rehearing and rehearing en banc. The mandate is accordingly scheduled to issue on August 23, 2002. Fed. R. App. P. 41(b). As discussed more fully below, a petition for writ of certiorari would present a substantial question, and there is good cause for staying the mandate to permit the Solicitor General adequate time to consult with interested agencies, to consider whether to seek Supreme Court review, and prepare a petition for a writ of certiorari.

STATEMENT

Because this case has been before this Court on two separate occasions, we will not burden the Court with a lengthy reiteration of the facts. The essence of the matter is that, on June 6, 2002, a panel majority

ordered the disclosure, under the Freedom of Information Act ("FOIA"), of four color photographs of the dead body of Deputy White House Counsel Vincent Foster, who committed suicide in Fort Marcy Park, McClean, Virginia, in 1993. The D.C. Circuit has held that the identical photographs (as well as others) are exempt from disclosure under FOIA's Exemption 7 (C), 5 U.S.C. (b)(7)(C). See Accuracy in Media v. National Park Service, 194 F.3d 120 (D.C. 1999), cert. denied, 529 U.S. 1111 (2000).

The panel's June 6, 2002 decision was rendered following the panel's prior decision in this case. The earlier panel decision, reported at 217 F.3d 1168 (2000), was accompanied by a dissent by Judge Pregerson. Judge Pregerson also issued a dissent from the June 6, 2002 decision, in which he explained that, after viewing the photographs in camera, he adhered to the conclusions in his prior published dissent that the "nine, never-before-released" photographs were properly withheld.<sup>1</sup>

The parties in this FOIA case are plaintiff Allan J. Favish, who was one of the unsuccessful counsel in Accuracy in Media, the Office of Independent Counsel, which investigated Mr. Foster's death and possesses its own set of the death-scene photographs, and the family of Mr. Foster, who intervened in this case and also filed an unsuccessful petition for rehearing to review this Court's June 6, 2002 decision. Mr. Foster's surviving family members are his aged mother, his widow, their three children, and his sister.

#### ARGUMENT

Under Fed R. App. P. 41 (d) (2) (A), a stay of mandate should ordinarily be granted if the movant "show[s] that the certiorari petition would present a substantial question and that there is good cause for a stay." This case satisfies both criteria.

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<sup>1</sup> The panel majority's decision has the effect of protecting against the FOIA disclosure of six of the photographs.

1. First, there is good cause for a stay. Indeed, a stay of the mandate would merely continue the status quo pending a final determination of this case. Preserving the status quo is particularly critical in FOIA cases. Because the essence of a FOIA suit is disclosure, once the documents are disclosed, a case or controversy no longer exists and the case is over. Absent a stay of the mandate, the government in this case will be required to release the four death-scene photographs ordered released by the June 6, 2002 decision, and the release of the photographs will moot the case. The Supreme Court and the lower courts have often recognized that irreparable injury results from mootng a case and have consistently granted stays of disclosure orders in FOIA cases. See, e.g., United States Department of Commerce v. Assembly of the State of California, 501 U.S. 1272 (1991); Rosenfeld v. United States Department of Justice, 501 U.S. 1227 (1991); John Doe Agency v. John Doe Corp., 488 U.S. 1306 (1989) (Marshall, Circuit Justice); Martin v. IRS, 857 F.2d 722, 724 (10th Cir. 1988); Taylor v. Department of the Army, 684 F.2d 99, 102 (D.C. Cir. 1982); Providence Journal Co. v. FBI, 595 F.2d 889 (1st Cir. 1979).

Premature disclosure of the death-scene photographs will strongly damage the privacy interests of the surviving family members, who have filed substantial declarations supporting their privacy interests. ER 528-532. The public interest would be served by permitting adequate time for the Solicitor General to complete the certiorari process in this sensitive case. By contrast, the harm to the plaintiff if a stay is granted is minimal. Even assuming that plaintiff is eventually entitled to disclosure under FOIA, a stay only means that plaintiff may be delayed somewhat in receipt of the photographs.

The balance of harms in this case tips strongly in the government's favor. Thus, a stay is warranted while the Solicitor General considers whether to seek certiorari.

2. Although the panel majority disagreed with the government's position, the Court's decision

presents a substantial question for the certiorari petition. As noted above, the June 6, 2002 decision orders the public release under FOIA of four death-scene photographs whose nondisclosure under FOIA was specifically upheld by the D.C. Circuit in Accuracy in Media. It is well settled, of course, that the Supreme Court will often grant certiorari where the decision of a federal court of appeals, as to which review is sought, is in direct conflict with a decision of another court of appeals. See Stern, Gressman, Shapiro and Geller, Supreme Court Practice, 7th edition, pp. 174-176. The fact that one of the conflicting decision is unpublished does not lessen the conflict, and indeed in this case, the panel majority's earlier decision was in fact published.

We also believe that, aside from the direct conflict between the Circuits, the case presents an important question as to whether the panel majority's decision is consistent with the Supreme Court's teachings as to the limited approach to "public interest" under Exemption 7(C). See U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) and Bibles v. Oregon Natural Desert Ass'n, 519 U.S. 355 (1997). There is also a substantial question whether the panel majority endorsed a requirement that the photographs be "graphic, explicit and extremely upsetting" (217 F.2d at 1174) which is not consistent with Reporters Committee. We also submit that other Circuits have interpreted Reporters Committee to adopt a narrower definition of "public interest" and a broader definition of Exemption 7(C) privacy interest than the one adopted by this Court here. See, e.g., SafeCard Servs., Inc. v. SEC, 926 F.2d 197, 1205-06 (D.C. Cir. 1991).<sup>2</sup>

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<sup>2</sup> Judge Pregerson's dissent did not encompass one of the photographs ordered released by the panel majority, which had been the subject of a prior unauthorized release. However, the D.C. Circuit upheld the withholding of that photograph under Exemption 7(C), and there is a substantial argument that the prior disclosure is irrelevant because the surviving family members have not waived their right to

3. As noted above, we respectfully submit that the public interest would be served by permitting the Solicitor General adequate time in which to determine whether the above matters should be presented to the Supreme Court in a petition for a writ of certiorari. As the Court knows, the Solicitor General undertakes a completely separate process of determining whether to seek certiorari in a case, separate and apart from his prior consideration of whether to appeal or seek rehearing en banc, in his role as "gatekeeper" to the Supreme Court on behalf of the entire Federal Government. Accordingly, the Supreme Court and the Courts of Appeals have consistently recognized the Solicitor General's institutional need for wide consultation within the Federal Government and the requirement that the Solicitor General engage in full and careful deliberation prior to deciding whether to seek certiorari. See, e.g., United States v. Mendoza, 464 U.S. 154, 160 (1984); Rex E. Lee, Lawyering for the Government, 47 Ohio St. L. J. 595 (1986); David A. Strauss, Litigating on Behalf of the United States: The Solicitor General and the Interests of the United States, 61 Law and Contemp. Probs. 165 (1998).<sup>3</sup>

Accordingly, we are requesting that the Court stay the mandate for ninety (90) days. Fed. R. App. P. 41 (d) (2) (B) specifically provides that this Court is authorized to issue a stay for that period of time. A ninety-day stay will insure that the Solicitor General has adequate time to consult with affected officials and agencies within the Government, to evaluate the case for certiorari purposes, and to determine whether a writ of certiorari is necessary and appropriate. If he determines that Supreme Court review is

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privacy.

<sup>3</sup> We understand that the intervening family members are also moving for a stay of mandate, and that they have already determined to file a petition for a writ of certiorari. As noted above, the Solicitor General has a unique role as "gatekeeper" to the Supreme Court on behalf of the entire Federal Government which differentiates his institutional needs from that of private litigants.

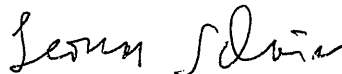
appropriate, this period of time will also permit the Solicitor General time to prepare and file a petition for a writ of certiorari.

4. Mr. Favish, who is an attorney at law, advised undersigned counsel by telephone that he does not oppose the motion.

#### CONCLUSION

For the reasons stated above, this motion should be granted and the mandate in this case should be stayed until November 21, 2002.

Respectfully submitted



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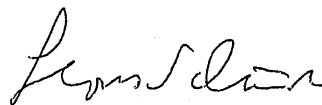
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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2002, I caused the foregoing Motion for A Stay of the Mandate to be served upon the Court and upon the following counsel by Federal Express and telefax.

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