UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. DEPARTMENT OF THE TREASURY,	
Petitioner,	
v.	**No. 1:12-mc-00100-EGS**
PENSION BENEFIT GUARANTY CORPORATION,	
Interested Party,	
v.	
DENNIS BLACK, *et al.*,	
Respondents.	

REPLY IN SUPPORT OF PETITIONER'S MOTION FOR STAY

INTRODUCTION

By order dated April 13, 2017, the Court directed petitioner U.S. Department of the Treasury (Treasury) to produce "forthwith" to respondents Dennis Black, Charles Cunningham, Kenneth Hollis, and the Delphi Salaried Retiree Association the 63 documents over which Treasury had asserted the presidential communications privilege. ECF No. 44 at 1. Treasury has moved for an order staying that order until any appeal of the order had been adjudicated. ECF No. 46 at 1. Respondents agree with Treasury, ECF No. 47 at 5, that the granting of Treasury's motion for a stay is governed by the following four factors:

> whether the stay applicant has made a strong showing that he is likely to succeed on the merits . . . whether the applicant will be irreparably injured absent a stay . . . whether issuance of the stay will substantially injure the other parties interested in the proceedings . . . and . . . where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Respondents disagree, however, that the balance of hardships favors the granting of Treasury's motion for a stay or that Treasury has a strong likelihood of success on the merits. ECF No. 47 at 2. Respondents are mistaken, for the following reasons, on both counts.

ARGUMENT

I. THE BALANCE OF HARDSHIPS FAVORS THE GRANTING OF TREASURY'S MOTION FOR A STAY.

Respondents make five separate arguments in an effort to show that the balance of hardships does not favor the granting of Treasury's motion for a stay. None of respondents' arguments is persuasive.

Respondents argue as a threshold matter that the balance of hardships does not favor the granting of Treasury's motion for a stay because the Supreme Court held in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), that "the production of purportedly privileged documents prior to appellate review does not constitute irreparable harm because there will be sufficient remedies available post appeal." ECF No. 47 at 6. *Mohawk* is inapposite, however. The Supreme Court held in *Mohawk* that orders requiring the production of documents subject to claims of attorney-client privilege "[do not] qualify for immediate review under the collateral order doctrine" because "postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege." 558 U.S. at 103, 109. Emphasizing, however, that its decision did not apply to orders requiring the production of records subject to claims of presidential communications privilege, the Court said: "[T]he United States contends [as *amicus curiae*] that collateral order appeals should be available for rulings involving certain governmental privileges 'in light of their structural constitutional grounding under the separation

of powers, relatively rare invocation, and unique importance to governmental functions.' *We express no view on that issue*." *Id.* at 113 n.4 (emphasis added, citation omitted).

Respondents next argue that the balance of hardships does not favor the granting of Treasury's motion for a stay because Treasury could mitigate any harm that otherwise would result from its production of the documents over which it has asserted the presidential communications by producing the documents to respondents pursuant to a protective order. ECF No. 47 at 8. The protective order that respondents have in mind is the protective order in *Black v. Pension Benefit Guaranty Corporation*, No. 2:09-cv-13616-AJT-MKM (E.D. Mich.), pursuant to which documents alleged to be privileged were produced to respondents by interested party Pension Benefit Guaranty Corporation. *Id. Black* is different from this case because the documents produced in *Black* were documents alleged to be "protected from disclosure by the attorney-client, attorney work product, or deliberative process privileges." Ex. A hereto at 8. They were not, as in this case, documents held by the Court to be covered by the presidential communications privilege. ECF No. 45 at 10. Documents covered by the presidential communications privilege stand on a different footing from documents covered by other privileges because of the "structural constitutional grounding [of the privilege] under the separation of powers, relatively rare invocation, and unique importance to governmental functions." *Mohawk*, 558 U.S. at 113 n.4; *see In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997) (holding that "[t]he presidential communications privilege is rooted in constitutional separation of powers principles and the President's unique constitutional role" while "the deliberative process privilege is primarily a common law privilege"); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (characterizing the attorney-client privilege as a "common law" privilege); *Feld v. Fireman's Fund Ins. Co.*, 991 F. Supp. 2d 242, 247 (D.D.C. 2013) (noting that

the work product doctrine, though codified now in the Federal Rules of Civil Procedure, was "[o]riginally a product of the common law"). Any production in this case of the documents over which Treasury has asserted the presidential communications privilege would therefore "'let the cat out of the bag, without any effective way of recapturing it if the district court's directive [is] ultimately found to erroneous,'" *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005) (quoting *Irons v. FBI*, 811 F.2d 681, 683 (1st Cir. 1987)), even if the production took place pursuant to a protective order.

Respondents also argue that the balance of hardships does not favor the granting of Treasury's motion for a stay because the presidential communications privilege was asserted in this case by the previous administration. ECF No. 47 at 9, 13. The Supreme Court has held that "[t]he expectation of the confidentiality of executive communications . . . [is] subject to erosion over time after an administration leaves office." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 451 (1977). No significant erosion has taken place in this case, however, because the previous administration has been out of office for less than four months.

Respondents argue further that the balance of hardships does not favor the granting of Treasury's motion for a stay because the public does not have a cognizable interest in the protection of documents covered by the privilege. ECF No. 47 at 13. The Supreme Court has held, however, that the presidential communications privilege "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution," *United States v. Nixon*, 418 U.S. 683, 708 (1974), and the D.C. Circuit has held that "the public interest is best served by holding that communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President." *Sealed Case*, 121 F.3d at

751-52. The public thus has a significant interest in protecting documents that the Court has held to be covered by the presidential communications privilege.

Respondents argue as a final matter that the balance of hardships does not favor the granting of Treasury's motion for a stay because any appeal of the order dated April 13, 2017, will delay the adjudication of *Black.* ECF No. 47 at 12. "[D]elays of litigation" are "inevitable," however. *United States v. Ruzicka*, 329 U.S. 287, 293 (1946). Treasury considers *Black* to be a meritless lawsuit, *see* ECF No. 15 at 14-15, but has never taken any action to delay the adjudication of that action or this action. Any delay in the adjudication of *Black* that results from Treasury's appealing the order dated April 13, 2017, will be justified by the significant public interest, discussed above, in the protection of documents that the Court has held to be protected by the presidential communications privilege. Treasury has expressed its willingness, moreover, to try to minimize any delay in the adjudication of *Black* by seeking expedition of any such appeal. ECF No. 46-1 at 5.

II. TREASURY WILL HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS IF IT APPEALS THE ORDER DATED APRIL 13, 2017.

The order dated April 13, 2017, is premised on "[r]espondents[']assert[ion] that they need the withheld material because it may show pressure exerted by Treasury or the White House to terminate the Delphi Plan for impermissible or political reasons." ECF No. 45 at 10-11. That premise is unlikely to survive appellate review because, as Treasury has stated, none of the documents over which it has asserted the presidential communications privilege contains any indication that any such pressure was ever exerted. ECF No. 46-1 at 6. Respondents do not address that key point in their opposition to Treasury's motion for a stay. They merely say instead that "the Court applied the well-settled needs analysis" in determining that the order dated April 13, 2017, was warranted, ECF No. 47 at 10, and therefore do nothing to refute

Treasury's showing that it will have a strong likelihood of success on the merits if it appeals the order.

CONCLUSION

Treasury's motion for a stay should be granted for the foregoing reasons and for the reasons set forth in the memorandum in support of the motion, ECF No. 46-1.

Respectfully Submitted,

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Dated: May 11, 2017

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2017, I served the within memorandum and the exhibit to the memorandum on all counsel of record by filing them with the Court by means of its ECF system.

s/ *David M. Glass*