Consovoy McCarthy PLLC

1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
703.243.9423
www.consovoymccarthy.com

September 29, 2020

Catherine O'Hagan Wolfe
Clerk of Court
U.S. Court of Appeals, Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: *Trump v. Vance*, No. 20-2766-cv

Dear Ms. O'Hagan Wolfe:

This Court has asked for letter briefs addressing whether the Mazars subpoena is presently enforceable. As explained below, the stay pending appeal issued by a panel of this Court on September 1, 2020 renders the subpoena unenforceable.

The Court remanded this case to the district court on July 10, 2020. JA9 (D. Ct. Doc. 46). That same day, the district court ordered the parties to file a joint submission outlining next steps. JA9-10 (D. Ct. Doc. 47). In the joint submission, the District Attorney agreed "to forbear on execution of the Mazars subpoena pending the orderly resolution by [the district court] of any remaining arguments the President may raise, provided the appropriate schedule moves on an expedited basis." D. Ct. Doc. 52 at 10. Specifically, he agreed to "forbear on enforcing the Mazars subpoena through and including seven calendar days after the date of a decision by [the district court] on the earliest motion filed by any party under Rule 12 or Rule 56 of the Federal Rules of Civil Procedure." *Id.* On August 20, 2020, the district court issued an order granting the District Attorney's Rule 12(b)(6) motion to dismiss, JA30-132, and entered final judgment, JA133.

On August 21, 2020, the district court denied a stay pending appeal. JA12 (D. Ct. Doc. 74). One hour later, the President asked this Court for a stay pending appeal. CA2 Doc. 16-1. In the memorandum filed in support of that motion, the President argued that a stay was needed in order to prevent irreparable injury, *viz.*, the enforcement of the subpoena. CA2 Doc. 16-2 at 1, 5-7. The *only* purpose of the motion was "preserving the status quo." *Id.* at 19. The District Attorney opposed the stay application. CA2 Doc. 72. He argued, *inter alia*, that the President needed an injunction—not a stay—in order to render the subpoena unenforceable. *See id.* at 6-7. On reply, the President explained why that was incorrect:

> The District Attorney linked the enforceability of the subpoena to the issuance of the judgment. *Trump v. Vance*, 2020 WL 4914390, at *1 (S.D.N.Y. Aug. 21, 2020). Hence, "temporarily divesting [that] order of enforceability" renders the subpoena unenforceable. *Nken v. Holder*, 556 U.S. 418, 428 (2009). That is why the District Attorney, in opposing a stay in the prior appeal, never argued that the President was trying to "recast" an injunction request "as a request for a stay" even though the circumstances were the same. Opp. 7.

> This is also what happened in the litigation over the congressional subpoenas. As here, the committees deferred enforcement pending judicial review, except they tied enforceability to issuance of the mandate instead of the judgment. Application for Stay, *Trump v. Mazars USA, LLP*, 19A545 (U.S. Nov. 15, 2019) at 1. The appropriate relief thus was a stay of the mandate—not an injunction pending appeal—and that was the relief the Supreme Court granted. *Trump v. Mazars USA, LLP*, 140 S. Ct. 581 (2019); *Trump v. Deutsche Bank AG*, 140 S. Ct. 660 (2019).

CA2 Doc. 78 at 1-2.

On September 1, 2020, a panel of this Court granted the President's motion for a stay pending appeal. The order provided: "IT IS HEREBY ORDERED that a stay of the district court's order and judgment pending determination of the appeal is granted." CA2 Doc. 83.

Accordingly, the subpoena is not enforceable while this Court's stay order remains is in place. The *only* reason that the President sought a stay was to prevent enforcement of the subpoena, thereby preserving the status quo. Awarding that relief, in turn, would be the *only* reason for the stay panel to grant the motion. The dispute between the parties over the kind of relief that the President needed to preserve the status quo thus has been litigated and necessarily resolved. After all, this Court is not in the habit of issuing a meaningless order that pointlessly stays a district court decision. Yet that would be the result if the District Attorney somehow remains free to enforce the subpoena notwithstanding this Court's order granting a stay pending appeal.

The only way for the stay panel to have rendered the subpoena unenforceable—other than by granting a stay that effectively awarded that relief—would be by agreeing with the District Attorney that an injunction is necessary and then granting one. As noted above, however, that understanding is squarely refuted by the terms of the order itself. Indeed, this Court knows how to issue an injunction when it intends to do so. *See, e.g.*, *Cty. of Westchester v. HUD*, Doc. 39, No. 15-979 (2d Cir. May 1, 2015); (granting "injunction pending appeal"); *New Hope Family Servs., Inc. v. Poole*, Doc. 160, No. 19-1715 (2d Cir. Nov. 4, 2019 (granting "motion for a preliminary injunction … pending a decision on this appeal").

In sum, there is no way to interpret the stay panel's decision other than as deciding that a stay of the district court's order would render the subpoena unenforceable and granting that relief. That ruling was correct and, in all events, there is no basis to disturb it. *See Shomo v. City of N.Y.*, 579 F.3d 176, 186 (2d Cir. 2009) (explaining that a merits panel will not revisit prior determinations made by a motions panel "absent 'cogent' or 'compelling' reasons"). But if this Court disagrees, the President respectfully requests prompt notification and an order temporarily preserving the status quo so that he can seek further appellate relief.

Respectfully submitted,

/s/ Williams S. Consovoy
Counsel for Appellant