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Southern District of New York

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October 11, 2013

By ECF and Hand

Hon. William H. Pauley, III
United States District Judge
United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *ACLU et al. v. Clapper et al.*, 13 Civ. 3994 (WHP)

Dear Judge Pauley:

We write respectfully on behalf of the Defendants in this action in response to the Plaintiffs' letter of October 10, 2013 (ECF No. 64) ("Pls.' Oct. 10 Ltr."). Plaintiffs request that the Court's October 1, 2013, stay of civil cases to which the U.S. Government is a party be lifted as to this matter, and that the Court re-set dates for reply briefs and argument on Plaintiffs' motion for a preliminary injunction and Defendants' motion to dismiss. *Id.* at 1. For the reasons explained herein, Plaintiffs' request should be denied, and the stay should remain in place.

Under the Court's scheduling orders of August 8 and September 27, 2013, Plaintiffs' reply in support of their preliminary injunction motion, and Defendants' reply in support of their motion to dismiss, were due to be filed on October 15, 2013; oral argument on both motions was scheduled for November 1, 2013. *See* ECF Nos. 22, 28. At the end of the day on September 30, 2013, however, the appropriations act that had been funding the Department of Justice expired and appropriations to the Department lapsed. The same is true for most Executive agencies.

In light of this lapse in funding to the Department, the Court, by Chief Judge Preska, immediately ordered on October 1, 2013, that all civil cases (other than civil forfeiture cases) in which the United States Attorney's Office for the Southern District of New York has appeared as counsel of record for the United States be stayed until appropriations for the Department of Justice are restored. The Court ordered further that court deadlines in most such cases be tolled until the restoration of the Department's funding, and be extended thereafter for a period commensurate with the lapse in the Department's appropriations. *In re Stay of Certain Civil Cases Pending the Restoration of Department of Justice Funding*, 13 Misc. 0334, Order (S.D.N.Y. Oct. 1, 2013) (Preska, C.J.) (ECF No. 59). By operation of the Court's October 1 Order, the dates previously scheduled in this case for submission of the parties' reply briefs and for argument of their pending motions are stayed and extended for the length of the Government shutdown.

The Court's action was the correct one under the extraordinary circumstances presented, because absent an appropriation, attorneys and employees at the Department of Justice are prohibited from working, even on a voluntary basis, except in very limited circumstances,

including “emergencies involving the safety of human life or the protection of property.” 31 U.S.C. § 1342. Although, by its terms, the October 1 Order is subject to modification in individual cases, the stay has been in place only a short time, and Plaintiffs have pointed to no circumstances peculiar to this case that would justify lifting the stay in this action.

As their principal reason for seeking to lift the stay, Plaintiffs cite the “ongoing” irreparable harm they claim to suffer as a result of the telephony metadata program challenged in this action. Pls.’ Oct. 10 Ltr. at 1, 2. That argument is undercut, however, by the fact that Plaintiffs waited ten days to seek to lift the stay, as well as by the fact that they waited two and one-half months after filing this lawsuit (on June 11) before moving for a preliminary injunction (on a non-expedited basis) on August 26. In addition, as Defendants have shown in opposition to Plaintiffs’ motion, Plaintiffs have not, in fact, offered any evidence of “ongoing” or even likely harm befalling them from the telephony metadata program. *See generally* Defs’ Opp. to Pls.’ Mot. for a Prelim. Inj. (ECF No. 61) at 12-15. There are no exigent circumstances presented by this case involving the safety of human life or the protection of property that warrant an exception to the stay.

Plaintiffs next assert that a continued stay of their preliminary injunction motion will “deprive the public and Congress of information relevant to the ongoing public debate about the [telephony metadata] program.” Pls.’ Oct. 10 Ltr. at 2-3. Plaintiffs do not explain, however, what new information about the program the Court can expect Plaintiffs’ reply brief and oral argument to bring to light. Nor do they explain why any such expectation would constitute an exigency under 31 U.S.C. § 1342 that would merit lifting the stay. In any event, if Plaintiffs have additional information about the program that they wish to bring to the attention of Congress or the public, they do not need to wait until their reply brief is filed in order to do so.

Finally, Plaintiffs note that in *First Unitarian Church of L.A. v. NSA*, No. 3:13-cv-03287 (N.D. Cal.) – a case also challenging the lawfulness of the telephony metadata program – the court recently denied a motion by the Government to stay and extend all pending deadlines for the duration of the current lapse in appropriations. Pls.’ Oct. 10 Ltr. at 3. This Court, however, by virtue of its October 1 order, has already recognized that it is not appropriate to require Department of Justice attorneys and other Executive Branch personnel to incur financial obligations on behalf of the United States for which no appropriations are currently authorized by working on cases that do not present exigent circumstances “involving the safety of human life or the protection of property.” 31 U.S.C. § 1342. The fact that the court in *First Unitarian* disagreed presents no grounds for this Court to make an exception here to its prior determination to stay proceedings in this District. Moreover, the district court’s action in *First Unitarian* further justifies continuation of the stay here because, despite the lapse in federal appropriations, Justice Department counsel are now required to proceed in that case and undertake extensive work during the period in which Plaintiffs seek to re-set briefing and argument in this case.¹

In the event that the Court decided to lift the stay in this action (which it should not), it should nevertheless reject Petitioner’s proposed schedule for briefing and argument. Under Plaintiffs’ proposal, the Court and the parties effectively would have less than one week following the submission of the parties’ reply briefs to prepare for argument on the numerous

¹ Under the current schedule in *First Unitarian*, Justice Department counsel must prepare with opposing counsel and submit a joint case-management statement by November 1, attend a case-management conference in San Francisco on November 8, and prepare a motion to dismiss due on November 12, 2013.

issues to be addressed at the hearing on the parties' motions, contrary to the original intention of the Court. *See, e.g.*, ECF No. 20 (setting deadline for reply briefs on October 10, and scheduling argument on November 1, 2013). To allow the Court and the parties adequate time to prepare for argument as contemplated under the Court's scheduling orders, and to accommodate the Government's conflicting obligations in *First Unitarian*, oral argument should be scheduled no sooner than two to three weeks following the parties' reply briefs, and in no event prior to the week of November 18, 2013.

For the reasons stated above, Plaintiffs' request to lift the Court's October 1 stay as it applies to this case should be denied, and their proposed schedule for reply briefs and argument on the parties' pending motions should be rejected.

Respectfully submitted,

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