

Defendants seeking certification are the Vice President, the National Energy Policy Development Group (“NEPDG”), Lundquist, Bolton, and Lindsey (hereafter “Executive Defendants”).

Executive Defendants now seek urgent review of three of the Court’s rulings: (1) denial of their motion for reconsideration and for a protective order; (2) the order authorizing discovery and denying permission to file a motion for summary judgment; (3) the order holding that the Federal Advisory Committee Act (“FACA”) may be enforceable against the Vice President in a mandamus action. Motion at 1-2. Executive Defendants also state that “in absence of timely certification by this Court,” they will seek appellate review – and further delay – under 28 U.S.C. § 1651(a) and 28 U.S.C. § 1291. Motion at 2.

Standard of Review

The decision of whether to allow an immediate interlocutory appeal of a non-final order under section 1292(b) is within the discretion of the district court. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995). When deciding a motion for certification, a district court must consider the following factors: (1) whether the motion to be appealed involves a controlling question of law; (2) whether an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) whether there is a substantial ground for difference of opinion on that question of law. 28 U.S.C. § 1292(b); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1116 (D.D.C. 1996).

Interlocutory appeals under 28 U.S.C. § 1292(b) are, however, rarely allowed, and the party seeking interlocutory review has the burden of persuading the court that “exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.” As this Court recently stated: “[B]oth Congress and the Judicial Branch have recognized the public interest in avoiding “piecemeal” litigation occasioned by

stays and interlocutory appeals.” Order, Nov. 1, 2002, at 8 (citing *United States v. Nixon*, 418 U.S. 683, 690 (1974)); *see also First Am. Corp.*, 948 F. Supp. at 1116; *Manion v. American Airlines, Inc.*, 215 F. Supp. 2d 90, 93 (D.D.C. 2002).

No Controlling Question of Law Exists

First, the term “controlling” is not to be read literally, but as a flexible standard that has not only legal, but practical significance as well. “A growing number of decisions have accepted the rule that a question is controlling . . . if interlocutory reversal might save time for the district court and expense for the litigants.” 16 Wright, Miller & Gressman, *Federal Practice and Procedure* § 3930; *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (both authorities also relied on by Defendants).

According to Executive Defendants, the “central question at this juncture is whether discovery should be permitted into the operations of a group of government officials operating in close proximity to the President and into the Office of the Vice President” Motion at 5. This question posed by Executive Defendants does not constitute a controlling issue of law.

Executive Defendants’ Motion is larded with the same arguments already presented to and rejected by this Court. As this Court recently pointed out, Defendants have been making these same arguments “since January of this year that there shouldn’t be any discovery in this case.” Tr., Oct. 17, 2002, Hearing, at 11 (lines 20-22). Executive Defendants continue to assert their novel theories despite “U.S. Supreme Court precedent, and the absolute dearth of authority supporting their arguments” Order, November 1, 2002, at 4. Thus Executive Defendants have wholly failed to establish a legally cognizable, much less plausible, question of law worthy of being heard by an appellate court.

Moreover, an interlocutory appeal will not save time for the Court nor save expenses by

the litigants. Even if the Court were to certify an interlocutory appeal and Executive Defendants were entirely successful at the appellate court, multiple defendants and multiple claims would remain before the Court. Executive Defendants' Motion is only on behalf of five (the Vice President, the NEPDG, and three individuals) of the 16 current Defendants. If Executive Defendants fail partly or completely before the appellate court, which is very likely given what this Court has already determined as the "absolute dearth of authority supporting their argument," Executive Defendants will again be before this Court, with only further delay to show for their efforts. Order, November 1, 2002, at 4. In fact, an interlocutory appeal will only increase the cost to Plaintiffs of prosecuting their claims, as they will be forced to proceed on two fronts simultaneously – both in this Court and in the appellate court.

No Significant Difference of Opinion Exists

Second, though they continue to disagree with this Court's rulings, Defendants have not demonstrated that grounds for a significant difference of opinion exists on what Executive Defendants consider the fundamental issue – whether discovery should go forward. Motion at 5. Notwithstanding their novel theories on privilege, Executive Defendants have not presented any significant precedent or rationale regarding why they should not have to comply with the discovery ordered by this Court. As this Court has noted more than once, "Defendants have cited no authority, and indeed this Court knows of none, which supports [their] proposition." Order, November 1, 2002, at 4. Executive Defendants' vague and "conclusory" arguments regarding discovery are without merit and "belie precedent." *Judicial Watch, Inc. v. NEPDG*, Mem. Op., 2002 U.S. Dist. LEXIS 12598, *94-98 (July 11, 2002).

Certification Will Not Speed Resolution of the Litigation

Finally, in regards to the third factor necessary to certify an order, an appeal at this stage will not materially advance the ultimate termination of this litigation. As discussed above, because of the existence of Plaintiffs' claims against the other Defendants, an interlocutory appeal will not advance the ultimate termination of this litigation at all, but will simply force Plaintiffs to prosecute their claims on two fronts simultaneously – before this Court and the appellate court – at an obviously substantial increase in cost.

Executive Defendants do not explain how their proposed excursion to the appellate court will speed the ultimate resolution of this case. In reality, an appeal at this stage of this case will only cause more delay and further harm Plaintiffs' – and the public's – interest. As this Court has stated, “[a]s time proceeds, the value of the information sought by plaintiffs and the public declines substantially, thereby effectively denying plaintiffs the relief to which they contend they are entitled.” Order, November 1, 2002, at 8. *See also Isra Fruit Ltd. v. Agrexco Agric. Exp. Co., Ltd.*, 804 F.2d 24, 26 (2d Cir. 1986) (denying certification where interlocutory appeal would result in no “appreciable saving of time”); *Genentech, Inc. v. Novo Nordisk A/S*, 907 F. Supp. 97, 100 (S.D.N.Y. 1995) (denying certification where immediate appeal would not “speed the parties’ litigation”); *Brown v. Pro Football, Inc.*, 812 F. Supp. 237, 239 (D.D.C. 1992) (denying certification where interlocutory appeal would “only delay trial of damages issues”).

For all the foregoing reasons, Plaintiff respectfully requests that Defendants' Motion for Certification Pursuant to 28 U.S.C. § 1292(b) and for Expedited Consideration be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2002, a true and correct copy of the foregoing PLAINTIFF JUDICIAL WATCH'S OPPOSITION TO DEFENDANTS' MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(B) AND FOR EXPEDITED CONSIDERATION OF THIS MOTION was served via ECF Notification and first class U.S. Mail, where applicable, on the following:

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