UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Subpoenas in JEANNE PAHLS, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 08-mc-0362 (RJL)
BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF BERNALILLO, *et al.*,	)	
Defendants.	)	
EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES	)	
Third-Party Movant.	)	

PLAINTIFFS' OPPOSITION TO THE EXECUTIVE OFFICE OF THE PRESIDENT'S MOTION TO QUASH SUBPOENA *AD TESTIFICANDUM* AND *DUCES TECUM*

INTRODUCTION

The Complaint in this 42 U.S.C. § 1983 case, which is pending in the District of New Mexico, alleges that in August 2007, when President Bush visited Albuquerque, demonstrators expressing criticism of the President and his policies were forced to stand out of sight of the President's motorcade route, while pro-Bush demonstrators were allowed to stand on his route and at a place where he slowed down to make a turn. Plaintiffs (the anti-Bush demonstrators) allege that this discrimination against them based on their viewpoint violated their right under the First Amendment.

Plaintiffs' only contact was with local law enforcement. Plaintiffs sued local law enforcement seeking damages but alleged that local law enforcement acted according to

instructions from federal officials. Plaintiffs' subpoena to the Office of Presidential Advance (the "Advance Office") (Exhibit A) seeks to establish that fact, so that additional defendants can be added to the case if appropriate.

Several facts are critical to the disposition of this motion.

1. Plaintiffs acted promptly. Plaintiffs subpoenaed the Advance Office less than one month after the Court's Rule 16 conference, where the Court issued a schedule for discovery.

2. Plaintiffs employed alternative means to obtain this information. Plaintiffs first sent out informal letters to counsel for local law enforcement officers seeking the identities of federal actors. In response the County sent a letter stating that local law enforcement worked with federal officials during the event, but that their identities were not known. Plaintiffs subsequently deposed nine local law enforcement officers, also seeking to identify the federal employees who were involved. Every local law enforcement officer confirmed that federal officials dictated the differential treatment of the demonstrators. Every local law enforcement officer professed not to know the names or titles of a single federal official, except for one officer who named a single Secret Service agent.

3. Plaintiffs have ample reason to believe that the Advance Office was responsible for the violation of their constitutional rights. The official manual of the Office of Presidential Advance explicitly urges its operatives to ensure that demonstrators critical of the President be kept out of sight of the President and the news media. By contrast, the Secret Service (at least as a matter of formal policy), prohibits its agents from engaging in differential treatment of demonstrators based on viewpoint. In addition, plaintiffs' counsel have been involved in two similar cases in which testimony by officials or volunteers of the Advance Office confirmed that decisions to keep against anti-Bush demonstrators out of sight were made

not by Secret Service or local law enforcement but by the Office of Presidential Advance. And the Director of the Advance Office states that the Office plans and coordinates the logistics for *all* Presidential events (Declaration of Spencer Geissinger, ¶ 2), thus confirming that the Office was involved in the President's visit to Albuquerque.

4. The movant has not demonstrated burdensomeness as required by law. For example, the Advance Office has not even identified the personnel who worked the New Mexico event, and thus cannot allege they are currently working on any other events. Moreover, the subpoena is narrowly focused, seeking information about one Presidential visit and related policies and complaints. Finally, in other lawsuits plaintiffs' counsel have deposed close to a dozen full-time employees and/or volunteers of the Advance Office without any disruption of that office (and indeed, without any objection). Notably, the Secret Service in this case received a nearly identical subpoena, and it complied with the subpoena without any objection of burdensomeness.

5. Time is of the essence. To the extent the government's motion alternatively seeks additional time to respond, plaintiffs are constrained by the scheduling order of the United States District Court for the District of New Mexico, where this case is pending. Plaintiffs must file an amended complaint naming any additional defendants, including any from the Office of Presidential Advance, no later than July 21, 2008 – less than five weeks from now.

STATEMENT OF THE CASE

BACKGROUND

On August 27, 2007, President George W. Bush visited Albuquerque, New Mexico to attend a fundraiser for Senator Pete Domenici. Complaint ¶ 21 (Exhibit B). Prior to the President's visit, various individuals decided that they would peacefully express their

disagreement with the President's policies by holding up signs along his travel route on Rio Grande Boulevard *Id*. ¶ 23.

The fundraiser took place at the estate of Mayor Larry Abraham. *Id*. ¶ 22. On the morning of the event, one of the individuals was told that protesters would be allowed to gather on the shoulders of Rio Grande Boulevard, near the entrance to the driveway leading into Mayor Abraham's estate. *Id*. ¶ 26. Some individuals gathered on the north side of the driveway. *Id*. ¶ 28. A larger group gathered on the south side. *Id*.

However, at some point prior to the President's arrival, local law enforcement officials – consisting of officers from the Albuquerque Police Department ("APD") and the Bernalillo County Sheriff's Department ("BCSD") – forced all of the protesters to move south on Rio Grande Boulevard and to stand behind a barrier established by the officers approximately 150 yards away from the entrance to the driveway. *Id*. ¶¶ 37, 40.

The President's motorcade approached the fundraiser site from the north, and, as a result, the President never passed by the protesters. Moreover, the protesters were kept behind a barrier and at such a distance that their signs could not even be seen by the President. *Id*. ¶ 46. Meanwhile, the local law enforcement officials did not move a group of Presidential supporters standing on the shoulder of Rio Grande Boulevard immediately across from the driveway. *Id*. ¶¶ 38, 39. Several of these supporters were holding American flags and two individuals held up a banner that said, "God Bless George Bush! We pray for you!" *Id*. ¶ 39. These individuals were permitted to stand directly alongside the President's motorcade route, close to and in plain sight of his passing car, and at a point where the motorcade had to slow down to turn into the driveway. *Id*. ¶¶ 38-39, 45. In other words, while those disagreeing with the President were

kept out of sight, those who directed a positive message toward the President were allowed to stand where he would surely see them.

PROCEDURAL HISTORY

On January 15, 2008, several of the protesters filed a complaint in the U.S. District Court for the District of New Mexico (Exhibit B), alleging violations of their First and Fourteenth Amendment rights because they were discriminated against based on the content and viewpoint of their speech. Just three days after the complaint was filed, plaintiffs contacted counsel for local law enforcement to inquire about expedited discovery to ascertain the identities of the unknown federal actors (Exhibit C). Counsel for the Board of County Commissioners for the County of Bernalillo and the Bernalillo County Sheriff's Department ("County defendants") responded that they would be willing to enter into an informal agreement to allow for limited, expedited discovery. *Id*. Despite initially confirming that they would agree to whatever the County would agree to, the City of Albuquerque and the Albuquerque Police Department ("City defendants") never responded to subsequent inquiries.

Thereafter, pursuant to an agreement with the County defendants, plaintiffs sent a letter on February 1, inquiring about the identities of any federal actors working at the August 2007 Presidential visit (Exhibit D). The County defendants responded with a letter on February 18 indicating that while the County worked with various members of the Secret Service, they could not identify any of the federal actors (Exhibit E).

On February 18, the County defendants also filed their answer to the complaint. The City defendants answered on March 3. Magistrate Judge Alan Torgerson issued an initial scheduling order on March 10, 2008 (Exhibit F). The order directed the parties to file a joint status report on April 14, 2008, and set the Rule 16 scheduling conference for April 22, 2008.

At the April 22 pretrial conference, plaintiffs' counsel apprised the Court of certain discovery issues, including the fact that plaintiffs were seeking to identify unknown federal actors, and that a couple of rounds of depositions might be needed to do so. Because of the atypical path of discovery, and the need to amend the pleadings to add the federal actors after they were identified, plaintiffs' counsel requested a later deadline – closer to the end of discovery – to add parties or amend the pleadings. After the conference, the Court issued a scheduling order (Exhibit G). The Court set June 20, 2008 as the cutoff date by which plaintiffs had to add parties or amend their pleadings. *Id*. The final discovery cutoff date was set for August 20, 2008. Just five business days after the Rule 16 Conference, on April 29, plaintiffs served their requests for production on both the City and County defendants.

On May 30, 2008, plaintiffs filed a motion to extend the deadline to add parties or amend pleadings until July 21, 2008. Both the City and County defendants consented to the extension, and the Court granted the motion on June 2, 2008.

From June 3 to 6, plaintiffs deposed nine local law enforcement officials. They included: (1) Lt. Brown, Lt. Parkins, and Commander Hetes of the APD; and (2) Lt. McCauley, Sgt. Mimms, Sgt. Dunlap, Lt. Thomas, Sgt. Rees, and Deputy Sheriff Linthicum of the BCSD. Each of these local law enforcement officials stated under oath that it was federal officials, and not local law enforcement officials, who were the decision-makers during the President's August 27, 2007 visit to Albuquerque. *See, e.g.*, Exhibits H &I (examples of deposition testimony from local law enforcement officials). They were unable, however, to provide names of any of the federal officials with the exception of one officer, who provided the name of one Secret Service agent. *Id*.

Plaintiffs also served third-party subpoenas for Rule 30(b)(6) depositions of the Secret Service and the Advance Office on May 10 and 13, respectively. Although plaintiffs' counsel abided by the instructions for service on the Advance Office provided by the White House Deputy Counsel, the Department of Justice took the position that the subpoena had not been properly served. To avoid a time-consuming dispute, plaintiffs served a new subpoena on May 23. The subpoena to the Advance Office noticed its 30(b)(6) deposition for June 12, 2008. The categories for the deposition and documents requested by plaintiffs were confined to the August 27, 2007 Presidential visit to Albuquerque, the policies that the Advance Office follows when planning for such events, and other complaints regarding similar discrimination along Presidential motorcade routes. Specifically, plaintiffs listed the following as the categories for deposition:

1. Reasons, facts, and/or other information concerning why Plaintiffs were required to stand approximately 150 yards away from the President's motorcade route while a group of presidential supporters was permitted to be closer to the route.

2. The name, affiliation, and contact information of individuals responsible for deciding where Plaintiffs and other demonstrators were permitted to stand.

3. Reasons, facts, and/or other information concerning any claim or belief that Plaintiffs posed a safety, security, or other kind of threat to the President or anyone else.

4. Communications concerning the incident involving Plaintiffs and/or actions taken as a result of the August 27, 2007 incident involving Plaintiffs.

5. White House policies, procedures, guidelines, and/or training materials concerning:

   A. Expressive activities or speech, including, but not limited to, policies concerning placement of demonstrators and protesters;

   B. Discrimination or non-discrimination against speakers based on content or viewpoint;

6. Other complaints of First Amendment/free speech violations by individuals demonstrating along presidential motorcade routes.

Advance Office Subpoena (Exhibit A).

Two weeks later, on June 6, the government moved in this Court to quash the subpoena. For the reasons that follow, that motion should be denied.

ARGUMENT

I. LEGAL STANDARDS

The Federal Rules provide for liberal discovery to ensure that litigation proceeds with "the fullest possible knowledge of the issues and facts before trial." *Hickman v. Taylor,* 329 U.S. 495, 501 (1947). Rule 26(b)(1) provides that parties may obtain discovery "regarding any matter, not privileged, that is relevant to the claim or defense of any party" and "the court may order discovery of any matter relevant to the subject matter involved in the action." Accordingly, the Federal Rules provide a mechanism by which parties may obtain discovery from third parties through the issuance of subpoenas. *See* Fed. R. Civ. P. 45.

A court may quash or modify a subpoena if it "subjects a person to an undue burden." Fed. R. Civ. P. 45(c)(3)(A)(iv). Whether a subpoena imposes an undue burden depends on "such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed." *Alexander v. FBI,* 186 F.R.D. 21, 34 (D.D.C. 1998). A "party's need for the [discovery] and the nature and importance of the litigation" are also weighty factors. *Linder v. Department of Defense*, 133 F.3d 17, 24 (D.C. Cir. 1998).

When a witness seeks to avoid discovery, "[t]he burden of proving that a subpoena is oppressive is on the party moving to quash." *Northrop Corp. v. McDonnell Douglas Corp.,* 751 F.2d 395, 403 (D.C. Cir. 1984); *Linder,* 133 F.3d at 24 ("the agency has the burden of proving oppressiveness"). A showing of undue burden must be specific, and significantly, assertions of undue burden without "'specific estimates of staff hours needed to comply' will be 'categorically

rejected.'" *Flatow v. The Islamic Republic of Iran*, 196 F.R.D. 203, 207 (D.D.C. 2000) (Lamberth, J.), *vacated in part on other grounds*, 305 F.3d 1249 (D.C. Cir. 2002) (quoting *Association of Am. Physicians & Surgeons v. Clinton,* 837 F. Supp. 454, 458 n.2 (D.D.C. 1993)); *see also Alexander v. FBI*, 194 F.R.D. 305, 315 (D.D.C. 2000)

The government's motion to quash relies on *Cheney v. U.S. District Court*, 542 U.S. 367 (2004), for the proposition that subpoenas directed to the White House are subject to heightened scrutiny. Mot. to Quash at 6-9. But *Cheney* is a far narrower precedent than the government asserts, dealing only with discovery requests "directed [personally] to the Vice President and other senior Government officials who … give advice and make recommendations to the President," the disclosure of which would interfere with the Executive Branch's "constitutional prerogatives." 542 U.S. at 385. The Court explicitly distinguished "cases that do not involve senior members of the Executive Branch," *id*., and reaffirmed the proposition that in appropriate circumstances even the President himself can be subject to civil discovery. *Id*. at 388 (citing *Clinton v. Jones*, 520 U.S. 681 (1997)). Moreover, the Court emphasized the relative unimportance of the discovery at issue in *Cheney*, which was sought

> not to remedy known statutory violations, but to ascertain whether FACA's [the Federal Advisory Commission Act's] disclosure requirements even apply to the NEPDG [National Energy Policy Development Group] in the first place. Even if FACA embodies important congressional objectives, the only consequence from respondents' inability to obtain the discovery they seek is that it would be more difficult for private complainants to vindicate Congress' policy objectives under FACA.

542 U.S. at 384-85. The Court contrasted that situation with another case in which discovery had been ordered directly against the President "where a court's ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction hinges on the availability of certain indispensable information." *Id*. at 385 (citing *United States v. Nixon*, 418 U.S. 683

(1974)). *Cheney* stands, therefore, only for the proposition that relatively unimportant discovery requests directed to senior Executive Branch officials, seeking information related to their "advice and … recommendations to the President," are beyond the scope of proper discovery. As we show below, that proposition has nothing to do with this case.

II. THE DISCOVERY SOUGHT BY PLAINTIFFS IS BASED ON A SOLID EVIDENTIARY FOUNDATION, CANNOT BE OBTAINED BY OTHER MEANS, AND INVOLVES THE CENTRAL FACTS IN AN IMPORTANT CASE INVOLVING FUNDAMENTAL CONSTITUTIONAL RIGHTS

The government asserts that the noticed 30(b)(6) deposition of the Advance Office is "a quintessential fishing expedition" that is "based on nothing more than speculation" about any involvement of Advance Office personnel. Mot. to Quash at 9-10. The evidence proves the contrary.

A. The Subpoena Rests on a Solid Evidentiary Foundation

First, plaintiffs' counsel have litigated two other cases involving viewpoint discrimination at Presidential events, and in each of these cases the Advance Office has been identified as the relevant decision-maker. In *Rank v. Hamm*, 2007 WL 894565 (No. 04-cv-997, S.D.W.Va. March 21, 2007), the plaintiffs attended a non-political, government-sponsored speech by President Bush on July 4, 2004 in Charleston, West Virginia. *Id*. at *1. After they were admitted to the event, they removed their outer shirts to display t-shirts with messages critical of the President. *Id*. at *2. When they refused to cover up their t-shirts, local law enforcement officials arrested them and removed them from the event. *Id*. Discovery indicated that the determination to remove the plaintiffs was done at direction of Advance Office personnel. *Id*. at *3.

Similarly, in *Weise v. Casper*, 507 F.3d 1260 (10th Cir. 2007), the plaintiffs attended a public speech by President Bush in Denver, Colorado. *Id*. at 1262. They alleged that they were

forced to leave the event because officials working at the event discovered that their car had a bumper sticker that said "No More Blood For Oil." *Id*. There, a volunteer working at the event testified at deposition that personnel from the Advance Office asked him to remove the plaintiffs from the event, confirming that members of the Advance Office were the ultimate decision-makers. Deposition of Michael Casper (Exhibit J) at 6-8.

Second, plaintiffs' counsel obtained a redacted copy of the Presidential Advance Manual through discovery in the *Rank* case (Exhibit K). As mentioned above, the manual has a section called "Preparing for Demonstrators," which states that members of the Presidential Advance team should "work with the Secret Service and have them ask the local police department to designate a protest area where demonstrators can be placed, preferably not in view of the event site or motorcade route." Manual at 34. This description is entirely consistent with how plaintiffs were treated in the *Rank* case and in this case. Here, they were confined to a designated area, forced to stand approximately 150 yards beyond the driveway entering the event site, and blocked from the view of the motorcade. Complaint ¶¶ 37, 40, 46. The Advance Manual also makes clear that demonstrators who support the President are to be given favored treatment – indeed, should even be used to block or drown out any expression by those who are opposed. Manual at 34. That policy of the Advance Office also was implemented in Albuquerque. Complaint ¶ 51.

As already noted, all nine of the City and County law enforcement officers who have already testified in this action have confirmed that federal officials dictated the differential treatment of the demonstrators. Exhibits H & I. The federal officials known to be on the scene

were Secret Service agents and Advance Office operatives.[1] We presume that government counsel here are not suggesting that it was the Secret Service that imposed this unconstitutional policy upon plaintiffs; the Secret Service has a formal policy that prohibits such discriminatory treatment of protesters: "In the absence of knowledge of specific facts or observable actions which would indicate that a demonstration group or individuals participating in a demonstration pose a security threat to a protectee, such demonstrators are to be treated as members of the general public. Secret Service personnel shall not initiate any action to segregate such demonstration groups or demonstrators from public areas." Exhibit L at 5. While that formal policy does not prove that the Secret Service was not involved in the decision to discriminate against anti-Bush protesters during the President's visit to New Mexico, it certainly leaves the Advance Office as the more likely culprit.[2]

Third, the Advance Office's role as the decision-maker regarding non-security matters at Presidential events should come as no surprise given the very purpose of that office. According to its Director, the Advance Office "plans and coordinates the logistics for *all* Presidential domestic and international travel and events." Geissinger Decl. ¶ 2 (emphasis added). It would thus be extraordinary for the Advance Office *not* to have been involved in the planning and coordination of the President's visit to Albuquerque.

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[1] The Advance Office admits that there were "members of the Advance Team who traveled to Albuquerque for the event." Mot. to Quash at 15 n.7.

[2] In still other cases of alleged viewpoint discrimination at Presidential appearances in which plaintiffs' counsel are (or have been) involved, the Secret Service has strenuously denied that it engages in viewpoint discrimination, citing its formal policy. *See Moss v. U.S. Secret Service*, 2007 WL 2915608 (No. 06-cv-3045, D. Ore. Oct. 7, 2007) (denying motion to dismiss), *appeal pending*, No. 07-36018 (9th Cir., filed Nov. 30, 2007); *Acorn v. City of Philadelphia*, 2004 WL 1012693 at *2 (No. 03-cv-4312, E.D. Pa. May 6, 2004) ("It is also undisputed that the Secret Service has elaborate written regulations which specifically provide for non-discrimination on the basis of the views sought to be expressed by protesters.").

It is beyond dispute that the Advance Office is likely to have knowledge about what happened along Rio Grande Boulevard on August 27, 2007; a 30(b)(6) deposition of that Office "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). The government's repeated assertion that the subpoena at issue is based on "nothing more than speculation" is simply not credible.

B. Plaintiffs Have Exhausted Other Avenues of Discovery

Nor is it credible for the government to argue that plaintiffs have not attempted to obtain the information in question from other sources, or that they can successfully do so. Mot. to Quash at 11. Plaintiffs have already exhausted other avenues. First, even before the commencement of formal discovery – just three days after the complaint was filed – plaintiffs reached out to the attorneys for the local law enforcement officials in an attempt to identify the federal actors involved. Exhibit C. The attorneys reached an informal agreement with the County, *id*., but not the City. In response to a letter sent by plaintiffs (Exhibit D), the County stated that the BCSD worked with various members of the Secret Service, but that the identities of the Secret Service officials were unknown. Exhibit E. Plaintiffs' first attempt to identify federal actors was therefore unsuccessful.

Second, plaintiffs promptly deposed nine City and County law enforcement officials, all of whom testified that federal officials were the ultimate decision-makers in terms of how to treat protesters. Exhibits H & I. The local law enforcement officials for the most part did not remember any names, but did mention the involvement of the Secret Service. They did not directly implicate the Advance Office. That, however, should not absolve the Advance Office from having to comply with the subpoena. Local law enforcement officials often assume, mistakenly, that all federal officials wearing suits and earpieces at a Presidential event are with

the Secret Service. More importantly, the Advance Office is still likely to be the decision-maker in matters like this even if the local law enforcement officials only took directions from the Secret Service. As the Advance Office's Manual states, members of the Advance team should "work with the Secret Service and have them ask the local police department to designate a protest area where demonstrators can be placed." Manual (Exhibit K) at 34. Thus, while the local law enforcement officials may have interacted only with the Secret Service, the actual directions may have come from the Advance Office.

In short, plaintiffs have already tried other avenues to ascertain the identities of the federal actors, but those sources – despite confirming the involvement of federal actors – have not been able to provide any names.

C. The Discovery Sought by Plaintiffs Involves the Central Facts in an Important Case Involving Fundamental Constitutional Rights

A "party's need for the [discovery] and the nature and importance of the litigation" are weighty factors in the calculus of burden. *Linder v. Department of Defense*, 133 F.3d 17, 24 (D.C. Cir. 1998). Those factors weigh heavily in favor of enforcing the subpoena at issue here. Unlike the peripheral discovery sought in *Cheney v. U.S. District Court, supra*, the deposition of the Advance Office seeks to obtain information central to plaintiffs' case: the identity of those who directed that plaintiffs be pushed down the road and out of sight of the President because their signs expressed criticism of him and his policies. Plaintiffs need for this information is also plain; without it, they will be unable to name the true malefactors in an amended complaint and therefore, perhaps, be unable to recover damages for the violation of their constitutional rights. And plaintiffs' requested discovery is important, because the New Mexico federal district court's "ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction hinges on the availability of [this] indispensable information." *Cheney*, 542 U.S. at

385 (describing to the situation in *United States v. Nixon*, 418 U.S. 683 (1974)). No judicial responsibility exceeds the responsibility to protect the First Amendment rights of Americans to express their political views peacefully, but freely, in a public forum, and "peaceably to assemble, and to petition the Government" – including the President – "for a redress of grievances." U.S. Const. Amend. I.

III. THE SUBPOENA DOES NOT POSE AN UNDUE BURDEN ON THE ADVANCE OFFICE

The subpoena at issue (Exhibit A) is narrowly focused on what happened in Albuquerque on August 27, 2007, and Advance Office policies and complaints directly relevant to that event. Providing a witness for the noticed deposition will not impose an undue burden on the Office. Contrary to the government's assertions, plaintiffs have not been dilatory in their pursuit of discovery, and have provided sufficient time for the Advance Office to comply. The Office's complaints about the President's travel schedule do not excuse it from producing a modest quantity of documents and providing a single deponent.

A. Plaintiffs Acted Promptly in Serving the Subpoena

The government asserts that plaintiffs were dilatory in conducting discovery, and that the Advance Office should not be forced to comply with the subpoena on short notice. The government repeatedly points to the fact that plaintiffs filed their complaint in mid-January but did not subpoena the Advance Office until May 23. Mot. to Quash at 2, 4, 12-13. This argument is inaccurate at best and misleading at worst.

The New Mexico court issued an initial scheduling order in this action on March 10, 2008 (Exhibit F), just one week after the City defendants filed their answer on March 3. The Rule 16 pretrial conference was held on April 22, 2008. As soon as the court issued a discovery order after the April 22 conference, plaintiffs promptly began discovery. On April 29, just one

week after the Rule 16 conference, plaintiffs served their requests for production on both the City and County defendants. And a mere two weeks later, on May 10, plaintiffs served a subpoena on the Secret Service and three days later on the Advance Office. Because government counsel claimed that service on the Advance Office had been improper (although plaintiffs had made service as directed by White House Deputy Counsel), plaintiffs served a second subpoena 10 days later on May 23, with a compliance date of June 12. Plaintiffs' actions with respect to discovery were not dilatory in any way.

More importantly, between the time the complaint was filed in mid-January and the Rule 16 scheduling conference in mid-April, plaintiffs did seek to ascertain the identities of the federal actors. In fact, plaintiffs' counsel contacted counsel for the City and County defendants just days after the complaint was filed in an attempt to get informal, expedited discovery (Exhibits C&D). As explained above, however, these informal efforts did not produce any names. The Advance Office's claim that plaintiffs have been dilatory is simply not borne out by the record.

B. The Subpoena is Narrowly Tailored and the Advance Office Has Sufficient Time To Comply

The Advance Office also argues that it is too busy to comply with the subpoena. Mot. to Quash at 13-17. This argument is unavailing for several reasons.

First, this Court has repeatedly held that a party moving to quash a subpoena based on assertions of burdensomeness must provide "specific estimates of staff hours needed to comply," *Flatow*, 196 F.R.D. at 207; failure to do so means that the claim will be "categorically rejected." *Id*. Here, the Director of the Advance Office states that the President is taking three trips abroad in June, July and August, and that the Advance Office has been busy preparing for those events. (Mot. to Quash at 14-15). But the motion to quash fails to provide a specific – or even a general – estimate of the staff hours needed to respond to the subpoena. *See Flatow*, 196 F.R.D. at 207

("bare assertions of a burden do not satisfy the specificity requirement of an undue burden objection."). The Advance Office says that the individuals most likely to have information about what happened in Albuquerque are members of the Advance Team who are not employees of the White House, and that the Office is therefore "beholden to the[ir] willingness and availability" in preparing a witness to testify. Mot. to Quash at 15 n.7. But the Office does not asset that these individuals are unwilling to assist or unavailable; indeed, the very fact that they are not White House employees suggests that they are not involved in the planning for the President's foreign travels. The Advance Office's apparent failure even to ascertain whether these individuals are willing and available to assist bespeaks a lack of good faith in responding to the subpoena.[3]

Second, plaintiffs' request is not overly broad. Unlike the discovery request in *Cheney,* which "ask[ed] for everything under the sky," 542 U.S. at 387, plaintiffs' subpoena is narrowly confined to a specific event – the August 27, 2007 protest – and to the policy that the Advance Office follows when preparing for such events and "complaints of First Amendment/free speech violations by individuals demonstrating along presidential motorcade routes." Each of these topics is directly related to how the Advance Office treats protesters, and they all lie comfortably within the broad definition of relevance for discovery.[4] As the *Cheney* court noted, "[t]he very

[3] In any event, the President's five-nation European trip has now ended. *See* http://www.whitehouse.gov/infocus/europe/2008/index.html ("The President and Mrs. Bush will travel to Europe from June 9 to June 16, 2008"); the Advance Office now can comply with its discovery obligations, even if it failed to do so earlier.

[4] Plaintiffs' counsel has offered to discuss limiting plaintiffs' requests to the extent the Advance Office feels they are too broad, but the Office has not shown interest in such discussions. Should the Court decide that the scope of category 6 is overbroad, it should modify that item, not quash the entire subpoena. *See Linder v. Nat'l Sec. Agency*, 94 F.3d 693, 698 (D.C. Cir. 1996) ("a modification of a subpoena is generally preferred to outright quashing"). Additionally, plaintiffs would consent to any reasonable extension of time that does not conflict with the New Mexico district court's scheduling order.

This Court should also be aware that there is a conference scheduled in New Mexico on June 20, 2008, and the plaintiffs intend to advise the New Mexico court of the pendency of this motion.

specificity of the subpoena requests serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Id*.

Third, the government's assertions of burden are unpersuasive in light of the fact that the plaintiffs in *Rank v. Hamm*, No. 04-cv-0997 (D. W. Va.) deposed six individuals from the Advance Office, without objection. In *Rank*, plaintiffs deposed Michael Heath, a full-time Advance Office employee, three senior volunteers for the event, and two more junior volunteers. Plaintiffs are asking for far less in this case – just one deposition of one designated representative of the Office. It seems unlikely that this would be so burdensome as to prevent the Advance Office from performing its other obligations. Could the Office not meet its obligations if the employee who would be the designated deponent called in sick for a day or two?[5]

Fourth, the Secret Service has agreed to comply with an almost identical discovery request without objection. *See* Exhibit L. The Secret Service provides security for the President, and is presumably just as busy meeting its important obligations – including planning for the President's trips abroad – as the Advance Office. Nonetheless, the Secret Service had no objections to the scope, timeliness, or burdensomeness of Plaintiffs' subpoena.

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[5] As already noted, the subpoena does not demand the presence of a senior Executive branch official who advises the President on matters of policy. While the motion to quash refers constantly to the "White House," the fact is that the Executive Office of the President is not the intimate operation that it was when it was created in 1939 in response to the Brownlow Committee's famous plea that "The President needs help." Joel Achenbach, *What Does a President Really Do All Day*, The Washington Post, April 27, 2008, at B-1. The EOP is now a bureaucracy of about 3,000 staffers, most working outside the White House. *Id.; see also* Library of Congress, Congressional Research Service: THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW (updated March 17, 2008), available at http://www.fas.org/sgp/crs/misc/98-606.pdf . The EOP includes such diverse agencies as the Council on Environmental Quality, the Office of National Drug Control Policy, and the Gulf Coast Recovery and Rebuilding Council. Library of Congress, *supra*, at 3-4. Exempting all of these agencies from relevant discovery is not what the Supreme Court had in mind when deciding the *Cheney* case.

In sum, plaintiffs' discovery requests are narrow and specific, and do not place an undue burden upon the Advance Office. Moreover, the Advance Office has failed to provide a proper accounting of the alleged burden its compliance would require.

CONCLUSION

For these reasons, the motion to quash should be denied.

Respectfully submitted,

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