United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

January 05, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-30697 In re: Vivek Murthy
USDC No. 3:22-CV-1213

Enclosed is an order entered in this case.

Attached is a revised case caption to be used on all future filings in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Allison G. Lopez, Deputy Clerk
504-310-7702

Mr. Charles F. Capps
Mr. Tony R. Moore
Ms. Elizabeth Baker Murrill
Mr. Dean John Sauer
Mr. Michael Everett Talent
Mr. Daniel Bentele Hahs Tenny
Mr. John Julian Vecchione
Mr. Daniel Winik

No. 22-30697

In re Vivek H. Murthy; Jen Easterly; Rob Flaherty; United States of America,

Petitioners

United States Court of Appeals for the Fifth Circuit

No. 22-30697

IN RE VIVEK H. MURTHY; JEN EASTERLY; ROB FLAHERTY,

Petitioners.

Petition for a Writ of Mandamus
to the United States District Court
for the Western District of Louisiana
USDC No. 3:22-CV-1213

UNPUBLISHED ORDER

Before CLEMENT, SOUTHWICK, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

On November 21, 2022, we entered an order on the federal government's petition for a writ of mandamus. We left the petition pending in this court and stayed the depositions of three federal officials until the district court made further findings. The district court then made findings that caused the parties to pursue other alternatives to these depositions.

The federal government now seeks to supplement its earlier mandamus petition and have us vacate an order by the district court authorizing the deposition of a fourth person, former White House Press Secretary Jennifer R. Psaki. We STAY Psaki's deposition pending the use of other alternatives, leaving the supplemental petition pending. We explain.

Our previous order summarized the facts of this case in some detail. We provide a shorter summary here.

In May 2022, the States of Missouri and Louisiana, along with five individuals, sued various federal officials and departments in federal district court in Louisiana. The suit alleges the defendants are infringing the First Amendment by coercing social media platforms to censor speech.

In June 2022, the plaintiffs moved for a preliminary injunction and for expedited discovery for the injunctive relief. The district court granted expedited discovery. As relevant here, that discovery included interrogatory responses from the White House Office of the Press Secretary.

In October 2022, the plaintiffs requested the deposition of ten federal officials, including former White House Press Secretary Psaki.[1] On October 21, 2022, the district court authorized the deposition of Jennifer R. Psaki and seven other officials.

The federal government then petitioned this court for a writ of mandamus to vacate the order insofar as it required the depositions of three officials: Rob Flaherty, Vivek Murthy, and Jen Easterly. We concluded the district court needed first to consider whether the relevant information could be obtained through less intrusive means. We also stated that the district court should address in an order whether the federal government's motion to dismiss should be ruled on before any depositions were required. We stayed all three depositions.

Because Psaki is no longer in government service, the federal government challenged her deposition through the procedures provided in

[1] Psaki was originally named as a defendant in this case until her resignation, when current White House Press Secretary Karine Jean-Pierre was substituted.

Federal Rule of Civil Procedure 45. The plaintiffs served Psaki with a Rule 45 subpoena in the United States District Court, Eastern District of Virginia, and the federal government moved in that court to quash the subpoena. The Virginia court transferred the motion to the district court in Louisiana where this case was originally filed.

In light of our earlier order regarding other depositions, the district court in Louisiana recognized it should "evaluate the need for Psaki's deposition in the same manner as the depositions of Murthy, Easterly, and Flaherty." On December 7, 2022, after receiving additional briefing, the district court again authorized the deposition of Psaki. The federal government now seeks to vacate the district court's October 7 and December 22 orders to the extent they allow Psaki's deposition.

As we explained in our previous order, a party seeking the deposition of a high-ranking executive official must show that "extraordinary circumstances" exist. *In re F.D.I.C.*, 58 F.3d 1055, 1060 (5th Cir. 1995). We agree with other circuits that such a showing is equally applicable to former officials, lest they be ensnared in unnecessary discovery upon leaving office. *In re U.S. Dep't of Educ.*, 25 F.4th 692, 705 (9th Cir. 2022); *In re United States*, 542 F. App'x 944, 949 (Fed. Cir. 2013). The district court found, and the plaintiffs do not dispute, that Psaki is high-ranking. Indeed, as a former Assistant to the President, Psaki was one of those in the most senior rank in the White House other than Chief of Staff.

In evaluating whether deposition testimony can be compelled from someone at the apex of government, courts must consider: (1) the deponent's high-ranking status; (2) the substantive reasons for the deposition; and (3) the potential burden the deposition would impose on the deponent. *In re F.D.I.C.*, 58 F.3d at 1060. A "key aspect" of this analysis is whether the information sought can be obtained through other means. *In re Paxton*, 53

F.4th 303, 309 (5th Cir. 2022) (quotation marks and citation omitted). "A district court commits a clear abuse of discretion when it compels apex testimony absent extraordinary circumstances." *Id.* at 309 (quotation marks and citation omitted).

Here, the district court found that the defendants had not provided any "reasonable alternative to" Psaki's deposition and had "disavowed any knowledge of Psaki's information." Our review, though, reveals a clear alternative that both parties actually had accepted. Each stated in district court that Psaki's deposition was unnecessary at this time. The defendants proposed that they amend interrogatory responses after consulting with Psaki, while the plaintiffs requested both amended interrogatories and the designation of lower-level officials with relevant knowledge.

In authorizing Psaki's deposition, the district court did not discuss the parties' alternatives. As we stressed in our previous order, depositions of high-ranking officials are disfavored when there are "less intrusive, alternative means" of obtaining relevant information. Where there are alternatives, testimony is justified only in the "rarest of cases." *In re F.D.I.C.*, 58 F.3d at 1062. We certainly do not find such rarity where all parties agreed that testimony was not needed.[2]

We also disagree with the district court's appraisal of the "substantive reasons" for taking Psaki's deposition. *See In re F.D.I.C.*, 58 F.3d at 1060. The district court supported its orders by referring to a "series of public

[2] It may well be that the information the plaintiffs seek can be more expeditiously obtained through a deposition. The doctrine protecting high-ranking officials, however, is not altered by its inconvenience. Indeed, the doctrine assumes its application often will be more cumbersome for the party seeking discovery. Because only "extraordinary circumstances" can justify deposing such officials, slower — but less intrusive — means may be required. *See In re F.D.I.C.*, 58 F.3d at 1060 (citation omitted).

statements" Psaki had made regarding social media content moderation. The plaintiffs argue that a deposition is required in order to, among other things, illuminate the meaning of these statements. Much of this desired illumination, though, is apparent from the record. For example, the plaintiffs assert they need additional information regarding "asks," *i.e.*, requests for action the federal government made to social media platforms. The broad content of those "asks," though, is available from Psaki's public statements.[3] In a similar vein, the plaintiffs say they need to uncover the identities of government officials and social media platforms mentioned in Psaki's statements. The record is already replete with such information. For example, the record identifies White House officials Rob Flaherty, Andrew Slavitt, and several others by name, as being among those in contact with social media platforms. The record also identifies several technology platforms to whom "asks" were directed — Twitter, Facebook, YouTube, and Google.

Further, we recently rejected subjecting certain high-ranking state-government officials to depositions because of generalized "public statements about a matter that later became the subject the litigation." *In re Paxton*, 53 F.4th at 309. The *Paxton* court rejected the district court's finding that Paxton had "unique, first-hand knowledge" because of a series of public statements. *Id.* We held that making "unexceptional" public statements cannot supply the basis for compelled testimony without rendering the "exceptional circumstances test" a hollow doctrine. *Id.*

[3] During a July 15, 2021, press conference, Psaki stated that the administration "engage[s] with [social media platforms] regularly and they certainly understand what our asks are." Directly prior to that statement, Psaki explained that there are "proposed changes that we have made to social media platforms" and then proceeded to outline, in detail, the content of the proposed "asks."

So too here. As Press Secretary, Psaki's role was to inform the media of the administration's priorities, not to develop or execute policy. Unsurprisingly, then, the record does not demonstrate that Psaki has *unique* first-hand knowledge that would justify the extraordinary measure of deposing a high-ranking executive official. *See id.* We offer one example. The plaintiffs and district court rely, in part, on Psaki's public statements that the President supports "a robust anti-trust program." The plaintiffs assert they need to probe the meaning behind the statement. To the contrary, this is the sort of "unexceptional," generalized statement that cannot establish the existence of "extraordinary circumstances." *Id.*

We now address a few secondary matters. First, the plaintiffs contend the defendants were required to move in the district court to certify an interlocutory appeal of the denial of the motion to quash, before seeking mandamus relief. *See* 28 U.S.C. 1292(b). There are few absolute procedural prerequisites for mandamus. The key is that mandamus relief is available "only 'to remedy a clear usurpation of power or abuse of discretion' when 'no other adequate means of obtaining relief is available.'" *In re F.D.I.C.*, 58 F.3d at 1060 (quoting *In re Fibreboard Corp.*, 893 F.2d 706, 707 (5th Cir. 1990)). Given the imminence of Psaki's deposition, and the fact we already had stayed other depositions sought by the same parties that raise the same issues in this same case, other relief such as pursuing an interlocutory appeal from the denial of the motion to quash was an inadequate means to obtain relief.

Second, the plaintiffs argue that the three officers named in the federal government's first mandamus petition lack standing to object to Psaki's deposition. Regardless of whether that is so, a point we need not address, we order that the United States be added to the caption of this case as a petitioner.

Finally, the plaintiffs argue that the defendants have lost the right to assert alternatives to deposing Psaki. The federal government, plaintiffs say, refused to consult with Psaki on previous occasions and should not be allowed to do so now. Our reaction to that argument is that the usual incidents of litigation lead parties to alter their approaches over time. Here, it was in response to our previous order that the federal government offered to consult Psaki. Indeed, the plaintiffs also had a conversion experience and accepted that a deposition was not necessary at this time. Now, in response to the new mandamus petition, the plaintiffs again changed course and argue that a deposition is necessary. We conclude that the federal government has not waived or forfeited its argument.

A writ of mandamus is always discretionary. *In re Paxton*, 53 F.4th at 310. The allegations that the plaintiffs make against the federal government are, no doubt, serious. They warrant careful consideration. We remain, though, at an early station in litigation. This action was brought over six months ago. An initial motion to dismiss was filed, and another revised to reflect the amended complaint is pending. In the meantime, the district court has authorized extensive discovery, even while acknowledging that "expedited discovery" should be "narrowly tailored." The federal government has produced thousands of pages of written discovery, and four depositions have already taken place.

The central concern of this court is that absent "extraordinary circumstances," depositions of high government officials should not proceed. That rule is a constant across the decades regardless of who the officials are. The circumstances have not yet been shown as extraordinary in light of the possibility of alternatives.

IT IS ORDERED that the federal government's motion for leave to supplement its petition for writ of mandamus is GRANTED.

IT IS ORDERED that the United States be added as a petitioner in this matter.

IT IS FURTHER ORDERED that Jennifer R. Psaki's deposition is stayed pending the pursuit of less intrusive alternatives to a deposition and further order of the district court.

The petition for a writ of mandamus remains pending in this court.