

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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JOHN DOE; AMERICAN CIVIL LIBERTIES	)	
UNION; AMERICAN CIVIL LIBERTIES	)	
UNION FOUNDATION,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	No. 05-4896
	)	
ALBERTO GONZALES, in his official capacity	)	(No. 3:05cv1256 JCH)
as Attorney General of the United States;	)	(D. Conn.)
ROBERT MUELLER, in his official capacity as	)	
Director of the Federal Bureau of Investigation;	)	
JOHN ROE, Federal Bureau of Investigation,	)	
in his official capacity,	)	
	)	
Defendants-Appellants.	)	
	)	
	)	

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REPLY IN SUPPORT OF  
EMERGENCY MOTION FOR STAY PENDING EXPEDITED APPEAL

The memorandum in support of the government’s stay motion explains why the district court’s injunction should be stayed pending appeal. The plaintiffs’ opposition to the government’s stay motion does not require, and time does not permit, an extended response. However, two basic points bear emphasis.

First, the government is appealing from a decision that enjoins the enforcement of an Act of Congress. “[A]ny time a [government] is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” New Motor Vehicle Board v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in Chambers). Moreover, “all Acts of Congress \* \* \* bear[] a heavy presumption of constitutionality,” Biller v. U.S. Merit Systems

Protection Board, 863 F.2d 1079, 1085 (2d Cir. 1988), and “[t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants [for stays] in balancing hardships.” Walters v. National Association of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in Chambers) (granting stay of district court injunction against enforcement of federal statute). Thus, the fact that the decision below purports to enjoin an Act of Congress is itself a weighty consideration in favor of staying the injunction pending appeal.

Second, unless this Court extends the district court’s temporary stay for the pendency of the appeal, the appeal itself will become moot and the government’s right to obtain appellate review will be forfeited. In Providence Journal Co. v. Federal Bureau of Investigation, 595 F.2d 889 (1<sup>st</sup> Cir. 1979), a district court ordered the disclosure of certain FBI documents, then – like the district court here – entered a temporary stay. In granting a full stay pending appeal, the First Circuit explained:

[T]he Constitution and laws entitle litigants to have their cases independently reviewed by an appellate tribunal. Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable. Appellants’ right of appeal here will become moot unless the stay is continued pending determination of the appeals. Once the documents are surrendered pursuant to the lower court’s order, confidentiality will be lost for all time. The status quo could never be restored.

595 F.2d at 890. The same consideration applies with equal force here. To deny a stay would be not only to allow an Act of Congress to be enjoined, but also to prevent any appellate review of the decision that imposes that extraordinary restraint. Nothing in the plaintiffs’ opposition even arguably supports such a result.

CONCLUSION


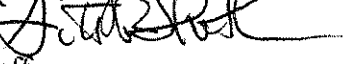
For the foregoing reasons and those previously given, the district court's preliminary injunction should be stayed pending expedited appeal, and a temporary stay should be entered if necessary to preserve the status quo while the Court considers the underlying stay request.

Respectfully submitted,

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September 19, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2005, I filed and served the foregoing REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING EXPEDITED APPEAL, by causing the document to be sent by fax and Fedex to the Clerk of the Court and by causing one copy to be sent by electronic mail and Fedex to:

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