

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIETNAM VETERANS OF AMERICA, et al.,)	
)	
Plaintiffs-Appellants,)	Nos. 13-17430,
)	14-15108
v.)	
)	
CENTRAL INTELLIGENCE AGENCY, et al.,)	
)	
Defendants-Appellees.)	

**MOTION FOR A 21-DAY EXTENSION OF TIME
IN WHICH TO FILE REHEARING PETITION**

Pursuant to Fed. R. App. P. 27 and Ninth Cir. R. 27, defendants-appellees, the Department of the Army, *et al.*, respectfully move for an extension of twenty-one (21) days, to and including September 4, 2015, in which to file a petition for rehearing and/or rehearing *en banc*. The reasons for this motion are as follows.

1. On June 30, 2015, this Court issued a divided decision affirming the judgment of the district court in part and reversing in part. Pursuant to Fed. R. App. P. 40(a)(1), a petition for rehearing and/or rehearing *en banc* would currently be due on August 14, 2015.

2. The lengthy, published decision by the panel majority in this case, which prompted a partially dissenting opinion from Judge Wallace, raises numerous, important issues that may well warrant further review. Among other things, the

decision raises significant questions concerning the level of clarity and specificity required in order for a regulation to create a specific, mandatory directive enforceable under 5 U.S.C. § 706(1) and *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). The decision also raises the question whether district courts retain discretion not to issue injunctive relief after finding agency action unreasonably delayed or unlawfully withheld, as both this Court and the D.C. Circuit have held, *see Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1176-77 (9th Cir. 2002); *In re Barr Labs.*, 930 F.2d 72, 75 (D.C. Cir. 1991), or whether district courts are instead required to issue injunctive relief in such circumstances, as the panel as now held, *see Op. 28*, following *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999). Because the panel's decision has serious practical consequences for the Army's operations, and raises important issues concerning the proper boundaries of judicial authority to compel agency action based on ambiguous regulations, further review may well be warranted.

3. The Solicitor General of the United States must approve the filing of all petitions for rehearing *en banc* filed by the Department of Justice. *See* 28 C.F.R. § 0.20(b). The determination as to whether such a petition should be filed requires extensive consultation among the Department of the Army, the Department of Veterans Affairs, and various components within the Justice Department. Given the complexity and importance of the issues in this case, and the unavailability of

key officials who are on previously-scheduled leave during the summer months, additional time is required for the Solicitor General's Office to make a determination whether to authorize the filing of a petition for rehearing *en banc*.

4. In addition, the requested extension is necessary to ensure adequate time for the preparation of any rehearing petition authorized in light of previously-scheduled vacations and other appellate deadlines faced by the primary government counsel in this case.

Primary responsibility for handling this appeal and preparing all documents filed on behalf of the government is assigned to Charles Scarborough. In addition to non-litigation duties during this time, Mr. Scarborough is primarily responsible for preparing the government's brief in opposition to the petition for certiorari in *Triple Canopy v. United States ex rel. Omar Badr*, No. 14-1440 (S. Ct), a False Claims Act case involving questions of first impression in the Fourth Circuit, which is currently due (on extension) on August 7, 2015. Moreover, Mr. Scarborough will also be out of the office on previously-scheduled leave from Saturday, August 1 until Monday, August 10, 2015.

During the same period, Mark Stern, who is responsible for reviewing all documents filed on behalf of the government in this case, also has supervisory responsibility for appellate briefs in the following cases: *Hill v. SEC*, No. 15-12831 (11th Cir.), opening brief due August 4; *Tilton v. SEC*, No. 15-2103 (2d Cir.),

responsive brief due August 7; *Melinda Armstrong v. USA*, No. 15-35094 (9th Cir.), opening brief due August 10; *United States v. Joseph Zadeh*, No. 15-10195, 15-10202 (5th Cir.), appellee brief due August 10; *Association of Am. Railroads v. U.S. Dep't of Transp.*, No. 12-5204 (D.C. Cir.), appellee brief due August 13; *Compassion over Killing, et al. v. FDA*, No. 15-15107 (9th Cir.), appellee brief due August 17. Moreover, Mr. Stern will also be out of the office on previously-scheduled leave from Tuesday, August 4 until Tuesday, August 25, 2015.

5. Counsel for plaintiffs-appellants, Eugene Illovsky, has stated that plaintiffs-appellants do not consent to this motion but do not plan to oppose it.

CONCLUSION

For the foregoing reasons, the Court should grant this motion and extend the time for filing a petition for rehearing and/or petition for rehearing *en banc* until September 4, 2015.

Respectfully submitted, _

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JULY 2015

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2015, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Counsel for plaintiffs-appellants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Charles W. Scarborough
CHARLES W. SCARBOROUGH