SUPREME COURT OF THE UNITED STATES

ROBERT RUBIN, SECRETARY OF THE TREASURY, ET AL., *v.* UNITED STATES OF AMERICA ACTING THROUGH THE INDEPENDENT COUNSEL

ON APPLICATION FOR STAY

No. A–53 (98–93). Decided July 17, 1998

CHIEF JUSTICE REHNQUIST, Circuit Justice.

This case is before me as Circuit Justice on the application for stay submitted by the Solicitor General, on behalf of the Secretary of the Treasury Robert E. Rubin. Because several of my colleagues are out of the country, I have decided to rule on the matter myself rather than refer it to the Conference.

An applicant for stay first must show irreparable harm if a stay is denied. In my view, the applicant has not demonstrated that denying a stay and enforcing the subpoenas pending a decision on certiorari would cause irreparable harm. The Secretary identifies two injuries that would result from denying a stay: any privileged information would be lost forever and the important interests that the "protective function privilege" protects would be destroyed. I cannot say that any harm caused by the interim enforcement of the subpoenas will be irreparable. If the Secretary's claim of privilege is eventually upheld, disclosure of past events will not affect the President's relationship with his protectors in the future. On balance, the equities do not favor granting a stay.

An applicant for stay must also show that there is a likelihood that four members of this Court will grant certiorari to review the decision of the Court of Appeals on

the merits. This case is obviously not a run-of-the-mine dispute, pitting as it does the prosecution's need for testimony before a grand jury against claims involving the safety and protection of the President of the United States. I shall assume, without deciding, that four members of this Court on that basis would grant certiorari.

But a stay applicant must also show that there is a likelihood that this Court, having granted certiorari and heard the case, would reverse the judgment of the Court of Appeals. The applicant simply has not made that showing to my satisfaction, and I believe my view would be shared by a majority of my colleagues. The opinion of the Court of Appeals seems to me cogent and correct. The District Court which considered the matter was also of that view, and none of the nine judges of the Court of Appeals even requested a vote on the applicant's suggestion for rehearing *en banc*.

The application for stay is accordingly denied.