IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Steven J. HATFILL, M.D., *Plaintiff* v. Attorney General John ASHCROFT, Timothy BERES, Daryl DARNELL, Van HARP, the DEPARTMENT OF JUSTICE, the FEDERAL BUREAU OF INVESTIGATION, *et alia,* *Defendants*	)	Civil No. 1:03-CV-01793 (RBW)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE AGENCY DEFENDANTS' MOTION FOR A STAY OF PROCEEDINGS

Thomas G. Connolly, D.C. Bar # 420416
Mark A. Grannis, D.C. Bar # 429268
Eric O. Bravin, D.C. Bar # 214741
Harris, Wiltshire & Grannis, LLP
1200 18th Street, NW
Washington, DC 20036
Counsel for Plaintiff

December 2, 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

* Case on which Plaintiff principally relies.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Steven J. HATFILL, M.D., *Plaintiff*	)	
	)	Civil No. 1:03-CV-01793 (RBW)
v.	)	
Attorney General John ASHCROFT, Timothy BERES, Daryl DARNELL, Van HARP, the DEPARTMENT OF JUSTICE, the FEDERAL BUREAU OF INVESTIGATION, *et alia,* *Defendants*	)	

Memorandum of Points and Authorities in OPPOSITION to the
AGENCY DEFENDANTS' MOTION FOR A STAY OF PROCEEDINGS

Plaintiff Steven J. Hatfill, M.D. hereby opposes the Agency Defendants' Motion for a Stay of Proceedings. In their Memorandum of Points and Authorities in Support of their motion (hereafter, the "Government Memorandum" or "Gov. Mem."), the Agency Defendants fail to engage in the detailed, fact-specific analysis which the D.C. Circuit's decisions call for in guiding the Court's discretion. In particular, the Agency Defendants fail to address the clear prejudice that their requested stay would cause to Dr. Hatfill; they fail to acknowledge the significant public interest in the enforcement of the Privacy Act; and they invent improbable discovery requests to support implausible and conclusory suggestions about how the already-too-public investigation could be harmed in the absence of a stay. For these reasons, the interests of justice require that the motion be DENIED.

This Memorandum of Points and Authorities in Opposition begins with a brief Introductory Statement, devoted to two overarching realities that frame the arguments in this

case and highlight what is at stake: first, the particularly heinous nature of the anthrax murders and the climate of fear they created; and second, the monumental irony that inheres in the government's claim that *the government's own leaks* cannot be probed by the man they injured because of the government's new-found concern about the secrecy of the Amerithrax investigation. These two realities do not fit neatly into any textbook legal framework, but they must be discussed explicitly in order to place the stay request in its proper perspective.

The Legal Argument is then divided into three parts. Part I sets forth the law applicable to the Agency Defendants' stay motion – a subject that will have to receive somewhat more care than would otherwise be necessary because of the unfortunate ways in which the Government Memorandum obscured or misstated the applicable law. Part II then proceeds to set forth the law that applies to Dr. Hatfill's claim under the Privacy Act, which appears in Count III of the complaint. Because that is the *one and only* count as to which a stay is being sought, it is critical to understand how the largely backward-looking perspective of Count III contrasts with the Agency Defendants' overwrought and entirely speculative claims about how discovery on the Privacy Act violations is likely to affect the Amerithrax investigation going forward. Part III of the Legal Argument then applies the law to the circumstances of this case, making clear that the normal safeguards of the discovery process are more than adequate to protect the Agency Defendants' legitimate interests in this case, and that the Court should therefore deny the stay motion.

INTRODUCTORY STATEMENT

Before we turn to the law and the facts of this case, there are two major issues that provide the inescapable context for the instant stay request and any further attempts at delay that the defendants may interpose. The first is the terror that the anthrax mailings struck into

American hearts in the fall of 2001 – hearts that were almost universally full of shock, fear, mourning, anger, pride, or some indescribable combination of these after the attacks of September 11. The government's moving papers and the accompanying affidavit give the clear impression that the Agency Defendants hope and believe that the horror of that episode will induce this Court to subordinate all other public policies to protect the government's ability to secure a conviction against the perpetrator(s). Dr. Hatfill and his counsel fully understand the gravity of the crimes that were committed, and will in no way try to minimize the public interest in solving the anthrax murders and convicting the barbarian(s) who committed them.

At the same time, however, the Court and the defendants must understand that, *precisely because the anthrax mailings were so horrific,* the defendants' conduct in leaking Dr. Hatfill's name to the press and identifying him publicly as a "person of interest" is a matter of much, much graver concern than it would be in a "run of the mill" case under the Privacy Act. This is not a case in which government officials leaked unflattering information about a citizen's employment record, or embarrassing anecdotes from her adolescence. This is a case in which employees of the Agency Defendants used the press to suggest to the world that Dr. Steven Hatfill – formerly a doctor, scientist, and patriot to those who knew him – was instead a mass murderer, the arch villain in a nationwide drama covered by every major news outlet.

Having falsely but successfully implicated Dr. Hatfill in one of the most notorious crimes of a generation, the defendants must understand that Steven Hatfill has been injured infinitely more by the defendants' whispering campaign than any other Privacy Act plaintiff ever. Whatever extra measure of depravity was required to carry out the anthrax murders has in fact been attributed to Dr. Hatfill, by the named and unnamed defendants, via CNN, ABC, CBS, NBC, *The New York Times*, *The Washington Post*, and so on. The notion that redress for so

grievous an injury should take a back seat to some other public policy is inherently suspect; surely a stay in such a case requires a much stronger justification than would be necessary in, for example, a government bid protest. It cannot be enough simply to point to the fact of an ongoing criminal investigation and speculate wildly about things that *might* be requested during discovery when no such request is pending. As we shall demonstrate below, Dr. Hatfill has no reason to make the outlandish requests the Agency Defendants imagine for him, nor have such requests ever been contemplated.

The second major issue is the monumental irony behind the government's newfound concern for the secrecy and integrity of the Amerithrax investigation. No one on Earth regrets the illegal leaks about the Amerithrax investigation more than Steven Hatfill. As noted in the complaint, the June 25, 2002 *consensual* search of Dr. Hatfill's apartment was broadcast live to a national television audience just minutes after Dr. Hatfill gave his consent. It was the defendants, rather than Dr. Hatfill, who chose to rend the cloak of secrecy that day. When the August 1, 2002 search of Dr. Hatfill's apartment was *again* broadcast live to the nation, it was again the defendants, rather than Dr. Hatfill, who chose to invite television cameras. Time and again since those searches were conducted, it has been the defendants, rather than Dr. Hatfill, who have elected to reveal the fruits of the searches,[1] as well as plans for future searches[2] and

[1] *See, e.g.*, Don Foster, *The Message in the Anthrax*, Vanity Fair, Oct. 2003, at 180, 199 ("Searching [Dr. Hatfill's] refrigerator, agents found a canister of *Bacillus thuringiensis*, or B.t. – a mostly harmless pesticide widely used on caterpillars . . . ."); Mark Miller & Daniel Klaidman, *The Hunt for the Anthrax Killer*, Newsweek, Aug. 12, 2002, at 22, 25 ("The searches came up empty. There was one intriguing, but inconclusive, find. On Hatfill's computer hard drive, agents discovered the draft of a novel. The thriller's plot centered on a bioterror attack, and how the perpetrator covered his tracks. But the fictional musings of a scientist were hardly evidence, and the investigation stalled.").

[2] *See, e.g.*, Marilyn W. Thompson, *New Find Reignites Anthrax Probe; Evidence From Pond May Indicate Killer's Method*, Wash. Post, May 11, 2003, at A1 ("[S]ources close to the case

other investigative information.[3] On August 6, when defendant Ashcroft decided to appear on not one but two network television news programs, it was Mr. Ashcroft rather than Dr. Hatfill who decided to speak publicly about the investigators' interest in Dr. Hatfill. Now, however – now that they have been called to answer for their illegal actions – the defendants suddenly express grave concern for the secrecy and integrity of the investigation they themselves turned into one of the premier media circuses of 2002-2003. Apparently tired of leaking to the likes of ABC News' Brian Ross,[4] and apparently remorseless over their destruction of Dr. Hatfill's life,

---

said the discoveries were so compelling that the FBI now plans to drain one of the ponds in another search for sunken evidence. . . . Additional agents have been assigned to the case, code-named Amerithrax."); Marilyn W. Thompson, *Md. Pond Drained for Clues in Anthrax Probe; FBI's 'Forensic Searches' Seek Clothing and Equipment*, Wash. Post, June 10, 2003, at A1 ("Now [investigators] are seeking equipment and clothing that might have been used to work with the anthrax bacteria . . . . They also plan to sift through sediment at the bottom of the pond to test for any trace of the lethal pathogen.").

[3] *See, e.g.*, Miller & Klaidman, *supra* note 1, at 22 (Bloodhounds brought to Dr. Hatfill's apartment "'went crazy,' says one law-enforcement source."); Marilyn W. Thompson, *Md. Pond Drained for Clues in Anthrax Probe; FBI's 'Forensic Searches' Seek Clothing and Equipment*, Wash. Post, June 10, 2003, at A1 ("In diving expeditions last winter, the FBI recovered a plexiglass box with holes in it that some authorities believe could have served as a makeshift protective glove box, allowing someone to safely manipulate anthrax microbes. Some FBI investigators also theorize that the envelopes may have been prepared after the perpetrator waded into the water with the box, using it as a natural protection from any spores that might have escaped."); *id.* ("Agents also discovered vials and gloves wrapped in plastic. Tests for the presence of anthrax bacteria on the equipment are continuing, after two rounds of tests produced conflicting results."); *id.* ("The FBI has obtained documents under grand jury subpoena and interviewed hundreds of people to construct an elaborate day-by-day timeline of Hatfill's activities, the [FBI] sources said."); *id.* ("Law enforcement sources have described the results of [an early 2002 polygraph administered to Dr. Hatfill by the FBI] as inconclusive.").

[4] In an almost surreal episode from June 10, 2003, ABC's Charles Gibson ambushed a friend of Dr. Hatfill's on "Good Morning America," citing "the FBI" as the source of his information:

GIBSON: (Off Camera) . . .the FBI has been focused on your friend for well over a year. Why are you so convinced of his innocence?

Pat CLAWSON: Well, I have seen no evidence at all that Steve Hatfill's been involved in anthrax attacks. I've known my friend for many, many years. I believe completely that he is innocent of this. The Steven Hatfill I know is a very gentle individual. He's got a delightful sense of humor. And he's a healer, not a killer.

these defendants now claim that the need for secrecy about the Amerithrax investigation is *so great*, that Dr. Hatfill cannot be permitted to find out who leaked his name. The need for secrecy is *so great*, that the Agency Defendants cannot possibly be asked to stipulate that the leaks came from one or more of their employees. The need for secrecy is *so great*, that Dr. Hatfill should not even be permitted to ask the reporters whether they were reporting truthfully when they attributed the leaks to FBI and DoJ sources in dozens upon dozens of published news reports.

The defendants' change of heart on the need for a shroud of secrecy over the Amerithrax investigation is so sudden and so striking, that one cannot help but wonder if it is entirely genuine. Is it not possible that the defendants are simply showing more solicitude for their own reputations than they ever showed for Dr. Hatfill's? We urge the Court to keep that possibility

---

GIBSON: (Off Camera) Brian [Ross] just made the point that this is a very circumstantial case and there's not a shred of physical evidence. But, but he was seen near this pond that they are now draining. The blood hounds with his scent . . .
CLAWSON: Now, wait a minute, Charlie.
GIBSON: (Off Camera) Yeah?
CLAWSON: Who said that he was seen near this pond?
GIBSON: (Off Camera) Well, I . . .
CLAWSON: Who said that?
GIBSON: (Off Camera) **Brian has told me that the FBI has told him that [Dr. Hatfill] has been seen near that pond**.
CLAWSON: Well, that comes as great news to me, because Dr. Hatfill, it's my understanding that Dr. Hatfill doesn't ever remember being anywhere near that pond.
GIBSON: (Off Camera) Well, that . . .
CLAWSON: The only thing he remembers about being in any kind of wooded area was somewhere around the Frederick area years ago with some Boy Scouts, and he didn't think it was this area at all.
GIBSON: (Off Camera) . . .**that, that's according to the FBI, Patrick, at least as, as they told Brian. Then, the blood hounds with his scent led them to that pond. They . . .**
CLAWSON: Charlie, why is the FBI telling Brian Ross or any other reporter what they're finding in this investigation? That's just another example of the leaks of rumor and innuendo and gossip that the government has been putting out about Steve Hatfill over the last several months that have destroyed his life. This is wrong.

ABC News Transcripts, Good Morning America (June 10, 2003) (emphasis added).

squarely before it as it evaluates the credibility of the Agency Defendants' statements about the prejudice they will suffer if Dr. Hatfill's lawsuit is not stayed.

LEGAL ARGUMENT

I. To Invoke the Court's Discretionary Power to Issue a Stay or Protective Order, the Agency Defendants Bear the Burden of Showing that Justice So Requires.

The law governing the instant stay motion is less complicated than one might guess from the Agency Defendants' presentation. The U.S. Court of Appeals for the D.C. Circuit has written at least four important opinions on the topic, and the relevant legal principles have been applied to various factual scenarios by the District Court in well-reasoned opinions. In addition, the fundamental principle of law – that the decision to grant a stay or a protective order, or some more narrowly tailored relief, is committed to the sound discretion of the trial court – is easily stated and easily understood, even though it leads to a wide variety of possible outcomes when applied to different sets of facts. In Part I.A, we set forth the law of the D.C. Circuit regarding motions to stay civil proceedings during the pendency of parallel criminal proceedings. In Part I.B, we explain why our rendition of the controlling principles diverges from the Agency Defendants' version.

A. Parallel Criminal and Civil Proceedings in the D.C. Circuit.

"Of course the District Court has a broad discretion in granting or denying stays so as to 'coordinate the business of the court efficiently and sensibly.'" *McSurely v. McClellan,* 426 F.2d 664, 671 (D.C. Cir. 1970) (quoting *Landis v. North American Co.,* 299 U.S. 248, 255 (1936)). "Where related civil and criminal proceedings are pending at the same time, sound discretion of the court may require that the civil action not be blocked entirely but be subject to some limitation, including, *e.g.*, protective orders pertinent to discovery, to avoid essential unfairness

or other interference with the public interest." *Dellinger v. Mitchell,* 442 F.2d 782, 787 (D.C. Cir. 1971).

"However, the fact that the civil case is not stayed does not mean that discovery must proceed in the same way as ordinary civil litigation." *Gordon v. FDIC,* 427 F.2d 578, 580 (D.C. Cir. 1970). The Court is expected to consider less drastic alternatives as well. "[A] court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions 'when the interests of justice seem[] to require such action . . . .'" *SEC v. Dresser Industries,* 628 F.2d 1368, 1375 (D.C. Cir.) (*en banc*), *cert. denied,* 449 U.S. 993 (1980) (citing *United States v. Kordel,* 397 U.S. 1, 12 n.27 (1970)). Thus, in *Gordon,* in which the FDIC was suing for recovery of certain financial obligations from a defendant who was simultaneously being prosecuted in another federal court, the Court of Appeals for the D.C. Circuit upheld the trial court's refusal to grant a second three-month stay, but vacated and remanded the trial court's denial of a motion to strike a request for admission. 427 F.2d at 579-80, 581. One court granted a protective order staying all discovery only after finding there was "no principled way of narrowing the range of discovery so as not to compromise the criminal proceedings." *Capital Engineering & Mfg. Co. v. Weinberger,* 695 F. Supp. 36, 42 (D.D.C. 1988) (plaintiff, a suspended government contractor, could not proceed with discovery in his declaratory relief action against the Army without interfering with an ongoing criminal investigation of the very same contract that led to the suspension).

Although the Court has discretion to impose a stay or to limit discovery, such orders are not automatic. Rather, the Court must exercise its discretion "in the light of the particular circumstances of the case." *Dresser Industries,* 628 F.2d at 1375. There must exist "'special circumstances' in which the nature of the proceedings demonstrably prejudices substantial rights

of the investigated party or of the government." *Dresser Industries*, 628 F.2d at 1377 (*quoting Kordel*, 397 U.S. at 12). In *Dresser Industries*, the issue was whether a civil defendant in an SEC enforcement action could be compelled to comply with an SEC subpoena while the Department of Justice was conducting a grand jury investigation into the same questionable foreign payments. The court held that the defendant was not entitled to have the civil subpoena quashed just because the fruits of civil discovery might be used in a later criminal prosecution.

The highly fact-specific nature of the inquiry has not, of course, prevented courts from occasionally generalizing about the sorts of facts that favor one result versus another. Thus, the D.C. Circuit has stated that "the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter." *Dresser Industries*, 628 F.2d 1375-76. The case for a stay is "far weaker" when "[n]o indictment has been returned [and] no Fifth Amendment privilege is threatened." *Dresser Industries*, 628 F.2d at 1376.

The importance of the rights at stake in the civil action has also been found relevant:

> Any protracted halting or limitation of plaintiffs' right to maintain their case would require not only a showing of "need" in terms of protecting the other litigation involved but would also require a balanced finding that such need overrides the injury to the parties being stayed. This consideration is of particular importance where the claim being stayed involves a not insubstantial claim of present and continuing infringement of constitutional rights.

Dellinger, 442 F.2d at 787. In *Dellinger*, for example, the civil plaintiffs were simultaneously defendants in the "Chicago Seven" trial, and their civil complaint alleged that they had been subjected to unlawful wiretaps. The trial court stayed the civil complaint until after all appeals in

the criminal proceeding; considering the importance of the rights at stake, the D.C. Circuit found this to be reversible error.

Finally, while the discretion of the trial court is extremely broad, it is not unlimited. Although we are unaware of any case in which the D.C Circuit has reversed a trial judge for refusing to enter a stay, the Court of Appeals has on several occasions reversed trial courts for abusing their discretion to enter stays that were too long or too broad; or for failing to consider the hardship to the civil plaintiff in staying his or her action. *Dellinger,* 442 F.2d at 787; *McSurely*, 426 F.2d at 671-72 (vacating a stay of all civil proceedings in a related case where "final resolution of the criminal cases, including the resolution of any appeals if the McSurelys are convicted, may require considerable time"). When the trial court abuses its discretion in the granting of a stay, the aggrieved party can apply for a writ of mandamus from the Court of Appeals. *Dellinger,* 442 F.2d at 788-90.

Earlier cases tended to identify the policies the court found persuasive in a given case without attempting to reduce them to any set formula. *See, e.g., Dellinger,* 442 F.2d at 786-88. More recently, Judge Harold H. Greene provided a framework within which to consider all the relevant facts that should inform the court's discretion: (1) the interests of the civil plaintiffs; (2) the public interest; (3) the interests of the civil defendants; (4) the interests of persons who are not parties; and (5) considerations of judicial economy. *Barry Farm Resident Council, Inc. v. United States Dep't of the Navy*, 1997 WL 118412 at *1 (D.D.C. 1997). In *Barry Farm Resident Council*, the civil plaintiffs were suing the Navy and the General Services Administration to compel compliance with the Clean Water Act. When the government defendants sought to delay the civil action in order to give them time to complete a criminal investigation involving the

same shipbuilding site, the court found that these factors weighed in favor of permitting the civil action to proceed.

Several years later, in *Horn v. District of Columbia,* 210 F.R.D. 13 (D.D.C. 2002), the court borrowed a three-part standard from the Court of Claims without reference to *Barry Farm Resident Council,* requiring that the moving party "(1) make a clear showing, by direct or indirect proof, that the issues in the civil action are 'related' as well as 'substantially similar' to the issues in the criminal investigation; (2) . . . make a clear showing of hardship or inequality if required to go forward with the civil case while the criminal investigation is pending; and (3) . . . establish that the duration of the requested stay is not immoderate or unreasonable." 210 F.R.D. at 15 (citing *St. Paul Fire and Marine Ins. Co. v. United States,* 24 Cl. Ct. 513, 515 (1991)). *Horn* used a somewhat different standard, but reached the same result, denying the U.S. Attorney's motion for delay and permitting the plaintiff's civil action against the D.C. police to proceed.

Each of these standards captures some part of the relevant authority that the other one misses. The *Horn* standard, for example, incorporates some substantive considerations that the more general *Barry Farm Resident Council* standard does not, such as the degree of overlap between the issues in the two proceedings and the importance of the duration of the stay. However, the *Horn* standard does not explicitly refer to any element of prejudice to the non-moving party, which is clearly relevant under the cases decided in this Circuit.[5] The *Barry Farm*

[5] *E.g., Dellinger,* 442 F.2d at 787 ("Any protracted halting or limitation of plaintiffs' right to maintain their case would require not only a showing of 'need' in terms of protecting the other litigation involved but would also require a balanced finding that such need overrides the injury to the parties being stayed."); *Dresser Industries,* 628 F.2d at 1377; *Capital Engineering & Mfg. Co. v. Weinberger,* 695 F. Supp. 36, 42 (D.D.C. 1988); *Founding Church of Scientology of Washington, D.C. v. Kelley,* 77 F.R.D. 378, 381 (D.D.C. 1977) ("balancing the plaintiff/movants'

Resident Council formulation appears to be both more comprehensive and more representative of the cases decided by the Court of Appeals for the D.C. Circuit, but either standard will suffice as long as it is applied consistently with the case law.

B. Problems with the Agency Defendants' Statement of the Law

This statement of the relevant legal principles departs in important ways from the version espoused by the Agency Defendants. There are four primary reasons for this divergence.

First, the Agency Defendants seem to have gone out of their way to find cases from outside the D.C. Circuit and to avoid citing controlling precedent from within the D.C. Circuit. The Agency Defendants cite only one of the four leading D.C. Circuit opinions cited above, and it is cited as part of a string cite for a thoroughly unremarkable proposition. *See* Gov. Mem. at 4. Nor do the defendants seem to be aware of the decision in *Barry Farm Resident Council,* which is factually quite similar to this case in that there is no guarantee, or even any reason to believe, that the "ongoing criminal investigation" will ever lead to a criminal proceeding that could be parallel with Dr. Hatfill's civil action. *See Barry Farm Resident Council,* 1997 WL 118412 at *4 n.2. *Barry Farm Resident Council* is also relevant in that it, too, involved a civil action to enforce laws that the government defendants refused to enforce.[6]

---

need for the information sought against the Government's need to prevent interference with a criminal investigation that may result from civil discovery").

[6] The Agency Defendants' heavy citation of cases from outside the Circuit does not appear to have anything to do with any factual resemblance between those cases and the instant one. Indeed, the Agency Defendants rarely make any reference to the underlying facts of the cases they cite, even when those facts seem to be of nearly dispositive significance. For example, the Agency Defendants cite *United States v. Hugo Key and Son, Inc.*, 672 F. Supp. 656 (D.R.I. 1987), for the proposition that "this court is compelled to acknowledge the greater weight of [the government's] interest in determining the priority of the criminal action." Gov. Mem. at 6 (alteration by the defendants). But they neglect to note that in *Hugo Key and Son* the government was the *plaintiff* in the civil action and was therefore presumptively in the best position to determine whether the criminal proceeding was important enough to postpone the government's own action for civil redress. *See Hugo Key and Son,* 672 F. Supp. at 658 (noting

Second, the Agency Defendants, despite their lip service to the Court's discretion, seem determined to confine that discretion as narrowly as possible, as if the granting of a stay were practically *mandatory* with the Court. Ambiguous words like "properly" and "commonly" are used to suggest not just that courts sometimes grant stays in certain situations, but that somehow it would be wrong or unusual if they did *not*. See, e.g., Gov. Mem. at 4 ("this authority [to stay] is properly exercised when a civil action threatens to interfere with a related criminal proceeding"); Gov. Mem. at 6 ("courts commonly stay civil proceedings related to a pending criminal investigation . . ."). The language seems calculated to imply that a stay is the only proper outcome. In fact, however, it is clear that courts "properly exercise" their authority over their calendars even when they decline to grant stays; and that courts also "commonly" refuse to issue such stays.[7] As we shall see in Part III, the key to this motion lies in a fact-intensive analysis of whether there is any actual conflict between Dr. Hatfill's present civil action and the

---

the "peculiar facts" of that case). The same important factual distinction applies to the civil forfeiture cases cited by the Agency Defendants, *e.g., United States v. Any and All Assets of That Certain Business Known as Shane Co.*, 147 F.R.D. 99 (M.D.N.C. 1993); and to *FDIC v. Chuang*, 1986 WL 3518 (S.D.N.Y. 1986), in which the FDIC sought civil redress from an individual who was also the subject of a criminal investigation. *See also Afro-Lecon, Inc. v. United States*, 820 F.2d 1198 (Fed. Cir. 1987) (stay requested by civil plaintiff). While stays are unquestionably available both to civil plaintiffs and civil defendants, whether public or private, the alignment of the parties is certainly relevant to the fact-intensive balancing of interests required by the case law.

[7] Similarly, it is at best misleading to state, "Courts have widely recognized that civil proceedings should be stayed where they substantially overlap with a pending criminal investigation," Gov. Mem. at 3, because this inaccurately suggests that a showing of overlap is sufficient to justify a stay. In fact, overlap is *necessary*, but the D.C. Circuit has expressly stated that it is *not* sufficient. On the contrary, "The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. *In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence*." *Dresser Industries*, 628 F.2d at 1374 (emphasis added).

hypothetical future criminal action with which the Agency Defendants are concerned. Word games shed no light on the subject.

Third, the Agency Defendants sometimes obfuscate the issue by quoting a *dictum* they like and then leaving off an immediately following statement that qualifies, explains, or expands. For example, the Agency Defendants frame their legal argument by quoting a forfeiture decision from North Carolina as follows: "'In order to show good cause to support a stay of civil discovery, the government must show that the two proceedings are related and substantially similar so that the same evidentiary material will likely be involved and that the government's case may be compromised.' *Shane Co.*, 147 F.R.D. at 101." Gov. Mem. at 8. That is fine as far as it goes, but it is not the end of what the *Shane* court had to say about the way stay motions are analyzed. The *Shane* court continued directly:

> When such a showing is made, the Court should *consider* granting a stay so long as it is *not indefinite in either scope or duration*. [Citation.] In determining the length and breadth of a stay, the Court may consider whether the party opposing the stay itself is ready and able to fully participate in the discovery process. [Citation.] If that party is not in a position to provide discovery, the Court may look more favorably upon staying all discovery in order to prevent overreaching by or unfairness to any one party. Notwithstanding, the Court must also *balance* any substantial harm to the claimant and his *interest in obtaining a prompt and fair resolution of the civil action* . . . against the government's interest in preserving the integrity of its criminal investigation and the narrow scope of criminal discovery. *United States v. Mellon Bank, N.A.*, 545 F.2d 869, 871-73 (3d Cir. 1976).

United States v. Any and All Assets of that Certain Business Known as Shane Co., 147 F.R.D. 99 at 101 (M.D.N.C. 1993) (emphasis added). The government's excerpt omits any reference to the interests of the plaintiff, and makes it appear as though the trial court is a stay machine for the government; they make their showing and they get their stay. The omitted portion makes clear

that a stay motion calls for the thoughtful and balanced consideration of a number of important factors – the same factors discussed in the D.C. Circuit cases the defendants avoid.

Fourth, the Agency Defendants appear to have made some other editorial decisions that seem difficult to defend. At one point, the Agency Defendants quote selectively from *Shane* as follows:

> "When a civil proceeding may interfere with a criminal investigation, it is not uncommon that the United States will seek to stay . . . the civil action in order to protect the criminal investigation." *United States v. Any and All Assets of that Certain Business Known as Shane Co.*, 147 F.R.D. 99, 101 (M.D.N.C. 1993) (noting further that such requests are 'presumptively reasonable').

Gov. Mem. at 5. Now here is the full quotation from *Shane,* with the words elliptically removed by the government restored in bold:

> When a civil proceeding may interfere with a criminal investigation, it is not uncommon that the United States will seek to stay **discovery in** the civil action in order to protect the criminal investigation. In such circumstances, the stay is often sought until an indictment is returned or until the conclusion of the criminal trial. Such requests are presumptively reasonable**,** nothing else appearing. [Citation.] *However, the defendant also has due process rights and the grant of a stay should not be indefinite.* [Citations.]

Shane Co., 147 F.R.D. at 101 (emphasis added). Here, the government has not only omitted language of limitation and balance, it has actually intentionally omitted two critical words, without which it appears as if the subject of the quotation were a stay of the entire action (as requested here) rather than a discovery order. *Compare also* Gov. Mem. at 5 (citing *Afro-Lecon, Inc. v. United States* for the proposition that "a *civil litigant* involved in a related criminal matter *is likely to face* 'an irresistible temptation to use [civil] discovery to [his] advantage in the criminal case'" (emphasis added; brackets in original)) *with Afro-Lecon,* 820 F.2d 1198, 1203

("The broad scope of civil discovery *may* present to *both the prosecution, and at times the criminal defendant,* an irresistible temptation to use that discovery to one's advantage in the criminal case" (emphasis added)).

Dr. Hatfill has no interest in making the Agency Defendants explain their editorial choices; we have set forth the law of this Circuit correctly above and are content to proceed to an examination of the facts. The point of lasting importance, however, is that despite the impression that the Agency Defendants have tried to create, "no 'general rule' governs the determination of whether a civil action will necessarily interfere with an ongoing criminal investigation, and the determination 'must be made on a case-by-case basis.'" *Horn*, 210 F.R.D. at 15 (quoting *St. Paul Fire & Marine Ins. Co. v. United States,* 24 Cl. Ct. 513, 515 (1991)). As we show in Part III, the Agency Defendants have given only slight attention to the actual facts of this particular case, and utterly fail to carry their burden of demonstrating that the interests of justice demand a complete stay of all proceedings for an indefinite period.

II. The Privacy Act Does Not Require Dr. Hatfill to Prove Any Fact That Might Induce Him to Make the Kinds of Discovery Requests that Appear in the Agency Defendants' Parade of Horribles.

Despite their soft-pedaling of the fact-intensive nature of the stay issue, the Agency Defendants are aware that they must point to "'*special circumstances*' in which the nature of the proceedings *demonstrably prejudices substantial rights* of the investigated party or of the government," *Dresser Industries*, 628 F.2d at 1377 (*quoting Kordel*, 397 U.S. at 12) (emphasis added); and that they must make this showing "in the light of the particular circumstances of the case," *Dresser Industries*, 628 F.2d at 1375. Since no discovery has yet been propounded, the Agency Defendants are forced to rely on speculation, largely contained in the Declaration of Richard L. Lambert. However, the Lambert Declaration cannot begin to support the heavy burden it must bear for two reasons. First, insofar as the plaintiff's future discovery requests are concerned, the Lambert Declaration can never be more than speculation; and second, the Lambert Declaration fails to take seriously the very limited showing required of Dr. Hatfill under the Privacy Act. A brief summary of the elements of Dr. Hatfill's case under the Privacy Act makes this latter point clear.

With exceptions not relevant here, the Privacy Act forbids any federal agency from disclosing "any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by or with the prior written consent of, the individual to whom the record pertains . . . ." 5 U.S.C. § 552a(b). The Act creates a civil cause of action in favor of any individual adversely affected by an agency's intentional or willful violation of its provisions. 5 U.S.C. § 552a(g)(1). It also imposes criminal penalties upon agency officers or employees who willfully disclose

information covered by the Act without the prior consent of the individual to whom it pertains. 5 U.S.C. § 552a(*i*)(1).

Thus, Dr. Hatfill's Privacy Act claim is quite clear, and quite focused. In order to prevail he must show: (1) that the Agency Defendants disclosed information about him; (2) that the information was contained "in a system or records"; and (3) that the Agency Defendants acted intentionally or willfully in disclosing such information.

Just as Dr. Hatfill's Privacy Act claim is narrow and focused, discovery on his claim will also be focused on only those elements necessary for a judgment in his favor. Contrary to the unsubstantiated and largely irrelevant speculation in the government's moving papers, Dr. Hatfill has no desire, no need, and no intention, to pursue his Privacy Act claim by seeking to discover "the character and nature of evidence acquired, the identities of the individuals who are cooperating, the names and addresses of persons interviewed, the substance of witnesses' statements, investigative techniques and procedures, and ongoing and planned investigative initiatives." See Lambert Declaration ¶ 9. Dr. Hatfill neither needs nor intends to force the defendants to reveal "the specific investigative techniques being used by the FBI in this case," Lambert Declaration ¶ 12, except perhaps insofar as any defendant claims that calling a reporter and anonymously violating Dr. Hatfill's rights under the Privacy Act is a legitimate "investigative technique." Dr. Hatfill, who has worked for many years to keep Americans safe from bioterrorism, neither needs nor intends to "reveal scientific and technological matters related to national security; special intelligence collection activities, sources and methods; and the vulnerabilities and capabilities of installations, projects and plans related to U.S. bio-weapons defense and national security." Lambert Declaration ¶ 14. What Dr. Hatfill seeks to discover in pressing his claim under the Privacy Act is quite simple: he wants to know the identities of those

law enforcement officials who engaged in criminal behavior by leaking private information about him to the press. The parade of horribles that appears in the Lambert Declaration is simply a work of fiction.

Stated another way, Dr. Hatfill's Privacy Act claim has very little to do with the "89 Agent work years" that the FBI says it has devoted to this case. Lambert Declaration ¶ 5. On the contrary, Dr. Hatfill's Privacy Act claim depends instead on only those hours the investigators devoted to their campaign to disclose highly confidential and scurrilous information to the press. Although Dr. Hatfill cannot know for sure how many hours the defendants spent committing Privacy Act violations, we trust the defendants will agree that it is only a very small subset of the 231,000 agent hours described in the Lambert Declaration.

III. The Agency Defendants Have Not Met Their Burden of Establishing that the Interests of Justice Require the Requested Relief.

"In determining whether to stay a civil proceeding pending the outcome of a related criminal proceeding, courts customarily weigh the following factors: the interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to them if it is delayed; the public interest in the pending civil and criminal litigation; the interests of and burdens on the defendant; the interest of persons not parties to the civil litigation; and the convenience of the court in the management of its cases and the efficient use of judicial resources." *Barry Farm Resident Council, Inc. v. United States Dep't of the Navy,* 1997 WL 118412 at *1 (D.D.C. 1997). *Cf. Horn v. District of Columbia,* 210 F.R.D. 13, 15 (D.D.C. 2002) (borrowing a somewhat different formulation discussed in Part I.A, *supra*). "Not all of these factors have equal weight." *Barry Farm Resident Council,* 1997 WL 118412 at *1 n.1. We proceed to consider each in turn.

A. The Interests of the Plaintiff

The stay proposed by the Agency Defendants would prejudice Dr. Hatfill significantly in his quest to vindicate his constitutional and statutory rights. For more than a year, Dr. Hatfill has lived under a cloud that the defendants created through their own misconduct. Thanks to the defendants' constant stream of illegal leaks to the press, his name has become synonymous with "the worst bioterrorism attack in U.S. history," Lambert Declaration ¶ 3. All of the anger and scorn owed to the true culprit(s) has instead been directed toward Dr. Hatfill. Precisely because the anthrax murders were a genuine atrocity, the Privacy Act violations that cast the blame upon Dr. Hatfill are a genuine outrage. It is high time for the defendants to be held accountable for these actions.

The Agency Defendants may honestly believe that, after what Dr. Hatfill has endured, a few more months here or there should not matter. But on the contrary, a stay of this action would prejudice Dr. Hatfill in at least four important ways. First, Dr. Hatfill's professional and personal life will remain in shambles (and he himself will remain uncompensated) until this action is permitted to proceed toward judgment. Given the magnitude of the wrongs that continue to affect his life, every day counts. The Agency Defendants' argument that no lasting harm will result from postponing Dr. Hatfill's action for monetary damages fails to account for the fact that the Defendants have made Dr. Hatfill completely unemployable through their campaign of smears and harassment. To a plaintiff with other sources of income, additional interest on his eventual judgment may fully compensate for a short delay at the outset of litigation, but for someone in Dr. Hatfill's current circumstances, the "time value of money" is a highly impractical concept.

Second, Dr. Hatfill's ability to discover and preserve relevant evidence, particularly from third parties who are not properly privy to any details of the Amerithrax investigation, will be prejudiced by delay. There is a need for third-party discovery from a wide variety of reporters and professors who have publicly connected Dr. Hatfill to the anthrax murders based on illegal leaks from both known and unknown defendants. That third-party discovery will be aimed only at identifying the sources for information that is already, albeit improperly, in the public domain. There is therefore no reason whatsoever why Dr. Hatfill should not be permitted to pursue such discovery requests without delay. The prospect that some of these third parties may attempt to cover for their sources makes it all the more important for the Court to permit this area of discovery to proceed. Indeed, in many cases, if a particular reporter were to die or become otherwise unavailable to this tribunal before discovery took place, information about the source of the illicit leak might be lost to Dr. Hatfill permanently.

Third, a stay would also adversely affect Dr. Hatfill's ability to identify additional defendants. Dr. Hatfill has causes of action not only against the named defendants, but against unnamed defendants whose identity must be learned in discovery. A stay may prevent the plaintiff from discovering the true identities of the unnamed defendants until too late, which might permit them to escape civil or criminal liability for their actions. Statutes of limitations could also come into play if, for example, the two Agency Defendants or other defendants or witnesses deny their complicity in the campaign of illegal leaks, and attempt to shift the blame – for example, to Postal investigators, outside contractors, concerned microbiologists, or amateur sleuths with overactive imaginations. There is, in short, the ever-present risk that the truth will become harder to find as the trail grows colder. As the *en banc* court in *Dresser Industries*

noted, "If Justice moves too slowly the statute of limitations may run, witnesses may die or move away, memories may fade, or enforcement resources may be diverted." 628 F.2d at 1377.

Finally, all of these potential harms are magnified greatly by the fact that the Agency Defendants here seek an open-ended stay without any prediction of how long it will take for the alleged conflict with the Amerithrax investigation to clear up. Knowing that such indefinite stays are extremely disfavored, the Agency Defendants claim that they are not seeking one; that they are seeking a stay only for "a reasonable period during which the investigation can go forward unhindered." Gov. Mem. at 17; *see also* Gov. Mem. at 3 ("proceedings on [the Privacy Act] claim should be temporarily stayed *while the investigation continues*" (emphasis added)). Yet the Agency Defendants do not specify a definite duration for the stay, nor a definite event to trigger the lifting of the stay. The most they offer is a definite event that will trigger – at an indefinite time in the future – an "update[] on the progress of the ongoing criminal investigation," followed by yet more argument about "whether a further stay is appropriate." Gov. Mem. at 17. This is, quite literally, indefinite. And in light of the 231,000 agent-hours already invested in this investigation over the past two years, the Court might reasonably join Dr. Hatfill in wondering exactly what is supposed to be different in a month or two or even a year or two. *See Barry Farm Resident Council*, 1997 WL 118412 at *1 (government defendants' stay motion denied where "the two federal agencies have studied the underlying problems for many years without taking action"). Regrettably, the FBI seems unable to solve the anthrax case. Steven Hatfill has already suffered the consequences of that failure for almost 18 months; surely he should not be held hostage indefinitely.

B. The Public Interest

The Agency Defendants repeatedly refer to the strong public interest in seeing that the perpetrator(s) of the anthrax mailings will one day be brought to justice. They are right to draw attention to this public interest, and Dr. Hatfill seconds their views on the importance of identifying the terrorist(s) responsible for the mailings.

However, as Judge Harold Greene pointed out in *Barry Farm Resident Council*, some civil suits also vindicate important public policies. *See Barry Farm Resident Council*, 1997 WL 118412 at *4 n.3 ("the public interest in a civil lawsuit between private parties, such as a contract dispute, is usually quite small. However, there is a considerably greater public interest in a civil proceeding to compel compliance with the environmental laws"); *see also Dellinger*, 442 F.2d at 787 (burden of delay on civil plaintiff "is of particular importance where the claim being stayed involves a not insubstantial claim of present and continuing infringement of constitutional rights"). The Agency Defendants attempt to minimize the importance of the Privacy Act claim by characterizing Count III as "only" a claim for damages, but the Privacy Act embodies important public policies, and the facts of Dr. Hatfill's case demonstrate that violations of that Act can deprive innocent citizens of even the most fundamental personal and economic liberties. Just as significantly, the public has an important stake in learning whether, as alleged in the complaint, its federal law enforcement authorities have illegally disclosed confidential information from investigative files (information the authorities hold in public trust) in an effort to smear an American citizen and convince the public they are making progress in a high-profile criminal investigation.

There are therefore important public interests on both sides of this question. If the government had indicted a particular suspect for the anthrax attacks and were preparing to bring the case to trial, Dr. Hatfill would concede that the interest in the integrity of the investigation

and prosecution would justify a protective order declaring certain areas off-limits for discovery, or possibly even a very short stay of the entire proceeding. But where there is no prospect that the public interest in convicting the anthrax killer(s) will be vindicated anytime soon, the public should not be doubly victimized by having its privacy laws go unenforced for an indefinite period.

C. The Interests of the Defendants

The Agency Defendants argue that Dr. Hatfill's civil action threatens to interfere with the Amerithrax investigation because "'the two proceedings are related and substantially similar so that the same evidentiary material will likely be involved and . . . the government's case may be compromised.'" Gov. Mem. at 8 (quoting *United States v. Any and All Assets of that Certain Business Known as Shane Co.,* 147 F.R.D. 99, 101 (M.D.N.C. 1993)). We should pause to note that there is no criminal proceeding against Dr. Hatfill, and that unlike the indicted civil litigants to whom the government would analogize him, he has no need of using civil discovery to obtain evidence that will be used against him in a criminal prosecution. Dr. Hatfill's problem, rather, is that employees of the Agency Defendants have chosen to whisper, unofficially and anonymously, accusations they could not make officially and would not dare to make "on the record."

In their moving papers, the Agency Defendants show a surprising willingness to imply that Dr. Hatfill may wish to use this civil action for the purpose of evading limitations on discovery in criminal prosecutions. *See, e.g.,* Gov. Mem. at 5, 11, and 13. To the extent that the government honestly wishes to maintain that Dr. Hatfill has any reason to be concerned about the possibility of a future prosecution (let alone getting a head start on discovery), the Court should pointedly ask the Assistant United States Attorney in charge of the grand jury investigation, *in camera* if necessary, whether Dr. Hatfill is in fact a target of the grand jury, and further, whether

the grand jury is expected to return an indictment against Dr. Hatfill in the near future. If Dr. Hatfill is not even a target of the grand jury proceeding, the Court should lend no weight to the Agency Defendants' references to the possibility for evasion of limitations on criminal discovery.

However, even assuming that "the Amerithrax investigation" can be called a "proceeding" at this point, and assuming further that Dr. Hatfill is in some sense "involved" in that proceeding, the two proceedings are far from identical, and the Agency Defendants both ignore the obvious differences and exaggerate the similarities.

First, as noted in Part II, the gravamen of Dr. Hatfill's claim under the Privacy Act is that the defendants took confidential information about Dr. Hatfill and intentionally leaked it publicly. Thus, unlike a civil litigant who is simultaneously a criminal defendant, Dr. Hatfill is *complaining about public access to investigative information* rather than trying to get it for himself. Questions about whether employees of the Agency Defendants intentionally revealed private facts about Dr. Hatfill can be distinguished analytically and practically from questions about the investigation into the anthrax attacks. Any doubt about this is removed by the ease with which *DoJ itself* distinguishes between the Amerithrax investigation and the now-defunct leak investigation. On September 26, 2003, – a month after the complaint in this case had been filed – H. Marshall Jarrett of the DoJ Office of Professional Responsibility formally advised counsel for Dr. Hatfill that DoJ would no longer investigate the leaks of which Dr. Hatfill had repeatedly complained, because of an Office of Professional Responsibility policy of "refrain[ing] from investigating issues or allegations that are the subject of pending litigation...." Letter from H. Marshall Jarrett, U.S. Department of Justice, to Thomas G. Connolly, Harris, Wiltshire & Grannis LLP (Sept. 26, 2003) (attached as Exhibit A). Mr. Jarrett's letter reveals

that there have been at least three different internal DoJ investigations (all desultory) into improprieties *arising out of* the Amerithrax investigation, and somehow DoJ managed to close all three investigations while simultaneously keeping the Amerithrax investigation open. Thus, at least one of the Agency Defendants seems to have had no trouble distinguishing the two different investigations before the instant motion was filed. Consequently, the Court should disregard the later-invented claim that no such distinction is possible.

Second, while one can certainly imagine some discovery questions that would be relevant to both investigations, it is equally clear that there are many legitimate discovery questions that would not interfere with the Amerithrax investigation in any way. For example, Dr. Hatfill could ask the FBI to admit that one of its employees leaked a specific published fact to a specific reporter. The fact being public already, and the source having been identified publicly as having come from within the FBI, it is difficult to see how this would interfere with any criminal prosecution. Similarly, Dr. Hatfill might seek the production of documents evidencing telephone calls to a specific reporter. Or, he might notice the deposition of a third party who has written that law enforcement sources told him about items retrieved during a search of Dr. Hatfill's apartment. None of these discovery requests would seek any fact not already in the public domain.

Third, even these innocuous discovery requests could be avoided through judicious use of admissions, other stipulations, pre-trial scheduling orders negotiated and submitted to the Court under rules 16 and 26 of the Federal Rules of Civil Procedure, alternative dispute resolution, and possibly even the appointment of a special master with the clearances necessary to review government files. The first opportunity for such a narrowing of potential discovery is of course the defendants' respective answers, and yet it is precisely the obligation to answer that the

defendants seem so intent on avoiding. Perhaps, at bottom, the reason the defendants are so hesitant to answer the complaint is because one or more defendants really cannot claim a good-faith belief that *every* published report attributing leaks to DoJ or FBI officials was fabricated. The Court should note, however, that the volume of published reports in which unnamed employees of the Agency Defendants are said to have provided confidential details about the investigation is so great that only two hypotheses are possible: Either the Agency Defendants have violated the Privacy Act, or else reporters from all over the political spectrum are engaged in one of largest and most deceptive conspiracies in human history.

If the Agency Defendants are prepared to stipulate that *at least some* of the dozens upon dozens of leaks attributed to FBI and DoJ sources was an intentional disclosure, by one of their employees, of a record protected under the Privacy Act, then Dr. Hatfill's discovery pursuant to Count III – the only count at issue here – is largely complete. In claiming that stipulations and requests for admission would provide "no answer" to the problem, Gov. Mem. at 11 n.6, the Agency Defendants' untenable position seems to be that they are not necessarily prejudiced by the *leaking* of investigative facts, but they will be gravely prejudiced if the Court permits Dr. Hatfill to confirm that the leaks came from agency records. *See, e.g.*, Gov. Mem. at 11 (discovery "would enable plaintiff to test the accuracy of media stories about the investigation"). On points such as these, the Court will no doubt be sensitive to the undeniable fact that defendants sometimes have illegitimate interests for seeking delay as well as legitimate ones, and that neither their fear of civil and criminal liability, nor their embarrassment at what they have done to Dr. Hatfill, can justify the total, pre-answer stay these defendants request.[8]

[8] Naturally, if there *were* some reason for Dr. Hatfill to seek discovery of a fact that could not be given public circulation, the Court has the authority to limit such information to the parties themselves, or possibly even lawyers for the parties. Counsel might be able to devise a number

Fourth, although the Agency Defendants for their part manage to *invent* some *possible* discovery requests to which they would interpose an objection, these imaginary future requests are insufficient to justify any current relief, let alone a stay of the entire proceeding. Significantly, the Agency Defendants purport to base their speculation on the allegations in Dr. Hatfill's complaint, but many of the allegations in the complaint do not pertain to Count III. Somewhat more embarrassing for the Agency Defendants is that almost all their examples of allegations that come too close to the heart of the Amerithrax investigation are actually *quotations from published news stories that were based on leaks from the defendants themselves. See* Gov. Mem. at 10 (citing eight paragraphs of the complaint, of which seven refer to specific leaks to ABC News, *Newsweek*, *The New York Times*, CBSNEWS.com, and *The Washington Post*). The Agency Defendants simply have not established, nor can they, that Dr. Hatfill's lawsuit will disclose any more sensitive information than they themselves have already disclosed.

Moreover, the Agency Defendants never explain why the normal procedures for validating claims of privilege in civil litigation would be inadequate in this case. As the court noted in *Barry Farm Resident Council*, "the Court has the ability to impose protective orders to prevent potential future criminal defendants from obtaining information to which they are not entitled." 1997 WL 118412 at *4. Defendants repeatedly claim that they might not even be able to answer the complaint without invoking privilege on some points, but nowhere do they explain why they cannot simply invoke the privilege and proceed as usual. If the Court stayed (at the pre-answer stage, no less) every action in which it expected privileges to be asserted, very few

---

of innovative ways of conducting discovery so as to protect all proper governmental interests, and we would expect that to be a topic for the post-answer conference under rules 16 and 26.

complaints would ever be answered. Disputes about the scope of various privileges are simply a part, albeit perhaps an unpleasant part, of any civil case, and the courts are well equipped to deal with them.

Fifth, at the present time these imagined conflicts are *doubly* speculative, because both the discovery requests and the future prosecution are purely hypothetical. No indictment has been issued, and the Agency Defendants have not represented that any indictments are expected to be issued during the duration of the requested stay. Before the Court even considers granting relief as extensive as the requested stay, it should insist on a report directly from the Assistant U.S. Attorney in charge of the grand jury, *in camera* if necessary, containing specific representations as to (1) whether a grand jury is still investigating the anthrax attacks; (2) whether the grand jury is expected to return an indictment against anyone in the next 60 days; (3) if not, whether the grand jury is making any appreciable progress toward the identification of a potential criminal defendant; (4) whether the status of the investigation is likely to change materially in the immediate future so as to justify a brief stay of Dr. Hatfill's action; and (5) what relationship, if any, Dr. Hatfill may have to any eventual criminal prosecution. The Court must insist on this level of specificity and this level of authority, or else the Agency Defendants will continue to justify relief in vague or purely hypothetical terms, as they have done here. Dr. Hatfill's claim for violation of the Privacy Act should not be pushed aside indefinitely on the mere supposition that some imaginary discovery requests will conflict with a non-existent prosecution. *See Barry Farm Residents' Council*, 1997 WL 118412 at *3 ("If and when criminal indictments are filed, and Fifth Amendment issues arise, there will be time enough to deal with the problems they might cause.").

Sixth, the Agency Defendants argue that permitting the litigation to proceed "would further divert and distract DOJ and FBI personnel" from the Amerithrax investigation. Gov. Mem. at 14-15 n. 7. This argument is foreclosed, however, by *Clinton v. Jones*, 520 U.S. 681 (1997). If a sitting President of the United States cannot be excused from the burdens and distractions of defending a civil lawsuit, *see id.* at 705 n.40, it is difficult to understand how the Agency Defendants can seriously claim that their duties in connection with the Amerithrax investigation justify a stay. The defendants obviously had enough time to divert from their official duties to leak to the press secret information contained in their investigative files. Requiring them to answer interrogatories or sit for depositions will not unreasonably burden them, particularly in light of the fact that this civil proceeding is apparently the only venue in which there is any chance to enforce Dr. Hatfill's rights under the Privacy Act.

In summary, the Agency Defendants have not advanced a single legitimate governmental interest that cannot be protected by (a) an answer that fairly and truthfully meets the substance of the plaintiff's Privacy Act claim; (b) responsible stipulations and admissions as to facts not reasonably in dispute (to the extent they are not admitted in the Agency Defendants' answer); (c) pre-trial scheduling orders negotiated by counsel and approved by the Court; (d) the normal procedures for accommodating privileges during discovery; (e) narrowly tailored protective orders governing discovery; (f) alternative dispute resolution; (g) some combination of these; and (h) *such other or further relief as the Court deems necessary and proper in the interests of justice*. The available solutions to the problems are both numerous and powerful, and their existence makes it extremely difficult to justify a blanket stay of all proceedings in this case. To the extent the Agency Defendants are truly interested in addressing the issues about which they

profess such great concern, they need only *answer the complaint* and they will find that both the parties and the Court have ample means of protecting confidential information.[9]

D. Judicial Convenience and Efficiency[10]

The Agency Defendants direct their stay motion only at Count III, which is based on the Privacy Act. Gov. Mem. at 3. However, in the "judicial economy" section of the Government Memorandum, they argue that one of the reasons Count III should be stayed is because they intend to raise a "qualified immunity" defense to Counts I and II, and discovery on those counts

---

[9] The Agency Defendants have presented their argument in the more defendant-centric framework set forth by the Court of Claims in *St. Paul Fire and Marine Ins. Co. v. United States*, 24 Cl. Ct. 513 (1991), and borrowed by the court in *Horn*, 210 F.R.D. at 15. The result is the same no matter which formulation the Court uses. As noted in Part I.B, the *Horn* version requires the moving party to demonstrate, among other things, that the two proceedings are not only "related" but also "substantially similar." *Horn*, 210 F.R.D. at 15. Here, unlike in *St. Paul Fire and Marine Ins. Co.*, (1) the facts necessary to prove Dr. Hatfill's Privacy Act claim do not "track" the facts the government would have to prove in a criminal prosecution for the anthrax murders; (2) the leaks of which Dr. Hatfill complains are not the "primary focus" of – indeed, are at best peripheral to – any future criminal prosecution; and (3) the affidavit filed in support of the stay motion makes clear that the supposedly "parallel" proceeding is about the anthrax murders, not about the defendants' illegal leaking of information protected by the Privacy Act. *Cf. St. Paul Fire and Marine Ins. Co.*, 24 Cl. Ct. at 516 (finding that plaintiff's contract action against the government was "substantially similar" to a criminal investigation into alleged fraud in connection with the exact same contract). Furthermore, the *Horn* formulation also requires the moving party to "make a clear showing of hardship or inequality," 210 F.R.D. at 15, and on this point the Agency Defendants have also failed. Here, as in *Horn*, the government makes speculative and conclusory assertions of possible interference, but has not proffered specific information from any official who is both close enough to the investigation to know the facts and senior enough to speak with authority. *See Horn*, 210 F.R.D. at 15-16. Finally, the Agency Defendants' failure to specify a short and definite duration for their requested stay makes it impossible for them to "establish that the duration of the requested stay is not immoderate or unreasonable." *Horn*, 210 F.R.D. at 15. Here, as in *Horn*, the criminal investigation is already quite old (older even that the 17 months in *Horn*), and the government gives no reason whatsoever to expect that any acceptably short delay in the enforcement of Dr. Hatfill's rights under the Privacy Act will eliminate the potential for harms of the sort the Agency Defendants hypothesize. *See Horn*, 210 F.R.D. at 16. The Court should therefore find that the Agency Defendants have failed on all three prongs in this case, as in *Horn*.

[10] We omit any discussion of the fourth factor discussed in *Barry Farm Resident Council*, namely the interests of persons who are not parties to the action, because to the best of our knowledge no such person has a cognizable interest in whether Dr. Hatfill's Privacy Act claim is stayed.

cannot proceed until after the qualified immunity defense has been rejected. Gov. Mem. at 15-16. According to the movants, "All of plaintiff's claims in this litigation are factually intertwined and involve many of the same officials and agents." Gov. Mem. at 16.

This argument completely misses the relevance of judicial economy in these circumstances. Judicial economy is sometimes mentioned as a reason for staying a civil case when both civil and criminal proceedings will determine the same set of facts. Thus, a number of the cases cited by the Agency Defendants are either forfeiture proceedings or employment termination cases where the forfeiture or termination is based entirely on allegations of criminal misconduct. *E.g.*, *Peden v. United States,* 512 F.2d 1099 (Ct. of Cl. 1975); *Shane Co.*, 147 F.R.D. 99. In such cases, a criminal conviction in a parallel proceeding will often completely dispose of the civil action. This sort of "judicial economy" argument obviously cannot be made here, because *no other tribunal is either considering or scheduled to consider these facts.* And this is true not only because the facts relating to the Privacy Act differ from the facts that would be relevant to an anthrax prosecution, but also because there is no guarantee that there will *ever be an anthrax prosecution*. *Cf. Barry Farm Resident Council*, 1997 WL 118142 at *4 n.2 ("The Court finds that it would be more efficient to proceed with the civil case than to stay it for at least six months, as the defendants have requested, and probably much longer, when the Court cannot be certain that the criminal investigation will ever result in any indictments.").

Even on its own terms, the Agency Defendants' argument that qualified immunity principles should preclude discovery on the Privacy Act claim is extremely difficult to understand. Legally, at the risk of stating the obvious, a defense to one count in a complaint cannot normally be stretched to cover other counts to which it is inapplicable. Whether or not any defendant has a qualified immunity defense to Counts I and II has no bearing on Count III.

And factually, if the litigation proceeds as to Count III and their qualified immunity defense ultimately succeeds as to the other counts, they will suffer no prejudice and the Court will not have wasted time or resources – indeed, the case will have proceeded as efficiently as possible despite the pendency of the qualified immunity motions. If, on the other hand, the qualified immunity defense is rejected as to Counts I and/or II, then it will become even more apparent that there was never a reason to delay proceedings on Count III (or any other count) in the first place. In other words, there seems to be no conceivable scenario in which discovery on Count III will be a waste of time for the Court or the litigants. The Agency Defendants seem to have an unstated concern that plaintiff will notice a flurry of depositions regarding Count III in early 2004, only to have to repeat them later in the year for the other counts. But Dr. Hatfill has no reason to follow that course, and his counsel has many reasons not to. This is, once again, a topic for the pre-trial scheduling conference that will occur after the defendants answer, and by postponing their answer the defendants are only postponing the potential solutions to their stated concerns.

The defendants' quasi-qualified-immunity argument is also troubling insofar as it continues a pattern of piecemeal and ostensibly temporary delays which, laid end to end, result in substantial prejudice to the plaintiff. The first step was the motion to "enlarge" – nearly double, really – the Agency Defendants' time within which to answer or otherwise respond. The Agency Defendants sought this extension on the quite dubious ground that they *intended* to file the instant stay motion at some point in the future and should not be required to answer before this motion was argued and decided. Notwithstanding the fact that the Agency Defendants could just as easily have filed their stay motion *after* answering; and notwithstanding the fact that if they wanted to avoid answering they could have filed their stay motion *well in advance* of the answer

deadline, the Agency Defendants essentially waited until the eleventh hour and *then* sought a seven-week delay, for the sole purpose of seeking more delay later. Their last-minute strategy succeeded, with remarkably little in the way of "good cause."

The same defendants *now* seek a stay on Count III, and argue as one ground in support that they *intend* to file motions dismissing the other counts. Again, they could file their motions to dismiss the other counts now if they wanted, but they prefer to push those motions off into the future and use them as a bootstrap justification for the stay they seek now. And in light of their otherwise-baffling statement that the instant motion is "directed solely to plaintiff's Privacy Act claim," but that "the grounds for the instant motion are equally applicable to plaintiff's remaining claims," Gov. Mem. at 3 n.3, can there be any doubt that this stay motion will be enlarged or renewed with respect to the non-Privacy Act claims after the Court has ruled on the defendants' promised motions to dismiss? Can there be any doubt that they will move once again to extend their answer date if the Court has not ruled on the instant motion by the time their answers are due?

The pattern has become quite clear: Having negotiated an extended answer date for the individual defendants, the government begged the Court to consolidate all the answers together, and won. Now the government seems to be attempting to do the same thing by splitting Count III off from the other counts and then begging the Court not to let anything happen on any of the claims until all motions on all claims have been resolved. If the Court permits the defendants to play this game, there is no telling how long we will all spend taking pieces of the case apart and putting them back together again. The government's strategy seems in this respect to be exactly the *opposite* of judicial economy. If the defendants have meritorious motions to dismiss the

Bivens claims, they should file them – not tell the Court they *intend* to file them and seek to delay everything else until they are resolved.

CONCLUSION

At its core, the Agency Defendants' stay motion is a request for the Court to relieve the defendants from the consequences of their own actions. Having engaged in a campaign to smear Dr. Hatfill by disclosing confidential information from their investigative files, the government now requests that the Court grant an indefinite suspension of any inquiry into their illegal conduct. The government dresses up its request by citing a speculative parade of horribles that could be unleashed if Dr. Hatfill takes discovery in his case. But if the government's real concern is in protecting the secrecy of its investigation (and not merely protecting its agents from responsibility for their illegal acts) there is another course for the Agency Defendants to take – an honorable choice. The honorable option would be to acknowledge, through answer, stipulation, or admission, the obvious: that the countless "law enforcement officials," "FBI officials," and "senior law enforcement officials" quoted in the press are, in fact, representatives of the Agency Defendants; that those representatives disclosed protected information from agency files; and that they did so intentionally. Dr. Hatfill, having endured all that he has at the hands of the government, does not reasonably expect the Agency Defendants to take this honorable path; but it is nonetheless open to them. And, of course, if the defendants took the honorable approach, their concerns regarding the secrecy of their investigation would evaporate. With so many other options available, the prejudice to the plaintiff from a blanket stay is simply unjustifiable.

WHEREFORE, Plaintiff respectfully asks the Court to DENY the requested relief and order to Agency Defendants to answer the complaint by January 5 or the fifteenth day following the denial of this motion, whichever comes latest.

DATED: December 2, 2003

Respectfully submitted,

By: /s/

Thomas G. Connolly, D.C. Bar # 420416
Mark A. Grannis, D.C. Bar # 429268
Eric O. Bravin, D.C. Bar # 214741
Harris, Wiltshire & Grannis, LLP
1200 18th Street, NW
Washington, DC 20036

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Steven J. HATFILL, M.D., *Plaintiff* v. Attorney General John ASHCROFT, Timothy BERES, Daryl DARNELL, Van HARP, the DEPARTMENT OF JUSTICE, the FEDERAL BUREAU OF INVESTIGATION, *et alia,* *Defendants*	)	Civil No. 1:03-CV-01793 (RBW)

ORDER

The Court has considered the Agency Defendants' Motion for a Stay of Proceedings, the Memoranda of Points and Authorities in support thereof, and the Memorandum of Points and Authorities in Opposition, which was submitted by plaintiff Steven J. Hatfill, M.D, and all other papers filed in support of and opposition to the Motion. After consideration of all the parties' arguments, the Court finds that the Agency Defendants have failed to carry their burden of establishing that the interests of justice require a stay of these proceedings.

Although there is some degree of overlap between the Privacy Act count in the complaint and the defendants' ongoing investigation into the anthrax attacks, the overlap is not nearly as complete as the defendants suggest. "The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our

jurisprudence." *SEC v. Dresser Industries,* 628 F.2d 1368, 1374 (D.C. Cir.) (*en banc*), *cert. denied,* 449 U.S. 993 (1980). The distinction between the anthrax investigation itself, and the plaintiff's inquiry into unauthorized leaks about the anthrax investigation, is straightforward, both practically and analytically.

Although the defendants argue that some hypothetical discovery requests might prejudice them by breaching the confidentiality of the Amerithrax investigation, no such prejudicial request is currently before the Court. Furthermore, both the parties and the Court have ample means for protecting privileged matter from improper disclosure should the need arise. Because so many more narrowly tailored alternatives exist, the Court does not believe that the defendants have shown a likelihood of such substantial prejudice that the right of the plaintiff to pursue his cause of action should be delayed. In addition to the usual interest that almost any plaintiff has in the speedy resolution of his matter, the Court notes that there is an important public interest in enforcement of the Privacy Act.

Finally, the defendants have failed to convince the Court that any acceptably brief stay of this action would be likely to reduce whatever overlap there is between the plaintiff's Privacy Act claim and the Amerithrax investigation. The Court need not decide whether a stay would be warranted if a criminal prosecution for the anthrax attacks were imminent. The Court cannot stay plaintiff's Privacy Act claim indefinitely, yet nowhere in the record have the defendants supplied any basis for believing that a stay of any definite duration is likely to resolve the conflicts of which they complain. Accordingly,

IT IS HEREBY ORDERED:

1. That the Agency Defendants' Motion for a Stay of Proceedings is hereby DENIED; and

2. That the Agency Defendants shall answer the complaint on or before January 5, 2004.

This Order is made without prejudice to any claim of privilege that either party may later raise in more concrete factual circumstances.

Dated _____, 2003 _____

Hon. Reggie B. Walton
United States District Judge