Case Number: 2006-1066-F

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U.S. Department of Justice

Civil Division

P.O. Box 883
Washington, D.C. 20044

file: FBI files

James J Gilligan
Trial Attorney

Tel: (202) 514-3358
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ATTORNEY-CLIENT COMMUNICATION
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2006-1066-F
INITIALS: R DATE: 6/22/15

December 16, 1996

BY TELECOPY AND REGULAR MAIL

Sally Paxton, Esq.
Special Associate Counsel
to the President
Office of White House Counsel
The White House
Washington, D.C. 20500

Re: Alexander, et al. v. FBI, et al.,
Civil Action No. 96-2123 (D.D.C.)

Dear Ms. Paxton:

It was a pleasure meeting with you on Friday. Given the time constraints we are facing, I thought it would be useful to set forth in a letter the items of information that the Department of Justice has requested that you provide to us on behalf of the Executive Office of the President ("EOP"), to assist us in our defense of EOP and the FBI in the above-referenced litigation.

1. To establish a "chain of custody" for the files of the five named plaintiffs in the case (Cara Leslie Alexander, Patrick Adam Beers, David Lee Black, Marjorie Anne Bridgman, and Joseph Cate), we wish to interview those persons presently or formerly employed by the Office of Personnel Security ("OPS"), the Office of Records Management ("ORM"), and the Office of Counsel to the President who can attest

-- to the fact that the FBI background reports on plaintiffs were requested by and delivered to OPS between December 1993 and March 1994;

-- to the fact that OPS delivered the files to ORM sometime between December 1994 and February 1995;

-- to the fact that the files were delivered to the Counsel's Office, which in turn delivered them to the FBI, in June 1996

-- to the manner in which OPS, ORM and the Counsel's Office stored the files and took steps to guard against unauthorized access; and

-- to the extent, if any, that plaintiffs' files were made available to persons outside OPS, ORM or the Counsel's Office.

(As we have already contacted, or will soon contact, counsel for Lisa Wetzl, Mari Anderson, Craig Livingstone, and Anthony Marceca to schedule interviews, it is not necessary that you make arrangements on our behalf to meet with those individuals.)

2. Also, for the purpose of establishing a chain of custody, we seek copies of any logs, lists or other documents relating to the receipt or transmittal of plaintiffs' files by OPS, ORM or the Counsel's Office, including any documents showing or otherwise relating to the extent to which plaintiffs' files were (or were not) made available to persons outside OPS, ORM or the Counsel's Office while in the custody and control of those offices.

3. To establish that OPS, ORM and the Counsel's Office have no substantial responsibilities other than to provide advice and assistance to the President, we wish to speak with persons who can attest to the position of OPS, ORM and the Counsel's Office within EOP's organizational structure, and the duties and responsibilities of each office. We would also like copies of any documents that can provide this information.

4. To establish that Patrick Beers and (perhaps) Joseph Cate are not proper plaintiffs, we seek documents or any other information to confirm that the FBI disclosed no information to OPS concerning Mr. Beers, and documents or any other information concerning whether Mr. Cate had or was seeking White House access or employment at the time his file was requested (December 1993) and delivered to OPS (March 1994).

5. Finally, so that we may prepare EOP's (and the FBI's) defense with the fullest possible knowledge of the existing public record on the FBI files matter, we seek copies of

-- hearings conducted by the House Committee on Government Reform and Oversight, and the Senate Judiciary Committee, regarding the FBI files matter (we already have copies of the June 19 and August 1, 1996 hearings conducted by the House Committee); and

-- transcripts of interviews and/or depositions that the Senate Committee has made public.

In addition, we would like the opportunity to review and designate for copying all documents that EOP has provided to the House and Senate in connection with their investigations of the FBI files matter.

By order of the district court, we must submit EOP's response to plaintiffs' complaint by January 17, 1997. In light of that short deadline, and the intervening holiday season, we wish to interview these individuals, and have access to these documents, preferably this week, but in any event as soon as possible.

Thank you for your cooperation in this important matter. If you have any questions or concerns about the foregoing requests, please do not hesitate to call me at (202) 514-3358.

Very truly yours,

James J. Gilligan

cc: Gary G. Grindler
Deputy Assistant Attorney General
Civil Division

THE WHITE HOUSE

WASHINGTON

DATE: 11-11

TO: KATHY

FROM: White House Counsel JACK Q.
2nd Floor, West Wing x6-2632

- [x] FYI
- [ ] Appropriate Action
- [ ] Let's Discuss
- [ ] Per Our Conversation
- [ ] Per Your Request
- [ ] Please Return
- [ ] Other

Office of the Deputy Attorney General
Washington, D.C. 20530

FACSIMILE COVER SHEET

DATE: November 8, 1996

TO: Jack Quinn, Esq.
Counsel to the President

FAX NUMBER 456-6279

PHONE NUMBER: 456-2632

FROM: **David W. Ogden**
Associate Deputy Attorney General

Tel. (202) 514-8633
Fax (202) 514-6897

ADDITIONAL INFORMATION: See Exhibit B.

NUMBER OF PAGES INCLUDING COVER SHEET: 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA ALEXANDER, et al., Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	Civil Action No. 96-2123 (RCL)

DECLARATION OF GARY G. GRINDLER

I, Gary G. Grindler, for my declaration pursuant to 28 U.S.C. § 1746, depose and say as follows:

1. I am the Deputy Assistant Attorney General for the Federal Programs Branch, Civil Division, United States Department of Justice.

2. Attached hereto as Exhibit A is a true and correct copy of a letter from myself to John D. Bates, Deputy Independent Counsel, Office of the Independent Counsel, dated October 31, 1996.

3. Attached hereto as Exhibit B is a true and correct copy of a letter I received from Mr. Bates, dated November 4, 1996.

I swear under penalty of perjury that the foregoing is true and correct.

Executed on November 6, 1996.

GARY G. GRINDLER

November 2, 1996

BY HAND-DELIVERY

John D. Bates, Esq.
Deputy Independent Counsel
Office of Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490 North
Washington, D.C. 20004

Re: Alexander, et al. v. FBI, et al., Civil Action No. 96-2123 (D.D.C.)

Dear John:

As you are aware, I wrote you on October 31, 1996, to inquire again whether the Independent Counsel wishes the Department of Justice ("DOJ") to seek a stay of Alexander v. FBI, pending your investigation of the FBI files matter. As I have also advised you, in deference to the Independent Counsel's interests DOJ has to date refrained from factual inquiries regarding the civil case, so as not to interfere with or impede your investigation. I stressed, however, that absent a stay DOJ must soon begin such inquiries so as to prepare our clients' defense to plaintiffs' claims.

Our clients' responses to the civil complaint are currently due on November 18, 1996. Even if we obtained a short extension of that deadline, DOJ has concluded that, unless we move for a stay, we cannot postpone factual inquiries regarding the civil case beyond Tuesday, November 12, without prejudice to our clients' interests in the civil litigation. For that reason, I request that you please advise me whether or not the Independent Counsel believes that the civil case should be stayed by no later than Friday, November 8. If you are not able to inform us of your position by that time, then DOJ must embark upon such factual inquiries into the FBI files matter as are necessary to defend our clients against plaintiffs' allegations.

Exhibit A

I thank you again for your cooperation in this matter. If you would like to discuss it further, please call either myself (514-7836) or Eva Plaza (514-3309).

Very truly yours,

Gary G. Grindler
Deputy Assistant Attorney General

Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688
Fax (202) 514-8802

November 4, 1996

File
Alexander

Gary G. Grindler, Esq.
Deputy Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Re: Alexander, et al. v. FBI, et al.
Civil Action No. 96-2123 (D.D.C.)

Dear Mr. Grindler:

You have advised us that before responding to the complaint filed in the referenced civil litigation, the Department of Justice will need to conduct a factual inquiry into the circumstances under which FBI background investigation files of employees of the Reagan and Bush administrations were obtained by the White House. You have further advised us that civil discovery may involve additional inquiries into this matter.

The subject matter of the civil litigation relates to our ongoing criminal investigation, authorized by orders of the Special Division of the D.C. Circuit dated June 21, 1996 and October 25, 1996. We believe that the inquiry by the Department of Justice that you describe, if undertaken at this time, would interfere with our investigation. However, we also believe that will no longer be the case in the near future.

Accordingly, we request that the United States seek a stay of the civil litigation of sufficient length to allow you to wait thirty days from today before initiating your inquiry. We will reevaluate our position after this brief delay and advise you at that time whether we believe the Department may proceed in the civil litigation without interfering with our investigation.

We will notify you promptly if we should conclude before the expiration of the thirty days that the Department may proceed without interfering with our investigation.

Sincerely,

John D. Bates
Deputy Independent Counsel

Exhibit B

Alexander

THE WHITE HOUSE

WASHINGTON

November 8, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN EK

SUBJECT: FBI FILES CASE

Attached is DOJ's motion for a 90-day stay in the FBI files case. The motion is based on the representation of the Office of the Independent Counsel that factual inquiry by DOJ into the FBI files matter within the next thirty days "would interfere with our investigation." This representation is made in a letter, dated November 4, from John Bates to Gary Grindler, which is attached as Exhibit B to the Grindler Declaration.

As I have discussed with Kathy, DOJ filed the motion only on behalf of the EOP and FBI, and not on behalf of Mrs. Clinton or any other individual defendant. DOJ's rationale is that it cannot determine the propriety of representing an individual defendant -- even with respect to such a procedural motion -- until it undertakes certain factual inquiries.

Note well that the Bates letter, after stating that factual inquiries made now would interfere with the IC's investigation, says that "we believe that will no longer be the case in the near future." <u>This statement seems a good indication that the IC is nearing completion of its investigation of the FBI files matter and that it does not expect to bring any indictments</u>.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA ALEXANDER, et al., Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, J. Edgar Hoover Building 935 Pennsylvania Avenue, N.W. Washington, D.C. 20535, EXECUTIVE OFFICE OF THE PRESIDENT 1600 Pennsylvania Avenue, N.W. Washington, D.C. 20500, et al., Defendants.	)	Civil Action No. 96-2123 (RCL)

GOVERNMENT DEFENDANTS' MOTION FOR A LIMITED STAY OF PROCEEDINGS

The government defendants in the above-captioned action (the Federal Bureau of Investigation, and the Executive Office of the President), hereby move for a stay of all proceedings in this matter until February 3, 1997.

Pursuant to Local Rule 108(m), counsel for the government defendants has conferred with counsel for plaintiffs, and ascertained that plaintiffs oppose this motion.

For the reasons stated in the Memorandum of Points and Authorities in Support of the Government Defendants' Motion for a Limited Stay of Proceedings, dated November 7, 1996 (filed herewith), the government defendants' motion should be granted.

Dated: November 7, 1996

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

GARY G. GRINDLER
Deputy Assistant Attorney General
Federal Programs Branch

DAVID J. ANDERSON
ANNE L. WEISMANN
JAMES J. GILLIGAN
(Bar Id. No. 422152)
ELIZABETH SHAPIRO
Attorneys
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
(202) 514-3358

Counsel for Defendants Federal
Bureau of Investigation and
Executive Office of the President

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA ALEXANDER, et al., Plaintiffs,	)	Civil Action No. 96-2123 (RCL)
v.	)	
FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE GOVERNMENT DEFENDANTS' MOTION FOR A LIMITED STAY OF PROCEEDINGS

Dated: November 7, 1996

FRANK W. HUNGER
Assistant Attorney General

GARY G. GRINDLER
Deputy Assistant Attorney General
Federal Programs Branch

DAVID J. ANDERSON
ANNE L. WEISMANN
JAMES J. GILLIGAN
(Bar Id. No. 422152)
ELIZABETH SHAPIRO
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Counsel for Defendants Federal
Bureau of Investigation and
Executive Office of the President

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA ALEXANDER, et al., Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	)	Civil Action No. 96-2123 (RCL)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE GOVERNMENT DEFENDANTS' MOTION FOR A LIMITED STAY OF PROCEEDINGS

STATEMENT

The question presented by this motion is whether this civil case should be briefly stayed, so that the litigation does not interfere with Independent Counsel Kenneth W. Starr's investigation of the so-called "FBI files matter." By letter dated November 4, 1996, the Independent Counsel has answered that question in the affirmative, stating that Department of Justice inquiries necessary to defend this case "would interfere with [his] investigation" if undertaken at this time, and requesting that "the United States seek a stay of the civil litigation of sufficient length to allow [DoJ] to wait thirty days from [November 4, 1996] before initiating [such an] inquiry." At that time, the Independent Counsel will re-evaluate whether a further delay might be necessary. See Exhibit B to Declaration of Gary G. Grindler, dated November 6, 1996 ("Grindler Decl.") (filed herewith).

1. The Court should heed the Independent Counsel's request. The federal courts routinely stay civil cases where such litigation may obstruct the pursuit of criminal matters, to the detriment of the paramount public interest in effective law enforcement. This case, too, should be temporarily stayed so that litigation of plaintiffs' claims does not compromise the public interest in the effective discharge of the Independent Counsel's responsibilities. Absent a brief delay, litigating this case would force the Department of Justice ("DoJ"), in order to mount a defense to this lawsuit, to embark upon a comprehensive inquiry into matters undergoing scrutiny by the Independent Counsel (from which, to date, it has forborne, except as to matters in the public record). The Independent Counsel believes that a DoJ inquiry of that kind, conducted at this time, would interfere with his FBI files investigation. Such an incursion by DoJ upon the Independent Counsel's jurisdiction would compromise the integrity of the Independent Counsel's investigation, contrary to the goals of the Ethics in Government Act, and should be avoided if at all possible.

2. Last June, the Attorney General received information from the FBI (and press reports) that defendant Anthony Marceca, at the time employed in the White House Office of Personnel Security, had submitted written requests from the Counsel to the President to the FBI seeking copies of "previous reports" on a number of individuals. The requests indicated that these reports were needed to update and re-create background files on persons requiring access to the White House. See Notification to the Court Pursuant to 28 U.S.C. § 592(a)(1) of the Initiation of a Preliminary Investigation and Appli-

cation to the Court Pursuant to 28 U.S.C. § 593(c)(1) for the Expansion of the Jurisdiction of an Independent Counsel, dated June 20, 1996, at 1-2 (Exhibit 1, hereto).[1] However, some of the requests sought reports on persons who did not require White House access, including individuals who had worked in previous Administrations. Id. at 2.

In light of this information, Attorney General Reno concluded that "further investigation is warranted to determine whether the inaccurate request forms constituted knowing and willful false statements [to the FBI] in violation of 18 U.S.C. § 1001." Exhibit 1 at 3. In addition, noting the potential conflict of interest (within the meaning of 28 U.S.C. § 591(c)(1)) should the Department of Justice conduct an inquiry into dealings between the FBI and the White House, the Attorney General invoked her discretionary authority under the Ethics in Government Act, 28 U.S.C. § 592(c), to request that the D.C. Circuit appoint Mr. Starr, Independent Counsel in the matter of Madison Guaranty Savings & Loan Association, to conduct that investigation. Id. Attorney General Reno also concluded that DoJ should not make any further investigation of this matter, to avoid a "political conflict of interest" (see 28 U.S.C. § 591(c)(1)), and, further, "to avoid interfering with any investigation that the Independent Counsel may deem appropriate." Id.

On or about August 1, 1996, the Attorney General received a transmittal from the House Committee on Government Reform and Oversight to the effect that defendant Bernard Nussbaum "may have made false statements to the Committee during sworn

[1] The Court may take judicial notice of the documents attached to this memorandum, which are part of the Court of Appeals' record in the criminal matter. F.R.E. 201.

testimony on June 26, 1996 . . . concerning the role of Hillary Clinton in the hiring of Craig Livingstone" as head of the Office of Personnel Security. The Attorney General concluded that further investigation of this matter also was warranted, but that an inquiry by DoJ as to whether Mr. Nussbaum's statements were perjurious would constitute a section 591(c)(1) conflict of interest. For these reasons, Attorney General Reno requested that the Court of Appeals expand the Independent Counsel's jurisdiction to include investigation of this matter as well. Notification to the Court Pursuant to 28 U.S.C. § 592(a)(1) of the Initiation of a Preliminary Investigation and Application to the Court Pursuant to 28 U.S.C. § 593(c)(1) for the Expansion of the Jurisdiction of an Independent Counsel, dated October 24, 1996 (Exhibit 2, hereto).

On June 21, 1996, the Court of Appeals issued an order expanding the Independent Counsel's jurisdiction, authorizing him to investigate whether Mr. Marceca "committed a violation of 18 U.S.C. § 1001 or any other federal criminal law . . . relating to requests made by the White House between December 1993 and February 1994 to the Federal Bureau of Investigation for background investigation reports and materials." Order dated June 21, 1996, at 1-2 (Exhibit 3, hereto). On October 26, the Court of Appeals expanded the Independent Counsel's jurisdiction again, authorizing him to investigate whether Mr. Nussbaum committed a violation of 18 U.S.C. § 1621 in connection with his June 26 testimony before Congress. Order dated October 25, 1996 (Exhibit 4, hereto). Pursuant to the court's Orders, the Independent Counsel also has jurisdiction to investigate allegations or evidence that any person conspired to violate federal criminal law, or aided or abetted any federal offense, relating to these matters. The Independent Counsel's jurisdiction includes authority to seek indictments and bring prosecutions. Exhibit 3 at 2; Exhibit 4 at 1-2. His investigation is pending.

3. Plaintiffs brought this action on September 12, alleging that they held political appointments and other positions of employment with the United States during the Reagan and Bush Administrations that required them to have regular access to the White House. Complaint, ¶ 21.[2] In order to obtain the necessary security clearances, plaintiffs allegedly underwent background investigations by the FBI. Id., ¶ 22. According to the Complaint, in the spring of 1993, defendants Nussbaum, Livingstone and/or Marceca, acting at the direction of defendant Hillary Rodham Clinton, and without legal justification, requested that the FBI furnish copies of plaintiffs' confidential background investigation files to the Executive Office of the President ("EOP"). Id., ¶ 25. In turn, the FBI allegedly released their files without plaintiffs' prior knowledge or consent. Id., ¶ 27.

In Count I of the Complaint, plaintiffs maintain that the FBI willfully and intentionally violated the Privacy Act, 5 U.S.C. § 552a, both by its release of their background files to EOP, and by its alleged failure to establish appropriate administrative safeguards to insure the confidentiality and security of these records. Complaint, ¶¶ 31-

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[2] The recitation herein of matters alleged in the Complaint, filed September 12, 1996 (the "Complaint"), should not be construed as an admission of any fact or legal conclusion asserted therein. The moving defendants reserve their right to controvert any and all of plaintiffs' legal and factual allegations at the appropriate time.

32. Count II alleges that EOP also willfully and intentionally violated the Privacy Act by maintaining plaintiffs' background files in a system of records without legal authority. Id., ¶ 36. Count III asserts that the individual defendants violated plaintiffs' common law right of privacy. Id., ¶¶ 39-41. Plaintiffs seek compensatory damages in excess of $90,000,000 for each of the three counts, together with punitive damages, costs, and attorneys fees. Id. at 9, 10, 11 (ad damnum clauses). Plaintiffs also seek to litigate this case as a class action. Id., ¶¶ 14-20.

4. Given that the matters forming the crux of plaintiffs' law suit -- the alleged disclosure of their FBI background files to EOP, and the reasons therefor -- also are the focus of the Independent Counsel's probe, it became apparent that mounting a defense to plaintiffs' claims would require DoJ, as counsel to the government defendants, to conduct just the sort of inquiry into the FBI files matter that the Attorney General had already recognized could interfere with the conduct of the Independent Counsel's investigation. Exhibit 1 at 3. It also became apparent that DoJ would have to make similar inquiries to ascertain whether the individual defendants' conduct, as relevant to plaintiffs' allegations, fell within the scope of their office or employment. Under the Westfall Act, 28 U.S.C. § 2679(d), upon certification by the Attorney General that a federal employee against whom a tort claim is brought "was acting within the scope of his office or employment at the time of the incident out of which the claim arose," the claim shall be deemed to be one brought under the Federal Tort Claims Act, and the United States substituted as defendant. 28 U.S.C. § 2679(d)(1).

In deference to the Independent Counsel as the official charged with responsibility for investigating the FBI files matter, and to avoid any inquiry by DoJ that the Attorney General had already determined could interfere with or impede the Independent Counsel's investigation, the Department of Justice has refrained from conducting any factual inquiries regarding plaintiffs' complaint, except as to the public record. If, however, the case were to proceed, DoJ could not maintain that posture without severely compromising, if not vitiating, its ability to defend the interests of the United States, the government defendants, and the individual defendants,[3] in this litigation. To resolve this situation, the Department inquired of the Independent Counsel's office, beginning September 25, 1996, as to whether he believed that the case should be stayed, or that a stay would not be required and DoJ could proceed with any factual inquiries necessary to defend the case. See Letter from Gary G. Grindler, Deputy Assistant Attorney General to John D. Bates, Deputy Independent Counsel, dated October 31, 1996 (Grindler Decl., Exh. A).

On November 4, 1996, the Office of the Independent Counsel responded to DoJ's inquiries, stating that "[t]he subject matter of th[is] civil litigation relates to [the Independent Counsel's] ongoing criminal investigation," and that an inquiry by DoJ into the FBI

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[3] One of the individual defendants has requested representation by the Department of Justice. DoJ cannot honor that request -- or the request of any of the other defendants, should any more come forward -- without first conducting inquiries to determine whether the requesting individuals acted within the scope of their office or employment, and/or whether representation would be in the interests of the United States. See 28 U.S.C. §§ 516, 517; 28 C.F.R. § 50.15(a). The Independent Counsel has asked that these inquiries, as well as the very similar substantive inquiries necessary to defend against the charges on behalf of such defendants as are represented by the Department of Justice, not go forward during the next thirty days.

files matter "would interfere with [that] investigation." Letter from John D. Bates, Deputy Independent Counsel, to Gary G. Grindler, Deputy Assistant Attorney General, dated November 4, 1996 (Grindler Decl., Exh. B). The Independent Counsel also concluded, however, that this might no longer be the case "in the near future." He therefore requested that the United States "seek a stay of the civil litigation of sufficient length to allow [DoJ] to wait thirty days from [November 4] before initiating [its] inquiry [emphasis added]." The Independent Counsel further stated that he would advise DoJ if the thirty-day period needed to be extended, or could be shortened. Id.

In light of the Independent Counsel's request, this case should be temporarily stayed, until the Department of Justice can defend it without intruding upon the Independent Counsel's FBI files investigation.

ARGUMENT

THIS CASE SHOULD BE STAYED PENDING THE INDEPENDENT COUNSEL'S INVESTIGATION OF THE FBI FILES MATTER

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket . . . ." NL Chem., Inc. v. Southern Clay Prod., Inc., 704 F. Supp. 299, 300 (D.D.C. 1989), quoting Landis v. N. Am. Co., 299 U.S. 248, 254-55 (1936). This power may be invoked to defer civil litigation pending the outcome of related criminal proceedings whenever "the interests of justice seem[ ] to require such an action . . . ." United States v. Kordel, 397 U.S. 1, 12 n. 27 (1970). See Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1202 (Fed. Cir.

1987). Staying civil litigation until parallel criminal proceedings are completed is a well recognized and often used procedure. See Kordel, 397 U.S. at 12 n. 27 (citing cases); United States v. U.S. Currency, 626 F.2d 11, 17 (6th Cir.) ("[t]he Kordel decision embodies a recognition of the power of the federal courts . . . to stay civil suits because of pending criminal charges") (citation omitted), cert. denied, 449 U.S. 993 (1980).

In light of the Independent Counsel's investigation, this case should be stayed to "protect the integrity" of the criminal matter entrusted to him. Bureerong v. Uvawas, 167 F.R.D. 83, 87 (C.D. Cal. 1996); Integrated Generics, Inc. v. Bowen, 678 F. Supp. 1004, 1009 (E.D.N.Y. 1988). It is well recognized by the federal courts that, where pending civil and criminal matters overlap, proceeding with the civil litigation may compromise the government's case in the related criminal matter, to the detriment of the public interest in effective law enforcement. See e.g., United States v. Premises and Property at 297 Hawley St., 727 F. Supp. 90, 91 (W.D.N.Y. 1990), citing United States v. Eight Thousand Eight Hundred and Fifty Dollars, 461 U.S. 555, 567 (1983); United States v. Hugo Key and Son, Inc., 672 F. Supp. 656, 658 (D.R.I. 1987).

Safeguarding the effective pursuit of criminal matters from infringement by civil litigation is a "paramount concern," Bureerong, 167 F.R.D. at 87, one that takes precedence over a civil plaintiff's interest in a speedy determination of his or her claims. Twenty First Century Corp. v. La Bianca, 801 F. Supp. 1007, 1010 (E.D.N.Y. 1992) (citation omitted). So holding, courts routinely enter stays to ensure that civil cases do not interfere with related criminal proceedings. E.g., United States v. Any and All

Assets of Shane Co., 147 F.R.D. 99, 101 (M.D.N.C. 1992); LaRouche Campaign v. FBI, 106 F.R.D. 500, 501 (D. Mass. 1985). As the court observed in Afro-Lecon, 820 F.2d at 1204,

> [i]t has long been the practice to "freeze" civil proceedings when a criminal prosecution involving the same facts is warming up or under way * * * out of a sense that deferrable civil proceedings constitute improper interference with the criminal proceedings if they churn over the same evidentiary material [citation omitted].

The Independent Counsel wishes this action stayed for that very reason. See Grindler Decl., Exh. B. To defend themselves against plaintiffs' civil claims, defendants and their attorneys will have to make extensive factual inquiries into matters now under investigation by the Independent Counsel. They will have to "churn over the same evidentiary material" as the Independent Counsel, Afro-Lecon, 820 F.2d at 1204, simply to prepare answers (or other responses) to the Complaint, and, in DoJ's case, to determine whether to substitute the United States as the proper tort claim defendant, and, if asked, to decide whether it should represent the individual defendants. See supra at 6.

If discovery commenced prior to completion of the Independent Counsel's investigation, the defendants would be entitled, and their counsel (including DoJ) would be obligated, to use all the available tools of discovery to elicit witness statements and documents tending to refute plaintiffs' claims, evidence which in a criminal matter might not be available prior to trial, if ever.[4] Because defendants' legitimate pursuit of their

[4] For example, in criminal cases the Jencks Act, 18 U.S.C. § 3500, prohibits pretrial discovery of statements by government witnesses. Likewise, depositions are not an (continued...)

defense in this litigation predictably will collide with the pursuit of the Independent Counsel's FBI files investigation, the Court should honor the Independent Counsel's wishes and stay this case. Integrated Generics, 678 F. Supp. at 1009; Hugo Key, 672 F. Supp. at 658.[5]

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[4](...continued)
authorized method of criminal discovery, but may be taken only by order of the court, in "exceptional circumstances," to preserve testimony for trial. Fed. R. Crim. P. 15(a); United States v. Kelley, 36 F.3d 1118, 1124 (D.C. Cir. 1994). On the other hand, in civil litigation witnesses generally may be deposed as a matter of right, and disclosure of their prior statements compelled, for the purpose of discovering "any matter, not privileged, which is relevant to the subject matter" of the litigation. Fed. R. Civ. P. 26(b)(1), 30(a)(1), 34(a). The disparity in scope between civil and criminal discovery is a frequently cited reason for staying civil litigation that overlaps with an ongoing criminal proceeding. See Shane Co., 147 F.R.D. at 101; 297 Hawley Street, 727 F. Supp. at 91.

[5] The case for a stay is that much stronger here, because the criminal investigation in question is one supervised by an independent counsel, and the civil case is defended, at least in part, by DoJ. Not only have the Independent Counsel and the Attorney General both concluded, at least at this time, that DoJ should not make inquiries into the facts of this case, their determination is consonant with public policy that seeks to avoid involvement by DoJ in the affairs of an independent counsel.

To ensure that independent counsels may carry out their responsibilities "without interference, supervision or control by the Department of Justice," S. Rep. No. 170, 95th Cong., 2d Sess. 66 (1977) (emphasis added), reprinted in 1978 U.S. Code Cong. & Ad. News 4216, 4282; see In re Sealed Case (North), 829 F.2d 50, 56 (D.C. Cir. 1987), cert. denied, 484 U.S. 1027 (1988), the Ethics in Government Act provides, with exceptions not relevant here, that "[w]henever a matter is in the prosecutorial jurisdiction of an independent counsel . . . the Department of Justice . . . shall suspend all investigations and proceedings regarding such matter[.]" 28 U.S.C. § 597(a). Strictly speaking, section 597(a) is meant to halt law enforcement investigations and proceedings initiated by DoJ, and should not be construed to apply to civil cases brought by private parties. But the policy underlying the statute would be disserved if this case is not stayed in deference to the Independent Counsel's investigation.

Accordingly, the "interests of justice" require that litigation of this case be briefly delayed pending the Independent Counsel's investigation of the FBI files matter. Specifically, as the Independent Counsel has requested, a stay should be entered that will allow DoJ to wait thirty days from November 4, 1996, to begin any inquiry necessary to defend this case. Grindler Decl., Exh. B. Therefore, the government defendants seek a stay of the case until Monday, February 3, 1997. A stay of that modest length will allow DoJ thirty days (until December 4, 1996) to forbear from any inquiry into this matter, as requested by the Independent Counsel, and 60 days thereafter to conduct any necessary factual inquiries and prepare its clients' response to plaintiffs' complaint. This is no more than the time that would ordinarily be accorded to the government defendants under Fed. R. Civ. P. 12(a)(3). Plaintiffs will not suffer any hardship or otherwise be prejudiced by a stay of this short duration.

The Court should also grant leave for the government defendants to seek an extension of this stay, should the Independent Counsel determine, as he indicates is possible, that a stay of greater duration is necessary. Grindler Decl., Exh. B.

CONCLUSION

For the foregoing reasons, the government defendants' motion for a limited stay of proceedings should be granted.

Dated: November 7, 1996

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

GARY G. GRINDLER
Deputy Assistant Attorney General
Federal Programs Branch

DAVID J. ANDERSON
ANNE L. WEISMANN
JAMES J. GILLIGAN
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Counsel for Defendants Federal Bureau of Investigation and Executive Office of the President

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
INDEPENDENT COUNSEL DIVISION

United States Court of Appeals
For the District of Columbia Circuit
FILED JUN 21 1996

In re ANTHONY MARCECA) Division No. 94-1
)

NOTIFICATION TO THE COURT PURSUANT TO 28 U.S.C. § 592(a)(1)
OF THE INITIATION OF A PRELIMINARY INVESTIGATION AND
APPLICATION TO THE COURT PURSUANT TO 28 U.S.C. § 593(c)(1)
FOR THE EXPANSION OF THE JURISDICTION OF AN INDEPENDENT COUNSEL

In accordance with the Independent Counsel Reauthorization Act of 1994, I hereby notify the Special Division of the Court that I have commenced a preliminary investigation, 28 U.S.C. § 592(a)(1), and request expansion of the jurisdiction of Independent Counsel Kenneth Starr to investigate whether any violations of federal criminal law, other than a Class B or C misdemeanor or infraction, were committed by Anthony Marceca, an investigator with the United States Army Criminal Investigative Division detailed to the White House Office of Personnel Security from August 1993 through February 1994.

Background and Conclusions. The Department of Justice has received information from the Federal Bureau of Investigation (FBI) and press reports that Mr. Marceca caused the submission of memoranda from the Counsel to the President to the Federal Bureau of Investigation, requesting copies of "previous reports" on a number of individuals, asserting that the information was needed because the individuals were in need of access to the White House. A sworn statement signed by Mr. Marceca and obtained by the FBI states that part of his job as a detailee in the Office of Personnel Security was to update and recreate necessary background files on individuals with White House access, and that he prepared the requests to the FBI, working from various lists of names that had been provided to him.

When one Administration leaves office, it is established practice for the outgoing Administration to remove all of its records, which then become part of the Presidential Papers. Thus, it is necessary for the new Administration to recreate personnel records for those individuals who continue to need access to the White House. This is a routine and established process, and is Mr. Marceca's explanation for his preparation of the form requests to the FBI for "previous reports," which resulted in the FBI's sending new copies of background information on the named individuals to the White House.

However, some of the requests provided to the FBI identified individuals who did not require access to the White House, including individuals who had worked in previous Administrations and individuals who had been terminated in connection with the White House Travel Office matter. Therefore, some of the request forms completed by Mr. Marceca and sent to the FBI, insofar as they stated that the named individuals required access to the White House, were false. Furthermore, according to press reports, a former employee of the Office of Personnel Security has provided testimony to Congress that to the best of her knowledge, lists of individuals needing White House access maintained by the Office of Personnel Security were current.

I have concluded that further investigation is warranted to determine whether the inaccurate request forms were knowing and willful false statements in violation of 18 U.S.C. § 1001.

I further have concluded that because it necessarily will involve an inquiry into dealings between the White House and the FBI, an investigation by the Department of Justice of whether Mr. Marceca violated federal criminal law in making the requests to the FBI would constitute a political conflict of interest, as described in 28 U.S.C. § 591(c)(1). I therefore have decided to utilize my discretionary authority to invoke the provisions of the Independent Counsel Reauthorization Act of 1994 with respect to this matter. Finally, I have concluded that additional preliminary investigation by the Department of Justice would not be appropriate in this situation because of the political conflict of interest, and to avoid interfering with any investigation that the Independent Counsel may deem appropriate.

I recommend that Kenneth Starr, Independent Counsel in the matter of Madison Guaranty Savings & Loan Association, be appointed to conduct this investigation through an expansion of his current jurisdiction. Expansion of jurisdiction rather than appointment of a new Independent Counsel with respect to this matter is appropriate because Mr. Starr has already conducted a limited inquiry into the matter. Mr. Starr has expressed his willingness to accept jurisdiction over this matter if his jurisdiction is expanded by this Court.

Recommended Jurisdiction. Pursuant to 28 U.S.C. § 593(c)(1), I recommend and request that the Special Division of the Court expand Independent Counsel Starr's jurisdiction to permit investigation of this matter and determine whether a violation of federal criminal law has occurred. I have appended a recommended statement of expansion of prosecutorial jurisdiction.

Disclosure. I request that the Court authorize public disclosure of this Notification and Application. The matter has received a great deal of public attention recently, and is the subject of ongoing congressional inquiry. Public disclosure of the fact that the investigation is being referred to an Independent Counsel therefore would serve the public interest.

Respectfully submitted,

Janet Reno

Janet Reno
Attorney General of the United States

Date: June 20, 1996

Recommended Statement of Expanded Jurisdiction

The Independent Counsel shall continue to enjoy the full jurisdiction conferred upon him as a result of any previous order of the Special Division of the Court. Pursuant to 28 U.S.C. § 593(c)(1), the Independent Counsel's jurisdiction shall be expanded to include the following:

The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Anthony Marceca committed a violation of 18 U.S.C. § 1001 or any other federal criminal law, other than a Class B or C misdemeanor or infraction, relating to requests made by the White House between December 1993 and February 1994 to the Federal Bureau of Investigation for background investigation reports and materials.

The Independent Counsel shall have jurisdiction and authority to investigate related allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity, including any person or entity who has engaged in unlawful conspiracy or who has aided or abetted any federal offense, as necessary to resolve the matter described above.

The Independent Counsel shall have jurisdiction and authority to investigate crimes, such as any violation of 28 U.S.C. § 1826, any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, arising out of his investigation of the matter described above.

Should it be deemed appropriate, the Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute the matters described above.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

United States Court of Appeals
For the District of Columbia Circuit
FILED OCT 24 1996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
INDEPENDENT COUNSEL DIVISION

In re BERNARD NUSSBAUM	)	No.

NOTIFICATION TO THE COURT PURSUANT TO 28 U.S.C. § 592(a)(1) OF THE INITIATION OF A PRELIMINARY INVESTIGATION AND APPLICATION TO THE COURT PURSUANT TO 28 U.S.C. § 593(c)(1) FOR THE EXPANSION OF THE JURISDICTION OF AN INDEPENDENT COUNSEL

In accordance with the Independent Counsel Reauthorization Act of 1994, I hereby notify the Special Division of the Court that I have commenced a preliminary investigation, 28 U.S.C. § 592 (a)(1), and request expansion of the jurisdiction of Independent Counsel Kenneth Starr to investigate whether any violations of federal criminal law, other than a Class B or C misdemeanor or infraction, were committed by Bernard Nussbaum, former White House Counsel from 1993 through 1994.

Background and Conclusions. The Department of Justice has received information from the United States House of Representatives Committee on Government Reform and Oversight, that Mr. Nussbaum may have made false statements to the Committee during sworn testimony on June 26, 1996.

More particularly, several Committee Members claim that statements made by Mr. Nussbaum to the Committee on June 26, 1996, concerning the role of Hillary Clinton in the hiring of Craig Livingstone "appear to be inconsistent" with statements he may have made in 1993 to Federal Bureau of Investigation (FBI)

Special Agent Dennis Sculimbrene during the course of Agent Sculimbrene's background investigation of Mr. Livingstone.

Review of relevant portions of the Congressional Record reveal that Mr. Nussbaum denied knowledge of who hired Mr. Livingstone, and specifically denied discussing Mr. Livingstone with Hillary Clinton. According to a statement by Congressman Clinger in the Congressional Record on July 25, 1996, during the hearing Congressman Horn asked former Associate White House Counsel William Kennedy whether Mrs. Clinton wanted Mr. Livingstone at the White House. According to Clinger, Mr. Kennedy testified that "I can state that I have never discussed Mr. Livingstone with Mrs. Clinton in any way, shape or form." Mr. Nussbaum immediately responded, "Nor did I." When Congressman Clinger directly asked Mr. Nussbaum if he knew who hired Craig Livingstone, Mr. Nussbaum responded, "I don't know who brought Mr. Livingstone into the White House."

According to Congressman Clinger, Special Agent Sculimbrene's report of his interview of Mr. Nussbaum in 1993 indicates that Mrs. Clinton recommended Livingstone to Nussbaum. Specifically, Congressman Clinger quotes the interview report as stating that "Mr. Livingstone had come highly recommended to him by Hillary Clinton, who has known his mother for a longer period of time."

Based on the foregoing, I have concluded that further investigation is warranted to determine whether Mr. Nussbaum's statements before the Committee are in fact false, and if so, whether there has been a violation of 18 U.S.C. § 1621.

This investigation necessarily will involve an inquiry into statements allegedly made by a former senior member of the White House staff to the FBI concerning the role of the First Lady in a controversial personnel decision, which has become the focus of Congressional hearings and which touches on matters already under investigation by an Independent Counsel. Given this set of circumstances, I have concluded that an investigation by the Department of Justice into whether Mr. Nussbaum made perjurious statements would constitute a political conflict of interest, as described in 28 U.S.C. § 591(c)(1). I therefore have decided to use my discretionary authority to invoke the provisions of the Independent Counsel Reauthorization Act of 1994 with respect to this matter. Finally, I have concluded that additional preliminary investigation by the Department of Justice would not be appropriate in this situation because of the political conflict of interest, and to avoid interfering with any investigation that the Independent Counsel may deem appropriate.

I recommend that Kenneth Starr, Independent Counsel in the matter of Madison Guaranty Savings and Loan Association, be appointed to conduct this investigation through an expansion of his current jurisdiction. Expansion of jurisdiction rather than appointment of a new Independent Counsel with respect to this matter is appropriate because Independent Counsel Starr has already commenced investigation of similar matters involving some of the same individuals. Independent Counsel Starr has expressed his willingness to accept jurisdiction of this matter if his jurisdiction is expanded by this court.

Recommended Jurisdiction Pursuant to 28 U.S.C. § 593(c)(1), I recommend and request that the Special Division of the Court expand Independent Counsel Starr's jurisdiction to permit investigation of this matter and determine whether a violation of federal criminal law has occurred. I have appended a recommended statement of expansion of prosecutorial jurisdiction.

Disclosure I request that the Court authorize public disclosure of this Notification and Application. The matter has received significant public attention, and is the subject of Congressional inquiry. Public disclosure of the fact that the investigation is being referred to an Independent Counsel therefore would serve the public interest.

Respectfully Submitted,

Janet Reno

Janet Reno
Attorney General of the United States

Date: October 24, 1996

Recommended Statement of Expanded Jurisdiction

The Independent Counsel shall continue to enjoy the full jurisdiction conferred upon him as a result of any previous order of the Special Division of the Court. Pursuant to 28 U.S.C. § 593(c)(1), the Independent Counsel's jurisdiction shall be expanded to include the following:

The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Bernard Nussbaum committed a violation of 18 U.S.C. § 1621 or any other federal criminal law, other than a Class B or C misdemeanor or infraction, relating to statements he made on June 26, 1996, before the United States House of Representatives Committee on Government Reform and Oversight.

The Independent Counsel shall have jurisdiction and authority to investigate related allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity, including any person or entity who has engaged in unlawful conspiracy or who has aided or abetted any federal offense, as necessary to resolve the matter described above.

The Independent Counsel shall have jurisdiction and authority to investigate crimes, such as any violation of 28 U.S.C. § 1826, any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, arising out of his investigation of the matter described above.

Should it be deemed appropriate, the Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute the matters described above.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Madison Guaranty Savings & Loan Association (In re: Anthony Marceca) — Division No. 94-1

O R D E R

Before: SENTELLE, *Presiding*, BUTZNER and FAY, *Senior Circuit Judges*.

Upon consideration of the notification to the court pursuant to 28 U.S.C. § 592(a)(1) of the initiation of a preliminary investigation and application to the court pursuant to 28 U.S.C. § 593(c)(1) for expansion of the jurisdiction of an independent counsel, it is

ORDERED that, pursuant to 28 U.S.C. § 593(c)(1), the investigative and prosecutorial jurisdiction of Independent Counsel Kenneth W. Starr be expanded to investigate whether any violations of federal criminal law other than a Class B or C misdemeanor or infraction, were committed by Anthony Marceca, an investigator with the United States Army Criminal Investigative Division detailed to the White House Office of Personnel Security from August 1993 through February 1994. Pursuant to 28 U.S.C. § 593(c)(1), the Independent Counsel's jurisdiction shall be expanded to include the following:

The Independent Counsel shall continue to enjoy the full jurisdiction conferred upon him as a result of any previous order of the Special Division of the Court. Pursuant to 28 U.S.C. § 593(c)(1), the Independent Counsel's jurisdiction shall be expanded to include the following:

The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Anthony Marceca committed a violation of 18 U.S.C. § 1001 or any other federal criminal law, other than a Class B or C misdemeanor or infraction, relating to requests made by the White House between December 1993 and February 1994 to the Federal Bureau of Investigation for background investigation reports and materials.

The Independent Counsel shall have jurisdiction and authority to investigate related allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity, including any person or entity who has engaged in unlawful conspiracy or who has aided or abetted any federal offense, as necessary to resolve the matter described above.

The Independent Counsel shall have jurisdiction and authority to investigate crimes, such as any violation of 28 U.S.C. § 1826, any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, arising out of his investigation of the matter described above.

Should it be deemed appropriate, the Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute the matters described above.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

FURTHER ORDERED that, in light of the Attorney General's motion heretofore made for the authorization of the disclosure of her application for this expansion pursuant to 28 U.S.C. § 592(e) and the ongoing public interest in this matter, this order and the notification upon which it issues be publicly disclosed.

<u>Per Curiam</u>
For the Court:

Mark J. Langer, Clerk

United States Court of Appeals
For the District of Columbia Circuit
FILED OCT 25 1996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Madison Guaranty Savings & Loan Association (In re: Bernard Nussbaum)

Division No. 94-1

ORDER

Before: SENTELLE, *Presiding Judge*, BUTZNER and FAY, *Senior Circuit Judges*.

Upon consideration of the notification to the court pursuant to 28 U.S.C. § 592(a)(1) of the initiation of a preliminary investigation and application to the court pursuant to 28 U.S.C. § 593(c)(1) for expansion of the jurisdiction of an independent counsel, it is

ORDERED that, pursuant to 28 U.S.C. § 593(c)(1), the investigative and prosecutorial jurisdiction of Independent Counsel Kenneth W. Starr be expanded to include the following:

The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Bernard Nussbaum committed a violation of 18 U.S.C. § 1621 or any other federal criminal law, other than a Class B or C misdemeanor or infraction, relating to statements he made on June 26, 1996, before the United States House of Representatives Committee on Government Reform and Oversight.

The Independent Counsel shall have jurisdiction and authority to investigate related allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity, including any person or entity who has engaged in unlawful conspiracy or who has aided or abetted any federal offense, as necessary to resolve the matter described above.

TOTAL P.02

The Independent Counsel shall have jurisdiction and authority to investigate crimes, such as any violation of 28 U.S.C. § 1826, any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, arising out of his investigation of the matter described above.

Should it be deemed appropriate, the Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute the matter described above.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994. It is

FURTHER ORDERED that the Attorney General's request for authorization to disclose publicly this notification and application be granted. It is

FURTHER ORDERED that, in light of the Attorney General's request for the authorization of the disclosure of her application for this expansion pursuant to 28 U.S.C. § 592(e) and the ongoing public interest in this matter, this order be publicly disclosed.

Per Curiam
For the Court:

Mark J. Langer, Clerk

by

Marilyn R. Sargent
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA ALEXANDER, et al., Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	Civil Action No. 96-2123 (RCL)

DECLARATION OF GARY G. GRINDLER

I, Gary G. Grindler, for my declaration pursuant to 28 U.S.C. § 1746, depose and say as follows:

1. I am the Deputy Assistant Attorney General for the Federal Programs Branch, Civil Division, United States Department of Justice.

2. Attached hereto as Exhibit A is a true and correct copy of a letter from myself to John D. Bates, Deputy Independent Counsel, Office of the Independent Counsel, dated October 31, 1996.

3. Attached hereto as Exhibit B is a true and correct copy of a letter I received from Mr. Bates, dated November 4, 1996.

I swear under penalty of perjury that the foregoing is true and correct.

Executed on November 6, 1996.

GARY G. GRINDLER

November 2, 1996

BY HAND-DELIVERY

John D. Bates, Esq.
Deputy Independent Counsel
Office of Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490 North
Washington, D.C. 20004

Re: Alexander, et al. v. FBI, et al., Civil Action No. 96-2123 (D.D.C.)

Dear John:

As you are aware, I wrote you on October 31, 1996, to inquire again whether the Independent Counsel wishes the Department of Justice ("DOJ") to seek a stay of Alexander v. FBI, pending your investigation of the FBI files matter. As I have also advised you, in deference to the Independent Counsel's interests DOJ has to date refrained from factual inquiries regarding the civil case, so as not to interfere with or impede your investigation. I stressed, however, that absent a stay DOJ must soon begin such inquiries so as to prepare our clients' defense to plaintiffs' claims.

Our clients' responses to the civil complaint are currently due on November 18, 1996. Even if we obtained a short extension of that deadline, DOJ has concluded that, unless we move for a stay, we cannot postpone factual inquiries regarding the civil case beyond Tuesday, November 12, without prejudice to our clients' interests in the civil litigation. For that reason, I request that you please advise me whether or not the Independent Counsel believes that the civil case should be stayed by no later than Friday, November 8. If you are not able to inform us of your position by that time, then DOJ must embark upon such factual inquiries into the FBI files matter as are necessary to defend our clients against plaintiffs' allegations.

Exhibit A

I thank you again for your cooperation in this matter. If you would like to discuss it further, please call either myself (514-7836) or Eva Plaza (514-3309).

Very truly yours,

Gary G. Grindler
Deputy Assistant Attorney General

Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688
Fax (202) 514-8802

November 4, 1996

Gary G. Grindler, Esq.
Deputy Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Re: Alexander, et al. v. FBI, et al.
Civil Action No. 96-2123 (D.D.C.)

Dear Mr. Grindler:

You have advised us that before responding to the complaint filed in the referenced civil litigation, the Department of Justice will need to conduct a factual inquiry into the circumstances under which FBI background investigation files of employees of the Reagan and Bush administrations were obtained by the White House. You have further advised us that civil discovery may involve additional inquiries into this matter.

The subject matter of the civil litigation relates to our ongoing criminal investigation, authorized by orders of the Special Division of the D.C. Circuit dated June 21, 1996 and October 25, 1996. We believe that the inquiry by the Department of Justice that you describe, if undertaken at this time, would interfere with our investigation. However, we also believe that will no longer be the case in the near future.

Accordingly, we request that the United States seek a stay of the civil litigation of sufficient length to allow you to wait thirty days from today before initiating your inquiry. We will reevaluate our position after this brief delay and advise you at that time whether we believe the Department may proceed in the civil litigation without interfering with our investigation.

We will notify you promptly if we should conclude before the expiration of the thirty days that the Department may proceed without interfering with our investigation.

Sincerely,

John D. Bates
Deputy Independent Counsel

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA ALEXANDER, et al., Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	)	Civil Action No. 96-2123 (RCL)

ORDER

This case is before the Court upon the motion of the government defendants (the Federal Bureau of Investigation and the Executive Office of the President) for a limited stay of all proceedings in this case until February 3, 1997. The Court having considered the parties respective submissions in support of and in opposition to the government defendants' motion, the relevant facts, and applicable law,

IT IS HEREBY ORDERED THAT:

1. The government defendants' motion for a limited stay of proceedings is hereby GRANTED.
2. All proceedings in this case shall be STAYED until February 3, 1997.

3. Leave is hereby GRANTED to seek an extension of this stay as appropriate.

So ORDERED this ______ day of November, 1996.

HON. ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

Copies to:

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Washington, D.C. 20005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA ALEXANDER, *et al*., Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, *et al*., Defendants.	Civil Action No. 96-2123 (RCL)

GOVERNMENT DEFENDANTS' MOTION TO SHORTEN TIME
AND FOR EXPEDITED CONSIDERATION OF
MOTION FOR A LIMITED STAY OF PROCEEDING
AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

STATEMENT

On November 7, 1996, the government defendants (Executive Office of the President and the FBI) moved for a stay of the proceedings in the above-captioned case. The basis of the motion is the request of the Independent Counsel investigating the FBI files matter that the Department of Justice ("DOJ") not undertake any factual inquiry into the subject matter of this litigation at this time because to do so would interfere with his investigation. Because a response to plaintiffs' complaint is due on November 18, 1996, the government defendants hereby request that the Court shorten plaintiffs' time to respond and expedite its consideration of the motion to stay so that the matter may be resolved before that date.[1] Alternatively, the government defen-

[1] Under Local Rule 108(b), plaintiffs would ordinarily have eleven days to respond to the government defendants' motion. We are requesting that they file their response, if any, in six days, a modest shortening of time considering the simplicity of the stay

dants request an extension of time to respond to the complaint sufficient to allow the Court first to decide defendants' motion for a stay.[2]

ARGUMENT

A district court is afforded substantial discretion to control its docket, including the discretion to expedite proceedings. Lonchar v. Thomas, ___ U.S. ___, 116 S. Ct. 1293, 1299-1300 (1996); Landis v. North American Co., 229 U.S. 248, 254 (1936). In this case, an expedited scheduling of the government defendants' motion to stay is warranted so that the matter can be resolved prior to November 18, 1996, the date on which a response to plaintiffs' complaint is due. If the government defendants are otherwise required to respond to the complaint before the Court has ruled on the stay motion, they will face the dilemma of being required to respond without any factual inquiry, or compromising the governmental interests that underlie the stay motion.

The government defendants have filed their motion to stay as expeditiously as possible given that the Independent Counsel did not request that a stay be sought until November 4, 1996. The Department made its first inquiry to the Independent Counsel's office on September 25, 1996. On November 4, 1996, the Office of the Independent Counsel responded, stating that "[t]he subject matter of th[is] civil litigation relates to [the Independent

---

request.

[2] Pursuant to Local Rule 108(m), counsel for the government defendants attempted to contact plaintiffs' counsel with regard to this motion, but were unable to ascertain their position.

Counsel's] ongoing criminal investigation," and that an inquiry by the Department of Justice into the FBI files matter "would interfere with [that] investigation." See Exhibits A and B to the Grindler Declaration, attached to the Government Defendants' Motion to Stay. Defendants prepared and filed their motion to stay promptly after receiving the Independent Counsel's request.

Because the government defendants moved for a stay as soon as practicable, and because a response to plaintiffs' complaint is due on November 18, 1996, this Court should exercise its discretion to expedite the briefing and disposition of defendants' motion for a stay. Alternatively, defendants request an extension of time to respond to plaintiffs' complaint sufficient to allow this Court to hear and decide their motion to stay.

CONCLUSION

For the foregoing reasons, the Court should require plaintiffs to file any opposition to the stay motion by close of business on November 13, 1996 and should expedite its consideration by resolving that motion prior to November 18, 1996.

Dated: November 7, 1996

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

GARY G. GRINDLER
Deputy Assistant Attorney General

DAVID J. ANDERSON
ANNE L. WEISMANN
JAMES J. GILLIGAN
(Bar Id. No. 422152)
ELIZABETH J. SHAPIRO
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
(202) 514-3358

Counsel for Defendants
Executive Office of the President
and Federal Bureau of Investigation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA ALEXANDER, <u>et al</u>., Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, <u>et al</u>., Defendants.	Civil Action No. 96-2123 (RCL)

ORDER

Before the Court is the Government Defendants' Motion to Expedite the briefing and decision of their motion to stay the proceedings in the above-captioned case. Having considered the parties' submissions, the relevant facts and applicable law, it is hereby

ORDERED that the government defendants' motion is GRANTED; and it is further

ORDERED that:

1. Plaintiffs' opposition to the government defendants' motion to stay is due on November 13, 1996.

2. The Court will expedite its consideration of the motion to stay.

Date

Hon. Royce C. Lamberth
United States District Judge

Copies to:

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Elizabeth J. Shapiro
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Washington, D.C. 20044

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA LESLIE ALEXANDER, et al., Plaintiffs. v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	Civil Action No. 96-2123 (RCL)

PLAINTIFFS' OPPOSITION TO GOVERNMENT DEFENDANTS' MOTION FOR STAY

Plaintiffs, through undersigned counsel, hereby file their opposition to the Motion for a Limited Stay of Proceedings of Defendants Federal Bureau of Investigation and Executive Office of the President ("government Defendants").

I. BACKGROUND.

After waiting some seven weeks from the time it was served to notify Plaintiffs and this Court of its intentions, the United States Department of Justice ("DOJ"), on behalf of the government Defendants in the instant case, now seeks a stay of the proceedings which would give it one hundred and thirty-seven (137) days to respond to the Complaint. DOJ claims that in order to properly defend the case it will need to make certain inquiries into the issues in dispute, which could conceivably interfere with the investigation of Independent Counsel Kenneth Starr. In an apparent effort to delay responding to the Complaint, DOJ has suggested to the office of the

Independent Counsel that it should ask for a stay of these proceedings pending completion of the Independent Counsel's own investigation of related matters. By letter dated November 4, 1996, the Independent Counsel's office agreed that DOJ should seek a stay of only sufficient length to enable DOJ to wait until December 4, 1996 before beginning its inquiries.[1] DOJ now seeks a stay of sixty-one (61) calendar days beyond December 4, 1996, or a total of seventy-seven (77) days beyond the date on which Defendants' response to the Complaint would be due. For the reasons discussed below, this request is unreasonable, and government Defendants' motion should not be granted.

II. ARGUMENT.

A. The Circumstances of This Case Do Not Warrant a Stay of the Civil Proceedings.

The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. Securities & Exchange Commission v. Dresser Industries, 628 F.2d 1368, 1375 (D.C. Cir. 1980) ("Dresser Industries"). A court may decide in its discretion to stay civil proceedings when the interests of justice so require. U.S. v. Kordel, 397 U.S. 1, 12 n. 27 (1970) ("Kordel"). However, absent substantial prejudice to the rights of the parties, parallel civil and criminal proceedings are unobjectionable. Dresser Industries, *supra* at 1374. Indeed, a stay of civil proceedings is the exception, rather than the rule. International Business Machines v. Brown, 857 F.Supp. 1384, 1387 (C.D. Cal. 1994) ("IBM v. Brown").

The types of circumstances which weigh in favor of a decision to stay civil proceedings

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[1]It is obvious that Independent Counsels will nearly always agree that civil proceedings should defer to their investigations. That it was DOJ which contacted the Independent Counsel, rather than the other way around, is telling -- as it proves that the Independent Counsel did not have a strong interest in having this case stayed even until December 4, 1996

include such things as malicious prosecution, the absence of counsel for defendant during depositions, agency bad faith, malicious government tactics and similar "special circumstances." Dresser Industries, *supra* at 1375, Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1202 (Fed. Cir. 1987). "Other than where there is specific evidence of agency bad faith or malicious government tactics, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment . is required to defend a civil or administrative action involving the same matter." Dresser Industries, *supra* at 1375-76 (emphasis supplied). This is because the discovery process in the civil proceeding might undermine the party's Fifth Amendment privilege against self-incrimination or expose the basis of the defense to the prosecution in advance of the criminal trial. *Id.* at 1376

None of the above circumstances is present in this case. Malicious prosecution and agency bad faith simply have no relevance; and defendants are obviously all represented by experienced counsel. The most common reason for granting a stay of civil proceedings, the danger that civil process may be improperly used to obtain evidence for use in a parallel criminal proceeding, similarly does not apply in this case, because the civil and criminal cases are not both being prosecuted by the government.

In Arden Way Associates v. Boesky, 660 F.Supp. 1494 (S.D.N.Y. 1987) ("Boesky") (attached as Exhibit 1), the court denied defendant Boesky's motion to stay the proceedings in a private civil suit pending resolutión of ongoing criminal proceedings against him. *Id.* In that case, Boesky had agreed in writing with the prosecution that he would maintain the confidentiality of matters still subject to criminal investigation; and allegedly sought the stay of civil litigation so that his testimony in the civil case would not prejudice the government's criminal case *Id.* The court, however, denied Boesky's motion; reasoning that his predicament was of his own making, and that any agreement he had made with the prosecution in the criminal case must not take precedence over the civil plaintiffs' interest in diligently prosecuting their case. *Id.* at 1497. In the instant case, the government Defendants similarly "deliberately courted the impediment [they] seek[] to erect as a shield." *Id.* at 1498, as it was DOJ's idea to postpone its inquiries while the Independent Counsel's investigation was continuing. Thus, like Mr. Boesky, Defendants must, respectfully, not be allowed to avail themselves of the fact that their misconduct has also resulted in a criminal investigation, and thereby prevent Plaintiffs' rights from being promptly vindicated in this civil litigation. *See id.* at 1497.

In fact, the argument against a stay of civil proceedings is even stronger here than in Boesky, because in this case, although the Independent Counsel is conducting criminal investigations of two of the Defendants, no indictments have been returned, the criminal discovery rules are not in effect, and no Fifth Amendment privilege is currently threatened. (Of course, it is only the individual Defendants, not the government Defendants, who have a Fifth Amendment privilege to begin with; and this privilege may only be asserted by those individual Defendants themselves.) Thus the justification for seeking a stay of the civil proceedings in this case is virtually non-existent. *See* Dresser Industries, *supra* at 1375. *Accord* United States v. Private Sanitation Industry Association, 811 F.Supp. 802, 805 (E.D.N.Y.1992) ("Pre-indictment requests for a stay of civil proceedings are generally denied.").

In Kordel, *supra*, the U.S. Supreme Court denied a stay of the civil proceedings even when the government was prosecuting both the civil and criminal cases; because the Court found that the government had not brought the civil action "solely to obtain evidence for its criminal prosecution." Kordel, *supra* at 11-12. In the instant case, where the civil proceeding is brought by private litigants rather than by the government, it is even more absurd to argue that there is a danger of abuse by the prosecution (assuming there is eventually a criminal trial) of information gained in the civil suit. The ongoing investigation of the Independent Counsel did not prevent an investigation of the same subjects by Congress, and it should not prevent this lawsuit from going forward.

Furthermore, among the factors which a court should consider in deciding whether to grant a stay of civil proceedings are "the interest of the plaintiffs in proceeding expeditiously with [the] litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay." Federal Savings and Loan Ins. Co. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989). In this case, the interests of justice require that Plaintiffs be granted a prompt hearing of their claims, as the injuries suffered by Plaintiffs, from the misuse of their confidential FBI files, are continuing. In this regard, the instant case is distinguishable from such cases as United States v. U.S. Currency, 626 F.2d 11 (6th Cir. 1980), where a stay was granted of civil forfeiture proceedings because the court there found "no strong public interest in proceeding expeditiously in the forfeiture action." *Id.* at 17. Rather, this case more resembles IBM v. Brown, where the court noted that "[i]t is hard to see why the indirect societal interest in bringing to justice the perpetrators of crimes should ever take precedence over the direct interest of the victims of crimes to obtain redress for their losses." IBM v. Brown, *supra* at 1391.

B. If Defendants are Granted a Stay of the Proceedings, it Should be for Far Less than the Time Sought.

While it is apparent that the Independent Counsel does not have a strong interest in having these proceedings stayed, at DOJ's initiative the Independent Counsel's office was coaxed into agreeing to a brief stay. Out of deference to the Independent Counsel's modest request, Plaintiffs are willing to agree to a brief stay of the proceedings, notwithstanding the weakness of the arguments in favor of such a stay. However, there is no justification for a delay of the extent sought by the government Defendants, which would give them fully one hundred and thirty seven (137) days from the time of service to respond to the Complaint.

In the Memorandum of Points and Authorities accompanying the government Defendants' Motion for Stay, DOJ claims that it began making inquiries on September 25, 1996 as to whether the Independent Counsel's office believed that the DOJ should seek a stay of the civil proceedings. However, the earliest written contact is apparently a letter of October 31, 1996 *See* Memorandum of Points and Authorities in Support of Government Defendants' Motion for a Limited Stay of Proceedings at 7; Exhibit A to Amended Declaration of Gary G. Grindler. It thus appears that DOJ in fact waited some six (6) weeks after being served before going to the Independent Counsel with a formal request. Moreover, DOJ failed to put Plaintiffs or this Court on notice that it was planning to seek a stay, until November 5. In the interim, DOJ has concededly made inquiries regarding this case, to the extent of examining matters in the public record. Memorandum of Points and Authorities at 2, 7. The public record in this case is very highly developed, including as it does the Interim Report of the House of Representatives Committee on Government Reform and Oversight. House Comm. on Government Reform and Oversight, 104th Cong., Investigation into the White House and Department of Justice on Security of FBI Background Investigation Files, Interim Report, H.R. Rep. No. 104-862 (1996) (Attached as Exhibit 2). Consequently, DOJ has been able to undertake an extensive investigation already, and will not be starting from scratch when it begins its "comprehensive inquiry" on December 4.

Moreover, DOJ's own letter to the Independent Counsel's office on November 2, originally attached as Exhibit A to the Declaration of Gary G. Grindler (but which DOJ now claims was never sent), provides evidence that the DOJ's inquiries and response to the Complaint will take far less than the additional seventy-seven (77) days DOJ is now seeking. In that letter, DOJ noted that its response to the Complaint is due on November 18, 1996, and stated that even if it received a short extension of that deadline, without a stay of the proceedings it would have to begin its inquiries by November 12, 1996. The letter goes on to state that if DOJ did not get a response from the Independent Counsel's office by November 8, DOJ would begin its inquiries (presumably under the assumption that a response would still be due by the 18th). The clear implication of this letter is that DOJ would require ten (10) days or two (2) weeks to make its inquiries and respond to the Complaint – not seventy-seven (77) days.

Furthermore, the government Defendants attempt to reserve the right to move for an even longer stay, should the Independent Counsel's investigation not be completed on schedule. Plaintiffs should not be forced to wait indefinitely to have their day in court; they must be provided with some certainty that their case will proceed expeditiously.

Accordingly, Plaintiffs respectfully request that if the government Defendants are granted a stay of the proceedings in this case, that stay should be for no more than two (2) weeks beyond December 4, 1996, or thirty (30) days beyond the time their Answer to the Complaint is now due.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 1996, true copies of the foregoing, PLAINTIFF'S OPPOSITION TO GOVERNMENT DEFENDANTS' MOTION FOR STAY, were served via first class U.S. mail, postage prepaid, on the following:

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