UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE JAMES MADISON PROJECT et al.	*	
	*	
Plaintiffs,	*	
	*	
v.	*	Civil Action No. 07-02306 (RBW)
	*	
CENTRAL INTELLIGENCE AGENCY	*	
	*	
Defendant.	*	
	*	

* * * * * * * * * * * *

OPPOSITION TO DEFENDANT'S MOTION
FOR A STAY OF PROCEEDINGS

Plaintiffs The James Madison Project and Matthew Cole (collectively referred to as "JMP") brought this Freedom of Information Act ("FOIA") action against defendant Central Intelligence Agency ("CIA"), seeking expedited processing and the release of records pertaining to the 2005 destruction of videotapes by the CIA. The videotapes contained the interrogations of terrorists Zayn Abidin Muhammed Hussain Abu Zubaida (a/k/a Abu Zubaydah) and Abd al-Rahim al-Nashiri, as well as other suspected terrorists. Their destruction was made public on December 6, 2007, by way of an announcement by CIA Director Michael V. Hayden.

The CIA, in an attempt to deliberately forestall this litigation for a potentially excessively-broad period of time, is seeking a stay from this Court until – at a minimum – the Department of Justice's criminal investigation into the conduct of relevant CIA officials has been completed, as well as any subsequent – if ever – criminal proceedings. As this request is a blatantly inappropriate attempt to circumvent the statutory remedies of FOIA the CIA's Motion should be denied and it should be required to disclose all responsive records or justify their withholding.

PROCEDURAL BACKGROUND

The original complaint in this action was filed by the James Madison Project on December 21, 2007. On January 25, 2008, a First Amended Complaint was filed adding Matthew Cole as a plaintiff..

The CIA filed its answer on February 19, 2008. On June 9, 2008, the CIA filed this Motion for a Stay of Proceedings.

ARGUMENT

The CIA offers both a procedural argument and a three-part substantive argument to justify this stay request. The procedural argument states that civil actions relating to a pending criminal investigation are commonly stayed in order to avoid compromising a criminal investigation, regardless of whether an indictment has been issued. Defendant's Memorandum in Support of Motion for a Stay of Proceedings at 4-6 (filed June 9, 2008)("CIA's Memo"). Relying upon that argument, the CIA argues that: (1) the pending criminal action could be harmed if the FOIA case proceeded; (2) the stay would not create a hardship for JMP; and (3) judicial economy and the temporary nature of the stay favors a stay. Id. at 6-11. For the reasons stated below, these arguments are without merit and fail to demonstrate that a balancing of the circumstances warrants the issuance of a stay.

I. THE CIA HAS MISCONSTRUED THE EXTENT TO WHICH THE D.C. CIRCUIT HAS HELD THAT IT WILL STAY CIVIL PROCEEDINGS ABSENT AN INDICTMENT IN THE CRIMINAL PROCEEDINGS.

The current state of the law within the D.C. Circuit remains that the Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. See SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980),

citing Baxter v. Palmigiano, 425 U.S. 308 (1976). While courts admittedly retain the discretionary authority to issue such a stay, the decision to exercise that authority is dependent upon the particular circumstances of the case. Dresser, 628 F.2d at 1375. See also Landis v. North American Co., 299 U.S. 248, 255 (1936)(the movant party "must make out a *clear case of hardship* or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else")(emphasis added); Dresser, 628 F.2d at 1375-76 ("[T]he 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.")(emphasis added). The mere relationship between criminal and civil proceedings, and the resulting prospect that discovery in the civil case could prejudice the criminal proceedings, does not establish the requisite good cause for a stay. Horn v. District of Columbia, 210 F.R.D. 13, 15 (D.D.C. 2002).

The lack of a criminal indictment is most assuredly a factor that weighs against any argument in favor of a stay of civil proceedings. See Dresser, 628 F.2d at 1376 (finding argument in favor of stay weaker due to absence of criminal indictment). See also Brock v. Tolkow, 109 F.R.D. 116, 120 n.2 (E.D.N.Y. 1985)(that indictment had not been issued viable consideration counseling against stay of proceedings). Indeed, the CIA cited to only one case in which the court granted a stay in the absence of a criminal indictment. CIA's Memo at 5, citing Capital Engineering & Manufacturing Co. Inc. v. Weinberger, 695 F. Supp. 36, 41-42 (D.D.C. 1988).[1]

[1] As an example of the novelty of the CIA's arguments, especially in the context of a FOIA lawsuit, it relies heavily upon non-binding case law to justify its argument. See CIA's Memo at 5 fn.1.

In fact, the Court's decision to stay the civil proceedings in Capital Engineering came *after* it had denied the government's initial Motion to Dismiss in order to stay discovery. In that case the pending criminal investigation actually involved the very same plaintiff who had brought the civil action. Id. at 40. The District Court was clear in concluding that the government had "raised a meritorious concern as to the *timing* of plaintiff's discovery" and exercised its discretionary authority to stay discovery in order to prevent the plaintiff "from availing themselves of liberal civil discovery rules in order to circumvent the more restrictive guidelines governing criminal discovery". Id. at 41 (emphasis in original). Such circumstances could not be more distinguishable from the case at bar, in which the CIA has yet to even file a dispositive motion justifying its withholdings or the adequacy of its search, nor for that matter are the plaintiffs parties to the criminal investigation or will ever be.

Furthermore, it is far from necessary to suspend all proceedings in a civil case – particularly one still in its infancy – due to its mere relation to a pending criminal investigation. The Supreme Court devised a limited approach meant to address such a problem, particularly where compliance with discovery requests by an opposing party would subject the other party to a "real and appreciable risk of self-incrimination". United States v. Kordel, 397 U.S. 1, 8-9 (1970)(recognizing that, in such a circumstance, protective order suspending civil discovery until termination of criminal action would be appropriate).[2] See also Dellinger v. Mitchell, 442 F.2d 782, 787 (D.C. Cir. 1971)("Where related civil and criminal litigations are pending at the same time, sound discretion of the

[2] The CIA failed to identify any binding case law justifying its argument that proceedings in a civil case must be suspended in order to protect a pending criminal investigation. See CIA's Memo at 5.

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."); Gordon v. Federal Deposit Ins. Corp., 427 F.2d 578, 580 (D.C. Cir. 1970)(even if civil case not stayed, protective order to prevent discovery viable potential option); Capital Engineering, 695 F. Supp. at 41 (narrowing "range of discovery so as not to impinge upon the criminal proceedings" viable option). The fact that a protective order might ultimately be appropriate, though, does not justify a total stay of proceedings. Dellinger, 442 F.2d at 787.

In the present case, the CIA has yet to even file a dispositive motion in order to withhold records responsive to JMP's FOIA request.[3] The CIA fails to articulate any sound reason why the viability of any potentially applicable FOIA exemptions, especially that of Exemption 7(a), could not be litigated rather than a stay being imposed. Declaration of Mark S. Zaid, Esq. at ¶¶9-12 (dated July 21, 2008)("Zaid Decl."), attached as Exhibit "1". Therefore, the CIA's Motion should be denied and the CIA should be ordered to release all responsive records and/or timely file a dispositive motion addressing its invocation of FOIA Exemption 7(a), as well as any other allegedly-appropriate FOIA exemption.

[3] As explained in greater detail below, the CIA readily admits that, absent a stay, it will file a dispositive motion invoking FOIA Exemption 7(a) to withhold all responsive records. See CIA's Memo at 10. Ironically, this case is one of the incredibly rare circumstances where the CIA has granted expedited processing for a requester. See Exhibit "1-A". See also CIA Freedom of Information Act Annual Report Fiscal Year 2007 at 8 (noting of 127 requests for expedited processing filed between FY 2004 – 2007, only one was granted)(a copy of the report can be found at *http://www.foia.cia.gov/txt/Annual_Report_2007.pdf*)

II. THE CIA HAS FAILED TO DEMONSTRATE THAT THE CURRENT CIRCUMSTANCES SUPPORT THE ISSUANCE OF A STAY

Even if it is determined that a stay of all civil proceedings should even be entertained, the CIA has not demonstrated that a stay is warranted. A party seeking a stay needs to satisfy the following standard: (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) must establish that the duration of the requested stay is not immoderate or unreasonable. Horn, 210 F.R.D. at 15. The underlying necessity for this standard is simple, namely that it is an abuse of discretion for a district court to grant a stay of "*indefinite duration in absence of a pressing need*". Feld Entertainment, Inc. v. ASPCA, 523 F. Supp. 2d 1, 5 (D.D.C. 2007)(emphasis added).

The CIA argues that it has satisfied this standard and demonstrated that the circumstances warrant the issuance of a stay. CIA's Memo at 6-11. As will be demonstrated below, this argument is without merit. Accordingly, the CIA's Motion should be denied and the CIA should be ordered to expeditiously release all responsive records and thereafter timely file a dispositive motion to justify any challenged withholdings.

A. The Durham Declaration Does Not Sufficiently Demonstrate That The Criminal Investigation Would Be Harmed By The Civil FOIA Action

The burden rests upon the movant party to demonstrate that the parallel criminal proceedings warrant a finding that the issues in the civil proceedings are "related" and "substantially" similar. See Horn, 210 F.R.D. at 15-16. Moreover, as the CIA readily

admits, the key issue is the risk of prejudice to the criminal investigation. CIA's Memo at 6. See also Dresser, 628 F.2d at 1374 ("In the absence of *substantial prejudice* to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.")(emphasis added).

The CIA, by way of the Declaration of John H. Durham (dated June 9, 2008)("Durham Declaration"), who is currently handling the criminal investigation into the actual destruction of the videotapes, argues that each of the five categories of documents sought by JMP's FOIA request relate directly to the destruction of the videotapes and therefore substantially overlap with the ongoing federal criminal investigation. The CIA notes that the criminal investigation is broad, "essentially looking into all aspects of the destruction of the videotapes interrogations, including whether anyone obstructed justice, made false statements, or acted in contempt of court or Congress in connection with the destruction of the videotapes." Id. at ¶4. The CIA also argues that "because the review and processing of the documents potentially responsive to plaintiffs' FOIA requests will be done by individuals who are potential (and essential) witnesses in the interrogation, such review and processing could well prejudice the criminal investigation by causing these witnesses to, unintentionally or intentionally, change their testimony to conform their version of events to the documents. Id. at ¶7. In light of that, the CIA argues that the circumstances warrant a stay. CIA's Memo at 7.

The Durham Declaration, for its part, is insufficient for purposes of demonstrating either the extent to which the two proceedings are "substantially similar" or, for that matter, there will be "substantial prejudice" to the rights of the parties involved in the criminal investigation. It relies largely upon generic, boilerplate statements detailing the

similarity of the proceedings and the potential prejudicial risk that the present case poses to the criminal investigation, ultimately relying upon the assertion that the "highly classified nature of much of the information in this investigation" cautions against divulging further any details regarding the prejudicial risks posed by this civil action. See Durham Decl. at ¶¶6-10. These vague statements fail to provide sufficient context within which to identify the extent that: (1) the individuals responsible for reviewing the records responsive to JMP's FOIA request would be "potential" or "essential" witnesses in the criminal investigation; (2) such review and processing could – or more specifically, would – cause witnesses to change their testimony; (3) the likelihood of public disclosures would arguably be increased due to the processing of the FOIA request – excluding the issue of actual documents being disclosed to JMP. This failure undermines any argument that the CIA has sufficiently satisfied the first prong of the standard.

Additionally, the Durham Declaration provides negligible factual context in asserting that many of the individuals who would review responsive records are "essential" witnesses in the criminal investigation and that exposing these witnesses to records responsive to JMP's FOIA request could arguably affect the answers they would subsequently provide to criminal investigators. Id. at ¶¶6-7. Without at least some form of supplemental information on these particular individuals and why they would be involved in both proceedings,[4] this Court is deprived of any context in which to assess

[4] JMP is not necessarily arguing that actual names or job titles would need to be disclosed. However, supplemental information regarding why these particular individuals referenced by the CIA would be both involved in the processing of JMP's FOIA request as well as potential witnesses in the criminal investigation can be provided to this Court without undermining the integrity of the criminal investigation. This is a particularly relevant question as thousands of pages of responsive records have already been

(Continued…)

whether the particular individuals would, in fact, be involved in both the present civil FOIA action and the criminal proceedings, as well as whether other individuals within particular offices and/or divisions of the CIA could fill this role for purposes of this present case.[5] In effect, the Durham Declaration is arguing that entire offices and/or divisions of CIA employees are considered "essential" witnesses, and therefore nobody could be permitted to review the records due to their need to participate with the criminal investigation.[6] To say the least, this argument is insufficient and without merit, especially since the CIA has already identified thousands of relevant pages without any apparent harm to the criminal investigation. See Exhibit "1-B".

(…Continued)
identified and processing has begun. Exhibit "1-B". At a minimum, the CIA should provide to this Court a supplemental *in camera* affidavit that addresses the factual deficiencies identified by JMP and demonstrates, to this Court's satisfaction, that the individuals responsible for processing JMP's FOIA request are "potential" and/or "essential" witnesses in the criminal investigation. The CIA, for its part, recognizes that such a filing may be necessary, see Durham Decl. at ¶10, and JMP strongly urges that it be provided to this Court. Should the CIA pursue this path, and following the completion of the investigation or the conclusion of any criminal prosecution, JMP will seek review by this Court to ensure the CIA's response did not amount to perjury and a determination as to whether its Motion to Stay was frivolously filed and deserving of sanctions pursuant to Rule 11.

[5] Ironically, this option would in effect constitute the same type of "substitution of personnel" that the Department of Justice is utilizing in conducting the criminal investigation. As the Durham Declaration itself recognizes, Mr. Durham is serving as the United States Attorney for the Eastern District of Virginia solely in an "Acting" capacity in place of the actual United States Attorney, Chuck Rosenberg. Id. at ¶1.

[6] Given that the CIA admits that many, if not most, of the documents in question have already been identified for purposes of the criminal investigation, id. at ¶6, it remains unclear what role, if any, non-FOIA personnel would have at this point in processing JMP's FOIA request. Determinations relating to responsiveness and classification are handled exclusively by FOIA personnel, none of whom could arguably be considered as "potential" witnesses in the criminal investigation. Zaid Decl. at ¶12.

Furthermore, the Durham Declaration does not provide any contextual information justifying its unsubstantiated assertion that processing JMP's FOIA request would somehow increase the likelihood of public disclosure of information – by way of leaks or inadvertent discussions – that could negatively impact the criminal investigation. See Durham Decl. at ¶8. The CIA has failed to provide this Court with any factual basis upon which to evaluate the likelihood of this occurring, and is in effect arguing that CIA employees are somehow more likely to divulge this information to the public than the DOJ employees who have been working and continue to work on the criminal investigation. The Durham Declaration's virtual silence on this issue is most telling and further undermines the CIA's argument that permitting the present civil FOIA action to continue would be "substantially" prejudicial to the parties involved in the criminal investigation.

Given the insufficiency of the Durham Declaration, the CIA has failed to make a "clear showing" that the issues are "substantially similar" and that denying the stay would result in substantial prejudice.

B. The CIA Has Failed To Make A Clear Showing Of Hardship If The Stay Is Not Granted

The D.C. Circuit's underlying rationale behind its view that – absent "special circumstances" involving "substantial prejudice" – the courts should not block parallel civil and criminal proceedings is simple, namely that efficient enforcement of the law may require simultaneous proceedings. See Dresser, 628 F.2d at 1377. The CIA, though, seems to argue that it can demonstrate the existence of "special circumstances" by way of the mere assertion that "the public's interest in the integrity of the criminal investigation, however, takes priority over the plaintiffs' interest in disseminating information (even to

the public) that would squarely implicate the integrity of the investigation, and, to the extent that plaintiffs' FOIA requests are made in the public interest, that interest will be vindicated through the criminal investigation (and any subsequent release of documents in this FOIA case or otherwise". CIA's Memo at 9. As far as the CIA is concerned, public policy gives "priority to the public interest in law enforcement". Id.[7]

This assertion, however, lies in conflict with the law of this Circuit. See Linde Thomson Langworhty Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1518 (D.C. Cir. 1993)(rejecting the argument that the commencement of one proceeding was rendered moot by an arguably "supervening" parallel proceeding when the statute authorizing the former proceeding did not contain any restrictions on its authority). See also Dresser, 628 F.2d at 1378-79 (concluding SEC retained full powers of investigation under pertinent statute even after parallel criminal proceeding underway).[8] On its own, the public's interest in the "integrity of the criminal investigation" fails to constitute a "special circumstance" sufficient to satisfy the Linde Thomson standard, as it would have

[7] Of course, the very purpose of FOIA is to benefit the public's interest, and cases such as this are clearly designed to effectuate that purpose. NARA v. Favish, 541 U.S. 157, 171-72, reh'g denied, 541 U.S. 1057 (2004)(emphasizing that the FOIA's underlying purpose of allowing "citizens to know 'what their government is up to'" is "a structural necessity in a real democracy", quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

[8] Moreover, the public interest in the flow of information is just as strong when the source of information is an individual, as opposed to a law enforcement agency. See Founding Church of Scientology of Washington, D.C., Inc. v. Director, 1985 U.S. Dist. LEXIS 22267, *10 (D.D.C. February 26, 1985).

no prohibitive effect on the otherwise unrestricted authority vested within the FOIA. The CIA, for its part, has failed to cite to a single binding case that states otherwise.[9]

FOIA Exemption 7(a) could, if invoked, arguably constitute a restriction on FOIA that would in fact constitute a "special circumstance", particularly in light of the fact that the exemption prohibits disclosure otherwise permissible under the FOIA.[10] The CIA, albeit in an indirect manner, does address the relevance of FOIA Exemption 7(a), namely that it applies "as long as there is a concrete prospect of a law enforcement proceeding that could be harmed by a premature release of information". CIA's Memo at 10. See also NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 228-32 (1978)(exemption applicable if agency can show that law enforcement proceeding is pending or prospective and release of information could reasonably be expected to cause some articulatable harm).

The CIA notes that the current criminal investigation, as well as any subsequent indictments or prosecutions, would qualify as a pending law enforcement proceedings, and that disclosure of information in the responsive records would harm the investigation. CIA's Memo at 10. Strangely enough, while admitting that it has not yet formally invoked the exemption, the CIA asserts that, if this Motion is denied, it will invoke Exemption 7(a) over all of the responsive records anyways, and ultimately disclosure to

[9] With all due respect to the statements and rulings by courts in other districts and circuits upon which the CIA has chosen to rely exclusively, see CIA's Memo at 9, they are at best informative and lack any binding effect on the present case. More importantly, not one of the cases pertains to a stay of FOIA proceedings.

[10] Exemption 7(a) exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings". 5 U.S.C. § 552(a)(b)(7).

JMP will still not be permitted until after the conclusion of the criminal proceedings. Id. With that in mind, the CIA argues that JMP will not be harmed by a stay of the present case. Id. This argument then renders this current Motion completely disingenuous and reflects the fact that it is nothing but a delay tactic to further string out these proceedings as well as to create unnecessary work for the plaintiffs and this Court. If the CIA genuinely believed that an appropriate FOIA exemption existed that would, as it states, accomplish the same objective as this Motion, then why not invoke the exemption outright rather than have the parties dance this dance?[11]

That said, the plaintiffs are not yet faced with having to address Exemption 7(a). Therefore, under the present circumstances, the CIA has misconstrued the nature of the burden of persuasion pertaining to a motion for a stay of proceedings. The burden is on the CIA, not JMP, to "make a clear showing of hardship or inequality" if the stay is not granted. See Horn, 210 F.R.D. at 15. See also Id. at 16 (finding that a claim of "likely interference" falls short of demonstrating a "clear showing of hardship or inequality"). JMP, for its part, is not required to identify any harm that it will incur if the stay is granted, but rather only has to demonstrate that the CIA has failed to meet its burden of persuasion in support of granting the stay. The fact that this Court may ultimately uphold the CIA's prospective invocation of Exemption 7(a) has no bearing or relevance on the

[11] Indeed, as late as March 2008, the CIA was seeking to negotiate a processing and release schedule of six months. It was not until June 2008, a full six months after the CIA received the relevant FOIA requests and significant processing had begun, that a stay was sought. Exhibit "1-B".

issue of whether, for purposes of this Motion, the CIA has made a clear showing of hardship that will occur in the absence of a stay.[12]

Given the insufficiency of its arguments and its misconstruction of the burden of persuasion, the CIA has failed to make a "clear showing of hardship" and therefore failed to satisfy the second prong of the test.

C. The CIA Has Failed To Demonstrate That The Nature Of The Stay Is Temporary Or Reasonable

The Supreme Court has held, and the D.C. Circuit has affirmed, that "in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." Landis, 299 U.S. at 256. See also Dellinger, 442 F.2d at 787 (rejecting motion for stay of proceedings after considering both duration of stay and scope). The burden rests upon the movant party, though, to demonstrate that the duration and scope of the stay are not immoderate or unreasonable. Horn, 210 F.R.D. at 15.

The CIA largely sidesteps the issue of whether the scope of the stay – the halting of all proceedings in the present case prior to the filing of a single dispositive motion – is reasonable, instead it focuses on two other issues of questionable relevance. First, the CIA once again notes that even if its Motion is denied, it will subsequently invoke FOIA

[12] The CIA's assertion that, pursuant to Maydak v. Dep't of Justice, 218 F.3d 760 (D.C. Cir. 2000), a blanket invocation of FOIA Exemption 7(a) would still require the review and process all responsive records and, therefore, encounter the "same problems" of potential witnesses reviewing records that will undermine the integrity of the criminal investigation, similarly has no relevance here. If this Court chooses to deny the CIA's Motion, then the CIA has failed to demonstrate to this Court that merely reviewing and processing the records will undermine the integrity of the criminal investigation to such an extent that a stay is warranted to halt the present case's proceedings in its infancy.

Exemption 7(a) over most, if not all, of the responsive records and that the applicability of the exemption would subsequently have to be litigated. CIA's Memo at 11.[13] Needless to say, the CIA's argument misses the point. Regardless of whether the applicability of FOIA Exemption 7(a) is subsequently litigated, possibly even in the CIA's favor, it has no bearing or relevance on the immediate issue before this Court of whether the scope of the stay sought by the CIA is reasonable. Indeed, the CIA has failed to provide any support for the notion that the scope of the stay is in fact reasonable. In light of the law of this Circuit, something which JMP has previously referenced, halting the proceedings of the case at bar while they are still in their infancy is not reasonable. See Dellinger, 442 F.2d at 787.

Second, almost in the form of a teaser, the CIA notes that once the criminal investigation has concluded, all Exemption 7(a) concerns will be moot and the documents withheld under the exemption – likely all of the responsive records – would be released. See CIA's Memo at 11. This constitutes the very definition of a "red herring", suggesting that all that stands in the way of disclosure are the CIA's Exemption 7(a) concerns. Reality, however, paints a far different picture, as there are several other exemptions that would arguably be invoked as well. As a general rule, an agency can not invoke exemptions piecemeal but rather must assert all exemptions at the same time, in the original district court proceedings. See Maydak, 218 F.3d at 764-65. See also Ryan v. Dep't of Justice, 617 F.2d 781, 792 (D.C. Cir. 1980)("The danger of permitting the Government to raise its FOIA exemption claims one at a time, at different stages of a

[13] Given that JMP's counsel specifically suggested to the CIA's counsel months ago that the parties litigate this very issue immediately and avoid protracted administrative delay, see Exhibit "1-B", JMP has no objection to this course of action, although it obviously disputes the CIA's assertion that JMP will fail to succeed on the merits.

district court proceeding, is especially apparent in this case, where any delay through this means could easily render the appellants' claim futile.").

At a minimum, it is reasonably likely that the CIA will also attempt to invoke Exemptions 1, 3 and 5 over a large swath of the responsive records, either redacting portions of records or withholding records in their entirety. Given that the scope of the request was for records pertaining to videotapes of interrogations of two highly infamous terrorists, the CIA will likely deem a great deal of information in the responsive records to be classified and thereby within the scope of Exemption 1. Knowing full well the CIA's oft-held reliance upon Exemption 3 by way of the National Security Act of 1947 and CIA Act of 1949 to prevent disclosure of "intelligence sources and methods", JMP can confidently argue that it is reasonably likely that the CIA will seek to exempt additional swaths of information under this exemption. Furthermore, given that it has been well reported that there were discussions amongst agency officials, including legal counsel, regarding the legal authority to destroy the videotapes, it is reasonably certain that the CIA will seek to withhold information by way of evidentiary privileges under Exemption 5.

Lastly, even if the benefit of the doubt is afforded to the estimate by the criminal investigators that the investigation itself will only last another six months, see CIA's Memo at 11, and, as a best case scenario procedure-wise, the investigators do not choose to issue any criminal indictments, the CIA has still failed to demonstrate that both the duration and scope of the stay are moderate and reasonable. Needless to say, if indeed criminal indictments are issued, the delays will mount. Although the Speedy Trial Act will arguably expedite a criminal trial, without knowing how many different trials will be

necessary or how many appeals will have to be considered, it remains unknown exactly how long the criminal proceedings could last, even arguably stretching into multiple years.

Therefore, the CIA has not demonstrated that the duration and scope of the stay is reasonable and has failed to satisfy the third and final prong.

CONCLUSION

For all the foregoing reasons, Defendant's Motion for a Stay of Proceedings should be denied.

Date: July 21, 2008

Respectfully submitted,

/s/

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