

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**
CASE NUMBER: 03-81110-CIV-HURLEY/HOPKINS

MAUREEN STEVENS, as Personal
Representative of the Estate of ROBERT
STEVENS, Deceased, and on behalf of
MAUREEN STEVENS, Individually,
NICHOLAS STEVENS, HEIDI HOGAN
and CASEY STEVENS, Survivors,

Plaintiffs,

vs

UNITED STATES OF AMERICA,

Defendant.

**DEFENDANT UNITED STATES' STATEMENT OF MATERIAL FACTS NOT IN
GENUINE DISPUTE IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT
BASED ON THE ABSENCE OF PROXIMATE CAUSE**

Defendant United States hereby submits this statement of material facts not in genuine dispute in support of its accompanying motion for summary judgment based on the absence of proximate cause:

Anthrax in U.S. History

1. Mr. Robert Stevens was the first person in the history of the United States maliciously killed with a pathogen. *See* Plaintiffs' Emergency Motion [DE# 138] at 4 ¶ 2 (stating that "[t]his is a unique case considering it involves the first bioterrorism attack on U.S. soil").

2. Mr. Robert Stevens was the first person in the history of the United States killed by an attack with anthrax bacteria. *See id.*; U.S. Exhibit ("U.S. Ex.") in support of its "Motion for Summary Judgment Based on the Absence of Proximate Cause" ("PC")-02,¹ *Stevens v. Battelle Memorial Institute*, Case No. 04-80213-HURLEY [DE# 31], EMERGING INFECTIOUS DISEASES,² "First Case of Bioterrorism-Related Inhalational Anthrax in the United States, Palm Beach County, Florida, 2001" at 18 ("This report documents . . . the first recognized case due to intentional dissemination of *B. anthracis* spores in the United States") & 14 ("we confirmed the first bioterrorism-related anthrax case identified in the United States").

3. Mr. Robert Stevens was the first person in the history of the world killed by an attack with anthrax bacteria descended or derived from anthrax bacteria in the possession of any United States laboratory, including government laboratories. *Cf. id.*

¹ U.S. Ex. PC-01 is the Exhibit List that serves as an index of exhibits supporting this statement.

² Emerging Infectious Diseases is published by the Centers for Disease Control and Prevention.

4. Mr. “Robert Stevens was the first person to die of inhalation anthrax in the United States of America since 1976.” U.S. Ex. PC-03, Plaintiffs’ Response to the United States Request for Admission No. 5.

5. Human anthrax has been rare. Among eight human cases reported in Florida throughout the 20th Century, the most recent was a cutaneous³ case in 1974. U.S. Ex. PC-02, at 14.

There was no “Missing Anthrax” from Fort Detrick, Maryland, in 1992

6. The Memorandum of Charles R. Brown, II, titled “Missing Anthrax Blocks” (attached to Plaintiffs’ Complaint [DE #1] as Exhibit F) stated that an electron microscopy (EM) block⁴ of “Anthrax Spores” was “not present in the laboratory files/archives” and “reported” “EM blocks” of other pathogens “missing from the archival file system within the Experimental Pathology Branch.” *Id.* at 1.

7. The Memorandum of Charles R. Brown, II, titled “Missing Anthrax Blocks” noted that the anthrax spores EM “blocks are of extreme importance to ongoing research” (*id.* at 1) and requested “an investigation into the ‘loss’ ... of the specific items . . . due to their immediate and future value to the Pathology Division” (*id.* at 2).

8. The Memorandum of Charles R. Brown, II, titled “Missing Anthrax Blocks” made no mention, whatsoever, of any threat to human health, safety or security from the asserted loss of EM blocks of “anthrax spores” or any other pathogens. *See id.* at 1-2.

³ “Cutaneous” anthrax appears as a skin lesion.

⁴ An EM block can be thought of as long-lasting ‘slide’ material of a dead pathogen that is used as a reference for scientific study with an electron microscope.

9. The allegedly “missing” samples of pathogens identified in the Memorandum of Charles R. Brown, II, titled “Missing Anthrax Blocks” “were non-viable, non-infectious, and never a hazard to the public or environment.” U.S. Ex. PC-04, USAMRIID Freedom of Information Act Response report, Feb. 2002 (excerpt) (emphasis added), at USAM-19803; U.S. Ex. PC-05, Deposition of Dr. Edward Eitzen (excerpt), at 167:16-24; U.S. Ex. PC-06, Deposition of Dr. Peter Jahrling (excerpt), at 89:7-11.

10. “[A]ny material that was reported ‘missing’ [in the Memorandum of Charles R. Brown, II, titled “Missing Anthrax Blocks”] was dead.” U.S. Ex. PC-07, USAMRIID Information Paper, Jan. 21, 2002 (emphasis added), at USAM-19788 (“The pathology specimens . . . contained non-living organisms as a result of the procedures used to process the tissues for examination”); *see* U.S. Ex. PC-05, Deposition of Dr. Eitzen, at 166:3-21; U.S. Ex. PC-06, Deposition of Dr. Jahrling, at 88:6-89:6.

11. Each and every sample of a pathogen identified in the Memorandum of Charles R. Brown, II, titled “Missing Anthrax Blocks,” was killed twice – first killed with an overabundance of gamma radiation, then ‘killed’ with an “aldehyde fixative” and process that included “dehydration through ethanols and [then] finally embedded in resin and cured . . .” U.S. Ex. PC-08, USAMRIID Information Paper, Jan. 22, 2002, at USAM-19792; *see* U.S. Ex. PC-06, Deposition of Dr. Jahrling, at 87:4-88:2 (verifying the veracity of the conclusions reflected in U.S. Ex. PC-08); U.S. Ex. PC-05, Deposition of Dr. Eitzen at 166:3-21; U.S. Ex. PC-04, at USAM-19804 (“ . . .these were pathology samples, twice inactivated during the . . . process . . .”).

12. No pathogen identified in the Memorandum of Charles R. Brown, II, titled “Missing Anthrax Blocks” was “missing from [a] lab at Ft. Detrick” [D.E. #1 ¶ 9], but was instead asserted to be missing from a building located outside of Fort Detrick, because the

pertinent office, “the Pathology Division was located off-post (Frederick, MD) in leased commercial space close to Ft. Detrick” where “[o]nly inactivated materials were taken.” U.S. Ex. PC-08, at USAM-19792; see PC-05, Deposition of Dr. Eitzen at 166:22-167:2.

13. Finally, subsequent investigation established that no pathogens discussed in the Memorandum of Charles R. Brown, II, titled “Missing Anthrax Blocks” were missing or unaccounted for:

The missing electron microscopy blocks Mr. Brown refers to in his memorandum have been located or accounted for. Despite a standard operating procedure for the division allowing proper disposal of non-essential material after seven years, these samples were located in the archives or accounted for via Pathology logs in January 2002. . . . Mr. Brown’s allegation of lost samples is unfounded.

U.S. Ex. PC-04, at USAM-19803-04. See U.S. Ex. PC-05, Deposition of Dr. Eitzen at 167:7-11.

14. Prior to the anthrax letter attacks, to the extent that it was required, USAMRIID was not known to have any problem with accountability or inventory management for its live anthrax stocks. See U.S. Ex. PC-09, Deposition of Dr. William Russell Byrne (excerpt), at 63:10-15 (former Chief of Bacteriology Division unaware of any problem with anthrax accountability or inventory management at USAMRIID).

The Anthrax Letters

15. The late Dr. Bruce Ivins created the flask of anthrax bacteria in a liquid medium known as RMR-1029 by October 1997. U.S. Ex. PC-10, Reference Material Receipt Record 1029 (RMR-1029), p. 1.

16. It is not known whether or not some of the initial steps to carry out the anthrax letter attacks “occurred well in advance” of the attacks. U.S. Ex. PC-11, National Academy of

Sciences, REVIEW OF THE SCIENTIFIC APPROACHES USED DURING THE FBI'S INVESTIGATION OF THE 2011 ANTHRAX LETTERS, p. 78 (http://www.nap.edu/catalog.php?record_id=13098).

17. The anthrax spores used in the anthrax attacks were likely descendants of anthrax bacteria derived from the flask known as "RMR-1029" created and kept at USAMRIID, although the assailant could not have used the material contained in the RMR-1029 flask as the "immediate, most proximate source of the letter material." U.S. Ex. PC-11, p. 7.

18. "[O]ne or more separate growth steps, using seed material from RMR-1029 followed by purification, would have been necessary" to prepare the anthrax attack letters. *Id.*

19. Anthrax in the possession of the United States government was "genetically similar, but *dissimilar in its form*, to the anthrax that resulted in the death of Robert Stevens." Stipulation [DE# 85] ¶ 3 (emphasis added).

20. To prepare the anthrax spores for the 2001 anthrax letter attacks, someone had to: (i) take anthrax bacteria, (ii) cultivate/grow a sufficient quantify, (iii) concentrate/purify it, (iv) dry it, and (v) convert it into an extremely fine powder before placing it in the envelopes for mailing. U.S. Ex. PC-11, pp. 76-77.

21. The anthrax attacker would have cultivated at least "2.8 to 53 liters of liquid medium to produce the spores required for the letters." *Id.*, p. 77. If the attacker used Petri dishes instead, he would have needed 463 to 1250 plates to grow enough anthrax. *Id.*

22. By way of comparison, the smallest possible estimate of liquid solution used to prepare the anthrax letters was at least three to seven times larger than the liquid contents of RMR-1029, which never contained more than one liter of liquid, and contained less than 400 milliliters on October 4, 2011. *Compare id.*, with U.S. Ex. PC-10.

23. Once the assailant completed cultivating (or growing) enough anthrax, he would need to conduct “[s]pore purification . . . typically accomplished by a repeated centrifugation, disposal of the . . . cellular debris, and resuspension of the spore pellet in fresh liquid. . . . Purification by any method would involve some liquid washing steps and would require a relatively large-capacity centrifuge.” U.S. Ex. PC-11, p. 77.

24. After concentrating/purifying the anthrax spore, the anthrax attacker would have to dry the spores and convert them into an extremely fine, dry powder, suitable for transmission in the letter. *Id.*, pp. 77-78.

25. USAMRIID exclusively used liquid anthrax spore preparations when working with viable anthrax. U.S. Ex. PC-12, Dr. Worsham at 31:22-25 and 34:3-34:18; U.S. Ex. PC-13, Deposition of Dr. Susan Welkos, at 69:4-7 (“We don’t work with powders, just liquids, and in relatively small volumes.”); *see id.* at 66:13-67:5, 67:18-25, 68:7-9.

26. Even when conducting animal challenges to test the effectiveness of vaccines, scientists at USAMRIID only used spore preparations in a liquid medium. They would use a specialized nebulizer to aerosolize the liquid into very fine particles within a confined space over a short-range so the material would always “retain [] its liquid state.” U.S. Ex. PC-12, Dr. Worsham, at 34:3-18; *see* U.S. Ex. PC-13, Dr. Welkos, at 66:23-67:2.

27. It would also take special expertise (even amongst those used to working with anthrax) to make dried material of the quality used in the attacks. U.S. Ex. PC-14, Deposition of Stephen Little (excerpt), at 56:12-16; U.S. Ex. PC-12, Dr. Worsham, 31:25-32:9 (“I think it would be very difficult to do”); U.S. Ex. PC-13, Dr. Welkos, at 68:15-69:7.

28. USAMRIID did not have the specialized equipment in a containment laboratory that would be required to prepare the dried spore preparations that were used in the letters. U.S.

Ex. PC-12, at 31:25-32:24, 26:6-20 (“I don’t believe that we had facilities at USAMRIID to make that kind of preparation. It would have taken a great deal of time; it would have taken a huge number of cultures; it would have taken a lot of resources . . . We did not have anything in containment suitable for drying down anything, much less a quantity of spores.”); U.S. Ex. PC-14, Mr. Little, at 44:9-47:15, 55:7-19 (discussing barriers to using equipment from outside the biocontainment suites); *see id.* at 49:23-25 (barriers to working outside the laboratory).

Mass Murder and Serial Murder

29. Plaintiffs’ expert Dr. Park Dietz, testified that the anthrax attacks are better understood as “a mass murder or serial killer” than as “theft” or “terrorism.” U.S. Ex. PC-15, Deposition of Dr. Park Dietz (excerpt), at 108.

30. “Serial murder is a relatively rare event, estimated to comprise less than one percent of all murders committed in any given year.” U.S. Ex. PC-16, NATIONAL CENTER FOR THE ANALYSIS OF VIOLENT CRIME, SERIAL MURDER: MULTI-DISCIPLINARY PERSPECTIVES FOR INVESTIGATORS (2008) at 2.

31. Serial killings defy prediction, in part, because (*id.* at 3):

The majority of serial killers are not reclusive, social misfits who live alone. They are not monsters and may not appear strange. Many serial killers hide in plain sight within their communities. Serial murderers often have families and homes, are gainfully employed, and appear to be normal members of the community. Because many serial murderers can blend in so effortlessly, they are oftentimes overlooked by law enforcement and the public.

Id. at 3.

32. Serial murder cannot be predicted because what causes the development of a serial murderer is unclear:

Symposium attendees agreed that *there is no single identifiable cause or factor that leads to the development of a serial killer*. Rather, there are a multitude of factors that contribute to their development. The most significant factor is the serial killer's personal decision in choosing to pursue their crimes.

More research is needed to identify specific pathways of development that produce serial killers.

Id. at 11-12 (emphasis added).

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Respectfully Submitted,

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