UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE AND VETERANS FOR PEACE, Plaintiffs, v. DEPARTMENT OF DEFENSE, AND ITS COMPONENTS DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF JUSTICE, AND ITS COMPONENTS CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE OF INFORMATION AND PRIVACY, OFFICE OF INTELLIGENCE, POLICY AND REVIEW, FEDERAL BUREAU OF INVESTIGATION; DEPARTMENT OF STATE; AND CENTRAL INTELLIGENCE AGENCY, Defendants.	DOCKET NO. 04-CV-4151 (AKH)

MOTION TO VACATE PROTECTIVE ORDER AND FOR ACCESS TO PAPERS FILED BY THE GOVERNMENT IN SUPPORT OF SUMMARY JUDGMENT

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INTRODUCTION

This is a motion under the First Amendment and common law to vacate a protective order that restricts Plaintiffs' counsel from disseminating certain unclassified information that the government has relied on in seeking partial summary judgment in the above-captioned case. The motion also seeks an order requiring the government to file its summary judgment papers on the public docket, for general access, in the same form as have already been provided to Plaintiffs under the protective order.

The information that Plaintiffs' counsel are restricted from disclosing and that is redacted from the government's publicly filed papers relates to the government's proffered reasons for refusing to release, in response a request under the Freedom of Information Act (FOIA), photographs and videotapes that depict the abuse of prisoners at Abu Ghraib prison in Iraq. The instant motion does not concern the government's refusal to release the photographs and videotapes but rather the government's refusal to disclose – or to allow Plaintiffs' counsel to disclose – the *grounds* on which the Government refuses to release the photographs and videotapes. As discussed below, the First Amendment does not permit a protective order and prior restraint of this kind.

PROCEDURAL CONTEXT

On July 21, 2005, the government submitted *ex parte* and *in camera* a Supplemental Brief in Further Support of the Government's Partial Motion for Summary Judgment, together with three supporting declarations (collectively, the "Submission"). The government provided Plaintiffs' counsel with a redacted version of the Submission under a protective order ("Protective Order"), which was endorsed by the Court on July 22, 2005, and which generally restricts Plaintiffs' counsel from disclosing those passages

in the Submission that the government has designated "confidential." The government has represented that the only information redacted from the version of the Submission provided to Plaintiffs' counsel consists of specific descriptions of the photographs and videotapes that Plaintiffs have sought under the Freedom of Information Act (FOIA).[1] The version of the Submission that the government has filed on the public docket, however, redacts, in addition to descriptions of the photographs and videotapes, the information that the Government has designated as "confidential."

ARGUMENT

I. PLAINTIFFS' MEMBERS AND THE GENERAL PUBLIC HAVE A FIRST AMENDMENT AND COMMON LAW RIGHT OF ACCESS TO THE GOVERNMENT'S SUMMARY JUDGMENT PAPERS.

The First Amendment and common law embrace a right of access to judicial documents, including documents filed in support of summary judgment. As discussed below, the presumption of openness can be overcome only by "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984) ("*Press-Enterprise II*"). The government has not demonstrated such an overriding interest here.

a. The government's summary judgment papers are subject to a presumption of openness.

The Supreme Court has repeatedly recognized that the First Amendment encompasses a right of access to certain judicial proceedings. See, e.g., Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986) ("*Press-Enterprise I*") (voir dire);

[1] Plaintiffs do not now contest these redactions.

Press-Enterprise II, 464 U.S. at 501 (preliminary hearing on criminal complaint); Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596 (1982) (criminal trial); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (criminal trial). Generally, the First Amendment protects access when (i) "the place and process have historically been open to the press and general public"; and (ii) "public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise Co. II, 478 U.S. at 8.

The guarantee of public access serves multiple ends. It promotes confidence in the judicial system. See, e.g., Huminski, 396 F.3d 53 (2d Cir. 2004) ("[I]n these cases, . . . the law itself is on trial, quite as much as the case to be decided. Holding court in public thus assumes a unique significance in a society that commits itself to the rule of law."); Leucadia, Inc. v. Applies Extrusion Technologies, Inc., 998 F.2d 157 (3d. Cir. 1993). As the Seventh Circuit has written,

> The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.

Union Oil Co. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000). Public access also serves as a check against abuse and corruption. *See, e.g.,* Richmond Newspapers, 448 U.S. at 569 ("In comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.") (quoting 1 Jeremy Bentham, Rationale of Judicial Evidence, 524 (1827)). Public access also ensures the *appearance* of fairness. *See, e.g.,* Richmond Newspapers, 448 U.S. at 569 ("A result considered untoward may undermine public confidence, and

where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted."); United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*") ("Without [public] monitoring . . . the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings"). And public access ensures that citizens have the information they need in order to advocate for systemic change if such change is perceived to be necessary. *See* Huminski, 396 F.3d at 82 ("And when the theatre of justice . . . does not progress or end consistently with what a member of the public, or public opinion at large, deems proper, citizens can attempt to initiate reform.").

Numerous Circuits, including the Second Circuit, have held that the First Amendment right of access extends to civil proceedings. *See, e.g.*, Huminski v. Corsones, 396 F.3d 53, 82 (2d Cir. 2005); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988); Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 16, 23 (1984); Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1067-1070 (3d Cir. 1984).

Moreover, the constitutional right of access extends not only to the proceedings themselves but also to documents filed in connection with the proceedings. *See* Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 91-93 (2d Cir. 2004) (civil docket sheets) ("the constitutional right of access [applies] to written documents submitted in connection with judicial proceedings that themselves implicate the right of access") (internal quotation marks omitted); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (summary judgment papers and accompanying exhibits); *In re* Gabapentin Patent

Litigation, 312 F.Supp.2d 653 (D.N.J. 2004) (summary judgment papers and accompanying exhibits).

The Supreme Court has also recognized a *common law* right of access to judicial documents. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); *see also* United States v. Amodeo, 44 F.3d 141, 146 (2d Cir. 1995) ("*Amodeo I*"). This common law right of access applies with special force to "adjudicative" documents, including summary judgment papers:

> [D]ocuments used by the parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons. Fed.R.Civ.P.26(c) authorizes protective orders in the course of discovery . . . . Protective order are useful to prevent the discovery from being used as a club by threatening disclosure of matters which will never be used at trial. . . . At the adjudication stage, however, very different considerations apply. An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.

Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982); *see also* Diversified Group v. Daugerdas, 217 F.R.D. 152, 159 (S.D.N.Y. 2003) ("the [summary judgment] documents were clearly used in the judicial process and are therefore subject to the right of public access"); In re "Agent Orange" Product Liability Litigation, 98 F.R.D. 539, 545 (E.D.N.Y. 1983) ("documents attached to and referred to in the parties' papers on the summary judgment motions are part of the court record and are entitled to the presumption of public access").

The documents at issue here, filed by the government in support of summary judgment, are plainly subject to both a common law and First Amendment presumption of access.

b. The government has not demonstrated an interest sufficient to overcome the constitutional presumption of openness.

As the Second Circuit recently observed, "the presumption of openness cannot easily be overcome." ABC, Inc., 360 F.3d at 98. The Supreme Court has explained:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise II, 464 U.S. at 510; *see also* ABC, Inc., 360 F.3d at 98; Hartford Courant, 380 F.3d at 96; Virginia Department of State Police v. Washington Post, 386 F.3d 567, 575 (4th Cir. 2004) ("When the First Amendment provides a right of access, a district court may restrict access only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest.") (internal quotation marks omitted).[2]

The government cannot overcome the presumption of openness here. Indeed, the government simply fails to offer any specific rationale for the suppression it advocates. It bears repetition that the information at issue here consists solely of the government's basis for withholding records relating to the abuse and torture of prisoners held by the United States at Abu Ghraib prison. The issue here is not whether the records themselves must be released – though Plaintiffs believe they must be – but whether the government must, at a minimum, publicly explain its reasons for refusing to release them. The government has offered no specific justification for the extraordinary secrecy it has

[2] The courts have engaged in a more complex analysis where only the common law right of access is at issue, but even in that context "[t]he presumption [of access] is given great weight where the requested documents were introduced at trial or otherwise material to a court's disposition of a case on the merits." Diversified Group, 217 F.R.D. at 158-59 (citing Joy v. North, 692 F.2d at 880).

proposed. The government certainly does not offer any rationale sufficiently weighty to override a constitutional right of access.

The Declaration of Richard B. Myers explains the rationale for the redactions as follows:

> In many of the paragraphs of this Declaration, I have provided you my professional military assessments of country-specific, regional, and international conditions, and trends. These are based both on my own experience, the assessments of our commanders, and the evaluations of Department of Defense subject matter experts. This information is very sensitive, is not the type we would voluntarily disclose due to its national security and intelligence value, and its disclosure could potentially have adverse diplomatic implications.

Myers Decl. ¶ 41. The Myers Declaration does not explain why General Myers' "professional military assessments" must be withheld from the public. It does not explain why the redacted information is "sensitive" or in what way its release could harm diplomatic relations. Nor does it explain in what way the information – much of which has previously been reported in national newspapers, as discussed below – has "intelligence value" or why its disclosure would undermine national security.

The Declaration of Ronald Schlicher is equally bereft of any meaningful justification for the redactions in the publicly filed version of the Submission. It states:

> [I]n many places in this declaration, I provide my views regarding the impact the release of the subject photographs would have in Iraq and potentially other countries in the region. These views are provided solely for the benefit of the Court in considering these issues and were not prepared for public dissemination. Public release of such views could have a negative impact on the foreign relations of the United States.

Schlicher Decl. ¶ 17. Mr. Schlicher does not explain why disclosure of the redacted material would "have a negative impact" on the foreign relations of the United States. Nor does he explain the nature of the "negative impact." Mr. Schlicher's statement that

his views "were not prepared for public dissemination" is not an explanation at all. It is clear that the government would prefer that the public be denied access to the redacted information. But the government's preference in this regard is, from a legal perspective, immaterial.

Neither the Myers nor the Schlicher declaration articulates "an overriding interest based on findings that closure is essential to preserve higher values." Press-Enterprise II, 464 U.S. at 510. To the contrary, the government's explanation for the redactions is wholly conclusory and clearly insufficient to meet First Amendment requirements. *See, e.g.,* Press-Enterprise I, 478 U.S. at 15 ("The First Amendment right of access cannot be overcome by [a] conclusory assertion"); In re Washington Post Co., 807 F.2d 383, 392 (4th Cir. 1987) ("a blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse"); United States v. Moussaoui, 65 Fed. Appx. 881, 887 (4th Cir. 2003) ("the mere assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to documents").

Notably, though the government has proposed that release of the redacted information could adversely affect national security and foreign relations, none of the information that the government has redacted is classified. Courts may permissibly impose narrow protective orders to ensure that *classified* information is not disclosed. *See generally* United States v. Pappas, 94 F.3d 795 (2d Cir. 1996). But, as the D.C. Circuit has held, "[t]he government has no legitimate interest in censoring unclassified materials." McGehee v. Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983); *see also* Snepp v. United States, 444 U.S. 507, 767 n.8 (1980). The government can classify only certain

kinds of extraordinarily sensitive information, *see* Exec. Order No. 13,292 § 1.4, 68 Fed. Reg. 15315, and it cannot classify *any* information without complying with stringent procedural requirements, *see* Exec. Order No. 13,292 §§ 1.2-1.3, 68 Fed. Reg. 15315. The government has not – and could not – satisfy those substantive and procedural requirements here.

Even if the government could point to an overriding interest to justify secrecy, it is plain that the redactions the government has proposed here are not narrowly tailored to serve any conceivable interest that the government could assert. In fact, virtually every factual sentence redacted from the publicly filed Submission recites facts that have been widely reported in the media. To take only a few examples:

- The government has redacted: **Redacted** Yet *The Washington Times* and *The Detroit News* noted both this shift in tactics and the rise in suicide attacks. *See* Levon Sevunts, *Coalition Forces Fear Rise in Afghan Suicide Attacks*, Wash. Times, June 23, 2005 (noting a "shift in insurgency tactics as the remnants of the Taliban and the al Qaeda network in Afghanistan increasingly turn to Iraq-style suicide attacks"); *see also* Lisa Hoffman, *Afghanistan Suicide Blasts Rise*, Det. News, June 15, 2005 (noting military concern over the increase in suicide attacks in 2005).

- The government has redacted: **Redacted** Yet *The New York Times* and the BBC reported this information at the time of the events. *See* Dexter Filkins, *Captive Briton Implores Blair To Do More To Free Him*, N.Y. Times, Sept. 30, 2004, at A8 (noting Zarqawi's hostage demand was the "release of all Iraqi women held in American military prisons"); *see also Iraq Woman Prisoner 'To be Freed'*, BBC.com, Sept. 22, 2004, *at* http://news.bbc.co.uk/1/hi/world/middle_east/3678794.stm (noting that, "the kidnappers have demanded the release of all Iraqi women held in US-run prisons").

- The government has redacted: **Redacted** This same information was reported by CNN on November 17, 2004. *See Family Heartbreak Over Hassan Fate*, CNN.com, Nov. 17, 2004, *at* http://www.cnn.com/2004/WORLD/meast/11/16/iraq.hassan/ (noting that in addition to pleading for her life, "Hassan also called for the release of all female prisoners in Iraq").

- The government has redacted: **Redacted** The State Department reported this in 2003, noting that Saddam Hussein has publicly admitted to violence against women and that, "[under Hussein] women [were] often raped in order to blackmail their relatives." U.S. State Dept., Iraq: A Population Silenced – Women Silenced: Saddam Hussein Acknowledges Crime Against Women, Feb., 2003, *at* http://usinfo.state.gov/products/pubs/silenced/women.htm.

- The government has redacted: **Redacted** MSNBC reported that a "U.S. defense official, speaking to The Associated Press on condition of anonymity, said post-invasion attacks in Iraq were at lower levels — 150 to 200 per week — until April 2004," the month the Abu Ghraib photos became public, and that "[a]fterward, the rate of attacks doubled, to around 400 or more per week." Associated Press, *Insurgent Attacks in Iraq Again on the Rise*, MSNBC.com, Apr. 27, 2005, *at* http://www.msnbc.msn.com/id/7648280/.

- The government has redacted: **Redacted** CBS News, in reporting the execution of Nicholas Berg, noted that according to the executioner's video, "the execution was carried out to avenge abuses of Iraqi prisoners." *American Beheaded in Iraq*, CBSNews.com, May 12, 2004, *at* *http://www.cbsnews.com/stories/2004/05/12/iraq/main616901.shtml*.

The government provides no justification for excising from the public record facts that are already in the public domain.

The government's insistence that *unclassified* information that is *already in the public domain* should be suppressed is truly extraordinary. Plaintiffs know of no court

that has held that such information can constitutionally be redacted from a summary judgment filing.[3] The government's argument would be astonishing in any context, but it is especially so here, where the underlying litigation concerns a request under the Freedom of Information Act. The animating principle behind the FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). The whole point of the statute, in other words, is to ensure that the public has information about government activity. The government's audacious proposal – that it be permitted not only to withhold the requested photographs and videotapes but also to withhold its *reasons* for withholding the requested photographs and videotapes – would certainly have found no favor with the statute's drafters. *See* 112 Cong. Rec. H13654 (daily ed. June 20, 1966) (statement of then-Representative Donald Rumsfeld) (stating intention "that the courts interpret this legislation broadly, as a disclosure statute and not as an excuse to withhold information from the public").

For these reasons, the Court should vacate the Protective Order and require the government to file the Submission on the public docket in the same form as was provided to Plaintiffs.

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[3] It is not uncommon for courts to impose relatively broad protective orders *during the discovery process*. But "[d]iscovery material, merely because it is produced pursuant to the judicial process, is not necessarily part of the public record." In re "Agent Orange" Product Liability Litigation, 98 F.R.D., at 544. The constitutional (and common law) calculus changes when the same information is introduced at trial or in support of summary judgment. *See id.* ("documents which, like those attached to the summary judgment motions in this case, are submitted to the court for its consideration must, of necessity, lose their status of being raw fruits of discovery") (internal quotation marks omitted); United States v. Lindh, 198 F.Supp. 2d 739, 744 (E.D.Va. 2002).

II. THE PROTECTIVE ORDER IS A PRIOR RESTRAINT AND UNCONSTITUTIONALLY PROHIBITS PLAINTIFFS' COUNSEL FROM DISSEMINATING UNCLASSIFIED INFORMATION ABOUT A MATTER OF EXTRAORDINARY PUBLIC CONCERN.

The Protective Order enjoins Plaintiffs from disclosing to their members and the general public the information that the government has designated "confidential." This restriction on the speech of Plaintiffs' counsel is a prior restraint that, for the same reasons discussed above, cannot survive First Amendment scrutiny.

As the Second Circuit has recognized, "[a]n order that prohibits the utterance or publication of particular information or commentary imposes a 'prior restraint' on speech." United States v. Salameh, 992 F.2d 445, 446 (2d Cir. 1993) (invalidating "gag" order that prohibited counsel from publicly discussing "any aspect of the action"); *see also* United States v. Quattrone, 402 F.3d 304, 306 (2d Cir. 2005) (invalidating order that prohibited press from publishing jurors' names); In re Application of New York Times Co., 878 F.2d 67, 68 (2d Cir. 1989) (invalidating order that restricted right of counsel to speak to press).

As the Supreme Court has recognized, "even a short-lived 'gag' order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect." Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1304 (1983). Accordingly, prior restraints are understood to be "the most serious and least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stewart, 427 U.S. 539, 559 (1976); *see also* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 102 (1979) (noting that "[p]rior restraints have been accorded the most exacting scrutiny in previous cases"); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) ("[a]ny system of prior restraints of

expression comes to this Court bearing a heavy presumption against its constitutional validity") (per curiam); Near v. Minnesota, 283 U.S. 697, 716 (1931) (prior restraints may be imposed only in "exceptional cases," such as when necessary to prevent the overthrow of the government).

The Protective Order must be vacated for essentially the same reasons discussed above. The government has not articulated a compelling interest to justify secrecy, and the array of information that it insists Plaintiffs' counsel may not disclose is far broader than could be justified by any conceivable government interest. The prior restraint on Plaintiffs' speech is particularly offensive because the speech that is foreclosed relates to government activity; as such, it is speech at the very core of the First Amendment's protection. *See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) ("[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs") (internal quotation marks omitted); Stromberg v. California, 283 U.S. 359, 369 (1931) ("[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system").

It would be impossible to overstate the public significance of the information at issue here. Broadly, the Protective Order prohibits Plaintiffs from disclosing the government's reasons for withholding photographs and videotapes that depict the abuse and torture of prisoners held by the United States at Abu Ghraib prison. Many Americans believe that the abuse and torture of prisoners is offensive to American values,

undermines the standing of the United States in the international community, jeopardizes U.S. forces stationed in Iraq and Afghanistan, and violates domestic and international law. Many, like Col. Pheneger, believe that the "first step to abandoning practices that are repugnant to our laws and national ideals is to bring them into the sunshine and assign accountability." Pheneger Decl. ¶ 13.[4] This litigation has already uncovered voluminous evidence that the abuse and torture of prisoners was pervasive not only in Iraq, but also in Afghanistan, and at Guantanamo Bay Naval Base. Substantial questions have arisen with respect to the role of senior civilian officials in authorizing, endorsing, or permitting unlawful activity. The public has a First Amendment right to know why the government is withholding the photographs and videotapes, and Plaintiffs' counsel have a First Amendment right to speak on this matter. The First Amendment does not permit the government to edit the script of public debate, and it does not permit the government to compel Plaintiffs' counsel to silence.

[4] Plaintiffs submitted the declaration of Col. Michael Pheneger, U.S. Army (Ret.), in support of their Opposition to Defendant's Supplemental Memorandum of Law in Further Support of Defendants' Motion for Partial Summary Judgment.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully urge that the Court vacate the Protective Order and require the government to file the Submission on the public docket in the same form as has previously been provided to Plaintiffs.

Respectfully submitted,

/LSL/

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