IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	Misc. No. 08-442 (TFH)
GUANTANAMO BAY DETAINEE LITIGATION	)	

PRESS INTERVENORS' MEMORANDUM IN OPPOSITION TO GOVERNMENT'S MOTION TO AMEND AND FOR CLARIFICATION

Pursuant to permission granted by the Court on April 22, 2010, The Associated Press, The New York Times Company, and USA Today (collectively, "Press Intervenors") respectfully submit this memorandum in opposition to the Government's sealed motion to amend and clarify prior orders requiring the public filing of unclassified Factual Returns.

PRELIMINARY STATEMENT

The Government's latest motion is an untimely effort to amend three prior orders entered over the past two years, each directing the Government to follow the same procedure to make public unclassified versions of records filed in these habeas proceedings:

- The Stipulated Protective Order entered on September 11, 2008, pursuant to which the Government was ordered on November 6, 2008 to file public versions of its Factual Returns *within 14 days* after first filing each Return.
- The June 1, 2009 Order refusing the Government's request to seal all Factual Returns in their entirety, and enforcing compliance with the judicial review process required by the Protective Order.
- The January 14, 2010 Order declaring the Government to have violated the June 1, 2009 Order and directing compliance by no later than April 14, 2010.

Each of these prior orders effectively protects the public's constitutional right to inspect court pleadings by requiring the Government either (a) to file *publicly* redacted versions of its Factual

Returns with only classified information deleted, or (b) to seek court approval to withhold non-classified information. It has been *17 months* since the Government was first ordered to make public unclassified copies of the Factual Returns in the manner required by the Protective Order. The Government consistently has failed to do so.

The Court's most recent order was entered on Press Intervenors' motion for contempt. While the Court ultimately declined to issue a contempt citation, it held that the Government had directly violated a clear order, found the Government's claim of compliance "disingenuous," ordered the Government to comply within 90 days, and reserved judgment on sanctions sought by Press Intervenors. In imposing a 90-day deadline, the Court stressed it was high time for the unclassified information to be disclosed:

> [T]here are things that people will learn in [the Returns] that are good in the sense that they will understand what some of the problems are that the government faces with some of these individuals. At the same time there will be examples of conduct that is unfortunate, perhaps, on the government's side. But that should all be made public for review in accordance with standards that apply on protecting national security interests.

(Mot. for Contempt Hr'g Tr. at 44-45, Jan. 14, 2010.)

Instead of complying, the Government has filed yet *another* motion seeking once again to be relieved of its obligation to obtain judicial approval to withhold unclassified information. And remarkably, this motion was filed *completely* under seal.[1]

The Government's proposed order, which was publicly filed, requests that six ill-defined categories of unclassified information be made exempt from public disclosure, but the proposed order includes categories the Court of Appeals already has *rejected* as improper in two separate

[1] After repeated requests from Press Intervenors, on April 28, 2010 counsel for the Government indicated that a declassified version of the Government's motion papers would be prepared and would likely be made available during the first week of May. (*See* Declaration of David A. Schulz ("Schulz Decl.") ¶ 8.) The papers are still sealed and unavailable as of the due date of this opposition.

decisions addressing unclassified information about Guantanamo detainees. Without even being able to read the Government's arguments, its proposal is self-evidently contrary to law. Based upon the *public* record and *published* authority, aspects of the Government's request to amend this Court's order are legally indefensible.

The Government seeks relief it knows to be improper and its motion serves only to extract further delay. The motion should be rejected and the sanctions reserved by the Court on January 14 should be entered at this time.

BACKGROUND

Through these habeas proceedings petitioners challenge the legality of their indefinite detention at the U.S. Naval Base at Guantanamo Bay, Cuba as enemy combatants. As this Court has underscored, the Factual Returns at issue are:

> fundamental to these proceedings. . . . [They] detail what the detainees are accused of doing and who they are accused of being. They are the basis on which the government justifies each petitioners' detention, [and] . . . [t]he public's understanding of the proceedings . . . is incomplete without [them].

(Mem. Op. at 15, June 1, 2009.) Nonetheless, the Government consistently has resisted any judicial oversight of its decisions about what unclassified information in the Factual Returns will be available to the public.

A. The Court's Initial Order Directing the Government to File Public Redacted Versions of The Returns

Under procedures spelled out in the Protective Order governing these proceedings, when filing papers with the Court the Government may withhold all classified information and may initially designate unclassified information as "protected." Protected information is maintained under seal by the Court and not disclosed to anyone other than petitioners' counsel. (*See* Am. Protective Order ¶ 35, Jan. 9, 2009.) If the parties do not subsequently agree upon what

designated material may properly remain sealed in the public file, the Protective Order requires the Court to make that determination. (*See id*. ¶¶ 10, 34.) This procedure has been in place, pursuant to an order of this Court, since September 11, 2008. (*See* Protective Order ¶ 34, Sept. 11, 2008.)

Enforcing the terms of the Protective Order, in November 2008 the Government was ordered to file an unclassified version of each factual return appropriate for public disclosure, within 14 days after its initial filing. (*See* Case Management Order at 2, Nov. 6, 2008.) The Government resisted. When it began to file its unclassified returns, the Government designated all of them "protected," in their entirety.

B. The Court's Rejection of the Government's Motion to Seal the Factual Returns Completely

Because petitioners objected to blanket sealing, the Government filed a motion in December 2008 seeking to confirm the "protected" status of all of the unclassified Factual Returns. (*See* Resp't's Mot. to Confirm Designation of Unclassified Factual Returns as "Protected" (the "Government's Sealing Motion") (Dkt. No. 1416), Dec. 29, 2008.) The Government argued that complete sealing was necessary because "properly classified material ha[d] not been fully redacted" from the unclassified Returns, and the "collection and analysis" of any remaining classified material "could yield usable intelligence harmful to the interests of the United States." (Govt's Sealing Mot. at 3-4.) As a remedy, the Government asked to keep the Returns under seal indefinitely.

Press Intervenors promptly sought to be heard in opposition to the indefinite blanket sealing of unclassified material. They asserted both a First Amendment and a common law right to inspect the Factual Returns, and urged that the Government had not met its burden to (a) establish a compelling need to withhold specific information from the public, and (b)

demonstrate that the sealing requested was both narrowly tailored and effective. (*See* Press Intervenors Mem. in Opp'n to Gov't Mot. to Confirm Designation of Unclassified Factual Returns as "Protected" (Dkt. No. 1526-2) at 2, Jan. 14, 2009.)

The Court agreed that the public has a qualified constitutional and common law right to inspect the Factual Returns, and rejected the blanket sealing sought by the Government. (*See* Mem. Op. at 11, June 1, 2009.) Relying on two decisions of the Court of Appeals rejecting the Government's identical claim of unilateral authority to seal unclassified information in its court filings, *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), and *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), this Court held that the Government had once again "failed to provide a court with a sufficient 'basis for withholding' the unclassified information in these cases." (Mem. Op. at 7 (quoting *Parhat*, 532 F.3d at 852-53).) The Court found that "[p]rohibiting public access to every document in every factual return" was neither essential to protect national security nor narrowly tailored to achieve that end. (Mem. Op. at 17.) The Court granted the Government until July 29, 2009 to comply with the Protective Order. (*Id*. at 8-10.)

C. The Court's Finding of a Violation of the June 1 Order and its Second Order to Comply

The Government did publicly file redacted Factual Returns by the Court's deadline, but secretly failed to abide the Court's orders. The Government continued to withhold *unclassified* information without notifying the Court or counsel that it had done so, and without seeking judicial review or approval. On September 24, 2009, Judge John D. Bates entered an Order in one of the habeas proceedings, publicly revealing for the first time that the Government in that case had withheld unclassified information in violation of the June 1 Order. (*See* Order at 3 in *Al-Ghizzawi v. Obama*, Civ. A. No. 05-2378 (D.D.C.), Sept. 24, 2009.) Immediately upon learning of Judge Bates' Order, Press Intervenors asked the Government's attorneys if

unclassified information had similarly been redacted from any other Factual Returns. The Government responded that this was done in *every* case, but declined to amend its filings, even after Judge Bates' ruling, insisting it had complied with the June 1 Order.

Press Intervenors then filed a motion for contempt, seeking to enforce the June 1 Order. In deciding that motion, the Court rejected the Government's claim to have complied with the earlier orders as "disingenuous," and "fly[ing] in the face of the history of why we went through this whole protective order process." (Hr'g Tr. at 46-7, Jan. 14, 2010.) The Court held that the Government had directly violated a "clear and reasonably specific" order. (*Id.* at 45.) But despite its "displeasure with the Government," the Court declined to issue a contempt citation. Instead, the Court made clear its expectation that a finding of contempt would not be "necessary to achieve compliance with my orders," and noted, "if something else happens I expect that the ruling could be different." (*Id.* at 52.)

In opposing contempt, the Government suggested that it be allowed automatically to withhold "six new categories" of unclassified information. (*Id.* at 51). The Court expressed frustration that this approach had never before been raised, and refused to consider the proposal in the context of a motion where the petitioners were not parties. The Court suggested that the Government might attempt to work out a procedure with the parties, but left no doubt that the June 1 Order "still stands" (*id.* at 54), and directed the Government to bring itself into full compliance by no later than April 14, 2010 (*id.* at 55).

Finally, the Court reserved judgment on the Press Intervenors' application for an award of their costs and attorneys fees as a sanction for being forced to file a motion to obtain compliance with a clear order. The Court cautioned the Government that it was "very close" to contempt and a sanction could follow if the failure to follow orders continued:

> Since I denied the contempt motion finding, although granted the motion in other respects, I am not going to grant a sanction at this time, but I'm reserving as to proper sanctions, as I said, in the future should this recur and the government has failed to comply with the Court's order.

(*Id.* at 58.)

D. The Government's Continuing Failure to Comply

The Government has once again failed to comply. It did not make any serious effort to negotiate a limited categorical approach over the past 90 days (*see* Schulz Decl. ¶ 5), nor apparently did it file any of the completed Returns it has been "reprocessing" since last fall. Instead, on its final due date, the Government filed *another* motion seeking further delay and proposing to change the rules the Court had ordered on three separate occasions. To make matters worse, the Government acted to prevent meaningful response from Press Intervenors by seeking to litigate its latest motion on a sealed record and relying on sealed authority.

On the public record, the Government's motion is plainly improper. It should be denied, and the Court should reconsider Press Intervenors' request for a sanction of the costs and fees, as will now be demonstrated.

ARGUMENT

I.

THE GOVERNMENT IMPROPERLY ATTEMPTED TO MODIFY THE ORDERS FOR SECRET REASONS RELYING UPON SEALED PRECEDENT

The Government impermissibly filed both its motion to amend and its supporting memorandum completely under seal, then compounded the offense by purporting to rely upon a sealed opinion of the Court of Appeals. (*See* Notice of Filing of Coordinated Motion, Apr. 14, 2010.) As a threshold matter, the Government's action is procedurally improper. To the extent the Government withheld from its public filings *unclassified* information and legal argument, it

violated both the Protective Order in this case—which requires petitioners' consent to maintain unclassified material under seal—and the public's affirmative right of access to judicial records. (*See* Mem. Op. at 16, June 1, 2009 (public has a First Amendment right of access to judicial records that can only be sealed on judicial findings of fact).) Fundamental fairness requires that the Government should not be allowed to litigate on sealed papers without any judicial determination that sealing is necessary.

A. The Government Should Not Be Permitted to Seek Relief on Unilaterally Sealed Records

Shortly before it was to file the redacted Returns, counsel for the Government contacted counsel for Press Intervenors to say they instead intended to move to withhold information categorically, and to get more time to do so. (Schulz Decl. ¶ 2.) Press Intervenors advised the Government that they did not seek to create unnecessary make-work, and would not have objected, in principle, to a categorical approach that was limited to carefully defined categories of facts that could properly be withheld on a categorical basis. They strenuously objected, however, to some of the specific categories being proposed by the Government and to further delay. (*See id*. ¶¶ 3-4.) The objectionable categories were vaguely worded, left broad discretion about the types of information included, and encompassed information that necessarily required a case by case assessment to know if sealing was proper. Counsel for the Government responded that the review process was far along and counsel would not voluntarily agree to revise or limit the proposed new categories in any respect. (*See id*.)

On the eve of filing its motion, counsel for the Government called again to advise counsel for Press Intervenors that the Government "might" file its motion as a "classified motion." (*See id*. ¶ 7.) Counsel for Press Intervenors objected once more, noting the fundamental unfairness of such a procedure. Counsel observed that none of the matters discussed during the "meet and

confer" call was classified, and pointed out the Government's constitutional obligation to make public the unclassified sections of its motion papers. (*See id.*) The Government nevertheless proceeded to file its motion and supporting memorandum entirely under seal.

The Government should not be permitted to litigate in this manner. Even where sealing of a judicial document is justified by a compelling need for secrecy, it is fundamental that a court must authorize the sealing, and the sealing must be no broader than necessary to protect the threatened interest. *See, e.g.*, *Press-Enterprise v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 13-14 (1986); *In re Application of New York Times Co. for Access to Certain Sealed Court Records*, 585 F. Supp. 2d 83, 91 (D.D.C. 2008). If a more narrowly tailored means of protecting the interest exists, such as making documents available in redacted form, it must be employed to limit the impact on the public's rights of access to judicial records. *See Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501, 510 (1984); *In re Application of New York Times Co.*, 585 F. Supp. 2d at 91 (compelling interest in protecting identity of confidential informants did not warrant sealing of warrant materials altogether; "that interest can be accomplished by simply redacting the identity and personal identifiers of the informants").[2]

At a minimum, the Government could not properly file under seal unclassified material that cannot fairly be considered "protected" within the meaning of the Protective Order. The Government's arguments about the relevance to its motion of the publicly-filed court decisions

[2] *See also United States v. Jordan*, 544 F.3d 656, 665 (6th Cir. 2008) (noting that government motion containing grand jury material could have been redacted to protect secrecy of grand jury proceedings and stating that "the level of secrecy exercised here by both the government and the district court was unjustified"); *United States v. Moussaoui*, 65 Fed. Appx. 881, 891 (4th Cir. 2003) ("Unquestionably, our decision to partially seal argument infringes, albeit for good reasons, upon the rights of the press and the public. We believe, however, that this harm can be substantially ameliorated by the release of a redacted transcript of the sealed hearing as soon as is practicable after the conclusion of argument."); *Methodist Hospitals, Inc. v. Sullivan*, 91 F.3d 1026, 1032 (7th Cir. 1996) ("To say that particular *information* is confidential is not to say that the entire document containing that information is confidential.) (emphasis in original); *id*. (stating that district court should have granted motion to seal and ordered movant to redact confidential material and file remainder in the public record).

attached as exhibits to its notice of filing cannot reasonably be considered sensitive to national security or law enforcement operations, nor can the Government argue that its justifications for the six proposed categories require wholesale sealing after having discussed those categories openly with Press Intervenors' counsel before filing the motion. The Government equally has no excuse for sealing the entirety of its arguments supporting the request for yet another extension of time to comply with the June 1, 2009 Order. The Government's obvious effort to prevent meaningful public scrutiny of its actions in this case—and its continual foot-dragging in providing public, unclassified Returns—should not be countenanced.

B. The Government Should Not Be Permitted To Rely On Authority Sealed at Its Request

The Government not only acted improperly in filing its motion papers under seal, it also unfairly seeks to rely on a sealed decision of the United States Court of Appeals for the D.C. Circuit, a decision apparently sealed at the Government's own request.

Although not identified in the public record of the Government's latest motion, Press Intervenors infer that the sealed decision invoked by the Government is the January 8, 2010 decision in *Ameziane v. Obama*, No. 09-5236 (D.C. Cir. 2008), a decision the Government previously presented in opposing contempt. (*See* Notice of Filing Under Seal at 1, Jan. 12, 2010) (describing the *Ameziane* decision as "relevant to issues presented by the Press Intervenors' motion").) The public record indicates that nothing in the *Ameziane* decision itself is classified, but rather reveals that the opinion was sealed at the Government's request. (*See id*. (explaining that the decision is under seal "owing to the *protected information* identified in the body of the court's opinion") (emphasis added).)

If this is so, it lies completely within the Government's power to have the seal lifted, or at a minimum to permit the nature of the holding and its legal rationale to be disclosed so that Press

Intervenors have a fair opportunity to respond. The Government should not be permitted to rely upon secret authority addressing undisclosed issues as grounds for withholding unclassified information from the public. *See Krynicki v. Lopacich*, 983 F.2d 74, 75 (7th Cir. 1992) ("Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification.").

II.

THE PROPOSED CATEGORIES OF INFORMATION TO BE SEALED ARE VAGUE, OVERBROAD AND CONTRARY TO CONTROLLING AUTHORITY

The only thing the Government has placed on the public record thus far about the substance of relief it now seeks is the proposed order. That order identifies six categories of information the Government seeks permission to withhold without any further judicial approval. While Press Intervenors remain in the dark as to the grounds being advanced by the Government to support such a dramatic change in procedures at this late date, the public record reveals the Government's proposed relief to be overbroad and improper.

A. Any Delegation of Authority to Seal "Categories" of Information Must Satisfy Strict Constitutional Standards

Press Intervenors acknowledged during argument on January 14 that there may exist some categories of clearly defined, non-newsworthy information that could properly be withheld without the need for specific judicial permission in each case. (*See* Hr'g Tr. at 38-42, Jan. 14, 2009.) But any such category must meet the constitutional standard for sealing court records. To properly seal any portion of a court record the Government is required to demonstrate four things:

> **1. The existence of a substantial probability of prejudice to a compelling interest.** One seeking to seal court records must demonstrate a substantial probability that public access is likely to harm a compelling

governmental interest. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 581; *Press-Enterprise I*, 464 U.S. at 510; *Press-Enterprise II*, 478 U.S. at 13-14; *ABC v. Stewart*, 360 F.3d 90, 100 (2d Cir. 2004); *United States v. Doe*, 63 F.3d 121, 128 (2d Cir. 1995). In *Press-Enterprise I*, the Supreme Court stressed that a denial of access is permissible only when "essential to preserve higher values." 464 U.S. at 510. A compelling interest is required because "[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat." *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

2. The absence of any alternatives to sealing that will adequately protect the threatened interest. One seeking to seal records must further demonstrate that no alternative to secrecy can adequately protect the threatened interest. As the Second Circuit explained in *In re Application of The Herald Company*, 734 F.2d 93, 100 (2d Cir. 1984), a "trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue." *See also, e.g.*, *Press-Enterprise II*, 478 U.S. at 13-14; *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982).

3. The proposed restriction on access is narrowly tailored, to limit secrecy in time and scope. Any sealing imposed must be no broader than necessary to protect the threatened interest. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 13-14; *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1278 (D.C. Cir. 1991); *In re Application of New York Times Co.*, 585 F. Supp. 2d at 91. If a more narrowly tailored means of protecting the interest exists, such as making documents available in redacted form, it must be employed to limit the impact on the public's access rights. *See Press-Enterprise I*, 464 U.S. at 510.

4. The restriction on access will meaningfully protect the threatened interest. Because constitutional rights may not be infringed for an idle purpose, any order limiting access must be effective in protecting the threatened interest for which closure is imposed. *See Press-Enterprise II*, 478 U.S. at 14 (party seeking secrecy must demonstrate "that closure would prevent" harm sought to be avoided); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1146 (9th Cir. 1983) ("[T]here must be 'a substantial probability that closure will be effective in protecting against the perceived harm.'") (citation omitted).[3]

Furthermore, the ultimate determination of whether these criteria have been satisfied must be made by the court, not by the parties litigating a case, who have great incentives to favor

[3] Similar showings must be made before the common law access right may be vitiated. *See In re Application of New York Times Co.*, 585 F. Supp. 2d at 92. The D.C. Circuit has articulated six factors to consider in assessing a limitation of the common law right of access to judicial records that are closely aligned with the constitutional concerns. *See Johnson*, 951 F.2d at 1277 n.14.

secrecy. *See, e.g.*, *Parhat v. Gates*, 532 F.3d at 836. Any delegation of the right to seal court records to a litigant must be carefully limited to prevent abuse and to ensure the constitutional standards are met. Particularly given the intense public interest in these habeas proceedings, any approval of categorical redactions should strictly be limited to circumstances where each of the following criteria is satisfied:

1. The category must be carefully defined, and encompass only specific pieces of information that can precisely and accurately be identified without the need to exercise discretion;
2. The category must be limited to information that uniformly raises a significant threat to privacy, law enforcement or national security that cannot adequately be addressed through other means;
3. The category must be limited to information having no legitimate public interest or concern that otherwise requires a case by case assessment; and
4. The category must be defined in the most narrow terms that will effectively protect the threatened interest.

Press Intervenors respectfully submit that any category not meeting these conditions cannot satisfy the constitutional standard governing public access and cannot properly be withheld unilaterally by the Government without court review and approval.

B. Two Proposed Categories to be Sealed Are Improper Under Directly Controlling Authority

Judged by the controlling legal standards, the Government's proposed order is plainly improper. Two of its categories are vastly overbroad and ill-defined, and would encompass material the public has a right to know. Category B is one such improper category. It essentially seeks sweeping permission for the Government to withhold any unclassified information relating

to "law enforcement or intelligence operations." As proposed, Category B would authorize the Government to withhold all:

> [i]nformation that would reveal the existence, focus, or scope of law enforcement or intelligence operations, including the sources, witnesses, or methods used and the identity of persons of interest.

This category is so vague and open-ended that it would provide the Government with justification to withhold almost any information likely to be found in a Factual Return—certainly every detainee must have been connected to a "law enforcement or intelligence operation."

The Court of Appeals already has rejected efforts by the Government to withhold just such broad and unambiguous categories of information about the Guantanamo detainees in no uncertain terms. Twice. In *Bismullah v. Gates*, the Court of Appeals held that the Government may not unilaterally withhold information simply because it considers the information sensitive to national security or law enforcement. 501 F.3d at 188. The Court of Appeals left no doubt that the Government must provide a judge with a specific basis—in context—for withholding such unclassified information from public view. Again, in *Parhat v. Gates*, the Court of Appeals rejected the Government's renewed request to withhold categorically information it considered "law enforcement sensitive." As the *Parhat* court stressed:

> Although we do not doubt that there is information in these categories that warrants protection, the government has proffered only a generic explanation of the need for protection, *providing no rationale specific to the information actually at issue in this case*. . . . Without an explanation geared to the information at issue in this case, we are left with no way to determine whether that specific information warrants protection – other than to accept the government's own designation. But as we held in *Bismullah*, "[i]t is the court, not the Government, that has discretion to seal a judicial record. . . ."

532 F.3d at 836. The Government's proposed Category B improperly seeks once again the very delegation of authority twice rejected by the Court of Appeals.

Proposed Category E is equally improper. It seeks permission to withhold any information about "certain interrogation techniques approved by Executive Order 13491 and described in The Army Field Manual No. 2-22.3." How the detainees have been treated, whether the Government complied with international treaties, and the extent to which it may be relying in some habeas proceedings on evidence allegedly obtained through torture are all topics of significant public debate and concern. There can be no proper basis to withhold all information concerning "interrogation techniques" as the Government seeks to do, particularly where the Government already has publicly acknowledged the use of harsh interrogation techniques. *See, e.g., In re The Herald Co.*, 734 F.2d at 101 (closure order cannot stand if "the information sought to be kept confidential has already been given sufficient public exposure"). Once again, the proposed category is overbroad and ill-defined, plainly encompassing information that cannot properly be withheld across the board.

While Press Intervenors know nothing of the arguments advanced by the Government in support of its delinquent motion to proceed categorically, it is impossible to understand how it could possibly have made the requisite showings to justify these two categories. In both *Parhat* and *Bismullah* the Court of Appeals rejected an approach that "relies solely on spare, generic assertions of the need to protect information" and that did not provide information specific to a particular factual return. *Parhat*, 532 F.3d at 852-853; *Bismullah*, 501 F.3d at 188. The Government's continuing effort to withhold unilaterally any information it does not want made public about "law enforcement or intelligence operations," and about "interrogation techniques," remains improper and should be rejected.

C. The Remaining Categories Require Modification to Satisfy the Constitutional Standards

Some of the other categories proposed by the Government are less problematic. Categories A, C, D and F, with some revision, could be made consistent with the constitutional standard, but no change in procedure should be allowed if it will provide an excuse for any further delay. With the modifications noted below, if the adoption of these categories would *accelerate* the release of unclassified Factual Returns, Press Intervenors would not object to a revision of the June 1 Order to this limited extent.

Category A: This category would permit the withholding of names and personal identifying information of U.S. Government employees and agents below the Senior Executive Service or General Officer level, and the names of family members of detainees. The information to be withheld is precisely defined and limited in scope. Press Intervenors do not object to this category as proposed.

Category C: This category would permit the withholding of information identifying locations of interest to "counter-terrorism intelligence gathering, law enforcement, or military operations," but only in those cases where "the government has not previously acknowledged publically" its interest in the location. Again, the category is precisely defined to avoid the need for discretion, and Press Intervenors do not object to this category as proposed so long as it is limited to information not previously acknowledged.

Category D: This category would allow the Government to withhold its "knowledge of" telephone numbers, websites, passwords and the like "used by known or suspected" terrorists along with "discussions of the manner in which known or suspected terrorists use these methods for communications." Press Intervenors have no interest in

obtaining disclosure of the specific telephone numbers, websites, passwords, etc. of identified individuals, but object to the extent this category would afford the Government discretion to withhold information about the types of communications surveillance undertaken by the Government, even where the Government has already publicly acknowledged its surveillance activities, such as its admitted program to monitor certain international telephone calls and email messages of U.S. citizens. No purpose would be served by such redactions; disclosure would create no new risk to national security or law enforcement operations.

Category F: Press Intervenors do not object to the withholding of administrative data, operational "nicknames," code words, or FBI case names and file numbers as delineated, in part, by Category F. Press Intervenors do object to a blanket authorization for the Government to withhold the "dates of acquisition" of such information, "including dates of interrogations," as proposed in Category F. Disclosure of such information could well shed light on the actions on Government and therefore proposed redactions require review, in context, on a case by case basis.

III.
GIVEN THE GOVERNMENT'S CONTINUING REFUSAL TO ABIDE COURT ORDERS AND CONTINUING PATTERN OF DELAY, THE COURT SHOULD ENTER SANCTIONS AT THIS TIME

The current motion reflects a continuing pattern of conduct by the Government that has delayed disclosure of unclassified material in the court's records for months and years. Even after being lectured about its misconduct and warned against further delays, the Government has not filed any properly redacted Returns during the last 90 days. It also waited until the last day of its final deadline to propose changes to the review of the Returns that was supposedly ongoing

all along. The Government's foot dragging, non-compliance and evasions should not be countenanced.

Since 2007 the Government repeatedly has been told by the courts that the very categories of information it now seeks to withhold without review are improper and unacceptable. Since November 2008, it has been told repeatedly by this Court to prepare and file unclassified Factual Returns. Its renewed effort to re-litigate these issues, and its request for still more time are wholly inappropriate and warrant entry of the sanctions the Court reserved at the January 14 hearing.

In their earlier contempt motion, Press Intervenors asked the Court to (1) require the Government affirmatively to represent that it is not similarly withholding unclassified information from its other court filings, beyond the Factual Returns, without affirmatively obtaining petitioner's consent or filing a motion to seal, as required by the Protective Order, and (2) pay the reasonable attorneys' fees and costs Press Intervenors were required to incur to enforce the Court's clear orders. (*See* Mot. by Press Intervenors for an Order to Show Cause Why the Gov't Should Not Be Held in Contempt (Dkt. 1868) at 12-13, Oct. 6, 2009.) In reserving decision on these sanctions in January, the Court made plain to the Government that it was "very close" to contempt and "if something else happens . . . the ruling could be different." (Hr'g Tr. at 52, Jan. 14, 2010.) The continuing failure of the Government to carry out the Court's orders, its manipulations to secure repeated delays, and its continual failure to make public information vital to the public's understanding of these proceedings, fully warrant the imposition of sanctions at this time.

CONCLUSION

For each and all the foregoing reasons, the Court should deny Categories B and E of the Government's motion to amend its prior orders, modify the other proposed categories as proposed by Press Intervenors, compel complete compliance with the amended order in no more than 30 days, and enter the sanctions previously requested by Press Intervenors as were reserved by the Court on January 14, 2010, together with such other and further relief as the Court deems just and necessary.

Dated: May 3, 2010

Respectfully submitted,

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