IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE CONTINUED ACCESS TO COUNSEL	) Misc. No. 1:12-mc-398 (RCL)

RESPONDENTS' OPPOSITION TO THE MOTION OF JASON LEOPOLD TO INTERVENE[1] AND TO UNSEAL CERTAIN EVIDENCE

The June 3, 2013, declaration of Colonel John V. Bogdan, in pertinent part, [2] sets forth in detail certain security procedures currently used at the military detention facility at Guantanamo Bay, Cuba, and the rationales therefore. Though unclassified, those procedures and rationales contained in the declaration constitute sensitive information, the public disclosure of which will threaten the operational security and force protection of the Guantanamo facility. The protective order and governing precedent in these Guantanamo detainee habeas cases provide that unclassified but sensitive information may be protected from public disclosure. Given the opinion of the responsible military officer that the release of security and guard-force procedures at Guantanamo would

[1] The Government does not oppose the intervention of Jason Leopold for the limited purpose of seeking to unseal the declaration of COL John V. Bogdan, a declaration previously filed under seal in this matter on June 3, 2013. See Dkt. No. 41.

[2] Only parts of the declaration contain sensitive information about security procedures and operations that need to be protected. Because resolution of the underlying emergency motions in response to which the declaration was filed was expedited, the Government was unable to create a publicly releasable version of the declaration prior to filing its opposition or to argument. Accordingly, the entire declaration and the opposition were designated as protected. To narrow the issues before the Court on the instant motion to unseal, the Government has created a publicly releasable version of the declaration, which is attached as Exhibit 1. Attached as Exhibit 2 is an unredacted version of COL Bogdan's June 3, 2013 declaration, with the redactions highlighted. To preserve the confidentiality of the redacted information pending resolution of the motion to unseal, Exhibit 2 will be filed under seal and will not be provided to counsel for Mr. Leopold. Additionally, the justifications for the redactions in Exhibit 1 are explained in another declaration by COL Bogdan, dated August 2, 2013, and attached as Exhibit 3 and submitted under seal. Because this August 2, 2013, declaration discusses in detail the nature of the threat posed by disclosure of the original declaration in toto, the Government has also designated Exhibit 3 as protected under the governing protective order and respectfully moves to confirm the protected status of Exhibit 3 and to maintain Exhibit 3 under seal. See Ex. 3, ¶ 10.

endanger the operational security and force protection of the facility, this information should remain protected. Accordingly, to the extent that the motion seeks to unseal the Bodgan declaration, the motion should be denied.

BACKGROUND

On May 22, 2013, three Petitioners currently detained at Guantanamo Bay filed emergency motions seeking relief from various security procedures implemented at the detention facility there.[3] In opposing those motions, the Government filed the declaration of COL John V. Bogdan, Commander, Joint Detention Group, Joint Task Force – Guantanamo. See Resp'ts' Opp'n to Pet'rs' Emerg. Mots. Re Access to Counsel, Ex. 1 (filed under seal). This declaration set forth in detail the nature of the challenged procedures and the rationales therefore. Though this information was not classified, because of its sensitive nature, the Government designated it as "protected information" under the protective order governing these detainee habeas cases. See Protective Order & Procs. for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba ("Protective Order"), 577 F.Supp.2d 143 (D.D.C. 2008) ¶ 34. Pursuant to the Protective Order, the Government's opposition brief, including the Bogdan declaration, was filed under seal and properly marked as such.

On June 5, 2013, the Court held a hearing on the emergency motions. Although Petitioners' opening arguments were made in open court, most of the hearing was sealed to protect the information that the Government had designated as protected information in

[3] In addition to filing their motions in this Miscellaneous Action, the petitioners filed their motions in their respective petitioner-specific cases. See Hatim v. Obama, 1:05-cv-1429 (RCL), Emerg Mot. Re Counsel Access (May 22, 2013) (Dkt No. 416); al-Shubati v. Obama, 1:07-cv-2338 (RCL), Emerg. Mot. to Enforce the Right of Access to Counsel (May 22, 2013)(Dkt. No. 262); Hentif v. Obama, 1:06-cv-1766 (RCL), Emerg. Mot. to Enforce the Right of Access to Counsel (May 22, 2013) (Dkt. No. 298).

its opposition. To the Government's knowledge, no protected information was disclosed in open court.

On July 11, 2013, the Court issued its Memorandum Opinion explaining its decision to grant in part and to deny in part the emergency motions. In that opinion, the Court referenced both COL Bogdan's sealed declaration and portions of the sealed hearing transcript.

ARGUMENT

It is well settled that the right of access of the press to information, including court records, is coextensive with and does not exceed that of the public in general. See Branzburg v. Hayes, 408 U.S. 665, 684 (1972); Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011). Here, the right of the public to access information filed in these Guantanamo habeas cases that the Government deems sensitive is governed by procedure and precedent. The procedure for protecting unclassified but nevertheless sensitive information in these detainee habeas cases is established by the Protective Order. As to the Bogdan declaration, that procedure was followed. All that remains is for the Court, to apply the relevant precedent—precedent that, as explained by the Court of Appeals, strikes the appropriate balance among "the needs of the government," "the rights of the detainee," and "the traditional right of public access to judicial records grounded in the First Amendment," Ameziane v. Obama, 620 F.3d 1, 6 (D.C. Cir. 2010)—to determine whether the seal should remain on those portions of the Bogdan declaration for which the Government still seeks protection. Because those portions squarely pertain to critical operational-security and force-protection procedures at the Guantanamo Bay detention facility, and because those procedures are due deference under the judiciary's long-

standing policies not to interfere in either military or prison-administration matters, the seals as to those portions of the Bogdan declaration should be maintained.

I. The Designated Portions Of The Bogdan Declaration Should Remain Sealed

A. The Protective Order And Detainee-Habeas-Specific Precedent Govern The Sealing Of Information In These Habeas Cases

The Protective Order provides that the Government may seek to protect from public disclosure unclassified but otherwise sensitive information included in the parties' filings, subject to approval by the Court. The Protective Order expansively defines "protected information" as "any document or information the Court deems . . . not suitable for public filing." Protective Order ¶ 10. As to "protected information," the Protective Order authorizes the Government, in the first instance, to designate documents or information as protected. Id. ¶ 34. Once designated, the information remains protected unless the Court rules otherwise. Id. ¶ 34.

To justify the designation, the Government is to move the Court to permit the seal to remain in place – as it is doing here – setting forth its reasons for keeping the material protected. Protective Order ¶ 34. This justification need not be item-by-item nor necessarily case-specific. Ameziane, 620 F.3d at 7 (the Government is not required to "provide a rationale for protection that [is] so specific as to preclude any generalized categorization."). Rather, the Court of Appeals has explained that the Government may justify protecting categories of information by providing (1) a "tailored" and "specific" rationale for withholding the category and (2) precisely designating each particular item of information that it contends falls within the protected category. Ameziane, 620 F.3d at 6 (citing Parhat v. Gates, 532 F.3d 834, 853 (D.C. Cir. 2008)); In re Guantanamo Bay Detainee Litigation, 787 F.Supp.2d 5, 12-13 (D.D.C. 2011) (Hogan, J.). In other words,

Parhat and Ameziane establish that the Government may protect information on a categorical basis by identifying a category of information that requires protection, explaining why that category should be protected, and establishing that the specific information sought to be protected satisfies the rationale. Ameziane, 620 F.3d at 6 (discussing Parhat). Ameziane further provides that "the narrower the category for which the government seeks protection, the more likely the government's rationale will be sufficiently tailored." Id. at 7. This categorical approach has been successfully applied to these detainee habeas cases. E.g., In re Guantanamo Bay Detainee Litigation, 787 F.Supp.2d at 15-24 (Judge Hogan pre-approving six categories of information that may be protected in all Guantanamo detainee habeas cases).[4]

In applying this categorical test, a reviewing court must account for any deference owed by the judiciary to the underlying government interest. As Ameziane makes clear, at least where the underlying government interest is generally accorded deference by the judiciary, the reviewing court, where the Government otherwise satisfies the Ameziane / Parhat test, is "required to defer to the government's assessment of harm" that would

[4] The six pre-approved categories are:

(1) Information tending to reveal the identities of certain government personnel, and family members of detainees;
(2) Information revealing the existence, focus, or scope of law enforcement or intelligence operations, including sources, witnesses or methods used, and the identity of persons of interest;
(3) Names, locations [redacted], and other locations of interest as they pertain to counter-terrorism intelligence gathering, law enforcement, or military operations, where the government has not previously acknowledged publicly its knowledge of those names or locations;
(4) Information revealing the government's knowledge of terrorist phone numbers, websites, and other means of communication because disclosure of such information could lead terrorists to alter or improve their communications technology to better avoid detection;
(5) Information regarding the effectiveness of or details regarding the implementation of certain interrogation techniques and approaches approved by Executive Order 13492, 75 Fed. Reg. 4893 (Jan. 27, 2009);
(6) Administrative data that, though unclassified standing alone, could in the aggregate reveal sources and methods used to investigate persons suspected of terrorism-related activity.

787 F.Supp.2d at 15-24.

flow from disclosure of the information that it seeks to protect. 620 F.3d at 7-8; see id. at 5 (noting that the judiciary defers to the Executive in the two interests underlying the protection sought there, namely foreign affairs and national security). In other words, the reviewing court may not "perform its own calculus" as to the harm that might result were the information to be disclosed. Id. at 7 (internal quotations and citations omitted).

Here, the Government seeks to protect information pertaining to the operational security and force protection of the Guantanamo Bay facility. The judiciary has routinely deferred to the Executive in matters of prison security. See Bell v. Wolfish, 441 U.S. 520, 547 (1979) (corrections officials entitled to "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security"). This deference is heightened here because the detention facility is one operated by the military to detain enemy forces in a time of continuing hostilities. See Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008) ("We 'give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.'") (quoting Goldman v. Weinberger, 475 U.S. 503, 507 (1986)); In re Navy Chaplaincy, 697 F.3d 1171, 1179 (D.C. Cir. 2012) (courts must "give great deference to the professional judgment of military authorities regarding the harm that would result to military interests if an injunction were granted") (internal quotation omitted). Ameziane recognized that "Executive Branch officials bearing this responsibility possess far greater resources and aptitude than the judiciary for determining what will aid, and what will undermine, their mission." 620 F3d at 8. Accordingly, the Court should defer to the military's assessment of the threat created by the public disclosure of COL

Bogdan's discussions of the security procedures and guard operations at Guantanamo Bay.

This deference makes the categorical test, as Judge Hogan noted, "a fairly mechanical process." In re Guantanamo Bay Detainee Litigation, 787 F.Supp.2d at 13. First, the reviewing court must evaluate whether the Government has provided a valid reason to withhold the category of information that it seeks to protect. Id. A proffered reason is valid if it provides "a detailed and logical explanation of the impact" that a release would pose to the asserted government interest. Ameziane, 620 F.3d at 8. The final step requires the court to determine whether the Government has demonstrated that the rationales asserted to protect the category of information are implicated by the specific information it has designated for protection. In re Guantanamo Bay Detainee Litig., 787 F.Supp.2d at 13. These requirements are readily satisfied here.

B. The Designated Information In The Bogdan Declaration Should Remain Protected

1. The rationale to protect the information is detailed and logical

As the August 2, 2013, declaration of COL Bogdan submitted in support of this opposition makes plain, all of the remaining redactions in the June 3, 2013, declaration protect sensitive operational-security and force-protection measures in place at JTF-GTMO that the Government has historically sought to protect. Protecting these operational-security and force-protection procedures from the public remains critically important, as evidenced by the recent al-Qaida attacks on prisons at Abu Ghraib and Taji in Iraq. Ex. 3, Decl. of COL John V. Bogdan ¶ 4. Those attacks killed 16 Iraqi guards and released hundreds of al-Qaida prisoners. Id. Release of the operational security and force protection information in the declaration would better enable our enemies to attack

the detention facilities at Guantanamo or undermine security at the facility. Id. Of note, Ayman al-Zawahri, al-Qaeda's leader, identified the JTF-GTMO detention facilities as a target during a 22-minute video posted July 31, 2013, stating, "the terror network will spare no effort to free prisoners held at the U.S. military-run detention center in Cuba". Id.

In particular, the June 3, 2013, declaration discusses operational-security information concerning (1) how and where detainees are moved, (2) when detainees cannot be moved, (3) the capabilities and limits of current guard force staffing, (4) details about the physical layout of the detention facilities, and (5) certain risks for introducing contraband into the facility and (6) the physical details of the vans used for transporting detainees. Id. ¶ 5. The declaration also provided precise details of how detainees are now searched for external movements outside their residence camps, **[redacted, designated as protected information under the Protective Order]** Id. These details, if publicly disclosed, would better prepare enemies to attack the detention facility. Id. ¶ 6. Information about detainee movements, guard force capabilities and limitations, the physical facility layout, contraband weaknesses, van descriptions, **[redacted, designated as protected information under the Protective Order]** would be useful to an enemy for identification and targeting purposes. Id. To be sure, all of this information provides unique details about the operations at JTF-GTMO that would better prepare our enemies to plan an attack – data points that enable a blueprint of JTF-GTMO security operations to be created. Id. Revealing this information to the public would provide detainees, visitors, and our enemies information – on its own or combined with other information –

that, at the very least, would allow them to manipulate or undermine operational security and threaten the security of the guards, detainees, and visitors. Id.

Additionally, the potential harm would not be limited to just the Guantanamo Bay detention facility. The search, restraint, and transportation procedures described in the June 3, 2013, declaration are force-protection measures that are also used, in some measure, at other **[redacted, designated as protected information under the Protective Order]** detention facilities in the United States, **[redacted, designated as protected information under the Protective Order]**. Id. ¶ 7. Those force-protection measures are essential to the detention facilities' need to maintain security to protect their staff, inmates, and visitors. Additionally, **[redacted, designated as protected information under the Protective Order]** the declaration is unclassified, but sensitive, and revealing the citation combined with the declaration's in-depth description of how that search is conducted would reveal force-protection procedures **[redacted, designated as protected information under the Protective Order]** Id. Thus, revealing these force-protection procedures and practices as described in COL Bogdan's June 3, 2013, declaration could compromise tactics, techniques, and procedures used at various **[redacted, designated as protected information under the Protective Order]** detention facilities, potentially requiring changes to the policies and procedures in place at the compromised **[redacted, designated as protected information under the Protective Order]** detention facilities that frequently receive new prisoners. Id.

While the current Guantanamo Bay detainees experience some of the operational-security and force-protection procedures described in the June 3, 2013, declaration, their ability to communicate those procedures publicly to the outside world is limited. Id. ¶ 8.

But were the declaration released, it would reveal to the public specific operational-security measures or force-protection procedures, and thus the limitations of those measures and procedures. Id. This will enable our enemies, foreign or domestic, to better prepare for an assault or operation against JTF-GTMO, thereby enhancing the risk to national security and endangering United States personnel. Id.

In summary, COL Bogdan's August 2, 2013, declaration lays out with specificity the harms that would flow from release of his original, June 3, 2013, declaration. In the words of Ameziane, this analysis is both "detailed and logical." 620 F.3d at 8. Accordingly, the first prong for continuing the protection of this information is met.

2. The designated information squarely fits within the rationale to protect operational-security/force-protection information

The second prong of the Ameziane test requires that the government identify with particularity what information it wishes to protect. 620 F.3d at 6. As Judge Hogan found, implicit in this identification is a judicial assessment of whether the identified information properly falls within the Government's designated category. In re Guantanamo Bay Detainee Litig., 787 F.Supp.2d at 13. The key inquiry is "whether the rationale for protection . . . is implicated by the specific information the government has designated for protection." Id. These tests are easily met here. First, the information that the Government seeks to protect is clearly highlighted in Exhibit 2 (submitted under seal), the unredacted copy of the June 3, 2013 Bogdan declaration. Thus, the particularity requirement has been satisfied.

So, too, it is clear that the information identified for protection falls into the protected category. As Exhibit 3, COL Bogdan's August 2, 2013 declaration, makes clear, the information that the Government seeks to protect can be broken down into sub-

categories. The logical relationship of the operational-security/force-protection rationale to each of these sub-categories is readily apparent. First, the details of detainee movements – where, what for, when, and how (**[redacted, designated as protected information under the Protective Order]**) – would be of ready interest to anyone seeking to assault the facility, as would be information of circumstances in which detainee movements might be constrained, such as the effect of an attorney visit in a residence camp on other detainee activities, **[redacted, designated as protected information under the Protective Order]**. Similarly, details about the **[redacted, designated as protected information under the Protective Order]** guards would be very desirable for anyone planning an attack. **[redacted, designated as protected information under the Protective Order]**. And descriptions of contraband risks might highlight exploitable vulnerabilities. **[redacted, designated as protected information under the Protective Order]**. Even more relevant would be details about the physical layout of the facility. **[redacted, designated as protected information under the Protective Order]**. And if the attack was to coincide with a detainee movement between camps, the details of those movements **[redacted, designated as protected information under the Protective Order]** would be critical targeting information. **[redacted, designated as protected information under the Protective Order]**. Lastly, the search procedures obviously implicate force-protection issues. **[redacted, designated as protected information under the Protective Order]**. The detail that COL Bogdan's original declaration provided about these search procedures **[redacted, designated as protected information under the Protective Order]** would be critically important to anyone seeking to undermine, now or in the future, the efficacy of these searches and, so,

successfully smuggle contraband into or within the Guantanamo facility or other DoD detention facilities.

C. The Information Remains Protected Despite Certain Public Disclosures In This Case

Respondents acknowledge that the Court's July 11, 2013, Opinion in this case publicly discusses various aspects of the search procedures and other matters that were the topic of COL Bogdan's June 3, 2013, declaration, and that the opinion has been cited in filings before the Court of Appeals. For the reasons discussed in COL Bogdan's August 2, 2013, declaration (Ex. 3), however, this discussion in the prior opinion does not vitiate the need for continued protection of the June 3, 2013, declaration.

Release of COL Bogdan's June 3, 2013, declaration in full would constitute a substantively different disclosure, both in nature and scope, as explained in the August 2, 2013, declaration, and would implicate the harms described above. The partial release by citation in the Court's Opinion is a substantively different acknowledgement than would be a disclosure of the relevant information directly attributable to the JTF-GTMO JDG Commander. Such a disclosure would compound the harm from the prior release and potentially be perceived as more useful to those who would seek to use the information. Accordingly, the discussion contained in the Court's prior opinion does not undermine the continuing need for protection of those portions of the June 3, 2013, Bogdan declaration for which the Government still asserts protections. The June 3, 2013, declaration also should remain protected from public disclosure to minimize proliferation of the information on topics addressed in the declaration, which would make it more likely that the harms described would come to pass. Indeed, a release of the declaration would constitute an additional disclosure event related to those topics, calling

additional attention to the matter and making it more likely that the harms described would come to pass.

CONCLUSION

In the opinion of the responsible military officials, the public release of certain portions of COL Bogdan's June 3, 2013, declaration would severely threaten the operational security and force protection at the Guantanamo Bay detention facility. Under the governing procedures and applicable precedent, sensitive information of this type may be withheld from the public and, so, from the press. Accordingly, intervener's motion should be denied to the extent that it seeks release of those portions of the Bogdan declaration for which the Government still asserts protections.

Dated: 2 August 2013

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

JOSEPH H. HUNT
Director, Federal Programs Branch

TERRY M. HENRY
JAMES J. GILLIGAN
Assistant Branch Directors

_/s/ Ronald J. Wiltsie_____
RONALD J. WILTSIE
Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, DC 20530
Tel: (202) 307-1401
ronald.wiltsie@usdoj.gov