UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CRIMINAL ACTION NO. 3:06MJ-230
UNITED STATES OF AMERICA, PLAINTIFF,

vs.

STEVEN D. GREEN, DEFENDANT.

REPLY TO RESPONSE OF THE UNITED STATES TO DEFENDANT'S MOTION TO RESTRAIN PARTIES AND TRIAL PARTICIPANTS

May it Please the Court:

Defendant has moved the Court to restrain parties, trial participants, and others from making inflammatory or otherwise prejudicial extrajudicial statements to news media or the public. (R. 14 Motion to Restrain Parties and Other Trial Participants from Making Extrajudicial Statements of Inflammatory or Prejudicial Nature). The United States has responded thereto arguing that 1) an order restraining statements by trial participants is not required to ensure a fair trial because the United States will comply with Department of Justice guidelines; and 2) there is no legal or factual basis for restraining the extrajudicial statements of Executive Branch officials engaged in national defense or the conduct of foreign affairs. (R. 19 Government's Opposition to Steven D. Green's Motion to Restrain Parties and Trial Participants from Making Extrajudicial Statements of an Inflammatory or Prejudicial Nature). Defendant addresses each objection in turn.

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The Need to Restrain Statements by Trial Participants

The government has objected to defendant's motion insofar as it seeks to restrain "trial participants, attorneys, parties, civilian or military law enforcement officers or investigators, witnesses or prospective witnesses, jurors, or court officials" from making extrajudicial statements by representing to the Court that all Department of Justice personnel are bound by and will adhere to Department of Justice regulations governing the release of information in criminal cases, including, but not limited to, 28 C.F.R. §50.2(b)(2) and United States Attorney's Manual §1-7.500. This is all well and good, but the Department of Justice has not always followed its own rules. For example, in United States v. Koubriti, 305 F.Supp.2d 723 (E.D. Mich. 2003)[1], the Department entered into a stipulated order which mirrored 28 C.F.R. §50.2(b)(2) and United States Attorney's Manual §1-7.500, in that it "prohibited the public disclosure of information that had a reasonable likelihood of interfering with a fair trial or otherwise prejudicing the proceedings." Koubriti, 305 F.Supp.2d at 725. It was not long before the Department violated the stipulated order and the very same regulations it touts to dismiss defendant's concerns herein.

> This Order generally achieved its purpose, despite a number of challenging developments during the course of these proceedings. Some lamentable incidents did arise, however, and two of the more serious of these directly involved this Nation's highest law enforcement official, United States Attorney General John Ashcroft. Specifically, the Attorney General referred to this case at two separate press briefings in Washington, D.C., once near the outset of this case and again in the middle of the trial. In the first instance, Attorney General Ashcroft erroneously stated that the three Defendants arrested on September 17,

[1] This was the first terrorism related case to be tried following the September 11 attacks, and was attended—as is Mr. Green's case—by "heightened public and media interest"

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> 2001 were "suspected of having knowledge of the September 11th attacks." On the second occasion, the Attorney General referred to a cooperating Government witness who had just completed his trial testimony, opining that this individual's testimony had "been of value, substantial value" to the Government.

Koubriti, 305 F.Supp.2d at 725. Department personnel compounded these breaches by leaking to the media a draft of a superceding indictment adding terrorism-related charges to what had begun as a fraud case before it had been returned by the grand jury. Koubriti, 305 F.Supp.2d at 725, n1. While the Court did not go so far as to hold the Attorney General in criminal contempt, it judicially admonished him, finding that "the Attorney General violated the Court's Order on two occasions" and that his comments to the media "created a real potential for prejudice and interference with these proceedings." Koubriti, 305 F.Supp2d at 765.

In other high profile cases, the Department has shown an equally cavalier approach to its own regulations prohibiting potentially prejudicial extrajudicial statements. For example, in the press conference following the indictment of Zacarias Moussaoui, the Attorney General engaged in braggadocio about how the "United States of America has brought the awesome weight of justice against terrorists who blithely murdered innocent Americans," told victims of the September 11 attacks that Moussaoui was one of the "killers of their loved ones," linked his prosecution with the "field of battle in Afganistan," and opined that his anticipated conviction would be "another victory" in the "war on terrorism." The Director of the FBI went on to state his and the Attorney General's personal belief in Moussaoui's guilt.

> The indictment we are announcing today is an important step in the process of

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> bringing justice to those we believe to be connected to these violent and vicious attacks on America.

Attorney General Transcript, News Conference Regarding Zacarias Moussaoui, December 11, 2001, *available at* http://fas.org/irp/news/2001/12/agremarks12_11.htm. Likewise, in announcing the arrest and indictment of seven individuals in Miami, Florida, for allegedly planning terrorist attacks in Chicago and the Miami area, the Attorney General freely discussed evidence that may or may not be admitted at trial.

> These individuals wish to wage a, quote, "full ground war" against the United States. That quote is from the investigation of these individuals, who also allegedly stated the desire to, quote, "kill all the devils we can." They hoped for their attacks to be, quote, "just as good or greater than 9/11."

Transcript of Press Conference Announcing Florida Terrorism Indictments, June 23, 2006, *available at* http://www.usdoj.gov/ag/speeches/2006/ag_speech_0606231.html. The Deputy Director of the FBI went beyond the grand jury's allegations to state his personal belief as to the "facts" of the case, claiming to have "identified and disrupted a terrorist plot before any harm could be done" and flatly stating that the defendants did the things alleged in the indictment. Id. Following the arrest of John Walker Lindh, an American citizen captured in Afghanistan and charged with fighting with the Taliban against American forces, the Attorney General equated Lindh's conviction with successful prosecution of the government's foreign policy and domestic security agenda, gave an exhaustive rendition of the evidence as he perceived it to be, and even detailed statements allegedly made by the defendant. He then attacked him personally as a traitor and ridiculed him for his political and religious beliefs. His comments went as far beyond a simple reporting of the charges as is possible and were

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infused with inflammatory statements that he must have known "may reasonably be expected to influence the outcome of a pending or future trial" in violation of 28 C.F.R. §50.2(b)(2).

> Walker was blessed to grow up in a country that cherishes freedom of speech, religious tolerance, political democracy, and equality between men and women. And yet he chose to reject these values in favor of their antithesis, a regime that publicly and proudly advertised its mission to extinguish freedom, enslave women, and deny education. John Walker Lindh chose to fight with the Taliban, chose to train with al Qaeda, and to be led by Osama bin Laden.
>
> We may never know why he turned his back on our country and our values, but we cannot ignore that he did. Youth is not absolution for treachery, and personal self-discovery is not an excuse to take up arms against one's country. Misdirected Americans cannot seek direction in murderous ideologies and expect to avoid the consequences.

Attorney General Transcript, John Walker Lindh Press Conference, January 15, 2002, *available at* http://www.usdoj.gov/archive/ag/speeches/2002/011102walkertranscript.htm.

For these reasons, defendant is reticent to accept the government's assurances that its own regulations adequately prevent Department personnel from "furnishing any statement or information for the purpose of influencing the outcome of a defendant's trial" or making public comments that could "reasonably be expected to influence the outcome of a pending or future trial." 28 C.F.R. §50.2(b)(2). It *has* happened before. Likewise, the self-imposed prohibition of §1-7.500 of the United States Attorney's Manual preventing the release of statements or information having "a substantial likelihood of materially prejudicing an adjudicative proceeding"can be rendered toothless by a Department of Justice that treats indictments as press releases loaded with argumentative surplusage that may or may not ever

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find its way into a trial as admissible evidence.[2] Nevertheless, the word of the Criminal Chief of the United States Attorney's Office for the Western District of Kentucky carries great weight with the undersigned—as it no doubt does with the Court—and her representation to the Court that the Department will follow the letter and spirit of the sited regulations in *this* particular case is accepted by the defendant in good faith; and counsel is agreeable to proceeding under that assurance without the need of an order of the Court.

The Need to Restrain Statements by Executive Branch and Military Officials

The prosecutors herein and other personnel of the Department of Justice are one thing. Members of the Executive Branch and the military are another. No regulations against prejudicial extrajudicial statements—self-imposed or otherwise—bind the President and his non-Department of Justice subordinates, including his military commanders and the military personnel who are conducting the lion's share of the investigation of this civilian prosecution as well as the military investigation, prosecution, and trial of the others accused of involvement in the alleged criminal acts. As media coverage becomes virtually instantaneous and more and more pervasive, even off-handed comments by the President or other members of the Executive Branch run a proportionally greater risk of influencing prospective jury pools and tainting criminal trials. Consider President Nixon's public pronouncements in 1970 during the trial of Charles Manson which lead to the now infamous headline "Nixon Says Manson

[2] Defendant will address the possibility of such a prosecution tactic in a separate motion to seal the anticipated indictment herein pending review by counsel and an opportunity for the Court to consider any motions to strike prejudicial surplusage.

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Guilty." People v. Manson, 61 Cal.App.3d 102, 186 n. 82 (1976). In that case, the Court found insufficient prejudice to warrant relief: the trial was under way, the jury had been sequestered, and the statement came to the jury's attention only through the intentionally improper acts of the defendant himself. In this case, the prospective jurors would be subject to the full prejudicial effect of such a statement. The likelihood of taint in Mr. Green's case from comments by members of the Executive Branch on the proceedings or the evidence is exponentially greater than it would have been in the 1970s. Then there were no 24 hour cable news channels endlessly hawking every sensational development in the criminal trial du jour, nor an internet that can instantaneously blanket the planet with a President's attempt to influence the outcome of a case by commenting on the evidence or stating an opinion as to the issues or the desirable outcome. The rhetoric and issues surrounding this case further complicate the prospects of obtaining a fair trial by equating conviction and severe sentences as essential to national security, support for and safety of military personnel in the field, and successful prosecution of the war on terror. If the defendant is to be found guilty of the charges herein, it should only be because an unbiased jury unanimously believes him guilty beyond a reasonable doubt based solely on the facts admitted into evidence, not because acquittal or leniency may have consequences deemed undesirable by the government or the military.

The government concedes that such comments by prosecutors or Department personnel would be inappropriate. It is just as prejudicial—perhaps even more so—for the President to comment on a pending criminal prosecution as it is for the Attorney General to do so. As the

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Vice President of the United States responded when asked to comment on the pending federal criminal prosecution of his aide and close friend, Lewis I. Libby, *any* comment on a pending prosecution by a member of the Executive Branch adversely affects the fairness of the proceedings.

> In our system of government an accused person is presumed innocent until a contrary finding is made by a jury after an opportunity to answer the charges and a full airing of the facts. Mr. Libby is entitled to that opportunity.
>
> Because this is a pending legal proceeding, in fairness to all those involved, it would be inappropriate for me to comment on the charges or on any facts relating to the proceeding.

Vice President's Statement on Libby Resignation, October 28, 2005**,** *available at* http://www.whitehouse.gov/news/releases/2005/10/20051028-4.html. What's good for Scooter Libby should be good for Steven Green. Unfortunately, that is not the case; and absent an order, those Executive Branch and military officials sought to be restrained herein are likely to engage in the very extrajudicial "comment on the charges or on any facts relating to the proceeding" condemned by the Vice President as inimical to a fair trial—at least when it is one of his friends and colleagues in the dock. Any such commentary in this prosecution will undermine the court's ability to provide a fair trial based only upon the facts and the law applicable to the case. The protestations of the United States to the contrary ring hollow in light of calculated attempts by the Executive Branch to affect the outcome of high profile criminal trials by either publicly proclaiming the guilt of those it wishes to see convicted or the innocence of those it wishes to see acquitted. For example, when his friend and political ally, Tom DeLay, was indicted for violations of Texas criminal law, the President openly

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declared on the Fox News Channel that Delay was innocent of the charges. Transcript: Bush Talks With Brit, December 14, 2005, *available at* http://www.foxnews.com/story/0,2933,178760,00.html. When the President's press secretary was asked whether the President was at all concerned that his public comment could improperly influence the potential jury pool for Delay's trial, he acknowledged that the comment was in violation of White House "policy" against commenting on pending criminal prosecutions, but that the President enjoyed a "presidential prerogative" to violate it if he wished. Press Briefing by Scott McClellan, December 15, 2005, *available at* http://www.whitehouse.gov/news/releases/2005/12/20051215-4.html. This "presidential prerogative" to selectively influence criminal investigations and trials was liberally exercised during the criminal investigation of White House officials for the illegal disclosure of a covert CIA agent's identity. At a press conference, the President's press secretary—who specifically confirmed that he was speaking for the President on the issue[3]—decreed that the subjects—one of whom, Lewis Libby, was subsequently indicted and now awaits trial—were the victims of "rumors," "innuendo," and "unsubstantiated accusations" and that he had no doubt that "they were not involved."

> Q Scott, you have said that you, personally, went to Scooter Libby, Karl Rove and Elliot Abrams to ask them if they were the leakers. Is that what happened? Why did you do that, and can you describe the conversations you had with them? What was the question you asked?
>
> MR. McCLELLAN: Unfortunately, in Washington, D.C., at a time like this, there are a lot of rumors and innuendo. There are unsubstantiated accusations

[3] "I speak for the President and I'll talk to you about what he wants." Press Briefing by Scott McClellan, October 7, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/10/20031007-4.html.

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> that are made. And that's exactly what happened in the case of these three individuals. They're good individuals, they're important members of our White House team, and that's why I spoke with them, so that I could come back to you and say that they were not involved. I had no doubt of that in the beginning, but I like to check my information to make sure it's accurate before I report back to you, and that's exactly what I did.
>
> Q So you're saying -- you're saying categorically those three individuals were not the leakers or did not authorize the leaks; is that what you're saying?
>
> MR. McCLELLAN: That's correct. I've spoken with them.

Press Briefing by Scott McClellan, October 7, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/10/20031007-4.html. After the uninvolved Mr. Libby's indictment, further comment became an embarrassment for the administration. Only then did the above-quoted Cheney doctrine decrying the impropriety and unfairness of commenting "on the charges or any facts relating to the proceeding" come into play. Officials who had been eager to do just that a short time before were now directed by the Office of General Counsel to the President to do precisely what is requested of them in this motion.

> MR. McCLELLAN: . . . . The special counsel today, as you are aware, announced the indictment of former White House official Scooter Libby. The legal proceedings in this matter will continue for some time, with various pre-trial matters and then possibly a trial. ***In our system of law, every defendant is entitled to a presumption of innocence; every defendant is entitled to due process and a fair trial. Because of the ongoing investigation and legal proceedings, at the direction of the White House Counsel's Office, all White House officials, including myself, are not going to be able to respond to questions or discuss the factual circumstances of the matter, except as requested by the special counsel, or in consultation with the White House Counsel's Office. All such questions should be directed to the special counsel, or personal attorneys involved in this matter.***
>
> . . . .
>
> ***The White House Counsel's Office also sent out a memo to all staff***

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> ***reminding them that this is an ongoing investigation and ongoing legal matter, and as such, White House staffers should not be responding to questions about it, or discussing it, except as directed by the special counsel or the White House Counsel's Office. . . .***

Afternoon Press Gaggle by Scott McClellan, October 28, 2005, *available at* http://www.whitehouse.gov/news/releases/2005/10/20051028-14.html (emphasis added). Although the Libby prosecution involves very serious questions of foreign policy and military significance—not the least of which is the perceived security of those who covertly work for or on behalf of the United States—no protestations of hindering the President's ability to consult foreign leaders or advise his subordinates or Members of Congress were made. Instead, the White House adopted an absolute ban on any public discussion of the charges, the evidence, or the consequences of the possible outcomes of the case, saying that to do so would deprive Mr. Libby of a fair trial.

> Q Some Democrats say that the President should apologize for the role of some administration officials in the unmasking of the name of a CIA undercover operative. What's the White House reaction to that?
>
> MR. McCLELLAN: ***First of all, there is a legal proceeding that continues right now, and under our legal system, there is a presumption of innocence. We need to let that legal process continue. If people want to try and politicize this process, that's their business.***
>
> Q Well, I think that the role of some administration officials in this, in the leaking of the person's name has been established.
>
> MR. McCLELLAN: ***I think you're presuming things in that question, and I don't think while this investigation and this legal proceeding is ongoing, that we should make such presumptions. We should let that process continue.***
>
> Q Another part of that is, some of the same Democrats are saying that the President should fire Karl Rove. What's your reaction to that?

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MR. McCLELLAN: ***Again, there is an ongoing investigation; we need to let that investigation continue. We need to let the legal process work. As I indicated to you all on Friday, our Counsel's Office has directed us not to discuss this matter while it continues, and that means me not responding to questions about it from this podium. This is a process that we need to let continue. There is, as I said, a presumption of innocence in our legal system, and we don't want to do anything from here that could prejudice the opportunity for there to be a fair and impartial trial. I think that's the basis of our legal system.***

And in terms of comments that people are making, again, I think they're presuming things and trying to politicize the process. But that's their business. We're going to let the legal process work.

Q ***Let me just follow up on an aspect of this and try it again here. On October 7, 2003, you were asked about a couple of the key players here, Karl Rove and Scooter Libby, as well as another administration official who has not figured in the investigation, so far as we know. And you said the following, "There are unsubstantiated accusations that are made, and that's exactly what happened in the case of these three individuals," including Rove and Libby. "They're good individuals, they're important members of our White House team, and that's why I spoke with them, so that I could come back to you and say that they were not involved." You were wrong then, weren't you?***

MR. McCLELLAN: ***David, it's not a question of whether or not I'd like to talk more about this. I think I've indicated to you all that I'd be glad to talk about this once this process is complete, and I look forward to that opportunity. But, again, we have been directed by the White House Counsel's Office not to discuss this matter or respond to questions about it.***

Q That was a public representation that was made to the American people.

MR. McCLELLAN: Hang on. We can have this conversation, but let me respond.

Q No, no, no, because it's such an artful dodge. Whether there's a question of legality --

MR. McCLELLAN: No, I disagree with you.

Q Whether there's a question of legality, we know for a fact that there was involvement. We know that Karl Rove, based on what he and his lawyer have

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said, did have a conversation about somebody who Patrick Fitzgerald said was a covert officer of the Central Intelligence Agency. We know that Scooter Libby also had conversations.

MR. McCLELLAN: I don't think that's accurate.

Q So aside from the question of legality here, you were wrong, weren't you?

MR. McCLELLAN: ***Again, David, if I were to get into commenting from this podium while this legal proceeding continues, I might be prejudicing the opportunity for there to be a fair and impartial trial. And I'm just not going to do that.*** I know very --

Q You speak for the President. Your credibility and his credibility is not on criminal trial. But it may very well be on trial with the American public, don't you agree?

MR. McCLELLAN: No, I'm very confident in the relationship that we have in this room, and the trust that has been established between us. This relationship --

Q See those cameras? It's not about us. It's about what the American people --

MR. McCLELLAN: This relationship is built on trust, and you know very well that I have worked hard to earn the trust of the people in this room, and I think I've earned it --

Q Is the President -- let me just follow up on one more thing.

MR. McCLELLAN: -- and I think I've earned it with the American people.

Q Does the President think that Karl Rove did anything wrong?

MR. McCLELLAN: Well, I think it would be good for you to allow me the opportunity to respond to your questions without jumping in. I'm glad to do that. I look forward to the opportunity --

Q I haven't heard a response.

MR. McCLELLAN: Well, no, I have been responding to you, David, and there's no need -- you're a good reporter, there's no need to be rude or

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disrespectful. We can have a conversation and respond to these questions, if you'll just give me the opportunity to respond. I'm glad to do that.

We need to let this legal process continue. The special counsel indicated the other day that it is ongoing. And that's what we're going to do from this White House. That's the policy that we have set for quite some time now.

. . . .

Q There's been a wound to your credibility here. A falsehood, wittingly or unwittingly, was told from this podium. And do you really believe that the American people should wait until the conclusion of all of this process and just take on trust everything that comes from that podium now, without the explanation and the answer that you say you want to get --

MR. McCLELLAN: ***There are a lot of facts that still are not known in this investigation and in this legal proceeding that is ongoing. We also have to work under the presumption of innocence in our legal system. And, again, the reason I can't comment further is because if we were to get into that, we could be prejudicing the opportunity for there to be a fair and impartial hearing.***

Q I understand that.

MR. McCLELLAN: ***And we don't want to do that from this podium. No matter how much I may want to talk about this issue*** -- and I think you know that I would like to talk further about it -- but I have enough confidence in my relationship with you all, and you all report the news to the American people, to know that we have a good relationship that is built on a foundation of trust. And I have worked hard to earn that trust and I think I've earned that trust with you all. And it's your job to duly report to the American people, and I'm confident that you all will when you look at the facts and look at everything that's been said and where we are today. And at some point, I look forward to talking more about it.

But let me step back for a second, too, because part of my job is to be an advocate for the President, and I'm going to vigorously defend his decisions and his policies, and help him to advance his agenda. But I've another important responsibility, as well -- it's something that we all, I think and hope, share in this room -- that is to make sure that the American people get an accurate account of what's going on here in Washington, D.C. And I work hard to meet both those responsibilities.

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> Q But don't you think, Scott, that that second part of your job has been damaged, your credibility has been damaged by this?
>
> MR. McCLELLAN: ***For me to even respond to that question would force me to talk about an ongoing investigation and legal proceeding, and we've been directed not to do that.*** Whether or not that puts me in a difficult position is another matter. But I have enough confidence in the relationship that we've built over the last few years to be able to move forward, and for you all to know that what I'm saying from this podium is based on the facts and based on me working to provide an accurate account of what's going on here in Washington, D.C.
>
> Q Is Karl Rove back at work --
>
> MR. McCLELLAN: And -- let me finish -- in other words, Terry, ***you can't answer that question without it being viewed in the context of an ongoing investigation, an ongoing legal proceeding, and that's why I can't go further than that at this point.***

Press Briefing by Scott McClellan, October 31, 2005, *available at* http://www.whitehouse.gov/news/releases/2005/10/print/20051031-3.html (emphasis added).

Again, what is good for Scooter Libby should be good for Steven Green. It would be a simple matter for the President's General Counsel to issue a memorandum to all Executive Branch and military personnel in this case, as it did in the Libby case, directing them not "to respond to questions or discuss the factual circumstances of the matter" and "reminding them that this is an ongoing investigation and ongoing legal matter, and as such, White House staffers should not be responding to questions about it, or discussing it." Afternoon Press Gaggle by Scott McClellan, October 28, 2005, *available at* http://www.whitehouse.gov/news/releases/2005/10/20051028-14.html. Were General Counsel to do that, defendant would be satisfied. Absent that simple—and consistent—accommodation, the Court should impose the same conditions on the Executive Branch in this case as the Executive Branch has

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apparently imposed on itself in the Libby case.

The Requested Order Will Have No Effect on National Defense or the Conduct of Foreign Affairs and Does Not Adversely Impact the Separation of Powers

The government bangs the drum of preserving the separation of powers, a tune not often heard from those quarters these days. It claims that "any order from this Court restricting the ability of the President and the Secretary of State to discuss or comment on those events [the subject matter of the charges], either within the Executive Branch, with Congress, with Iraq and other foreign governments, or with the public, would also directly affect the war and foreign affairs." (R. 19 Government's Opposition to Steven D. Green's Motion to Restrain Parties and Trial Participants from Making Extrajudicial Statements of an Inflammatory or Prejudicial Nature, pp. 9-10). In short, the Executive's mantra is that in time of war, nothing—not even the constitutional right of a citizen of the United States to a fair trial—trumps the "presidential prerogative" to disseminate prejudicial and inflammatory information or rhetoric "for the purpose of influencing the outcome of a defendant's trial" or making public comments that could "reasonably be expected to influence the outcome of a pending or future trial." 28 C.F.R. §50.2(b)(2). The Attorney General cannot release statements having "a substantial likelihood of materially prejudicing an adjudicative proceeding," United States Attorney's Manual §1-7.500, but the President, Secretary of State, and Secretary of Defense can. The hypocrisy of such a position in light of General Counsel's order in the Libby case aside, the transparency of the government's argument is stunning. The requested order seeks only to restrict statements to the *media* and the *public* and then only in

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a very narrow range.

> Comes the defendant, Steven D. Green, by counsel, and moves the Court to prohibit *inflammatory or otherwise prejudicial extrajudicial statements to news media or the public* by trial participants, attorneys, parties, civilian or military law enforcement officers or investigators, witnesses or prospective witnesses, jurors, or court officials in the above-styled action. This request includes, but is not limited to, the President, Attorney General, and Secretary of Defense of the United States, their respective agents, representatives, subordinates, employees, and any persons acting in concert with or on behalf of such officials, and is *intended to restrain extrajudicial statements regarding the guilt or innocence of the defendant, the appropriate sentence should he be convicted, any statements made by defendant to officials, the invocation of any rights by defendant, the identity of prospective witnesses or their probable testimony, the results of any mental or physical examinations, the results of scientific or medical tests or experiments (including autopsies of any persons), statements concerning the merits of the case, or any other prejudicial or inflammatory fact or matter not of public record.*

(R. 14 Motion to Restrain Parties and Other Trial Participants from Making Extrajudicial Statements of Inflammatory or Prejudicial Nature, p. 1 (emphasis added)).

First, it is not the intention of the defendant or his counsel to affect in any meaningful way the Executive's ability to conduct "the war and foreign affairs." Nothing in the proposed order restricts the President or other members of the Executive Branch and the military from discussing the alleged events at issue herein or the broader issue of improper conduct by American military personnel and the policy consequences of same "within the Executive Branch, with Congress, [or] with Iraq and other foreign governments." What the President or the Secretaries of Defense and State tell Nouri al-Maliki, Members of Congress, or each other is of no consequence to defendant's ability to receive a fair trial—as long as they are not "furnishing any statement or information for the purpose of influencing the outcome of [the]

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defendant's trial," 28 C.F.R. §50.2(b)(2), making public comments that could "reasonably be expected to influence the outcome of [his] trial," Id., or releasing statements or information having "a substantial likelihood of materially prejudicing [this] adjudicative proceeding." United States Attorney's Manual §1-7.500. The war can be prosecuted and foreign affairs conducted without statements *to the public and the media* prejudicing defendant's right to a fair and impartial jury. Indeed, the government's hyperbole on the issue makes one wonder exactly what it is that the Executive wishes to convey. Does the Secretary of Defense wish to guarantee Muqtada al-Sadr that there will be a conviction in this case in order to appease his militia? Does the Secretary of State seek leave to assure Sunnis that defendant will receive the death penalty so that they will support American policy? Does the President wish to tell Members of Congress or his cabinet that he personally believes defendant to be guilty and that his conviction and execution are important to the successful prosecution of the war on terror? As presumptuous and improper as such statements would be, nothing in the instant motion seeks to restrain them—as long as they are not released to the public or the media where they run the real risk of prejudicing the prospective jury and influencing the outcome of the case.

Second, assuming *arguendo* that the government's stated concern for the balance of powers is not disingenuous, the issue presents whether the defendant's right to due process can be set aside in deference to the President's right to conduct foreign policy and prosecute the war on terror. This is not the first instance in which the Executive has asserted such preeminence of its authority. In Hamdi v. Rumsfeld, 542 U.S. 507 (2004), the President argued that the constitutional power of the Executive Branch to conduct combat operations

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precluded the constitutional power of the Judicial Branch to consider the habeas corpus petition of an American citizen arrested and detained as an enemy combatant. The argument was rejected by the Supreme Court.

> Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. See *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 164-165, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action"); see also *United States v. Robel,* 389 U.S. 258, 264, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ··· which makes the defense of the Nation worthwhile").
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> . . . .
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> In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. *Youngstown Sheet & Tube,* 343 U.S., at 587, 72 S.Ct. 863. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. *Mistretta v. United States,* 488 U.S. 361, 380, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"); *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398, 426, 54 S.Ct. 231, 78 L.Ed. 413 (1934) (The war power "is a power to wage war successfully, and thus it

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> permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties")."

Hamdi v. Rumsfeld, 542 U.S. 507, 532-36 (2004).

The Judicial Branch, while showing justifiable deference to Executive powers and responsibilities, has, on occasion, prohibited the President from acting, Hamdi v. Rumsfeld, *supra*, and required him to act. United States v. Nixon, 418 U.S. 683 (1974). While the government is correct that judicial deference to Executive power is greatest in "such 'central' Presidential domains as foreign policy and national security," Harlow v. Fitzgerald, 457 U.S. 800, 812 n.19 (1988), it is not absolute, as evidenced by Hamdi. But in this case, we need not be detained by such arguments regarding interference with "central Presidential domains." The requested order herein does not impact those central responsibilities. As set forth above, nothing in the tendered order will in any way restrict or compel Presidential action or discretion in the prosecution of the war on terror or the conduct of the nation's foreign policy. Rather, this case is more akin to United States v. Nixon, *supra*, where the Court compelled the President to turn over to prosecutors certain records and information despite the general presidential interest in confidentiality because such order did not impact military, diplomatic, or national security secrets. Here defendant requests an order prohibiting the President and his subordinates from denying him a fair trial by an impartial jury through the public dissemination of "inflammatory or otherwise prejudicial extrajudicial statements" such as "statements regarding the guilt or innocence of the defendant, the appropriate sentence should he be convicted, any statements made by defendant to officials, the invocation of any rights

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by defendant, the identity of prospective witnesses or their probable testimony, the results of any mental or physical examinations, the results of scientific or medical tests or experiments (including autopsies of any persons), [and] statements concerning the merits of the case." What presidential interests are adversely impacted by this request? Certainly not the "central" responsibilities of being the commander-in-chief or conducting the foreign policy of the United States. Not even the government is bold enough to suggest that there is a Presidential interest in denying a citizen a fair trial by prejudicing the prospective jury pool. For good reason. The constitutional guarantee of a fair trial by an impartial jury is the "most fundamental of all freedoms," Estes v. Texas, 381 U.S. 532, 540 (1965), and it is the Judicial Branch's obligation to enforce that right by controlling the publicity attending sensational cases. Sheppard v. Maxwell, 384 U.S. 333, 357 (1966). The only Executive interest impacted by this request is the dubious notion of a "presidential prerogative" to comment on pending criminal proceedings. If such a prerogative exists, it must certainly give way to defendant's right to a fair trial.

> It is true that the right to a fair trial, both in civil and criminal cases, is one of our most cherished values, and that a trial judge should have the authority to adopt reasonable measures to avoid injury to the parties by reason of prejudicial or inflammatory publicity.

CBS, Inc. v. Young, 522 F.2d 234, 240, 241 (6th Cir.1975). Far from frustrating the Court's ability to enjoin the Executive to protect the defendant's right to a fair and unbiased jury, the balance of powers doctrine compels it to do so.

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Conclusion

This administration has acknowledged, contrary to the response of its attorneys, that any public comment by the Executive Branch on the charges or on any facts relating to a pending criminal prosecution is inappropriate and unfair to the defendant. Vice President's Statement on Libby Resignation, October 28, 2005, *supra*. It has gone so far as to prohibit "White House officials" from responding to questions or discussing the factual circumstances of at least one high profile federal criminal prosecution, Afternoon Press Gaggle by Scott McClellan, October 28, 2005, *supra*, recognizing that to do so "could prejudice the opportunity for there to be a fair and impartial trial." Press Briefing by Scott McClellan, October 31, 2005, *supra*. If the government were to be as solicitous of Mr. Green's right to a fair and impartial trial as it seems to be of Scooter Libby's, counsel agrees that there would be no need for the order requested herein. But this Executive concern for fair trials by impartial juries is spotty at best in its application, as evidenced by the abuses set out above. Absent a voluntary commitment in this case to refrain from the same type of comment deemed injurious to fair trials for White House officials, the Court should impose the relief requested herein.

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CERTIFICATE

I certify that a copy of the foregoing motion was served on the United States by mailing and same to its counsel of record, Marisa J. Ford, Esq., Assistant United States Attorney, Tenth Floor, BB&T Bank Building, 510 West Broadway, Louisville, Kentucky 40202; and Brian D. Skaret, Esq., Attorney, Domestic Security Section, Criminal Division, United States Department of Justice, 950 Pennsylvania Avenue N.W., Washington, D.C. 20530, all this 28th day of August, 2006.

/s/ Scott T. Wendelsdorf

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