

FILED U.S.
DISTRICT COURT
WESTERN DISTRICT OF KY

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY 06 JUL 25 PM 4:25
AT LOUISVILLE**

UNITED STATES OF AMERICA

v.

Criminal Action No. 3:06MJ-230

STEVEN D. GREEN

**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**

The United States respectfully opposes defendant Green's motion for an order restraining extrajudicial statements ("Motion"). Green has failed to establish grounds for an order restraining direct participants before this Court. He has cited no extrajudicial statements, let alone prejudicial statements, made by the Attorney General, prosecutors, or other trial participants, nor is there a basis for the Court to conclude that such statements will be made in the future. Moreover, Department of Justice personnel are bound by regulation to refrain from making inappropriate extrajudicial statements, and they will adhere to that obligation.

Green's request for an order restraining extrajudicial statements by, among others, the President and members of his Cabinet is unprecedented and without a legal or factual basis. The proposed order would raise profound separation-of-powers problems and would impede the President's ability to carry out his constitutional responsibilities and duties regarding foreign affairs and as Commander-in-Chief. The charges in this case stem from an incident on foreign soil that has already been a matter of public interest. The proposed order would, for example,

prevent the President and members of his Cabinet from addressing the incident, to the extent necessary, in discussions with foreign leaders and the public at large. More specifically, it would prevent the President, members of his Cabinet, and other Executive Branch officials from informing the Iraqi government of developments in the case and assuring the Iraqi people – and people throughout the world – that the United States is diligently pursuing justice in this matter and that it will not tolerate unprovoked attacks on civilians by our armed forces. Moreover, it should be noted that, in fulfilling their duties to protect the national security and conduct foreign affairs, neither the President nor any other high-ranking official has made any statements imperiling Green’s right to a fair trial.

STATEMENT

On June 30, 2006, a criminal complaint was sworn alleging that, on or about March 12, 2006, Green murdered four Iraqi civilians and raped one of those civilians in Mahmudiyah, Iraq while serving as a member of the United States Army. *See* Complaint (Dkt. 1). The complaint further alleges that these actions violate 18 U.S.C. §§ 7, 1111, 2241, and 3261(a)(2). Green was arrested and presented for an initial appearance, at which he pleaded not guilty to the charges in the complaint. *See* Order on Initial Appearance (Dkt. 6), at 1.

On July 11, 2006, Green filed a motion requesting that the Court enter an order (commonly referred to as a “gag order”) prohibiting certain extrajudicial statements. Motion (Dkt. 13). More specifically, he seeks the entry of a two-part order. Part one would apply to “trial participants, attorneys, parties, civilian or military law enforcement officers or

investigators, witnesses or prospective witnesses, jurors, or court officials” (“trial participants”).¹ Proposed Order 1. The order would prohibit these persons from “making any inflammatory or otherwise prejudicial extrajudicial statements to the news media or the public.” *Id.*

Part two of the proposed order would be even broader, both in terms of who would be covered and what speech would be prohibited. The order “includes, but is not limited to, the President, the Attorney General, the Secretary of State and the 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.” *Id.* Such individuals would be prohibited from making:

extrajudicial statements regarding [1] the guilt or innocence of the defendant, [2] the appropriate sentence should he be convicted, [3] any statements made by defendant to officials, [4] the invocation of any rights by the defendant, [5] the identity of prospective witnesses or their probable testimony, [6] the results of any mental or physical examinations, [7] the results of scientific or medical tests or experiments (including autopsies of any persons), [8] statements concerning the merits of the case, or [9] any other prejudicial or inflammatory fact or matter not of public record.

Id. at 1-2.

ARGUMENT

Because the proposed order is divided into two parts, and because the considerations applicable to each part vary, the government will address each separately.

¹ Although the parameters of this category are vague, its general thrust appears to be parties that are or may become direct participants in the case. Accordingly, for purposes of this Response, we collectively refer to this category as “trial participants.”

I. Green Has Failed to Demonstrate that an Order Restraining Statements by Trial Participants Is Required to Ensure a Fair Trial

While a court may, under appropriate circumstances, enter an order restraining the extrajudicial statements of trial participants, *see, e.g., United States v. Brown*, 218 F.3d 415, 428 (5th Cir. 2000), such an order constitutes a prior restraint on speech and may be imposed only in limited circumstances. *See, e.g., CBS Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975) (per curiam). Specifically, an order of this type is appropriate only upon a specific showing that the trial participants are likely, absent an order, to engage in extrajudicial commentary that will undermine the court's ability to provide a fair trial. *See, e.g., United States v. Ford*, 830 F.2d 596, 598-600 (6th Cir. 1987); *CBS*, 522 F.2d at 238-39.² In addition, the court must find that other less restrictive means are inadequate to mitigate the risk of an unfair trial and that the order

2

The specific standard applicable to limitations on speech by trial participants in the Sixth Circuit is potentially subject to some uncertainty and distinction among the categories of trial participants. The two seminal cases in this Circuit, *Ford, supra*, and *CBS, supra*, establish that a gag order generally requires a specific showing of a "clear and present danger," *i.e.*, "a serious and imminent threat" that extrajudicial statements will undermine the right to a fair trial. *Ford*, 830 F.2d at 598-600; *see also* Motion 2-3 (using "clear and imminent danger to the fair administration of justice" standard). The court, however, left open whether that standard necessarily applies to *all* trial participants. *See Ford*, 830 F.2d at 597 (noting case does not specifically address restraints on lawyers, officers of the court, or witnesses). In light of the Supreme Court's decision in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074-75 (1991), it is likely that a somewhat less demanding standard – "substantial likelihood of material prejudice" – will apply at least to attorneys appearing before the court. *See generally Brown*, 218 F.3d at 426-28 (addressing varying case standards among the circuits).

This Court, however, does not need to decide the particular standard applicable to each subcategory of trial participant to resolve this motion. As discussed below, Green has failed to establish that there is even a "substantial likelihood" that the prosecutors in this case or other trial participants will, absent the proposed order, make extrajudicial statements that will undermine his right to a fair trial. *See also Gentile*, 501 U.S. at 1037 (Kennedy, J.) (expressing view of four Justices that "[t]he difference between the requirement of serious and imminent threat * * * and * * * substantial likelihood of material prejudice could prove mere semantics").

is narrowly tailored to the accomplishment of that purpose. *See, e.g., Ford*, 830 F.2d at 600; *CBS*, 522 F.2d at 239.

Green has failed to make these showings. Although he contends (Motion 2) that an order is needed “to mitigate the effects of the likely dissemination of such unrestrained comment by the trial participants,” he provides no support for that assertion. In particular, he has made no allegation that a prosecutor or other trial participant has made any inappropriate extrajudicial statement, let alone statements that would tend to undermine a fair trial. Absent a specific factual finding that trial participants are likely to make extrajudicial statements that prejudice the court’s ability to provide a fair trial, entry of an order restraining speech by trial participants is unjustified. *See Ford*, 830 F.2d at 600 (“Such a threat must be specific, not general. * * * In the instant case, no facts were found which would suggest ‘a serious and imminent threat.’”); *id.* at 603 (Krupansky, J., concurring) (“Absent findings of fact to support a ‘serious and imminent threat’ in a narrowly tailored order directed to specific circumstances and without evidence of having explored the less burdensome alternatives of voir dire, jury selection, sequestration, or a change of venue, the order in its present form should be vacated.”).³

Particularly given the strong presumption against prior restraints,⁴ this Court may not simply presume that the Attorney General, the prosecutors, or other trial participants will make

3

Compare *Brown*, 218 F.3d at 428 (upholding order because district court “made specific findings about the conduct of the parties persuading it that these fears might well be realized”); *id.* at 429 (“[T]he district court found it clear ‘that [the parties] are prepared to “try this case in the press” and would attempt to use the media to influence the potential jury pool and create a prejudicial media atmosphere, if permitted.’”).

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See, e.g., Brown, 218 F.3d at 424-25; *CBS*, 522 F.2d at 238.

extrajudicial statements prejudicing the fairness of the proceedings. Department of Justice personnel, moreover, are already obligated by regulation not to make such statements. Those regulations, which govern the release of information in criminal cases, provide in part:

At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.

28 C.F.R. § 50.2(b)(2); *see also, e.g.*, United States Attorney's Manual § 1-7.500 ("At no time shall any component or personnel of the Department of Justice furnish any statement or information that he or she knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding."). There is no reason to believe that the prosecution team will fail to adhere to these regulations. And those regulations provide a further reason for the court to conclude that Green has not established the requisite risk that prejudicial statements will be made. *See Sheppard v. Maxwell*, 384 U.S. 333, 362 & n.16 (1966) (identifying Department of Justice regulations as example of one appropriate means to help address concerns about prejudicial publicity); *United States v. Walker*, 890 F. Supp. 954, 957 (D. Kan. 1995) (citing local rules prohibiting inappropriate disclosures among reasons for concluding defendant had failed to "demonstrate[] that a gag order is appropriate or warranted").⁵

5

It is worth noting that Green needs to establish not only that inappropriate extrajudicial statements are likely to be made, but that they are likely to pose a significant threat – be it a "serious and imminent threat" or a "substantial likelihood" (*see* n.2, *supra*) – of preventing a fair trial. *See, e.g., United States v. Scarfo*, 263 F.3d 80, 94-95 (3d Cir. 2001) (extrajudicial statements did not justify gag order because they did not support "credible findings of any risk of material prejudice, much less a substantial likelihood of material prejudice"). Absent a basis for

Green has also failed to demonstrate that other less restrictive alternatives, such as voir dire and clear and emphatic instructions on the jury's duty to decide the case solely on the evidence presented at trial, would be inadequate, or that the proposed order is narrowly tailored. *See Ford*, 830 F.2d at 600. Given the absence of specific statements by trial participants that might inform the nature of the risk, as well as the early stage of the proceeding, there is no basis for the court to conclude that less restrictive measures would be inadequate or that the proposed order would be an effective means to address defendant's concerns about publicity. *See, e.g., Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98-99 (3d Cir. 1988) ("Prior restraints are the most drastic, but not necessarily the most effective, judicial tool for enforcing the right to a fair trial."); *Gentile*, 501 U.S. at 1044 (Kennedy, J.) (noting "that the timing of a statement [i]s crucial in the assessment of possible prejudice"; the closer to trial, the more likely the statement is to prejudice the jury pool).⁶

determining the nature of the statements likely to be made, it is not clear how a court could find that those statements will likely prejudice its ability to provide for a fair trial.

6

Defendant's concern appears to be publicity generally, rather than particular statements by trial participants. As the Supreme Court has explained, however, "even pervasive, adverse [pretrial] publicity does not inevitably lead to an unfair trial." *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 554 (1976); *see also Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961) ("To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."). Further, and perhaps more significantly, there is no basis for concluding either that the publicity here is a function of or will be materially amplified by statements from trial participants, since no such statements have been identified, or that an order restraining trial participants' statements would effectively address defendant's publicity-based concerns. *See Nebraska Press*, 427 U.S. at 562 (in evaluating its permissibility, court must consider "how effectively a restraining order would operate to prevent the threatened danger").

Finally, the proposed order is vague and overbroad in terms both of who is covered and what statements are prohibited.⁷ For example, the proposed order applies to a broad and ill-defined range of persons. Even assuming that the list would, as a matter of proper construction, apply only to individuals directly participating in the criminal case, the order would still cover (e.g.) all “witnesses or prospective witnesses.” This would bind a potentially huge and open-ended class, leaving an unknown (and presently unknowable) number of persons unsure about their obligations under the order. Further, Green has failed to establish that each of these categories involves people who are likely to speak publicly in ways that would prejudice his right to a fair trial. Accordingly, the range of persons Green seeks to bind is “neither narrowly tailored nor directed to any specific situation.” *Ford*, 830 F.2d at 600.

In addition, the prohibition on “any inflammatory or otherwise prejudicial extrajudicial statements to the news media or the public” is impermissibly vague. As the Fourth Circuit explained regarding similarly vague language: “This proscription is so imprecise that it can be a trap for the unwary. It fosters discipline on a subjective basis depending entirely on what statements the disciplinary authority believes reasonably endangers a fair trial. Thus neither the speaker nor the disciplinarian is instructed where to draw the line between what is permissible

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We do not attempt in this Response to identify the full range of problems with the proposed language, but only to identify two specific examples. To the extent the court were to consider imposing an order restraining extrajudicial statements by trial participants or by any other individuals or parties, we would request an opportunity to comment on the specific terms of the order.

and what is forbidden.” *Hirschkop v. Snead*, 594 F.2d 356, 371 (4th Cir. 1979) (en banc) (per curiam).⁸

II. There Is No Legal or Factual Basis for Green’s Unprecedented Request for an Order Restraining Statements by the President, the Secretary of Defense, the Secretary of State, and Other Executive Branch Officials Who Protect the National Defense and Conduct Foreign Affairs

Green also moves this Court for an order restricting the authority of the President, the Secretary of Defense, the Secretary of State, and other Executive Branch officials and members of our Armed Forces from speaking to the matters of national and international significance implicated by this case. To our knowledge, the proposed order would be unprecedented; we are aware of no court that has ever suggested that it has the authority, let alone that it would be an appropriate exercise of that authority, to delimit the matters on which the President and members of his Cabinet may speak. Such an order would raise the most profound separation-of-powers problems. And even assuming solely for the sake of argument that there could be circumstances justifying such an order, Green has not begun to make the kind of showing that would be required.

a. The crimes charged in this case, namely, the murder and rape of Iraqi civilians by members of the United States Army, directly affect the war in Iraq and our nation’s foreign affairs. Necessarily then, any order from this Court restricting the ability of the President and the Secretary of State to discuss or comment on those events, either within the Executive Branch,

⁸ Indeed, the term “extrajudicial” is also far from clear. We assume, for example, that Green is not seeking an order that would preclude the Department of Justice prosecution team from conferring with their military counterparts, for example. We likewise assume that Green is not seeking an order that would preclude the President and his Cabinet from discussing the case with foreign officials as needed to conduct foreign affairs or to promote national security. *See* Point II, *infra*.

with Congress, with Iraq and other foreign governments, or with the public, would also directly affect the war and foreign affairs.

The President holds a unique place within our constitutional system. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 749-50 (1982). Of particular relevance here, the Constitution vests in the President authority as Commander-in-Chief and responsibility for conducting the nation's foreign affairs and for protecting national security.⁹ In addition, the President, typically acting through the Secretary of Defense, directs our armed forces. 10 U.S.C. §§ 113, 125; 50 U.S.C. § 401. Likewise, the President acts through the Secretary of State when conducting foreign affairs. 22 U.S.C. § 2656. Given the President's unique responsibilities in these areas, courts have recognized that separation-of-powers principles mandate that they exercise extreme caution before interfering with the President's ability to carry out those functions.¹⁰

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See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 812 n.19 (1982) (describing the "central Presidential domains as foreign policy and national security" and explaining that "the President could not discharge his singularly vital mandate [in these areas] without delegating functions nearly as sensitive as his own"); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (noting "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

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See, e.g., Department of Navy v. Egan, 484 U.S. 518, 529-30 (1988) ("The Court also has recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive.' 'As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.' Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.") (internal citations omitted); *Nixon v. Fitzgerald*, 457 U.S. at 750 (rejecting argument that the President, like governors, might be protected by only limited immunity because that would be inconsistent with "[t]he President's unique status under the Constitution"); *Harlow v. Fitzgerald*, 457 U.S. at 812 n.19 (explaining that claim of absolute immunity from suit by subordinate Executive Branch officials is "strongest in such 'central' Presidential domains as foreign policy and national security"); *cf. United States v. Nixon*, 418 U.S. 683, 710-11 (1974) (noting that "the courts have traditionally shown the utmost deference to Presidential responsibilities" in the areas of foreign policy and military affairs, but the same level of deference did not necessarily extend to more generalized

These principles and concerns are manifest in the present case. The conduct of members of the United States military, including the events at issue in this case, are matters of great domestic and international concern. The President and other Executive Branch officials must have the authority and discretion to address these incidents in the way and to the degree they determine is necessary. For instance, this order, if entered, would limit the ability of the President and his senior officials – including the Secretary of State and the Secretary of Defense – to explain to the Iraqis and the world that the United States does not countenance attacks on civilians, and to discuss developments in the case with officials of Iraq or other foreign governments. It would, in short, raise grave separation-of-powers concerns if the Court were to infringe the President’s powers as Commander-in-Chief and in conducting foreign affairs by entering the requested restraining order.¹¹

claims of executive confidentiality).

11

As the Sixth Circuit explained in vacating a gag order imposed on a sitting Congressman, “the doctrine of separation of powers – a unique feature of our constitutional system designed to insure that political power is divided and shared – would be undermined if the judicial branch should attempt to control political communication between a congressman and his constituents. It would tend to undermine the representative nature of the democratic process and the legislator’s responsibility to the electorate to account for his actions.” *Ford*, 830 F.2d at 601; *see also Bailey*, 852 F.2d at 100 (noting that “a public official has the right and, we add, sometimes the duty, to address issues of public concern within his or her domain” and that the duty restricts the authority of courts to impose limits on an official’s speech). These separation-of-powers concerns are not merely manifest in this case; they are also greatly amplified by the President’s “unique position in the constitutional scheme,” *Nixon v. Fitzgerald*, 457 U.S. at 749, and by the issues of national and international significance implicated by this case.

The President, of course, “is a representative of the people, just as the members of the Senate and of the House are.” *Myers v. United States*, 272 U.S. 52, 123 (1926). Indeed, “on some subjects * * * the President, elected by all the people, is rather more representative of them all than are the members of either body of the Legislature.” *Id.* Because of his unique position as the only elected official with a truly “national’ perspective,” *INS v. Chadha*, 462 U.S. 919,

It bears emphasis that the question raised in this case is not whether the defendant has a right to a fair trial; he unquestionably does, and that right may be vindicated in numerous ways (including, if necessary, the voiding of a conviction). The issue is instead whether imposing a gag order on the President and his Cabinet as a *prophylactic* to prevent the mere possibility of a violation is a permissible or appropriate exercise of judicial authority. Given the significance and importance of preserving the President's ability (both personally and through members of the Executive Branch) to speak to matters of relevance and importance to his duties as Commander-in-Chief and as the voice and organ of the United States in foreign affairs, we believe the answer must be an unequivocal "no."

b. Indeed, the Supreme Court has said that courts lack the authority to order the President to refrain from taking discretionary actions in the exercise of the duties of his office. *See Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866). In the latter case, the State of Mississippi sought to enjoin President Johnson from

948 (1983), the ability of the President to communicate freely with the people of the United States is a crucial component of our system of government and of the President's ability to carry out the functions and duties of the office. *Cf. Democratic Nat'l Committee v. FCC*, 460 F.2d 891, 905 (D.C. Cir. 1972) ("[I]t is clear that in this day and age it is obligatory for the President to inform the public on his program and its progress from time to time. * * * The President is obliged to keep the American people informed and as this obligation exists for the good of the nation this court can find no reason to abridge the right of the public to be informed by creating an automatic right to respond reposed in the opposition party."); *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1317-18 (D.C. Cir. 1968) (Robinson, J., concurring) ("The effective functioning of a free government like ours depends largely on the force of an informed public opinion."). This role, and its function within our constitutional system, necessarily extends to the President's senior officers, as the President cannot adequately discharge his duties and responsibilities without relying on senior Cabinet and other officials. *Cf. Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 886 (1991) ("The Cabinet-level departments are limited in number and easily identified. Their heads are subject to the exercise of political oversight and share the President's accountability to the people.").

enforcing the Reconstruction Acts, which it alleged were unconstitutional. Notwithstanding the grave allegation of unconstitutionality, the Court determined it simply did not have the authority to enjoin the President in the exercise of his discretionary duties. *See, e.g., Johnson*, 71 U.S. at 499 (“It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive * * * but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.”).

As Justice O’Connor explained in her plurality opinion in *Franklin*:

While injunctive relief against executive officials like the Secretary of Commerce is within the courts’ power, the District Court’s grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows. We have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely “ministerial” duty, and we have held that the President may be subject to a subpoena to provide information relevant to an ongoing criminal prosecution, but in general “this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.”

505 U.S. at 802-03 (citations omitted); *see also id.* at 826-29 (Scalia, J., concurring in part and concurring in the judgment) (adding fifth vote to this view).

c. Even assuming, solely for the sake of argument, that an order prohibiting the President or members of his Cabinet from commenting on matters of this nature would ever be appropriate, nothing about the comments Green has cited warrant the entry of such an order. “The Supreme Court and Courts of Appeals have announced varying standards to review gag orders depending on who or what is being gagged.” *Scarfo*, 263 F.3d at 92. Given who the restriction would apply to and the weighty countervailing interests in permitting the President and his Cabinet to speak to these matters, only the most compelling and specific “clear and

present danger” to defendant’s ability to receive a fair trial could suffice in these circumstances. Green has pointed to no such “clear and present danger.”

Significantly, the President has not publicly suggested or implied that Green is guilty of the offenses charged. To the contrary, both the President and the Chairman of the Joint Chiefs of Staff (the only other official whose comments Green cites) have exercised care not to prejudge Green’s guilt. For example, in the July 6, 2006, CNN interview that Green references (Motion 3), the President repeatedly qualified his statements with “if these charges are true” and “if this person is guilty” to make clear that no determination of guilt has been made.¹² Green complains,

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The President’s remarks in full were as follows:

KING: Are you concerned about these charges about the troops killing civilians in Iraq?

G. BUSH: These are very serious charges, and what the Iraqis must understand is that we will deal with these in a very transparent, upfront way. People will be held to account if these charges are true.

KING: Because they want to know that.

G. BUSH: Of course they do. Yes, they do. And they’ll learn that we will be very open about how we deal with this issue. What concerns me is not only the action, and, you know, if this is true, the despicable crime, if true. But what I don’t want to have happen is for people to then say, well, the U.S. military is full of these kind of people. That is not the case. Our military is fabulous. The men and women who wear the uniform of the United States are some of the finest people I have ever known. And they are, anyway

.....

KING: That a little bit can taint them.

G. BUSH: Yeah, you worry about a – one person or a couple of people staining the image, the honorable image of the United States military. So one thing you’ll hear me do is defend our troops, because I believe in them. And then the other thing people will see is people will be brought to justice. There will be absolute justice if this person is guilty.

KING: Because officials in the Iraq government certainly have a right to be concerned.

however, that the President stated that this was “a despicable crime” and that he worried about the risk of individual actions potentially “staining the image, the honorable image of the United States Military.” Motion 3. Contrary to Green’s suggestion, these are not the type of “strong and inflammatory opinion” that might warrant entry of the requested order. Particularly viewed in context, including the President’s care not to prejudge the defendant and the lack of any inflammatory rhetoric, these are not they type of statements that would be likely to prevent Green from receiving a fair trial. *See Gentile*, 501 U.S. at 1044 (Kennedy, J.); *Scarfo*, 263 F.3d at 94. The public facts demonstrate that, if proven true, this was a despicable crime; it is hard to characterize a rape and accompanying murder of four people (including a young girl approximately five-years old) as anything less. *See Arrest Warr. Aff. 2* (Dkt. 1). Similarly, General Pace’s comments (*see* Motion 3) that “[a]ny such acts on the part of any U.S. service member, *if proven to be true*, are totally unacceptable” and that “[w]e know that in uniform, and all of our fellow citizens know that,”¹³ is neither inflammatory nor creates a risk of prejudice.¹⁴

G. BUSH: Well, it’s a sovereign government. Of course they do. I mean, when you find – if in fact the charges are true that somebody was raped and murdered, then there ought be concern by the Iraqis. What they’ve got to be comforted in knowing is that we will deal with this in a way that is going to be transparent, above board and open.

Transcript of CNN’s Larry King Live (July 6, 2006) (available at <http://transcripts.cnn.com/TRANSCRIPTS/0607/06/lkl.01.html>).

13

See American Forces Information Service, News Articles (July 4, 2006) (emphasis added) (reporting comments made by General Pace on NBC’s Today program) (available at http://www.defenselink.mil/news/Jul2006/20060704_5578.html).

14

The remaining comments cited by Green (Motion 3) are not by government officials, but by a member of the press and the Prime Minister of Iraq. These individuals would not be covered by the proposed order and their comments provide no basis for restricting statements by either trial participants or members of the Executive Branch.

In addition, Green has failed to demonstrate that less restrictive alternatives, such as voir dire and appropriate jury instruction, would be inadequate. *See pp. 7, supra.* Such a requirement takes on particular significance here given the unprecedented nature of the order he seeks. This portion of the proposed order also suffers from the same type of overbreadth and vagueness problems discussed above. *See pp. 8-9, supra.* For example, the proposed order expressly names the Secretary of Defense, the Secretary of State, and the Attorney General. *See Proposed Order 1.* Green, however, points to no public statements by these officials, let alone prejudicial ones.¹⁵ The order also purports to cover an ill-defined group of additional persons, apparently including every member of the Executive Branch, as well as “any person acting in concert with or on behalf of such officials.” *Id.* Accordingly, the relief Green seeks is “neither narrowly tailored nor directed to any specific situation.” *Ford*, 830 F.2d at 600.

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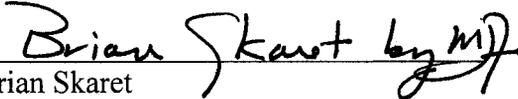
In addition, the Attorney General’s contact with the media is governed by regulation. *See* 28 C.F.R. § 50.2. There is no basis for this Court to assume that the Attorney General will violate these regulations, and they further reduce any justification for an order applying to the Attorney General in this case. *See pp. 5-6, supra.*

Conclusion

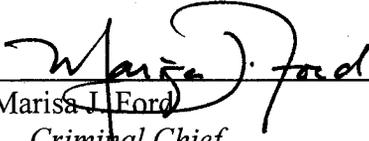
For the reasons set forth above, defendant Green's motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing response was mailed and faxed this 25th day of July, 2006, to Scott T. Wendelsdorf, Federal Defender, and Patrick J. Bouldin, Assistant Federal Defender, 200 Theatre Building, 629 Fourth Avenue, Louisville, Kentucky 40202, counsel for Defendant, Steven D. Green.



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