EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
v.	
	Cr. No. 08-360 (RMU)
PAUL ALVIN SLOUGH,	
NICHOLAS ABRAM SLATTEN,	
EVAN SHAWN LIBERTY,	
DUSTIN LAURENT HEARD,	
DONALD WAYNE BALL,	
Defendants.	

GOVERNMENT'S MOTION FOR A PROTECTIVE ORDER

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully moves this Court, pursuant to Rule 16(d)(1) of the Federal Rules of Criminal Procedure, for issuance of a protective order regarding the handling of discovery material that has been and will be disclosed by the United States to the defendants. In support of its motion, the United States relies on the following points and authorities and such other points and authorities as may be cited at any hearing on this motion. A proposed Order is attached.

1. The defendants are charged with multiple counts of voluntary manslaughter, attempt to commit manslaughter and a related weapons offense, arising from their participation in the shooting at Nisur Square in central Baghdad, Iraq, on September 16, 2007. The defendants are accused of opening fire with automatic weapons and grenade launchers on unarmed civilians located in and around Nisur Square, killing at least fourteen people, wounding at least twenty people, and assaulting but not injuring at least eighteen others. None of these victims was an insurgent, and many were shot while inside of civilian vehicles that were attempting to flee from the defendants'

convoy. Since the day it occurred, the Nisur Square shooting has generated considerable media attention both in Iraq and in the United States. As of the time of this filing, a LEXIS-NEXIS search reveals that nearly 2,000 news articles have been published mentioning the Blackwater shooting at Nisur Square.

2. Since the prosecutors sent a letter to the defendants on December 3, 2008, formally advising them to surrender themselves for arrest, there have been a number of documents and other material associated with this case that have been selectively provided to Mr. Matt Apuzzo, a reporter for the Associated Press wire service. In each instance, the material was provided to Mr. Apuzzo in an apparent attempt to influence improperly the opinions of prospective jurors at a trial in this case.

a. On Saturday, December 6, 2008, two days before the United States unsealed the indictment in this case, Mr. Apuzzo wrote and had published an article entitled *Charged Blackwater Guards ID'd: All Decorated Vets*, attached hereto as EXHIBIT A. The article stated that the names of the five Blackwater guards were provided to the Associated Press by "lawyers for the guards," and noted that "[d]ocuments in the case remain sealed but are expected to become public Monday, when the men have been ordered to surrender." Id. Details concerning the defendants' military service were also provided to the Associated Press, and counsel for Paul Slough and Dustin Heard were directly quoted in the article. Id.

b. On Monday morning, December 8, 2008, Mr. Apuzzo wrote and had published a follow-up article entitled *Venue Fight: Blackwater Guards Plan Utah Surrender*, attached hereto as EXHIBIT B. The article stated that "five Blackwater Worldwide security guards indicted in Washington . . . plan to surrender to the federal authorities Monday in

Utah" and detailed several legal challenges the defendants' attorneys were expected to raise in the case. Id. Counsel for defendant Ball was quoted in the article, although a Justice Department spokesperson declined to comment. Id.

c. On December 19, 2008, Mr. Apuzzo wrote and had published an article entitled *Blackwater Radio Logs: Guards Took Incoming Fire*, attached hereto as EXHIBIT C. The article stated that transcripts of radio logs were provided to the Associated Press by "defense attorney Thomas Connolly, who represents Nick Slatten, a former Army sergeant and indicted Blackwater guard." Id. According to the article, Mr. Connolly told Mr. Apuzzo that the prosecutors had received the radio logs from Blackwater, and the logs allegedly cast doubt on the Government's charges. Id. Counsel for defendant Slough was also quoted in the article. Id. A Justice Department spokesperson declined to comment "on evidence related to a pending case." Id.

d. On Monday morning, February 2, 2009, Mr. Apuzzo wrote and had published an article entitled *Pentagon letter Undercuts DOJ in Blackwater Case,* attached hereto as EXHIBIT D. The article quoted from a Pentagon letter that had been produced in discovery to the defense attorneys less than three days earlier, on Friday evening, January 30, 2009. Id. Prosecutors sent a letter to the Court alerting it to this apparent abuse of the discovery process, attached hereto as EXHIBIT E. In response, Mr. Connolly sent a letter to the Court saying that, although he was not the source of a leak, he had talked to Mr. Apuzzo about the Pentagon letter over the weekend, attached hereto as EXHIBIT F.

e. Most recently, on April 1, 2009, Mr. Apuzzo wrote and had published an article entitled *No Forensic Match For Ammo in Blackwater Shooting*, attached hereto as

EXHIBIT G. The article stated that the Associated Press had obtained copies of the FBI lab reports detailing that law enforcement agency's forensic examination work in this case – reports that had been produced in discovery to the defense attorneys less than three weeks earlier, on March 9, 2009. The article contained the curious attribution that the reports were obtained "from someone not involved in the criminal case," as if anticipating an inquiry into this very matter. Notwithstanding that attribution, the fact remains that the defense attorneys were the only persons to receive copies of the actual lab reports, other than a small number of line prosecutors and case agents who had no motivation to leak them or to misstate their findings (as Mr. Apuzzo's headline and article did). Accordingly, on April 1, 2009, the United States submitted another letter to the Court protesting the leak of discovery material to the media. See Letter dated April 1, 2009, to the Court from Assistant United States Attorneys Kenneth C. Kohl and Jonathan M. Malis, and Department of Justice Trial Attorney Barry Jonas, attached hereto (without attachments) as EXHIBIT H. In response, counsel for the defendants submitted a joint letter to the Court stating that "the lab reports referred to by Mr. Apuzzo in his news article were not provided to him by any of the defense attorneys or any member of the defense team." Notably, the defendants' joint letter failed to address the question of whether the defense attorneys turned over the FBI lab reports to any third parties, who may have leaked them to Mr. Apuzzo. See Letter dated April 1, 2009, to the Court from David Schertler, Esq., et al., attached hereto as EXHIBIT I.

3. In response to the Government's first letter on February 2, 2009, the Court promptly convened a conference call with counsel, during which it admonished the parties to refrain from disseminating information to the media concerning this case.

4. To avoid the need to avail itself of judicial relief, over six weeks ago the United States sought assurances from the defense that no further sharing of discovery material with the media would occur. By way of an email exchange with Mr. Connolly, on which all lead defense counsel for all five defendants were copied, the United States believed it had obtained that assurance. Indeed, Mr. Connolly advised that: "We all understood our obligations to the Court and will be mindful of them when we receive the discovery." See Email dated February 12, 2009, from Kenneth C. Kohl to all lead defense counsel, and Email dated February 13, 2009, from Thomas G. Connolly, Esq., to AUSA Kohl (both of which are attached hereto as EXHIBIT J). Furthermore, in the Government's subsequent discovery productions, the United States reiterated its understanding of the agreement reached with all defense counsel – i.e., that they would "only use this information in preparation of [their] case for trial, and that [they would] not describe or disclose the contents of any discovery materials to any third persons for any other purpose, including members of the news media."

5. After the most recent leak of discovery material to the media on April 1, 2009, the United States participated in a joint conference call with counsel for all five defendants and advised them that the United States could not continue to provide discovery, or set deadlines for the production of future discovery, without an appropriate protective order in place to ensure that no additional material is disseminated to the media.[1] That next morning, April 2, 2009, the United

[1] The United States continues to assemble discovery material for production to the defendants and intends to resume production of such material once the Court rules on the instant motion for a protective order. The United States did not lightly make the decision to suspend the production of discovery material. Rather, the United States is acutely mindful that further disclosure of discovery material to the media could have serious adverse consequences for the Government's ability to prosecute this case and for the Court's ability to preside over it. For example, the defendants advised the Court at arraignment that they intend to file a motion to dismiss the

States circulated a proposed protective order for the defendants' consideration. Additional versions were exchanged and discussed among the parties but, in the end, no agreement could be reached. Defense counsel have insisted on the right to disseminate copies of discovery material to third parties as they deem appropriate, and have declined to accept language that would place enforceable limitations on what those third parties can do with the material. The text of the proposed order submitted with this motion contains language that prohibits defense counsel from disseminating copies of discovery material to third parties who refuse to agree not to share the contents of the discovery material with the media, or to pass copies of that material to anyone else. The defendants have declined to accept this enforceable limitation on third-party use of discovery material.

ARGUMENT

Rule 16(d) of the Federal Rules of Criminal Procedure specifically provides that a district court may "for good cause, deny, restrict or defer discovery or inspection, or grant other appropriate relief." See Fed. R. Crim. P. 16(d)(1). The Supreme Court has emphasized that trial courts can and should use protective orders to restrict the dissemination of material produced in discovery in appropriate cases. Alderman v. United States, 394 U.S. 165, 185 (1969). The "production of discovery material . . . does not create a public record [and] [r]estrictions on the dissemination of

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indictment on the grounds set forth in Garrity v. New Jersey, 385 U.S. 493 (1967), and Kastigar v. United States, 406 U.S. 441 (1972). The Government's "Garrity/Kastigar" team is prepared to produce to the defendants their prior statements to agents of the Department of State, which are expected to be the subject of the defendants' Garrity/Kastigar motion. Disclosure of those statements to the media could cause the very harm that the defendants claim gives rise now to a basis to dismiss the indictment, that is, exposure of witnesses to the claimed Garrity-protected statements. Disclosure to the media would also risk the same exposure of the jury pool.

Classified discovery has not been suspended, because it is controlled by a separate Protective Order. See Protective Order under the Classified Information Procedures Act [**Document 74**].

information obtained through discovery are constitutional." United States v. Abdel Rahman, 1993 U.S. Dist. LEXIS 15404, * 4; 22 Media L. Rep. 1063 (S.D.N.Y. 1993) (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)).

Of course, a criminal defendant has no constitutional right to leak discovery material to the media, either directly or through third parties. "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454, 462 (1907) (Holmes, J.). Accord Bridges v. California, 314 U.S. 252, 271 (1941) ("The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting hall, the radio and the newspaper.").

In this case, the United States has provided and will continue to provide discovery material to the defendants in a timely manner. However, the need for Court-imposed limitations on the handling of discovery material – in particular, the disclosure of the content of such material to the media and the dissemination of copies of such material to any third party – is now readily apparent. Information contained in documents from the last two discovery productions has been published by the media. In each instance, the very same reporter whom the defense attorneys have used on three prior occasions to disseminate information favorable to their clients wrote and had published articles about the Government's discovery material.

The United States is not asking the Court to conduct a leak investigation. Instead, the United States seeks relief provided for in the Federal Rules of Criminal Procedure to ensure that discovery material produced to the defendants is handled appropriately and does not continue to be fodder for

pre-trial news reporting. Any trial of this case should be conducted in the courtroom. The Court should impose a protective order to prevent further trial of this case in the media.[2]

The Government's proposed order strikes a reasonable balance – in allowing the defendants the freedom to disseminate discovery material to fact witnesses, potential or actual expert witnesses, and other third parties (except the media), as they deem necessary and appropriate, while at the same time requiring the recipient of any such discovery material to agree to two narrow and enforceable conditions: (1) not to share the contents of the discovery material with the media; and (2) not to disseminate copies of the discovery material to anyone else without the permission of the Court.

Respectfully submitted,

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[2] The defendants' most recent representation to the Court – that none of FBI lab reports came from "any of the defense attorneys or any member of the defense team," see EXHIBIT I, suggests that the Court should impose clear rules as to which third parties, if any, may be given copies of discovery material in this case and what those third parties may do with the copies that they receive.

/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing unopposed motion to be served through the Court's Electronic Case Filing System, on counsel for the defendants, this 6th day of April, 2009.

/s/
JONATHAN M. MALIS
Assistant United States Attorney