UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	**Case No. 21-cr-90 (PLF)**
NATHANIEL DEGRAVE,	:	
	:	
Defendant.	:	

RESPONSE TO MINUTE ORDER REGARDING APPLICATION FOR ACCESS TO CERTAIN SEALED VIDEO EXHIBITS

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby responds to the Court's July 6, 2021 Minute Order, directing the government to respond to Petitioners' Reply Memorandum (Dkt. No. 4) filed in Miscellaneous No. 21-0075. Petitioners represent 16 news organizations (hereinafter the "Press Coalition") that have moved this Court to disclose video evidence, including sealed exhibits, used in the pretrial detention hearings for the defendant in the above-captioned case, pursuant to the procedure outlined by the Chief Judge in Standing Order 21-28 (BAH).

As stated in its prior filing (Dkt. No. 49) and for the reasons set forth below, the government opposes the release of exhibits previously identified as Videos 9 through 11 that were previously sealed by way of the Court's March 25, 2021 Order.

ARGUMENT

I. Maintaining the Secrecy of the Capabilities and Locations of the U.S. Capitol's Interior Security Camera System Is "Essential to Preserve Higher Values and Is Narrowly Tailored to Serve That Interest."

Even assuming, *arguendo*, that the First Amendment right of public access applies to the detention proceedings at issue, this right is "not absolute." *Press-Enter. Co. v. Superior Ct. of*

California for Riverside Cty. ("*Press-Enter. II*"), 478 U.S. 1, 9 (1986). Materials presented in a judicial proceeding may closed to the public if doing so "is essential to preserve higher values and is narrowly tailored to serve that interest." *Dhiab v. Trump*, 852 F.3d 1087, 1102 (D.C. Cir. 2017) (Williams, J., concurring) (quoting *Press-Enter. Co. v. Superior Ct. of California, Riverside Cty.* ("*Press-Enter. I*"), 464 U.S. 501, 510 (1984)). Importantly, Petitioners need to show there is a "tradition of openness" to the material, which they have failed to do. *U.S. v. Brice*, 649 F.3d 793, 795 (D.C. Cir. 2011) (affirming closure of material witness proceedings and records). The declaration of Thomas DiBiase, General Counsel for the U.S. Capitol Police, further refutes the existence of any such tradition. *See* Ex. 1, Decl. of Thomas DiBiase.

The D.C. Circuit has articulated the following test when the First Amendment right of access applies to a judicial proceeding: "[P]resumption [of access] can be overridden only if (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Wash. Post v. Robinson*, 935 F.2d 282, 290 (D.C. Cir. 1991) (citations and internal quotation marks omitted). Here, the government has shown, and this Court has already found, that national security interests could be harmed by the disclosure of the sealed CCTV videos. *See* Dkt. No. 18 (finding that "because there are reasonable grounds to believe that the disclosure of such materials could jeopardize national security, the United States has established a compelling governmental interest to justify the requested sealing"); *see also Dhiab*, 852 F.3d at 1098 ("It bears repeating that the government has a *compelling* interest in protecting ... the secrecy of information important to our national security...." (citations and internal quotation marks omitted)). Specifically, the full capabilities

and mapping of the U.S. Capitol's security system are not widely exposed to the public and, in the aggregate, constitute "security information." *See* 18 U.S.C. § 1979(a); Dkt. No. 17. It goes without saying that disclosing this sensitive infrastructure to the public, including hundreds of individuals who have already shown a willingness to storm the Capitol in an attempt to obstruct such crucial proceedings to our democracy as the certification of the Electoral College vote, would be detrimental to those interests.

And there simply are no alternatives to protect these interests. Once the capabilities of a U.S. Capitol interior surveillance camera, including its position and whether it pans, tilts or zooms, is disclosed to the public via the release of a single video from that camera, the cat is out of the bag. Petitioners have not shown that footage from these particular cameras has been released to the public in any domain, nor does the prior release of a still image disclose a camera's full capabilities. The government's positions in the two Capitol riot cases cited by Petitioners are inapposite. The footage discussed in the *Jackson* matter depicted different areas of the Capitol, while the withdrawn objection in the other matter related to cameras positioned on the outdoor terrace of the Capitol and elsewhere on Capitol grounds. It cannot be that once the government fails to object to the release of one camera's footage, *all* U.S. Capitol surveillance footage from January 6 is fair game, allowing certain members of the public potentially to better plot another insurrection.

For these reasons, the government submits that it has overcome the presumption to the public's First Amendment right of access to the sealed footage, to the extent that right attaches here, pursuant to the D.C. Circuit's test in *Washington Post v. Robinson*.

II. Because the Government Prevails on the First Amendment Right of Access Claim, the Common Law Right of Access Claim Is Moot.

The D.C. Circuit has explicitly stated that "the need to 'guard against risks to national security interests' overcomes a common-law claim for access." *Dhiab*, 852 F.3d at 1098 (quoting *United States v. Hubbard*, 650 F.2d 293, 315-16 (D.C. Cir. 1980)). Here, the government has demonstrated a compelling interest of guarding national security to justify the continued sealing of Videos 9 through 11, and that no alternatives to sealing would adequately protect that interest. Accordingly, Petitioners cannot prevail in their common-law claim. *See Wash. Post*, 935 F.2d at 288 n.7.

III. The *Hubbard* Factors Support Sealing the Exhibits.

The *Hubbard* factors also support the continued closure of the sealed video exhibits. The *Hubbard* factors, which guide courts in weighing the common law right of access against any competing interests, are:

> (1) [T]he need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.

In re Leopold to Unseal Certain Elec. Surveillance Applications & Ords., 964 F.3d 1121, 1131 (D.C. Cir. 2020) (quoting *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 665 (D.C. Cir. 2017)); *see also Hubbard*, 650 F.2d at 317-21.

As to the first factor, contrary to Petitioners' position that the wealth of video footage already in the public domain supports the sealed exhibits' disclosure, this fact actually cuts against it. Because the public already has access to scores of videos recorded by the media, police (via Body Worn Camera), and other rioters, as well as those CCTV videos released during former President Trump's impeachment proceedings, there is "little public value" in the specific videos at issue, and Petitioners have not articulated any. *Cable News Network, Inc. (CNN) v. FBI*, 984 F.3d 114, 119 (D.C. Cir. 2021). While deeply troubling, the videos showing the defendant and others assaulting law enforcement are cumulative of other videos from January 6 to which the public already has access. And more importantly, the public's desire for such footage, to the extent it exists, does not outweigh the compelling national security interest of shielding the surveillance capabilities of the U.S. Capitol from scrutiny. This factor thus weighs in favor of the government's position.

In *CNN v. FBI*, the D.C. Circuit recently clarified that "[a] district court weighing the second [*Hubbard*] factor should consider the public's previous access to the sealed information, not its previous access to the information available in the overall lawsuit." *Id.* Analogously here, prior access to footage from other CCTV cameras on January 6 has no bearing on the public's access to this exact footage. Because still images from only one surveillance camera here have been made public, such images do not reveal that camera's full capabilities, and the other cameras' positions and capabilities have not yet been made public at all,[1] this factor weighs in favor of closure.

[1] This latter point is undersigned counsel's understanding.

As to the third *Hubbard* factor, the U.S. Capitol Police strongly object to the disclosure of the sealed video exhibits at issue and are the owners of the footage. And while the U.S. Capitol Police is a government agency, it falls under the Legislative Branch and therefore its objection is more akin to a third-party objection than one by the FBI, which is an Executive Branch agency. *See id.* at 119-120. And like the FBI, USCP is "no ordinary agency." *Id.* at 119. It is charged with protecting the grounds where the insurrection at issue in this case took place. Because the threat of violence on Capitol grounds has unfortunately not diminished in light of the continued false assertions by politicians and other high-profile figures that the election was stolen,[2] the Capitol Police's objection on national security grounds deserves significant weight. This factor thus weighs in favor of the continued sealing of the exhibits. For similar reasons, USCP's property and privacy interests—at issue under the fourth *Hubbard* factor—also weigh in favor of continued sealing. *See id.* at 120 (holding that "a district court weighing the fourth *Hubbard* factor should consider whether secrecy plays an outsized role in the specific context," and citing *Hubbard*'s finding that "courts deny public access to guard against risks to national security" (citation and internal quotation marks omitted)).

Finally, the D.C. Circuit has instructed that "a district court weighing the fifth *Hubbard* factor should consider the dire consequences that may occur if an agency discloses its intelligence sources and methods," and that the sixth *Hubbard* factor can be decisive, for example, if the judicial record at issue was not used to affect a judicial decision. *Id.* While the fifth factor weighs in favor of continued closure of the exhibits, the government concedes that

[2] *See, e.g.*, Rosalind Helderman et al., *Inside the "Shadowy Reality World" Promoting the Lie that the Presidential Election Was Stolen*, WASH. POST (June 24, 2021), available at https://www.washingtonpost.com/politics/2021/06/24/inside-shadow-reality-world-promoting-lie-that-presidential-election-was-stolen/.

the sixth factor weighs in favor of release, as the videos clearly were submitted to influence the Court's decision on the pretrial detention of the defendant.

In sum, the government has shown that competing national security interests outweigh any common law public right of access to the sealed video exhibits under the *Hubbard* standard.

For all of the above reasons, Petitioners' application should therefore be denied as to Videos 9 through 11.

Respectfully submitted,

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