IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

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CLERK, US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
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DEPUTY

UNITED STATES OF AMERICA,	§	
	§	
v.	§	
	§	
JOHN TRAVIS KETNER, et al.,	§	EP-06-CR-1369-FM
	§	
Defendants,	§	
	§	
v.	§	
	§	
EL PASO MEDIA GROUP, INC. dba THE NEWSPAPER TREE,	§	
	§	
Intervenor.	§	

MEMORANDUM OPINION AND ORDER REGARDING MOTION OF EL PASO MEDIA GROUP, INC. DBA THE NEWSPAPER TREE TO INTERVENE TO UNSEAL COURT DOCUMENTS AND OPEN HEARINGS AND REQUEST FOR HEARING ON THE MOTION AND THE GOVERNMENT'S MOTION TO UNSEAL REDACTED TRANSCRIPTS

On this day, the Court considered El Paso Media Group, Inc. dba The Newspaper Tree's ("Intervenor") "Motion of El Paso Media Group, Inc. dba The Newspaper Tree to Intervene to Unseal Court Documents and to Open Court Hearings and Request for Hearing on the Motion" ("Motion to Intervene") [Rec. No. 97], filed August 6, 2008. In its Motion to Intervene, Intervenor argues the Court's sealing of documents and hearings by court order in this case is not narrowly tailored to satisfy constitutional muster.[1] Intervenor avers "[s]ecrecy and silence on government corruption is contrary to our nation's values and detrimental to the ability of El Paso's local governments to govern themselves."[2] Therefore, Intervenor requests the Court to "open court documents and hearings in this

[1] Intervenor's Mot. to Intervene at 1.

[2] *Id.*

case, and related cases, as well as hold a hearing with the parties and the press to evaluate the necessity of such a high level of secrecy by the Court."[3]

On September 2, 2008, the Government filed "Government's Response and Opposition to Intervenor's Motion of El Paso Media Group, Inc. dba The Newspaper Tree to Intervene to Unseal Court Documents and to Open Court Hearings and Request for Hearing on the Motion" ("Government's Response") [Rec. No. 99], opposing Intervenor's Motion to Intervene. On September 4, 2008, the Government filed "Government's Motion to Unseal Redacted Transcripts" ("Motion to Unseal") [Rec. No. 101].

Intervenor replied to the Government's Response in its "Reply to Government's Response and Opposition to the Motion of El Paso Media Group, Inc. dba The Newspaper Tree to Intervene to Unseal Court Documents and to Open Court Hearings and Request for Hearing on the Motion" ("Intervenor's Reply") [Rec. No. 104], filed September 15, 2008, and "Intervenor's Supplement to Its Reply to Government's Response and Opposition to the Motion of El Paso Media Group dba The Newspaper Tree to Intervene to Unseal Court Documents and to Open Court Hearings and Request for Hearing on the Motion" ("Intervenor's Supplemental Reply") [Rec. No. 105], filed September 19, 2008. Based upon the parties' briefs, argument, and the law, the Court denies Intervenor's Motion to Intervene and grants Government's Motion to Unseal.

I. FACTUAL AND PROCEDURAL HISTORY

On March 26, 2008, Carl Starr filed a *pro se* "Motion for Leave to File Motion to Intervene for the Limited Purpose of Being Heard in Connection with Access to Certain Portions of the Record and Hearings and Memorandum in Support" ("Motion for Leave to Intervene") [Rec. No. 57]. Starr attached his proposed "Motion to Intervene for the Limited Purpose of Being Heard in Connection with Access to Certain Portions of the Record and Hearings and Memorandum in Support" to his

[3] *Id.* at 2.

Motion for Leave to Intervene, in which he requested the Court to unseal the plea agreements in this matter, unseal documents filed in this matter, and open all hearings in this matter to the public and the press. Starr also requested an oral hearing on his Motion for Leave to Intervene [Rec. No. 58], filed April 7, 2008.

On May 28, 2008, the Court entered its "Memorandum Opinion and Order Regarding Motion for Leave to Intervene" ("Memorandum Opinion and Order") [Rec. No. 60], denying Starr's motion for an oral hearing and his Motion for Leave to Intervene, in part.[4] In the Court's Memorandum Opinion and Order, the Court laid out the factual background of this case.[5] The Court adopts and incorporates by reference the factual and legal bases from its May 28, 2008, Memorandum Opinion and Order. For clarity, the Court briefly summarizes the contents of the Memorandum Opinion and Order here.

For the past four years, the Government has undertaken a thorough investigation of public corruption allegations throughout the County and City of El Paso ("City"). As part of its investigation, the Government has used electronic surveillance, which has enabled the Government to acquire pertinent information regarding the public corruption allegations and has led to the Government's interest in more than eighty persons. These "persons of interest" include current and former public officials and noted community leaders.

To date, as a result of the Government's investigation, nine individuals associated with the public corruption allegations have pled guilty, including John Travis Ketner ("Ketner"), Elizabeth Flores ("Flores"), Bernardo Lucero, Jr. ("Lucero"), Carlos Villa Cordova ("Cordova"), Roberto Gerardo Ruiz ("Ruiz"), Chrisotpher Chol-Su Pak ("Chol-Su Pak"), Raymond R. Telles ("Telles"),

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[4] Mem. Op. & Order Regarding Mot. for Leave to Intervene at 2, *United States v. Ketner*, EP-06-CR-1369-FM (May 28, 2008).

[5] *See id.* at 2-14.

Antonio Dill ("Dill"), and Fernando Parra ("Parra") (collectively, "Defendants"). The Court's Memorandum Opinion and Order documents how the prosecutorial stage for each of the first six Defendants began with the use of Informations, an alternative to grand jury indictments.[6] Each of the Defendants, except Parra, entered a guilty plea at a closed hearing, notice of which did not appear on the Court's calendar or in the electronic docket for the case. At many of the plea hearings, the Government requested the Court to seal everything in the case except for the Informations for the Defendants.[7] The Court sealed the hearing minutes and transcript for each of the plea hearings. Only Parra's plea proceeding was open to the public or the press.

The Government continues to rely on these Defendants who have pled guilty to enhance its investigation. The Government also relies on informants, who initially assisted the Government in identifying the nine Defendants who have pled guilty, as well as numerous documents the Government has seized as a result of the execution of numerous search and seizure warrants, which

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[6] *See id.* at 9-13.

[7] *See, e.g.*, Tr. of Lucero Plea Hr'g at 17:18-21, *United States v. Ketner*, EP-06-CR-1369-FM (Aug. 17, 2007). On August 17, 2007, at Bernardo Lucero's plea hearing, Assistant United States Attorney ("AUSA") Debra Kanof ("Kanof") asked the Court to seal the factual basis and to make the factual basis part of the plea agreement. *Id.* Later in Lucero's plea hearing, Kanof asked the Court to seal everything in the case:

> MS. KANOF: Your Honor, may I ask the Court to seal everything in this case with the exception of the information,
> including the transcript and the minutes?
> THE COURT: Yes, we will do that.
> Adriana, take note of that, please.

Id. at 14:23-15:3. Again, in December 2007, AUSA Kanof reiterated her previous request, asking the following:

> MS. KANOF: Everything is to remain sealed with the exception of the information. That would be the plea agreement, the factual bases, the waiver. And the [G]overnment would also ask that the record that's being kept by the court reporter be sealed as well.
>
> THE COURT: Yes. In conformity to the other pleas in this case, Nalene, we will do likewise with these two.

Tr. of Ruiz and Chol-Su Pak Plea Hr'g at 17:12-16, *United States v. Ketner*, EP-06-CR-1369-FM (Dec. 21, 2007).

were amply supported by affidavits describing in exacting detail the probable cause for each search and seizure. The affidavits contained information, which if exposed to the public, could both compromise the Government's investigation and put numerous individuals who have cooperated with the investigation at risk.

In its May 28, 2008, Memorandum Opinion and Order, the Court acknowledged law enforcement's general privilege barring interference with its investigations and the dangers of premature disclosure of statements and details of the Government's case prior to the time the Government was prepared to prosecute its case.[8] Relying on the United States Supreme Court's previous decisions, the Court described in depth the substantial interest law enforcement has in safeguarding the information it acquires during the course of its investigation.[9]

The Court also acknowledged the press's right of access to judicial proceedings.[10] The Court found, however, "the need to respect prosecutorial discretion, preserve the integrity of the investigation, and protect the due process rights of unindicted co-conspirators overrides the public's right of access and the presumption of open proceedings."[11] The Court, therefore, granted Government counsel's and defense counsel's joint requests to close hearings to the press and public and to seal correlative documents, "until such time as they may be unsealed without jeopardizing the Government's investigation."[12]

In a footnote of the Government's Response to the instant motion, the Government claims it never made any oral motions to close proceedings in any of the plea hearings. While this is true, the Court notes counsel for the Government and the Defendants met in chambers prior to each plea

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[8] Mem. Op. & Order at 16.

[9] *Id.* at 16-18.

[10] *Id.* at 18-21.

[11] *Id.* at 22.

[12] *Id.*

hearing. Every proceeding was preceded by a discussion in chambers with the Government's counsel and defense's counsel. In every in-chambers discussion, issues regarding confidentiality, safety, and the identity of informants were raised. Based upon these compelling interests, the undersigned determined it was prudent to close the proceedings to the public. Indeed, the Government's efforts of stemming the tide of impunity, which has flowed unchecked in the City for more than a generation, is compelling enough.

In the Court's May 28, 2008, Memorandum Opinion and Order, the Court also addressed the Defendants' closed plea hearings and the sealed transcripts associated with the hearings, distinguishing the public's right of access to judicial proceedings preceding grand jury indictment and the public's right of access following grand jury indictment.[13] The Court noted the plea hearings were part and parcel to the Government's ongoing investigation, and therefore the Government should be afforded prosecutorial discretion and the privilege barring interference with the Government's investigation.[14] The Court did find, however, the plea hearing minutes, the Defendants' "Order[s] Setting Bond," "Release Order[s]," and "Appearance and Compliance Bond[s]" no longer posed a risk to the Government's investigation and held unsealing redacted versions of these documents for public access was warranted.[15]

On the other hand, the Court found the plea agreements themselves, as well as their factual bases, posed a significant threat to the Government's investigation and the due process rights of unindicted co-conspirators.[16] The Court stated it would continue to evaluate the need for further closure of future hearings based upon the information provided by counsel for the Government and

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[13] *Id.* at 27.

[14] *Id.* at 28-29.

[15] *Id.* at 29.

[16] *Id.*

any defendant on an "as-needed basis."[17] Ultimately, the Court concluded the Government's compelling interests in protecting the integrity of its investigation and preventing witness intimidation outweighed the public's right of access to the proceedings and documents associated with this case.[18] Accordingly, the Court denied Starr's Motion for Leave to Intervene and unsealed redacted versions of numerous documents associated with the plea hearings.[19]

II. ANALYSIS OF PARTIES' ARGUMENTS BASED UPON APPLICABLE LAW

"[T]he First Amendment must be interpreted in the context of current values and conditions . . . ."[20] First Amendment rights of freedom of speech and of the press "would be circumscribed were those who wish to disseminate information denied access to it, for freedom to speak is of little value if there is nothing to say."[21] There is little doubt "that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."[22] "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs."[23] Hence, "the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve."[24]

With respect to judicial proceedings,

> [a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish

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[17] *Id.* at 30.

[18] *Id.* at 31.

[19] *Id.* at 33-35.

[20] *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) (citations omitted).

[21] *In re Express-News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982).

[22] *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

[23] *Id.* at 219 (citation omitted).

[24] *Id.*

information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.[25]

Despite the press's important role in reviewing the judicial processes for the benefit of the public, "[t]he extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly a duty widely acknowledged but not always observed by editors and publishers."[26]

Here, Intervenor is a member of the press, seeking to enforce its First Amendment right of access to judicial proceedings and correlative documents. As a preliminary matter, the Court notes Intervenor has standing to motion to intervene in this case.[27] Courts of this Circuit have recognized the press's and public's right to object to judicial closure of proceedings or sealing of the record or documents in criminal cases using the procedural vehicle of a motion or petition filed in the appropriate district court.[28]

A. The Court's Jurisdiction Over Intervenor's Motion to Intervene

1. Parties' Arguments

Intervenor requests the Court to allow its exercise of the presumptive First Amendment right of access to the Court's criminal plea and preliminary pre-trial hearings in this case.[29] Intervenor also argues the case files must be opened fully in order to ensure the public can be fully apprised of public

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[25] *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559-60 (1976) (citation omitted) (internal quotation marks omitted).

[26] *Id.* at 560.

[27] *See United States v. Gurney*, 558 F.2d 1202, 1206 (5th Cir. 1977) (holding the press had standing to address right of access to judicial proceedings because it had claimed an injury in fact and "the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.").

[28] *See, e.g.*, *id.* (considering the press's petition challenging the district court's decision regarding the press's right of access to case documents).

[29] *See* Intervenor's Mot. to Intervene at 4.

corruption to preserve "[t]he public's interest in self-governance and a functioning democracy."[30] Intervenor contends the press gives justice a voice, which in turn engages the community in the processes of self-governance.[31]

The Government does not dispute the press and the public have a presumptive right of access to criminal trials.[32] The Government argues, "[h]owever, th[e] right is not without exceptions."[33] The Government contends Intervenor's request to have open proceedings in the future is moot or, alternatively, not yet ripe.[34] In particular, the Government contends the Parra hearing, which the Court listed on its calendar and made open to the public, moots Intervenor's request for open proceedings.[35] The Government also argues Intervenor's "request for future open proceedings . . . is not ripe in that it assumes facts and requests ruling on a matter that has not happened, thus, not before the Court."[36] The Government further notes Intervenor's request for future proceedings to be open presupposes any future proceedings that may occur in the case will be inappropriately closed to the public and the press.[37]

In reply, Intervenor argues the case is not moot simply because the Court has held one open plea hearing.[38] Intervenor contends the voluntary opening of proceedings in this case does not deprive the Court of its power to review Intervenor's Motion to Intervene.[39] Intervenor argues the

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[30] *Id.* at 5.

[31] *Id.* at 3.

[32] Gov't's Resp. at 2.

[33] *Id.*

[34] *Id.* at 3-6.

[35] *Id.* at 4-5. Fernando Parra pled guilty in an open plea hearing on July 15, 2008.

[36] *Id.* at 5.

[37] *Id.*

[38] Intervenor's Reply at 3.

[39] Intervenor's Supplemental Reply at 1.

Government "has done nothing to demonstrate that it will not return to its 'old ways,'"[40] and therefore, "[a] court order is required to ensure the cessation of this practice in the future."[41]

2. Applicable Law

In evaluating whether an issue is moot, the Fifth Circuit held when the issue presented is of a continuing nature, the "case . . . presents a controversy 'capable of repetition yet evading review.'"[42] The Supreme Court repeatedly recognized "jurisdiction is not necessarily defeated by the practical termination of a contest which is short-lived by nature."[43] "[T]rial closure issues fall within that category of disputes that are 'capable of repetition, yet evading review.'"[44] "More often than not, criminal trials will be of sufficiently short duration that a closure order 'will evade review . . . .'"[45] This is because "'the underlying criminal proceeding would almost always terminate before the appellate court hears the case.'"[46]

"[T]he 'ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'"[47] According to the Fifth Circuit, "[t]he 'basic rationale [behind the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'"[48] The Court "'should dismiss a case for lack of "ripeness" when the case is abstract or hypothetical.'"[49] In determining whether a

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[40] *Id.* at 2.

[41] Intervenor's Reply at 3.

[42] *Gurney*, 558 F.2d at 1207 (citations omitted).

[43] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980) (citations omitted).

[44] *United States v. Edwards*, 823 F.2d 111, 114 (5th Cir. 1987) (citations omitted).

[45] *Richmond Newspapers, Inc.*, 448 U.S. at 563 (citation omitted).

[46] *Gurney*, 558 F.2d at 1207 (citations omitted).

[47] *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 (5th Cir. 2008) (citation omitted).

[48] *Id.* (citation omitted).

[49] *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003) (citation omitted).

case is ripe, the Court should examine "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[50] "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required."[51]

3. Discussion

The Government's argument Intervenor's Motion to Intervene is moot or, alternatively, unripe, is unavailing. The Court finds Intervenor's Motion "presents a controversy 'capable of repetition yet evading review.'"[52] The Court's exercise of jurisdiction over Intervenor's Motion is not defeated because the Government has held one open plea hearing, which the press and the public were able to attend.[53] Intervenor requests the Court calendar the proceedings in this matter, open the proceedings to the public and the press, and unseal documents related to the proceedings in this case. If the Court continued to keep closed plea hearings off the calendar at the request of the Government, Intervenor would have no notice the proceedings occurred in the first instance to be able to request an opportunity to be heard on the issue of closing or opening proceedings to the public and the press.

This case remains active and ongoing. The Government could request the Court to close a plea hearing. Such a request could potentially result in a First Amendment violation if the press cannot intervene to learn why the proceedings will be closed to the press and the public or if the press cannot argue the Government's interests are no longer compelling. That the Government could do this in the future seems speculative, but it does not negate this is a type of harm that is "'capable of repetition yet evading review.'"[54] Furthermore, there are numerous documents the Government has

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[50] *Id.* (citation omitted) (internal quotation marks omitted).

[51] *Id.* (citation omitted) (internal quotation marks omitted).

[52] *Gurney*, 558 F.2d at 1207 (citation omitted).

[53] *See Richmond Newspapers, Inc.*, 448 U.S. at 563.

[54] *Gurney*, 558 F.2d at 1207 (citation omitted).

not released to the public or the press related to the Government's ongoing investigation and the closed plea hearings. To the extent the Court's decision on the Government's Motion to Unseal does not reach the documents Intervenor requests the Court unseal in the instant motion, Intervenor's Motion to Intervene is not moot as to those documents.

The Court also finds Intervenor's Motion is ripe for review. While the Government contends Intervenor's "request for future open proceedings . . . is not ripe in that it assumes facts and requests ruling on a matter that has not happened,"[55] this argument is simply without merit. The Court is tasked with undertaking a case-by-case analysis when a request to open or close a proceeding is made.[56] Here, the Court deals with the same case it dealt with in its May 28, 2008, Memorandum Opinion and Order. The issue of opening proceedings in the future and unsealing documents in the case is neither abstract nor hypothetical, as the Court has dealt with these issues numerous times already.[57] Intervenor previously endured the Court's closure of numerous plea hearings and a lack of notice of their occurrences in order to protect the integrity of the Government's investigation. There is a danger to the press this may occur again in the future in this case. That it could occur raises the purely legal question of whether the interests the Government has propounded in its Response are sufficiently compelling to warrant future closure.

Thus, this is a matter of law the Court can now find, absent no new factual development.[58] The Government has presented the same concerns regarding its investigation and due process rights of unindicted co-conspirators as it has previously for the Court. Intervenor has not offered any new

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[55] Gov't's Resp. at 5.

[56] *See Edwards*, 823 F.2d at 119 (citation omitted).

[57] *See Monk*, 340 F.3d at 282.

[58] *See id.*

factual developments to contest the Government's interests, leaving the Court with a purely legal issue. Therefore, the Court finds Intervenor's Motion to Intervene is neither moot nor unripe.[59]

B. *First Amendment Presumption of Openness of Judicial Proceedings and Narrowly Tailoring the Closure Order and Order to Seal*

1. Parties' Arguments

Intervenor next contends the extent of closure in the case "is much broader than [the Government's interests] can excuse."[60] The Government proffers "law enforcement's right and need to conduct investigations without interference; the negative effect premature disclosure of details of the investigation would have on [the] investigation; or the right of an uncharged subject or target to maintain confidentiality" as compelling interests.[61] The Government also contends it has a qualified privilege to withhold the identity of its informants.[62] The Government further argues its interest in presenting sufficient evidence to warrant a guilty plea required the closure of the plea hearings and sealing of the correlative documents.[63] Finally, the Government contends unsealing the documents relevant to this matter would violate the due process rights of unindicted individuals named in the relevant documents.[64] Specifically, the Government states "[w]ithout a forum by which the uncharged can defend themselves, an unsealing of their identit[ies] would violate their [c]onstitutional right[s] to due process and might expose them to public scrutiny with a possible result of physical, social[,] and financial harm."[65]

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[59] This finding today does not preclude either Intervenor or the Government in the future from revisiting the issue of whether proceedings should be closed or open, if new facts arise or the Government's interests shift.

[60] Intervenor's Reply at 1.

[61] Govt.'s Resp. at 8.

[62] *Id.*

[63] *Id.* at 9.

[64] *Id.* at 9-10.

[65] *Id.* at 11.

Intervenor argues "[the Goverment's] interests can excuse some limited encroachment and may exist in this case, but they are not sufficiently strong enough to justify the breadth and length of the suppression of information which has occurred."[66] Intervenor argues "the Court's sweeping actions evidence that the closure is neither narrowly tailored nor have documents been released within a reasonable time."[67] Intervenor contends "closure of eight out of nine proceedings does not indicate such narrow tailoring as required by the Constitution."[68] Intervenor further avers "[t]he widespread use of closure here indicates broad application, the opposite of narrow tailoring."[69]

Intervenor also argues that because the Court has released some of the documents related to this proceeding, the Court's Order is not narrowly tailored.[70] Intervenor contends the documents that were unsealed as a result of Starr's intervention in this matter were insufficient to meet constitutional muster because "[t]here are more documents that remain sealed, which should be released to the public."[71] Intervenor argues the Court's order is not narrowly tailored because the Court can redact information or use pseudonyms in order to release the documents to the press.

Intervenor also contends the Court's release of the documents after one year is not reasonable.[72] Intervenor argues a "'[r]easonable time' cannot mean indefinitely or until a lawsuit is filed to unseal the documents . . . ."[73] Intervenor also contests the Government's assertion that some sealed information in documents warrants withholding of the entire document.[74] Intervenor states

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[66] Intervenor's Reply at 1.

[67] Intervenor's Mot. to Intervene at 9.

[68] Intervenor's Reply at 2.

[69] *Id.*

[70] *Id.* at 3.

[71] *Id.*

[72] Intervenor's Mot. to Intervene at 8.

[73] Intervenor's Reply at 2.

[74] *Id.* at 3-4.

"even a document which has been heavily redacted may have some value to the public."[75] Finally, Intervenor raises its concern over the procedures that will be utilized in future proceedings for new defendants in the case and whether the proceedings will be listed on the docket sheets.[76] Intervenor contends "no notice of court hearings is not narrowly tailored to the [G]overnment's interests, as required by the First Amendment."[77]

2. Applicable Law

a. Presumption of Openness

The First Amendment bars the Court "from summarily closing courtroom doors which had long been open to the public at the time th[e] Amendment was adopted."[78] Presumptive open access to criminal trials is founded on the notion trials historically have been open to the press and public, which "plays a particularly significant role in the functioning of the judicial process and the government as a whole."[79] The Supreme Court observed "[openness] gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality."[80]

The history of open judicial proceedings "in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value."[81] Access to the judicial process "serve[s] an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion."[82] Each step in a judicial proceeding, "'as much

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[75] *Id.*

[76] Intervenor's Mot. to Intervene at 9.

[77] *Id.*

[78] *Richmond Newspapers, Inc.*, 448 U.S. at 576.

[79] *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 606 (1982).

[80] *Richmond Newspapers, Inc.*, 448 U.S. at 569 (citations omitted).

[81] *Id.* at 570.

[82] *Id.* at 571.

perhaps as the execution of punishment, operat[es] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security . . . .'"[83] "[N]o community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'"[84]

When a court closes a judicial proceeding, "an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted."[85] "[T]he means used to achieve justice must have the support derived from public acceptance of both the process and its results."[86] The presence of the media at court proceedings "'contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system . . . .'"[87] Fundamental to First Amendment access to judicial proceedings "is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'"[88] Accordingly, "[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process . . . ."[89] "Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process,"[90] and in turn "ensur[ing] that the individual citizen can effectively participate in and contribute to our republican system of self-government."[91]

Nonetheless, the First Amendment right of access to judicial proceedings is not absolute.[92]

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[83] *Id.* (citations omitted).

[84] *Id.* (citation omitted).

[85] *Id.*

[86] *Id.*

[87] *Id.* at 573 (citation omitted).

[88] *Globe Newspaper Co.*, 457 U.S. at 604 (citation omitted).

[89] *Id.* at 606.

[90] *Id.* (citations omitted).

[91] *Id.* at 604 (citations omitted).

[92] *Id.* at 606 (citations omitted).

The First Amendment "does not 'guarantee journalists access to sources of information not available to the public generally.'"[93] The Court must balance countervailing concerns with the press's right of access to judicial proceedings.[94] The Court has a duty to ensure its proceedings are not subject to external prejudicial influences.[95] "'Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the [C]ourt should be permitted to frustrate its function.'"[96] The Court may limit access to judicial proceedings based upon a defendant's right to a fair trial and "'the needs of [G]overnment to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants.'"[97]

According to the Supreme Court, "[c]losed pretrial proceedings have been a familiar part of the judicial landscape in this country."[98] Closing judicial proceedings "is often one of the most effective methods [the Court] can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun."[99] Nonetheless, "[c]losed proceedings . . . must be rare and only for cause shown that outweighs the value of openness."[100] In determining whether there exists a First Amendment right of access to a particular criminal proceeding, the Supreme Court considers "whether the place and

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[93] *United States v. Brown*, 250 F.3d 907, 914 (5th Cir. 2001) (citations omitted).

[94] *See In re Express-News Corp.*, 695 F.2d at 809.

[95] *See Neb. Press Ass'n*, 427 U.S. at 553 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966)).

[96] *Id.* at 553-54 (citing *Sheppard*, 384 U.S. at 362-63).

[97] *Chagra*, 701 F.2d at 364 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 398 (1979) (Powell, J., concurring)).

[98] *Gannett Co.*, 443 U.S. at 390.

[99] *Id.* at 379 (citation omitted).

[100] *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 509 (1984) ("*Press-Enterprise Co. I*").

process have historically been open to the press and general public"[101] and "whether public access plays a significant positive role in the functioning of the particular process in question."[102]

The Supreme Court observed "there are some kinds of government operations that would be totally frustrated if conducted openly."[103] However, the Government's interest in having a proceeding closed "must be a weighty one."[104] In order to permissibly close a presumptively open judicial proceeding, "it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[105] Furthermore, when the Court finds closure of proceedings to be appropriate, it must articulate "findings specific enough that a reviewing court can determine whether the closure order was properly entered."[106] Accordingly,

> [a] court may not impose a restraint that sweeps so broadly and then require those who would speak freely to justify special treatment by carrying the burden of showing good cause. The [F]irst [A]mendment right to gather news is 'good cause' enough. If that right is to be restricted, the [G]overnment must carry the burden of demonstrating the need for curtailment.[107]

If the Government can provide no countervailing interest to open proceedings, the Court must abstain from closure,[108] "'[r]egardless of how beneficent-sounding the purposes of controlling the press might be . . . .'"[109]

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[101] *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 8 (1986) (citations omitted) ("*Press-Enterprise Co. II*").

[102] *Id.* (citation omitted).

[103] *Id.* at 8-9.

[104] *Globe Newspaper Co.*, 457 U.S. at 606.

[105] *Id.* at 606-07 (citations omitted).

[106] *Press-Enterprise Co. I*, 464 U.S. at 510.

[107] *In re Express-News Corp.*, 695 F.2d at 810 (citation omitted).

[108] *Richmond Newspapers, Inc.*, 448 U.S. at 581.

[109] *Neb. Press Ass'n*, 427 U.S. at 560 (citing *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 259 (1974) (White, J., concurring)).

The Fifth Circuit has upheld closure of records identifying jurors in the important interest of maintaining jury anonymity.[110] The Fifth Circuit has also denied public access to bench conferences.[111] The Fifth Circuit observed "although the media generally have a right to publish information that they obtain, '[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the [G]overnment's control.'"[112] Nonetheless, the Fifth Circuit noted "closure of an entire [lengthy] proceeding would rarely be warranted. . . . [] [A]ny limitation must be narrowly tailored to serve that interest."[113]

With respect to docket sheets, the Second Circuit held "docket sheets enjoy a presumption of openness and that the public and the media possess a *qualified* First Amendment right to inspect them,"[114] as did the Eleventh,[115] Fourth,[116] and Eighth Circuits.[117] According to the Second Circuit, however, "this 'presumption is rebuttable upon demonstration that suppression "is essential to preserve higher values and is narrowly tailored to serve that interest."'"[118] The Eleventh Circuit found the district court's "maintenance of a public and a sealed docket is inconsistent with affording the various interests of the public and the press meaningful access to criminal proceedings."[119] The Eight Circuit stated "[t]he fact that a closure or sealing order has been entered must itself be noted on the

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[110] *See Brown*, 250 F.3d at 914.

[111] *See Edwards*, 823 F.2d at 116 (citation omitted).

[112] *Brown*, 250 F.3d at 915 (citation omitted).

[113] *Press-Enterprise Co. II*, 478 U.S. at 15 (citation omitted) (internal quotation marks omitted).

[114] *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004) (emphasis added).

[115] *See United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993).

[116] *See In re State-Record Co.*, 917 F.2d 124 (4th Cir. 1990).

[117] *See In re Search Warrant*, 855 F.2d 569 (8th Cir. 1988).

[118] *Hartford Courant Co.*, 380 F.3d at 96 (citing *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (quoting *Press-Enterprise Co. I*, 464 U.S. at 510)).

[119] *Valenti*, 987 F.2d at 715 (citation omitted).

court's docket, *absent extraordinary circumstances*."[120] The Fourth Circuit found sealing the docket entry sheet as part of the district court's order sealing the entire record was constitutionally impermissible, noting "[s]uch overbreadth violates one of the cardinal rules that closure orders must be tailored as narrowly as possible."[121]

With respect to plea agreements, the D.C. Circuit found "plea agreements have traditionally been open to the public, and public access to them 'enhances both the basic fairness of the criminal [proceeding] and the appearance of fairness so essential to public confidence in the system.'"[122] The D.C. Circuit requires procedural prerequisites to be followed "before a motion to seal a plea agreement may be granted *in all but the extraordinary case, for example where the physical safety of an individual may be at risk*."[123] The D.C. Circuit's procedure for sealing a plea included filing notice of a motion to close the proceeding in the public docket and requiring the district court to articulate specific findings demonstrating sealing the plea agreement is narrowly tailored to meet the compelling governmental interest.[124]

b. Narrowly Tailoring the Closure Order and Order to Seal

The Court must ensure any order to close or seal a judicial proceeding is narrowly tailored to serve the Government's compelling interests.[125] The Court must "articulate findings with the requisite specificity but . . . also . . . consider alternatives to closure and to total suppression of the

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[120] *In re Search Warrant*, 855 F.2d at 575 (emphasis added).

[121] *In re State-Record Co.*, 917 F.2d at 129.

[122] *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) (citations omitted).

[123] *Id.* at 289 (emphasis added).

[124] *Id.*

[125] *Globe Newspaper Co.*, 457 U.S. at 606-07 (citations omitted).

transcript."[126] Accordingly, the Court "should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected."[127]

When a court does not present findings supporting "prolonged closure" or does not consider alternatives available to protect privacy interests, the closure is constitutionally impermissible.[128] However, when a proceeding is closed to the press or public, "the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the [Court] determines that disclosure can be accomplished while safeguarding the [individual]'s valid privacy interests."[129] According to the Fifth Circuit, "the availability of the transcript is the key to satisfying the constitutional values of public scrutiny."[130]

Redaction of "names or portions of the transcript may constitute a reasonable alternative . . . and yet preserve the competing interests served by disclosure."[131] The Fifth Circuit observed "[t]he transcripts will reveal the substance and significance of the issues."[132] If a court does release a redacted transcript, the court must still explain why portions of the transcript merit continued privacy.[133] Nevertheless, the Fifth Circuit cautioned against "unnecessary delay in releasing the record of closed proceedings after trial."[134] The Fifth Circuit recognized

> the worth of timely news reported on the front page and, by contrast, the diminished value of noteworthy, but untimely, news reported on an inside page. Implicit in that

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[126] *Press-Enterprise Co. I*, 464 U.S. at 513.

[127] *Id.*

[128] *See id.* at 510-11.

[129] *Id.* at 512.

[130] *Edwards*, 823 F.2d at 118.

[131] *Id.* at 120.

[132] *Id.*

[133] *Press-Enterprise Co. I*, 464 U.S. at 513.

[134] *Edwards*, 823 F.2d at 119.

> assessment, however, is the fair assumption that significant news will receive the amount of publicity it warrants. The value served by the [F]irst [A]mendment right of access is in its guarantee of a public watch to guard against arbitrary, overreaching, or even corrupt action by participants in judicial proceedings. Any serious indication of such an impropriety, would, we believe, receive significant exposure in the media, even when such news is not reported contemporaneously with the suspect event.[135]

Accordingly, "[w]hen a motion is made for release of transcripts, the [] [C]ourt should anticipate their probable post-trial disclosure and endeavor to release them as soon after verdict as possible."[136] If a party questions the Court's release of a redacted transcript, the unredacted transcripts are subject to Fifth Circuit review.[137]

If the Court only temporarily denies the press access to a judicial proceeding, no constitutional violation has occurred because the closure order was narrowly tailored.[138] On the other hand, if a change of venue is a feasible alternative to closure, the Court's order closing the proceeding will not be considered narrowly tailored to meet the Government's compelling interest.[139] In considering the feasibility of a change of venue, the Court will consider "impediments to a fair trial that would be created by a change of venue, including the additional cost to the defendant and the [G]overnment, the additional difficulty to the defendant of conducting his defense in a distant venue, and whether publicity would be equally intensive in the alternative venue."[140]

3. Discussion

The May 28, 2008, Memorandum Opinion and Order addressed an argument similar to the argument Intervenor presents here.[141] In the instant motion, Intervenor relies on the presumption

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[135] *Id.*

[136] *Id.*

[137] *Id.* at 119-20.

[138] *See Gannett Co.*, 443 U.S. at 393.

[139] *See Chagra*, 701 F.2d at 365.

[140] *Id.*

[141] *See* Mem. Op. & Order at 21-27.

that plea hearings and correlative documents should be open to the public and the press, and if they are not, the Court's order of closure must be narrowly tailored to serve the Government's compelling interests. Intervenor contends the Court's orders regarding closure of plea hearings and unsealing of the transcripts and other documents from the previous plea hearings have not been narrowly tailored to meet the Government's compelling interests. The Government, on the other hand, maintains it still has compelling interests, which warrant continued sealing of some of the documents related to this matter, to the extent those documents are not implicated by the Government's Motion to Unseal Transcripts.

The Court has already acknowledged the Government has compelling interests in conducting its investigation without interference, keeping secret the subjects of its investigation in order to further the investigation and prevent witness intimidation, maintaining the due process rights of targets of the investigation, and withholding the identity of its informants.[142] The Court explained these compelling interests, as a matter of law, warranted closure of plea hearings and sealing of correlative documents. Intervenor asks the Court in the instant Motion to Intervene to alter the Court's previous decision and find the Government's interests are no longer compelling enough to warrant future closure, or, alternatively, find the Court's previous order unsealing redacted transcripts and other documents was not sufficiently narrow or accomplished within a reasonable amount of time.

Based upon the historical openness of plea proceedings, and the significant role the press plays in enhancing the public's understanding of such proceedings, the Court affirms Intervenor's presumptive right to access the plea hearings that have transpired in the past fifteen months.[143] The Court recognizes the importance of Intervenor's presence at plea hearings to assure each proceeding is

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[142] *See id.* at 14-16.

[143] *See Press-Enterprise Co. II*, 478 U.S. at 8.

conducted fairly for the Defendants, the Government, Intervenor, and the City's residents.[144] The presumptive openness of these proceedings exists so the residents of the City can receive the vindication they deserve, can heal from the offenses the residents have endured, and can "restore the imbalance" that has been created as a result of the ongoing public corruption scandal.[145] The Court recognizes Intervenor's contribution of making the City's residents aware of the crisis that plagues the City and appreciates its efforts to include the City's residents in the City's governmental affairs, our republican system of government, and the judicial processes. Nonetheless, Intervenor's right of access is not absolute.[146]

The Court's task is to balance countervailing concerns with the press's and public's right of access to judicial proceedings.[147] The Government has demonstrated the need to curtail Intervenor's First Amendment freedom.[148] The First Amendment does not guarantee Intervenor the right to access information the Government holds as part of its investigation.[149] Based upon the information presented to the Court at this time, the Court finds the Government's compelling interests would be frustrated if the documents Intervenor requests were unsealed to the extent Intervenor requests.[150] The plea agreements, as well as the other documents, contain factual information so detailed that even substantial redaction would still allow contextual inferences to be drawn. The probable result would be disclosure of crucial information that would significantly undermine the Government's investigation and endanger individuals involved with it.

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[144] *See Richmond Newspapers, Inc.*, 448 U.S. at 569; *see also Washington Post*, 935 F.2d at 288.

[145] *See Richmond Newspapers, Inc.*, 448 U.S. at 571 (citation omitted).

[146] *See Globe Newspaper Co.*, 457 U.S. at 606.

[147] *See In re Express-News Corp.*, 695 F.2d at 809.

[148] *See id.* at 810.

[149] *See Brown*, 250 F.3d at 915.

[150] *See Press-Enterprise Co. II*, 478 U.S. at 8-9.

The Government has been pursuing this investigation for more than four years now. Because of the sensitive nature of its investigation, the subjects of which include community leaders, secrecy is an essential component to bringing many of these individuals to justice. By closing the previous plea hearings, removing notice of them from the calendar, and sealing the record for this case, the Court tailored closure and sealing in order for the Government to maintain the integrity of its investigation and the due process rights of unindicted co-conspirators, while simultaneously providing the public the necessary catharsis it needs as the Government brings corrupt public officials to justice. These Court ordered restraints were as narrowly confined as possible in order to protect the Government's compelling interests.

The nature of the closure and sealing has been essential to preserving the integrity of the Government's investigation and to allowing the Government to direct the course and scope of its investigation.[151] This is an extraordinary case, and many individuals face economic and safety risks if the Government is not permitted to close the proceedings and seal the record.[152] The Government's efforts of reigning in the pervasive corruption which has plagued the City for years is of the utmost importance in moving the City forward and is no less than compelling. If the Court had calendared the plea proceedings, the targets of the Government's investigation would have been made aware of the nature of the investigation of them prior to the time the Government was ready to pursue its prosecution of them. It is emphatically not the province and duty of the Court to interfere with the Government's executive power to prosecute its own case.[153] In these extraordinary circumstances, the Court's closure of the plea proceedings and the sealing of the docket sheet and correlative documents

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[151] *See Hartford Courant Co.*, 380 F.3d at 96.

[152] *See Washington Post*, 935 F.2d at 289.

[153] *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

were necessary to serve the compelling Government interests at stake.[154] In as much as the Government needed to maintain the anonymity of the targets of its investigation, as well as its informants, places to be searched, and items and monies to be seized, closure of the plea proceedings and sealing of the docket sheet and other documents was absolutely necessary and as narrowly confined as possible.[155]

The Court has explored alternatives to closure, but in dealing with an investigation of this magnitude, the Court has not found any means other than those it has employed to date to adequately protect the Government's compelling interests.[156] The Government indicates in its Motion to Unseal that certain aspects of its investigation no longer require particular documents to be kept under seal. Accordingly, the Court will uphold the constitutional values of Intervenor.[157] Those records and documents will no longer be sealed. In keeping with the Court's findings, necessary redactions suggested by the Government were made.[158] The Court is satisfied the suggested redactions are necessary and the information redacted is essential to the Government's investigation and therefore should remain private.[159]

While the Court understands Intervenor's frustration at not having ready access to the Government's information in order to timely report on the ongoing corruption scandal, it notes Fifth Circuit precedent takes such timeliness concerns under consideration. Intervenor's belated reports

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[154] *Cf. In re Search Warrant*, 855 F.2d at 575 (noting only "extraordinary circumstances" would warrant sealing docket sheet).

[155] *Cf. Brown*, 250 F.3d at 914 (affirming the procedure of sealing the record to safeguard the anonymity of the jurors).

[156] *Cf. Press-Enterprise Co. I*, 464 U.S. at 513 (finding district court erred in failing to consider alternatives to closure and suppressing transcript).

[157] *See id.* at 512.

[158] *See Edwards*, 823 F.2d at 119.

[159] *Cf. Press-Enterprise Co. I*, 464 U.S. at 513 (finding the district court sealed more information than was necessary).

will receive the publicity they merit.[160] The limitations the Court has imposed serve to meet the Government's compelling interests.[161] The Court has made and will make available documents related to the plea hearings and this case as soon as reasonably possible, keeping in mind at all times the Government's compelling interests.[162] To the extent that the Government may, in future proceedings, move to close the proceedings, the Court maintains the compelling interests the Government has proffered today warrant closure. To the extent the Government's interests change and Intervenor can establish new facts to bear regarding the opening or closing of proceedings, a factual dispute would exist and therefore would require the Court to review anew any motion to intervene Intervenor might file.

C. *Prior Restraint*

1. Parties' Arguments

Intervenor next claims "the press has been issued a *de facto* gag order" because the Court closed Defendants' plea hearings without notice to the press or public.[163] Intervenor argues "[t]he Court's overwhelming secrecy and barricade against the press mirrors a prior restraint."[164] In particular, Intervenor notes the lack of grand jury indictment, stating "it appears that a judge alone is administrating justice in a way that is secretive to the public and El Paso community."[165] Intervenor declares "[t]he Court's veil of secrecy abrogates the special First Amendment function of the press in the absence of an indicting grand jury, creating a great risk" because "public opinion is an effective

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[160] *See Edwards*, 823 F.2d at 119.

[161] *Cf. Press-Enterprise Co. II*, 478 U.S. at 15 (finding closure unwarranted where limitations were not sufficiently narrow).

[162] *See Press-Enterprise Co. I*, 464 U.S. at 513.

[163] Intervenor's Motion to Intervene at 5.

[164] *Id.*

[165] *Id.* at 6.

restraint on possible abuse of judicial power."[166] Intervenor requests the Court "announce proceedings on the docket, unseal documents, and open hearings"[167] in light of "no grand jury issuing indictments in these cases and a change of venue implemented."[168]

The Government responds to Intervenor's questions regarding the grand jury by declaring the Government's use of Informations in this case "does not mean a grand jury has not heard evidence against [the Defendants]."[169] The Government argues Intervenor misunderstands the grand jury's role and contends the "potential evil" Intervenor lays out does "not demonstrate a need to grant the requested relief."[170] Intervenor, in reply, notes the Government has not actually confirmed "[w]hether or not a grand jury actually considered evidence,"[171] and further notes "the theory that the absence of a jury to act as a moderating influence on the government and the court heightens the public constitutional interest in accessing court proceedings" applies to this case.[172] Intervenor also argues there are alternatives to avoid prior restraints.[173]

2. Applicable Law

The First Amendment "afford[s] special protection against orders that prohibit the publication or broadcast of particular information or commentary orders that impose a 'previous' or 'prior' restraint on speech."[174] The Supreme Court has made clear "[a]ny system of prior restraints of

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[166] *Id.* (citation omitted) (internal quotation marks omitted).

[167] *Id.* at 7.

[168] *Id.*

[169] Govt.'s Resp. at 6-7.

[170] *Id.* at 7.

[171] Intervenor's Reply at 3.

[172] *Id.* at 2.

[173] Intervenor's Mot. to Intervene at 6.

[174] *Neb. Press Ass'n*, 427 U.S. at 556.

expression comes . . . bearing a heavy presumption against its constitutional validity."[175] Accordingly, the Government "carries a heavy burden of showing justification for the imposition of such a restraint"[176] and "the barriers to prior restraint remain high . . . ."[177]

"[P]rotection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct."[178] "[A] whole community cannot be restrained from discussing a subject intimately affecting life within it."[179] The Court must "determine whether . . . 'the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'"[180] In order to balance these factors the Court must consider "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important."[181]

Generally, "'a prior restraint . . . will be upheld only if the [G]overnment can establish that "the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest."'"[182] Alternatives to prior restraint may include

> (a) change of trial venue to a place less exposed to the intense publicity that seemed imminent . . . ; (b) postponement of the trial to allow public attention to subside; (c) searching questioning of prospective jurors . . . to screen out those with fixed opinions

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[175] *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (citations omitted) (internal quotation marks omitted).

[176] *Id.* (citation omitted) (internal quotation marks omitted).

[177] *Neb. Press Ass'n*, 427 U.S. at 561.

[178] *Id.* at 559.

[179] *Id.* at 567.

[180] *Id.* at 562 (citations omitted).

[181] *Id.*

[182] *Brown*, 250 F.3d at 915 (citation omitted).

> as to guilt or innocence; (d) the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court.[183]

Alternative measures to prior restraint may also include "limit[ing] what the contending lawyers, the police, and witnesses may say to anyone."[184] The Court "may refuse to allow the media to inspect documents not a matter of public record, including jurors' names and addresses; such orders are distinct from prior restraints."[185]

3. Discussion

Intervenor's argument the Court has imposed a prior restraint and issued a *de facto* gag order is meritless. The Court has in no way ordered Intervenor or other media outlets not to report on the proceedings related to the ongoing public corruption scandal that come before it, and in fact, Intervenor continues to report on various aspects of the scandal.[186] The Court has explained in its May 28, 2008, Memorandum Opinion and Order, as well as here, that the closure and sealing it has undertaken in this matter is directly and narrowly tailored to the Government's compelling interests. If the Court has created a veil of secrecy, thereby shrouding the matter from Intervenor and the media, it is because the Government's compelling interests have warranted the protection the Court has provided to preserve those interests. Intervenor's right of access, the Court reiterates, is not absolute.

Even if it could rightly be said that the closure and sealing the Court has imposed are prior restraints, the Government has more than carried its burden of showing any such restraint is constitutionally valid.[187] The gravity of the Government's critical investigation being undermined by

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[183] *Neb. Press Ass'n*, 427 U.S. at 563-64.

[184] *Id.* at 564 (citation omitted).

[185] *Brown*, 250 F.3d at 914-15 (citation omitted).

[186] *See, e.g.*, D. Crowder, *Government raises Mena stakes by $46,000*, NEWSPAPER TREE, Oct. 2, 2008, http://newspapertree.com/news/2906-government-raises-mena-stakes-by-46-000 (last visited Oct. 8, 2008) (discussing Sal Mena, who has been implicated in the public corruption scandal and was originally indicted on September 25, 2008).

[187] *See New York Times Co.*, 403 U.S. at 714.

the media reporting crucial aspects of the Government's case, which it learns from attending these plea hearings and having access to the correlative documents, is far weightier than postponing the media's access to this information until the time when the Government is ready to exercise its discretion and prosecute its case.[188] The Court's closure of the plea hearings and its sealing of the record and docket sheet prevents this threatened danger.[189] As the Court has already stated, it has found no alternatives which could otherwise mitigate the curtailment of the media's access.[190] Regardless, the Court finds it has not issued a *de facto* gag order, nor has it imposed a prior restraint on Intervenor or any other media source.

D. Opportunity to Be Heard

1. Parties' Arguments

Finally, Intervenor requests the Court for an opportunity to be heard on the issue of access to open court proceedings.[191] The Government argues the Court's previous Memorandum Opinion and Order does not "supply legal authority for a hearing in this matter."[192] Instead, the Government contends "[t]here are no factual issues to be resolved in Intervenor's Motion."[193] The Government further notes it has tried to moot any factual disputes by filing a motion to unseal redacted transcripts, which results in "a legal dispute which has been and can be contested by pleadings," thereby negating the requirement of a hearing.[194]

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[188] *See Neb. Press Ass'n*, 427 U.S. at 562.

[189] *See id.* at 563-64.

[190] *Cf id.* at 563-65 (noting no record existed to determine whether alternatives to prior restraint were available).

[191] Intervenor's Mot. to Intervene at 9-10.

[192] Govt.'s Resp. at 11.

[193] *Id.*

[194] *Id.* at 12.

2. Applicable Law

The Court must undertake a case-by-case analysis to determine whether closing proceedings comports with the First Amendment presumption of access to judicial proceedings.[195] A "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[196] "[T]he press and general public must be given an opportunity to be heard on the question of their exclusion"[197] from judicial proceedings. When there are no disputed issues of fact, but rather only questions of law, the Local Court Rules for the Western District of Texas permit the Court to decide a motion based upon the parties' briefs and filings, rather than requiring an oral hearing.[198]

When the press has requested disclosure of a transcript from a sealed proceeding, the Fifth Circuit required the press "be given a meaningful opportunity to be heard before any contrary decision is made."[199] The Fifth Circuit commanded a court to "make specific, on-the-record, factfindings demonstrating that a substantial probability exists that an interest of a higher value will be prejudiced and that no reasonable alternatives to closure will adequately protect that interest."[200] If a court does not permit a transcript from a sealed proceeding to be released, the court "must make specific, on-the-record factfindings demonstrating a substantial probability that higher values will be prejudiced and that reasonable alternatives cannot adequately protect those values."[201]

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[195] *See Edwards*, 823 F.2d at 119.

[196] *Merriman v. Sec. Ins. Co. of Hartford*, 100 F.3d 1187, 1191 (5th Cir. 1996) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

[197] *Edwards*, 823 F.2d at 119 (citation omitted) (internal quotation marks omitted).

[198] LCVR-7(g); *see also Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 750 (6th Cir. 2004) ("[F]ederal district courts can decide cases as a matter of law without an oral hearing when it is clear there are no genuine material [factual] disputes to be resolved . . . .").

[199] *Edwards*, 823 F.2d at 119 (citation omitted).

[200] *Id.* (citation omitted).

[201] *Id.*

Simply because due process requires a party have a meaningful opportunity to be heard does not "imply that the [C]ourt must hold a hearing and write redundant findings of fact that merely reiterate truisms."[202] According to the Fifth Circuit, a court's redaction of names from a transcript is "within [the Court's] discretion and need not be the subject of a hearing."[203] That the court permits the individual the opportunity to explain his side through paper filings comports with the due process requirement of the opportunity to be heard.[204] In the habeas context, the Fifith Circuit held "a hearing on the merits may be satisfied by a 'paper hearing' rather than by an in-court evidentiary hearing."[205] Likewise, in the petty criminal contempt context, the Fifth Circuit found a "paper hearing" to be sufficient.[206]

3. Discussion

The Court finds Intervenor has been given a meaningful opportunity to be heard on its Motion to Intervene to open judicial proceedings and access documents related to this matter.[207] Intervenor briefed the Court on what Intervenor believes to be its First Amendment right to access the Court's proceedings. Intervenor had the opportunity to review the Government's proffered compelling interests in sealing the record in this case and closing plea hearings. In addition, Intervenor had two opportunities to reply to the Government's assertions. The Court finds Intervenor has fully expounded its argument for inclusion in future proceedings in this case and to unseal the record of

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[202] *Id.* (citation omitted).

[203] *Id.* (citation omitted).

[204] *See Fahle v. Cornyn*, 231 F.3d 193, 196 (5th Cir. 2000).

[205] *Id.* (citing *Armstead v. Scott*, 37 F.3d 202, 206 (5th Cir. 1994).

[206] *Id.*

[207] *See Edwards*, 823 F.2d at 119.

this case,[208] and therefore does not require an oral hearing in addition to the written submissions the Court has already considered.[209]

III. FINDINGS OF FACT

With respect to this hearing on Intervenor's Motion to Intervene, the Court makes the following findings of fact:

1. Intervenor has a presumptive right to access plea hearings in this case because such a proceeding is of a type that has been historically open to the public;

2. The Government has compelling interests in maintaining the integrity of its investigation and the due process rights of unindicted co-conspirators;

3. The Government has a compelling interest in preventing witness intimidation, so as to prevent obstruction of its ongoing investigation into pervasive corruption in the City;

4. The Government also has a compelling interest in safeguarding the identities of its informants, so that it can continue to collect information to further its investigation and ultimately prosecute this case;

5. The Government has a compelling interest in ending the decades-long corruption that has eaten away at the City's government and community;

6. The Court has a duty to weigh the Government's compelling interests against Intervenor's presumptive right of access to the proceedings associated with this case, as well as the record which correlates with the proceedings;

7. The Court finds the Government's compelling interests outweigh Intervenor's First Amendment rights of access to the proceedings and record of this case;

8. The Court has narrowly tailored its closure and sealing of the record to safeguard the compelling Government interests and to insure that Intervenor's First Amendment right of access will be restored as soon as the Government's compelling interests abate;

9. The Court has narrowly tailored its closure order to safeguard the Government's compelling interests by not calendaring plea hearings so the Government could conceal the identities of its informants to further its investigation;

10. The Court has narrowly tailored its closure order to safeguard the Government's compelling interests by closing plea hearings to conceal the identities of the

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[208] *See id.* at 119 (noting the district court need not "hold a hearing and write redundant findings of fact").

[209] *See Fahle*, 231 F.3d at 196.

Government's informants and to keep secret the Government's information regarding aspects of its investigation it is not yet ready to prosecute;

11. The Court has narrowly tailored its closure order to safeguard the Government's compelling interests by sealing the record to keep secret the Government's information regarding aspects of its investigation it is not yet ready to prosecute, to protect the due process rights of unindicted co-conspirators, to prevent witness intimidation based upon that information, and to prevent serious risk of physical and economic harm to those who might be implicated with the public corruption scandal based upon the record;

12. As of this date, documents, including affidavits in support of search warrants and plea agreements and the plea agreements themselves, contain factual information, which, even with substantial redaction, could still be deciphered and imperil the investigation and welfare of many;

13. The redacted documents the Government moves to unseal no longer warrant the Court's protection because the Government no longer has a compelling interest in safeguarding the information contained in them;

14. The redacted portions of the documents the Government moves to unseal still require the Court's protection because the redacted portions relate to parts of the Government's investigation, which still require secrecy so the Government can pursue its investigation and choose when to prosecute its case, with the exception of one of the suggestions the Government makes, which the Court disagrees with and therefore will unseal.

IV. CONCLUSION AND ORDERS

Every decent person deeply laments the corruption and hypocrisy that have become intertwined with the City's government.[210] As Intervenor so aptly stated, "secrecy and silence on government corruption is contrary to our nation's values and detrimental to the ability of El Paso's local governments to govern themselves."[211] Indeed, in the City, "secrecy and silence" was present before the Government began its investigation. "Secrecy and silence" was at the heart of the

[210] *See* C. Raj Kumar, *Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 17 COLUM. J. ASIAN L. 31, 32 (2003) (quoting Mohandas Karamchand Gandhi (1869-1948)) ("Corruption and hypocrisy ought not to be inevitable products of democracy, as they undoubtedly are today.").

[211] Intervenor's Mot. to Intervene at 1.

impunity, which has been the target of the Government's investigation. And "if [this] vice and corruption prevail, liberty cannot subsist."[212]

Free government cannot be preserved without a return to fundamental principles.[213] Fundamental principles are, as is the case here, at times incompatible. Intervenor's presumptive right of access to judicial proceedings directly conflicts with the Court's longtime duty to safeguard the integrity of those proceedings and the individuals who are a part of them.[214] While the Court recognizes Intervenor's First Amendment right, it must allow the right to give way to the Government's compelling interests to maintain the integrity of its investigation, affirm the Government's executive power to prosecute the case in a manner of its own choosing, protect witnesses from intimidation, safeguard the due process rights of unindicted co-conspirators, and allow the Government to complete the task at hand.

For more than a generation, the corruption that enwraps the City has been cloaked in secrecy, but today, the confidentiality which the Government requires to undertake its investigation has been narrowly confined in order to unveil it.[215] To date, the court proceedings and filings for this case have been, to a great extent, held confidentially. Some documents related to the case are being unsealed this day. The rest remain confidential. As to future proceedings and filings, the Court will continue to carefully and rigorously address them one at a time. The press will not be disregarded. Disclosures will be made when the risks are diminished. Premature disclosure could very well deprive the City of much needed relief from the repression of public corruption. Just as "a reporter's ability to keep the

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[212] ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 241-42 (3d ed., printed for A. Millar 1751) (1698).

[213] *See* Patrick Henry, *Virginia Bill of Rights*, ¶15 (June 12, 1776), *available at* http://www.nhinet.org/ccs/docs/va-76.htm ("[N]o free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue; and by a frequent recurrence to fundamental principles.").

[214] *See Neb. Press Ass'n*, 427 U.S. at 569-70.

[215] *See* SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION (1982) ("[W]hile all deception requires secrecy, all secrecy is not meant to deceive.") .

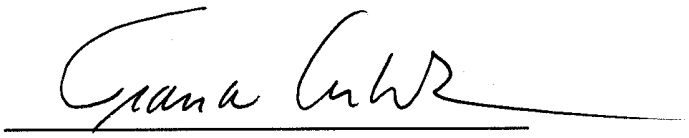
bond of confidentiality often enables him to learn the hidden or secret aspects of government,"[216] so, too, does the Government's ability to maintain the confidentiality of its investigation enable it to unshroud the "veil of secrecy" which obscures public corruption in the City today.

Therefore, based upon the foregoing discussion and analysis, the Court enters the following orders:

1. The Court concludes Intervenor's "Motion of El Paso Media Group, Inc. dba The Newspaper Tree to Intervene to Unseal Court Documents and to Open Court Hearings and Request for Hearing on the Motion" [Rec. No. 97] should be and is hereby **DENIED**, except to the extent the Court grants the Government's Motion to Unseal.
2. The Court concludes the "Government's Motion to Unseal Redacted Transcripts" [Rec. No. 101] should be and is hereby **GRANTED**.
3. Pursuant to Federal Rule of Criminal Procedure 49.1 and the United States District Court for the Western District of Texas' May 8, 2008, "General Order Regarding Electronic Filing of Transcripts," particularly Part I.F, the Court Reporter is instructed to **REDACT** the transcripts of the Ketner, Flores, Cordova, Lucero, Ruiz, Chol-Su Pak, Telles, and Dill plea hearings, as suggested by the Government and amended by the Court, and to **FILE** them on the Western District of Texas CM/ECF system for the above-captioned case number.

SO ORDERED.

SIGNED this 14 day of **October, 2008.**



FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

[216] Interview with Bob Woodward, Author of ALL THE PRESIDENT'S MEN, (June 17, 1997), *available at* http://discuss.washingtonpost.com/zforum/97/woodward.htm.