

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
MOTION INFORMATION STATEMENT

Docket Number(s): 06-3140-cv Caption [use short title]

Motion For: Recall the Mandate

Set forth below precise, complete statement of relief sought: AMERICAN CIVIL LIBERTIES UNION V. DEPT. OF DEFENSE

Recall the mandate pending filing and disposition for certiorari and proposed legislation.

MOVING PARTY: Department of Defense
and Department of the Army
 Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

OPPOSING PARTY: American Civil Liberties Union, et al.

MOVING ATTORNEY: LEV L. DASSIN
Acting United States Attorney
Southern District of New York
86 Chambers St., 3rd Floor
New York, NY 10007

OPPOSING ATTORNEY: Lawrence S. Lustberg, Esq.
Address: Gibbons P.C.
One Gateway Center
Newark, NJ 07102
Tel: (973) 596-4500
Fax: (973) 596-0545

By: AUSA Heather K. McShain
Tel.: (212) 637-2696
Fax: (212) 637-2702

Court-Judge/Agency appealed from: Southern District of New York, Hon. Alvin K. Hellerstein

Please check appropriate boxes:

Has consent of opposing counsel:
A. been sought? Yes No
B. been obtained? Yes No
Is oral argument requested? Yes No
(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No

If yes, enter date: Not applicable.

Signature of Moving Attorney: Heather K. McShain Date: 5/28/09
Heather K. McShain, AUSA

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS
AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No

Requested return date and explanation of emergency:

Not applicable

Has service been effected? Yes No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk

Date: _____ By: _____

supplementing Federal Rules of Appellate Procedure

INSTRUCTIONS

INTERIM LOCAL RULE 27.

(a) Form of Motion and Supporting Papers for Motion and Opposition Statement.

1. Form of Motion. A motion must be in writing, unless the court otherwise directs, and must conform to paragraphs (A) through (C) below.

(A) The front page of the motion must follow the form of the Motion Information Statement approved by the Court (T-1080 revised as of 5/1/02 [printed on the reverse side]) and contain all information required by the form.

(B) The body of the motion, following the Motion Information Statement, must set forth the information and legal argument necessary to support the motion, and, if emergency relief is sought, an explanation of the emergency.

(C) Formal requirements.

- (i) 8-½ x 11 inch paper;
- (ii) Text double spaced, except for quotations, headings and footnotes;
- (iii) Margins of one inch on all sides;
- (iv) Pages sequentially numbered (page numbers may be placed in the margins);
- (v) Bound or stapled in a secure manner that does not obscure text;
- (vi) Length: no more than 20 pages, not including attachments and the Motion Information Statement;
- (vii) Number of copies: original plus four copies;
- (viii) Required attachments to motion:
 - a. An affidavit (containing only statements of fact, not legal argument);
 - b. If the motion seeks substantive relief, a copy of lower court opinion or agency decision;
 - c. Any exhibits necessary to determine the motion;
 - d. Affidavit of service.

2. Non-Compliance Sanctions. If the moving party has not complied with this rule, the motion may be dismissed by the clerk without prejudice to renew upon proper papers. If application is promptly made, the action of the clerk may be reviewed by a single judge. The court may impose costs and an appropriate fine against either party for failure to comply with this rule.

MOTION INFORMATION FORM

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DOCKET NOS. 06-3140-cv

American Civil Liberties Union v. Dept. of Defense

Attorney(s) for Appellee
LEV L. DASSIN
Acting United States Attorney
Southern District of New York
86 Chambers Street, 3rd Floor
New York, NY 10007
By: Heather K. McShain, AUSA
Tel.: (212) 637-2696

Motion to Recall the Mandate

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES)
UNION, ET AL.,)
)
Plaintiffs-Appellees,)
)
v.) No. 06-3140
)
DEPARTMENT OF DEFENSE,)
ET AL.,)
)
Defendants-Appellants.)
)
_____)

**MOTION TO RECALL THE MANDATE
PENDING FILING AND DISPOSITION OF A PETITION FOR
CERTIORARI AND PROPOSED LEGISLATION**

Pursuant to Fed. R. App. P. 41, Defendants-Appellants Department of Defense and Department of the Army respectfully request an order recalling the mandate issued by this Court on April 27, 2009. As discussed below, recall of the mandate is appropriate because the Solicitor General has determined that the government will file a petition for a writ of certiorari in this case, absent intervening legislation. Congress is considering legislation (already passed by the Senate) that would exempt certain photographs—including those at issue in this case—from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, upon certification by the Secretary of Defense that disclosure would endanger United States personnel.

STATEMENT

1. On September 22, 2008, this Court held that photographs depicting the mistreatment or alleged mistreatment of detainees in Iraq and Afghanistan must be released under FOIA, notwithstanding the conclusion of high-ranking military officers that such disclosure poses a clear and grave risk of inciting violence and riots against American and Coalition forces, as well as civilian personnel, serving in Iraq and Afghanistan. For purposes of its ruling, the panel accepted the validity of those compelling predictions of harm but nevertheless held that, as a legal matter, FOIA exemption 7(F) does not provide protection when disclosure threatens harm to a broad range of people, as opposed to a small set of easily identifiable individuals. Slip op. 9-17 & n.3.

2. The government filed a petition for rehearing *en banc*, which this Court denied on March 11, 2009. This Court subsequently granted the government's motion for a 30-day stay of the mandate, to April 17, 2009, to permit it to decide whether to file a petition for a writ of certiorari. The current deadline for filing a petition for a writ of certiorari is June 9, 2009.

3. The government initially determined that it would not seek certiorari, and this Court's mandate issued on April 27, 2009. However, the President of the United States subsequently determined that release of the photographs at issue here would

pose an unacceptable risk of danger to U.S. troops in Afghanistan and Iraq. *See Statement by the President on the Situation in Sri Lanka and Detainee Photographs (President's 5/13/09 Statement)* (May 13, 2009) (“[T]he most direct consequence of releasing them, I believe, would be to further inflame anti-American opinion and to put our troops in greater danger. * * * Now let me be clear: I am concerned about how the release of these photos would be – would impact on the safety of our troops.”);¹ *Remarks by the President on National Security (President's 5/21/09 Remarks)* (May 21, 2009) (“[I]t was my judgment – informed by my national security team – that releasing these photos would inflame anti-American opinion, and allow our enemies to paint U.S. troops with a broad, damning and inaccurate brush, endangering them in theaters of war.”)². Accordingly, the government has determined that it will file a petition for a writ of certiorari, unless legislation resolving the issue is enacted.

4. On May 20, 2009, Senators Lieberman, Graham, and McCain introduced the Detainee Photographic Records Protection Act of 2009 (Act) (S. 1100). 155 Cong.

¹ The *President's 5/13/09 Statement* is available at <http://www.whitehouse.gov/the_press_office/Statement-by-the-President-on-the-Situation-in-Sri-Lanka-and-Detainee-Photographs>.

² The *President's 5/21/09 Remarks* is available at <http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09>.

Rec. S5671-5674 (daily ed.). On May 21, 2009, the Senate adopted a modified version of this Act by unanimous consent as an amendment (Amendment No. 1157) to the Supplemental Appropriations Act, 2009. 155 Cong. Rec. S5798-S5799. That same day, the Senate passed the Supplemental Appropriations Act, which was previously passed (without the amendment) by the House of Representatives on May 14, 2009 (H.R. 2346). 155 Cong. Rec. H5632. The Senate has requested a conference with the House to reconcile the differences in the two versions of the bill. 155 Cong. Rec. S5804. It is expected that the conference will take place after Congress returns, on June 2, 2009, from its current recess.

The Act (reproduced in its entirety in an Appendix to this motion) provides that a “covered record shall not be subject to—(1) disclosure under 552 of Title 5, United States Code (commonly referred to as the Freedom of Information Act); or (2) disclosure under any proceeding under that section.” Act Section (d). A “covered record,” in turn, “means any record—(A) that is a photograph that was taken between September 11, 2001 and January 22, 2009 relating to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States; and (B) for which a certification by the Secretary of Defense under subsection (c) is in effect.” Act Section (b)(1). The Secretary of Defense “shall certify,” if the Secretary, “in

consultation with the Chairman of the Joint Chiefs of Staff, determines that the disclosure of that photograph would endanger” a United States citizen or members of the Armed Forces or employees of the United States government deployed outside the United States. Act Section (c)(1). The Act provides that it “shall take effect on the date of enactment of this Act and apply to any photograph created before, on, or after that date that is a covered record.” Act Section (f). Accordingly, the Act would permit the Secretary of Defense to preclude release under FOIA of the photographs at issue in this case.

ARGUMENT

This Court has recognized that “[its] power to recall a mandate is unquestioned.” *Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 89 (2d Cir. 1996); *see also Calderon v. Thompson*, 523 U.S. 538, 549-550 (1998) (recognizing that courts of appeals “have the inherent power to recall their mandates”). Where Supreme Court review is no longer available and the court of appeals judgment has become final, that power must be “exercised sparingly” and is “reserved for exceptional circumstances.” *Sargent*, 75 F.3d at 89 (citations omitted). In those circumstances, “[t]he reason for parsimony in the exercise of our power to recall a mandate is the need to preserve finality in judicial proceedings.” *Ibid.* Here, however, the time for filing a certiorari petition has not expired, and this Court’s

judgment therefore is not final in that sense. In light of the President’s determination and the pendency of legislation to address the precise issue in this case, recall of the mandate is warranted.

1. Recall of the mandate is warranted because the Solicitor General has determined that, if the aforementioned bill does not become law by the deadline for seeking Supreme Court review, the United States will file a petition for a writ of certiorari. As noted, the time for filing a petition for certiorari has not yet expired. Thus, the primary justification for the sparing use of the power to recall a mandate – “the need to preserve finality in judicial proceedings,” *Sargent*, 75 F.3d at 89 – is not implicated here. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (“[T]he decision of an inferior court is not (*unless the time for appeal has expired*) the final word of the department as a whole.”) (emphasis added); *cf. Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (“By ‘final,’ we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.”). For that same reason, recall of the mandate in this case would “not reopen a stale claim.” *Sargent*, 75 F.3d at 90. Rather, it would simply put the parties in the same, unexceptional position as if the mandate had originally been stayed pending the filing a petition for certiorari, rather than for only 30 days. Recall of the mandate in

these circumstances is a far less extraordinary exercise of the Court's authority.

As argued in our previous motion to stay the mandate (at 5-6), recalling the mandate would serve the important purpose of preserving the status quo pending a determination by the Supreme Court. Indeed, stays of mandate are common in FOIA cases, precisely because, without such a stay, the records in question must be disclosed and are then available to the public, and the government is thereby prevented from seeking further review of the court of appeals' decision. *See, e.g., Irons v. FBI*, 811 F.2d 681, 683 (1st Cir. 1987) (Post-disclosure review "would force the government to let the cat out of the bag, without any effective way of recapturing it if the district court's directive was ultimately found to be erroneous."); *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) ("Once the documents are surrendered * * * , confidentiality will be lost for all time. The status quo could never be restored."); *cf. John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (granting stay of FOIA disclosure order pending certiorari). Denying the government's motion (and the subsequent release of the photographs) would moot this case as to those photographs, thereby denying the government the right to seek further review to vindicate the paramount interests at stake here. Just as the need to preserve the government's right to appellate review is "perhaps the most compelling justification" for staying execution of a FOIA

disclosure order pending certiorari, *John Doe Agency*, 488 U.S. at 1309 (Marshall, J.) (quoting *New York v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers)), the same principles counsel strongly in favor of recalling the mandate.³

Beyond that, the fact that “[t]he next six to eight months are a time of particular fragility in Iraq,” Declaration of General Raymond T. Odierno (May 27, 2009), at ¶ 10,⁴ and the substantial risk to the Nation’s military personnel make clear that the public interest overwhelmingly favors a recall of the mandate to forestall irreparable harm to the United States and its personnel. By the same token, any additional delay is a result of the ordinary appellate review process and would not work a substantial countervailing harm.

In addition, a petition for certiorari would present a substantial question. See Fed. R. App. P. 41(d)(2)(A). Not only does this case involve the interpretation of an important FOIA exemption, but this Court’s interpretation of that exemption requires

³ The Supreme Court similarly grants stays pending government appeals in FOIA cases to preserve the government’s ability to pursue full appellate review of disclosure orders. See, e.g., *HHS v. Alley*, 129 S. Ct. 1667 (2009) (granting stay pending appeal of FOIA disclosure order); *Department of Commerce v. Assembly of State of Cal.*, 501 U.S. 1272 (1991) (per curiam order granting stay pending appeal of injunction directing FOIA disclosure); *Department of Justice v. Rosenfeld*, 501 U.S. 1227 (1991) (per curiam order granting stay pending appeal from FOIA order at 761 F. Supp. 1440 (N.D. Cal. 1991)).

⁴ Declaration from Generals Petraeus and Odierno have been filed concurrently with this motion, in both classified and unclassified (redacted) forms.

release of photographs notwithstanding the determination of the President, as Commander-in-Chief, that such release would present a grave risk of inciting violence and providing al Qaeda and the Taliban with valuable tools for recruiting and propaganda—thereby endangering the lives of U.S. and coalition troops in Afghanistan and Iraq. *See President’s 5/13/09 Statement, supra; President’s 5/21/09 Remarks, supra.* The President also has determined that “the publication of these photos may only have a chilling effect on future investigations of detainee abuse.” *President’s 5/13/09 Statement, supra.*

The President’s conclusions are informed and reinforced by the judgments of high-level military leaders and his battlefield commanders. *See* Declaration of General David H. Petraeus (May 27, 2009), at ¶ 2 (“The release of images depicting U.S. servicemen mistreating detainees in Iraq and Afghanistan, or that could be construed as depicting mistreatment, would likely deal a particularly hard blow to USCENTCOM and U.S. interagency counterinsurgency efforts in [Pakistan, Afghanistan, and Iraq], as well as further endanger the lives of U.S. Soldiers, Marines, Airmen, Sailors, civilians, and contractors presently serving there.”); Odierno Declaration ¶ 4 (“I strongly believe the release of these photos will endanger the lives of U.S. Soldiers, Airmen, Marines, Sailors, and civilians as well as the lives of our Iraqi partners.”), ¶ 17 (“MNF-I will likely experience an increase in attacks

against U.S. Forces and bases as the photos incite retaliation by the Iraqi public.”).

Moreover, General Odierno’s declaration (at ¶ 4) makes explicit the further determination that “[c]ertain operating units are at particular risk of harm from release of photos”—including certain small teams of between 15 and 30 individuals and soldiers engaged in small-unit patrols. That determination may well satisfy this Court’s own standard for FOIA exemption 7(F), as it identifies a more discrete set of individuals facing “a particularly serious risk to their lives and physical safety.” Odierno Declaration ¶ 4. Those conclusions are not mere speculation, but rather are based on the extensive experience of our Commanding Generals, intelligence briefings, reports from subordinate commanders in the field, and discussions with Iraqi leaders on the subject. Odierno Declaration ¶ 3; Petraeus Declaration ¶ 3.

The concerns articulated by the President and his military commanders are magnified by the presence of a substantial number of photographs, in addition to the 21 photographs before this Court and the 23 others previously identified as responsive (see Slip op. 6 n.2), that are responsive to the same FOIA request. *See* 4/23/09 Letter from the Government to District Court. The April 10, 2006 order of the district court provides that “any responsive images in [DoD’s] possession that have been or will be withheld in this case solely based on FOIA Exemptions 6, 7(C) and/or 7(F) * * * will be governed by the final ruling on appeal” as to the 21

photographs. J.A. 414. This Court's own decision, if allowed to stand and barring any new factual or legal developments, therefore will affect the release of more than the groups of 21 and 23 photographs. The potential scope of this Court's ruling makes it critically important that the Supreme Court have an opportunity to address the pressing legal questions in this case.

We recognize that this motion comes after the government initially determined not to seek certiorari and government counsel informed appellees that the photographs would be released. But the time for seeking Supreme Court review has not expired, and extraordinary circumstances have intervened. The President, in his capacity as Commander-in-Chief, consulted with top national security advisors and has determined that release of the photographs at issue would create an unacceptable risk of danger to U.S. soldiers and U.S. military and foreign policy interests. And for that very reason, Congress is now in the process of addressing the issue directly. These intervening developments warrant this Court's most serious consideration.

2. Recall of the mandate is warranted because of the pending legislation for an additional reason. As this Court has recognized, "[o]ne circumstance that may justify recall of a mandate is '[a] supervening change in governing law.'" *Sargent*, 75 F.3d at 90 (quoting *McGeshick v. Choucair*, 72 F.3d 62, 63 (7th Cir. 1995)). As noted above, the Senate has passed a bill that would provide for the Secretary of

Defense to exempt the photographs at issue in this case from disclosure under FOIA. Accordingly, the Act, if passed by the House and signed by the President—followed by the Secretary’s certification—will require a result directly contrary to this Court’s decision providing for release of the photographs. *See* 155 Cong. Rec. S5673 (Sen. Lieberman: “[T]he language in the bill is clear that it would apply to the current ACLU lawsuit that gave rise to the President’s decision last week.”).

Although the Act has not yet become law, the Senate’s action indicates the imminent possibility of a significant change in the law that strongly reinforces the grounds for recall of the mandate. Here, high-ranking military officers and the President, as Commander-in-Chief, have concluded that release of the photographs at issue will endanger the lives of U.S. military personnel overseas. And the Senate has expressed agreement with that judgment. *See* 155 Cong. Rec. S5672 (Sen. Lieberman: “When you are at war, you have to ask the question the President asked General Petraeus, General Odierno, and others: Will the public release of these pictures endanger America, American military personnel, and American Government personnel serving overseas? The answer came back loud and clear: Yes, it will.”); *id.* at S5672 (Sen. Graham: “I can tell you, beyond a shadow of a doubt, that if these photos get into the public domain, they will inflame populations where our troops are serving overseas and increase violence against our troops.”); *id.* at S5673 (Sen.

Graham: “If you release these photos, Americans are going to get killed for no good reason. That is why we need to pass this amendment—to help the President defeat this lawsuit that would lead to violence against Americans who are doing their job.”). In these circumstances, a recall of the mandate is appropriate not only to allow the government to petition the Supreme Court for a writ of certiorari, but to allow the completion of the legislative process prior to release of the photographs.

CONCLUSION

For the foregoing reasons, this Court should recall the mandate issued April 27, 2009, and stay it pending the filing and final disposition of a petition for certiorari in the Supreme Court. *See Fed. R. App. P. 41(d)(2).*

Dated: New York, New York
May 28, 2009

Respectfully submitted,

ELENA KAGAN,
Solicitor General

TONY WEST,
Assistant Attorney General

EDWIN S. KNEEDLER,
Deputy Solicitor General

ANTHONY A. YANG,
PRATIK A. SHAH,
*Assistants to the Solicitor
General*

DOUGLAS N. LETTER,
MATTHEW M. COLLETTE,
*Attorneys
Department of Justice
Washington, D.C.*

LEV L. DASSIN,
*Acting United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellants
Department of Defense and
Department of the Army.*

SEAN H. LANE,
PETER M. SKINNER,
HEATHER K. McSHAIN,
*Assistant United States Attorneys,
Of Counsel.*

Appendix

APPENDIX

SEC. __. DETAINEE PHOTOGRAPHIC RECORDS PROTECTION.

(a) *Short Title.*--This section may be cited as the “Detainee Photographic Records Protection Act of 2009”.

(b) *Definitions.*--In this section:

(1) COVERED RECORD.--The term “covered record” means any record--

(A) that is a photograph that was taken between September 11, 2001 and January 22, 2009 relating to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States; and

(B) for which a certification by the Secretary of Defense under subsection (c) is in effect.

(2) PHOTOGRAPH.--The term “photograph” encompasses all photographic images, whether originals or copies, including still photographs, negatives, digital images, films, video tapes, and motion pictures.

(c) *Certification.*--

(1) IN GENERAL.--For any photograph described under subsection (b)(1)(A), the Secretary of Defense shall certify, if the Secretary of Defense, in consultation with the Chairman of the Joint Chiefs of Staff, determines that the disclosure of that photograph would endanger--

(A) citizens of the United States; or

(B) members of the Armed Forces or employees of the United States Government deployed outside the United States.

(2) CERTIFICATION EXPIRATION.--A certification submitted under paragraph (1) and a renewal of a certification submitted under paragraph (3) shall expire 3 years after the date on which the certification or renewal, as the case may be, is submitted to the President.

(3) CERTIFICATION RENEWAL.--The Secretary of Defense may submit to the President--

(A) a renewal of a certification in accordance with paragraph (1) at any time; and

(B) more than 1 renewal of a certification.

(4) A timely notice of the Secretary's certification shall be provided to Congress.

(d) *Nondisclosure of Detainee Records.*--A covered record shall not be subject to--

(1) disclosure under section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act); or

(2) disclosure under any proceeding under that section.

(e) Nothing on this section shall be construed to preclude the voluntary disclosure of a covered record.

(f) *Effective Date.*--This section shall take effect on the date of enactment of this Act and apply to any photograph created before, on, or after that date that is a covered record.

Declaration of Heather K. McShain

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
AMERICAN CIVIL LIBERTIES UNION : Dkt. No. 06-3140-cv
v. :
DEPT. OF DEFENSE : DECLARATION OF
: HEATHER K. McSHAIN
-----X

HEATHER K. McSHAIN, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am an Assistant United States Attorney in the Office of Lev L. Dassin, Acting United States Attorney for the Southern District of New York, attorney for the Department of Defense and Department of the Army (“Appellants”) in the above-captioned appeal. I am fully familiar with the facts stated herein.
2. I submit this declaration in support of Appellants’ Motion to Recall the Mandate Pending Filing and Disposition of a Petition for Certiorari and Proposed Legislation.
3. On June 30, 2006, Appellants filed their notice of appeal of the District Court’s orders, dated June 9, 2006 and June 21, 2006, requiring the release under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), of images of overseas detainees.
4. On September 22, 2008, the Court issued its decision affirming

the district court's orders and holding that the photographs depicting the mistreatment or alleged mistreatment of detainees in Iraq and Afghanistan could not be withheld under FOIA exemptions 6, 7(C), and 7(F).

5. On November 6, 2008, Appellants filed a petition for rehearing *en banc* only as to the panel's decision on FOIA exemption 7(F).

6. By order dated March 11, 2009, this Court denied Appellants' petition for rehearing *en banc*.

7. The Court subsequently granted the government's motion for a 30-day stay of the mandate, to April 17, 2009, to permit the government to decide whether to file a petition for a writ of certiorari prior to issuance of the mandate. The government's certiorari petition is currently due June 9, 2009.

8. The government initially determined that it would not seek certiorari, and the Court's mandate issued on April 27, 2009.

9. Following issuance of the mandate, the President of the United States determined that release of the photographs at issue here would pose an unacceptable risk of danger to U.S. troops in Afghanistan and Iraq. The government has now determined that it will file a petition for a writ of certiorari, unless legislation resolving the issue is enacted.

10. On May 20, 2009, Senators Lieberman, Graham, and McCain introduced the Detainee Photographic Records Protection Act of 2009 (the "Act")

(S. 1100). Cong. Rec. S5671-5674 (May 20, 2009). On May 21, 2009, the Senate adopted a modified version of this Act by unanimous consent as an amendment (Amendment No. 1157) to the Supplemental Appropriations Act, 2009. Cong. Rec. S5798-S5799 (May 21, 2009). That same day, the Senate passed the Supplemental Appropriations Act, as amended, which previously had been passed (without the amendment) by the House of Representatives on May 14, 2009 (H.R. 2346). Cong. Rec. H5632 (May 14, 2009). The Senate has requested a conference with the House to reconcile the amendments. Cong. Rec. S5804 (May 21, 2009). It is expected that the conference will take place after Congress returns, on June 2, 2009, from its current recess.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
May 28, 2009


HEATHER K. McSHAIN
Assistant United States Attorney

**Unclassified Redacted Declaration of General
David H. Petraeus**

~~SECRET~~

DECLARATION OF GENERAL DAVID H. PETRAEUS

I, General David H. Petraeus, pursuant to 28 U.S.C. 1746, hereby declare as follows:

(U) 1. I currently serve as the Commander of United States Central Command (USCENTCOM). This Combatant Command was established by the President pursuant to Title 10, U.S. Code, Section 161. USCENTCOM seeks to promote cooperation, to respond to crises, to deter aggression, and when necessary, to defeat our adversaries in order to promote security, stability, and prosperity within the USCENTCOM Area of Responsibility (AOR). The USCENTCOM AOR stretches across more than 4.6 million square miles and 20 countries located through the Middle East and Central Asia, including Iraq, Afghanistan, and Pakistan. The statements in this declaration are based upon my personal knowledge and upon information made available to me in the performance of my official duties.

(U) 2. Through the exercise of my official duties and as a result of my personal knowledge, I am familiar with this civil action and have reviewed the 21 photographic images that the district court ordered released on 21 June 2006, and that are the subject of the appeal in ACLU v. Department of Defense, 543 F.3d 59 (2d Cir. 2008). I am also aware that in addition to the 21 images specifically addressed in the appeal before the Second Circuit, there is a substantial number of additional images that are responsive to the Freedom of Information Act request in this case. For the reasons set forth in this declaration, I have concluded that the official release of those images, even if redacted to obscure identifying information, could be reasonably expected to adversely impact current military, political, and civil efforts in the USCENTCOM AOR. In addition to fueling civil unrest, causing increased targeting of U.S. and Coalition

~~SECRET~~

forces, and providing an additional recruiting tool to insurgents and violent extremist groups, the destabilizing effect on our partner nations cannot be underestimated. Many of our partner nations in the region struggle with their populations' perceptions that they are merely instruments of the U.S. government and do not have their citizens' best interests at heart. These perceptions are directly fueled by extremist groups' expert public affairs campaigns to win "hearts and minds" across the USCENTCOM AOR and to recruit new members. Nowhere are USCENTCOM's efforts to win this struggle, by strengthening the legitimacy and efficacy of host nation governments, more critical than in Pakistan, Afghanistan, and Iraq. The release of images depicting U.S. servicemen mistreating detainees in Iraq and Afghanistan, or that could be construed as depicting mistreatment, would likely deal a particularly hard blow to USCENTCOM and U.S. interagency counterinsurgency efforts in these three key nations, as well as further endanger the lives of U.S. Soldiers, Marines, Airmen, Sailors, civilians, and contractors presently serving there.

(U) 3. My conclusions are based on my years of service and experience in the United States military; intelligence and operations reports, as well as assessments of the situation in the USCENTCOM AOR, and Pakistan, Afghanistan and Iraq specifically; assessments and evaluations of my subordinate commanders; the declarations made previously in this case; and regular interaction with both military and civilian leadership of the nations in the USCENTCOM AOR. In particular:

a. (U) I have served in the United States Army for 35 years at various levels of command and staff. I have commanded at the battalion, brigade, division, Multi-National Force-Iraq (MNF-I) and theater levels, including at the two-, three-, and four-star levels in Iraq. My

~~SECRET~~

staff experience includes serving as the Executive Assistant to the Chairman of the Joint Chiefs of Staff; Aide to the Chief of Staff of the Army; Military Assistant to Supreme Allied Commander – Europe; Chief of Operations of the United Nations Force in Haiti; and Assistant Chief of Staff for Operations of the NATO Stabilization Force in Bosnia.

b. (U) I have extensive experience in Iraq, including command at the division and theater levels. In addition to commanding Multi-National Force-Iraq (MNF-I) for over 19 months prior to taking command of USCENTCOM, I commanded the 101st Airborne Division (Air Assault), during the first year of Operation Iraqi Freedom. I was also the first commander of Multi-National Security Transition Command-Iraq from June 2004 to September 2005, and the commander of the NATO Training Mission-Iraq from October 2004 to September 2005. Prior to my tour as MNF-I commander, I commanded the U.S. Army Combined Arms Center and Fort Leavenworth, during the development and publication of both the U.S. Army Field Manual 3-24, *Counterinsurgency*, and U.S. Army Field Manual 2-22.3, *Human Intelligence Collector Operations*.

c. (U) As a result of this experience, I have intimate and extensive knowledge of our military forces and interagency partners and their capabilities, as well as those of the enemies who threaten U.S., Coalition, Iraqi, Afghan, and Pakistani forces and interests.

d. (U) As the commander of USCENTCOM, I receive daily intelligence and operations briefings regarding the political, economic, diplomatic, and security environment in the countries in the USCENTCOM AOR, with particular emphasis on Pakistan, Afghanistan, and Iraq. These briefings are produced by subject-matter experts, and I rely on and trust their expertise and insights.

~~SECRET~~

e. (U) I frequently travel throughout the USCENTCOM AOR to personally view the situation across the region. During these missions, I receive reports from subordinate operational and tactical commanders who provide insights from the local and regional levels. I also meet regularly with national political and military leaders.

f. (U) I reviewed and relied upon the Declaration of Brigadier General Carter F. Ham, dated April 26, 2006, and the Second Amended Declaration of the former Chairman of the Joint Chiefs of Staff, General Richard B. Myers, dated August 25, 2005, which were submitted to the district court regarding photos purporting to show detainee abuse.

g. (U) I strongly condemn any misconduct and abuse depicted in these images that were the responsibility of U.S. military personnel. I am committed to ensuring all detainees in the USCENTCOM AOR are treated humanely, and that any allegation of detainee mistreatment is immediately investigated and appropriate disciplinary action taken. In fact, as Commander of both MNF-I and USCENTCOM, I have repeatedly stressed that we must "live our values," and not only ensure U.S. servicemen treat detainees humanely, but that the nations we are assisting also do the same. Early on in our operations in Iraq in the late spring of 2003, I directed the 101st Airborne Division commanders to ensure observance of the Geneva Conventions regarding treatment of those we detained. As the Commander of MNF-I, I directed MNF-I forces to intervene to stop abuse if it occurs, and to prevent abuse through education, training, and mentoring.

PAKISTAN

(U) 4. The need to establish a trusting, mutually beneficial U.S.- Pakistan partnership is pressing, yet the ability to do so is severely challenged by current events. The Government of Pakistan (GOP) faces a burgeoning threat from the Taliban, indigenous Pakistani militant groups,

and foreign extremists in Pakistan's Federally Administered Tribal Areas (FATA) and Northwest Frontier Province (NWFP).

(U) 5. To counter this threat, Pakistan's Frontier Corps (FC) commenced security operations in the area in late-August 2008. Despite these efforts, which were undermined by a wavering commitment from the GOP, the security situation in Pakistan deteriorated further. The Taliban quickly came to control the entire Swat Valley in the NWFP. Pakistan's leaders became anxious to develop a means of restoring stability and order to the region. The GOP entered into peace talks with NWFP militants who proffered a diplomatic solution, including the implementation of Shari'a law within the Swat Valley and the Malakand Division. In exchange, the GOP agreed that the Pakistan Military would cease operations and the militants would lay down their arms.

(U) 6. This arrangement was short-lived, however, and disagreements quickly arose over the militants' immediate and brutal implementation of Shari'a law in Swat Valley. The militants resumed offensive operations and by late-April 2009, they had pushed to within 60 miles of Islamabad, Pakistan's capital. As militant influence grew toward the urban heart of the country, the international community and civil society groups became increasingly alarmed, forcing the government to recognize the growing threat and deploy the Pakistan Military. While the current offensive by the Pakistan Military seems their most serious effort to date, enduring success against the militants has yet to be seen, and several hundred-thousand Pakistani civilians have been displaced in the latest fighting.

(U) 7. The stabilization of Pakistan via a strong partnership with the United States is critical. Violent Extremist Organizations (VEO), Al Qaeda (AQ) and the Taliban not only destabilize Pakistan, they undermine the regional stability necessary for fulfillment of U.S. goals in the region. Al Qaeda and Associated Movements (AQAM) use the ungoverned space of the FATA to plan for and train terrorists intent on attacking the U.S. and U.S. interests abroad, including sending fighters across the border into Afghanistan.¹ Even with new supplemental distribution networks, sustainment operations of U.S. forces in Afghanistan are highly dependent on air and ground routes through Pakistan. Separately, the security of the Pakistani nuclear arsenal is of concern, and it is not entirely inconceivable that a country like Pakistan, facing many complex problems, could deteriorate at a pace that would challenge their and our best capabilities to restore order.

(U) 8. Newly released photos depicting abuse of detainees in U.S. military custody in Afghanistan and Iraq would negatively affect the on-going efforts by Pakistan to counter its internal extremist threat. Anti-U.S. sentiment has already been increasing in Pakistan. Most polling data reflects this trend, especially in regard to cross-border operations and reported drone strikes, which Pakistanis perceive to cause unacceptable civilian casualties. In June 2008, 45% of Pakistanis said that U.S. presence in the region was a threat to Pakistan, and that jumped to 54% in October 2008. It may be higher today, and will certainly increase if new detainee abuse photos are released. Most Pakistanis also feel that U.S.-Pakistan cooperation does not "mostly benefit" Pakistan (2% in October 2008, down from 7% in June 2008). While other polling data show minor improvements in US-Pakistan relations, 63% of Pakistanis still oppose cooperating

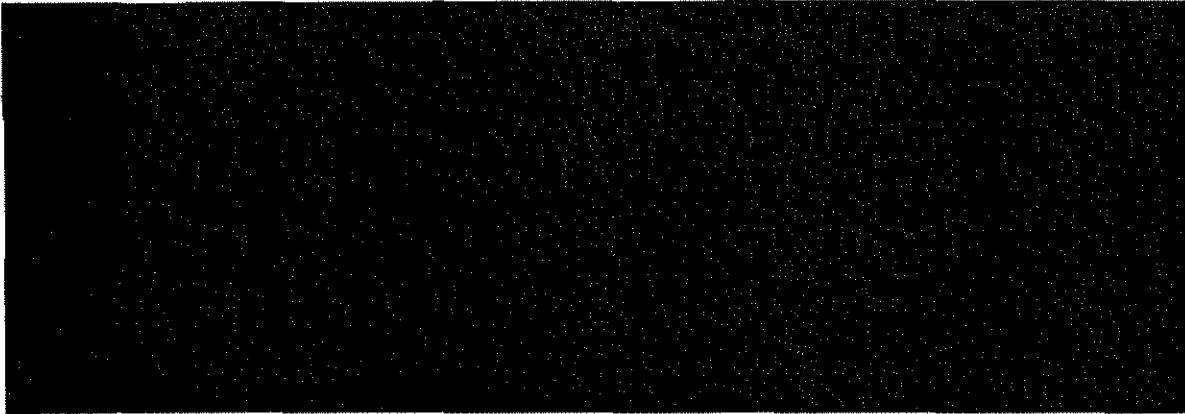
¹ (S) [REDACTED]

with the U.S. on counter-terror operations, and 35% say they do not support U.S. strikes into Pakistan, even if they are coordinated with the GOP and the Pakistan Military ahead of time. Preventing Pakistan-based militants from exacerbating strained U.S.-Pakistan tensions has been very difficult for the GOP in recent months and years. Release of images depicting, or that could be construed as depicting, U.S. forces abusing detainees who would likely be depicted as "fellow Muslims" would undermine this effort.

(U) 9. Based on historical precedents, such as the publication of Danish cartoons depicting the Prophet Mohammed in late 2005 and a Newsweek article erroneously highlighting desecration of the Koran by U.S. military members in 2006, civil unrest via spontaneous demonstrations in Pakistan's largest cities would be a likely result of publication of images depicting U.S. abuse of detainees in its custody in Iraq and Afghanistan. Militant and extremist groups would use these images to foment anti-U.S. sentiment and to incite demonstrators to conduct deliberate attacks against U.S. targets,² as well as western Non-Government Organization (NGO) facilities and personnel.³

(S) 10. 

² 
³ 



AFGHANISTAN

(U) 11. Afghanistan's nationwide violence is presently 95% higher than it was during this same period last year. The increase in violence is expected to continue throughout the summer following the conclusion of the spring poppy harvest. Fighters will refocus on conducting insurgent operations and additional U.S. forces will begin operations. Despite recent U.S. and International Security Assistance Force (ISAF) operations to disrupt insurgents in southern Afghanistan, insurgents continue planning for organized attacks against the provincial capitals of Helmand and Kandahar Provinces. The end of the poppy harvest in southern Afghanistan will likely lead to a significant increase in violence there, once again surpassing that of violence in all other regions.

(U) 12. Newly released photos depicting, or that could be construed as depicting, abuse of detainees in U.S. military custody in Iraq and Afghanistan would place U.S. servicemen in Afghanistan at heightened risk and corrosively affect U.S. relations with President Karzai's government, as well as further erode control of the Afghan government in general. Spontaneous

⁴ (U) Release of detainee abuse images depicting, or that could be construed as depicting, U.S. forces abusing detainees in its custody in Iraq and Afghanistan could reasonably be expected to endanger the life or physical safety

~~SECRET~~

demonstrations might occur in Kabul, Kandahar City, Mazar e Sharif and other population centers in Afghanistan. Public condemnations by Afghan leaders and insurgency leaders would be certain. An influx of foreign fighters from outside Afghanistan and new recruits from within Afghan could materialize, as the new photos serve as potent recruiting material to attract new members to join the insurgency. New photos would also serve to enhance fund-raising efforts for insurgent sympathizers across the Muslim world. Attacks against newly-arriving U.S. Marines and soon-to-arrive U.S. Army units in the south, and transitioning U.S. Army units in the east, could increase, thus further endangering the life and physical safety of military personnel in these regions.

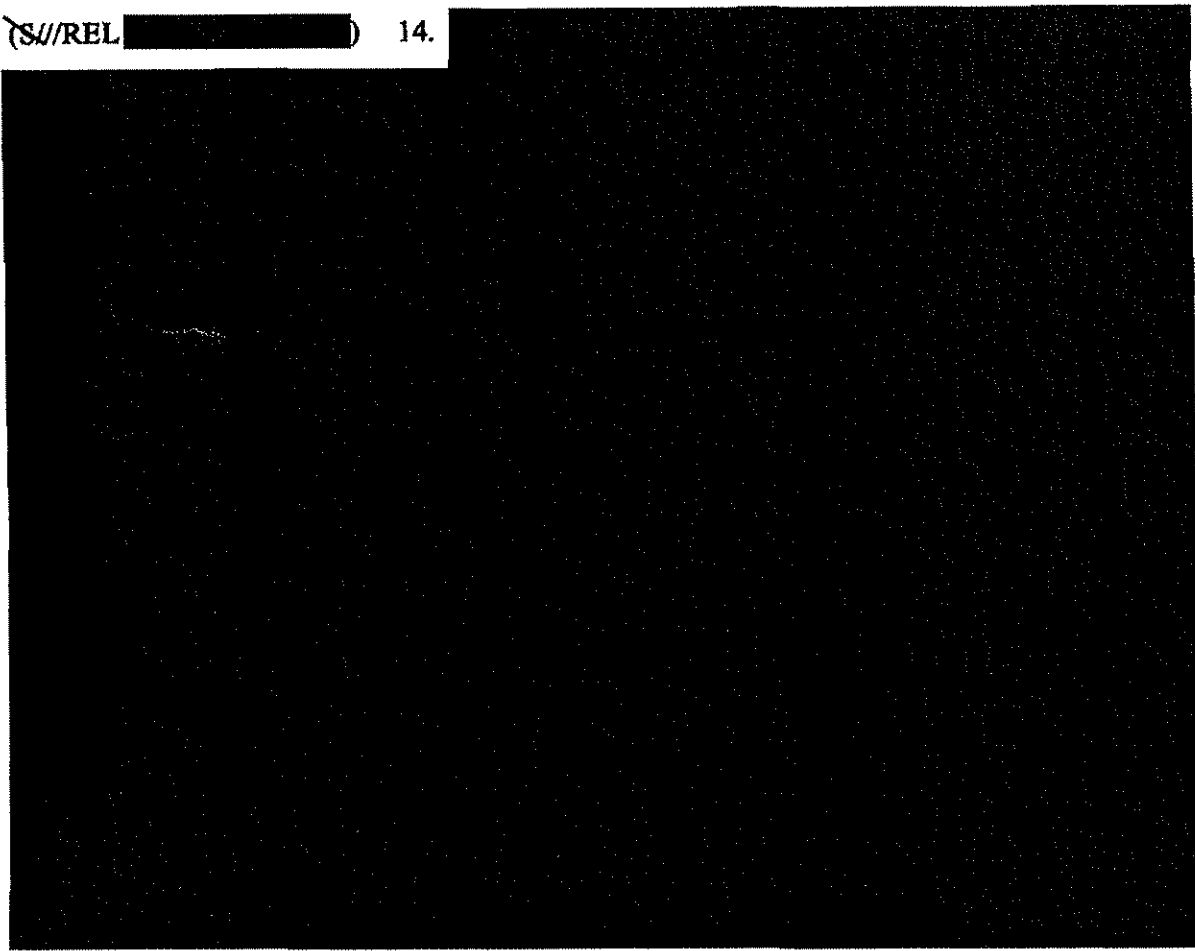
(U) 13. Attacks against Afghan offices and government leaders in Kabul and provincial capitals could also occur, as could attacks against the primary ground line of communication or disruption of the Northern Distribution Network. The Afghan presidential election cycle might also be disrupted. Indeed, Taliban and insurgent forces have stated that disrupting the 2009 presidential elections is one of their objectives. Release of the photos would make attacks and disruptions even more likely. Coordinated attacks focused on polling stations or destruction of votes could raise concerns over the validity of the elections, and any hint of improper elections would exacerbate perceptions that the Afghan government lacks legitimacy. Managing preparations for Afghanistan elections, while simultaneously enduring protests and public condemnations from Afghanistan leaders regarding detainee images and civilian casualties caused by U.S. airstrikes, would make the situation very challenging for U.S. and ISAF forces. Perhaps most importantly, release of the photos could undermine U.S. goals in the region, particularly if Muslim sensitivities become inflamed and Muslim willingness to work with the

of diplomatic personnel via invigorated kidnapping and assassination attempts.

~~SECRET~~

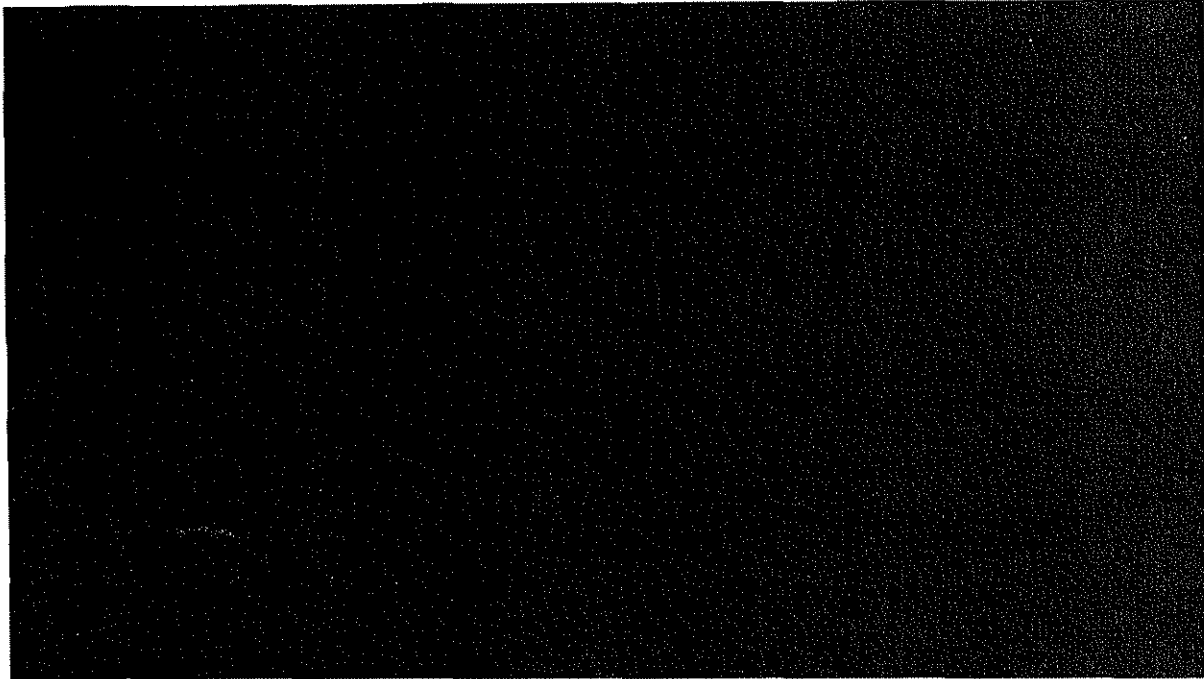
U.S. is degraded, which would be likely with publication of photos depicting, or that could be construed as depicting, U.S. detainee abuse of detainees in its custody in Iraq and Afghanistan.

(S//REL [REDACTED]) 14.



(S//REL [REDACTED]) 15.





IRAQ

(U) 16. Iraq continues to sustain progress in security and stability, but the progress remains fragile and reversible. Despite security gains, Sunni and Shi'a extremists continue to pose threats to Iraq's security. While overall violence decreased significantly⁵ in 2008, a string of high profile attacks aimed at Iraqi Shi'a in Baghdad, from late-March to early-May of this year, demonstrated the tenuous nature of Iraq's present security environment. These attacks highlight the lethality of small terrorist cells despite their reduced capacity. Shi'a extremist-related violence appears to be largely focused against U.S. forces. The focus of the Sunni insurgency has been pushed into parts of Northern Iraq as Coalition forces, Iraqi Security Forces (ISF), and Sons of Iraq (SOI) have worked to limit Sunni insurgent freedom of movement. Meanwhile, Iraq's security responsibilities are in a period of transition as responsibilities shift from Coalition

⁵ (S) [REDACTED]

Forces to Iraqi Security Forces, per the terms of the Iraqi-US Security Agreement that went into effect on 1 January 2009.

(U) 17. Newly released photos depicting abuse, or that could be construed as depicting abuse, of Iraqis in U.S. military custody would inflame emotions across Iraq and trigger the same motivations that prompted many young men to respond to calls for jihad following the Abu Ghraib photo release. After the Abu Ghraib photos were publicized in 2004, there was a significant response to the call for jihad, with new extremists committing themselves to violence against U.S. forces. Al-Qaeda in Iraq (AQI) and Sunni insurgents groups in Iraq will likely use any release of detainee abuse images for propaganda purposes, and possibly as an opportunity to widen the call for jihad against U.S. forces, which could result in a near-term increase in recruiting and attacks. Anti-American and anti-Iraqi government protests can also be expected, with most of the anger likely directed towards the U.S. presence.⁶ With national elections approaching later in the year, Iraqi politicians can be expected to use the detainee images as fodder for their campaigns, especially in response to anti-U.S. sentiment that may increase as elections draw near and final U.S. withdrawal becomes more imminent. Additionally, pressure will mount on the Prime Minister to allow for a national referendum on the Security Agreement and the Strategic Framework Agreement.


⁶ (S)



~~SECRET~~

(U) I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 27th May 2009.



DAVID H. PETRAEUS
General, U.S. Army
Commander, USCENTCOM4

~~SECRET~~

**Unclassified Redacted Declaration of General
Raymond T. Odierno**

DECLARATION OF GENERAL RAYMOND T. ODIERNO

I, General Raymond T. Odierno, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. (U) I am the Commander of Multi-National Force - Iraq (MNF-I). MNF-I is the strategic headquarters responsible for coalition operations in Iraq. I have served in the Iraq Theater of Operations (ITO) for 36 months in the past six years. The statements in this declaration are based upon my personal knowledge and upon information made available to me in the performance of my official duties. In relevant areas I will relate the views and opinions of senior Iraqi leaders.

2. (U) Through the exercise of my official duties and as a result of my personal knowledge, I am familiar with this civil action and have reviewed the 21 photographic images ("the photos") that the district court ordered released on June 21, 2006, that are the subject of the appeal in ACLU v. Department of Defense, 543 F.3d 59 (2d Cir. 2008). For the reasons set forth in this declaration, I have concluded that the official release of these images, even if redacted to obscure identifying information, could reasonably be expected to:

- a. (U) Endanger the lives of U.S. and coalition Soldiers, Airmen, Marines, Sailors, civilians, and contractors presently serving in Iraq;
- b. (U) Endanger the lives of Iraqi civilians, police, military personnel and government officials;
- c. (U) Aid in the recruitment and financing of extremists and insurgent groups;
and
- d. (U) Undermine the improving security conditions in Iraq.

3. (U) My conclusions are based on my years of service and experience in the United States military in general and Iraq in particular, intelligence and operations reports and

assessments of the situation in Iraq, the assessments and evaluations of my subordinate commanders, the declarations made previously in this case, and regular interaction with Iraqi leaders. In particular:

a. (U) I have served in the United States Army for over 32 years at various levels of command and staff. I have commanded units at every echelon, from platoon to theater. My staff experience includes serving as the Assistant to the Chairman of the Joint Chiefs of Staff, where I was the primary military advisor to Secretaries of State Colin Powell and Condoleezza Rice. I have extensive experience in Iraq, including command at the division, corps, and theater levels. I commanded the 4th Infantry Division, which was headquartered in the Sunni Triangle, when it was deployed to Iraq from April 2003 to March 2004. I commanded Multi-National Corps - Iraq, which is the operational command responsible for coalition forces throughout Iraq, from December 2006 to February 2008, during the surge of U.S. forces. I assumed my current command at Multi-National Force - Iraq, which is the strategic command responsible for coalition operations in Iraq, in September 2008. As a result of this experience, I have intimate and extensive knowledge of our forces and their capabilities, as well as those of the enemies who threaten U.S., Coalition, and Iraqi forces and interests.

b. (U) I receive daily intelligence and operations briefings regarding the political, economic, diplomatic, and security environment in Iraq. These briefings are produced by subject-matter experts, and I rely on and trust their expertise and insights.

c. (U) I frequently travel throughout Iraq to see firsthand the situation across the country. During these missions, I receive reports from subordinate operational and tactical commanders who provide insights from the local and regional levels.

d. (U) I reviewed and relied upon the Declaration of Brigadier General Carter F. Ham, dated April 26, 2006, and the Second Amended Declaration of the former Chairman of the Joint Chiefs of Staff, General Richard B. Myers, dated August 25, 2005, which were submitted to the district court regarding photos purporting to show detainee abuse.

e. (U) I am constantly engaged with the senior political leaders in Iraq, who share with me their unique insights into the conditions within their country. As the conflict in Iraq will impact their nation for decades to come, I find their perspective to be persuasive.

4. (U) I strongly believe the release of these photos will endanger the lives of U.S. Soldiers, Airmen, Marines, Sailors and civilians as well as the lives of our Iraqi partners. Certain operating units are at particular risk of harm from release of the photos. One example is our training teams throughout Iraq. These are small elements of between 15 and 30 individuals who live on Iraqi-controlled installations and thus do not have the same protections afforded to many of our service members. In addition, as they assist our Iraqi partners, members of such teams are regularly engaged in small-unit patrols, making them more vulnerable to insurgent attacks or other violence directed at U.S. forces. Accordingly, there is good reason to conclude that the soldiers in these teams and in similarly situated units would face a particularly serious risk to their lives and physical safety.

5. (U) The publication of these photos will be likely to significantly and adversely impact the MNF-I mission to develop a strategic partnership with a stable, secure, prosperous, and democratic Iraq that reflects its society and culture, stands as an ally in the war on terror, and contributes to peace and stability in the region. The photos will likely cause a very public and emotional response in Iraq and in the larger Arab world because the images may touch on a number of deep-rooted Arab cultural values that will resonate with the Iraqi public. The Iraqi

public, if inflamed with emotion, may be easily manipulated by competitors seeking to exploit this opportunity to their full advantage. Many Arabs harbor long-standing perceived grievances against the west in general and the U.S. in particular. The release of these photographs likely will only fuel this resentment.

6. (U) In April 2004, news organizations published reports of U.S. abuses of Iraqi detainees that publicly disseminated an initial set of photographs taken at the Abu Ghraib prison. Extremist organizations including al Qaeda in Iraq (AQI) and Islamic State of Iraq (ISI) used the revelations of detainee abuse and copies of associated photographs to recruit and motivate organization members. The graphic revelations of detainee abuse motivated some terrorists including foreign fighters from Syria, Yemen and Saudi Arabia to join the jihad. Reporting also indicates that some organizations may have staged and disseminated photographs of Arab women being abused by men in U.S. uniforms. Extremist groups intentionally misrepresented the depicted abuse as evidence of the widespread rape of female Iraqi detainees by U.S. soldiers as a further motivation for recruitment and to support the exhortation for attacks against Coalition Forces (CF).

7. (U) The public dissemination of detainee abuse photos in 2004 likely contributed to a spike in violence in Iraq during the third quarter of 2004 as foreign fighters and domestic insurgents were drawn to Iraq to train and fight. Attacks on CF increased from around 700 in March 2004 to around 1800 in May (after the photographs were broadcast and published) and 2800 in August 2004. Attacks on CF did not subside to March 2004 levels until June 2008. These increased attacks resulted in the death of CF, Iraqi forces, and civilians.

8. (U) The 2004 publication of detainee photos resulted in a number of postings on internet websites. In May 2004, one posting called for the dissemination of photographs

depicting Iraqi women being raped in U.S. prisons, "because now the timing is better than ever." Another posting referenced "torture and rape" of Muslims in Iraqi prisons, while calling for Saudi security forces to refrain from assisting CF. In June 2004, several Islamist, Jihadist, and Salafist websites provided links to an audio message, purportedly made by al-Qaeda leader Abu Musab al-Zarqawi. The message included a threat to kill then-Prime Minister of Iraq, Ayad Allawi, and referred to alleged degrading treatment suffered by female detainees.

9. (U) Perhaps the most gruesome of Internet reactions to the photo publication was a video posted in May of 2004 showing the decapitation murder of U.S. contractor Nicholas Berg. A man believed to be Zarqawi specifically made the linkage between the abuses at Abu Ghraib and Berg's murder, saying, "And how does a free Muslim sleep comfortably watching Islam being slaughtered, and [its] dignity being drained. The shameful photos are evil humiliation for Muslim men and women in the Abu Ghraib prison.... We tell you that the dignity of the Muslims at the Abu Ghraib prison is worth the sacrifice of blood and souls. We will send you coffin after coffin and box after box slaughtered in this way." The June 2004 kidnapping and murder of U.S. contractor Paul Johnson, Jr. and other anti-Western incidents in Saudi Arabia were possibly influenced by the coverage of Berg's kidnapping and murder.

10. (U) While conditions in Iraq have improved since the declarations of BG Ham and Gen Myers, I concur with their overall assessment of the potential impact of releasing images purporting to show detainee abuse. Extremist groups will likely use any means necessary to incite violence and, specifically, have and will likely focus on perceived U.S. or Coalition mistreatment of Iraqi civilians and detainees as a propaganda and recruiting tool to aid their cause. See BG Ham's Decl. ¶ 7 and Gen Myers' Decl. ¶ 8. The next six to eight months are a time of particular fragility in Iraq. Withdrawal of U.S. combat forces from Iraqi cities, villages,

and localities, elections for the Kurdistan Regional Government, a national referendum on the Security Agreement, a national census, and national elections are tipping points in the near future that extremist groups reinvigorated by release of the photos may seek to manipulate through violence.

11. (U) MNF-I will likely experience an increase in security incidents particularly aimed at U.S. personnel and facilities following the release of the photos. Incidents of spontaneous violence against U.S. Forces, possibly including attacks from outraged Iraqi police or army members are likely. This could weaken our partnership with the Iraqi Security Forces, decrease security, and lead to more violence. Attacks against soft targets which represent visible symbols of U.S. presence or culture are also likely. Such increased attacks will put U.S. Forces, civilians, and Iraqi partners at risk of being killed, injured, or kidnapped. The photos will likely be used as a justification for adversaries conducting retribution attacks against the U.S. for bringing shame on Iraq.

12. (U) Sunni ethno-sectarian nationalist and Islamist resistance groups, Salafist-jihadist extremist groups and Shia armed militia groups all oppose the U.S. presence and will likely attempt to exploit the release in their propaganda campaigns. Anti-U.S. groups will likely attempt to misrepresent the photos as evidence of continuing U.S. misconduct and noncompliance with international law and the standards of a humane and civilized society. The U.S. will also likely be portrayed as the continuing oppressor of Iraqis, Arabs and Muslims. In addition, opponents of a U.S. presence, such as the Sadrists and Iran, may use the photographs as propaganda supporting calls for a referendum on the U.S.-Iraq bilateral security agreement. The release of the photographs is likely to harden existing anti-US opinion in the Council of Representatives (COR), and in local and regional media.

13. (U) These propaganda measures will likely increase popular and financial support for anti-U.S. groups and may have a positive influence on recruitment for some groups. In particular, Sadrist political figures and their associated groups may respond to the release of photos by calling for mass demonstrations against the continuing presence of U.S. Forces in Iraq.

14. (U) The Security Agreement Referendum is scheduled for this summer. The release of the photos may incite the Iraqi public and cause the referendum to be defeated. If the referendum is defeated, U.S. Forces will be required to leave Iraq earlier than scheduled, further destabilizing the region and leaving Iraq vulnerable to outside influences, especially from Iran.

15. (U) MNF-I detainee release and reconciliation initiatives may be impacted as adversaries exploit these images to increase recruiting and motivate members to conduct attacks against the U.S. Iraqi community and political leaders will likely seek to avoid any potential liability associated with ties to U.S. detainee operations. Detainees released from our facilities may provide a focused target for extremist recruiting by characterizing all former detainees as having an obligation to restore the honor taken from the specific victims in the photos. This characterization may gain momentum among those detainees who are already vulnerable due to unemployment or community hostility by making them believe that the taint of their detention in a U.S. facility leaves them with no options.

16. (U) I believe these images will be used to inflame outrage against the U.S. and be used by terrorist organizations to recruit new members. The release of the photos will likely incite Muslim idealists to join the cause to seek retribution for the dishonor they may perceive to have been brought against all Muslims by the U.S. inside Iraq, the publicity over the images could incite additional attacks on U.S. personnel by members of the Iraq Security Forces ("green-on-blue" attacks); whether individually motivated, or instigated by an extremist

affiliation. Groups most likely to use this as an opportunity to recruit and engage in attacks against US forces are Sunni foreign fighters and Sunni extremists. Groups more likely to use this as an opportunity to draw attention to Iraqi jurisdiction and the relationship between Iraq and the United States are Shia extremists.

17. (U) MNF-I will likely experience an increase in attacks against U.S. Forces and bases as the photos incite retaliation by the Iraqi public. Iraqi Security Forces and the Government of Iraq (GoI) may experience a similar increase in attacks as a protest against the U.S./GoI partnership. Less violent, but still posing a challenge for the U.S., may be an increase in the number of unspecified allegations of recent mistreatment in order to contradict our statements that the photos do not represent our policies, practices, or values. These claims could be exacerbated by calls for criminal prosecutions in Iraqi courts over US servicemembers alleged to have engaged in mistreatment.

18. (U) The Iraqis, from their point of view, may feel largely excluded from the public discourse these images may generate in the U.S. and world stage. As was the case following Abu Ghraib, Iraqis may feel that the dignity of any Arab is of little consequence to the Americans when compared to their own interests. The official positions and talking points of the various stakeholders may do little to refute their certainty. The Iraqis likely will express this sentiment in a very public way utilizing media, political, and cultural mechanisms.

19. (U) During my conversations with senior Iraqi officials, they have expressed extreme concern about the impact of the potential release of photos depicting actual or perceived abuse of detainees ("abuse photos"). Among their concerns were that release of such photos would increase the pressure to release individuals that U.S. forces are currently holding as security detainees. These individuals currently are being released in a safe and orderly fashion, and

accelerating the process could disrupt the delicate security balance in Iraq. They also stated that those in violent opposition to the political process would likely use abuse photos to maximize support, increase funding, and stiffen the resistance. They believe that releasing such photos will result in an outbreak of violence directed at U.S. forces and facilities. Furthermore, they are concerned that releasing abuse photos will severely impact reconciliation as former opposition elements meet resistance to reconciling with a Government that has aligned itself with the country that committed this abuse.

20. (S)



21. (S)



22. (S)



23. (U) A senior member of a prominent Sunni political group and member of the Council of Representatives (the COR is the parliament) told a senior MNF-I leader that insurgents and terrorists groups will exploit the release of abuse photos to steadily increase attacks against U.S. Forces and Iraqis working with U.S. Forces. This COR member was consulted for a Sunni perspective, and he wished to emphasize that release of abuse photos would cause disturbances in Iraq: "With all due respect to freedom of information in the United States," for Iraq's sake he urged that they not be released at this time. "A release would disturb plans for [democratic] progress in the country because the Iraqi people would react poorly. In

light of upcoming national elections, Iraqi politicians would exploit the situation to attract votes, further stirring things up.”

24. (S)



25. (U) A senior Shi'a member of the COR in a recent discussion with a senior MNF-I leader also raised concerns that the release of abuse photos would disrupt Iraq's democratic process, its security environment, and U.S.-Iraq relations. He stated that this is the worst possible time to release abuse photos as it is just prior to the beginning of the second Iraqi national election season. The release, he explained, would only serve to embarrass the Maliki government. The release would also expose the Maliki government to criticism from political opponents like militant Sunni nationalists or the Sadrists who would want use any tool available to embarrass the current government. Furthermore, the "oppositionists" could tie the abuse scandal to their support for the U.S./Iraq Security Agreement (SA). He added that the lack of support could impact the ability of the GoI to defend the implementation of provisions in the SA, including any requests for U.S. military support in security operations in cities, villages, and localities, and implementing legal provisions concerning U.S. troops accused of crimes while conducting operations. Moreover, he explained that release of abuse photos would only serve to increase calls for a referendum on the Security Agreement and would prejudice the Iraqi public against any agreement that would serve Iraq and U.S. long term security interests. Release of

abuse photos would serve insurgent or terrorist interests by providing them with a propaganda windfall that would help recruit and find support from the population since it would be inevitable that many in the Iraqi public would feel a desire to take revenge on those whom they see as occupiers who humiliated them. Finally, he stated release of abuse photos would, in his opinion, directly endanger U.S. troops and civilians attempting to support the GoI efforts to improve security and services to the population as well as put Iraqi civilians at risk.

26. (U) Reconciliation among the various groups in Iraq is one of the prime efforts with which we support and assist the GoI. Recently, a senior official within the Government of Iraq who addresses reconciliation issues stated that timing now is poor for Iraq. He observed that those who support the reconciliation process might treat the photo release with equanimity, while those who oppose the political process would seek to use it as an instrument to create difficulties in advancing the strategic relationship. Further, those who oppose the process through violent means would likely seek to use abuse photos to maximize their support, seek additional funding from regional paymasters, and use the anger generated as a "recruiting sergeant" to stiffen the resistance. He agreed this is a problematic issue that needs resolution, but now would not be a good time, and it would not assist the reconciliation process.

27. (U) Political competitors are likely to exploit abuse photos as a means to gain leverage or improve negotiating positions – this political maneuvering may be focused on MNF-I and our allies in the Government of Iraq. Indeed, this could be a destabilizing event for the Prime Minister and his government. Moreover, any key leaders associated with our detention programs, such as judges or tribal leaders who participate in reconciliation efforts for released detainees, may distance themselves from the U.S. If publicly challenged, they could support a contrarian position against the U.S. Even if conditions do not rise to the level of green-on-blue

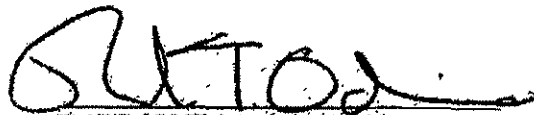
~~SECRET~~

attacks, units could experience increased tension from their Iraqi partner units, resulting in a reduction in the level of combined operations and training. This lack of partner unit cooperation would severely impact our ability to continue to operate under the Security Agreement, which requires agreement and coordination with the GoI.

28. (U) Iraq today is safer, but it is not without risk. The near future has several critical events that extremist groups may attempt to influence through violence. There are still attacks against coalition and Iraqi forces, and release of the photos would likely boost the recruiting and fundraising that enables those attacks. While not every attacker is as honest about his motivation as the murderers of Nicholas Berg, it is my belief, based on my years of experience and judgment, that release of the photos could reasonably be expected to destabilize the country and endanger American, Coalition, and Iraqi lives.

(U) I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 27 May 2009.



RAYMOND T. ODIERNO
General, U.S. Army
Commanding General, MNF-I

CERTIFICATE OF SERVICE

I, Heather K. McShain, an Assistant United States Attorney for the Southern District of New York, hereby certify that on May 28, 2009, I caused a copy of the foregoing motion information statement, Motion to Recall the Mandate Pending Filing and Disposition of a Petition for Certiorari and Proposed Legislation, and accompanying declarations of General David H. Petraeus (unclassified, redacted version), General Raymond T. Odierno (unclassified, redacted version), and Heather K. McShain, to be served by Federal Express, upon the following:

Amrit Singh
Staff Counsel
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Attorneys for Plaintiffs-Appellees

Lawrence S. Lustberg, Esq.
Gibbons P.C.
One Gateway Center
Newark, NJ 07102-5310
Attorneys for Plaintiffs-Appellees

Dated: New York, New York
May 28, 2009


HEATHER K. McSHAIN
Assistant United States Attorney

ANTI-VIRUS CERTIFICATION
See Second Circuit Local Rule 25(a)(6)

Caption: American Civil Liberties Union v. Dept. of Defense

Docket No: 06-3140-cv

I hereby certify that the PDF document specified below, submitted to the Court as an attachment to the instant email, has been scanned for viruses and that no virus was detected.

Document: Motion to Recall the Mandate Pending Filing and Disposition of a Petition for Certiorari and Proposed Legislation

***Signature of Person Making Certification:** Heather K. McShain

Name of Person Making Certification: Heather K. McShain

Date: May 28, 2009

*Manual signature not required for the Anti-Virus Certification that is attached to the email transmitting the PDF document.