

IN THE SUPREME COURT OF THE UNITED STATES

No. 08A_____

UNITED STATES DEPARTMENT OF DEFENSE, ET AL., APPLICANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

APPLICATION FOR AN EXTENSION OF TIME WITHIN
WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Department of Defense and the other federal parties in this suit, respectfully requests a 30-day extension of time, to and including July 9, 2009, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The court of appeals entered its judgment on September 22, 2008, and denied rehearing en banc on March 11, 2009. Unless extended, the time within which to file a petition for a writ of certiorari will expire on June 9, 2009. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). Copies of

the opinion of the court of appeals and the order of the court of appeals denying rehearing are attached.¹

1. This lawsuit under the Freedom of Information Act (FOIA), 5 U.S.C. 552, arises out of FOIA requests for records concerning allegations of mistreatment of overseas detainees held in United States custody after September 11, 2001. As is relevant here, respondents seek the disclosure of photographs in military investigatory files concerning the military's investigation of allegations of detainee abuse. At issue is the application of FOIA Exemptions 7(C) and 7(F), which exempt law-enforcement records from mandatory disclosure if their release "could reasonably be expected" either "to constitute an unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(7)(C), or "to endanger the life or physical safety of any individual," 5 U.S.C. 552(b)(7)(F).

A different set of photographs concerning detainee abuse at Abu Ghraib prison (known as the "Darby photos") were initially at issue in this litigation. The government argued that they should be exempt from disclosure on the ground that release of the images could reasonably be expected to invade the detainees' privacy (Exemption 7(C)) and to endanger the lives of American and coalition forces, as well as civilians, in the combat and insurgency areas (Exemption 7(F)). The district court rejected

¹ In light of the Court's summer recess, the requested extension will not result in any delay in the Court's consideration of a petition for a writ of certiorari in this case.

both arguments and ordered the release of the records. The government appealed, but its appeal was mooted shortly before oral argument by the publication of the Darby photos on a website (salon.com).

The litigation then turned to the 21 additional photographs of detainees presently at issue.² Those photos are contained in Reports of Investigation conducted by the Army's Criminal Investigation Division into allegations of misconduct in Iraq and Afghanistan. The government released to respondents the underlying reports, which contain descriptions of the detainee abuse allegations and the findings of each investigation, with the names of the soldiers and living detainees redacted. However, the government again invoked Exemptions 7(C) and 7(F) with respect to the 21 photographs and submitted supporting affidavits, including an affidavit from Brigadier General Carter Ham, who concluded that publicly releasing the photos "will pose a clear and grave risk of inciting violence and riots against American troops and coalition forces" and "expose innocent Iraqi, Afghan, and American civilians to harm as a result of the insurgency reaction."

The district court again ordered release of the photos, adopting the rationale of its prior opinion concerning the Darby photos without issuing a new written opinion.

² A substantial number of additional photographs exist, in addition to the 21 photographs, that are the subject of this case in district court.

2. On September 22, 2008, the court of appeals affirmed. The court accepted for the purposes of its opinion the conclusion of high-ranking United States military officers that public disclosure of the disputed photographs would pose a clear and grave risk of inciting riots and violence against American and Coalition forces, as well as civilian personnel, serving in Iraq and Afghanistan. The court nevertheless held as a matter of law that FOIA Exemption 7(F) does not protect against such harms from disclosure that threaten a broad range of people, as opposed to a small set of easily identifiable individuals. Slip op. 9-17 & n.3.

The court of appeals further held that the photos were not exempted from mandatory disclosure under Exemption 7(C). The court rejected as "speculation" the government's concerns regarding the potential for identifying the photographed detainees (or that the detainees would identify themselves) finding those concerns insufficient to create a privacy interest in light of the district court's redactions. Slip op. 42. The court of appeals additionally found a significant public interest in disclosing the photographs, relying upon the fact that the photos "yield evidence of wrongdoing" and rejecting the notion that the previously disclosed written summaries of the depicted events diminish such public interest in disclosure. Id. at 44-45. The court also rejected the government's reliance on the Geneva Conventions to buttress its assertion of the privacy exemption. Id. at 46-52.

The court of appeals denied the government's petition for rehearing en banc on March 11, 2009.

3. The President of the United States subsequently determined, after consultation with his military and national security advisors, that release of the photographs at issue here would pose an unacceptable risk of danger to U.S. troops in Afghanistan and Iraq. See, e.g., Remarks by the President on National Security (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."), available at <http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09>.³ The Solicitor General has accordingly determined that a petition for a writ of certiorari will be filed in the absence of legislation resolving the issue.

The President's determination is supported by the judgment of General David Petraeus and General Raymond Odierno as set forth in declarations filed in the Second Circuit on May 28, 2009, in

³ See also, e.g., Statement by the President on the Situation in Sri Lanka and Detainee Photographs (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."), available at <http://www.whitehouse.gov/the_press_office/Statement-by-the-President-on-the-Situation-in-Sri-Lanka-and-Detainee-Photographs>.

support of the government's motion to recall the mandate.⁴ Those declarations explain in detail the basis for the Generals' assessment that disclosure of the photographs could reasonably be expected to endanger the lives and safety of U.S. personnel in Iraq, Afghanistan, and Pakistan.

4. On May 21, 2009, the Senate by unanimous consent adopted the Detainee Photographic Records Protection Act of 2009 as an amendment to the Supplemental Appropriations Act, 2009 (H.R. 2346). 155 Cong. Rec. S5798-S5799 (daily ed.) (Amendment 1157). That same day, the Senate passed the Supplemental Appropriations Act. The House of Representatives previously had passed H.R. 2346 on May 14, 2009 without a similar provision regarding detainee photos. 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 the House returns from its current recess on June 2, 2009.

The Detainee Photographic Records Protection Act as passed by the Senate provides that a "covered record" shall not be subject to mandatory disclosure under FOIA, and it defines "covered record"

⁴ The court of appeals granted the government's motion for a 30-day stay of the mandate to April 17, 2009. The government initially determined that it would not seek certiorari, and the mandate issued on April 27, 2009. The government then informed the district court by letter that it intended to release the photographs. That letter has now been superseded by the motion to recall the mandate.

to mean "any record" 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 "for which a certification by the Secretary of Defense under subsection (c) [of the Act] is in effect." 155 Cong. Rec. S5799 (Subsection (b)(1), (d)). Subsection (c) provides that the Secretary of Defense "shall certify" a covered record 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. Ibid. The Act further 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." Ibid. (Subsection (f)). The Act accordingly would permit the Secretary of Defense to preclude release under FOIA of the photographs at issue in this case.

5. The Solicitor General has determined that a petition for a writ of certiorari will be filed unless the Detainee Photographic Records Protection Act is enacted into law, which, upon certification by the Secretary of Defense, would provide a sufficient and independent basis for withholding the photographs

presently at issue. The additional time sought by this application would permit the legislative process to continue and allow the United States to assess further the need to file a petition for a writ of certiorari in light of any new legislation. Additional time is also necessary to permit further consultation with other components of the Department of Justice, the Department of Defense, and other affected agencies about this litigation more generally, and to prepare and print the petition.

Respectfully submitted.

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MAY 2009