



U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

October 16, 2009

Honorable William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

United States Department of Defense v. American Civil Liberties Union,
S. Ct. No. 09-160

Dear Mr. Suter:

I am writing to advise the Court of further developments with respect to the above-captioned case. The petition for a writ of certiorari in this case was filed on August 7, 2009, and the petition is scheduled to be considered at the Court's conference on Monday, October 19, 2009.

This case concerns whether the Freedom of Information Act (FOIA), 5 U.S.C. 552, requires the government to disclose a set of photographic records concerning allegations of abuse and mistreatment of detainees in United States custody overseas. The government's petition for a writ of certiorari seeks review of the court of appeals' judgment that such photographic records are not exempt from disclosure under FOIA Exemption 7(F), notwithstanding that the government has demonstrated that disclosing the photographs could reasonably be expected to endanger the lives or physical safety of United States military and civilian personnel in Iraq and Afghanistan. Pet. i.

The petition explained that, on July 9, 2009, the Senate passed the Department of Homeland Security Appropriations Act, 2010 (H.R. 2892) with an amendment that would authorize the Secretary of Defense to exempt from disclosure photographs relating to the treatment of detainees held by the United States overseas by certifying that the Secretary has determined that such disclosure would endanger United States citizens, members of the Armed Forces, or employees of the United States. Pet. 11-12 n.8; see 155 Cong. Rec. S7370-S7371 (daily ed. July 10, 2009).

On October 13, 2009, the conference report for H.R. 2892 was printed in the Congressional Record. 155 Cong. Rec. at H11,195-H11,257 (reprinting H.R. Conf. Rep. No. 298, 111th Cong., 1st Sess. (2009)). As relevant here, the House and Senate conferees agreed to adopt a modified version of the Senate's detainee-photos amendment as Section 565 of H.R. 2892. See *id.* at H11,231.

Section 565(b) provides that, "[n]otwithstanding any other provision of law to the contrary, no protected document * * * shall be subject to disclosure under [FOIA] or any proceeding under [FOIA]." 155 Cong. Rec. at H11,207. Section 565 defines the term "protected document" to mean "any record" that is a photograph (1) taken between September 11, 2001, and January 22, 2009, that

“relates 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” (2) “for which the Secretary of Defense has issued a certification” under Section 565(d). *Ibid.* (Section 565(c)(1)). Subsection (d), in turn, provides that the Secretary of Defense “shall issue a certification” with respect to such a photograph if the Secretary “determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside of the United States.” *Ibid.* Subsection (f) specifies that Section 565 “shall take effect on the date of enactment” and “apply to any protected document.” *Ibid.* If enacted, Section 565 would therefore permit the Secretary of Defense to issue a certification that would preclude the release under FOIA of the photographs at issue in this case.

Yesterday, October 15, 2009, the House of Representatives voted to agree to the conference report on H.R. 2892 by a vote of 307 to 114. 155 Cong. Rec. at H11,395, H11,410. The Senate is not in session today, and we expect that the Senate will consider the conference report next week. If the Senate agrees to the conference report, H.R. 2892 will be presented to the President for his approval.

In light of these additional legislative developments, the Court may conclude that it would be appropriate to reschedule its consideration of the government’s petition for a writ of certiorari for a subsequent conference to await further developments that may affect the appropriate disposition of this case.

Sincerely,

A handwritten signature in cursive script that reads "Elena Kagan" followed by a stylized flourish.

Elena Kagan
Solicitor General

cc: See Attached Service List

09-0160

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GRIFFINGER & VECCHIONE, P.C.
ONE RIVERFRONT PLAZA
NEWARK, NJ 07102
973-596-4700
LLUSTBERG@GIBBONSLAW.COM

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AMERICAN CIVIL LIBERTIES UNION, ET AL.

CHARLES S. SIMS
PROSKAUER ROSE LLP
1585 BROADWAY
NEW YORK, NY 10036-8299
212-969-3000
ASCHINDEL@PROSKAUER.COM
212-969-2900 (Fax)