



U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

October 8, 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 a recent development 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 tomorrow, October 9, 2009.

This case concerns whether the Freedom of Information Act (FOIA), 5 U.S.C. 552, requires the government to disclose publicly 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) (Section 567(a) of H.R. 2892). On October 1, 2009, the House of Representatives voted 258-163 to instruct its conferees on H.R. 2892 to accept the Senate's detainee-photos amendment. 155 Cong. Rec. at H10,413, H10,417.

Yesterday, October 7, 2009, the House and Senate conferees completed their negotiations and agreed to file a conference report on the compromise legislation. 155 Cong. Rec. at D1148. The summary released by the House and Senate conferees states that the agreed legislation "[c]odifies the President's decision to allow the Secretary of Defense to bar the release of detainee photos." Committees on Appropriations, *FY2010 Conference Summary: Homeland Security Appropriations* 5 (Oct. 7, 2009) (attached). We expect that the conference report will be filed shortly. If Congress

enacts H.R. 2892 into law, it now appears likely the Secretary of Defense will have legal authority to exempt the photographs at issue in this lawsuit from disclosure under FOIA.¹

In light of these recent and significant 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,



Elena Kagan
Solicitor General

cc: See Attached Service List

¹ Respondent ACLU has issued a press release acknowledging that the House and Senate conferees now appear to have agreed to the Senate's amendment, which "would allow DOD to exempt" from FOIA disclosure "[t]he photos [that] were ordered released by [the court of appeals] as part of [respondent's] FOIA lawsuit." ACLU, *Proposed Appropriations Bill to Give Defense Department Authority to Suppress Torture Photos* (Oct. 7, 2009) <<http://www.aclu.org/safefree/general/41255prs20091007.html>>.

09-0160
DEPARTMENT OF DEFENSE, ET AL.
AMERICAN CIVIL LIBERTIES UNION, ET AL.

LUCY A. DALGLISH
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
STE. 1100
1101 WILSON BLVD.
ARLINGTON, VA 22209-2211
703-807-2100
LDALGLISH@RCFP.ORG

ARTHUR EISENBERG
BETH HAROULES
NEW YORK CIVIL LIBERTIES
UNION FOUNDATION
125 BROAD ST.
NEW YORK, NY 10004
212-344-3005

GITANJALI S. GUTIERREZ
SHAYANA KADIDAL
CENTER FOR CONSTITUTIONAL RIGHTS
666 BROADWAY
7TH FLOOR
NEW YORK, NY 10012
212-614-6485

JAMEEL JAFFER
STEVEN R. SHAPIRO
AMRIT SINGH
AMERICAN CIVIL LIBERTIES UNION
125 BROAD STREET, 18TH FLOOR
NEW YORK, NY 10004
212-549-2609
JJAFFER@ACLU.ORG

LAWRENCE S. LUSTBERG, ESQ.
GIBBONS, DEL DEO, DOLAN
GRIFFINGER & VECCHIONE, P.C.
ONE RIVERFRONT PLAZA
NEWARK, NJ 07102
973-596-4700
LLUSTBERG@GIBBONSLAW.COM

09-0160
DEPARTMENT OF DEFENSE, ET AL.
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)



COMMITTEES ON APPROPRIATIONS

Daniel K. Inouye (D-HI), Chairman
United States Senate

David R. Obey (D-OH), Chairman
U.S. House of Representatives

Wednesday, October 7, 2009

Contact: Rob Blumenthal / John Bray, w/Inouye (202) 224-7363
Ellis Brachman / Jenilee Keefe Singer, w/Obey (202) 225-2771

FY2010 CONFERENCE SUMMARY: HOMELAND SECURITY APPROPRIATIONS

The Homeland Security Appropriations Bill is focused on securing our nation's borders and preparing for any potential disaster. The conference agreement totals \$42.776 billion of discretionary budget authority for fiscal year 2010, \$2.648 billion, or 6.6 percent, above fiscal year 2009.

Priorities in the bill are focused on five major goals:

- 1) Securing our borders and enforcing our immigration laws;
- 2) Protecting the American people from terrorist threats and other vulnerabilities, and ensuring the Department is nimble enough to address future threats;
- 3) Preparing for, responding to, and recovering from all-hazards;
- 4) Supporting our State, local, Tribal, and private sector partners in homeland security with resources and information; and
- 5) Giving the Department resources to strengthen financial, procurement, IT systems, and other management tools that it needs to succeed; eliminating or reducing programs that are ineffective or duplicative.

Bill Total

2009 Enacted:	\$40.128 billion
2010 President's Request:	\$43.071 billion (includes Coast Guard Overseas Contingencies)
House Passed:	\$42.617 billion
Senate Passed:	\$42.927 billion
Conference Agreement:	\$42.776 billion

KEY INVESTMENTS

Customs and Border Protection (CBP): \$10.1 billion, \$306 million above 2009, excluding stimulus funding. Funding within CBP for border security includes:

- **Border Security Fencing, Infrastructure, and Technology (BSFIT):** \$800 million for Southwest Border investments, \$25 million above 2009, and \$22 million above the budget request. Through a mix of fencing, technology, and Border Patrol agents on the ground CBP now has nearly 700 miles of Southwest border under effective control, compared to 241 miles in FY 2005.
 - BSFIT funding includes \$40 million, the same as 2009, for additional investments in Northern Border security technology.
- **Border Patrol:** \$3.587 billion, \$86 million above 2009, to fully support 20,163 Border Patrol agents – an increase of 6,000 (or more than 50 percent) since 2006.
- **Southwest Border Counterdrug Initiatives:** \$72.6 million, including \$20 million for additional scanning systems for southbound lanes and checkpoints, and \$26 million above the request for 50 additional CBP officers, 100 Border Patrol agents, and 33 support personnel and equipment to stop

ATTACHMENT

the outbound flow of weapons and currency used in the drug trade. All inspection equipment is to be competitively procured.

- **Western Hemisphere Travel Initiative:** \$145 million, as requested, to continue deploying technology and infrastructure at the 46 busiest border ports of entry and to facilitate travel and security for all travelers.

Immigration and Customs Enforcement (ICE): \$5.437 billion, \$447.7 million above 2009, including:

- **Dangerous Criminal Aliens:** \$1.5 billion for identifying and removing from the United States criminal aliens who are either at-large or already incarcerated in prisons or jails once an immigration judge has ordered them deported.
 - **Secure Communities:** Included in the \$1.5 billion is \$200 million, \$50 million above 2009, for a program that allows local law enforcement to check fingerprints of people booked on criminal charges for immigration and criminal records.
- **Southwest Border Violence:** \$100 million to combat international trade in illicit drugs, weapons smuggling and crimes associated with violence along the Southwest Border. This is part of an overall \$99 million increase over 2009 for ICE investigations. Funding includes:
 - \$70 million, as requested, to expand operations related to Southwest border violence by initiating more ICE investigations, intelligence activities, and international programs;
 - \$10 million above the request for investigations of transnational gangs;
 - \$10 million above the request for expansion of Border Enforcement Security Task Forces (BESTs); and
 - \$10 million above the request for counter-proliferation investigation, including bulk cash and weapons smuggling investigations.
- **Detention Capacity:** Funding for 33,400 detention beds and statutory language requiring that this number of beds be maintained throughout the fiscal year.
- **Worksite Enforcement:** \$135 million, \$6 million above the request, to hire special agents to perform audits of employers.
- **Alternatives to Detention:** \$70 million, \$6 million above the request, to expand this program nationwide

United States Visitor and Immigrant Status Indicator Technology (US-VIST): \$373.7 million, \$73.7 million above 2009, for the US-VISIT program which uses biometrics to track the entry of visitors to the United States. The bill directs that a total of \$50 million be used to implement a biometric air exit capability so that we can determine if individuals have overstayed their visas.

United States Citizenship and Immigration Services: \$224 million, \$122 million above 2009, including \$5 million to cover naturalization of immigrants serving in the U.S. armed services, \$50 million for processing asylum and refugee applications, and \$11 million to expand immigrant integration and outreach efforts that promote legal paths to US citizenship.

- **E-Verify:** Includes a 3-year extension of E-Verify, as requested, and \$137 million to operate the system and further improve its accuracy and compliance rates.

Transportation Security Administration (TSA): \$7.7 billion, \$678.7 million above 2009, excluding stimulus funding. Funding includes:

- **Explosive Detection Systems:** \$778.3 million in discretionary funding to purchase and install explosives detection systems at airports. An additional \$250 million will be provided for this activity through mandatory fees.
- **Air Cargo Security:** \$122.8 million, including \$3.5 million above the budget request for 50 additional inspectors to ensure compliance with the 100% screening mandate set for August 2010 in the 9/11 Act; \$2.2 million above the budget request for inspectors and canine teams to convert 35 legacy teams to proprietary teams; and \$9 million above the budget request for testing and deployment of screening technologies.

- **Surface Transportation Security:** \$110.5 million, including funds for 15 new Visible Intermodal Protective Response security teams and 100 new surface transportation security inspectors to defend against potential attacks against our subways, trains, and buses.

Coast Guard: \$8.8 billion (excluding mandatory funding), \$275.2 million above 2009, including:

- **Deepwater:** \$1.154 billion, \$120 million above 2009, including \$389 million to complete production of the fourth National Security Cutter (NSC #4) and for long lead time materials for NSC #5.
- **Maritime patrol aircraft:** \$138.5 million for adding two patrol aircraft to the service rotation.
- **Fast Response Cutters:** \$243 million for four patrol boats.
- **Response Boat Mediums:** \$121 million to replace 41 foot Utility Boats in use since the early 1970's.
- **Interagency Operation Centers:** \$10 million for centers authorized by the SAFE Port Act.

Federal Law Enforcement Training Center: \$282.8 million for personnel and construction. The bill includes a general provision expanding the definition of "rural" to help the Rural Policing Institute reach jurisdictions in more rural areas of the United States.

Chemical Security: \$103.4 million for risk-based chemical facility security including \$25 million above 2009 to support the coordination and management of regulating high-risk chemical facilities. The increase, combined with the conversion of contract employees to federal employees, will bring the total DHS chemical facility regulatory staffing to 246, which is 168 above 2009. The bill also includes a one year extension of DHS's regulatory authority to secure chemical facilities.

FEMA: \$903 million for FEMA Management and Administration. Together with amounts made available for management and administration from other FEMA accounts, these activities are funded at \$9 million above fiscal year 2009.

Science and Technology: \$1.006 billion, \$73.9 million above 2009, for research on homeland security priorities, such as counter-improvised explosives devices, cyber security, air cargo security, and first responder technologies.

Cyber Security: \$397 million, \$84 million above 2009, to expedite the continuing effort to combat the cyber security threat by reducing the points of access to the federal computer network to prevent hacking; by coordinating with the private sector who owns 85 percent of the Nation's critical infrastructure; and by increasing security training and management of telecommunications, networks, computer systems, and the Internet.

Homeland Security Grants: \$4.17 billion, nearly \$300 million above the request, for grants to first responders and partners in homeland security, including:

- **State Grants:** \$950 million, matching the request and 2009, for grants used to plan, equip and train local first responders to respond to terrorist attacks and catastrophic incidents, including \$60 million for Operation Stonegarden.
- **Urban Area Security Grants:** \$887 million, matching the request and \$50 million above 2009, to help high-risk urban communities prevent, respond to, and recover from terrorist attacks.
- **Rail/Transit Security Grants:** \$300 million, \$50 million above the request, to protect critical transit infrastructure, including freight rail, Amtrak and ferry systems in high-threat areas.
- **Port Security Grants:** \$300 million, \$50 million above the request, to assist ports in enhancing maritime domain awareness and enhancing risk management capabilities to prevent, detect, and respond to terrorist attacks.
- **Emergency Management Performance Grants:** \$340 million, \$25 million above the request and 2009, for all-hazard grants for state and local emergency managers.
- **Fire Grants (including SAFER):** \$810 million, \$220 million above the request and \$35 million above 2009, to help local fire departments address communication, equipment and staffing problems. Of this total, \$420 million is for SAFER, as requested, and \$390 million is for fire grants.

- **Metropolitan Medical Response System:** \$41 million, \$1 million above the request, to help high-threat communities respond to mass casualty incidents.
- **Interoperable Communications:** \$50 million, matching the request and 2009, for help firefighters and emergency responders talk to each other during a crisis.
- **Emergency Operations Centers:** \$60 million, \$25 million above 2009, to equip and upgrade central command facilities used by emergency personnel during disasters.

REAL ID: \$60 million, \$40 million below 2009, to help states comply with REAL ID, which requires state driver's licenses to meet new standards in order to be used for federal identification purposes. Of this total, \$50 million is for the driver's license security grant program, the same as 2009, and \$10 million is for REAL ID hub development.

Emergency Food and Shelter: \$200 million, matching 2009 and \$100 million above the request, to address the increasing needs for food and shelter of our citizens in this time of economic downturn.

Strengthening DHS Financial, Procurement, IT Systems, and other Management tools:

- **Data Center Migration:** \$150 million above 2009 to continue the migration of 24 DHS data centers located across the country and develop the two secure locations they will be housed in. This funding will enable DHS to effectively monitor all IT systems for compliance while reducing the risk of vulnerabilities in information systems. Migration to two centers will also allow the Department to mitigate disaster recovery deficiencies.
- **Office of Security:** \$90.2 million, \$29.3 million above 2009, including: \$20 million for secure identification cards for DHS employees pursuant to Homeland Security Presidential Directive 12; and \$3 million to create a Personnel Security Adjudication Team to reduce the backlog in background investigations for security clearances, which has delayed hiring of critical positions at DHS.
- **Office of the Chief Procurement Officer:** \$68.5 million, \$29.5 million above 2009, including: \$7.5 million to create a new contracting component for classified programs; \$8 million to increase capacity in the acquisition program management division (this increase will bolster the Department's efforts to oversee major Departmental procurements); and \$7 million for 100 additional acquisition professionals across the Department to fill a shortage of qualified contracting professionals.

Domestic Nuclear Detection Office (DNDO): \$383 million, \$131.2 million below 2009. The reduction reflects the Department's delay in developing next-generation radiation portal monitors. DNDO is encouraged to focus on deterrence to alternative pathways for bringing nuclear devices or radiological materials into the country, such as general aviation or small maritime vessels. A total of \$20 million is provided for the Securing the Cities program.

United States Secret Service: \$1.5 billion, \$70 million above 2009. Additional funds are for Secret Service personnel costs, a new overseas field office in Tallinn, Estonia, and to secure the Service's mission-critical computer applications.

SIGNIFICANT CUTS:

Advanced Spectroscopic Portal Monitors: Language is included prohibiting the Department from full-scale procurement of Advanced Spectroscopic Portal Monitors (ASP) monitors until the Secretary submits a report to the Committees on Appropriations certifying that a significant increase in operational effectiveness will be achieved.

Program Eliminations: Cuts \$319 million by eliminating funding for programs such as: advanced spectroscopic portal monitors, trucking industry security grants, and commercial equipment direct assistance program.

OTHER IMPORTANT POLICY ITEMS:

Guantanamo Bay Detention Facility: 1) Prohibits current detainees from being released into the continental United States, Alaska, Hawaii, DC, or any U.S. territory. 2) Prohibits current detainees from being transferred to the continental United States, Alaska, Hawaii, DC, or any U.S. territory, except to be prosecuted and only after Congress receives a plan detailing: risks involved and a plan for mitigating such risk; cost of the transfer; legal rationale and court demands; and a copy of the notification provided to the Governor of the receiving state 14 days before a transfer with a certification by the Attorney General that the individual poses little or no security risk. 3) Current detainees cannot be transferred or released to another country (including freely associated states) unless the President submits to Congress 15 days prior to such transfer: the name of the individual and the country the individual will be transferred to; an assessment of risks posed and actions taken to mitigate such risks; and the terms of the transfer agreement with the other country, including any financial assistance. 4) Requires the President to submit a report to Congress describing the disposition of each current detainee before the facility can be closed. 5) Bars the use of funds to provide any immigration benefits to GTMO detainees other than to allow them to be brought to the U.S. for prosecution. 6) Mandates the inclusion of all GTMO detainees on the TSA No Fly List.

Detainee Photos: Codifies the President's decision to allow the Secretary of Defense to bar the release of detainee photos.

National Bio and Agro-defense Facility (NBAF): Prohibits the obligation of construction funds until DHS undertakes a bio-safety and bio-security mitigation risk assessment to determine requirements for the safe operation of NBAF in Manhattan, Kansas. Once DHS completes the risk assessment, the National Academy of Sciences shall provide an independent evaluation of the DHS study to ensure that risk has been adequately identified and mitigated for in planning for NBAF. In addition, the Secretary of DHS, in coordination with the Secretary of Agriculture, shall report to the Committees on the procedures used to issue a permit for foot-and-mouth disease live virus research and an emergency response plan in the event of an accidental release of a hazardous pathogen originating from NBAF.

Federal Protective Service (FPS): Transfers FPS from ICE to the National Protection and Programs Directorate and requires DHS to maintain a FPS in-service field staff of at least 900 FPS officers to protect Federal buildings.

LORAN-C: Allows for termination of the LORAN-C signal on January 4, 2010, after certification from the Commandant of the Coast Guard that it is not needed for navigation and from the Secretary of DHS that it is not needed as a backup for GPS.

Oversight: Expenditure plans, important to ensure that DHS is appropriately planning, are required for many programs, including: Deepwater; the Secure Border Initiative; the Automated Commercial Environment; US-VISIT; National Cyber Security Initiative; BioWatch; Office of Policy; CIO IT acquisition projects; TSA air cargo security, checkpoint support, and explosive detection systems; USCIS REAL-ID Hub; DND0 portal radiation monitors; ICE Alternatives to Detention; and Next Generation Networks.

Visa Extensions: Provides three year authorization extensions for the religious worker (R visa), rural-serving doctors (Conrad 30-J visa), and investor (EB-5 visa) programs.

Humanitarian Treatment for Surviving Spouses and Other Relatives of Deceased Immigrant Sponsors: Provides statutory authority for USCIS to complete processing of permanent residence applications for surviving spouses and other relatives of immigration sponsors who die during the adjudication process.

Program Extensions: Extends the authorization for PreDisaster Mitigation and Chemical Facility Anti-Terrorism Standards for a year.

###