

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

_____	)	
AMERICAN CIVIL LIBERTIES UNION	)	
et al,	)	
	)	
Plaintiffs,	)	
v.	)	04 Civ. 4151 (AKH)
	)	
DEPARTMENT OF DEFENSE et al,	)	
	)	
Defendants.	)	
_____	)	

**DECLARATION OF MEGAN M. WEIS**

Pursuant to 28 U.S.C. § 1746, I, Megan M Weis, hereby declare under penalty of perjury that the following is true and correct:

1. I am an Associate Deputy General Counsel in the Department of the Army, Office of General Counsel (“OGC”). OGC provides legal advice to the Secretary of the Army and other leaders within the Army. I have held my current position since June 2014. I previously served as an Associate Deputy General Counsel in the Department of Defense (DoD), Office of General Counsel, from April 2009 to June 2014. In that role, I oversaw Freedom of Information Act (“FOIA”) activities including administrative responses and litigation involving DoD. The statements in this declaration are based upon my personal knowledge and upon information made available to me in my official capacity.

2. On October 7, 2003, the American Civil Liberties Union (ACLU) filed a FOIA request for records related to the treatment, death, and rendition of detainees held in United States custody abroad after September 11, 2001. The ACLU filed a complaint in the above captioned case on June 2, 2004.

3. In April 2006, the government asserted it was properly withholding from release 29 photographs it identified as potentially responsive to plaintiffs' request; the Court ordered that a final ruling on the FOIA appeal as to the 29 photographs would govern any additional responsive images. In June 2006, this Court held that eight of the photographs were not responsive to ACLU's request, and ordered the release of the remaining 21 photographs in redacted form. The Second Circuit affirmed this Court's decision in an opinion dated September 22, 2008. The government filed a petition to the United States Supreme Court for certiorari on August 7, 2009. On October 28, 2009, Congress enacted the Protected National Security Documents Act of 2009 (PNSDA), Pub. L. No. 111-83, 123 Stat. 2184. The PNSDA precludes disclosure pursuant to Section 552 of title 5 of any photograph, taken between September 11, 2001, and January 22, 2009, that relates to the treatment of individuals engaged, captured, or detained by U.S. Armed Forces after September 11, 2001, in operations outside of the U.S., upon a certification by the Secretary of Defense that public disclosure of such photographs would "endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."

4. Since the time of the district court's order directing the release of 21 photographs, the government processed and withheld a substantial number of additional images potentially responsive to plaintiffs' FOIA request (the original 21 photographs and the additional images to be referred to collectively as the "photographs"). These photographs were gathered by the U.S. Army Criminal Investigation Command in response to law enforcement investigations of alleged detainee mistreatment.

5. On November 13, 2009, Secretary of Defense Robert Gates certified that disclosure of the photographs would “endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.” Upon remand in light of the certification, on July 11, 2011, this Court noted the Secretary’s certification and granted the government’s motion for summary judgment, ruling that the photographs were not subject to disclosure under FOIA Exemption 3.

6. Under the PNSDA, the Secretary of Defense’s certification expires after three years, and the Secretary may renew the certification at any time. On November 9, 2012, Secretary of Defense Leon Panetta issued a renewed certification regarding the photographs. In his certification renewal, Secretary Panetta determined, upon the recommendations of the Chairman of the Joint Chiefs of Staff, Commander, United States Central Command, and Commander, International Security Assistance Force/United States Forces-Afghanistan, that public disclosure of the photographs would “endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.”

7. In August 2012, I began the process of addressing the upcoming expiration of the 2009 certification. The process by which the certification renewal was executed was similar to the one that was used for the original certification. The government adopted a similar approach in light of the Court’s acceptance of Secretary Gates’s certification as sufficient to uphold the Government’s assertion of FOIA Exemption 3.

8. The General Counsel of the Department of Defense designated me to conduct the review of the photographs on the Secretary’s behalf. *See* 10 U.S.C. § 113(d) (“Unless specifically prohibited by law, the Secretary may . . . perform any of his functions or duties, or

exercise any of his powers through . . . such persons in, or organizations of, the Department of Defense as he may designate.”). I gathered all of the photographs subject to the 2009 certification and reviewed all of them. During this review, I placed the photographs into three categories, and created a representative sample of five to ten photographs in each category to provide to senior military commanders for their review and judgment of the risk from public disclosure of each category. In creating these three categories, I considered the content of each photograph, to include the extent of any injury suffered by the detainee, whether U.S. service members were depicted, and the location of the detainee in the photograph (e.g., at point of capture, at a medical facility). Although the photographs had previously been reviewed and categorized in 2009, I conducted a full review of all of the photographs and recategorized them where appropriate before creating the representative sample. I worked with leadership in the DoD Office of the General Counsel to ensure the representative sample accurately characterized all of the photographs.

9. I then set out to obtain the recommendations of the senior military leadership and field commanders as to whether public release of the photographs would endanger U.S. citizens and government personnel serving overseas. After raising the issue with the senior lawyers for the Chairman of the Joint Chiefs of Staff, the Commander of U.S. Central Command, and the Commander, International Security Assistance Force/United States Forces-Afghanistan, I provided each attorney with the representative sample. I asked each attorney to provide the representative sample to his commander and seek a written recommendation regarding whether the Secretary of Defense should renew the certification of the photographs.

10. On October 28, 2012, General John R. Allen, then the Commander, International Security Assistance Force/United States Forces-Afghanistan, provided a written

recommendation that the Secretary of Defense recertify all of the photographs. A copy of General Allen's recommendation is attached as Exhibit A to this declaration.

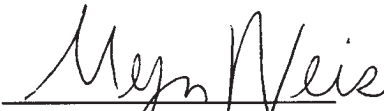
11. On October 29, 2012, General James N. Mattis, then the Commander of U.S. Central Command, concurred in General Allen's recommendation and further explained his view, as the commander of all U.S. forces in the Middle East, that the certification should be renewed as to all of the photographs. A copy of General Mattis's recommendation is attached as Exhibit B to this declaration.

12. General Martin E. Dempsey, the Chairman of the Joint Chiefs of Staff, concurred in the recommendation of the two field commanders and described why he believed the certification should be renewed as to all of the photographs. A copy of General Dempsey's recommendation is attached as Exhibit C to this declaration.

13. After receiving those written recommendations, I met with the General Counsel of the Department of Defense to discuss the recommendations of the military leadership and to review the representative sample. I also prepared a draft memorandum for the Secretary of Defense that would renew the certification as to all of the photographs. This certification renewal was based on the certification memorandum used in 2009 that was accepted by this Court as sufficient in connection with the government's invocation of FOIA Exemption 3. I provided the DoD General Counsel with the draft renewal of the certification, the representative sample, the recommendation memorandums, and a compact disk with all of the photographs. The DoD General Counsel then met with the Secretary of Defense and discussed with him whether to renew the certification. Although I did not attend that meeting, afterward, I received the signed renewal of the certification with respect to all of the photographs, which I ensured was promptly provided to staff from the appropriate committees of Congress.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and information.

Dated this 19th day of December, 2014, in Washington, DC.

  
Megan M. Weis



[REDACTED]  
[REDACTED]  
HEADQUARTERS  
United States Forces-Afghanistan  
Kabul, Afghanistan  
APO AE 09356

USFOR-A-CDR

28 October 2012

MEMORANDUM THRU  
COMMANDER, USCENTCOM  
CHAIRMAN, JOINT CHIEFS OF STAFF

FOR SECRETARY OF DEFENSE

SUBJECT: Impact of Releasing Detainee Photographs Previously Certified Pursuant to the Protected National Security Documents Act of 2009 [REDACTED]

1. [REDACTED] This memorandum provides my current assessment of the impact of publicly releasing the photographs referenced in the *United States Department of Defense v. American Civil Liberties Union*, 543 F.3d 59 (2d Cir. 2008), *vacated & remanded*, 130 S. Ct. 777 (2009), as well as other photographs of similar character taken in the period between 11 September 2011 and 22 January 2009, that are also related to the treatment of individuals engaged, captured or detained after 11 September 2001 by U.S. Armed Forces in operations outside of the United States (hereinafter, the "photographs").
2. [REDACTED] Under the Protected National Security Documents Act of 2009, certain photographs, as defined in the statute, are exempt from disclosure under the Freedom of Information Act when the Secretary of Defense certifies that disclosure would "endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." Having served in the U.S. Central Command Area of Operations for most of the past six years, and as current Commander, United States Forces – Afghanistan (USFOR-A) and Commander, International Security Assistance Forces (ISAF), it is my opinion that the public release of these photographs, even if redacted to obscure identifying information, would result in the harm the statute is intended to prevent.
3. [REDACTED] I strongly believe the release of these photographs will endanger the lives of U.S. Soldiers, Airmen, Marines, Sailors and civilians presently serving in Afghanistan, as well as the lives of our Coalition partners. The release of these photographs will significantly and adversely impact the USFOR-A/ISAF mission to develop a strategic partnership with a stable, secure, prosperous, and democratic Afghanistan, that stands as an ally in the war on terror, and contributes to peace and stability in the region. The photographs will likely cause a very public and emotional response in Afghanistan and the larger Muslim world. These responses can be devastating, like that caused by a release of the film "Innocence of Muslims," which generated 38 protests in a number of cities across Afghanistan, including three that turned violent. The mishandling of religious materials at Bagram in February 2012 also caused a similar outcry, and led to at least 74 demonstrations and 30 Coalition and Afghans deaths. Finally, in January 2012 an internet release of videos showing U.S. Marines urinating on corpses in Helmand province led to violence and Coalition deaths. The release of these photographs will only intensify existing resentment and emotional fervor harbored by the Afghan public.
4. [REDACTED] The release of these photographs will almost certainly exacerbate the conditions that foster "insider threat" attacks. Since January 2012, 38 insider threat attacks have caused [REDACTED]

[REDACTED]

SUBJECT: Impact of Releasing Detainee Photographs Previously Certified Pursuant to the Protected National Security Documents Act of 2009 [REDACTED]

the deaths of 53 individuals and 89 non-death casualties. These conditions will likely be aggravated with the release of images purporting to show detainee mistreatment, and the threat to ISAF forces, particularly U.S. forces, will increase. Of the insider attacks occurring in the last year, many were inspired by the mishandling of religious materials, the film "Innocence of Muslims," and the desecration of bodies by the Marines. Extremist groups, who already encourage this form of attack, would undoubtedly use the release of these photographs to further justify and encourage members of the Afghan National Security Forces (ANSF) to commit these attacks as worthy acts of righteous retribution.

5. [REDACTED] Anti-U.S. groups will likely attempt to misrepresent the photos as evidence of U.S. noncompliance with international law and basic standards of a humane and civilized society. Leaders within the Taliban will likely exploit released photographs for the purposes of recruitment and financial solicitation. The U.S. will likely suffer more generally from negative publicity as media outlets allow the story to proliferate throughout the U.S. and abroad. This could seriously affect the U.S. mission as some viewers will not understand the fact that the photographs depict incidents that occurred several years ago, in another theater of operation; they may be led to believe that this type of conduct is ongoing in detention facilities across Afghanistan. Finally, the release of the photographs is likely to harden any existing anti-US opinion in local and regional media.

6. [REDACTED] I have additional concerns that releasing such photographs would almost certainly exacerbate our current impasse with the Government of the Islamic Republic of Afghanistan (GIROA) over the issue of transferring detainees to Afghan Custody, and increase the pressure to fully release individuals that U.S. forces are currently holding. Over the past two years, Afghan national detainees have been transferred to Afghan custody in a safe and orderly fashion. Considering the current discord over U.S. detention operations, the release of these photographs could embolden President Karzai to call for the immediate release of the over 3,000 detainees transferred to GIROA custody, undermining the delicate security balance in Afghanistan. Many of these detainees continue to pose a serious risk to U.S. forces and U.S. domestic security.

7. [REDACTED] The release of these photographs may have some effect on our planning for NATO's post-2014 presence. Despite significant long-term commitments made at the NATO Summit in Chicago, and Tokyo Donors Conference in 2012, public support in the U.S. and among the members of the Coalition, for a post-2014 military mission in Afghanistan remains fragile. Release of these photos could undermine public and political support for our enduring presence in Afghanistan, as we enter a critical period for planning and national-level decisions on the scope and nature of our long-term military presence – a military presence that remains essential to achieving our vital national interests and defending the homeland.

8. [REDACTED] Afghanistan today is safer, but it is not without risk. There are still attacks against Coalition and Afghan forces, and the release of the photographs would likely boost the recruiting and fundraising that enables those attacks. While no attack has a solitary motivation, such as may be the case in the attack against the U.S. Embassy in Libya, it is my belief, based on my years of experience and judgment, that the release of the photos could be expected to destabilize the country and endanger the U.S., the Coalition, and Afghan lives. Finally, these photographs will likely only further erode the trust-based relationship the U.S. has forged with its Afghan partners, a trust already damaged by the increase in insider attacks that occurred over the last year.



[REDACTED]

SUBJECT: Impact of Releasing Detainee Photographs Previously Certified Pursuant to the Protected National Security Documents Act of 2009 [REDACTED]

9. [REDACTED] For the reasons described above, I recommend that the Secretary of Defense, in accordance with the authority granted under the Protected National Security Documents Act of 2009, renew the certification of Secretary Gates, that public disclosure of these photographs would endanger citizens of the United States, members of the U.S. Armed Forces or employees of the U.S. Government deployed outside the United States.

*Very respectfully,*



JOHN R. ALLEN

General, United States Marine Corps

Commander

International Security Assistance Force/

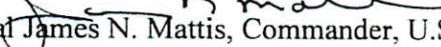
United States Forces-Afghanistan



**COMMANDER  
UNITED STATES CENTRAL COMMAND  
7115 SOUTH BOUNDARY BOULEVARD  
MACDILL AIR FORCE BASE, FLORIDA 33621-5101  
ACTION MEMO**

29 October 2012

FOR: SECRETARY OF DEFENSE  
CHAIRMAN, JOINT CHIEFS OF STAFF

FROM: General  James N. Mattis, Commander, U.S. Central Command

SUBJECT: Request for Certification Renewal of Photographs Pursuant to the Protected National Security Documents Act of 2009

Mr. Secretary, Chairman,

This is my assessment of the impact of publicly releasing the photographs previously certified by Secretary Gates as being not subject to release pursuant to the Protected National Security Documents Act of 2009.

**BACKGROUND**

- Under the Protected National Security Documents Act of 2009, certain photographs are exempt from disclosure under the Freedom of Information Act upon certification by the Secretary of Defense (SECDEF) that public disclosure would “endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.”
- On 29 October 2009, my predecessor, GEN David H. Petraeus, recommended that the SECDEF certify that public disclosure of the photographs referenced in the *United States Department of Defense v. American Civil Liberties Union*, 543 F.3d 59 (2d Cir. 2008), *vacated & remanded*, 130 S. Ct. 777 (2009), as well as other photographs of similar character taken in the period between 11 September 2001 and 22 January 2009 that also relate to the treatment of individuals engaged, captured or detained after 11 September 2001 by U.S. Armed Forces in operations outside of the United States (hereinafter, the “photographs”), would endanger the persons described above. On 13 November 2009, Secretary Gates concurred with this recommendation and made the requested certification.

**DISCUSSION**

- At the time of the initial certification in 2009, the situation in the CENTCOM area of responsibility (AOR) was described as fragile, particularly in Afghanistan. That characterization is still applicable at this time. Based on my intimate familiarity of the current situations in Pakistan, Afghanistan and other locations in the CENTCOM AOR, it is my conclusion that public release of these photographs, even if redacted to obscure identifying information, could reasonably be expected to adversely impact the political, military and civil efforts of the United States by fueling civil unrest, causing increased targeting of U.S. and Coalition forces, and providing a recruiting tool for insurgent and violent extremist groups thereby destabilizing partner nations.

- This request should also be considered in light of the increased insider threat activity which is much more prevalent in Afghanistan than when the original certification was made in 2009. It is my opinion that the release of images which could be construed as showing detainee mistreatment, especially in this context, would pose a far greater threat to U.S. forces than at the time of the original certification.
- I have seen first-hand the tremendous violence that the publication of certain images has incited within the CENTCOM AOR. The Koran burnings in early 2012, the images of Marines urinating on corpses and the “Innocence of Muslims” video release, have all sparked violence that have resulted in death and endangerment to members of our Armed Forces. Given the recent violence sparked by release of inflammatory imagery, I believe that the potential adverse impact from release of these photographs is even higher now than it was in 2009.
- This is an extraordinarily sensitive time in Afghanistan. Specifically, the negotiations for the Bilateral Security Agreement will soon begin. Additionally, U.S. and Coalition forces are drawing down as we continue the process of transferring the responsibility of overall security to the Government of the Islamic Republic of Afghanistan (GIROA). Detention operations in Afghanistan have become a contentious issue, especially regarding the transfer of detention responsibility to the GIROA. The release of these photographs along with the potential violence incited would have a major strategic impact that must be considered alongside the serious risks to U.S. forces.
- For the reasons described above, I conclude that release of the photographs at this time would endanger citizens of the United States, members of the U.S. Armed Forces and employees of the U.S. Government deployed outside the United States.

#### **RECOMMENDATION**

- I recommend that you renew the certification of Secretary Gates, that public disclosure of the photographs would endanger citizens of the United States, members of the U.S. Armed Forces or employees of the U.S. Government deployed outside the United States.

Copy to:  
OSD  
DEPSECDEF  
USD-P  
CCJ2  
CCJ3



████████████████████  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

WASHINGTON, D.C. 20318-9999

ACTION MEMO

FOR: SECRETARY OF DEFENSE

FROM: General Martin E. Dempsey, CJCS

DepSec Action \_\_\_\_\_

*Martin E. Dempsey* 18

SUBJECT: Impact of Releasing Photos Implicated in DoD v. American Civil Liberties Union

The Commander, U.S. Central Command (CDR, USCENTCOM), and Commander, U.S. Forces-Afghanistan (CDR, USFOR-A), request your exemption from public disclosure under the Freedom of Information Act (FOIA) of certain detainee photos described in their memorandums at TAB A. Their requests are in accordance with the Protected National Security Documents Act (PNSDA) of 2009. I strongly concur with their requests.

- Under the PNSDA of 2009, certain photos, as defined in the statute, are exempt from disclosure under FOIA upon certification by the Secretary of Defense that disclosure would “endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.”
- On 13 November 2009, my predecessor, Admiral M. G. Mullen, recommended that Secretary Gates issue such a certification for the photos referenced in the United States Department of Defense v. American Civil Liberties Union, 543 F.3d 59 (2d Cir. 2008), vacated & remanded, 130 S. Ct. 777 (2009), as well as other photos of similar character taken between 11 September 2001 and 22 January 2009 that also relate to the treatment of individuals engaged, captured, or detained after 11 September 2001 by U.S. Armed Forces in operations outside of the United States.
- Secretary Gates concurred with this recommendation and made the requested certification. Since the statute provides that a certification “shall expire 3 years after the date on which the certification or renewal, is issued by the Secretary of Defense,” certification must be renewed no later than 13 November 2012 to continue exempting the photos from disclosure.
- Based on my familiarity with these photos, the fragile situation in the USCENTCOM Theater of Operations, particularly in Afghanistan and Pakistan and the factual description provided by the memos, it is my view that public disclosure of these photos at this time would endanger citizens of the United States, members of the U. S. Armed Forces, or employees of the U. S. Government deployed outside the United States.

RECOMMENDATION: Renew the exemption authorized under the PNSDA of 2009 by again certifying that public disclosure of the photos would endanger citizens of the United States,

████████████████████



members of the U. S. Armed Forces, or employees of the U. S. Government deployed outside the United States by signing TAB B.

Approve \_\_\_\_\_ Disapprove \_\_\_\_\_ Other \_\_\_\_\_

COORDINATION: TAB C

Attachments:

As stated

Prepared By: Brigadier General Richard Gross, USA; OCJCS/LC; 

