

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 LIAM M. APOSTOL

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

1. I am an Associate Deputy General Counsel in the Office of the General Counsel for the Department of Defense (OGC). OGC is a component of the Office of the Secretary of Defense and provides legal advice to the Secretary of Defense, Office of the Secretary of Defense organizations and, as appropriate, other Department of Defense components. I have held my current position since September 2012 and have worked as an attorney for the Department of Defense since 2001. The statements in this declaration are based upon my personal knowledge and upon information made available to me in my official capacity.

2. The purpose of this declaration is to provide the Court with information regarding the process used to assist Secretary of Defense Ashton Carter in making his determination to certify certain photographs in accordance with the Protected National Security Documents Act of 2009 (PNSDA).

3. Approximately six months before the November 9, 2015, expiration of Secretary Panetta's 2012 certification, this office began to implement a robust, multi-phase process of reviewing the photographs that were previously certified under the PNSDA in order to enable military commanders and OGC to provide guidance to the Secretary about possible recertification of some or all of the photographs.

4. Attorneys from OGC and commissioned officers from the office of the Joint Staff, Deputy Director for Special Operations, Counterterrorism and Detainee Operations (Joint Staff J37) devised this review by considering the process undertaken for prior PNSDA certifications and the views of this Court. These offices re-examined and enhanced the thoroughness of the

review process previously undertaken. The review contained only photographs that were previously certified and no additional photographs.

5. In the first step of this process, an attorney from OGC conducted an individualized review of each photograph one-by-one, on behalf of the Secretary. The OGC attorney sorted the photographs into different categories based on what the photographs depicted and then further/additionally sorted based on how likely it was that the public release of the photographs would result in the harm the PNSDA was intended to prevent, which is the endangerment of citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the U.S. The purpose of this sorting was to ensure that a true representative sample that contained the full spectrum of what the full group of photographs depicted would be created for the Secretary's review.

6. Upon completion of this first phase of review, the photographs were then reviewed by commissioned officers assigned to Joint Staff J37, again on behalf of the Secretary. These officers conducted an independent second phase of review with the same purpose – to independently review each photograph based on the likelihood of harm that the PNSDA was intended to prevent and to independently assess whether the initial sorting of the photographs would ensure a true representative sample. The officers, based on their years of military service, past and present duties and responsibilities and military training, collectively have extensive knowledge of the Armed Forces and of the tactics, techniques and means employed by the enemies of the United States in Afghanistan, Iraq, and other regions of the Middle East and Africa.

7. After completion of the second phase of review by the officers in Joint Staff J37, three attorneys in OGC and one uniformed attorney attached to the Department of the Army, conducted a third review, on behalf of the Secretary, of the combined work product of the initial attorney and the officers assigned to Joint Staff J37. Neither the attorney who conducted the initial review for OGC, nor the officers attached to Joint Staff J37 took part in this third review. This third review consisted of the attorneys reviewing each photograph to assess the likelihood of harm it would cause to U.S. citizens, Armed Forces, and employees deployed abroad if publicly disclosed. Upon completion of this third review, the attorneys coordinated with the Joint Staff J37 officers and uniformed attorneys from the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff to reach final consensus.

8. A determination was made that 198 photos were least likely to cause harm and should be considered for non-certification. OGC developed a representative sample of the remaining photographs for review by the Commander of U.S. Central Command (USCENTCOM), the Commander of U.S. Africa Command (USAFRICOM), the Acting Commander of U.S. Forces, Afghanistan (USFOR-A), and the Chairman of the Joint Chiefs of Staff, so that they could provide informed recommendations to the Secretary regarding the potential harms that could be caused by release of any of the remaining photos. The goal of developing this representative sample was to provide the Secretary, and his advisors, with the full understanding of the nature of the all of the photographs. This included the full scope of what the imagery in the photographs depicted as well as the full range of the gravity of the content.

9. Commander, USCENTCOM, General Lloyd J. Austin, U.S. Army, has served in a wide variety of command and staff positions throughout his 40-year career, including commanding United States Forces – Iraq from September 2010 through the completion of OPERATION NEW DAWN in December 2011. Most recently General Austin served as the 33d Vice Chief of Staff of the Army from January 2012 to March 2013. General Austin assumed command of USCENTCOM on 22 March 2013.

10. General Austin stated in his recommendation to Secretary Carter that Within the USCENTCOM area of responsibility (AOR):

[P]olitical transitions, civil wars, and aggressive Violent Extremist Organizations (VEOs) threaten global security and stability. Multiple groups seek to destabilize the region to promote their own interests, degrade our military posture, and put our core national interests at greater risk. Based on my familiarity with these trends, the public release of these photographs, even if redacted to obscure identifying information, could reasonably be expected to adversely impact U.S.' civil and military efforts by fueling unrest, increasing targeting of U.S. military and civilian personnel, and providing a recruiting tool for insurgent and VEOs. These actions would further destabilize the region and create a situation ripe for political upheaval and anarchy.

There are a number of tremendous challenges present in the USCENTCOM AOR that require U.S. military engagement and strategic partnerships. These include U.S. and Coalition-led operations in Afghanistan, Iraq, Syria, Yemen, and Egypt. The potential adverse impact from the release of the photographs to our engagements and partnerships is high. The photographs would be used to fuel distrust, encourage insider attacks against U.S. military forces, and incite anti-U.S. sentiment across the region.

I assess that the release of the photographs will inspire extremist behavior by VEOs. VEOs successfully use social media to inspire and recruit individuals in support of their causes, plan and launch attacks within the AOR, and to encourage attacks within the U.S. Homeland, threatening regional security as well as U.S. core national interests. The VEOs will undoubtedly use the photographs in their propaganda efforts to encourage threats to U.S. service members and U.S. Government personnel.

The release of these photographs should also be considered in context of Al Qaeda, ISIL, and Iranian malign influence. These groups can be reasonably assessed to enflame sectarian tensions in the region. In my opinion, the release of the photographs could be used by these groups to have a major strategic impact to USCENTCOM's mission and priorities.

11. Commander, USAFRICOM, General David M. Rodriguez, U.S. Army, has served nearly 40 years since earning his commission from the United States Military Academy at West Point, New York in 1976. General Rodriguez has commanded at every level, including the United States Army Forces Command, the International Security Assistance Force - Joint Command in Afghanistan, and the 82nd Airborne Division. He became the third commander of USAFRICOM, on April 5, 2013.

12. In his recommendation to Secretary Carter, General Rodriguez detailed the USAFRICOM mission, operating environment, and regional threats. He noted that “Africa continues to present a broad spectrum of dynamic and uncertain global security challenges to the United States and our allies and partners, including the existence of transnational terrorist and criminal networks, regional armed conflict, health epidemics and other humanitarian disasters, corruption, exploitation of natural resources, unstable populations and governance, and maritime crime.” He further noted that, “[i]n North and West Africa, Libyan and Nigerian insecurity increasingly threatens U.S. interests. Terrorist and criminal networks are gaining strength and interoperability. Armed groups control large areas of territory in Libya and operate with impunity. Al-Qaida in the Lands of the Islamic Maghreb, Ansar al-Sharia, al-Murabitun, Boko Haram, the Islamic State of Iraq and the Levant (ISIL) and other violent extremist organizations are exploiting weak governance, corrupt leadership, porous borders across the Sahel and Maghreb to train and move fighters and distribute resources.”

13. General Rodriguez cited the potential for exploitation by extremist adversaries, misrepresentation of the photographs as evidence of U.S. noncompliance with international and humanitarian law, and the potential increased effort to attack personnel at Camp Lemonier, Djibouti. He determined that “[b]ased on my familiarity with the current trends in the African states and their regional partners, and the terrorist and criminal networks that link Africa with Europe, the Middle East, Southeast Asia, and North and South America, it is my conclusion that public release of the Detainee Photographs designated for recertification, even if they were redacted to obscure identifying information, would endanger the lives of U.S. servicemen, U.S. citizens, and government personnel serving overseas in the USAFRICOM AOR.”

14. Acting Commander, USFOR-A, Major General Jeffrey S. Buchanan, U.S. Army, has served for over 30 years since commissioning in 1982. He has been deployed multiple times to Iraq and Afghanistan.

15. General Buchanan stated in his recommendation to Secretary Carter that:

[t]he release of these photographs will significantly and adversely impact the USFOR-A and NATO-led Resolute Support Mission (RSM) to build a stable, secure, prosperous, and democratic Afghanistan that stands as an ally and contributes to the peace and stability in the Central and South Asia sub-region in the USCENTCOM area of responsibility. The designation of RSM as a non-combat mission does not eliminate the fact that U.S. and Coalition Forces and Civilians operate in a hostile environment. Our personnel will continue to be exposed to many risks in the remainder of 2015 and beyond.

16. General Buchanan opined that “[t]heir release could intensify existing and lingering resentment and exacerbate the conditions that foster insurgent ‘insider threat’ attacks,” and cited the killing of Major General Harold Greene by an Afghan military police officer in August 2014 as an high-profile example of an insider threat attack. He stated his belief that the photographs

would be used by VEOs to recruit, inspire violence, and as propaganda in strategic misinformation campaigns.

17. General Buchanan also stated:

[t]he release of the Detainee Photographs should also be considered in light of the emergence of the Islamic State of Iraq and the Levant (ISIL). We have seen some evidence of recruiting efforts in Afghanistan, and some Taliban members have rebranded themselves as ISIL. This rebranding is most likely an attempt to attract media attention, solicit greater resources, and increase recruitment. The budding presence of ISIL in the Afghanistan-Pakistan border areas offers an opportunity for both countries to work together in trust. However, the release of the photographs could erode the Afghanistan-Pakistan military-to-military relationship and the willingness to cooperate to prevent ISIL from establishing a credible presence in Afghanistan.

18. Based upon the assessments of these three senior military officers with decades of experience, the Chairman of the Joint Chiefs of Staff, General Joseph F. Dunford, U.S.M.C., “strongly concur[ed]” with their recommendation to certify the remaining photographs. General Dunford, with nearly 40 years of service since commissioning in 1977, has served as an infantry officer at all levels, to include command of 2nd Battalion, 6th Marines, and command of the 5th Marine Regiment during Operation IRAQI FREEDOM. As the 19th Chairman of the Joint Chiefs of Staff, he is the nation’s highest-ranking military officer, and the principal military advisor to the President, Secretary of Defense, and National Security Council. General Dunford concluded in his recommendation to Secretary Carter that:

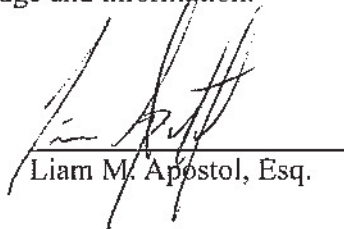
[d]isclosure of any of the photographs recommended for recertification would result in a substantially increased level of danger to citizens of the United States, members of the United States Armed Forces, or employees of the United States government deployed outside the United States. The potential for exploitation and the potential for use as a tool by violent extremist organizations could result in attacks on citizens of the United States, members of the United States Armed Forces, or employees of the United States government deployed outside the United States.

Based on my familiarity with the collection of photographs recommended for recertification, as well as my assessment of the strategic environment, the situations in the USCENTCOM, USFOR-A and USAFRICOM Areas of Responsibility and Theaters of Operations, and the factual descriptions provided by the Commanders, I concur with their recommendations. It is my view that public disclosure of the photographs contained in the collection of photographs would endanger citizens of the United States, members of the U.S. Armed Forces or employees of the U.S. Government deployed outside of the United States.

19. These recommendations, the 198 photographs recommended for non-certification, and the representative sample of the remaining photographs were provided to the Secretary of Defense for his review. The Secretary of Defense declined to certify the 198 photographs. On

November 7, 2015, the Secretary of Defense pursuant to the authority vested in him by the Protected National Security Documents Act, certified the remaining photographs. That certification is attached as Exhibit 1. The 198 non-certified photographs were released on February 5, 2016.

20. 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 26th day of February, 2016, in Arlington, VA.



Liam M. Apostol, Esq.