IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, et.al. Plaintiffs, v. DEPARTMENT OF DEFENSE, et al., Defendants.	)	Civ. Action No. 04-CV-4151 (AKH)

DECLARATION OF GEOFFREY S. CORN

I, Geoffrey S. Corn, declare as follows:

(1) I am an attorney with the Department of the Army. I am currently the Chief of the Law of War Branch for the Office of The Judge Advocate General, Headquarters, United States Army, in Rosslyn, Virginia. My position is also titled as the Special Assistant to the Judge Advocate General for Law of War Matters. I have held this position since July 27, 2004. Prior to commencing this position, I was a Lieutenant Colonel in the U.S. Army Judge Advocate General's Corps. My prior experience includes serving as the Chief of International and Operational Law for Headquarters, U.S. Army Europe, and as a Professor of International Law at the U.S. Army Judge Advocate General's School.

(2) In my current capacity as Special Assistant for Law of War Matters, I advise senior officials of the Department of the Army on all matters related to the law of war. The statements contained in this declaration are based upon my personal knowledge and expertise, upon information provided to me in my official capacity, and upon determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the terms and

requirements of the Geneva Convention Relative to the Treatment of Prisoners of War,[1] and the Geneva Convention Relative to the Treatment of Civilian Persons in Time of War.[2]

(4) The purpose of this declaration is to articulate the basis for withholding certain photographs of individuals detained by the U.S. Army at the Abu Ghraib Prison in Iraq pursuant to FOIA Exemption 3 and the GPW and GC.

FINDINGS OF DECLARANT

(5) I personally and independently examined the photographs referred to as the "Darby photos" (See Second Declaration of Phillip J. McGuire). As a result of this examination, I determined that these photographs contained images of individuals in the custody of U.S. Army forces pursuant to detention related to a period of armed conflict and belligerent occupation in Iraq. I further determined that release of these photographs would pose a serious risk of violating U.S. obligations imposed by either the GPW, and/or the GC. This determination is based on the fact that: (a) the photographs were taken during a period of time when the armed forces of the United States were involved in military operations qualifying as international armed conflict and belligerent occupation within the meaning of these treaties, thereby triggering their provisions; (b) the individuals depicted in the photographs were vested with the protection of one of these treaties as the result of being either enemy prisoners of war, or civilians qualifying for status as "protected persons"; (c) both of these treaties expressly require the United States, as a detaining power, to treat these individuals humanely and protect them from exposure to insults or public curiosity; (d) these treaties are binding on the U.S. Army; (e) the release of these photographs, even with obscured faces and genitals, would be inconsistent with the obligation of the United States to treat the individuals depicted humanely and would pose a great risk of subjecting these individuals to public insult and curiosity.

[1] Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, T.I.A.S. 3364 [hereinafter GPW].
[2] Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, T.I.A.S. 3365 [hereinafter GC].

SUPPORTING ANALYSIS

(6) The Darby photos were taken during the period when the United States was engaged in an international armed conflict and a belligerent occupation within the meaning of article 2 common to the Geneva Conventions of 1949. As a result of this conflict and belligerent occupation, the provisions of the GPW and the GC protecting enemy prisoners of war and "protected persons" in the custody of the armed forces of the United States came into force. These provisions are binding on the United States as both these treaties have been ratified by the United States. These provisions serve as controlling authority for determining whether release of the subject photos would be consistent with United States obligations under the law of war.

(7) The four Geneva Conventions of 1949[3] were drafted for the express purpose of protecting victims of war. The history of armed conflict that animated the drafters of the Conventions demonstrated that one major category of potential war victim in need of international legal protection was individuals subject to deprivation of liberty at the hands of a party to a conflict or an occupying power. Such individuals historically fell into three categories: enemy prisoners of war; civilians subjected to belligerent occupation; and alien civilians who find themselves in the territory of a belligerent nation at the outbreak of hostilities or thereafter. In order to provide for the humane treatment of these and anticipated future victims of war, the GPW and the GC established provisions for the benefit of such individuals when subjected to deprivation of liberty.

(8) With regard to prisoners of war, the following provisions of the GPW reflect the fundamental humane treatment obligation:

(a) Article 13 mandates that "Prisoners of war must at all times be humanely treated." It also mandates that "prisoners of war must at all times be protected, particularly against … insults and public

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[3] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, T.I.A.S. 3362 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, August 12, 1949, T.I.A.S. 3363 [hereinafter GWS Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, T.I.A.S. 3364 [hereinafter GPW]; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, T.I.A.S. 3365 [hereinafter GC].

curiosity." According to the International Committee of the Red Cross (ICRC) Commentary[4] to the article:

> The present provision adds the notion of protection. To protect someone means to stand up for him.... It is therefore a positive obligation for the Detaining Power at all times which follows from the obligation to treat prisoners humanely. The protection extends to moral values, such as the moral independence of the prisoner (protection against acts of intimidation) and his honour (protection against insults and public curiosity).

(b) Article 14 mandates that "Prisoners of war are entitled in all circumstances to respect for their persons and their honour." According to the ICRC Commentary to this article:

> Respect for the person goes far beyond physical protection and must be understood as covering all the essential attributes of the human person.
> ....
> The sentiment of honour is one of the factors of personality.... [Prisoners of war] must be protected against libel, slander, insult and any violation of secrets of a personal nature, and they must be so protected not only *vis-à-vis* their guards, but also (although this is sometimes more difficult to achieve) *vis-à-vis* their fellow prisoners.

(9) As noted above, the protection of the honor and dignity of individuals subject to detention by a party to a conflict is not limited to enemy prisoners of war. The GC mandates analogous protections for protected civilians[5] (even civilians who engaged in activities in opposition to the occupying force prior to the deprivation of liberty) in the custody of an occupying force. According to article 27:

> Protected persons [civilians subject to the authority of a belligerent occupying power] are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

According to the ICRC Commentary to this article:

> The obligation to grant protected persons humane treatment is in truth the

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[4] *See, e.g.,* Commentary, I Geneva Convention For the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (Jean S. Pictet ed.,1960) [hereinafter GWS Commentary].

[5] Civilians who qualify for status as "protected persons" in accordance with article 4 of the GC.

> "leitmotiv" of the four Geneva Conventions. … The word "treatment" must be understood here in its most general sense as applying to all aspects of man's life. It seems useless and even dangerous to attempt to make a list of all the factors which make treatment "humane". …What constitutes humane treatment follows logically from the principles explained in the last paragraph, and is further confirmed by the list of what is incompatible with it. In this connection the paragraph under discussion mentions as an example, using the same wording as the Third Geneva Convention, any act of violence or intimidation inspired not by military requirements or a legitimate desire for security, but by a systematic scorn for human values (insults, exposing people to public curiosity, etc.). The Convention does not confine itself to stipulating that such acts are not to be committed. It goes further; it requires States to take all the precautions and measures in their power to prevent such acts and to assist the victims in case of need.
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> The requirement of humane treatment and the prohibition of certain acts incompatible with it are general and absolute in character, like the obligation enjoining respect for essential rights and fundamental liberties.

(10) Based upon the foregoing authorities, the release of the subject photographs would violate the fundamental obligation of the armed forces of the United States to treat the detainees depicted in these photographs humanely. Moreover, as plaintiffs specifically seek photographs depicting abuse or mistreatment of detainees, such responsive photos if released would clearly violate the obligations of the United States under the Geneva Conventions because of their inherent humiliating content. Although these individuals have already been treated improperly, I believe the armed forces should, consistent with the Government's obligations under the Geneva Conventions, take all necessary measures to mitigate further suffering on the part of these individuals.

(11) Further, the release of the subject photographs would violate the treaty provisions protecting these individuals, whether as a result of their status as enemy prisoners of war or civilians who qualify as protected persons, from insult or public curiosity. Furthermore, while these provisions obligate the armed forces to prevent release of any photographs of persons protected by the Conventions, this obligation is clearly applicable in this case due to the nature of the photographs. The depictions of abuse or mistreatment of detainees would clearly subject the individuals depicted to public curiosity or insult because it is almost inconceivable that release of such photographs would not generate renewed public curiosity related to the details depicted in

the photographs. Even if the identities of the subjects of the photographs are never established (which is by no means assured as the result of obscuring their faces), each individual beneficiary of these treaty protections will undoubtedly suffer the personal humiliation and indignity accordant with the knowledge that these photographs have been placed in the public domain.

(12) My opinion of the obligation that the U.S. has to these individuals does not change after release of the individuals from detention. Termination of detention does not eliminate the risk of public humiliation as the result of the release of the pictures at issue. Therefore, a good faith application of the obligations imposed upon the U.S. Army by the above referenced treaty provisions requires the same result even following release of the individuals from detention.

(13) Finally, I consider the prospect of releasing the subject photographs pursuant to a request made under FOIA a situation materially distinguishable from a use of the same photographs during criminal proceedings related to the service members responsible for the abuse depicted therein. Prosecution of individuals suspected of responsibility for detainee abuse implements an equally important obligation established by these treaties – the suppression of breaches. These prosecutions also contribute to the deterrence of future violations of the law of war, which is a critical component of the U.S. obligation, as established in Article 1 common to the four Geneva Conventions, to respect and ensure respect for these treaties.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25 day of March 2005.

Geoffrey S. Corn

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