

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION,
CENTER FOR CONSTITUTIONAL RIGHTS,
PHYSICIANS FOR HUMAN RIGHTS,
VETERANS FOR COMMON SENSE AND
VETERANS FOR PEACE,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, AND ITS
COMPONENTS DEPARTMENT OF ARMY,
DEPARTMENT OF NAVY, DEPARTMENT OF
AIR FORCE, DEFENSE INTELLIGENCE
AGENCY; DEPARTMENT OF HOMELAND
SECURITY; DEPARTMENT OF JUSTICE,
AND ITS COMPONENTS CIVIL RIGHTS
DIVISION, CRIMINAL DIVISION, OFFICE OF
INFORMATION AND PRIVACY, OFFICE OF
INTELLIGENCE POLICY AND REVIEW,
FEDERAL BUREAU OF INVESTIGATION;
DEPARTMENT OF STATE; AND CENTRAL
INTELLIGENCE AGENCY,

Defendants.

ECF CASE

04 Civ. 4151 (AKH)

DECLARATION OF
EDWARD R. CUMMINGS

EDWARD R. CUMMINGS, pursuant to 28 U.S.C. § 1746, declares as follows:

(1) I am an attorney with the Office of the Legal Adviser, U.S. Department of State, and have served in several positions in this office since 1979. I am currently the Assistant Legal Adviser for Arms Control and Verification. I have been a member of the Senior Executive Service since 1987. My prior senior experience includes serving as the Assistant Legal Adviser

for Political Military Affairs (1987-95), and as the Legal Adviser to the U.S. Mission in Geneva (1995-2000). Prior to this, I served for five years within the Office of the Legal Adviser as an Attorney-Adviser in the Office of Political Military Affairs and for four years as an Attorney-Adviser in the Office of African Affairs. Prior to joining the State Department, I served on active duty in the U.S. Army (1972-79), including five years in the Office of the Judge Advocate General of the Army, International Affairs Division, which is the office responsible for law of war matters for the Department of the Army. I also served in that office as a Reserve Officer (1979-2000).

(2) In these various capacities, I have gained more than thirty years of experience in providing legal advice on matters related to the law of armed conflict. I have worked intensively on issues related to the requirements of the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War (hereinafter referred to as the "Third Geneva Convention") and the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (hereinafter referred to as the "Fourth Geneva Convention"). I have had official responsibility for interpreting the Geneva Conventions on behalf of the Department of State since 1979 and have had responsibility for negotiating treaties related to those Conventions.

(3) By virtue of this experience, I am one of the senior legal experts in the U.S. Department of State on law of war issues. The statements contained in this declaration are based on my personal knowledge and expertise, on information made available to me in my official capacity, and on determinations that I have made in accordance therewith.

(4) The purpose of this declaration is to set forth an analysis of legal issues related to the release of photographs of individuals detained by the U.S. Army at the Abu Ghraib prison in

Iraq and U.S. legal obligations under the Third and Fourth Geneva Conventions. While I have not read the record of the case in litigation, I have been given oral briefings as to the nature of litigation and understand the general legal issue before the court to be whether the release of photographs identifying or displaying abusive treatment of detainees protected by the Third or Fourth Geneva Conventions would be consistent with those Conventions.

(5) I have been informed that, as a general matter, plaintiffs in this litigation seek, under the Freedom of Information Act, 5 U.S.C. § 552, records relating to the alleged physical or mental abuse or mistreatment of detainees held by the United States in, inter alia, Iraq, Afghanistan, and Guantanamo Bay. More specifically, I am aware that plaintiffs have specifically requested photographs of detainee abuse or mistreatment taken or provided by Joseph Darby, a military policeman assigned to Abu Ghraib, to the Army Criminal Investigation Command. See Pls. List of 70 Specific Requests, Item 69, dated August 16, 2004 (the “responsive Darby photos”).

(6) I have not personally reviewed the responsive Darby photographs but have been informed that they consist of photographs taken of detainees in U.S. custody at Abu Ghraib in Iraq during the armed conflict or during the subsequent belligerent occupation by the Coalition. Accordingly, individuals depicted in the responsive Darby photographs were entitled, at the time the photographs were taken, to protections under either the Third or Fourth Geneva Conventions.

(7) For the reasons detailed in the following analysis, I believe that the public release of the responsive Darby photographs would be inconsistent with the U.S. Government’s obligations under the Third and Fourth Geneva Conventions.

A. Relevant International Obligations

(8) Common Article 2 of all four of the Geneva Conventions of 1949 provides that the Conventions apply “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Common Article 2 further states that the Conventions shall also apply “to all cases of partial or total occupation of the territory of a High Contracting Party.”

(9) The United States and Iraq are High Contracting Parties to each of these Conventions. The photographs at issue depict images of individuals who were in the custody of U.S. forces in Iraq during the period of armed conflict and belligerent occupation of Iraq. Thus, relevant provisions of the Geneva Conventions apply to the disposition of these photographs.

(10) With regard to prisoners of war, Article 13 of the Third Geneva Convention requires that a Detaining Power with custody over a prisoner of war must protect that prisoner of war, “particularly against acts of violence or intimidation and against insults and public curiosity.”

(11) With regard to protected persons detained by a Party to an armed conflict or by an Occupying Power of which they are not nationals, Article 27 of the Fourth Geneva Convention states:

Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be treated humanely, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

B. State Practice Regarding Release of Photographs

(12) Article 13 of the Third Geneva Convention and Article 27 of the Fourth Geneva Convention do not expressly address the taking of pictures and publication of photographs of prisoners of war or protected persons. There may be certain circumstances in which the publication of photographs of detainees would not run afoul of the Geneva Conventions, as, for instance, when detainees are not individually identifiable and the photographs do not show detainees in degrading or humiliating situations. However, where the protection of the dignity of prisoners of war or detainees might be undercut by photographing them and publishing the photographs (in newspapers or journals, for example), the U.S. Government historically has interpreted these Articles to mean that such publication would be holding detainees up to public curiosity and therefore would be forbidden. Where, as here, the photographs requested are of the abuse or mistreatment of detainees, such images would, by definition, depict detainees in degrading or humiliating positions or situations. Release of such photographs would be inconsistent with the obligations of the United States under Third and Fourth Geneva Conventions, as the United States has traditionally interpreted those obligations, because the release would subject the detainees depicted in the photographs to public curiosity.

(13) For example, the United States traditionally has protested the parading of American prisoners of war (as in Hanoi in 1966) or exposing prisoners of war on television. President George Bush described the "brutal parading" of Allied pilots by Iraq in January 1991 as a violation of the Geneva Conventions.¹ In a formal protest to the Government of Iraq, the

¹ See U.S. Department of State Dispatch, Vol. 2, No. 4 (January 28, 1991) ("Iraqi Mistreatment of POWs") at <http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1991/html/Dispatchv2no04.html>

United States stated that ". . . unlawful coercion and misuse of prisoners of war for propaganda purposes, the failure to respect their honor and well-being, and the subjection of such individuals to public humiliation" were violations of the Geneva Conventions.

(14) In 2003, several photographs were published of the in-processing of detainees into Guantanamo. After strong international criticism of the Guantanamo photographs, DOD issued specific guidelines on the kind of photographs that would be permitted. The Guantanamo guidelines state that "[t]he policy of limiting photography is in accord with treating detainees consistent with the protections provided under the Third Geneva Convention. This is not a change in policy. It is in conformity with long-standing U.S. procedures and practice." (Attached as Exhibit B.)

(15) These guidelines were consistent with guidelines in long-standing military regulations on prisoners of war. Specifically, Army Regulation 190-8, paragraph 1-5d provides, "Photographing, filming, and video taping of individual [enemy prisoners of war, civilian internees and retained personnel] for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of [enemy prisoners of war, civilian internees and retained personnel] or facilities will be taken unless approved by the senior Military Police officer in the Internment Facility commander's chain of command." Paragraph 1-9 further provides, "In the interest of national security, and the protection of the prisoners from public curiosity, and in adherence to the [Third and Fourth Geneva Conventions], [enemy prisoners of war, civilian internees and retained

(attached as Exhibit A).

personnel] and other detainees will not be photographed as per paragraph 1-5d." (Attached as Exhibit C.)

(16) DOD issued similar guidelines in connection with embedded news media and the conflict in Iraq. Those guidelines provide that "no photographs or other visual media showing an enemy prisoner of war or detainee's recognizable face, name tag or other identifying feature or item may be taken." It also prohibits "still or video imagery of custody operations or interviews with persons under custody."²

(17) In addition to the practice of States, the International Committee for the Red Cross ("ICRC") has had a significant influence on the interpretation of Article 13. The ICRC, which focuses on preserving the integrity and dignity of individuals in detention, generally has taken the view that Article 13 of the Third Geneva Convention requires parties to a conflict to avoid publication of images that show prisoners of war in degrading or humiliating positions or allow the identification of individual POWs.

(18) Images such as group photographs that neither identify individuals nor show mistreatment are generally less objectionable. The practice of High Contracting Parties as well as neutral organization such as the ICRC suggest that such images do not provoke the level of protest that images that degrade or identify prisoners do.

(19) In conclusion, given my understanding of the content of the photographs at issue, which not only permit identification of individual detainees protected by the Third or Fourth Conventions, but which also show detainees in positions that the U.S. Government believes are

² See

[http://www.iimefpublic.usmc.mil/public/iimefpublic.nsf/DPSByID/04BDD33ECB9A305685256F79005C91A9/\\$file/I-MEF_MediaEmbedInfoPkg.pdf](http://www.iimefpublic.usmc.mil/public/iimefpublic.nsf/DPSByID/04BDD33ECB9A305685256F79005C91A9/$file/I-MEF_MediaEmbedInfoPkg.pdf), at Enclosure B para.

(k)(18)-(19) (attached as Exhibit D).

humiliating or degrading, I believe that the public release of these photographs would conflict with the obligations of the U.S. Government as a High Contracting Party to the Third and Fourth Geneva Conventions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of March, 2005.



Edward R. Cummings
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