United States, Public Curiosity

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: United States Court of Appeals for the Second Circuit, American Civil Liberties Union v. Department of Defense, No. 06-3140-cv, September 22, 2008, available at http://www.ca2.uscourts.gov/decisions. Footnotes omitted]

[…]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[…]

(Decided: September 22, 2008)

[…]

AMERICAN CIVIL LIBERTIES UNION, [*et al.*] […] *Plaintiffs-Appellees,*

against

DEPARTMENT OF DEFENSE, *[et al.*] […] *Defendants-Appellants,*

[…]

The United States Department of Defense and Department of the Army appeal from orders of the United States District Court for the Southern District of New York directing them to release 21 photographs depicting abusive treatment of detainees by United States soldiers in Iraq and Afghanistan. Appellants claim that the photographs are exempt from disclosure under the Freedom of Information Act.

Affirmed

[…]

JOHN GLEESON, *United States District Judge*:

The United States Department of Defense and Department of the Army (referred to here as "the defendants") appeal from orders of the United States District Court for the Southern District of New York […] directing them to release 21 photographs pursuant to the Freedom of Information Act ("FOIA" or "the Act"), […] (2006). The photographs depict abusive treatment of detainees by United States soldiers in Iraq and Afghanistan.

On appeal, the defendants contend that the exemption in § 552(b)(7)(F) for law enforcement records that could reasonably be expected to endanger "any individual" applies here because the release of the disputed photographs will endanger United States troops, other Coalition forces, and civilians in Iraq and Afghanistan. They further claim that, notwithstanding the redactions ordered by the district court of 20 of the 21 photographs, disclosure will result in unwarranted invasions of the personal privacy of the detainees they depict, justifying nondisclosure under § 552(b)(6) and (7)(C).

We hold that FOIA exemption 7(F) does not apply to this case. We further hold that the redactions ordered by the district court render the privacy exemptions unavailable to the defendants. Accordingly, we affirm.

BACKGROUND

On October 7, 2003, the plaintiffs filed joint requests with the defendants and various other agencies pursuant to FOIA […], seeking records related to the treatment and death of prisoners held in United States custody abroad after September 11, 2001, and records related to the practice of "rendering" those prisoners to countries known to use torture. On June 2, 2004, having received no records in response to the requests, the plaintiffs filed the complaint in this case, alleging that the agencies had failed to comply with the law.

On August 16, 2004, to facilitate the search for relevant records, the plaintiffs provided a list of records they claimed were responsive to the FOIA requests. Among the records listed were 87 photographs and other images of detainees at detention facilities in Iraq and Afghanistan, including Abu Ghraib prison. The images from Abu Ghraib (the "Abu Ghraib photos") depicted United States soldiers engaging in abuse of many detainees. The soldiers forced detainees, often unclothed, to pose in dehumanizing, sexually suggestive ways.

The defendants initially invoked only FOIA exemptions 6 and 7(C) as their ground for withholding the Abu Ghraib photos. Those provisions authorize withholding where disclosure would constitute an "unwarranted invasion of personal privacy." […] The defendants contended in their motion for summary judgment that these personal privacy exemptions warranted the withholding of the Abu Ghraib photos in order to protect the privacy interests of the detainees depicted in them. The plaintiffs argued in their cross-motion that redactions could eliminate any unwarranted invasions of privacy.

[…]

On September 29, 2005 the district court rejected the defendants' arguments and ordered the disclosure of the Abu Ghraib photos. […] (the "Abu Ghraib order"). It determined that redaction of "all identifying characteristics of the persons in the photographs" would prevent an invasion of privacy interests. […] To the extent that an invasion of privacy might occur in spite of the redactions, the court found that such an invasion would not be "unwarranted" since the public interest involved "far outweighs any speculative invasion of personal privacy."

[…]

The defendants appealed the Abu Ghraib order, but in March 2006, while the appeal was pending, many of the Abu Ghraib photos were published on the internet by a third party. The appeal was thereafter withdrawn.

After the appeal was withdrawn, the plaintiffs sought clarification regarding other detainee abuse images, and the defendants confirmed that they were withholding an additional 29 images, again based on exemptions 6, 7(C) and 7(F). Whereas the Abu Ghraib photos were taken at that one location, the 29 photographs were taken in at least seven different locations in Afghanistan and Iraq, and involved a greater number of detainees and U.S. military personnel. And while many of the Abu Ghraib photos depicted unclothed detainees forced to pose in degrading and sexually explicit ways, the detainees in the 29 photographs were clothed and generally not forced to pose. The photographs were part of seven investigative files of the Army's Criminal Investigations Command ("Army CID"), and were provided to Army CID in connection with allegations of mistreatment of detainees. In three of the investigations, Army CID found probable cause to believe detainee abuse had occurred related to the photographs at issue here. Soldiers under scrutiny in two of the investigations have been punished under the Uniform Code of Military Justice.

On April 10, 2006, the district court established an expedited procedure for determining whether the 29 images could properly be withheld. By orders dated June 9, 2006 and June 21, 2006, the district court ordered the release of 21 of the disputed photos, all but one in redacted form. […]

The defendants' appeal of the June 2006 orders is now before us. […] We refer here to the 21 photographs in dispute as the "Army photos."

DISCUSSION

[…]

C. FOIA Exemptions 6 and 7(C)

FOIA exemptions 6 and 7(C) protect against disclosure that implicates personal privacy interests. The government may withhold records in "personnel and medical files and similar files" only when their release "would constitute a clearly unwarranted invasion of personal privacy." […]

[…]

1. The Detainees' Privacy Interest

[…]

The district court also rejected arguments that release of the photographs would conflict with the Geneva Conventions' requirement that detaining powers protect any prisoner of war against insults and "public curiosity." […] Instead, the court found that redaction is adequate to protect the detainees' identities and to preserve their honor. […]

[…] The defendants emphasize that […] (c) the Geneva Conventions obligate a detaining power to respect the dignity of detainees and avoid exposing them to "public curiosity," […]. For these reasons, the defendants assert that the release of images that could lead to the identification of the detainees by themselves or others presents an invasion of the detainees' privacy.

[…]

2. The Geneva Conventions

The defendants argue that the Geneva Conventions, which protect prisoners of war and detained civilians "against insults and public curiosity," serve as further basis for a finding that FOIA's privacy provisions apply to prevent release of the Army photos. The Third Geneva Convention, covering lawful belligerents, provides that "prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity." […] [GC III, Art. 13]. The Fourth Geneva Convention, covering civilians, states:

Protected persons 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.

[…] [GC IV, Art. 27]. Both of these treaties were designed to prevent the abuse of prisoners. Neither treaty is intended to curb those who seek information about prisoner abuse in an effort to help deter it.

However, government officials have concluded that release of photographs like the ones in this case would clash with the Geneva Conventions by subjecting the detainees depicted in the photos to public curiosity. […] (("[R]elease of [the Abu Ghraib] 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."); (release of the Army photos will subject detainees to public curiosity because "[e]ven if the identities of the subjects of the photographs are never established . . . 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").)

The defendants do not claim that the Geneva Conventions constitute specific statutory authorization to withhold these photographs under FOIA's exemption 3, […] but rather that FOIA should be read to be consistent with the Geneva Conventions […]. The defendants' current litigation position, however, is not at all consistent with the executive branch's prior interpretations of the Geneva Conventions.

As an initial matter, the government does not currently interpret the Geneva Conventions to prohibit dissemination of photographs or videos of detainees when those detainees are not identifiable. […] ("[T]he Department of Defense interprets the [Third Geneva Convention] to protect POWs from being filmed or photographed in such a manner that viewers would be able to recognize the prisoner. Photos and videos depicting POWs with their faces covered or their identities otherwise disguised [do] not, in the view of the Department of Defense, violate GPW art. 13."). However, the defendants note that the government's current practice does not allow dissemination of photographs of detainees being abused, even if they are not identifiable. […] The defendants argue that a photograph of abuse is so humiliating that its dissemination always opens the detainee to "public curiosity," even if the detainee cannot be identified. But this was not always the government's interpretation of the Geneva Conventions.

Prior to this litigation, the United States has not consistently considered dissemination of photographic documentation of detainee mistreatment to violate the public curiosity provisions of the Geneva Conventions, at least not when the detainee is unidentifiable and the dissemination is not itself intended to humiliate. The 1929 Geneva Conventions, in force during World War II, provided prisoners of war the same protection from "public curiosity" that the Third and Fourth Geneva Conventions offer to prisoners of war and civilians. […] ("[Prisoners of war] must at all times be humanely treated, and protected, particularly against acts of violence, insults and public curiosity.") […] At the end of the war, the United States government widely disseminated photographs of prisoners in Japanese and German prison and concentration camps. […] These photographs of emaciated prisoners, corpses, and remains of prisoners depicted detainees in states of powerlessness and subjugation similar to those endured by the detainees depicted in the photographs at

issue here. Yet the United States championed the use and dissemination of such photographs to hold perpetrators accountable.

The government responds that the individuals in the World War II photographs were not in the military custody of the United States, and thus the United States was under no duty to protect them from public curiosity. Therefore, the argument continues, there is no inconsistency between the United States' actions in publicizing photographs documenting German and Japanese detainee abuse and its current position that publicizing photographs documenting its own abuse of detainees would violate the Geneva Conventions. On this clever interpretation, the United States at the end of World War II was properly facilitating "public curiosity," but Nazi Germany and Imperial Japan were obligated by the 1929 Geneva Conventions to defeat those efforts to document their violation of the 1929 Geneva Conventions. We are not persuaded. The far more sensible interpretation of the United States' position is that the United States did not at that time consider documentation of Geneva Convention violations in order to hold the perpetrators accountable to constitute "public curiosity," even when the documentation included photographs of detainees subject to mistreatment.

Further, the defendants' contention that documentation of detainee abuse constitutes public curiosity is impossible to square with the United States' role as the lead prosecuting party of Imperial Japanese General Sadao Araki and others before the International Military Tribunal for the Far East ("IMTFE"). In that case, the IMTFE found the Japanese government's censorship of photographs depicting mistreatment of prisoners of war to be evidence of the government's complicity in war crimes, including violations of the 1929 Geneva Conventions. […] The United States' leading role in that prosecution would have been odd, to say the least, if the United States at the time took the position that the dissemination of photographs showing prisoners of war subject to mistreatment was itself a war crime.

In light of this contrary past practice, we do not defer to the government's current litigation position concerning the meaning of the "public curiosity" provisions of the Third and Fourth Geneva Conventions. […] We hold that Article 13 of the Third Geneva Convention and Article 27 of the Fourth Geneva Convention do not prohibit dissemination of images of detainees being abused when the images are redacted so as to protect the identities of the detainees, at least in situations where, as here, the purpose of the dissemination is not itself to humiliate the detainees. […] This construction is consistent with the past practice of the United States. It is also the construction publicly adopted by the International Committee for the Red Cross ("ICRC"), which has "had a significant influence on the interpretation of Article 13," […] (noting that ICRC spokesperson stated that photographs of detainee abuse could be released if faces and identifying features are obscured).

More importantly, this construction is consistent with the purpose of furthering humane treatment of captives, which animates Article 13 of the Third Geneva Convention and Article 27 of the Fourth Geneva Convention. […] Release of the photographs is likely to further the purposes of the Geneva Conventions by deterring future abuse of prisoners. To the extent the public may be "curious" about the Army photos, it is not in a way

that the text of the Conventions prohibits; curiosity about “enemy prisoners being subjected to mistreatment through the streets,” […], is different in kind from the type of concern the plaintiffs seek to inspire. […] Heightened public awareness of events depicted in the Army photos – some of which appear to violate the Geneva Conventions – would serve to vindicate the purposes of the Geneva Conventions without endangering the lives or honor of detainees whose identities are protected.

As the Third and Fourth Geneva Conventions do not prohibit disclosure of photographs of detainee abuse when, as here, the photographs are redacted and the disclosure is not itself intended as an act of humiliation, no need arises to alter the standard analysis under FOIA’s exemption 6 and 7(C) in order to construe that statute to be consistent with those conventions. Therefore, the defendants’ expressed desire to comply with the Geneva Conventions does not elevate the privacy interests in withholding the redacted Army photos above a de minimis level.

CONCLUSION

As stated above, the defendants have failed to identify an individual who could reasonably be expected to be endangered within the meaning of exemption 7(F). The district court’s redactions are sufficient to render inapplicable exemptions 6 and 7(C), even in light of the Third and Fourth Geneva Conventions. Accordingly, we affirm.

Discussion

1. Does the US government consider that persons arrested in Iraq, or in Afghanistan, in the “war on terror” are protected by Geneva Conventions III or IV? In this case? In other cases [**See** United States, Status and Treatment of Detainees Held in Guantánamo Naval Base]
2.
    a. Do you agree with the Court of Appeal that Article 13 of GC III and Article 27 of GC IV do not provide for a total prohibition on releasing photographs depicting prisoners of war? According to you, how should the said provisions be understood? What was the purpose of the drafters of the Conventions when they inserted such provisions?
    b. Does it make a difference with regard to the aforementioned prohibition whether the prisoners were ill-treated or treated in conformity with IHL?
    c. Why would photographs of prisoners being ill-treated in violation of IHL promote respect for IHL and deter future abuse?
3. Would it be acceptable to release photographs of identifiable POWs if the purpose of doing so was to prove that the prisoners were still alive and were being well treated?
4. In your opinion, does the conclusion of the Court of Appeal imply that it would be contrary to the prohibition on exposing POWs to public curiosity to release their names? Would the release of statements made by POWs be contrary to that prohibition? May they be published if the POW agrees? (GC III, Art.7.)