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## U.S. SENATE REPUBLICAN POLICY COMMITTEE

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### **Tangible Manifestation of a Commitment to Ensure the Photos Are Not Released**

## **The President Should Properly Classify Harmful Detainee Photos**

### *Executive Summary*

- The government is currently contesting a Freedom of Information Act (FOIA) lawsuit seeking the release of photos depicting treatment of detainees. The Senate accepted by unanimous consent an amendment to the war supplemental bill proposed by Senators Graham and Lieberman designed to prevent the release of these photos. That amendment, however, is not in the final conference report.
- The cost of releasing the photos is clear, as the President and our military commanders have said that it would put our troops in danger by inflaming anti-American feelings in the war zone. In the past, similar photos and rumors of mistreatment have led to increased attacks on our troops.
- The photos would also undo much of the success we have had in improving U.S.-Iraq relations, which is especially problematic in light of the upcoming popular referendum on the U.S.-Iraq Status of Forces Agreement.
- On the other hand, there are no benefits to be gained from releasing the photos, as they depict events from several years ago that have already been investigated and where the individuals at fault have been punished.
- The President has said he will “take every legal and administrative remedy available” to ensure that the photos are not released. To that end, the President should properly classify the photos, thereby shielding them from release.

## *Background*

Earlier this year, the government surrendered in a FOIA lawsuit by the American Civil Liberties Union (ACLU), agreeing to no longer contest the release of a “substantial number” of images depicting the treatment of detainees in Iraq and Afghanistan.<sup>1</sup> President Obama, arguing that the release of these photos would “put our troops in greater danger,” decided to change course and “argue against the release of additional detainee photos.”<sup>2</sup> Seeking to strengthen the commander in chief’s position, Senators Graham and Lieberman offered an amendment to the war supplemental bill updating FOIA to protect against disclosing photographs related to detainee treatment, which was accepted by unanimous consent.<sup>3</sup> Since the final conference report does not contain that amendment, at the President’s request, the President should classify the photos at issue now as a tangible manifestation of his commitment to ensure that the photos are not released.

### *Cost of releasing these photos: Place U.S. troops in danger and damage progress*

The cost of releasing the photos is clear, as the commander in chief has found that “the most direct consequence of releasing them, I believe, would be to further inflame anti-American opinion and to put our troops in greater danger.”<sup>4</sup> The commanders in the field confirm that position in their declarations to the court in the lawsuit at issue:

- The release of images would likely “further endanger the lives of U.S. Soldiers, Marines, Airmen, Sailors, civilians and contractors presently serving” in Iraq and Afghanistan.” – General David Petraeus, Commander of the U.S. Central Command.<sup>5</sup>
- “I strongly believe the release of these photos will endanger the lives of U.S. Soldiers, Airmen, Marines, Sailors and civilians as well as the lives of our Iraqi partners.” – General Raymond Odierno, Commander of Multi-National Force-Iraq (MNF-I).<sup>6</sup>
- “MNF-I will likely experience an increase in security incidents particularly aimed at U.S. personnel and facilities following the release of the photos. Incidents of spontaneous violence against U.S. forces, possibly including attacks from outraged Iraqi police or army members are likely. Such increased attacks will put U.S. forces, civilians, and Iraqi partners at risk of being killed, injured, or kidnapped.”<sup>7</sup> – General Odierno.

These assessments carry great weight given that they are the professional judgment of senior U.S. military commanders, based in part on the fact that attacks against U.S. troops

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<sup>1</sup> Letter of the United States Attorney to the Southern District of New York Judge Hellerstein dated April 23, 2009, available at [http://www.aclu.org/pdfs/safefree/letter\\_singh\\_20090423.pdf](http://www.aclu.org/pdfs/safefree/letter_singh_20090423.pdf).

<sup>2</sup> Barack Obama, Statement of the President on Detainee Photos, May 13, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/Statement-by-the-President-on-the-Situation-in-Sri-Lanka-and-Detainee-Photographs/](http://www.whitehouse.gov/the_press_office/Statement-by-the-President-on-the-Situation-in-Sri-Lanka-and-Detainee-Photographs/).

<sup>3</sup> S. Amdt. No. 1157, 111<sup>th</sup> Cong., 1<sup>st</sup> Sess, 155 Cong. Rec. S5798-S5799 (May 21, 2009).

<sup>4</sup> Obama Statement, supra note 2.

<sup>5</sup> *American Civil Liberties Union v. Department of Defense*, Case No. 06-3140-cv, Government Motion to Recall Mandate, Declaration of General David H. Petraeus ¶ 2 (2<sup>nd</sup> Cir., May 29, 2009).

<sup>6</sup> *American Civil Liberties Union v. Department of Defense*, Case No. 06-3140-cv, Government Motion to Recall Mandate, Declaration of General Raymond T. Odierno ¶ 4 (2<sup>nd</sup> Cir., May 29, 2009).

<sup>7</sup> *Id.* at ¶ 11.

increased in response to past releases of similar photos. For example, General Odierno concluded that the 2004 release of the Abu Ghraib photos “likely contributed to a spike in violence in Iraq,” as attacks on coalition forces “increased from around 700 in March 2004 to 1800 in May (after the photographs were broadcast and published) and 2800 in August 2004. . . . These increased attacks resulted in the death of Coalition Forces, Iraqi forces, and civilians.”<sup>8</sup> After *Newsweek* printed a false story in 2005 accusing U.S. troops of mistreating the Koran at Guantanamo, including placing the book in a toilet, there were numerous anti-U.S. riots in Afghanistan resulting in deaths and injuries.

Additionally, releasing these photos would likely have grave consequences for all of the hard-earned progress made in Iraq. Senator Lieberman recently noted that “Prime Minister Maliki told our military leadership in Iraq that the release of these photos will set back the tremendous progress we, together with the Iraqis, have made in building a better U.S.-Iraqi relationship and creating stability in Iraq.”<sup>9</sup> The United States-Iraq Status of Forces Agreement, which is to be placed before an Iraqi popular referendum, could very well be at risk. Similarly, General Petraeus explained that the release of these photos could “corrosively affect U.S. relations with President Karzai’s government, as well as further erode control of the Afghanistan government in general.”<sup>10</sup>

### *Benefit of releasing these photos: None*

There is nothing to be gained from the release of these photos, as they are at least three years old, dealing with incidents from 2001 to 2006. The Pentagon press secretary has pointed out that “every incident depicted in them has been thoroughly investigated, and that any of the troops involved, who were found to be at fault, have been punished.”<sup>11</sup> The Pentagon has a strong policy prohibiting detainee abuse, and has a record of holding accountable service members who violate it or otherwise engage in misconduct.<sup>12</sup>

### *The President should properly classify the photos*

The underlying supplemental appropriations conference report apparently did not contain any legislative language protecting against the release of the photos, and late in the evening during consideration of the report by the conference committee, Senator McConnell sought to restore the Graham-Lieberman amendment to the conference report. President Obama personally intervened, and Democrats rejected Senator McConnell’s effort on the President’s

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<sup>8</sup> Id. at ¶ 7 (parenthesis in original).

<sup>9</sup> Senator Joseph Lieberman, Statement at a Press Conference with Senator Lindsey Graham on the Release of Photos, June 9, 2009.

<sup>10</sup> Petraeus at ¶ 12.

<sup>11</sup> Geoff Morell, Statement of the Department of Defense Press Secretary at a News Briefing, Apr. 28, 2009, transcript available at <http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=4409>.

<sup>12</sup> Gerry J. Gilmore, “Pentagon to Release Photos from Detainee Custody Investigations,” American Forces Press Services, Apr. 24, 2009, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=54070> (discussing “instances where performance has not matched policy” and noting that more than 400 military members charged with detainee abuse have been found to be guilty of some form of misconduct).

promise that he “will continue to take every legal and administrative remedy available to [him] to ensure that the DoD detainee photographs are not released.”<sup>13</sup>

In asking Congress to reject the Graham-Lieberman amendment, President Obama is essentially asking the Congress to “trust him” that these photos will not be released, which is an argument Democrats adamantly rejected not too long ago.<sup>14</sup> To that end, as a sign of good faith to the Senate, which passed the Graham-Lieberman amendment by unanimous consent, the President should take the step of properly classifying the photos, thereby shielding them from release.

Information is exempt from release under FOIA for various reasons, most notably if it is properly classified.<sup>15</sup> Information generally can be classified at some level if its disclosure is expected to cause some damage to national security.<sup>16</sup> In this instance, it would seem that these photos should be classified, as military commanders have made clear the damage to national security that would be expected to attend the release of these photos, namely increased attacks upon U.S. troops and interests.

Proper classification of these photos by the President would likely withstand scrutiny by the courts for several reasons. Courts have held that there is nothing improper with labeling material as classified even if it were originally unclassified, so long as the material is in fact properly classified. They have further held that the only proper inquiry for courts to undertake in that instance is to evaluate the correctness of the classification status of the information and the agency’s explanation for that classification status.<sup>17</sup> In making such evaluations, as a substantive matter, courts have held that they are to accord great deference to the executive’s classification decisions.<sup>18</sup> Moreover, classifying these photos by executive order is the procedural mechanism to which courts are likely to afford the most deference.

By contrast, going forward without proper classification would be risky. The government is currently attempting to protect the photos from disclosure under FOIA exemptions other than the national security exemption, and that argument has been a losing one in the lower courts.

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<sup>13</sup> Barack Obama, Letter of the President to Chairman of the House and Senate Appropriations Committees, Representative David Obey and Senator Daniel Inouye, June 11, 2009.

<sup>14</sup> E.g. 154 Cong. Rec. S233 (daily ed. Jan. 24, 2008) (statement of Sen. Feingold) (“Once again, ‘trust us’ will have to do. Now I believe in this case, as in so many others, ‘trust us’ is not enough.”); 153 Cong. Rec. S15715 (daily ed. Dec. 17, 2007) (statement of Sen. Dodd) (“[T]wo words from our President’s mouth: ‘Trust me.’ I cannot speak for my colleagues—but I would never take that offer, not even in the best of times, not even from a perfect President.”); 149 Cong. Rec. S2252 (daily ed. Feb. 12, 2003) (statement of Sen. Leahy) (“I remember the made-up Russian proverb that President Reagan speech writers came up with: Trust, but verify. Even though there was no such proverb, I thought it was a great saying, so I will use the same one.”); 152 Cong. Rec. H4884 (daily ed. June 29, 2006) (statement of Rep. Dingell) (“[T]he President and his deputies have told the American people ‘Trust us.’ . . . I do not want to trust anymore.”).

<sup>15</sup> 5 U.S.C. § 552(b)(1).

<sup>16</sup> Exec. Order 13292 § 1.2, 68 Fed. Reg. 15,315 (Mar. 28, 2003) (amending Executive Order 12958).

<sup>17</sup> *Goldberg v. U.S. Dept. of State*, 818 F. 2d 71, 80-81 (D.C. Cir. 1987) (holding that an agency decision to classify information that was marked unclassified at the time of the FOIA request was not improper, and the only operative inquiry is the “correctness of the classification status of the withheld information”).

<sup>18</sup> *Campbell v. U.S. Dept. of Justice*, 164 F. 3d 20, 30 (D.C. Cir. 1998) (noting that an agency’s explanation of its decision to withhold information from FOIA disclosure under the national security exemption for classified material is entitled to “substantial weight”).

Classifying the photos would avoid leaving the issue to the vagaries of a Supreme Court that has ruled with relative frequency against the national security position of the government in recent years.<sup>19</sup>

There are some improper purposes for classifying materials, including “conceal[ing] violations of law, inefficiency or administrative error,” or “prevent[ing] embarrassment to a person, organization, or agency.”<sup>20</sup> The classification of these photos does not fall into any of those categories. Information can be classified if it is about military operations and intelligence activities,<sup>21</sup> and the disclosure of that information “reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism.”<sup>22</sup> Our military commanders have explained how that is applicable in this instance.

In his letter to Democratic Senators, the President wrote that including legislative language preventing the release of the photos “would unnecessarily complicate the essential objective of supporting the troops.”<sup>23</sup> This is apparently because the liberal Democratic base in the House would not support a supplemental war spending bill containing language specifically directed at protecting troops from the harm likely to befall them upon the release of the photos. Even though this is simply unacceptable on its face, Democrats would not need to defend this position further if the President classifies the photos at issue in order to protect them from release.

### *Conclusion*

In his first Memorial Day speech, President Obama promised that “as long as I am President, . . . I will always provide [our troops] with the equipment and support they need.”<sup>24</sup> The commanders in the field have made clear that the “support” they need right now is to be protected from the threats that would likely attend the release of certain photographs. To this end, the President should classify the photos as a tangible manifestation of his commitment to both the troops that he will provide them what they need, and to the Congress that he will take every step available to him to ensure the photos are not released.

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<sup>19</sup> See *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S. Ct 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 547 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>20</sup> Exec. Order 13292 § 1.7, *supra* note 16.

<sup>21</sup> *Id.* at § 1.4.

<sup>22</sup> *Id.* at § 1.1.

<sup>23</sup> Obama Letter, *supra* note 13.

<sup>24</sup> Barack Obama, Remarks of the President on Memorial Day, May 25, 2009, *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-on-Memorial-Day/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Memorial-Day/).