

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.

CIVIL ACTION
DOCKET NO. 04-CV-4151 (AKH)

DECLARATION OF
MICHAEL E. PHENEGER

Michael E. Phenege, pursuant to 28 U.S.C. sec. 1746, declares as follows:

1. I am a retired U. S. Army Colonel who served 30 years on active duty as a Military Intelligence Officer. While on active duty from 1963 to 1993, I held a wide variety of assignments including: Commander, U. S. Army Intelligence School (Fort Devens), Director of Intelligence (J2), U. S. Special Operations Command; Deputy Director of Intelligence (D/J2), U. S. Central Command; Commander, 470th MI Group (Panama); Director of Operations, 66th MI Brigade (Germany); and G2, Second Infantry Division (Korea). During assignments with USSOCOM and USCENTCOM, I routinely provided intelligence support to those combatant commanders. During my tenure with Central Command, I made frequent trips to the Middle East as part of a team conducting bi-lateral military planning with counterparts in Bahrain, Kuwait, and (less frequently) Saudi Arabia. For three years, I taught combat intelligence subjects at the U. S. Army Intelligence School, Fort Huachuca, AZ and participated in the development of Army intelligence doctrine.

2. While I do not have current access to classified information, I routinely consult a wide variety of published sources about the status of on-going military and nation building activities in Iraq and Afghanistan. These include reporting in major newspapers and studies prepared by the Center for Strategic and International Studies, the Brookings Institution, and GlobalSecurity.org. I comment on military operations for local media outlets in Tampa, Florida,

and occasionally on the FOX News Network. General Richard B. Myers and I were classmates at the U. S. Army War College, Class of 1981. I have the greatest personal and professional respect for General Myers and Generals Abizaid and Casey who contributed their insights to General Myers' Declaration.

3. I am an active member of the American Civil Liberties Union (ACLU) that is a plaintiff in this case. I represent Florida on the ACLU's national board of directors and serve as Treasurer of the Florida affiliate.

4. At the request of the plaintiffs, I reviewed the redacted versions of the Declarations of Richard B. Myers, Chairman of the Joint Chiefs of Staff, and Ronald Schlicher, former Deputy Assistant Secretary of State and Coordinator for Iraq in the Bureau of Near Eastern Affairs, pertaining to the official release to the plaintiffs of 87 photos and four tapes of Abu Ghraib prisoners under the Freedom of Information Act. In making the following comments, note that I had access only to the government's publicly filed summary judgment memorandum and supporting declarations. Some material was redacted. Redacted portions of the Declarations appeared to address specific aspects of the photos and tapes that General Myers and Mr. Schlicher believe would be viewed as inflammatory in the Islamic world.

5. In their Declarations, General Myers and Mr. Schlicher rightly condemn the misconduct and abuse depicted in the images, but they oppose the release of the 87 photos and four videotapes in the belief they would provoke reactions that could result in the death of U.S., allied, Iraqi, and Afghani military, diplomatic and contractor personnel and local civilians. They cite the ongoing insurgencies in Iraq and Afghanistan, the reaction of the "Arab street" to previously released photos, and the Muslim reaction to a Newsweek article on the alleged desecration of the Koran in support of their conclusions. Mr. Schlicher discusses the potential use of the images to buttress the claims of extremists and hostile commentators and to damage the foreign relations of the United States. I am a professional soldier now retired. I value the lives of our soldiers, marines, airmen and sailors as highly as General Myers. I would never seek to put them unnecessarily at risk. The same applies to the military personnel of our allies in the war on terror, contractors, and to the civilian population in areas where we are conducting military operations. However, I believe General Myers' and Mr. Schlicher's conclusions about the threat posed by the release of these photos and tapes are misleading.

6. The actual threat to the lives and physical security U.S., allied, Iraqi, and Afghani military, diplomatic and contractor personnel and local civilians is from ongoing insurgencies in Iraq and Afghanistan and the actions of terrorist organizations like Al-Qaeda. These insurgent and terrorist organizations are conducting effective, well-organized and well-financed campaigns to halt the democratization of Iraq and Afghanistan, undermine their current governments, and force U.S. Forces to leave the Middle East. During a May 12, 2005 press conference, General Myers noted that we are involved in a "very violent insurgency" against a "thinking and adapting adversary." He suggested the insurgency could last from three to nine years. According to General Myers, Iraqi insurgents conduct 70 attacks a day against U.S., allied, and Iraqi forces and civilians in an intense, sophisticated campaign to accomplish their political and military objectives. Attacks on Iraqi government personnel, foreign diplomats and infrastructure targets are increasing in frequency and severity. General Myers reports that Taliban elements are accelerating attacks in Afghanistan in an attempt to disrupt scheduled September elections. Our

enemies seek to prevent the United States from achieving its objectives in the Middle East. They do not need specific provocations to justify their actions.

7. In support of his conclusion that release of the photos and tapes could result in attacks, General Myers quotes Al Qaeda leader Abu Musab al-Zarqawi's claim that a particular insurgent attack responded to the release of photos of British abuse of detainees. However, in asserting that this attack responded to a specific provocation (i.e. – the photos of British abuse of detainees) I believe General Myers mistakes propaganda for motivation. It is painfully clear those insurgents in Iraq and Afghanistan and terrorist organizations like Al-Qaeda will continue their effort in pursuit of their political and military objectives as long as they have the will and resources to do so. They have a sophisticated ability to orchestrate their responses. Insurgents may publicly cite photos or alleged "provocations" to justify their actions, but that reflects propaganda, not cause and effect. I do not underestimate the propaganda impact of the release of additional photos of the degradation of Iraqi prisoners in U. S. custody, but the photos will not be the real cause of subsequent attacks. Insurgents average 70 attacks a day regardless of provocation as part of their effort to achieve specific objectives. The attacks will continue regardless of whether the photos and tapes are released.

8. In support of their conclusions, General Myers and Mr. Schlicher cite the widespread violent reaction in the Islamic world to the April 30, 2005, Newsweek report on the desecration of the Koran at the U.S. facility at Guantanamo Bay. Newsweek printed a retraction after its single source withdrew his claim. It was widely reported that story provoked widespread anti-U.S. demonstrations through out the Islamic world and that rioting in Afghanistan resulted in the death of 17 people. However, during a news conference on May 12, 2005, General Myers stated that "it's a judgment of our commander in Afghanistan, General Eikenberry, that in fact the violence that we saw in Jalalabad was not necessarily the result of the allegations about disrespect for the Koran . . . but more tied up in the political process and the reconciliation process that President Karzai and his Cabinet is conducting in Afghanistan. So that's – that was his judgment today in an after-action of that violence. He didn't – he thought it was not at all tied to the article in the magazine." See Transcript, Defense Department News Briefing, May 12, 2005, available at <http://www.dod.gov/transcripts/2005/tr20050512-secdef2761.html>. This illustrates the fallacy of asserting cause and effect relationships in this context. Notably there did not appear to be a violent reaction just a few weeks after the Newsweek report when the press reported the results of BG Jay Hood's inquiry that revealed five instances of mishandling of the Koran at Guantanamo Bay.

9. In discussing the effect of the 2004 publication of Abu Ghraib photos, the Myers and Schlicher declarations focused principally on the adverse public relations impact of the release. Neither has shown that publication of those photos resulted in loss of life. Mr. Schlicher did claim that the photos supported the belief of many Iraqis that U.S. abuses at Abu Ghraib "impugned the dignity and honor of Iraqis at the personal, familial and/or national scale." The photos certainly undermined Iraqi support for the United States and its allies. Conceivably, they may even have motivated some individuals to join the insurgents, but the same could be said of myriad articles that critically report on the war and controversial U.S. policies and practices. This does not mean that such articles should not be published. In a democracy, we make a societal judgment that the long-term benefits of openness and freedom of information outweigh the short-term costs that the dissemination of any particular piece of information may impose. The initial

publication of the Abu Ghraib photos damaged the image and credibility of the United States and raised questions in the Islamic world about the legitimacy of our objectives, but I have seen no convincing evidence that their publication caused loss of life. Our insurgent and terrorist enemies use daily violence to achieve their political, military and social objectives regardless of provocation.

10. General Myers' Declaration addresses insurgent use of "doctored photos and images to support their calls for violence." Disinformation is part of warfare, but the fact that false photographs are proliferating is no reason to suppress accurate ones. Our insurgent and terrorist enemies conduct sophisticated, aggressive information warfare. Unfortunately, publication of the Abu Ghraib photos, the release of thousands of pages of government documents concerning alleged torture of prisoners in U.S. custody, press statements by prisoners released from Guantanamo Bay, and media coverage of our government's decisions to depart from our own long-standing policies and practices regarding the detention and interrogation of prisoners have combined to lend credibility to false claims by our enemies. In departing from our principles, we foolishly risked undermining our efforts to bring democratic societies to the Middle East.

11. General Myers argues that an "official release" would lend "an imprimatur – an official patina – that has never been attached to these photos." I doubt his conclusion that these photos would be uniquely incendiary. If these photos are released, it will be clear to everyone that the government went to considerable effort to prevent it. If individuals in the Middle East conclude that the photos "ridicule and humiliate the individuals depicted, their culture or their religion", it will be because that is what the photos depict. That American soldiers committed such acts is to be deeply regretted.

12. The Declarations of General Myers and Mr. Schlicher are remarkable. Each asserts that photos and tapes of the abuse of detainees by U.S. military personnel is so potentially damaging that releasing them would undermine the war effort and result in the death of U.S. government and contractor personnel, our allies and innocent civilians. Publication of the first set of Abu Ghraib photos and the release of thousands of pages of government documents pertaining to the abuse of prisoners in our custody did damage our reputation and made suspect the credibility of our purpose in Islamic communities around the world. They may have aided insurgent and terrorist recruiting. It is a self-inflicted wound. The Declarations of General Myers nor Mr. Schlicher do not prove that the release of the photos and videos in question "could reasonably be expected to endanger the life or physical safety of any individual." They have shown that the release will damage our image and credibility and that they will be of significant propaganda value to our enemies in the information war for men's minds.

13. This is a difficult declaration for a patriot and a career soldier. I supported military action in Iraq until I became convinced that the Administration had failed to commit sufficient resources to ensure stability after the defeat of the Iraqi army and provide the security necessary to create a democratic government. I take each loss of American life seriously. I believe that the conclusions of men I respect are incorrect. The release of these photos will certainly harm the reputation of the Army in which it was my honor to serve and the nation that I love. However, I believe we need a thorough public examination of the implications and effects of the Administration's decision to abandon long-standing policies and principles that were

adopted to safeguard our own military, ensure compliance to treaties and International Law, and ensure that our behavior adheres to the principles that made us great and honorable nation. This cannot occur unless the public is fully informed. The Administration has portrayed the degradation of prisoners at Abu Ghraib as the actions of a few rogue reservists. Unfortunately, there is significant evidence that the administration elected to change the rules and approve interrogation techniques that the Army had long prohibited. The first step to abandoning practices that are repugnant to our laws and national ideals is to bring them into the sunshine and assign accountability.

14. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



MICHAEL E. PHENEGER, Colonel, U.S. Army
(Retired)

Date: Tampa, Florida
August 2, 2005