IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, ET AL.,	)	
Plaintiffs–Appellees,	)	
v.	)	No. 06-3140-cv
DEPARTMENT OF DEFENSE, ET AL.,	)	
Defendants–Appellants.	)	

PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION TO RECALL THE MANDATE PENDING FILING AND DISPOSITION OF A PETITION FOR CERTIORARI AND PROPOSED LEGISLATION

INTRODUCTION

For almost six years, Plaintiffs have sought disclosure under the Freedom of Information Act ("FOIA") of photographs of prisoners who were abused in U.S. custody overseas. On September 22, 2008, a unanimous panel of this Court issued a thorough and well-grounded opinion ordering release of these images, observing that "the facts of this case place governmental accountability at the center of the dispute," and emphasizing the "significant public interest in the disclosure of these photographs." *See Am. Civil Liberties Union v. Dep't of Def.* (*ACLU II*), 543 F.3d

59, 82, 87 (2d Cir. 2008). On March 11, 2009, this Court also denied the Government's petition for rehearing *en banc*.

On April 23, 2009, the Government specifically informed Plaintiffs and the district court that it would "not seek certiorari of the Second Circuit's decision," and that the Defense Department would by May 28, 2009, release the 21 photos at issue in the appeal, 23 additional photos previously identified as responsive, and a "substantial number of other images contained in Army CID [Criminal Investigation Division] reports that have been closed during the pendency of this case." Declaration of Amrit Singh, Ex. A, dated May 29, 2009 ("Singh Decl.") (Letter to Hon. Alvin K. Hellerstein from Lev. L. Dassin, Apr. 23, 2009). On April 24, 2009, Press Secretary Robert Gibbs announced that "[t]he Department of Justice decided based on the [Second Circuit's] ruling that it was hopeless to appeal." The White House, Office of the Press Secretary, Press Briefing, Robert Gibbs, Apr. 24, 2009, *available at* http://www.whitehouse.gov/the_press_office /Briefing-by-White-House-Press-Secretary-Robert-Gibbs-4-24-09/; *see also id.* ("[T]he Department of Justice determined specifically based on the [Second Circuit's] ruling that they were not likely to be successful"). This Court's mandate issued on April 27, 2009.

The Government now moves this Court to recall its mandate. In support of its claim to such disfavored and extraordinary relief, the Government argues first

that it intends to petition for a writ of certiorari which it claims will present a "substantial question," especially in light of the President's determination that the photographs could be used to incite violence and generate propaganda, and second that Congress may at some unknown time in the future enact a law that could potentially allow the Secretary of Defense to exempt the photographs at issue in this case from disclosure under FOIA.

As set forth below, neither of these arguments merits the extraordinary relief that the Government seeks here. A unanimous panel of this Court has already addressed and rejected the Government's argument that the photographs may lawfully be suppressed because they could be used to incite violence and generate propaganda. The Government effectively conceded the absence of a "substantial question" when it publicly acknowledged that a petition for certiorari would be "hopeless." As to the Government's claim that future legislation may allow the Defense Department to exempt the photos from disclosure, this argument is far too speculative to qualify as a valid basis for the extraordinary relief that the Government requests. At this stage, there can be no assurance that the proposed legislation will become law, and there can certainly be no assurance that any legislation that Congress ultimately enacts will mirror the legislation that has been proposed. Plaintiffs know of no case in which an appeals court has recalled its

mandate because of the mere prospect that retroactive legislation may be enacted in the future.

ARGUMENT

Although the Supreme Court has recognized the inherent authority of "the courts of appeals . . . to recall their mandates, subject to review for an abuse of discretion," *Calderon v. Thompson*, 523 U.S. 538, 549 (1998), it has carefully circumscribed that authority. "In light of 'the profound interests in repose' attaching to the mandate of a court of appeals, . . . the power can be exercised only in extraordinary circumstances." *Id.* at 550 (quoting 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3938, p. 712 (2d ed. 1996)). "The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Id.*

This Court has likewise recognized the extraordinary nature of this rarely invoked authority. *See, e.g.*, *Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 89 (2d Cir. 1996) (recognizing that the power to recall a mandate "is to be 'exercised sparingly'" (quoting *Greater Boston Television Corp. v. Fed. Commc'ns Comm'n*, 463 F.2d 268, 277 (D.C. Cir. 1971))); *Sargent*, 75 F.3d at 89 (noting that the power to recall a mandate is "reserved for 'exceptional circumstances'" (quoting *Fine v. Bellefonte Underwriters Ins. Co.*, 758 F.2d 50, 53 (2d Cir. 1985))).

To merit the relief it seeks, the Government must "overcome two hurdles." *United States v. Holland*, 1 F.3d 454, 455 (7th Cir. 1993) (chambers opinion). It must make "an adequate showing that the mandate ought to be recalled," but it must also make "an adequate showing that the mandate, if recalled, ought to be stayed" pending the filing of a petition for writ of certiorari. *Id.* To satisfy the latter burden, the Government must demonstrate that its petition "would present a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). A stay is appropriate "only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." *Holland*, 1 F.3d at 456 (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, Circuit Justice)) (internal quotation marks omitted). Relief is discretionary, however, "[e]ven if the movant makes the required showing." *Khulumani v. Barclay Nat'l Bank Ltd.*, 509 F.3d 148, 152 (2d Cir. 2007).

The Government has neither shown "extraordinary circumstances" that would warrant recall of this Court's mandate nor demonstrated a "substantial question" or "good cause" for a stay. If the circumstances here are extraordinary, they are extraordinary in ways that weigh *against* granting the relief that the

Government requests.[1] First, not only did the Government fail to request a stay beyond 30 days of the Court's mandate, it affirmatively informed the district court that it would release the photos that this Court had ordered released and that it would not file a petition for a writ of certiorari. *See* Singh Decl. Ex. A (Letter to Hon. Alvin K. Hellerstein from Lev. L. Dassin, Apr. 23, 2009). In publicly explaining its decision to accept this Court's decision as final, the Government itself characterized any such appeal as "hopeless" and "not likely to be successful"—which suggests something less than a "substantial question." The White House, Office of the Press Secretary, Press Briefing, Robert Gibbs, Apr. 24, 2009, *available at* http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-4-24-09/ (announcing that "[t]he Department of Justice decided based on the [Second Circuit's] ruling that it was hopeless to appeal"); *id.* ("[T]he Department of Justice determined specifically based on the [Second Circuit's] ruling that they were not likely to be successful.").

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[1] The Government's implicit suggestion that it would be "unexceptional" for the Court to recall its mandate in this case, Gov't Mot. at 6, is plainly incorrect. Neither the Supreme Court in *Calderon* nor the Second Circuit in *Sargent* predicated its holding—that recalling a mandate is an extraordinary remedy reserved for extraordinary circumstances—on the status of certiorari review. The decisions relied upon "'the profound interests in repose' attaching to the mandate of a court of appeals," *Calderon*, 523 U.S. at 550 (quoting 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3938, p. 712 (2d ed. 1996)), and not, as the Government asserts, to finality in the technical sense discussed in *Plaut v. Spendthrift Farm*, Inc., 514 U.S. 211, 227 (1995), and in *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987).

Moreover, the principal basis for the Government's motion—that the photographs could be used as propaganda and to incite violence—is virtually identical to the one that both the district court and a unanimous panel of this Court found insufficient to justify the suppression of the photos. *Compare* Gov't Mot. at 8 (contending that "release would present a grave risk of inciting violence . . . and providing [terrorists] with valuable tools for recruiting and propaganda"), *with ACLU II*, 543 F.3d at 67 (arguing that "disclosure of the photos could reasonably be expected to incite violence against United States troops, other Coalition forces, and civilians in Iraq and Afghanistan"), *and Am. Civil Liberties Union v. Dep't of Def.* (*ACLU I*), 389 F. Supp. 2d 547, 575 (S.D.N.Y. 2005) ("The government contends that publication of the Darby photographs pursuant to court order is likely to incite violence against our troops and Iraqi and Afghan personnel and civilians, and that redactions will not avert the danger. The government argues that the terrorists will use the re-publication of the photographs as a pretext for further acts of terrorism."). Insofar as the Government raises the new argument that the release of the abuse photos would have a chilling effect on future investigations of detainee abuse, *see* Gov't Mot. at 9, the argument is unsupported by the factual record, dubious as a matter of common sense,[2] not moored in any identifiable

[2] It is far more likely that release of the photographs would encourage investigations by promoting accountability for prisoner abuse. Indeed, both the district court and this Court have recognized the significance of the photographs

exemption to FOIA, and in any event, improperly raised at this stage in the litigation.[3]

Nor does the mere possibility that Congress may enact legislation relating to the photos at some unknown future point of time render circumstances "extraordinary" enough to warrant a recall of the mandate in this case. Indeed, the Government itself acknowledges that the Senate bill providing for the Secretary of Defense to exempt the photographs at issue in this case "has not yet become law." Gov't Mot. at 12. At this stage, there can be no assurance that the proposed

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for promoting government accountability. *ACLU II*, 543 F.3d at 91 ("Release of the photographs is likely to further the purposes of the Geneva Conventions by deterring future abuse of prisoners."); *ACLU I*, 389 F. Supp. 2d at 578 ("Publication of the photographs is central to the purposes of FOIA because they initiate debate, not only about the improper and unlawful conduct of American soldiers, 'rogue' soldiers, as they have been characterized, but also about other important questions as well—for example, the command structure that failed to exercise discipline over the troops, and the persons in that command structure whose failures in exercising supervision may make them culpable along with the soldiers who were court-martialed for perpetrating the wrongs; the poor training that did not create patterns of proper behavior and that failed to teach or distinguish between conduct that was proper and improper; the regulations and orders that governed the conduct of military forces engaged in guarding prisoners; the treatment of prisoners in other areas and places of detention; and other related questions.").

[3] It is similarly inappropriate for the Government to now argue—five years into the litigation in the context of a motion to recall the mandate—that 15-30 personnel military units are at particular risk of harm from release. *See* Gov't Mot. at 10. In any event, the Government's claim that this argument would satisfy this Court's own standard for FOIA Exemption 7(F) is without merit because the Government does not identify "at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual." *ACLU II*, 543 F.3d at 71.

legislation will become law, and there can certainly be no assurance that any legislation that Congress ultimately enacts will mirror the legislation that has been proposed. Plaintiffs know of no case in which an appeals court has recalled its mandate because of the mere prospect that retroactive legislation may be enacted in the future. The Government's claims about the likely passage of such legislation are far too speculative to warrant a recall of the mandate.

Finally, there is no "good cause for a stay" in this case. *See* Fed. R. App. P. 41(d)(2)(A). The Government's reassertion of Exemption 7(F) arguments repeatedly rejected by this Court and the speculative prospect of legislation do not warrant further delay. In contrast, further delay would significantly prejudice Plaintiffs. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Consistent with this purpose, the "Act calls for prompt disclosure of all nonexempt documents [because] long delays [are] inconsistent with the purpose of the FOIA." *Pierce & Stevens Chem. Corp. v. U.S. Consumer Prod. Safety Comm'n*, 585 F.2d 1382, 1387-88 (2d Cir. 1978) (footnotes omitted). Indeed, in amending FOIA, Congress specifically recognized that "information is often useful only if it is timely. Thus, excessive delay by the

agency in its response is often tantamount to denial." H.R. Rep. No. 93-876 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6271.

A unanimous panel of this Court rightly recognized that "the facts of this case place governmental accountability at the center of the dispute," and that "there is a significant public interest in the disclosure" of the prisoner-abuse photographs, which the Government concedes "yield evidence of governmental wrongdoing." *See ACLU II*, 543 F.3d at 82, 87. Accordingly, in seeking to further delay disclosure of these images, the Government's motion is fundamentally inconsistent with FOIA's basic purpose.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants-Appellants' motion to recall its mandate.

Respectfully submitted,

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Dated: June 1, 2009

Attorneys for Plaintiffs-Appellees

ANTI-VIRUS CERTIFICATION FORM

Case Name: ACLU v. Dep't of Defense

Docket Number: 06-3140-cv

I, Amrit Singh, hereby certify that the Plaintiffs-Appellees' Opposition to Defendants-Appellants' Motion to Recall the Mandate submitted in PDF form as an email attachment to civilcases@ca2.uscourts.gov in the above mentioned case, was scanned using Symantec AntiVirus Corporate Edition and that no viruses were detected.

Amrit Singh
Counsel for Appellees

Date: June 1, 2009

PROOF OF SERVICE

I, Konny Huh, declare as follows:

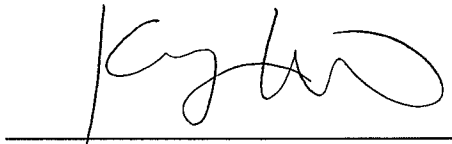
I am employed in the City, County and State of New York, in the office of the Plaintiffs-Appellees at whose direction the following service was made. I am over the age of eighteen years and am not a party to the within action. My business address is the American Civil Liberties Union Foundation, Immigrants' Rights Project, 125 Broad Street, 18th Floor, New York 10004.

On the 1st day of June 2009, I emailed a PDF copy to civilcases@ca2.uscourts.gov and sean.lane@usdoj.gov. I also sent two copies of the foregoing document by overnight Federal Express addressed to the following:

Sean H. Lane
U.S. Attorney's Office, SDNY (86 Chambers St.)
86 Chambers Street
New York, NY 10007

I declare under penalty of perjury under the laws of the State of New York that the above is true and correct.

Dated: June 1, 2009



Konny Huh

DECLARATION OF AMRIT SINGH

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, INC., PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE, and VETERANS FOR PEACE, Plaintiffs–Appellees, 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–Appellants.	No. 06-3140-cv

DECLARATION OF AMRIT SINGH
IN SUPPORT OF PLAINTIFFS–APPELLEES'
OPPOSITION TO DEFENDANTS–APPELLANTS'
MOTION TO RECALL THE MANDATE

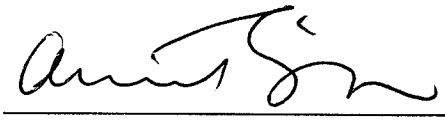
I, Amrit Singh, hereby declare and state as follows:

1. I am a member of the Bar of the United States Court of Appeals for the Second Circuit, and I am counsel for the plaintiffs–appellees in the above-captioned matter. I am an attorney at the American Civil Liberties Union Foundation, 125 Broad Street, 18th Floor, New York, NY 10004.

2. Attached hereto as Exhibit A is a true and correct copy of an April 23, 2009 letter sent to the Honorable Alvin K. Hellerstein by Acting United States Attorney Lev L. Dassin.

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

Executed on May 29, 2009.



Amrit Singh

EXHIBIT A

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

April 23, 2009

BY FACSIMILE
Hon. Alvin K. Hellerstein
United States District Court
Southern District of New York
500 Pearl Street, Room 1050
New York, New York 10007-1312

Re: ACLU, et al., v. Dep't of Defense, et al., 04 Civ. 4151 (AKH);
ACLU, et al., v. Dep't of Justice, 05 Civ. 9620 (AKH)

Dear Judge Hellerstein:

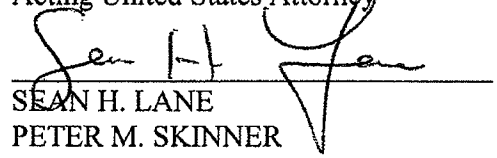
I am writing to update the Court regarding the status of certain images sought by the plaintiffs in the above-captioned case under the Freedom of Information Act ("FOIA").

By orders dated June 9, 2006 and June 21, 2006, the Court directed the Government to release twenty-one photographs depicting the treatment of detainees in Iraq and Afghanistan. By opinion dated September 22, 2008, the Second Circuit affirmed this Court's orders. See American Civil Liberties Union v. Department of Defense, 543 F.3d 59, 66-83 (2d Cir. 2008). On November 6, 2008, Appellants filed a petition for rehearing en banc only as to the panel's decision on FOIA exemption 7(F); that petition was denied on March 12, 2009. As the Government has now determined that it will not seek certiorari of the Second Circuit's decision, the Department of Defense is preparing to release the 21 photos at issue in the appeal and 23 other photos previously identified as responsive. In addition, the Government also is processing for release a substantial number of other images contained in Army CID reports that have been closed during the pendency of this case; these other images will be processed consistent with the Court's previous rulings on responsive images in this case. The parties have reached an agreement that the Department of Defense will produce all the responsive images by May 28, 2009.

We will keep the Court apprised of the status of this matter.

Respectfully,

LEV L. DASSIN
Acting United States Attorney

By: 

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cc: Amrit Singh, Esq. (by facsimile)
Jenny-Brooke Condon, Esq. (by facsimile)