

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

04 Civ. 4151 (AKH)

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,

THIRD DECLARATION OF  
STEWART F. ALY

Defendants.

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Stewart F. Aly, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am Associate Deputy General Counsel (Legal Counsel) in the Office of the General Counsel (OGC) of the Department of Defense ("DoD" or the "Department"). I have served in this office, either as the Acting or as Associate Deputy General Counsel, since 1993. My areas of responsibility include statutes relating to management and release of information, such as the Privacy Act and the Freedom of Information Act (FOIA). I personally review FOIA requests, appeals, and cases in litigation as part of my official duties, and I have authority to

make determinations regarding release of records of the OGC. Among my other responsibilities, I serve as counsel to the Office for Freedom of Information and Security Review (OFOISR), which is the office responsible for formulation and promulgation of DoD's FOIA policy.

2. I am familiar with the requests submitted under the Freedom of Information Act by the plaintiffs in this case; I am also familiar with the complaint, answer and other materials filed in this litigation. The statements in this declaration are based upon my personal knowledge and upon my review of information available to me in my official capacity. I have previously submitted two declarations in this case.

3. As part of their list of 70 dated August 16, 2004, plaintiffs sought specific documents and memoranda approving or putting into place the use of certain interrogation techniques within DoD. See Pls.' Br., Ex. A, Items 4, 37, 39-42. On or about March 23, 2005, DoD produced two documents in response to Items 4, 37, and 39-42: a September 14, 2003 memorandum and an October 12, 2003 memorandum. See Second Declaration of Stewart F. Aly, dated March 23, 2005, ¶¶ 23-26 (referring to Exhibits E and F to Second Aly Decl.). Both of these memoranda approved or put into place the use of certain interrogation techniques within DoD.

4. In their memorandum of law in opposition to defendant's motion for summary judgment, dated April 28, 2005 ("Pls.' Opp. Br."), plaintiffs argue that DoD failed to produce all documents responsive to Items 4, 37 and 39-42. In particular, plaintiffs contend that DoD failed to produce two documents: a September 10, 2003 memorandum and a September 28, 2003 memorandum. As evidence of the purported existence of these two additional documents, plaintiffs cite to two sources: 1) two paragraphs from the report prepared by Major General George Fay (Exhibit 2 to Pls.' Opp. Br.); and 2) a New York Times article (Exhibit 3 to Pls.'

Opp. Br.). However, as explained below, there are no memoranda dated September 10, 2003 or September 28, 2003, that are responsive to Items 4, 37 and 39-42; the documents referred to by plaintiffs are merely drafts of the two memoranda already provided to plaintiffs.

5. As to plaintiffs' first source, the first two paragraphs from the Fay report (Exhibit 2 to Pls.' Opp. Br.) explain that, on September 10, 2003, a judge advocate working for the Staff Judge Advocate of Combined Joint Task Force 7 in Iraq was assigned the responsibility for drafting a set of interrogation rules. The two paragraphs describe the process under which the rules were drafted. The second paragraph states that the drafting took place between September 10th and September 14th of 2003. The final product of this drafting process was the September 14, 2003, memorandum produced to plaintiffs and included as Exhibit E to my prior declaration.

6. The second source is an article published in the New York Times on May 21, 2004 (Exhibit 3 to Pls.' Opp. Br.). The article describes the development of memoranda concerning interrogation techniques. Like the Fay report, it describes a drafting process beginning on September 10th and ending on October 12, 2003:

The unsigned Sept. 10 draft authorized approaches spelled out in Army Field Manual 34-52 and other widely used interrogation techniques, as well as sensory deprivation, which could mean the hooding of prisoners.

On Sept. 14, General Sanchez approved the first formal policy for Iraq that allowed the use of "sleep management" techniques, like limiting prisoners to four hours rest each 24 hours, and stress positions, including standing or crouching for up to an hour at a time, Senate aides said.

The policy was sent to the Central Command and to other military, legal and intelligence experts for review. On October 12, in response to objections from military lawyers, General Sanchez issued a second, much narrower policy that Colonel Warren said Wednesday complied with the Geneva Conventions.

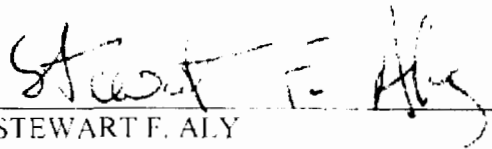
Exhibit 3 to Pls.' Opp. Br. at 3. The ultimate product of this drafting process was the October 12, 2003 memorandum produced to plaintiffs and included as Exhibit F to my prior declaration.

7. In addition to the two memoranda responsive to Items 4, 37, 39-42, our search within DoD identified several drafts of these two memoranda on interrogation techniques; these drafts are not responsive to Items 4, 37, 39-42 because these documents did not approve or put into place interrogation techniques within DoD. More specifically, we identified two drafts of the memorandum dated September 14th, with both drafts dated September 10, 2003, and two drafts of the memorandum dated October 12th, with the drafts dated September 28, 2003 and October 5, 2003. DOD is processing these drafts as part of its overall processing efforts. I anticipate that, as these documents are drafts of policies ultimately put into effect, these drafts will be withheld from release because, inter alia, the documents are covered by Exemption 5.

8. For the reasons set forth above and in my prior declaration, I can represent that there are no memoranda dated September 10, 2003 or September 28, 2003 that are responsive to Items 4, 37, 39-42 on plaintiffs' list of 70, dated August 16, 2004.

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

Date: Arlington, Virginia  
May 19, 2005

  
STEWART F. ALY