

PRESS GROUPS CALL GITMO BANNING PRIOR RESTRAINT

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" ... The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." SCOTUS Pentagon Papers Decision

A coalition of press outlets have written DOD General Counsel Jeh Johnson, calling that the banning of four Gitmo reporters for publishing the name of Omar Khadr interrogator Joshua Claus an unconstitutional example of prior restraint.

In a letter to Pentagon General Counsel Jeh Johnson, the organizations argue that the Pentagon's interpretation of the rules is "plainly illegal" because it bars publication of information considered "protected" even if the information is already widely known and publicly available.

Such a restriction is "a 'classic example' of a prior restraint" that "the Supreme Court repeatedly has refused to allow . . . even in the name of national security," the organizations said.

The organizations include McClatchy Newspapers, which owns The Miami Herald and 30 other newspapers, The Associated Press, Dow Jones & Co., The New York Times, Reuters and The Washington Post.

[snip]

"There must be a sufficiently strong, legitimate government interest before a contractual condition may legally restrict a citizen's First Amendment

rights," attorney David Schulz wrote on the news organizations' behalf. "As demonstrated above, no such legitimate interest justifies the overly broad censorship imposed by the ground rules."

The news organizations are also taking issue with the way DOD reviews and deletes images for classification reasons.

What's particularly interesting about this challenge, IMO, is how the timing is going to work out. As the article notes, DOD has agreed to lift the ban on the four reporters on August 5 (though I believe the reporters will have to "reapply" for credentials, providing one more opportunity for mischief).

The Pentagon has agreed to lift the ban on the four reporters on Aug. 5. That, however, isn't enough, the organizations said, noting that the hearing the reporters were covering resumes on July 12.

That is, in a show of faux-reasonableness, DOD has agreed to let the three best Canadian Gitmo reporters and the best Gitmo reporter, period, apply for credentials again on August 5. But, as the article makes clear, that means the journalists won't be able to attend "the hearing the reporters were covering" which starts up again in a week. Canada's best Khadr reporters and Carol Rosenberg will be able to reapply to cover Khadr's actual trial, but they won't be able to cover the rest of his suppression hearing, which reconvenes on July 12.

That hearing, of course, concerned whether or not Omar Khadr's confessions should be thrown out because of abuse he suffered at the hands of his interrogators.

I've noted before that DOD's own explanation for the banning clarifies it doesn't want reporters connecting the crimes for which Joshua Claus has already been convicted—including involvement in

the death of Dilawar—with the threats of rape and death he made against Khadr.

If we take DOD at its word that the big problem with naming Joshua Claus as Interrogator #1 even after he has been named as Khadr's primary interrogator at Bagram in the past, then the big problem must be connecting the content of Claus' testimony at this week's hearing—that he threatened Khadr with rape—with the general climate of abusiveness which led to the deaths of two detainees.

Remember, DOD is arguing that Khadr's admissions after he heard this story implicitly threatening rape and possibly death were untainted by abuse. That's the whole point of this hearing. That claim is much harder to sustain if we also know that the same guy who threatened rape went on to contribute to another detainee's death.

The argument about prior restraint is probably a good one and may improve things going forward.

But it's not clear it's going to get Carol Rosenberg and Michelle Shepherd down to Gitmo for the conclusion of the suppression hearing.

Why is DOD so worried about exposing its evidentiary standards to scrutiny of good reporting?