

which Defendants the Department of Defense and the Air Force halted the traditional American practice of honoring fallen soldiers when their flag-draped caskets return to United States soil. In April 2004, the Air Force Mobility Command responded to a Freedom of Information Act request by releasing 361 photographs of such flag-draped caskets arriving at Dover Air Force Base, only to have the Defense Department call the action a mistake and hold up any further releases. In this case, Plaintiff Begleiter seeks the release of additional images to further the public interest in an educated citizenry and to inform the public debate on important matters of U.S. foreign policy. Plaintiff also seeks the images as part of his academic research into the public tolerance for international aggression and the casualties of war. Defendants' refusal to release the photographic records requested by Plaintiff is unjustified under the law.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
4. Venue lies in this District under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

THE PARTIES

5. Plaintiff Ralph Begleiter is the “Distinguished Journalist in Residence” at the University of Delaware, where he teaches Communication, Political Science and Journalism. He directs the University’s “Global Agenda” speaker series on international issues. At the invitation of the U.S. Department of State, Begleiter has taught journalists in Amman, Jordan about the concepts of “credibility and objectivity” in independent journalism. He has addressed journalists in many other countries, and has helped train U.S. career diplomats studying public affairs at the State Department’s Foreign Service

Institute in Virginia. Plaintiff also has taught media and foreign policy in the Government Department at Georgetown University in Washington, and taught a course on the media's influence in international affairs as Ferris Professor of Journalism in the Council of the Humanities at Princeton University.

6. Defendant DOD is a Department of the Executive Branch of the United States Government, responsible for training and equipping three military departments: the Army, the Navy (which includes the Marine Corps), and Defendant Air Force. DOD is an agency within the meaning of 5 U.S.C. § 552(f). It has possession of and control over the records sought by Plaintiff Begleiter.

7. Defendant Air Force is a Department of the Executive Branch of the United States Government. Air Force is an agency within the meaning of 5 U.S.C. § 552(f). It has possession of and control over the records sought by Plaintiff Begleiter.

WAR IMAGES AT DOVER AIR FORCE BASE

8. Dover Air Force Base ("Dover AFB") is a federal facility in Dover, Delaware, that provides airlift support for U.S. military personnel, cargo, and equipment. Dover AFB is the site of the Department of Defense's only mortuary in the continental United States.

9. Upon information and belief, the remains of the majority of United States military personnel killed abroad return to the U.S. through Dover AFB. As a mark of respect, each coffin is draped with an American flag.

10. DOD routinely employs military and contract photographers to document the operations and activities of its three military components. DOD has employed military

and contract photographers to document the return to Dover AFB of the flag-draped coffins of American military men and women killed in service.

11. Public servants and private citizens traditionally have honored fallen American military men and women in return ceremonies or burial services. The soldiers' flag-draped coffins often figure prominently in such observances.

12. Photographs documenting the return to the United States of soldiers killed abroad also have influenced the planning and strategizing of various military endeavors, serving as powerful reminders to public servants and private citizens of the costs of war. Because the impact of war images on the public can affect any decision by United States officials to engage our military in combat, the public's reaction to photographs such as those taken at the Dover AFB mortuary has been called "the Dover Test."

13. The media have attended many ceremonies at Dover AFB and other military facilities marking the return or burial of fallen soldiers and other Americans. For example, in 1980, the press attended a ceremony for eight U.S. airmen killed in the aborted rescue of the Tehran Embassy hostages, and photographed then-President Carter praying over the flag-draped caskets of the fallen. Three years later, the media covered a ceremony for the military and diplomatic personnel killed in the bombing of the U.S. Embassy in Beirut, and photographed then-President Reagan in front of a row of flag-draped coffins. President Reagan was again photographed pinning purple hearts on the flag-draped caskets of military personnel killed in El Salvador in 1985. The media also covered ceremonies for the 47 U.S. sailors killed in an accidental explosion aboard the battleship *U.S.S. Iowa* in 1989.

THE DEPARTMENT OF DEFENSE POLICY AGAINST MEDIA COVERAGE

14. In February 1991, during the Persian Gulf War (a/k/a Operation Desert Storm), the Office of the Secretary of Defense Crisis Coordination Center issued an unclassified memorandum to “clarif[y] public affairs policy concerning memorial and arrival ceremonies at the ports of entry for remains of deceased military personnel arriving from overseas, and for media coverage of such ceremonies.” Dep’t of Defense Mem. re Public Affairs Guidance - Operation Desert Storm Casualty and Mortuary Affairs ¶ 2 (Feb. 6, 1991). The memorandum stated: “Media coverage of the arrival of the remains at the port of entry or at interim stops will not be permitted.” *Id.* ¶ 3. Thus, DOD instituted a policy that banned the press from ceremonies honoring the return to the United States of soldiers’ remains (the “1991 Policy”). Through the 1991 Policy, DOD prevented the news media from capturing images of the coffins of deceased soldiers transported through Dover AFB and other military facilities.

15. Several exceptions have been made to the 1991 Policy. For example, members of the press photographed the April 1996 arrival and transfer ceremony -- at which then-President Clinton received the flag-draped caskets -- for the remains of Commerce Secretary Ron Brown and 32 other Americans killed in a plane crash in Croatia. The press photographed the return ceremony for Americans killed in the 1998 embassy bombings in Tanzania and Kenya; the Pentagon released a number of photographs of the ceremony as well, including one depicting the transfer of the coffins.

16. Notwithstanding the 1991 Policy, DOD and its component entities also released their own photographs of ceremonies honoring the return to the United States of soldiers’ remains. In October 2000, DOD released photographs of caskets bearing the remains of

military personnel killed in the bombing of the U.S.S. Cole. Similar photographs were released in March 2001 of caskets bearing the remains of six military personnel killed in a training accident in Kuwait. In September 2001 the Air Force published a photograph of the arrival and transfer of the remains of a victim of the 9/11 attack on the Pentagon.

17. Defense officials reiterated the ban on media coverage in November 2001 at the start of the war in Afghanistan. *See* Lt. Col. Richard A. Lacquement, Jr., U.S. Army, *The Casualty Aversion Myth*, NAVAL WAR COLLEGE REVIEW, Winter 2004 at 41 (citing Defense Press Office, Assistant Secretary of Defense (Public Affairs), *Public Affairs Guidance-Casualty and Mortuary Affairs-Operation Enduring Freedom*, 1 November 2001).

18. Notwithstanding the reiteration of the 1991 Policy, several exceptions have been allowed since November 2001. That very month, the media attended the arrival and transfer of the remains of Johnny Micheal Spann, the first U.S. casualty resulting from the invasion of Afghanistan. In March 2002, the press photographed the arrival of seven flag-draped caskets carrying the remains of U.S. soldiers killed in Afghanistan.

19. In March 2003, DOD officials expanded the 1991 policy to cover all military operations and installations. *See* K. L. Vantran, *Dover's New Mortuary Center Aims to Ease Family's Grief*, AMERICAN FORCES INFORMATION SERVICE NEWS, Oct 29 2003, *available at* <http://www.defenselink.mil/news/Oct2003>.

20. Despite the expansion of the 1991 Policy, the media were permitted to photograph flag-draped caskets holding the remains of six U.S. soldiers as they were loaded onto a C-17 transport in Kabul, Afghanistan in March 2003. The DOD also released its own

photograph to the media in November 2003 of the flag-draped coffin bearing the remains of a soldier killed in the Korean War.

21. Upon information and belief, DOD has no established procedures for making the exceptions to the media ban described above.

22. When asked to describe the standards governing exceptions to the 1991 Policy, Deputy Undersecretary of Defense for Military Community and Family Policy John Molino has stated: “I don’t know if I can adequately address that because I don’t know that there’s a general standard or a threshold through which you have to pass” U.S. Dep’t of Defense News Transcript (April 22, 2004), *available at* <http://www.defenselink.mil/transcripts/2004/tr20040422-0648.html>.

23. DOD has asserted that the basis for its media ban policy is to protect the privacy interests of fallen soldiers and their families. Undersecretary Molino has attributed the policy to “what the families desire vis-à-vis privacy,” *id.*, and to “the dignity of the individual who was killed in action.” U.S. Dep’t of Defense News Transcript (Mar. 26, 2003), *available at* http://www.defenselink.mil/transcripts/2003/t03272003_t0326noc.html; *see also* Monte Morin, *Photos of Coffins Draw U.S. Crackdown*, LOS ANGELES TIMES, April 23, 2004, at A1 (reporting that the DOD took the position that images of caskets bearing soldiers’ remains violated the privacy of the troops’ families).

24. Upon information and belief, photographs of returning soldiers’ remains and/or their flag-draped caskets that have been taken at Dover AFB do not indicate the name or identity of the fallen soldiers therein.

25. According to a number of public statements, the DOD has indicated that privacy concerns and the 1991 Policy provide a basis for its refusal to release photographs of the return of fallen soldiers under FOIA. *See, e.g.,* Morin, *supra*, at A1 (reporting that DOD stated that a release of photographs had been a clear violation of the 1991 Policy); Frank Davies, *Views Mixed on Media Use of War Dead Photos*, MIAMI HERALD, April 24, 2004 at A22 (same).

THE DEPARTMENT OF DEFENSE'S FREEDOM OF INFORMATION ACT POLICY

26. In November 2003, Russ Kick filed a request under FOIA for photographs, taken between February 1, 2003 and November 6, 2003, of the caskets returning to Dover AFB containing the remains of military personnel killed overseas. Mr. Kick's request was denied, and he filed an administrative appeal.

27. Starting on March 29, 2004, Dover AFB Mortuary maintained a website that included a photograph of flag-draped caskets arriving at Dover in a transport aircraft. This website has since been taken offline. *See* http://www.thememoryhole.org/war/coffin_photos/dover.

28. In response to the administrative appeal of his FOIA request, 361 images of fallen soldiers' caskets at Dover AFB were released to Mr. Kick on April 14, 2004. Mr. Kick posted the photographs on his website, <http://www.thememoryhole.org>.

29. According to several public statements, the DOD, the Air Force, and the White House regarded the release of photographs to Mr. Kick as an accidental -- and regrettable -- lapse in the 1991 Policy. *See* Helen Kennedy, *Last Homecoming First Look at Tragic Photos That Show Somber Realities of War*, DAILY NEWS (New York), April 23, 2004 (reporting that the Pentagon stated the release to Kick was an accident); Morin, *supra*, at

A1 (reporting that military officials called the release to Kick a violation of the 1991 Policy); Davies, *supra* (same); Thomas Shanker and Bill Carter, *Photos of Soldiers' Coffins Spark a Debate Over Access*, NEW YORK TIMES, April 24, 2004, at A14 (reporting that President Bush and the Pentagon said the release to Kick was wrong).

30. The DOD and the Air Force also have taken the position that no further photographs of caskets bearing soldiers' remains will be released to the public. See Davis, *supra*; Bill Carter, *Pentagon Ban on Pictures of Dead Troops is Broken*, NEW YORK TIMES, April 23, 2004, at A14.

PLAINTIFF'S FOIA REQUESTS AND DEFENDANTS' FAILURE TIMELY TO COMPLY WITH PLAINTIFF'S REQUESTS

31. By facsimile dated April 23, 2004, addressed to Dover AFB and Air Mobility Command, Plaintiff Begleiter requested under FOIA:

Copies of the 361 images taken by Defense Department photographers that were released in April 2004 to Mr. Russ Kick of the www.memoryhole.org in response to his FOIA request for "all photographs showing caskets containing the remains of U.S. military personnel at Dover A.F.B."

Furthermore I also request all photographs of caskets containing the remains of U.S. military personnel at Dover A.F.B. taken since Mr. Kick's December 2003 request to the present, all photographs of caskets containing the remains of U.S. military personnel received at any U.S. military facilities between October 7, 2001 and the present.

32. By facsimile dated May 3, 2004, addressed to Dover AFB and Air Mobility Command, Plaintiff Begleiter requested under FOIA:

All photographs, videos (including analog and digital recordings) and any other media containing images of caskets holding the remains of U.S. military personnel taken by Department of Defense personnel or Department of Defense contractors at Dover Air Force Base from April 1, 2004-April 30, 2004. To ensure accuracy, please also include identifying information that may accompany these images, such as research finding aids, indexes, captions, dates, logs, and records management materials.

33. By facsimile dated May 3, 2004, addressed to Dover AFB and Air Mobility

Command, Plaintiff Begleiter requested under FOIA:

All videos (including analog and digital recordings) and any other media containing images of caskets holding the remains of U.S. military personnel taken by Department of Defense personnel or Department of Defense contractors at Dover Air Force Base from October 7, 2001-April 23, 2004. To ensure accuracy, please also include identifying information that may accompany these images, such as research finding aids, indexes, captions, dates, logs, and records management materials.

34. By letter dated May 20, 2004, Dover AFB acknowledged Plaintiff Begleiter's May 3, 2004 FOIA request concerning images from April 1, 2004-April 30, 2004, and indicated that the request was being forwarded to Headquarters Air Mobility Command at Scott AFB for action and a direct response.

35. By second letter dated May 20, 2004, Dover AFB acknowledged Plaintiff Begleiter's May 3, 2004 FOIA request concerning images from April 1, 2004-April 30, 2004, and indicated that the request was being forwarded to Headquarters Air Mobility Command at Scott AFB for action and a direct response.

36. By facsimile dated June 10, 2004, addressed to Dover AFB and Air Mobility Command, Plaintiff Begleiter requested under FOIA:

All Photographs, videos (including analog and digital recordings) and any other media containing images of caskets holding the remains of U.S. military personnel taken by Department of Defense personnel or Department of Defense contractors at Dover Air Force Base from May 1, 2004-May 31, 2004. To ensure accuracy, please also include identifying information that may accompany these images, such as research finding aids, indexes, captions, dates, logs, and records management materials.

37. By letter dated June 14, 2004, Headquarters Air Mobility Command at Scott AFB acknowledged Plaintiff Begleiter's June 10, 2004 FOIA request concerning images from May 1, 2004-May 31, 2004, and indicated that the agency could not "mak[e] a response

determination within 20 workdays” and that the request was placed in the “complex track.”

38. By letter dated June 24, 2004, Dover AFB acknowledged Plaintiff Begleiter’s June 10, 2004 FOIA request concerning images from May 1, 2004-May 31, 2004, and indicated that the request was being forwarded to Headquarters Air Mobility Command at Scott AFB for action and a direct response.

39. By facsimile dated June 30, 2004, Plaintiff Begleiter administratively appealed the constructive denial of his April 23, 2004 FOIA request. To date, Plaintiff has received no substantive response to his appeal.

40. By failing to respond substantively to Plaintiff’s administrative appeal, Defendants have constructively denied the April 23, 2004 request.

41. By facsimile dated July 22, 2004, addressed to Dover AFB and Air Mobility Command, Plaintiff Begleiter requested under FOIA:

All Photographs, videos (including analog and digital recordings) and any other media containing images of caskets holding the remains of U.S. military personnel taken by Department of Defense personnel or Department of Defense contractors at Dover Air Force Base from June 1, 2004-June 30, 2004. To ensure accuracy, please also include identifying information that may accompany these images, such as research finding aids, indexes, captions, dates, logs, and records management materials.

42. By letter dated Aug 3, 2004, Headquarters Air Mobility Command at Scott AFB acknowledged Plaintiff Begleiter’s May 3, 2004 FOIA request concerning images from April 1, 2004-April 30, 2004, and his May 3, 2004 request for images from October 7, 2001-April 23, 2004, and indicated that “[d]ue to our backlog, we have instituted multitrack processing of requests.”

43. By facsimile dated August 4, 2004, addressed to Dover AFB and Air Mobility Command, Plaintiff Begleiter requested under FOIA:

All Photographs, videos (including analog and digital recordings) and any other media containing images of caskets holding the remains of U.S. military personnel taken by Department of Defense personnel or Department of Defense contractors at Dover Air Force Base from July 1, 2004-July 31, 2004. To ensure accuracy, please also include identifying information that may accompany these images, such as research finding aids, indexes, captions, dates, logs, and records management materials.

44. By letter dated Aug 6, 2004, Headquarters Air Mobility Command at Scott AFB acknowledged Plaintiff Begleiter's Aug 4, 2004 FOIA request concerning images from July 1, 2004-July 31, 2004, and indicated that "[b]ecause our organization has a significant number of pending FOIA requests, which prevents us from making a response determination within 20 workdays, we have instituted multitrack processing of requests. Based on the information provided, we have placed your request in the simple track."

45. By letter dated August 10, 2004, Dover AFB acknowledged Plaintiff Begleiter's July 22, 2004 FOIA request concerning images from June 1, 2004-June 30, 2004, and indicated that the request was being forwarded to Headquarters Air Mobility Command at Scott AFB for action and a direct response.

46. By letter dated August 24, 2004, Dover AFB acknowledged Plaintiff Begleiter's August 4, 2004 FOIA request concerning images from July 1, 2004-July 31, 2004, and indicated that the request was being forwarded to Headquarters Air Mobility Command at Scott AFB for action and a direct response.

47. By facsimile dated September 6, 2004, addressed to Dover AFB and Air Mobility Command, Plaintiff Begleiter requested under FOIA:

All Photographs, videos (including analog and digital recordings) and any other media containing images of caskets holding the remains of U.S. military

personnel taken by Department of Defense personnel or Department of Defense contractors at Dover Air Force Base from August 1, 2004-August 31, 2004. To ensure accuracy, please also include identifying information that may accompany these images, such as research finding aids, indexes, captions, dates, logs, and records management materials.

48. By letter dated September 8, 2004, Headquarters Air Mobility Command at Scott AFB again acknowledged Plaintiff Begleiter's Aug 4, 2004 FOIA request concerning images from July 1, 2004-July 31, 2004, but indicated that "[b]ecause our organization has a significant number of pending FOIA requests, which prevents us from making a response determination within 20 workdays, we have instituted multitrack processing of requests. Based on the information provided, we have placed your request in the complex track."

49. To date, Defendant DOD has not provided any of the records requested by Plaintiff Begleiter in any of his FOIA requests -- to wit, his letters of April 23, May 3, June 10, July 22, August 4, and September 6, 2004.

50. To date, Defendant DOD has not responded to Plaintiff Begleiter's June 30, 2004, administrative appeal.

51. By failing to respond substantively to any of Plaintiff's requests within the statutory twenty-day period, Defendants have constructively denied those requests.

52. Based on Defendants' public statements indicating Defendants' policy of denying requests for images of the caskets bearing the remains of U.S. military personnel at Dover AFB, it would be futile for Plaintiff to file additional administrative appeals or to wait additional time to receive a substantive response from Defendants.

53. Defendants have wrongfully withheld the requested records from Plaintiff Begleiter.

CAUSE OF ACTION

54. Plaintiff incorporates the allegations set forth in paragraphs 1-53 as if set forth fully herein.

55. Plaintiff has exhausted his administrative remedies with respect to the FOIA requests filed on April 23, 2004, May 3, 2004, June 10, 2004, July 22, 2004, August 4, 2004, and September 6, 2004.

56. Pursuant to 5 U.S.C. § 552(a)(3), Plaintiff has a right of access to the information and documents requested in his FOIA requests filed on the following dates in 2004: April 23, May 3, June 10, July 22, August 4, and September 6.

57. Defendants have no legal basis for refusing to disclose this information and these documents to Plaintiff. Defendants have unlawfully withheld the records requested by Plaintiff Begleiter.

REQUESTED RELIEF

WHEREFORE, plaintiff prays that this Court:

- A. Declare that Defendants' policy of refusing to release images of military caskets pursuant to a FOIA request is unlawful;
- B. Enjoin and order Defendants to cease relying on its invalid policy for refusing to release images of military caskets pursuant to a FOIA request;
- C. Declare that Defendants' refusal to release the records requested by Plaintiff violates FOIA;
- D. Enjoin and order Defendants to disclose the requested records in their entirety and make copies available to Plaintiff;

- E. Provide for expeditious proceedings in this action;
- F. Award Plaintiff his costs and reasonable attorneys fees incurred in this action; and
- G. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

Daniel Mach
D.C. Bar No. 461652
Jenner & Block LLP
601 13th Street, NW
Suite 1200 South
Washington, DC 20005

Meredith Fuchs
D.C. Bar No. 450325
General Counsel
The National Security Archive
Gelman Suite 701
2130 H Street, NW
Washington, DC 20037

Counsel for Plaintiff Ralph Begleiter

DATE: October 4, 2004