06-3140-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, 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,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each of the Plaintiffs-Appellees certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

In this appeal, the government seeks for a second time to withhold under the Freedom of Information Act ("FOIA") images of detainee abuse by U.S. soldiers abroad. In its first appeal, the government sought to withhold images of detainee abuse at Abu Ghraib, Iraq ("Abu Ghraib images") under FOIA's Exemption 7(F) on the ground that their release would generate anti-American violence across the globe. The government also argued that the Abu Ghraib images could be withheld under FOIA's Exemptions 6 and 7(C) because the public interest in disclosure of images that depicted, in the government's view, aberrational abuse by "rogue" soldiers, JA 281, 284, was insufficient to outweigh the privacy interests of detainees, despite the fact that all of their identifying features had been redacted.

The government withdrew its first appeal when a large set of photographs and videotapes depicting torture and abuse at Abu Ghraib were published on salon.com without causing violence. JA 412. It also authenticated the images in its possession that corresponded to those published on salon.com,[1] again, without

[1] The government authenticated photos 1, 2, 5-28, 30, 34, 35 in Chapter 1; photos 1-7, 9-11 in Chapter 2; photo 12 in Chapter 3; photos 14-21 in Chapter 4; photos 2, 3, 4, 6, 7, 9-21, 24-28 in Chapter 6; photos 1, 2 in Chapter 9; movies 2, 3, 4 in Chapter 10 ("Authenticated Abu Ghraib images"), *available at* http://www.salon.com/news/abu_ghraib/2006/03/14/introduction/index.html. The photo number is indicated by the last number in the uniform resource locator ("URL") that appears in the status bar of the internet browser when the computer

causing violence. Iraq and Afghanistan experienced significant violence before and after the Abu Ghraib images were published and authenticated. But there is no evidence that violence was caused by the public revelations of these images.

The government now appeals to this Court for a second time, seeking to shield from disclosure, on the same grounds and with the same predictive claims as those asserted in the first appeal, yet another set of detainee abuse images from which individually identifying details have been redacted. These twenty-one images depict mistreatment by U.S. soldiers in locations other than Abu Ghraib in Iraq, and in Afghanistan ("Detainee Abuse Images").[2]

Once again, the government warns, invoking Exemption 7(F), that the Detainee Abuse Images are so incendiary that large-scale violence could erupt across the globe in response to their release. The government has not, however, met its burden under that exemption of showing that release of the Detainee Abuse Images "could reasonably be expected" to endanger lives. As noted, no violence ensued upon the release of the Abu Ghraib images or upon their authentication by the government. The government has failed to show why its erroneous prediction

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mouse pointer is placed over an image. For example, the URL for photo 1 in Chapter 1 is http://www.salon.com/news/abu_ghraib/2006/03/14/chapter_1/1.html.

[2] Moreover, the government has admitted to withholding still more images of detainee mistreatment on the same grounds as it is withholding the Detainee Abuse Images. Pursuant to a district court order endorsing an agreement between the parties, this Court's ruling with respect to the Detainee Abuse Images will also affect the disclosure, in redacted form, of all other images withheld by the government on grounds of FOIA exemptions 6, 7(C), and/or 7(F). JA 414.

of violence in connection with the Abu Ghraib images is any more accurate in its second appeal.

In any event, Exemption 7(F) does not protect records from disclosure on the basis of generalized harm that could be triggered by an adverse reaction. If the government's expansive construction of that exemption were accepted, it could deprive the public of access to precisely those records that are most critical to our democratic process, namely those that reveal government misconduct and are therefore more likely to trigger an adverse response.

Nor can the Detainee Abuse Images be withheld under FOIA Exemptions 6 and 7(C). Because Appellees seek release of these images only after all detainee identifying features have been redacted, any surviving privacy interests are more than outweighed by the considerable public interest in the disclosure of these images. The Detainee Abuse Images — which are the best evidence of what actually occurred — are of immense public interest because they shed light not only on the scope and nature of the abuses that took place in Iraq and Afghanistan, but also on unresolved questions regarding command responsibility for that abuse.

This Court's ruling on the Detainee Abuse Images is of critical significance. It will affect the disclosure of numerous other images of detainee abuse currently withheld by the government on the grounds of FOIA Exemptions 6, 7(C) and 7(F).

Moreover, the government's construction of Exemption 7(F) would seriously undermine the public's ability to expose government misconduct in other contexts.

For all of these reasons, this Court should order the government to comply with its obligations under FOIA and release the Detainee Abuse Images.

STATEMENT OF THE FACTS

I. PUBLIC DEBATE CONCERNING THE ABUSE OF PRISONERS IN U.S. CUSTODY ABROAD.

In late April of 2004, images of U.S. soldiers abusing prisoners at Abu Ghraib, Iraq were leaked to the press. One image depicted a hooded prisoner standing on a box with wires attached to his hands. Another image showed the beaten and bloodied dead body of an Iraqi prisoner. Other images showed naked and hooded prisoners placed in sexually humiliating positions before U.S. soldiers posing for the camera.[3]

The U.S. government condemned the abuse and laid the blame on a handful of "rogue" soldiers. In his May 8, 2004 radio address to the nation, President Bush said that "[w]hat took place in that Iraqi prison was the wrongdoing of a few."[4]

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[3] *See* Interactive, Abuse at Abu Ghraib, CBS News, Apr. 28, 2004, *available at* http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml.

[4] President's Radio Address, May 8, 2004, *available at* http://www.whitehouse.gov/news/releases/2004/05/20040508.html.

Defense Secretary Donald Rumsfeld denied that the abuse was conducted as a matter of policy[5] and that it was tantamount to torture.[6]

Over the next several months, national newspapers published government documents showing that high-level officials were involved in denying al Qaeda and Taliban prisoners legal protections under the Geneva Conventions,[7] and that Defense Secretary Rumsfeld had specifically authorized for use at Guantánamo Bay interrogation methods such as forcing detainees into stress positions, removing their clothing, and exploiting their phobias through the use of dogs.[8] Other

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[5] *See* Department of Defense News Transcript, Secretary Rumsfeld's Speech At The National Press Club, Sept. 10, 2004, *available at* http://www.defenselink.mil/transcripts/2004/tr20040910-secdef1286.html.

[6] Department of Defense Operational Update Briefing, May 4, 2004, *available at* http://www.defenselink.mil/transcripts/2004/tr20040504-secdef1423.html.

[7] *See, e.g.,* Memorandum from Defense Secretary Donald Rumsfeld, Jan. 19, 2002 (directing that "Al Qaeda and Taliban detainees under the control of the Defense Department are not entitled to prisoner of war status under the Geneva Conventions of 1949,"), *available at* http://www.defenselink.mil/news/Jun2004/d20040622doc1.pdf; Memorandum from White House Counsel Alberto Gonzales for the President, Jan. 25, 2002 (advising the President that the war on terror had "render[ed] obsolete" the Third Geneva Convention's "strict limitations on questioning of enemy prisoners"), *available at* http://wid.ap.org/documents/doj/gonzales.pdf; Memorandum from President Bush, Feb. 7, 2002 ("Bush February 2002 Order") (denying prisoner of war and Common Article 3 protections under the Third Geneva Convention to al Qaeda and Taliban detainees, but noting that they were to be treated "humanely," and, "to the extent appropriate and consistent with military necessity," in keeping with that Convention), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf.

[8] Order of Defense Secretary Donald Rumsfeld approving counter resistance techniques for Guantánamo Bay, Dec. 2, 2002 ("December 2002 Rumsfeld

documents produced in this litigation confirmed that prisoner abuse at the hands of U.S. soldiers was by no means limited to Abu Ghraib, but occurred at numerous locations elsewhere in Iraq, Afghanistan, and Guantánamo Bay.[9]

The Abu Ghraib images and other documents leaked to the press fueled public debate about the government's detainee treatment policies and the responsibility of senior officials for prisoner abuse.[10] According to media reports relating to the torture of two detainees held in United States custody in Bagram, Afghanistan, interrogators interpreted President Bush's February 2002 order denying detainees Geneva Convention protections to mean that they could deviate from the rules governing interrogation.[11] Other media reports discussed documents produced in this litigation that suggest that detainee abuse in Iraq ensued from the

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Order"), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf.

[9] *See, e.g.*, Information Paper Re: Allegations of Detainee Abuse in Iraq and Afghanistan (Defense Department document describing allegations of detainee abuse at Camp Cropper, Camp Bucca and Mosul, Samarra, Baghdad and Tikrit in Iraq, and Orgun-E in Afghanistan), *available at* http://www.aclu.org/projects/foiasearch/pdf/DOD054957.pdf; Email (names redacted), Aug. 2, 2004 (FBI agent describing detainee abuse at Guantánamo Bay), *available at* http://www.aclu.org/projects/foiasearch/pdf/DOJFBI002345.pdf.

[10] *See, e.g.*, Jackson Diehl, *How Torture Came Down From The Top*, Wash. Post, Aug. 27, 2004; Editorial, *The Roots of Abu Ghraib*, N.Y. Times, June 9, 2004.

[11] *See, e.g.*, Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates Deaths*, N.Y. Times, May 20, 2005.

belief generated by senior leaders that detainees were not entitled to protections afforded to prisoners of war.[12]

Debate also focused on links between high-level official policies and orders relating to interrogation techniques and prisoner abuse on the ground. Thus, media reports questioned how the government's investigations into detainee abuse could absolve U.S. policy makers of any blame when these investigations themselves acknowledge that abusive interrogation techniques such as the use of dogs, removal of clothing, and "stress positions" applied in Iraq and Afghanistan were derived from the December 2002 Rumsfeld Order.[13] Other reports discussed documents released to Plaintiffs in this litigation showing the similarity of interrogation techniques authorized by senior officials in Iraq and Guantánamo Bay.[14] In particular, reports discussed the marked similarity between practices

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[12] *See* Josh White, *Soldiers' "Wish Lists" Of Detainee Tactics Cited*, Wash. Post, Apr. 19, 2005 (relying on Memorandum for Commander, 104th Military Intelligence Battalion, Rebuttal of (name redacted) to Written Reprimand, Nov. 9, 2003, at DOD 2821-2823, *available at* http://www.aclu.org/projects/foiasearch/pdf/DOD002818.pdf).

[13] *See* Jackson Diehl, *supra* note 10 (citing Report of Major Gen. George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade ("Fay Report") at 29, *available at* http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf).

[14] *See, e.g.*, *Harsh Tactics Were Allowed, General Told Jailers in Iraq*, N.Y. Times, Mar. 30, 2005 (citing Memorandum from Lieutenant General Ricardo S. Sanchez to Commander, U.S. Central Command, Sept. 14, 2003 (Sanchez Sept. Order), *available at* http://www.aclu.org/FilesPDFs/september%20sanchez%20memo.pdf). The Sanchez Sept. order shows that abusive interrogation techniques such as

depicted in some of the Abu Ghraib images and those authorized for use at Guantánamo Bay.[15]

The Defense Department has conducted some investigations into detainee abuse by U.S. soldiers abroad and punished some low-ranking soldiers. *See* JA 281, 287-291. However, debate has centered over why no senior official has been held accountable for the abuse and the need for an independent investigation.[16] Numerous members of Congress, as well as civil society organizations have called for a truly independent investigation into the abuse of detainees held at Abu Ghraib and other U.S. detention facilities abroad.[17] Since the Supreme Court's holding in

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"isolation," "stress positions," and the use of dogs to exploit prisoner phobias—virtually identical to techniques authorized in the December 2002 Rumsfeld Order—were specifically authorized for use in Iraq. *Compare* Sanchez Sept. Order *supra*, *with* Rumsfeld December 2002 Order, *supra* note 8.

[15] Josh White, *Abu Ghraib Tactics Were First Used at Guantanamo*, Wash. Post, Jul. 14, 2005 (citing to the report of LTG Randall M. Schmidt & BG John T. Furlow, Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, AR 15-6 Final Report at 19-20 (June 9, 2005), *available at* http://www.defenselink.mil/news/Jul2005/d20050714report.pdf)); *see also* Authenticated Abu Ghraib images 11-14 in Chapter 1, 1-3 in Chapter 2 (depicting naked detainees in various positions, wearing female underwear on their heads, and a female U.S. soldier leading a detainee on leash).

[16] *See*, *e.g.*, Editorial, *The Truth About Abu Ghraib*, Wash. Post, July 29, 2005; Editorial, *The Joy of Being Blameless*, N.Y. Times, Mar. 23, 2006.

[17] *See* JA 392, 400-01; *see also*, Douglas Jehl, *Some Republicans Seek Prison Abuse Panel*, N.Y. Times, Jun. 22, 2005; 151 Cong. Rec. S12472 (daily ed. Nov. 8, 2005) (statement of Mr. Chambliss) (recording 43 senate votes in favor of legislation establishing an independent commission to examine detainee treatment); Press Release, American Bar Association, American Bar Association Condemns Torture (Aug. 10, 2004) (calling for creation of an independent,

Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006), that al Qaeda detainees are entitled to protections under the Geneva Conventions, *id*., at 2796, public debate has intensified around the government's apparent attempts to insulate U.S. officials from prosecution for "grave breaches" of those Conventions under the War Crimes Act.[18]

Whatever the merits of such claims directed against the current administration, the abuse of prisoners by U.S. forces abroad remains a subject of intense debate, and one in which more information rather than less is necessary for an informed public discussion.

II. PROCEDURAL HISTORY

This case arises from a FOIA request submitted by Plaintiffs to Defendants almost three years ago, on October 7, 2003, long before photographs of detainee abuse in Abu Ghraib, Iraq were first leaked to the press in late April of 2004. JA 51. The FOIA request sought records related to the treatment and death of detainees held in United States custody abroad, as well as the rendition of detainees to countries known to employ torture. JA 52. Over the next six months,

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bipartisan investigative commission), *available at* http://www.abanews.org/releases/news081004_4.html

[18] *See*, *e.g.*, Kate Zernike, *White House Asks Congress to Define War Crimes*, N.Y. Times, Aug. 3, 2006; R. Jeffrey Smith, *War Crimes Act Changes Would Reduce Threat Of Prosecution*, Wash. Post, Aug. 9, 2006.

Plaintiffs received no substantive response to their requests. On May 25, 2004, after images of detainee abuse were leaked to the press, Plaintiffs filed a second FOIA request with Defendants, seeking updated information for the same categories requested in the October 7, 2003, FOIA request. JA 44. On June 2, 2004, Plaintiffs filed a complaint, challenging the failure of Defendants to comply with their obligations under FOIA. JA 7.

To assist Defendants in responding to their FOIA requests, on August 16, 2004, Plaintiffs supplied them with a non-exhaustive list of responsive documents (the "August 16, 2004 list"). JA 65-81. Among other documents and detainee abuse images identified on that list, *see, e.g.*, JA 69 (items 10, 11), were the Abu Ghraib images.[19] JA 81 (item 69). The government invoked FOIA's Exemptions 6, 7(C), and 7(F) as a basis for withholding these images. It did not, however, provide any basis for withholding other images of detainee abuse identified on the August 16, 2004 list, claiming that those images had not been processed as of that time. JA 384.

The first round of summary judgment briefing centered on specific items identified on the August 16, 2004 list. JA 354. On September 29, 2005, after extensive *in camera* and *ex parte* review of these images, the district court rejected

[19] The government refers to the same images as the "Darby photos" because they were turned in to the Army by Joseph Darby, a military policeman. Appellants' Br. at 17.

the governments' arguments for withholding the Abu Ghraib images and ordered it to produce those images after deleting all identifying features of detainees depicted therein. JA 384-402.

On November 22, 2005, the government filed a Notice of Appeal with respect to the Abu Ghraib images. JA 408-09. In March 2006, however, after many of the Abu Ghraib images were published on salon.com, the government agreed to authenticate images of Abu Ghraib detainee abuse posted on that website, and withdraw its appeal before this Court. JA 412.

On April 10, 2006, the government authenticated seventy-three photographs and three videos of detainee abuse at Abu Ghraib posted on salon.com, and provided one photograph, redacted for detainee identifying features, to Plaintiffs.[20] On April 27, 2006, the government authenticated two more videos, distinct from the Abu Ghraib images, which were posted at http://www.palmbeachpost.com.[21]

After Plaintiffs sought clarification regarding other detainee abuse images withheld by the government on the grounds of FOIA Exemptions 6, 7(C) and 7(F), it confirmed that it was withholding an additional twenty-nine images on those grounds. On April 10, 2006, the district court ordered an expedited procedure for resolving any remaining issues regarding the release of the twenty-nine images under FOIA. JA 411-415. That court also ordered that all other images withheld

[20] *See supra* note 1.

[21] These images are no longer available at this web address.

by the government under FOIA Exemptions 6, 7(C) and 7(F) would be governed by the final ruling on appeal with respect to the twenty-nine images. JA 414. In opposition to Defendants' affidavits arguing for the withholding of the twenty-nine images, Plaintiffs submitted two new declarations in support of the release of the images on behalf of Colonel Michael Pheneger and Professor Khaled Fahmy. JA 447-459. Plaintiffs also requested the court to consider affidavits previously submitted by Scott Horton, JA 143-162, Professor Marco Sassòli, JA 163-172, Colonel Pheneger, JA 292-96, and Professor Fahmy, JA 297-300.

On June 9, 2006, after *ex parte* and *in camera* review of the twenty-nine images, the district court ordered the government to release twenty of the twenty-nine images, and on June 21, 2006, ordered release of another one of those twenty-nine images. JA 508-09, 513-14. On June 30, 2006, the government filed a Notice of Appeal, challenging the district court's June 9 and June 21, 2006 rulings ordering release of a total of twenty-one images of detainee abuse in redacted form. JA 515-16.

In a letter dated June 29, 2006, the government informed Plaintiffs that the Defense Department is withholding approximately twenty-three other images of detainees pursuant to FOIA Exemptions 6, 7(C) and/or 7(F), the release of which, under the district court's April 10, 2006 order, would be governed by any final

order concerning release of the twenty-one images that are the subject of this appeal.

SUMMARY OF THE ARGUMENT

FOIA was enacted to promote democratic decision-making by an informed electorate. The Detainee Abuse Images, which on their face depict serious misconduct of government personnel, are precisely the kinds of records that FOIA was designed to uncover. Plaintiffs are presumptively entitled to these records under FOIA, and the government has not met its burden of showing that any FOIA exemption authorizes the withholding of these records.

The government's construction of Exemption 7(F) should be rejected because it is limitless and would, contrary to FOIA's basic purpose, afford the greatest protection to records that depict the worst government misconduct. In addition, this expansive construction finds no support in case law and legislative history, which confirm that Exemption 7(F) applies only to protect individuals who would be endangered through the disclosure of identifying information. The government makes no claim that those circumstances are presented here. It merely asserts a generalized harm arising from an adverse reaction to the content of the Detainee Abuse Images. Furthermore, even if Exemption 7(F) were to apply in this case, the government has not met its burden under that exemption of showing that disclosure of these images "could reasonably be expected to endanger the life or physical safety of any individual." Indeed, the government's claims that violence will ensue from release of the Detainee Abuse Images are too speculative

to meet this burden, especially in light of the fact that the Abu Ghraib images that were the subject of the government's prior appeal were released on salon.com and then authenticated by the government without causing any violence.

Nor can these images be withheld under FOIA's Exemptions 6 and 7(C) or the Geneva Conventions. Any privacy concerns that survive redaction of identifying details depicted in these images are substantially outweighed by the considerable public interest in disclosure of these images. Moreover, written descriptions of the Detainee Abuse Images contained in publicly available Army documents cannot possibly capture all relevant information conveyed by the images themselves.

For all of these reasons, this Court should affirm the district court's ruling ordering disclosure of the Detainee Abuse Images.

ARGUMENT

I. THE FREEDOM OF INFORMATION ACT AFFORDS THE PUBLIC A PRESUMPTIVE RIGHT TO THE DETAINEE ABUSE IMAGES.

Forty years ago, Congress enacted FOIA to uproot "the weed of improper secrecy" that was "choking out" the public's "right to know." H.R. Rep. No. 89-1497, at 2419 (1966). Founded on the time-honored principle that "an informed electorate is vital to the proper operation of a democracy," FOIA's express purpose was to establish a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 89-813, at 3 (1965).

FOIA specifically sought to establish a presumption firmly in favor of agency disclosure by eliminating overly broad grounds for withholding government records needed to serve an "informed electorate." *See id*. (noting that under the Administrative Procedure Act ("APA"), phrases such as "for good cause" had been used to "cover up embarrassing mistakes or irregularities," and that it was the "purpose of the present bill to eliminate such phrases"); H.R. Rep. No. 89-1497, at 2419-23 (1966) (noting, that "[h]istorically, Government agencies whose mistakes cannot bear public scrutiny have found 'good cause' for secrecy," that the APA had been used as an "authority for withholding, rather than disclosing, information," and that FOIA intended to replace "vague phrases" such

as “good cause found” with “specific definitions of information which may be withheld”).

At its inception, FOIA was welcomed as legislation that would “make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that the people should be denied access to information on the conduct of Government” and assure “public access to information which is basic to the effective operation of a democratic society.” 112 Cong. Rec. 13653 (June 20, 1966) (statement of then Rep. Rumsfeld). More recently, Congress affirmed that a principal purpose of FOIA is to “foster democracy by ensuring public access to agency records and information.” Electronic FOIA Amendments of 1996, P.L. 104-231, § 2, 110 Stat. 3048 (1996). It specifically found that since its enactment in 1966, FOIA “has been a valuable means through which any person can learn how the government operates . . . [and has] led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government.” *Id*.

Today, the presumption in favor of disclosure is firmly embedded in the jurisprudence construing this statute. Courts have recognized that FOIA’s “most basic premise [is] a policy strongly favoring public disclosure of information in the possession of federal agencies.” *Halpern v. FBI*, 181 F.3d 279, 286 (2d Cir. 1999); *see also Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005). Consistent with this premise, FOIA places the burden on the agency to

justify the withholding of requested documents. *See* 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action"). Although FOIA sets forth specific exemptions from disclosure, they are "narrowly construed with all doubts resolved in favor of disclosure." *Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988). Moreover, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *see also Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 508 (2d Cir. 1992) (noting that "the exemptions that are part and parcel of the FOIA's broad disclosure plan are not to be used to deflect its aim that is focused on openness, not secrecy").

The district court correctly recognized that the disclosure of detainee abuse images such as those at issue in this appeal is "central to the purposes of FOIA." JA 400. The values underlying FOIA should be given effect here. The U.S. is in the midst of a critically important debate about the treatment of detainees held in the war on terror. The public has a presumptive right to government records that would inform this debate.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE GOVERNMENT CANNOT WITHHOLD THE DETAINEE ABUSE IMAGES UNDER EXEMPTION 7(F).

FOIA's Exemption 7(F) shields from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). That exemption does not apply here for two related reasons. First, the government's construction of Exemption 7(F) would turn FOIA on its head by affording the greatest protection to records that depict the worst government misconduct. Second, the government's construction finds no support in legislative history or case law. Because Exemption 7(F) can never apply to protect harms such as those asserted by the government here, it is unnecessary for this Court to examine affidavits submitted in support of the government's Exemption 7(F) arguments. In any event, even if this Court were to find that Exemption 7(F) applies here, the government's affidavits do not establish a "reasonable expectation" that anyone's life or physical safety will be endangered.

A. The Government's Construction of Exemption 7(F) Would Eviscerate the Freedom of Information Act By Affording The Greatest Protection From Disclosure To Records That Depict The Worst Government Misconduct.

Consistent with FOIA's presumption in favor of disclosure, Exemption 7(F) must be narrowly construed. *See supra* Part I. Notwithstanding that presumption,

the government proposes a limitless construction of Exemption 7(F). It argues that the Detainee Abuse Images may be withheld under Exemption 7(F) because the conduct they depict could provide "grist for [the] . . . propaganda mill" of al Qaeda and other terrorist groups, Appellants' Br. at 18, and "inspire members of the public to undertake acts of violence." Appellants' Br. at 43. This argument is fundamentally inconsistent with FOIA's "basic purpose" of "ensur[ing] an informed citizenry." *See NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978). It leads to the perverse conclusion that the more egregious the misconduct revealed by government records, the more compelling would be the government's basis for shielding these documents from disclosure under FOIA.[22]

Moreover, under the government's construction, any risk of records generating an adverse reaction — even a minimal one — would justify withholding the records no matter how compelling an interest the public has in their disclosure. Thus, were the government's construction of Exemption 7(F) to be accepted, numerous other records of critical import, not limited to other photographs of detainee abuse sought in this litigation, could be withheld from the

[22] That Exemption 7(F) applies only to records compiled for law enforcement purposes would offer little protection: The government would only need to refer the documents for investigation for them to be protected from disclosure under Exemption 7(F). *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 162-64 (1989) (Scalia, J., dissenting) (noting the potential for abuse of Exemption 7's requirement of compilation for law enforcement purposes).

public in the future. That construction would turn FOIA back into the withholding statute it was expressly designed to replace. *See supra* Part I.

As noted by the district court, the "sole justification [offered by the government under Exemption 7(F)] for suppressing the photographs is [its] concern about speech . . . ." JA 400. FOIA's legislative history provides no support for withholding agency records on the basis of such concerns. To the contrary, when Congress enacted FOIA, it took cognizance of the fact that "inherent in the right to speak and the right to print was the right to know," and that "the right to speak and the right to print, without the right to know, are pretty empty." H.R. No. 89-1497, at 2419 (1966); *see also* S. Rep. No. 89-813, at 2-3 (1965) ("[k]nowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives") (citing James Madison, as "chairman of the committee which drafted the first amendment to the constitution"). Thus, FOIA embodies this country's historic commitment to openness as the most effective antidote for countering falsehoods. *See* JA 401 (recognizing that "[c]larity and openness" and not suppression "are the best antidotes" for dispelling criticism).

Records such as the Detainee Abuse Images, which on their face convey "flagrantly improper conduct by American soldiers," are at the heart of what FOIA was designed to deliver to the public. *See* JA 400. As demonstrated below,

moreover, the public interest associated with disclosure of these images is not diminished by the fact that the government has released investigative reports relating to these images. *See infra* Part III A (2). Recognition of this public interest led the district court to rightly conclude that the government's construction of Exemption 7(F) is inconsistent with the purpose of FOIA and therefore in error. JA 400 (discussing the public interest associated with disclosure and concluding that the "core values that Exemption 7(F) was designed to protect are not implicated by the release of [detainee abuse images], but that the core values of FOIA are very much implicated").

The government urges this Court to ignore the public interest in the disclosure of the Detainee Abuse Images on the grounds that Exemption 7(F) does not permit a balancing test. Appellants' Br. at 40-41. Regardless of whether Exemption 7(F) permits a balancing test, however, consideration of the public interest in disclosure is necessary for determining the scope of this exemption. In enacting FOIA, and requiring all exemptions to be narrowly construed, Congress struck a careful balance between the public's right to information about government conduct and the need to protect against disclosure in narrowly confined circumstances. *See Dep't of Air Force v. Rose*, 425 U.S. at 360-61.

Other courts have preserved that balance by considering the public interest associated with disclosure of records that the government sought to withhold under

Exemption 7(F). Indeed, in *Los Angeles Times Commc'ns, LLC v. Dep't of the Army*, a case on which the government heavily relies, *see* Appellants' Br. at 32-34, the court explicitly considered the public interest associated with disclosure of the information at issue, and concluded that its ruling "str[uck]the balance Congress sought to preserve between the public's right to know and the government's legitimate interest in keeping certain information confidential." --- F. Supp. 2d ---, 2006 WL 2336457 at *17-18 (C.D. Cal. July 24, 2006).[23]

In sum, the government's expansive construction of Exemption 7(F) is in error because it would eviscerate FOIA. The public interest associated with disclosure of the Detainee Abuse Images confirms that this Court cannot accept that construction.

B. The Government's Limitless Construction Of Exemption 7(F) Finds No Support In Legislative History And Case Law Which Confirm That Exemption 7(F) Only Permits Withholding To Protect Individuals Who Would Be Endangered Through The Disclosure Of Identifying Information.

Legislative history and case law confirm that law enforcement records may be withheld under Exemption 7(F) only to protect individuals who would be

[23] Other courts have similarly considered the public interest associated with disclosure in determining whether records are appropriately withheld under Exemption 7(F). *See, e.g., Jimenez v. FBI*, 938 F. Supp. 21, 30-31 (D.D.C. 1996); *Colon v. Exec. Office for United States Atty's.*, No. 98-0180, 1998 WL 695631, at *6 (D.D.C. Sept. 29, 1998); *Martorano v. FBI*, No. 89-377, 1991 WL 212521, at *10 (D.D.C. Sept. 30, 1991); *Masiarczyk v. IRS*, No. 04-85, 2005 U.S. Dist. LEXIS 42815, at *22-23 (N.D.W.Va., Oct. 3, 2005).

endangered through the disclosure of identifying information. No authority exists — and indeed, the government has cited none — for withholding records pursuant to this exemption based on an inchoate fear of an adverse reaction that might endanger unidentifiable, unnamed and unknown members of the general public anywhere in Iraq or Afghanistan, or indeed, anywhere in the world. *See* JA 269, 436 (warning of "violence against United States interests, personnel, and citizens worldwide"); Appellants' Br. at 43-44 (warning that release of the images "can inspire members of the public to undertake acts of violence, either with provocation or wholly apart from the urging of terrorists or insurgent leaders" and citing, in relation to release of the Prophet Mohammed cartoons, "deadly violence throughout the Islamic world").

Taking Exemption 7(F) out of its statutory and legislative context, the government urges that the "plain language" of this exemption compels this Court to conclude that "any" literally means "any." Appellants' Br. at 30. But the Supreme Court has recognized in the FOIA context that:

> [t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification . . . . For our duty . . . is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.

FBI v. Abramson, 456 U.S. 615, 625 n.7 (1982).

In keeping with this principle, this Court has previously found the phrase "any court" to be ambiguous, and looked to statutory context and legislative history to resolve its meaning. *See United States v. Gayle*, 342 F.3d 89, 93-96 (2d Cir. 2003) (finding statutory term "any court" to include domestic but not foreign courts); *see also Small v. United States*, 544 U.S. 385, 388-94 (2005) (looking to congressional intent and interpreting the statutory term "any court," and concluding that it included domestic and not foreign courts); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (adopting a limited interpretation of "any person or persons" in order to reflect the intent of Congress).

The phrase "any individual" in Exemption 7(F) is similarly ambiguous and compels an examination of the statutory scheme as well as legislative intent. When viewed in light of its statutory scheme, it is apparent that Exemption 7(F) was not intended to address the broadly defined harms asserted by the government. Each of Exemption 7(F)'s companion provisions address narrowly defined harms. *See* 5 U.S.C. § 552(b)(7)(A) (interference with law enforcement proceedings); § 552(b)(7)(B) (deprivation of right to fair trial or impartial adjudication); § 552(b)(7)(C) (unwarranted invasion of personal privacy); § 552(b)(7)(D) (disclosure of identity of or information supplied by confidential source); and § 552(b)(7)(E) (disclosure of techniques and procedures or guidelines for law enforcement investigations). It is unlikely that Congress would have carefully

circumscribed each of Exemption 7's sub-provisions to address narrowly defined harms to law enforcement interests, but intended 7(F) to have as sweeping a construction as the government urges.

Furthermore, if Congress had intended for records to be withheld on the grounds that their content could generate an adverse reaction, it would have enacted "an independent and generally applicable exemption," JA 399 (citing Tr. of Aug. 30, 2005, at 22-23; JA 338-39), not limited to records compiled for law enforcement purposes, authorizing as much. *Cf. U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 178 (1993) (analogously declining to extend Exemption 7(D) protection for confidential sources to "*all* criminal FBI investigative sources" on the grounds that "[h]ad Congress meant to create such a rule, it could have done so much more clearly"). That Congress chose not to enact such a generally applicable exemption is further confirmation that records can never be withheld under FOIA on the grounds that the government asserts here. *See supra* Part I.

The legislative history of Exemption 7(F) confirms that it was enacted for the narrow purpose of protecting individuals connected to law enforcement interests — including law enforcement personnel, informants, and witnesses — who would be endangered through the disclosure of identifying information. Congress amended Exemption 7(F) in the Freedom of Information Reform Act of 1986. *See* Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3207, 3248-50 (1986)

(codified as amended at 5 U.S.C. § 552 (2002)). Prior to its amendment in 1986, the Exemption protected from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . *would* endanger the life or physical safety of *law enforcement personnel*." 5 U.S.C. § 552(b)(7)(F) (1984) (emphasis added). The 1986 amendments substituted "would" with "could reasonably be expected to" and "law enforcement personnel" with "any individual."

Congress intended the change from "law enforcement personnel" to "any individual" to be limited in scope. *See* 132 Cong. Rec. H9462 (daily ed. Oct. 8, 1986) (statement of Rep. English) (recognizing that the 1986 amendments made "only modest changes to the FOIA" and only "slight[ly]" expanded Exemption 7(F)). Specifically, that change was principally intended to extend the exemption's protection to actual and potential witnesses and confidential informants whose identifying information could be revealed through disclosure of law enforcement records. *See Freedom of Information Act—Appendix: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary* ("*Hearings*"), Vol. 2, 97th Cong. 38 (1981) (Section by Section Analysis) ("The bill would replace the words 'law enforcement personnel' with the words 'any natural person,' thus extending Exemption 7(F) to include such persons as witnesses and potential witnesses whose personal safety is

of central importance to the law enforcement process")[24]; 131 Cong. Rec. S263 (daily ed. Jan. 3, 1985) (statement of Carol E. Dinkins, Deputy Att'y Gen.) ("The current language in Exemption 7(F) exempts records only if their disclosure would endanger the life of a law enforcement officer. However, the exemption does not give similar protection to the life of any other person. S. 774 expands Exemption 7(F) to include such persons as witnesses, potential witnesses, and family members whose personal safety is of central importance to the law enforcement process"); 132 Cong. Rec. H9465 (daily ed. Oct. 8, 1986) (statement of Rep. Kindness) ("Much of the impetus for adjustment of the [FOIA] provisions . . . comes from the concerns . . . that the act is exploited by organized crime figures attempting to learn . . . the identities of informants. . . . The amendments to the [FOIA] . . . are designed to deal with these particularized law enforcement problems"); 132 Cong. Rec. S14252 (daily ed. Sept. 30, 1986) (statement of Sen. Denton) ("we need to rectify the chilling effect that FOIA requests have on informants who fear exposure through information released under the act"); 132 Cong. Rec. S14038 (daily ed. Sept. 27, 1986) (statement of Sen. Hatch) (internal quotation marks omitted) (expressing concern that "[i]nformants are rapidly becoming an extinct species

[24] The 1986 FOIA amendments originated in S. 1730, a bill proposed in the 97th Congress, which passed in the Senate during the 98th Congress as S. 774. The histories of these bills therefore inform an understanding of what Congress intended to change in the 1986 FOIA amendments. *See* 132 Cong. Rec. S14270 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy).

because of fear that their identities will be revealed in response to a FOIA request"); *id.* (noting reports that "the act has harmed the ability of law enforcement officers to enlist informants and carry out confidential investigations," and that "FOIA should be amended because it is used by lawbreakers 'to evade criminal investigation or retaliate against informants'"); 132 Cong. Rec. S14040 (quoting letter from William H. Webster, Dir., FBI, to Sen. Dole) ("This provision would amend the Freedom of Information Act to offer needed protections for confidential undercover informants and investigations"); *Hearings*, Vol. 1, 97th Cong. 1009-10 (1981) (statement of William H. Webster, Dir., FBI) (expressing concerns that informants and potential informants feared being exposed through FOIA disclosures).

Similarly, Congress intended the change from "would" to "could reasonably be expected to" to have modest effect. Indeed, Congress confirmed that this modification reflected the construction that courts already had adopted and "would not appreciably alter the meaning of the affected provisions in their practical application." 132 Cong. Rec. S14297 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy). In support, Congress introduced into the record a Congressional Research Service analysis that cited approvingly to *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315 (D.C. Cir. 1982), where the court described the 7(F) standard as "could reasonably be expected to *lead to the identification of subjects*." *Id*. at 323

(emphasis added). The legislative history did not envisage dramatically expanding Exemption 7(F) to preclude disclosure on the grounds of generalized harm.

In keeping with the statute's legislative history, virtually all Exemption 7(F) cases, including many cited by the government, have interpreted that exemption to permit withholding of records where the disclosure of identifying information would endanger individuals such as law enforcement personnel, informants, and witnesses, who are connected to law enforcement interests. *See, e.g., Garcia v. U.S. Dep't of Justice*, 181 F. Supp. 2d 356, 365, 378 (S.D.N.Y. 2002) (withholding identifying information of FBI and non-FBI government agents and informants); *Blanton v. U.S. Dep't of Justice*, 182 F. Supp. 2d 81, 87 (D.D.C. 2002) (withholding documents containing the identities of FBI agents and persons assisting in investigation of FOIA plaintiff); *Albuquerque Publ'g Co. v. U.S. Dep't of Justice*, 726 F. Supp. 851, 858 (D.D.C. 1989) (withholding names and identities of law enforcement officers); *Amro v. U.S. Customs Serv.*, 128 F. Supp. 2d 776, 788-89 (E.D. Pa. 2001) (same); *Durham v. U.S. Dep't of Justice*, 829 F. Supp. 428, 434 (D.D.C. 1993) (withholding identities of the individuals who assisted the government in its case against the plaintiff); *Shores v. FBI*, 185 F. Supp. 2d 77, 85 (D.D.C. 2002) (withholding identifying information concerning three cooperating witnesses as well as others who were interviewed concerning plaintiff). Here, the government has not alleged any harm to individuals connected to law enforcement

interests. Nor has it alleged any harm caused by the disclosure of identifying information.

The government cites a handful of district court cases in support of its argument that "all courts that have addressed the issue have held that Exemption 7(F) encompasses any unspecified individual whose life or safety could reasonably be endangered by a disclosure." Appellants' Br. at 30. But, consistent with the legislative history and case law described above, all of these cases permit records to be withheld for the sole purpose of protecting individuals who would have been endangered through the disclosure of identifying information contained in the records. In *Los Angeles Times Commc'ns, LLC,* for example, the court permitted redaction of names of private security contractor ("PSC") companies (hired to protect U.S. government personnel, construction contractors and others in Iraq) on the grounds that "this identification" would reveal to insurgents the location where a particular PSC operated, thereby endangering "PSC companies or the projects they protect." 2006 WL at *14, 15. Thus, while the court accepted the defendants' assessments that disclosure of the PSC company names could "endanger military personnel, PSC employees, and civilians in Iraq," it is apparent that the court's ruling was directed at protecting these individuals because they were endangered through the disclosure of identifying information relating to the PSC companies. *Id*. at *15.

Similarly, in *Ctr. for Nat'l Security Studies v. U.S. Dep't of Justice*, 215 F. Supp. 94 (D.D.C. 2002), *rev'd in part and aff'd in part on other grounds*, 331 F.3d 918 (D.C. Cir. 2003), the court permitted the government to withhold the locations of detention facilities, *i.e.*, identifying information that would make the facilities "vulnerable to retaliatory attacks," and place the facilities themselves, their employees, and their detainees at risk. *Id*. at 108. Other district court cases cited by the government address the scope of Exemption 7(F) only cursorily, but appear to permit withholding of identifying information the disclosure of which could endanger informants and/or witnesses. *See Anderson v. U.S. Marshals Serv*., 943 F. Supp. 37, 40 (D.D.C. 1996) (upholding the redaction of information relating to the plaintiff's Central Inmate Monitoring status, "*including the identity and location of an individual who required separation from the Plaintiff*") (emphasis added); *Brady-Lunny v. Massey*, 185 F. Supp. 2d 928, 932 (C.D. Ill. 2002) (holding that names of federal prison inmates could be withheld in light of other "inmates' gang ties, interest in escape, and *motive for violence against informants and rivals*") (emphasis added).

The government cites *Living Rivers v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313 (D. Utah 2003), apparently in support of its argument that records can be withheld under Exemption 7(F) to protect "any unspecified individual" from any kind of harm. *See* Appellants' Br. at 30. But the court in that case

permitted records to be withheld to protect not any unspecified individual, but a narrow community of identifiable "individuals who occupy the downstream areas that would be flooded by a breach of Hoover Dam or Glen Canyon Dam," *id*. at 1321, who could be endangered through disclosure of inundation maps, which terrorists could use for "*identifying* the populations that would be affected by the destruction of a dam." *Id*. at 1316 (emphasis added).

It bears emphasis that the government has not cited to a single case involving Exemption 7(F), nor indeed, any other FOIA exemption, that permits the withholding of information on the grounds that it asserts here. In all of the Exemption 7(F) cases cited above, courts permitted records to protect individuals who could be endangered through the disclosure of identifying information contained in those records.[25]

The government attempts to use Exemption 7(F) as a means of protecting information that, in its view, would compromise national security if released.

[25] To the extent that *Living Rivers* may be interpreted as going beyond this principle, it can readily be distinguished from this case because it concerned the withholding of technical information, *i.e.*, inundation maps, that could be employed directly as a weapon of sorts against the population residing near dams. *Id.* at 1321-22. In contrast, Plaintiffs are not seeking technical information, but are instead seeking the release of information of critical value that sheds light on the scope of human rights violations committed by U.S. soldiers. *Cf. New York Times Co. v. United States*, 403 U.S. 713 (1971) (distinguishing "sailing dates of transports or the number and location of troops," *id*. at 726, from the "Pentagon Papers" that revealed "the workings of government that led to the Vietnam war," *id*. at 717).

That exemption cannot, however, be "a substitute for the government's power to classify information requiring protection." JA 399. Even in the context of Exemption 1, which permits withholding of classified records under FOIA, there are more limits on the assertion of national security interests than the government admits to under Exemption 7(F). *See* 5 U.S.C. § 552(b)(1) (providing for withholding of records "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order"). Moreover, the executive order governing classification imposes important safeguards to protect against the over-classification of materials and specifically precludes the classification of materials in order to prevent embarrassment or conceal violations of law. *See* Exec. Order No. 13,292, § 1.7(a), 68 Fed. Reg. 15,315, 15,318 (Mar. 25, 2003) (providing that "[i]n no case shall information be classified in order to . . . conceal violations of law, inefficiency, or administrative error [or to] prevent embarrassment to a person, organization or agency"). The government should not be permitted to circumvent these standards by invoking Exemption 7(F).

C. Even If The Government's Unprecedented Construction Of Exemption 7(F) Were Accepted, The Government Has Not Met Its Burden Of Showing That Release Of The Detainee Abuse Images "Could Reasonably Be Expected To Endanger The Life Or Physical Safety Of Any Individual."

As demonstrated above, the government's construction of Exemption 7(F) turns FOIA on its head, and case law and legislative history confirm that Exemption 7(F) does not apply to this case. This Court need not, therefore, examine the government's affidavits, which allege harms that Exemption 7(F) does not address. Even if Exemption 7(F) were to apply to this case, and this Court were to defer to the government's affidavits, however, "deference is not equivalent to acquiescence." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C.Cir. 1998). The government's affidavits are insufficient for establishing "a reasonable expectation" that release of the Detainee Abuse Images could "endanger the life or physical safety of any individual."

The government argues that affidavits must be grounded in "past experience" to be accorded deference. Appellants' Br. at 37. But "past experience" of events most closely analogous to release of the Detainee Abuse Images confirms that the government's claims of violence ensuing from these images are too speculative to meet its burden under Exemption 7(F). Notably, the recent release of the Abu Ghraib images on Australian television and on salon.com, as well as other images published on palmbeachpost.com, did not cause

violence. *See* JA 449. Indeed, a United States military official specifically announced that release of the Abu Ghraib images — which depicted, *inter alia*, nudity and simulated homosexual acts — had not resulted in "increased hostility" in Iraq. JA 450 (citing *Iraqi Government Denounces Abu Ghraib Abuse*, CNN.com, Feb. 16, 2006, *available at* http://www.cnn.com/2006/WORLD/meast/02/16/abughraib.photos/). Similarly, the government's official authentications in April 2006 of images posted on salon.com and on palmbeachpost.com do not appear to have caused any violence. JA 450. It is also impossible to ascribe a clear correlation between the leaking in April 2004 of images of detainee abuse at Abu Ghraib and the level of violence at that time. JA 298. Nor have widely publicized reports containing vivid descriptions of the torture and mistreatment of detainees in U.S. custody caused violence. *See* JA 450-451.

In comparison to the aforementioned events, *Newsweek*'s reporting on possible Koran abuse and publication of the Prophet Mohammed cartoons are less analogous to release of the Detainee Abuse Images. As Prof. Khaled Fahmy, explains:

> [t]here is nothing that approaches the holiness of the Koran in Islam. . . . .To compare Muslims' feelings about reports of alleged desecration of the Koran to their feelings about abuse of Iraqi prisoners by U.S. troops is to misunderstand a fundamental tenet of Islam, namely, the sanctity of the Word of God. This comparison also

> confuses feelings of anger, frustration and/or hostility that some Iraqis may have towards what they consider a foreign occupation of their country with a basic religious feeling that millions of Muslims around the world have regarding what they consider their Holy Book.

JA 457. For similar reasons, cartoons of the Prophet are categorically different from images of detainee abuse. Thus, even if the government were able to demonstrate that the violence in Afghanistan was caused by the *Newsweek* story relating to Koran abuse,[26] or that the violence attributed to the cartoons of the Prophet were genuinely caused by their release, those facts do not support the claim that release of the Detainee Abuse Images would similarly cause violence, especially where no violence has been attributed to the previous release of the Abu Ghraib images.

A large proportion of the government's brief is devoted to its affiants' descriptions of continuing violence in Iraq and Afghanistan. Appellants' Br. at 7-12. Plaintiffs do not dispute that such violence is continuing. But it is important to

[26] Release of other information relating to Koran abuse, through, for example, press reports on BG Jay Hood's official inquiry revealing five instances of mishandling of the Koran at Guantánamo Bay, did not appear to cause any violence. JA 294. Similarly, on or about May 18, 2005, the FBI released to Plaintiffs documents describing numerous allegations of Koran abuse, including the flushing of a Koran down a toilet, in Guantánamo Bay. The government has not asserted that the release of these documents endangered lives, even though they were made publicly available.

note that for the most part, the government's affiants themselves do not assert that this violence was caused by or, indeed, related in any manner to the release of images of detainee abuse. *See* JA 439 ("Insurgent elements in both Afghanistan and Iraq continue to attack the process of democratic transition in those countries by mounting violent and deadly assaults . . ."); JA 440 ("Insurgent attacks against Coalition Forces in Iraq average about 1,700 attacks per month . . . "); JA 441 ("there are about 250 insurgent attacks per month against Coalition Forces [in Afghanistan]"); JA 275-76 (citing "near-term increases in the assassination of Iraqi government officials," a "recent uptick in insurgent attacks on senior diplomatic officials" in Iraq, "attacks on economic infrastructure in Iraq," steadily rising violence in Afghanistan including a rise in suicide bombings, and the targeting of candidates and electoral workers for the National Assembly elections); JA 254 ("Sadly, beheadings of foreign captives have now become commonplace in Iraq").

In a few instances, the government points to circumstances where "visual images of real and imagined suffering" were used for propaganda purposes, but again, the government does not state that those images caused violence. *See* Appellants' Br. at 8-9. The district court correctly interpreted the government's assertions as only confirming that:

> [t]he terrorists in Iraq and Afghanistan do not need pretexts for their barbarism; they have proven to be aggressive and pernicious in their choice of targets and

> tactics. They have driven exploding trucks into groups of children at play and men seeking work; they have attacked doctors, lawyers, teachers, judges and legislators as easily as soldiers. Their pretexts for carrying out violence are patent hypocrisies, clearly recognized as such except by those who would blur the clarity of their own vision.

JA 397. For this reason, there can be no reasonable expectation that release of the Detainee Abuse Images will cause violence.

Indeed, the government itself acknowledges that insurgents are prone to making non-credible propaganda statements to take credit for violence even when they are not responsible for it. *See* JA 276 (noting that "Taliban spokesmen respond quickly to claim credit when insurgents conduct successful attacks against Coalition or Afghan forces, *and even claim tactical successes for incidents not related to the insurgency*") (emphasis added). In this context, the government mistakenly relies on an al Qaeda leader's after-the-fact "description" of a single suicide bombing in Iraq as a "response to the harm inflicted by British occupation forces on our brothers in prison." JA 275. That "description" does not establish that the release of photos of detainees in British custody caused violence.

Furthermore, in describing the proliferation of doctored images and "disinformation" that terrorists can manufacture on their own, the government's declarations acknowledge that the insurgents do not need to rely on the Detainee

Abuse Images released by the government to incite violence. *See* JA 274, 276 (stating that "insurgents have falsely claimed that U.S. actions in Iraq, rather than their own terrorist attacks, have caused death and suffering," that they "rely on doctored photos and images to support their calls to violence," and that the Taliban "are quick to spread disinformation about culturally sensitive issues such as the Coalition treatment of Afghan women as a means of turning public opinion against the United States and other Western countries"). Similarly, "prophetic warnings in the Arab media about possible reprisals against British forces" Appellants' Br. at 10, are insufficient for proving that the release of a videotape of British forces abusing detainees actually caused violence. Contrary to unidentified "open sources" cited by the government, *see* JA 440-41, as noted by Plaintiffs' declarant, Colonel Pheneger, there is no evidence that the release of this videotape caused an Improvised Explosive Device ("IED") attack in February 2006 in Al Amarah, Iraq. JA 452.

In light of their own affidavits attesting to the ability of our enemies to manufacture false images in this manner, the government's claim that release of the Detainee Abuse Images in particular will make "it easy to falsely generalize from those images," JA 444, is not convincing. Indeed, if, as the government itself acknowledges, "[t]he insurgents *will use any means necessary to incite violence*,"

JA 273, 440 (emphasis added), they surely have sufficient means already at their disposal, without release of the Detainee Abuse Images.

Finally, the government states that release of the Detainee Abuse Images will be portrayed as part and parcel of the alleged continuing effort of the United States to humiliate Muslims and will be used by insurgents to increase calls for violence against U.S. and Coalition personnel. JA 444. As set forth in Professor Fahmy's declaration, there is a large group of Iraqis and of Muslims generally who would respond favorably to such a release and view it as an effort to hold perpetrators accountable. JA 459.

For all of these reasons, the government has not met its burden of demonstrating that release of the Detainee Abuse Images "could reasonably be expected to endanger the life or physical safety of any individual."

III. THE DISTRICT COURT CORRECTLY HELD THAT THE GOVERNMENT CANNOT WITHHOLD THE DETAINEE ABUSE IMAGES UNDER FOIA EXEMPTIONS 6 AND 7(C).

Plaintiffs seek release of the Detainee Abuse Images only after individually identifying information has been deleted from each of them. Because the public interest in disclosure substantially outweighs any privacy interest that might

survive deletion of individually identifying details, these images cannot be withheld under FOIA Exemptions 6 and 7(C).[27]

A. Disclosure Of The Detainee Abuse Images In Redacted Form Will Not Constitute An Unwarranted Invasion Of Personal Privacy Under FOIA Law.

Under FOIA, records can be withheld on privacy grounds only in limited circumstances. Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a *clearly unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). Exemption 7(C) similarly protects from disclosure "records or information compiled for law enforcement purposes . . . but *only* to the extent that the production of such . . . records or information . . . could *reasonably be expected to* constitute an *unwarranted* invasion of personal privacy." (Emphasis added). Although Exemption 7(C) affords slightly broader protection from disclosure than Exemption 6 does, courts routinely look to Exemption 6 jurisprudence in applying Exemption 7(C). *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 768 (1989). If the public interest in disclosure substantially outweighs the privacy interest implicated by the records, as it does in this case,

[27] Plaintiffs do not challenge the government's redaction of identifying features of U.S. military personnel depicted in the Detainee Abuse Images.

records cannot be withheld under either of these exemptions. *See Fed. Labor Relations Auth. v. U. S. Dep't of Veterans Affairs*, 958 F.2d at 509-510.

The Detainee Abuse Images cannot be withheld under Exemptions 6 and 7(C) for two principal reasons. First, the government has redacted identifying information from these images. Second, the public interest in disclosure of these images outweighs any residual privacy interest that survives redaction of detainee identifying features.

1. Deletion of identifying information is standard FOIA practice for accommodating privacy concerns.

FOIA's provisions as well as the case law on Exemptions 6 and 7(C) demonstrate that redaction of identifying information is an appropriate way of accommodating privacy interests in the circumstances of the present case.

Congress expressly authorized the deletion of "identifying details" in FOIA records as a means of preventing "clearly unwarranted invasion[s] of personal privacy." 5 U.S.C. § 552(a)(2); *see also U.S. Dep't of State v. Ray*, 502 U.S. 164, 174 (1991). This is consistent with FOIA's requirement that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552 (b). Thus, Exemption 7(C) does not "exempt from disclosure *all* of the material in an investigatory record solely on the grounds that the record

includes *some* information which identifies a private citizen." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995) (second emphasis added). Such a "blanket" interpretation of Exemption 7(C) "would reach far more broadly than is necessary to protect the identities of individuals," and would therefore be "contrary to FOIA's overall purpose of disclosure." *Id*.

Following procedures previously approved by this Court and the Supreme Court in similar cases, *see Rose*, 425 U.S. at 381, the district court ordered release of the Detainee Abuse Images after meticulously reviewing the deletion of all individually identifying features of detainees. JA 460-507. Notwithstanding these redactions, however, the government argues that "it is possible that" details in its investigative reports "could be used to help identify the pictured detainees," and that that there "is a chance" that the detainees will recognize themselves or be recognized by other detainees. Appellants' Br. at 47.

The Supreme Court has, however, recognized that FOIA protects threats to interests that are more than "mere possibilities," *Rose*, 425 U.S. at 381, n.19, and that even though "redaction cannot eliminate all risk of identifiability," it is an appropriate means of ensuring that FOIA exemptions are "practical[,] workable concepts." *Id*. at 381-82; *see also U. S. Dep't of State v. Ray*, 502 U.S. at 175-176 (recognizing that disclosure of personal information constitutes only a *de minimis* invasion of privacy when the identities of the individuals to whom that information

relates are unknown). Accordingly, the district court correctly rejected the government's assertion that detainees could still be recognized in redacted images as being "no more than speculative, a speculation which could apply equally to textual descriptions without pictures." JA 388.

The government's reliance on *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004) is misplaced. In that case, disclosure of the records requested would necessarily have been linked to the individual depicted therein because the FOIA request at issue specifically sought Deputy White House Counsel Vincent Foster's death-scene photographs. *See id*. Other cases on which the government relies similarly relate to protecting records from disclosure when their release would assuredly be linked to particular and identifiable individuals. *See, e.g., Reporters Comm.*, 489 U.S. at 757 (rap sheet of Charles Medico); *N.Y. Times v. NASA*, 782 F. Supp. 628 (D.D.C. 1991) (audiotapes of known astronauts aboard the Challenger); *Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999) (death photographs of Vincent Foster). In contrast, Plaintiffs do not seek the release of photographs of known or named individuals, and the government has redacted names of individuals from publicly available Army investigative files that it cites as being related to the Detainee Abuse Images. *See* Appellants' Br. at 14.

Moreover, the government's claim that detainees could be recognized from the redacted images is particularly speculative in light of the large numbers of detainees in United States custody who were subjected to similar treatment within and across different locations. As noted in the government's own reports, the abuse of detainees was "widespread,"[28] and "systemic,"[29] and they were subjected to similar treatment across Guantánamo Bay, Afghanistan and Iraq.[30] The government admits that many of the detainees depicted in the images are "hooded," Appellants' Br. at 50, and that some of them are tied in "stress positions." *Id*. at 14. "Hooding" and "stress positions" were among interrogation techniques specifically authorized by Secretary Rumsfeld for use on detainees at Guantánamo Bay,[31] and the Abu Ghraib photographs authenticated by the government confirm that these techniques were also employed on detainees in Iraq.[32] Furthermore, hooded detainees are impossible to recognize by face. These

[28] Final Report of the Independent Panel to Review DOD Detention Operations, 5 (August 2004), *available at* http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf.
[29] Maj. Gen. Antonio M. Taguba, Article 15-6 Investigation 800th Military Police Brigade, at 16 *available at* http://www.dod.gov/pubs/foi/detainees/taguba/TAGUBA_REPORT_CERTIFICATIONS.pdf.
[30] Fay Report at 29, *supra* note 13.
[31] *See* Rumsfeld order, *supra* note 8.
[32] *See e.g*., Authenticated Abu Ghraib images, photos 1, 5, 27 (Chapter 1); photo 14 (Chapter 4).

factors make it unlikely that detainees depicted in the Detainee Abuse Images will be recognized after all individually identifying details have been redacted.

As noted above, Plaintiffs have argued from the outset that identifying information should be redacted prior to release. Once that information is redacted, concerns about privacy are rendered negligible.

2. The considerable public interest in the disclosure of the Detainee Abuse Images outweighs any privacy interests that survive redaction.

The Detainee Abuse Images, if released, will inform the public about "what [its] government is up to," and "shed[] light on an agency's performance of its statutory duties." *Reporters Comm.*, 489 U.S. at 773. They cannot be withheld under FOIA Exemptions 6 and 7(C) because the certain public interest served by their disclosure far outweighs any speculative concerns as to the possibility of privacy invasions under hypothetical circumstances.

Courts routinely require information to be released where the public's interest in disclosure outweighs privacy interests at stake. *See Perlman v. Dep't of Justice*, 380 F.3d 110, 111 (2d Cir. 2004); *Rose*, 425 U.S. at 358, 381; *Cooper Cameron Corp. v. U. S. Dep't. of Labor*, 280 F.3d 539, 547, 554 (5th Cir. 2002); *Lissner v. U. S. Customs Serv.*, 241 F.3d 1220, 1223 (9th Cir. 2001).

This Court has recognized the heightened public interest in disclosure of records like the Detainee Abuse Images that relate to government misconduct. *See Perlman*, 380 F.3d at 111-112 (affirming prior decision ordering the disclosure of

portions of a government investigation providing details of "improper conduct" by INS officials). Here, recognizing that the government concedes "that wrongful conduct has occurred," JA 392, the district court correctly concluded that the public interest associated with release of images of detainee abuse was "substantiated," and "far outweigh[ed] any speculative invasion of personal privacy." JA 393. It recognized that:

> [release of such images will] 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.

JA 400-01. Thus, release of the Detainee Abuse Images will initiate and inform debate on a range of issues such as the scope and scale of detainee abuse, any direct or indirect command responsibility for such abuse, and the adequacy of the government's efforts to hold appropriate individuals accountable and prevent further abuse from occurring. *See e.g.*, Walter Shapiro, *Why We're Publishing The New Abu Ghraib Photos*, Feb. 16, 2006, *available at*

http://www.salon.com/opinion/feature/2006/02/16/abu_ghraib_intro/index.html (describing the communicative power of "seemingly banal" detainee abuse images and commenting on the adequacy of abuse investigations). However, it should be noted that it is impossible to provide a complete assessment of the full significance of the information contained in the Detainee Abuse Images prior to their release. It is possible that the public may be able to glean additional facts from these images especially when they are viewed in conjunction with other available information relating to detainee abuse.

The government argues that the public interest associated with disclosure of the Detainee Abuse Images is incremental because the publicly available Army investigative files relating to these images "reveal the course of the investigation and the facts it uncovered." Appellants' Br. at 57. This argument is unavailing for several reasons. As recognized by the district court, "photographs present a different level of detail and a different medium, and are . . . better than testimony, which can be self-serving, better than summaries, which can be misleading, and better even than a full description no matter how complete that description might be." JA 392.

Because it is impossible to accurately and completely transcribe complex visual information into text, the Army's written descriptions of the Detainee Abuse Images are by definition incomplete and inaccurate accounts of what the images

themselves convey. *See, e.g*, *Detroit Free Press, Inc. v. Dep't. of Justice*, 73 F.3d 93, 98 (6th Cir. 1996) (describing the communicative power of visual images of Rodney King and noting that "[p]ublic disclosure of mug shots . . . can . . . serve to subject the government to public oversight," and "reveal . . . circumstances . . . in a way that written information cannot"). In short, photographs provide the most accurate and best evidence of the treatment to which detainees were subjected, and textual descriptions are simply no substitute for visual images.

Moreover, in light of the fact that the adequacy of the Defense Department's investigations is itself a subject of ongoing public debate,[33] the possibility of "misleading" and "self-serving" descriptions of the Detainee Abuse Images cannot be ruled out *a priori*. Indeed, the Detainee Abuse Images are of public interest in part because they will inform public assessments of the government's descriptions and investigations relating to detainee abuse. *See Stern v. FBI*, 737 F.2d 84, 92 (2d Cir. 1991) (recognizing the public's interest in "knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner").

Furthermore, if the public interest in the Detainee Abuse Images must be measured in relation to information that is already publicly available, this calculus

[33] *See supra* Statement of Facts.

must also take account of "disinformation" and "doctored images" that the government claims are also proliferating in the public domain. *See* JA 274, 276. Because the lay public cannot distinguish "disinformation" and "doctored images" from truthful information that is available in the public domain, the value in disclosure of the Detainee Abuse Images is commensurately higher on account of the confirmed authenticity of these images.

In addition, there is no support in the case law for withholding on grounds of incremental value records which undisputedly depict government misconduct. In *New York Times v. NASA*, a case cited by the government, the court specifically permitted withholding of a tape reflecting voice inflections of known individuals and background noises on the grounds that this information "shed[] absolutely no light on the conduct of any Government agency or official." 782 F. Supp. at 633. Other cases cited by the government are similarly inapt. *See Favish*, 541 U.S. at 175 (withholding death scene photographs on grounds that FOIA plaintiff had "not produced any evidence" of "Government impropriety"); *Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d 120, 124-25 (D.C. Cir. 1999) (withholding death scene photographs on the grounds that FOIA plaintiff had produced no evidence of "illegality" or "falsification"); *Marzen v. Dep't of Health and Human Servs.*, 825 F.2d 1148, 1153-1154 (7th Cir. 1987) (withholding medical records of infant on grounds of absence of "nexus" to "public debate"); *Bast v. Dep't of Justice*, 665

F.2d 1251, 1255 (D.C. Cir. 1981) (withholding documents containing names, medical information, and allegations of wrongdoing by unprosecuted individuals on grounds that they contained "minor details" of an investigation, would "add little to a general understanding of the investigation," and were of "minimal" "utility to a legitimate public inquiry"); *Miller v. Bell*, 661 F.2d 623, 630 (7th Cir. 1981) (withholding names of FBI agents where there was "no allegation of wrongdoing by high-ranking government officials or indeed by any FBI personnel"). In contrast, the government has conceded here that the Detainee Abuse Images depict misconduct by government personnel, *see* JA 419, and the district court has identified the considerable public interest associated with the disclosure of such images. JA 400-01.

Other cases cited by the government concern the incremental value of identifying information that had been deleted from previously released textual records. *See, e.g.*, *U.S. Dep't of State v. Ray*, 502 U.S. at 171; *Miller v. Bell*, 661 F.2d at 630-31; *Halloran v. Veterans Admin.*, 874 F.2d 315, 324 (5th Cir. 1989); *Stone v. FBI*, 727 F. Supp. 662, 666 (D.D.C. 1990), *aff'd*, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990). In contrast, Plaintiffs do not seek the disclosure of identifying information. Rather, non-identifying information is precisely and only what Plaintiffs seek to have disclosed.

Finding no support for its position in FOIA law, the government mistakenly relies on numerous non-FOIA cases. This Court has, however, previously held that such cases are of limited relevance in the FOIA context. In *Rose v. Dep't of Air Force*, 495 F.2d 261 (2d Cir. 1974), *aff'd*, 425 U.S. 352 (1976), the majority opinion rejected the dissent's criticism that in upholding the right of law students to redacted summaries of Air Force cadets' disciplinary hearings, the Court placed its "stamp of approval upon" an "egregious invasion of constitutional rights of privacy." *Id*. at 268. In doing so, this Court noted that "[o]bviously, the problem would be a simple one if the Freedom of Information Act did not exist or if the only interest to be considered were that of [the individuals to whom the records at issue relate]." *Id*. at 268. The reality, however, is that FOIA does exist, and requires "a workable compromise between individual rights and the preservation of public rights to Government information." *Id.* at 269.

Indeed, non-FOIA cases that concern records of no public interest offer no support for the government's position here. *See, e.g., Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 932 (7th Cir. 2004) (upholding quashing of government's subpoena for private abortion records while noting that the government's motives in seeking these records "remain thoroughly obscure")[34];

[34] Moreover, the court's holding rested on circumstances that are not alleged in this case, *viz*., that patients would suffer retaliation at the hands of violent anti-abortion activists. *Id*. at 929.

Application of KSTP Television, 504 F. Supp. 360, 363 (D. Minn. 1980) (prohibiting publication of videotape of known victim's rape on grounds that there was "no public interest to be served"). In any event, the Second Circuit case cited by the government in this context confirms that deletion of identifying details is generally sufficient for addressing privacy interests where there are competing public interests at stake. *See United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995) (finding it proper for district court to "redact a judicial document" in weighing, *inter alia*, privacy concerns against "competing interests" in favor of disclosure).[35]

In sum, the public interest associated with disclosure of the Detainee Abuse Images far outweighs any privacy interests that may survive redaction of detainee identifying features, and warrants release of these images under FOIA.

[35] Furthermore, non-FOIA cases that concern publication of unredacted records relating to known individuals address privacy interests that are not presented in this case. *See e.g.*, *KSTP*, 504 F. Supp. at 361. Similarly, in *United States v. Kaufman*, the court did not address whether the redaction of individually identifying information could diminish privacy concerns. No. 04-40141-01, 2005 WL 2648070 (D. Kan. Oct. 17, 2005). As noted above, Plaintiffs do not seek the disclosure of information relating to known individuals. They seek release of the Detainee Abuse Images only after all individually identifying details have been redacted.

B. Release Of The Detainee Abuse Images In Redacted Form Is Consistent With the United States' Obligations Under The Geneva Conventions.

The district court correctly concluded that redactions of detainee identifying features will, consistent with U.S. obligations under the Geneva Conventions, "protect . . . detainees against 'insults and public curiosity' and preserve their 'honor.'" *See* JA 394; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 U.S.T. 3316, 754 U.N.T.S. 135 (requiring a detaining power to protect any prisoner of war within its custody "particularly against acts of violence or intimidation and against insults and public curiosity"); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3516, 75 U.N.T.S. 287 (stating that certain civilian detainees "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity").

The government argues, however, that disclosure of the Detainee Abuse Images would conflict with its obligations under the Geneva Conventions. Appellants' Br. at 53-54. Plaintiffs applaud the government's apparent concern for detainees' rights under the Geneva Conventions, notwithstanding its previous rejection in early 2002 of legal protections available to Taliban detainees under

those Conventions.[36] Nonetheless, the Geneva Conventions do not preclude disclosure of these images in redacted form.

As demonstrated by Plaintiffs' expert affidavits, the United States has never adhered to a *per se* rule barring all disclosure of detainee images. *See* JA 145-148. Instead, as demonstrated by exhibits to its own expert affidavits in this case, the government has specifically permitted the photographing of detainees in some instances as long as they remain unidentifiable. *See* JA 120 ("News media coverage, including photo/video coverage, will not identify individual detainees, by name(s) or by image (i.e. close-up images of individual face(s) that would allow individuals to be identified will not be permitted)"); *see also* Public Affairs Guidance (PAG) on Embedding Media During Possible Future Operations/Deployments in the U.S. Central Commands (CENTCOM) Area of Responsibility (AOR), ¶ 4.G.18., *available at* http://www.defenselink.mil/news/Feb2003/d20030228pag.pdf (establishing as ground rule that "[n]o photographs or other visual media showing an enemy prisoner of war or detainee's recognizable face, nametag, or other identifying feature or item may be taken").

Recent authority further confirms that the Department of Defense "interprets the [public curiosity] provision [of Article 13] to protect POWs from being filmed

[36] *See* Bush February 2002 Order, *supra* note 7.

or photographed in such a manner that viewers would be able to recognize the prisoner. Photos and videos depicting POWs with their faces covered or their identities otherwise disguised [do] not . . . violate GPW art. 13." JA 148.

Indeed, as explained in Plaintiffs' expert affidavit, the U.S. has approved the dissemination of such images when it has served the Conventions' fundamental purpose of "exposing and documenting a consistent pattern of abuse by the detaining power, and building public understanding and support" for the Conventions themselves. JA 147. It has been "a principal expositor of the view that photographic evidence can and should be used to bear witness to the abuse of detainees and for the purpose of seeking justice in their name." *Id*. The U.S. has never interpreted the public curiosity provisions to "afford states party a basis for suppressing photographic . . . evidence that prisoners have been treated inhumanely." *Id*.

At the end of the Second World War, for example, American armed forces responsible for the liberation of a number of German and Japanese concentration and prison camps followed a regular practice of photographically documenting camp conditions. *Id.* During this time, while the public curiosity provisions under the 1929 Geneva Conventions were in effect,[37] the U.S. disseminated large

[37] The public curiosity provisions were in place under the 1929 Geneva Conventions that governed the Second World War. JA 147; *see* Convention Relative to the Treatment of Prisoners of War July 27, 1929, art. 2, 47 Stat. 2021.

volumes of photographs from the camps to the media, including "photographs of corpses and remains of prisoners as well as of emaciated and poorly clothed survivors." *Id*. Such dissemination served the Conventions' central aim: that of ensuring that prisoners are treated humanely. *Id*.

The government acknowledges that the International Committee for the Red Cross ("ICRC") "has had a significant influence on the interpretation of Article 13." JA 110. As the expert affidavit of Marco Sassòli, former deputy head of the ICRC's legal division demonstrates, the ICRC's Commentaries support the view that release of the redacted Detainee Abuse Images would further the object and purpose of the Geneva Conventions. *See* JA 166-68. Mr. Sassòli's affidavit further explains that the British Red Cross Society has construed Article 13 of the Third Geneva Conventions as "prohibiting the public transmission of images of prisoners of war as individuals, but not forbidding the public transmission of images of prisoners of war who cannot be individually recognized." JA 166.

While the U.S. has also invoked the public curiosity provisions to protest the "parading" of detainees for the purposes of propaganda or public humiliation, *see*

Significantly, in consenting to the ratification of the 1949 Geneva Conventions, the Senate interpreted the 1949 restatement as embodying both the principles that the United States had accepted under the 1929 treaty, *see* 84 Cong. Rec. 9958, 9959, 9961 (1955), and the actual policies the United States followed during World War II. *Id*. at 9960.

Appellants' Br. at 53, the production of the Detainee Abuse Images would not constitute this form of parading. As Mr. Sassòli explains,

> [t]he proscription against exposing prisoners to 'insult and public curiosity' does not mean that photographs of prisoners being abused may *not* be disseminated at all. Rather, it means that photographs of prisoners being abused may not be disseminated *if* they depict prisoners who are individually recognizable . . . .
>
> 'Public curiosity' . . . must be distinguished from public concern . . . the dissemination of the [Detainee Abuse Images] . . . is likely to elicit concern for the prisoners depicted and for the treatment of prisoners of war and protected persons more generally.

JA 167-68. In the example the government cites — Iraq's exposure of Allied pilots on television during the first Gulf War — the United States clearly protested the humiliating *use* to which those images were put and not simply their content. *See* Appellants Br. at 52-53.

Plaintiffs are committed to safeguarding the rights of prisoners and preventing further abuse. *See* JA 45-49. They seek release of the Detainee Abuse Images not to denigrate the detainees depicted therein, but rather to educate the American public as to the scope of detainee abuse and generate "public concern" for the detainees' welfare. JA 167-68.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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I hereby certify that the PDF version of the Brief for Appellees sent by electronic mail to the court and counsel has been scanned for viruses using Symantec Anti-Virus, and that no viruses have been detected.

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I hereby certify that on September 7, 2006, I served the foregoing Brief for Appellees upon counsel of record by electronic mail and overnight Federal Express to:

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