



August 13, 2009

Mr. James Hogan  
 Defense Freedom of Information Policy Office  
 1155 Defenses Pentagon  
 Washington, D.C. 20301-1155

**Re: Freedom of Information Act Appeal, Request #09-F-0890**

Dear Mr. Hogan,

Requesters American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "ACLU") write to appeal the Defense Department's (DOD) withholding of a 12-page National Detainee Reporting Center (NDRC) report which is responsive to the ACLU's April 23, 2009 Freedom of Information Act (FOIA) request ("Request"). *See* Exh. A (FOIA Request dated April 23, 2009). The Request seeks records pertaining to the detention and treatment of prisoners at the Bagram Theater Internment Facility in Afghanistan ("Bagram"). *Id.* Among other things, the Request seeks records pertaining to the number of people currently detained at Bagram, their names, their citizenship, their length of detention and date of capture, and the place and circumstances of their capture. *Id.* (FOIA Request items 1-5).

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By letter dated July 28, 2009, Chief Paul J. Jacobsmeyer informed the ACLU that the DOD had located a record responsive to items 1-5 of the Request but that it was withholding that record in its entirety. Exh. B (Jacobsmeyer Letter dated July 28, 2009). Specifically, the NDRC located a 12-page classified report, "or list," that contains "the names, citizenship, capture date, days detained, capture location and circumstances of capture" concerning individuals detained at Bagram as of June 22, 2009. *Id.* According to the letter, Mr. Steve Dalbey, an Initial Denial Authority for the Office of the Deputy Assistant Secretary of Defense for Detainee Policy, determined that the report was exempt from release pursuant to: (1) FOIA Exemption 1 because it "pertains to information that is properly classified" as protected "military plans, weapons, or operations" and "intelligence activities, and intelligence sources and methods"; (2) FOIA Exemption 6 because its release would constitute a clearly unwarranted invasion of personal privacy; and (3) FOIA exemption 7(C) because it is a record compiled for law enforcement proceedings and its release could reasonably be expected to constitute an unwarranted invasion of privacy. *Id.* No further explanation for the invocation of these specific FOIA exemptions was provided.

## **Basic Facts about the Bagram Prisoners are Shrouded in Secrecy**

The nation is embroiled in an intense public debate about U.S. policy pertaining to the detention and treatment of suspected terrorists and individuals designated as unlawful enemy combatants. Although much of that debate is currently focused on how to close the prison at Guantánamo Bay, the executive branch, Congress, the judiciary, the press, and the public are also grappling with difficult questions about future detention policy, including what to do with suspected terrorists and combatants captured abroad and held at other off-shore detention facilities.

The Bagram detention facility in Afghanistan – where the U.S. government has been detaining an unknown number of prisoners since 2002 – is central to this debate. Exh. A at 8-12; Exh. C at 12-15 (Letter from Melissa Goodman to James Hogan dated June 12, 2009 appealing denial of expedited processing and discussing urgent need for disclosure of information about Bagram to inform detention policy debate); *see also* Eric Schmitt, *Pentagon Seeks to Overhaul Prisons in Afghanistan*, N.Y. Times, July 19, 2009; *US Report Urges Changes in Afghan Detainee Policy*, Reuters, July 20, 2009.

With the eyes of the world trained on Guantánamo, the Bagram detention facility appears to have grown enormously. Whereas approximately 200 individuals are currently imprisoned at Guantánamo, *see e.g.*, *US Moves Toward Releasing Young Guantanamo Detainee*, Reuters, Aug. 7, 2009, over 600 people are reportedly imprisoned at Bagram, *see* Exh. A at 2. Like prisoners at Guantánamo, at least some (if not many) prisoners at Bagram have been imprisoned for more than six years without charge or trial. Exh. A at 2. Like prisoners at Guantánamo, some Bagram prisoners were captured far from Afghanistan or any battlefield and transferred for detention at Bagram. *Id.* Unlike Guantánamo prisoners, however, Bagram prisoners have no access to lawyers and no access to a judicial forum in which to challenge their prolonged detention. In fact, according to a federal district court judge, Bagram prisoners receive an even less meaningful process for administratively challenging their detention than the Supreme Court invalidated for Guantánamo detainees. *See* Exh. A at 2-3. The conditions of confinement at Bagram are reportedly primitive and reports of mistreatment and abuse continue to surface. Exh. A at 3, 12-15; Exh. C at 17-18; *see also* Jonathan Horowitz, *Former Bagram Detainee Describes “Completely Wild” Arrest, Interrogation by US Troops*, The Huffington Post, July 28, 2009; Heidi Vogt, *US Detainees Hold Protest at Bagram Jail*, Associated Press, July 16, 2009; Greg Jaffe and Julie Tate, *Afghanistan Detainees Indefinitely Confined, Refusing to Leave Cells to Shower*, Wash. Post, July 16, 2009.

For these reasons, there is renewed public concern that Bagram has become, in effect, the new Guantánamo. The U.S. government’s actions at Bagram are increasingly the subject of worldwide criticism and concern. *See*,

*e.g.*, Exh. A at 8-11; Exh. C at 12-15; *Afghan Presidential Contender Vows Closure of Bagram Prison*, Fars News Agency, Aug. 10, 2009; Jonathan Burch, *U.N. Envoy Concerned at Afghanistan Jail Conditions*, Reuters, Aug. 2, 2009; Robert H. Reid and Kathy Gannon, *Karzai: Afghans Want Rules for Troops Changed*, Associated Press, July 27, 2009 (reporting that President Karzai said he wants “the U.S.-run prison at Bagram Air Base . . . re-evaluated and inmates released unless there is evidence linking them to terrorism” and that “[h]e said arrests are turning ordinary Afghans against U.S. and NATO forces”); *United Nations Week*, June 29, 2009 Issue (discussing 213-page report by Special Rapporteurs expressing concerns about prolonged detentions at Bagram);<sup>1</sup> William Fischer, *Bagram: Worse Than Gitmo?*, AntiWar.com, Jan. 13, 2009 (discussing confidential Red Cross report critical of Bagram); Amnesty International, *USA: Out of Sight, Out of Mind, Out of Court? The Right of Bagram Detainees to Judicial Review* (2009).<sup>2</sup> There is increased public speculation about who the government is holding at Bagram and whether the U.S. government’s actions there are appropriate and lawful. *See, e.g.*, Tom Curry, *Bagram: Is it Obama’s New Guantanamo?*, MSNBC.com, June 3, 2009; Tim Reid, *Guantanamo is Not the Hell-Hole We Imagine*, Times of London, May 27, 2009 (“[T]he grossly underreported story is a US-run jail that Mr. Obama does not want the world to focus on - the makeshift prison on the US airbase at Bagram, Afghanistan. There, more than 600 prisoners, many held for years and all without charge and indefinitely, are packed into conditions far worse than Guantánamo. They have virtually no access to lawyers. Journalists and human rights groups are barred.”). There is also increased speculation about whether many people at Bagram are being wrongfully detained. *See, e.g.*, Richard A. Oppel, Jr., *U.S. Captain Hears Pleas for Afghan Detainee*, N.Y. Times, May 25, 2009 (reporting on a Bagram detainee whom an Army Captain believes may be improperly detained as a case of mistaken identity).

Despite this widespread public concern, Americans remain in the dark about even the most basic facts about Bagram including who precisely is being detained there; for how long they have been imprisoned; where and under what circumstances they were captured (i.e. in Afghanistan, outside of Afghanistan, or far from any battlefield); and for how long the U.S. government has been imprisoning these individuals without charge, access to lawyers, or access to courts. The public is entitled to these very basic facts about the government’s actions at Bagram and they are the very facts contained in the NDRC report being withheld here. Without public release of even this basic information, the public detention debate will remain woefully uninformed. Without greater transparency about the government’s actions at Bagram, public concern that we are acting unlawfully or unwisely at Bagram

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<sup>1</sup> The June 29, 2009 Issue is available at <http://unweek.blogspot.com/2009/07/issue-of-june-29-2009.html>.

<sup>2</sup> Available at <http://www.amnesty.org/en/library/info/AMR51/021/2009/en>.

will continue to fester and the negative worldwide perception of our actions at that facility will only grow.

### **The Defense Department is Improperly Withholding the NDRC Report**

Mr. Jacobsmeyer did not provide any explanation for withholding the NDRC report beyond the conclusory assertion that it was exempt from disclosure under Exemptions 1, 6, and 7(C). Exh. B. Nor did Mr. Jacobsmeyer explain whether he believed that *all aspects* of the NDRC report were exempt from disclosure on all three grounds or whether some information was exempt under some grounds but not others. *Id.* Mr. Jacobsmeyer merely stated in a sweeping and undifferentiated fashion that the three exemption provisions applied to the document. *Id.* These failures have made it extremely difficult for the ACLU to formulate this appeal. Mr. Jacobsmeyer's failure to state the reasons for his decision constitutes an independent ground for overturning it. *See Shermico Indus., Inc. v. Sec. of the Air Force*, 452 F. Supp. 306, 317 n.7 (N.D. Tex. 1978), *rev'd on other grounds*, 613 F.2d 1314 (5th Cir. 1980) ("A person cannot effectively appeal a decision about the releasability of documents . . . if he is not informed of . . . why those decisions were made."); *see also Friends of the Coast Fork v. U.S. Dep't of Interior*, 110 F.3d 53, 55 (9th Cir. 1997) ("[T]he government's denial letter must be reasonably calculated to put the requester on notice as to the deficiencies in the requester's case.").

Moreover, Mr. Jacobsmeyer did not explain why the NDRC document must be withheld in its entirety nor why there was no segregable information in the document that could be released. *See* 5 U.S.C. § 552(b) ("Any 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."); *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992) ("an agency cannot justify withholding an entire document simply by showing that it contains some exempt material"); *Arieff v. Dep't of Navy*, 712 F.2d 1462, 1466 (D.C. Cir. 1983) ("[T]he exemptions of the FOIA do not apply wholesale. An item of exempt information does not insulate from disclosure the entire file in which it is contained . . .").

As demonstrated below, the NDRC report – which purportedly contains the number of prisoners at Bagram, their names, their citizenship, their capture date, the number of days they have been detained, the location of their capture and the circumstance of their capture – is not properly withheld under Exemption 1, 6, or 7(c). Even if *some* of this information was properly withheld, there is no basis for withholding *all* of it. We request that you reconsider the withholding of the NDRC document in its entirety, or, at a minimum, release some segregable portions of the document.

## The Number of Prisoners at Bagram

Even assuming that all of the substantive information in the NDRC report is properly withheld (and it is not), there appears to be no legitimate basis for withholding a key piece of information the report would undoubtedly reveal even if heavily redacted: the number of individuals detained at Bagram as of June 22, 2009.

To the extent DOD is withholding the mere number of prisoners at Bagram under Exemption 1, the withholding is improper. To justify withholding of information under Exemption 1, the agency must establish that the information withheld falls within an applicable executive order and that it has been properly classified under that order. 5 U.S.C. § 552(b)(1). To be properly classified, agency information must fall within an authorized withholding category set forth in the classification Executive Order. Exec. Order No. 12,958 § 1.2(a)(3). Information can be classified only where “the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security . . . and the original classification authority is able to identify or describe the damage.” *Id.* § 1.2(a)(4).

Beyond stating in a conclusory fashion that the NDRC report is classified under the portions of the Executive Order that pertain to “military plans, weapons, or operations” and “intelligence activities, and intelligence sources and methods,” Mr. Jacobsmeyer’s letter does not provide any explanation as to why the mere number people detained at Bagram is a properly classified fact. Exh. B. It is inconceivable that disclosure of the number of prisoners at Bagram alone could reasonably be expected to cause damage to national security; thus, that information is not appropriately withheld under Exemption 1. *See McDonnell v. United States*, 4 F.3d 1227, 1243 (3d Cir. 1993) (there must be, at least, “a logical connection” between release of information and potential damage to national security). Indeed, the fact that Secretary Defense Gates recently discussed publicly the approximate number of detainees held at Bagram during a hearing before the Senate Armed Services Committee strongly suggests the number itself is not classified at all, let alone properly classified. *Hearing to Receive Testimony on the Challenges Facing the Department of Defense: Hearing Before the Senate Armed Service Comm.*, 111th Cong. 22 (2009) (Gates stating: “We certainly continue to hold detainees at Bagram. We have about 615 there, I think something on [sic] that ballpark.”).<sup>3</sup> The Defense Department has previously disclosed the number of prisoners at Bagram at public briefings as well. *See, e.g.,* Defense Department Operational Update Briefing on Afghanistan, Aug. 4, 2005 (Deputy Assistant

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<sup>3</sup> A transcript of the hearing is available at <http://armed-services.senate.gov/Transcripts/2009/01%20January/A%20Full%20Committee/09-02%20-%201-27-09.pdf>.

Secretary of Defense for Public Affairs discussing number of Afghan detainees and stating “There's approximately 110 Afghan detainees under U.S. control in Guantánamo and somewhere around 350, I believe, that are at the facility at Bagram.”<sup>4</sup> The ICRC – the only non-governmental organization that has access to Bagram detainees – has also publicly reported approximate numbers. *See, e.g.*, ICRC Operational Update, Apr. 3, 2009 (“Currently, the ICRC is visiting around 550 detainees at Bagram Theater Internment Facility.”)<sup>5</sup> Moreover, analogous information pertaining to the number of prisoners detained at the Guantánamo Bay prison has not, to the ACLU’s knowledge, been treated as a classified fact. *See, e.g.*, News Release, Dep’t of Defense, *Detainee Transfer Announced*, Jan. 17, 2009 (announcing number of prisoners transferred out of Guantánamo since 2002 and the current number of people detained at Guantánamo).<sup>6</sup>

Nor could the number of prisoners at Bagram alone be properly withheld under Exemptions 6 or 7(C). Exemption 6 allows the agency to withhold “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). Exemption 7(C) allows the agency to withhold records “compiled for law enforcement purposes” where disclosure “could reasonably be expected to constitute an unwarranted invasion of privacy.” 5 U.S.C. § 552(b)(7)(C). The number of prisoners alone – without any identifying information – could not possibly implicate any conceivable privacy interest; thus, withholding of this information under either Exemption 6 or 7(C) is inappropriate.<sup>7</sup>

Accordingly, we request that you reconsider the withholding of the NDRC report to the extent that it contains information about the number of prisoners at Bagram.

### **The Names of People Imprisoned at Bagram**

As an initial matter, Mr. Jacobsmeyer’s letter does not make clear whether the agency is claiming that the names of the Bagram detainees are

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<sup>4</sup> The transcript is available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3068>.

<sup>5</sup> The ICRC update is available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/united-states-detention-faq-240209?OpenDocument&style=custo\\_print](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/united-states-detention-faq-240209?OpenDocument&style=custo_print). Fluctuating numbers of Bagram prisoners have been reported over the years by the media and human rights organizations as well. *See, e.g.*, Exh. A at 2; Amnesty International Report, *USA: Out of sight, Out of Mind, Out of Court?*, Feb. 18, 2009, AI Index: AMR 51/021/2009 (discussing estimates of Bagram prison population over time).

<sup>6</sup> Available at <http://www.defenselink.mil/releases/release.aspx?releaseid=12449>.

<sup>7</sup> It is not clear that the invocation of Exemption 7(c) is appropriate here at all because it is not evident that the NDRC document is compiled for law enforcement purposes or that it is compiled by an agency with a law enforcement function.

classified, and thus subject to withholding under Exemption 1, or whether DOD is invoking only privacy exemptions 6 and 7(C) with respect to the release of the detainees names. Regardless, withholding of the names is inappropriate.

To the extent Mr. Jacobsmeyer is withholding the names of prisoners at Bagram under Exemption 1, the withholding is improper. It is not evident how the release of the names of the Bagram detainees, standing alone, is a properly classified fact whose release could reasonably be expected to cause damage to national security. Nor is it evident why the names of the Bagram detainees would reveal information about military operations or intelligence activities, as Mr. Jacobsmeyer's letter claims. Exh. B. Indeed, the notion that the identities of the Bagram detainees must be kept secret in the name of national security is inconsistent with the well-established principle that the U.S. government is not permitted to engage in secret detention.

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In any event, the agency's Exemption 1 claim is difficult to square with the fact that the DOD has acknowledged the identities of Bagram detainees in the context of court cases. *See* Declaration of Colonel Joe E. Ethridge at ¶ 19, *Al-Najar v. Gates*, 1:08-cv-02143, filed Dec. 19, 2008 (confirming Redha Najar detained at Bagram); Declaration of Colonel Charles A. Tennison at ¶ 19, *Wazir v. Gates*, 1:06-cv-01679, filed Oct. 3, 2008 (confirming Haji Wazir detained at Bagram); Declaration of Colonel Charles A. Tennison at ¶ 19, *Al Bakri v. Gates*, 1:08-cv-01307, filed Sept. 15, 2008 (confirming Amin Al Bakri detained at Bagram); Declaration of Colonel James W. Gray at ¶ 19, *Al Maqaleh v. Gates*, 1:06-cv-01669, filed March 5, 2007 (confirming Fadi Al Maqaleh detained at Bagram); Declaration of Colonel James W. Gray at ¶ 5, *Ruzatullah v. Rumsfeld*, 06-cv-01707, filed Jan. 29, 2007 (confirming Mr. Ruzatullah and Mr. Rohulla detained at Bagram). Moreover, as discussed further below, the DOD has publicly released the names of similarly situated Guantánamo prisoners. *See Pentagon Releases Guantanamo Detainee List to Public*, Associated Press, May 15, 2006. To the ACLU's knowledge, DOD has never claimed that the names of Guantánamo prisoners are classified but rather initially withheld that information from the public on the basis of privacy claims. *See Associated Press v. Dep't of Defense*, 395 F. Supp. 2d 15, 16 (S.D.N.Y. 2005) (noting that the Defense Department "does *not* claim that any of the redactions [of Guantanamo prisoner's names] were required by national security").

To the extent the agency is withholding Bagram prisoners' names pursuant to Exemption 6, that withholding is also improper. As discussed above, Exemption 6 permits withholding only where disclosure would "constitute a *clearly unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). Exemption 6 requires "a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act to open agency action to the light of public

scrutiny.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (internal quotation marks omitted). The balance typically tilts heavily in favor of disclosure, not secrecy. *See, e.g., Wash. Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982) (“under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act”); *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971) (Exemption 6 “instructs the court to tilt the balance in favor of disclosure”). Even where a record implicates an individual’s privacy rights, it must be disclosed under FOIA when it “sheds light on an agency’s performance of its statutory duties.” *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

Even assuming that Bagram detainees have a privacy interest with respect to information that merely identifies them as being detained by the U.S., that privacy interest is outweighed here by the substantial public interest in knowing who DOD is detaining.<sup>8</sup> Access to basic information about whom the government has detained at Bagram is a fundamental prerequisite to the public’s ability to understand the DOD’s use of its detention power and to assess whether that power is being used appropriately or is being abused. The public cannot understand whether the government is appropriately or inappropriately imprisoning people at Bagram – often for prolonged periods of time, without charge, access to lawyers, or access to courts – if they are not permitted to know *who is being detained*. Disclosure of this information is particularly important given public concern about governmental mistakes in the course of Bagram detentions. *See, e.g., Richard A. Oppel, Jr., U.S. Captain Hears Pleas for Afghan Detainee*, N.Y. Times, May 25, 2009 (reporting on concerns of mistaken identity). Oversight of the government’s detention power is simply impossible without this basic information. *See, e.g., Reporters Comm.*, 489 U.S. at 773 (personally identifying information should be disclosed under FOIA where it informs citizens about “what their government is up to”).

Notably, the Defense Department has released identifying information about – including the names of – similarly situated Guantánamo detainees. In response to a FOIA request by the Associated Press, the Defense Department

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<sup>8</sup> At least one court has held that prisoners similarly situated to those at Bagram (prisoners held at Guantanamo) did not have a significant (if any) privacy interest with respect to information that merely identifies them as prisoners of the U.S. government. *See Associated Press v. Dep’t of Defense*, 410 F. Supp. 2d at 150-151; *see also Dep’t of State v. Ray*, 502 U.S. 164, 176 n.12 (emphasizing that “disclosure of a list of names and other identifying information” is not “inherently and always a significant threat to the privacy of the individuals on the list”). Courts have held that privacy interests are often diminished in the context of records relating to mere fact of arrest or detention. *See, e.g., Paul v. Davis*, 424 U.S. 693, 712-713 (1976) (no protected privacy interest in fact of arrest); *Tennessean Newspaper, Inc. v. Levy*, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975) (“[I]ndividuals who are arrested or indicted become persons in whom the public has a legitimate interest, and the basic facts which identify them and describe generally the investigations and their arrests become matters of legitimate public interest.”).



released hundreds of records pertaining to the Guantánamo Combatant Status Review Tribunals (CSRT), including transcripts and related documents, but redacted prisoners' identifying information from those documents. *See Associated Press*, 410 F. Supp. 2d. 147, 149 (S.D.N.Y. 2006). After a federal judge ruled that identifying information about the Guantánamo detainees was not properly withheld under Exemption 6, *id.* at 150-151, the DOD not only released the identifying information redacted in the CSRT documents, *see U.S. Reveals Details on Guantanamo Detainees after AP FOIA Lawsuit*, *Associated Press*, Mar. 7, 2006, but then also released the names of 558 Guantánamo prisoners, and soon thereafter, released a list of all 759 individuals detained at Guantánamo since 2002, *see Pentagon Releases Guantanamo Detainee List to Public*, *Associated Press*, May 15, 2006. Specifically, DOD provided a list that included their names, parts of their Internment Security Numbers, their citizenship, place of birth, and date of birth. *See Kathleen T. Rhem, DoD Releases Names of 759 Current, Former Guantanamo Detainees*, *American Forces Press Service*, May 15, 2006.<sup>9</sup> It is far from evident why the same exact information about Bagram detainees cannot be released.

To the extent the agency is withholding the Bagram prisoners' names under Exemption 7(C), that withholding is improper for the same reasons that the Exemption 6 withholding is improper. Under Exemption 7(C), a similar balancing inquiry is required and personal information should be withheld only where it "reveals little or nothing about an agency's own conduct." *Reporters Comm.*, 489 U.S. at 773. As discussed above, the balance here tips heavily in favor of public disclosure. Moreover, as noted above, *see infra* note 7, it is far from clear that Exemption 7(C) applies to the NDRC report at all because it not appear be compiled for law enforcement purposes by and agency with a law enforcement function.

### **Non-Identifying Information in the NDRC Document**

Even if names of the Bagram prisoners reflected in the NDRC document were properly withheld, the non-identifying information in the document – the Bagram detainees' nationality, citizenship, their length of detention, their date of capture, their place of capture, and the circumstance of their capture – is not. If unaccompanied by identifying information (such as the detainees' names), this information does not implicate *any* privacy interest whatsoever and, thus, is improperly withheld under Exemptions 6 and 7(C). *See Dep't of State v. Ray*, 502 U.S. 164, 176 (1991) (disclosure of personal

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<sup>9</sup> The article is available at <http://www.defenselink.mil/news/newsarticle.aspx?id=15754>. The list is available at <http://www.dod.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf>. The DOD also released identifying information in ARB records as well. *See U.S. Reveals Details on Guantanamo Detainees after AP FOIA Lawsuit*, *Associated Press*, Mar. 7, 2006.

information without *identifying* details “constitutes only a de minimis invasion of privacy”). Nor is it clear how (or whether) this information, when unmoored from the detainees’ names, is properly classified, and thus, withholdable under Exemption 1. Mr. Jacobsmeyer’s letter certainly does not explain how the release of such information could reasonably be expected to cause any damage to national security. Accordingly, even if the names (or even internment numbers) of the Bagram detainees are withheld, the remaining information is segregable and releasable. *See Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992). This information is of enormous value to the public even if not accompanied by identifying information about the detainees.

The withheld information pertaining to the *nationality and citizenship* of Bagram is vital to the public’s understanding of the composition of the Bagram prisoner population. This information is particularly valuable because among the key concerns surrounding the Bagram facility are unanswered questions about the percentage of prisoners who are not Afghan citizens. Exh. A at 2. Release of the nationality/citizenship information (of unidentified detainees) would quell public speculation on this issue. Release of such information would not implicate any privacy interests. Nor is it apparent that release of citizenship and nationality information alone would cause any identifiable damage to national security. Indeed, the fact that the Defense Department has confirmed the citizenship of some detainees in the context of litigation suggests this information is not classified and that its release would not cause harm. *See* Declaration of Colonel Joe E. Ethridge at ¶ 19, *Al-Najar v. Gates*, 1:08-cv-02143, filed Dec. 19, 2008 (confirming Al-Najar a Tunisian citizen); Declaration of Colonel Charles A. Tennison at ¶ 19, *Wazir v. Gates*, 1:06-cv-01679, filed Oct. 3, 2008 (confirming Wazir an Afghan citizen); Declaration of Colonel Charles A. Tennison at ¶ 19, *Al Bakri v. Gates*, 1:08-cv-01307, filed Sept. 15, 2008 (confirming Al Bakri a Yemeni citizen); Declaration of Colonel James W. Gray at ¶ 19, *Al Maqaleh v. Gates*, 1:06-cv-01669, filed March 5, 2007 (confirming Al Maqaleh a Yemeni citizen); Declaration of Colonel James W. Gray at ¶ 5, *Ruzatullah v. Rumsfeld*, 06-cv-01707, filed Jan. 29, 2007 (confirming two prisoners were Afghan citizens). Notably, the list of Guantánamo detainees DOD released in May 2006 included information about their nationality and citizenship. *See* Kathleen T. Rhem, *DoD Releases Names of 759 Current, Former Guantanamo Detainees*, American Forces Press Service, May 15, 2006.

The withheld information pertaining to the *length of each detainees’ detention and their date of capture* is vital to the public’s understanding of the average length of detention for prisoners at Bagram. It is public knowledge that some prisoners have been detained at Bagram for more than six years. Exh. A at 2; *see also Al Maqaleh v. Gates*, 604 F.Supp.2d 205, 209 (D.D.C. 2009). It is unknown, however, whether that length of detention is typical or aberrational. Without release of any information about how long Bagram

detainees have been imprisoned, public concern that Bagram detainees are wrongfully subjected to excessively prolonged and arbitrary detention will grow. Releasing information about the length of detention (without identifying information) would not implicate any privacy interests and would not obviously implicate national security concerns. It is generally public knowledge how long Guantánamo prisoners have been detained; indeed, the government has often announced publicly the capture of suspected terrorists. *See, e.g.*, President's Radio Address, Mar. 8, 2003 (President Bush announcing that "American and Pakistani authorities captured . . . Khalid Sheikh Mohammed . . .")<sup>10</sup>; Gerry J. Gilmore, *Rumsfeld Confirms Capture of Senior Al Qaeda Leader*, American Forces Press Service, Apr. 2, 2002 (former Secretary of Defense Rumsfeld confirming capture of Abu Zubaydah).<sup>11</sup>

The withheld information pertaining to the *where Bagram detainees were captured* is vital to the public's understanding of a key area of public concern about Bagram: whether individuals captured far from Afghanistan, are being imprisoned at Bagram. Exh A. at 2-3, 10-11; Exh C 13-14. This aspect of the Bagram detention policy is particularly controversial. *Id.* It is well-known that some Bagram detainees were captured outside of Afghanistan. *Al Maqaleh*, 604 F.Supp.2d at 209. What is unknown is whether *many* or a significant proportion of the Bagram prisoners were captured outside of Afghanistan. Releasing information about the place of capture (without identifying information) would not implicate any privacy interests and would not obviously implicate national security concerns. The notion that this information is properly classified is belied by the fact that the DOD has publicly released information about where some Bagram detainees were captured in the context of court cases. *See, e.g.*, Declaration of Colonel Joe E. Ethridge at ¶ 20, *Al-Najar v. Gates*, 1:08-cv-02143, filed Dec. 19, 2008 (stating Al-Najar was captured in Pakistan); Declaration of Colonel Charles A. Tennison at ¶ 20, *Wazir v. Gates*, 1:06-cv-01679, filed Oct. 3, 2008 (stating Wazir was captured in Pakistan); Declaration of Colonel James W. Gray at ¶ 20, *Al Maqaleh v. Gates*, 1:06-cv-01669, filed March 5, 2007 (stating Al Maqaleh captured in Afghanistan); Declaration of Colonel James W. Gray at ¶ 5, *Ruzatullah v. Rumsfeld*, 06-cv-01707, filed Jan. 29, 2007 (stating two prisoners were captured in Afghanistan).

Finally, the withheld information pertaining to the Bagram detainees' *circumstances of capture* is also important to the public debate about Bagram. There is tremendous public concern that the U.S. government is inappropriately subjecting individuals to military detention who were captured far from any battlefield or who were not in any way actively engaged in hostilities against U.S. or Afghan forces. Release of information pertaining to

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<sup>10</sup> Available at <http://www.whitehouse.gov/news/releases/2003/03/20030308-1.html>.

<sup>11</sup> Available at <http://www.defenselink.mil/news/newsarticle.aspx?id=44203>.

the circumstances under which Bagram detainees were captured (even without identifying information) would inform the public as to whether their concern is or is not justified. The release of this information would not implicate any privacy interests. Nor is it self-evident that release of this information, by itself, would cause damage to national security. Notably, the Guantánamo CSRT and ARB transcripts, summaries of evidence, and related documents released by the DOD in response to other FOIA requests contained un-redacted detail about both the prisoners' place of capture and the circumstance of their capture. *See Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) Documents*, Defense Department Reading Room.<sup>12</sup>

For the foregoing reasons, we respectfully request that you reconsider the decision to withhold the 12-page NDRC document that is responsive to the ACLU's Request in its entirety. We look forward to your prompt response.

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Sincerely,



Melissa Goodman  
Staff Attorney  
ACLU's National Security Project

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<sup>12</sup> These documents are available at  
[http://www.dod.gov/pubs/foi/detainees/csrt\\_arb/index.html](http://www.dod.gov/pubs/foi/detainees/csrt_arb/index.html).

# Exhibit A



April 23, 2009

Information Officer  
Office of Freedom of Information and Security Review  
Directorate for Executive Services and Communications  
FOIA/Privacy Branch  
1155 Defense Pentagon, Room 2C757  
Washington, D.C. 20301-1155

FOIA/PA Mail Referral Unit  
Department of Justice  
Room 115  
LOC Building  
Washington, D.C. 20530-0001

Information and Privacy Coordinator  
Central Intelligence Agency  
Washington, D.C. 20505

Office of Information Programs and Services  
A/ISS/IPS/RL  
U.S. Department of State  
Washington, D.C. 20522-8100

Re: **REQUEST UNDER FREEDOM OF INFORMATION ACT/  
Expedited Processing Requested**

To Whom it May Concern:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the Department of State implementing regulations, 22 C.F.R. § 171.1 *et seq.*, and the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 *et seq.* The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU").<sup>1</sup>

<sup>1</sup> The American Civil Liberties Union is a national organization that works to protect civil rights and civil liberties. Among other things, the ACLU advocates for national security policies that are consistent with the Constitution, the rule of law, and

This Request seeks records pertaining to the detention and treatment of prisoners held at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan ("Bagram"), including records concerning the process afforded these prisoners to challenge their detention and designation as "enemy combatants."

Recent news reports suggest that the U.S. government is detaining more than 600 individuals at Bagram. *See, e.g.,* Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009 ("The United States government is holding about 600 people at Bagram without charges and in spartan conditions."). The Bagram prison population includes not only Afghan citizens captured in Afghanistan but also an unknown number of foreign nationals captured outside of Afghanistan but held at Bagram as suspected terrorists or "enemy combatants." *See* R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009. Some of these prisoners have been detained for as long as six years. *See* James Vicini, *Judge Rules Afghan Detainees Can Sue in U.S. Court*, Reuters, Apr. 2, 2009. Bagram prisoners are not permitted any access to counsel, *see* Warren Richey, *Terror Suspects Held in Afghanistan May Challenge Their Detention*, Christian Science Monitor, Apr. 3, 2009, and only recently have been permitted any contact with their family, *see* Fisnik Abrashi, *U.S. Allows First Family Visits to Afghan Prison*, Assoc. Press, Sept. 23, 2008; Carlotta Gall, *Video Link Plucks Afghan Detainees From Black Hole of Isolation*, N.Y. Times, Apr. 13, 2008.

Bagram prisoners reportedly receive an even less robust and meaningful process for challenging their detention and designation as "enemy combatants" than the process afforded prisoners at the U.S. Naval Base at Guantanamo Bay ("Guantanamo") – a process the U.S. Supreme Court declared unconstitutional last year. *See* Daphne Eviatar, *Judge Rules Bagram Detainees Can Appeal to U.S. Courts*, Wash. Independent, Apr. 3, 2009. Indeed, a federal judge recently observed that the "process at Bagram falls well short of what the Supreme Court found inadequate at Guantanamo." *Al Maqaleh v. Gates*, --- F.Supp.2d ---, 2009 WL 863657, \* 19 (D.D.C. Apr. 2, 2009). Moreover, there is public concern that the U.S. government is holding many prisoners at Bagram, rather than at Guantanamo, specifically to avoid any judicial review of their detentions in U.S. courts. Editorial, *The Next Guantanamo*, N.Y. Times, Apr. 12, 2009 ("the evidence suggests it was the prospect that Guantánamo

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fundamental human rights. The ACLU also educates the public about U.S. national security policies and practices, including those pertaining to the detention, treatment, and process afforded suspected terrorists and alleged "enemy combatants" held in U.S. custody since the 9/11 terrorist attacks.

detentions might be subject to judicial oversight that caused the military to divert captives to Bagram instead”).

Media reports suggest that the conditions of confinement at Bagram are primitive and that abuse and mistreatment of prisoners was once, and may still be, widespread. *See, e.g.,* Daphne Eviatar, *Judge Rules Bagram Detainees Can Appeal to U.S. Courts*, Wash. Independent, Apr. 3, 2009; William Fischer, *Afghan Prison Looks Like Another Guantanamo*, Inter Press Service, Jan. 14, 2008 (“a recent confidential report from the International Committee of the Red Cross (ICRC) has reportedly complained about continued mistreatment of prisoners . . . massive overcrowding, ‘harsh’ conditions, lack of clarity about the legal basis for detention, prisoners held ‘incommunicado’, in ‘a previously undisclosed warren of isolation cells,’ and ‘sometimes subjected to cruel treatment’”). At least two Bagram prisoners have died while in U.S. custody; Army investigators concluded that these deaths were homicides. *See* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths*, N.Y. Times, May 20, 2005.

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The U.S. government’s Bagram detention facility has been the focus of widespread media attention and public concern for many years. Despite that attention, however, very little information about the facility – or the prisoners held there – has been made public. *See, e.g.,* Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009 (“United States officials have never provided a full accounting of the prison population”); R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009 (“The government has not said publicly how many of the approximately 600 people detained there are non-Afghans”); William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service, Apr. 3, 2009 (“the U.S. has not released details of who is held there”); Tim Golden and Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. Times, Feb. 26, 2006 (“Bagram has operated in rigorous secrecy since it opened in 2002”). The American public remains ill-informed about even the most basic facts about Bagram, including, for example, many of the policies and rules that govern the U.S. government’s detention of hundreds of people there; who precisely is being detained there, for how long, and on what basis; where and under what circumstances these prisoners were captured; whether the prisoners have a meaningful opportunity for challenging their (often prolonged) detention; whether that process meets the standards required by international, domestic, and military law; and whether any prisoners have successfully challenged their detentions through the existing status determination process.



Public attention to Bagram has recently intensified significantly. Earlier this month, a federal judge ruled that some prisoners at Bagram can challenge their detention in U.S. courts. See Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009. This ruling has led to renewed scrutiny of the U.S. government's actions at Bagram and fierce speculation about whether the Obama Administration will deviate from Bush Administration policies and practices at Bagram. See, e.g., R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009; *Obama to Appeal Detainee Ruling*, N.Y. Times, Apr. 10, 2009; David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009 ("The prison at the Afghan base was being expanded during the last year of the Bush administration, leading some to predict that the Pentagon would resolve its Guantanamo problem by sending more inmates to Bagram . . . a spokesman said the [Obama] administration was taking 180 days to decide on its prison policy.").

In short, there is renewed public concern that Bagram has become, in effect, the new Guantanamo. See, e.g., Editorial, *The Next Guantanamo*, N.Y. Times, Apr. 12, 2009.

#### Requested Records

1. All records, including logs, charts, or lists, pertaining to the number of people currently detained at Bagram.
2. All records, including logs, charts, or lists, pertaining to the names of individuals currently detained at Bagram.
3. All records, including logs, charts, or lists, pertaining to the citizenship of individuals currently detained at Bagram.
4. All records, including logs, charts, or lists, pertaining to date of capture and length of detention of individuals currently detained at Bagram.
5. All records, including logs, charts, or lists, pertaining to the places and circumstances of capture of individuals currently detained at Bagram.
6. All records created after September 11, 2001, pertaining to the rendition and/or transfer of individuals captured outside Afghanistan to Bagram, including memoranda, correspondence, procedures, policies, directives, guidance, or guidelines concerning when, why, and under what circumstances prisoners seized outside Afghanistan should be detained at Bagram rather than being brought to the United States, handed over to another country, or detained by the United States at

Guantanamo Bay or some other detention facility outside of Afghanistan.

7. All records created after September 11, 2001, including memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines, as well as agreements, accords, contracts, correspondence, and memoranda, between the U.S. and Afghan government, pertaining to the detention at Bagram of individuals captured in Afghanistan, and when, how, and why the determination is made by the United States to detain Afghan citizens at Bagram rather than at prisons or other facilities operated or controlled by the Afghan government.
8. All records created after September 11, 2001, pertaining to the process for determining and reviewing Bagram prisoners' status, the process for determining whether their detention is appropriate, and the process for determining who should be released, including but not limited to:
  - A. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning the development and operation of the status review process, as well as changes to that process over time.
  - B. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning whether prisoners should be given access to or denied access to counsel or another representative.
  - C. Any memoranda, correspondence, procedures, policies, directives, practices, guidance, or guidelines concerning: the provision or withholding of notice to prisoners of the basis for their detention; the composition of the Unlawful Enemy Combatant Review Board ("UECRB"); the convening of or decision not to convene an UECRB; the kinds of evidence to be reviewed by the UECRB; the standard employed to determine whether detention is appropriate; the prisoner's opportunity to submit written statements or other evidence to the UECRB; the prisoner's opportunity to rebut the government's evidence or question government witnesses; the presentation or consideration of exculpatory evidence; the prisoner's opportunity to attend any UECRB hearing; the prisoner's access to any written decisions, determinations, or rulings by the UECRB; the use of or access to interpreters at any UECRB hearing and access to translations of any written evidence or written decisions, determinations, or rulings of the UECRB; any appeal or higher-level review of UECRB

determinations or the final determinations of the final decision-maker; any annual or periodic review of the prisoners' status after the initial determination is made.

- D. Any written notices provided to prisoners at Bagram regarding the basis for their detention.
- E. Any transcripts of UECRB proceedings or any other proceeding that occurs during the status determination and review process.
- F. Any evidence considered in UECRB proceedings or any other proceeding that occurs during the status determination and review process including written statements provided by the detainees and unclassified summaries of the government's evidence.
- G. Any written decisions, determinations, or rulings issued by the UECRB, the commanding officer, or the final decision-maker.
- H. Any written decisions, determinations, or rulings issued in the course of any appeal process or in the course of periodic reviews of the initial UECRB determination.

- 9. All records, including agreements, accords, contracts, correspondence, memoranda, policies, guidelines, or directives between U.S. and Afghan government officials created after September 11, 2001, pertaining to the transfer of Afghan prisoners detained at Bagram to Afghan facilities or Afghan custody; and the release of Afghan prisoners to the Afghan government, into Afghan reconciliation programs, or back into Afghan society.
- 10. All records created after September 11, 2001, pertaining to the treatment of and conditions of confinement for prisoners detained at Bagram, including but not limited to memoranda, correspondence, procedures, policies, directives, guidance, or guidelines, investigatory records, disciplinary records, medical records, and autopsy reports.<sup>2</sup>

## **II. Application for Expedited Processing**

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c). There is a "compelling need"

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<sup>2</sup> To the extent that records responsive to this Request have already been processed in response to ACLU FOIA requests submitted on October 7, 2003 and May, 25, 2004, the ACLU is not seeking those records here.

for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). In addition, the records sought relate to a “breaking news story of general public interest.” 22 C.F.R. § 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence”).

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information” (internal citation omitted)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused.

The ACLU website specifically includes features on information obtained through the FOIA. *See, e.g.,* [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia); <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; [www.aclu.org/patriotfoia](http://www.aclu.org/patriotfoia); [www.aclu.org/spyfiles](http://www.aclu.org/spyfiles); <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>; [www.aclu.org/exclusion](http://www.aclu.org/exclusion). For example, the ACLU’s “Torture FOIA” webpage, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia), contains commentary about the ACLU’s FOIA request, press releases, analysis of the FOIA documents, an advanced search engine permitting webpage visitors to search the

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documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007). The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through the FOIA. The ACLU plans to analyze, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the Requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.<sup>3</sup>

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Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal government activity; specifically, the records sought relate the U.S. government's detention and treatment of suspected terrorists and alleged "enemy combatants" at Bagram, as well as their transfer or rendition to Bagram from other countries. The records sought also relate to the process the U.S. government affords Bagram prisoners to challenge the basis for their detention and designation as "enemy combatants" including whether that process is meaningful, and whether it departs in any way from the process typically required by the Geneva Conventions and Army Regulation 190-8. See 22 C.F.R. 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 1900.34(c)(2). For the same reasons, the records sought also relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

A recent court ruling that some prisoners at Bagram can challenge their detention in U.S. courts has sparked widespread media interest in and public concern about the U.S. government's practices at Bagram. See, e.g., Andy Worthington, *Justice Extends to Bagram, Guantanamo's Dark Mirror*, Counterpunch.org, Apr. 6, 2009; Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009; David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009; Nina Totenberg, *Ruling: Afghan Detainees Granted Habeas Corpus*, Nat'l Pub.

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<sup>3</sup> In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

Radio, Apr. 3, 2009; Daphne Eviatar, *Judge Rules Bagram Detainees Can Appeal to U.S. Courts*, Wash. Independent, Apr. 3, 2009; Kim Landers, *Terrorism Suspects 'Can Challenge Afghan Detention'*, ABCNews.com, Apr. 3, 2009; William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service, Apr. 3, 2009; Bill Mears, *Terror Suspects in Afghanistan Can Sue in U.S. Courts, Judge Rules*, CNN.com, Apr. 2, 2009; Ari Shapiro, *Terror Suspects to Gain Access to U.S. Courts*, Nat'l Pub. Radio, Apr. 2, 2009; Warren Richey, *Terror Suspects Held in Afghanistan May Challenge Their Detention*, Christian Sci. Monitor, Apr. 3, 2009; *Judge: 3 Can Challenge Detention at Bagram*, United Press Int'l, Apr. 2, 2009; James Vicini, *Judge Rules Afghan Detainees Can Sue in U.S. Court*, Reuters, Apr. 2, 2009; Daphne Eviatar, *Bagram Ruling Portends More Challenges to Obama Detention Policy in Afghanistan*, Wash. Independent, Apr. 2, 2009; *Inmates at Afghan Prison Can Challenge Detention*, AFP, Apr. 2, 2009; Nedra Pickler, *Judge: Bagram Prisoners Can Challenge Detention*, Assoc. Press, Apr. 2, 2009; Josh Gerstein, *Judge OKs Suits by Some Held by U.S. in Afghanistan*, Politico.com, Apr. 2, 2009; Marc Ambinder, *Judge: The Great Writ May Apply at Bagram*, TheAtlantic.com, Apr. 2, 2009; Lyle Denniston, *Major Extension of Boumediene*, Scotusblog.com, Apr. 2, 2009.

Public interest in Bagram has also recently intensified significantly due to speculation about what the Obama administration will do with the hundreds of people imprisoned there and whether it will craft new policies to govern Bagram detentions. See, e.g., Michael Scherer, *Civil Liberties Advocates Dismayed at Obama's Recent Moves*, Time, Apr. 21, 2009; Josh Gerstein, *Legal Left Cools Toward Obama*, Politico.com, Apr. 14, 2009; Glenn Greenwald, *An Emerging Progressive Consensus on Obama's Executive Power and Secrecy Abuses*, Salon.com, Apr. 13, 2009; *The Rachel Maddow Show* (MSNBC television broadcast Apr. 13, 2009) (transcript available at <http://www.msnbc.msn.com/id/30210708/>); Glenn Greenwald, *Obama and Habeas Corpus – Then and Now*, Salon.com, Apr. 11, 2009; Stuart Taylor Jr., *A Judicial Decision That Plagues Obama*, Nat'l Journal, Apr. 11, 2009; Del Quentin Wilber, *A Plea to Obama from Father of Detainee*, Wash. Post, Apr. 9, 2009; Bruce Fein, *Czar Obama: The President's Incredibly Imperialist Wielding of Executive Power*, Slate.com, Apr. 9, 2009; Andy Worthington, *Justice Extends to Bagram, Guantanamo's Dark Mirror*, Counterpunch.org, Apr. 6, 2009; Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 3, 2009; David G. Savage, *Some Prisoners at Bagram Air Base Can Challenge Detentions, Judge Rules*, L.A. Times, Apr. 3, 2009; Bill Mears, *Terror Suspects in Afghanistan Can Sue in U.S. Courts, Judge Rules*, CNN.com, Apr. 2, 2009; Daphne Eviatar, *Bagram Ruling Portends More Challenges to Obama Detention Policy in Afghanistan*, Wash. Independent, Apr. 2, 2009; see also William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service,

Apr. 3, 2009 (“Some critics of Obama administration detention policy have begun calling Bagram ‘Obama’s GITMO,’ charging that the new president is shipping detainees to the Afghan prison to evade the Supreme Court’s ruling giving habeas corpus rights to prisoners at Guantanamo.”).

In the past few weeks, numerous editorial boards have called for change on Bagram policy. *See* Editorial, *The Next Guantanamo*, N.Y. Times, Apr. 13, 2009; Editorial, *Obama Should Define Rights of Suspected Terrorists Held by U.S. Abroad*, L.A. Times, Apr. 9, 2009; Editorial, *The Constitution’s Reach*, Wash. Post, Apr. 7, 2009; *see also* Marie Cocco, *The Father of Guantanamo*, Truthdig.com, Apr. 8, 2009; Editorial, *A Reckoning at Bagram*, Wash. Post, Mar. 7, 2009; Editorial, *Overreach at Bagram*, Wash. Post, Jan. 7, 2009. Some editorial boards have criticized Judge Bates’ ruling. *See, e.g.*, Editorial, *Off Base on Terror*, N.Y. Daily News, Apr. 4, 2009; Editorial, *Imperial Judiciary Goes Global*, Nat’l Review, Apr. 3, 2009.

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The Obama administration’s recent decision to quickly appeal the Bagram ruling sparked another round of intense media coverage. *See, e.g.*, Daphne Eviatar, *Obama Bungles Bagram*, Wash. Independent, Apr. 13, 2009; Josh Gerstein, *DOJ: Courts Could Harm Afghan Effort*, Politico.com, Apr. 12, 2009; R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009; *Obama Sticks to Bush Detainee Policy*, United Press Int’l, Apr. 11, 2009; Marc Ambinder, *Obama Appeals Bagram Detainee Ruling*, TheAtlantic.com, Apr. 11, 2009; Glenn Greenwald, *Obama and Habeas Corpus – Then and Now*, Salon.com, Apr. 11, 2009; Lyle Denniston, *U.S. Resists Rights at Bagram*, Scotusblog.com, Apr. 11, 2009; *Obama to Appeal Detainee Ruling*, N.Y. Times, Apr. 10, 2009. Public speculation about whether the Obama administration will alter Bagram policy continues despite the decision to appeal the Bagram ruling. *See, e.g.*, R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009 (“officials said that [appeal] did not foreclose a change of heart after the completion in July of a comprehensive review of detainee policy”); Lyle Denniston, *U.S. Resists Rights at Bagram*, Scotusblog.com, Apr. 11, 2009 (“The future of Bagram detainees is one of the issues now being reviewed by a task force studying detainee policy worldwide.”).

Indeed, the U.S. government’s Bagram detention facility has been the focus of widespread and consistent media attention and public concern for many years. *See, e.g.*, Charlie Savage, *Obama Upholds Detainee Policy in Afghanistan*, N.Y. Times, Feb. 21, 2009; Eric Schmitt, *Afghan Prison Poses Problem in Overhaul of Detainee Policy*, N.Y. Times, Jan. 26, 2009; Dan Efron, *The Gitmo Dilemma - Four Reasons Obama Won’t Close the Controversial Prison Soon*, Newsweek, Nov. 7, 2008; *‘How Bagram Destroyed Me’*, BBC News, Sept. 25, 2008; Fisman Abrashi, *U.S.*

*Allows First Family Visits to Afghan Prison*, Assoc. Press, Sept. 23, 2008; Suzanne Goldenberg and Saeed Shah, *Mystery of 'Ghost of Bagram' - Victim of Torture or Captured in a Shootout?*, The Guardian, Aug. 6, 2008; Eric Schmitt, *Pakistani Suspected of Qaeda Ties Is Held*, N.Y. Times, Aug. 5, 2008; Del Quentin Wilber, *In Courts, Afghanistan Air Base May Become Next Guantanamo*, Wash. Post, June 29, 2008; Katie Paul, *The Road From Gitmo: Alternative Ways of Handling Suspects in the War on Terror*, Newsweek, June 27, 2008; Eric Schmitt and Tim Golden, *U.S. Planning Big New Prison in Afghanistan*, N.Y. Times, May 17, 2008; Fisnik Abrashi, *Red Cross Faults Afghan Prison*, Assoc. Press, Apr. 15, 2008; Carlotta Gall, *Video Link Plucks Afghan Detainees From Black Hole of Isolation*, N.Y. Times, Apr. 13, 2008; Candance Rondeaux, Josh White, and Julie Tate, *Afghan Detainees Sent Home to Face Closed-Door Trials*, Wash. Post, Apr. 13, 2008; Tim Golden and David Rohde, *Afghans Hold Secret Trials for Men That U.S. Detained*, N.Y. Times, Apr. 10, 2008; Ian Austin, *Canadian TV Network Seeks Release of Afghan*, N.Y. Times, Feb. 21, 2008; William Fisher, *Afghan Prison Looks Like Another Guantanamo*, Inter Press Service, Jan. 14, 2008; Andrew Gumbel, *Bagram Detention Center Now Twice the Size of Guantanamo*, The Independent, Jan. 8, 2008; Tim Golden, *Foiling U.S. Plan, Prison Expands in Afghanistan*, N.Y. Times, Jan. 7, 2008; *U.S. Expands Afghan Base at Bagram*, Assoc. Press, Oct. 6, 2007; Richard Leiby, *Down a Dark Road*, Wash. Post, Apr. 27, 2007; Matthew Pennington, *Inmates Detail U.S. Prison Near Kabul*, Assoc. Press, Oct. 2, 2006; Eliza Griswold, *American Gulag: Prisoners' Tales from the War on Terror*, Harpers, Sept. 1, 2006; Carlotta Gall and Ruhullah Khapalwak, *Some Afghans Freed from Bagram Cite Harsh Conditions*, N.Y. Times, June 8, 2006; William Fisher, *Bagram - 'Son of Guantanamo'*, Inter Press Service, Feb. 28, 2006; Tim Golden and Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantanamo*, N.Y. Times, Feb. 26, 2006; Tim Golden, *Years After 2 Afghans Died, Abuse Case Falts*, N.Y. Times, Feb. 13, 2006; Tim Golden, *Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates*, N.Y. Times, Jan. 8, 2006; Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. Times, Aug. 8, 2005; Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. Times, May 20, 2005; Emily Bazelon, *From Bagram to Abu Ghraib*, Mother Jones, March/April 2005; Stephanie Hanes, *Two Groups Detail Abuse of Afghan Prisoners*, Baltimore Sun, May 5, 2004; Pamela Constable, *An Afghan boy's Life in U.S. Custody: Camp in Cuba Was Welcome Change After Harsh Regime at Bagram*, Wash. Post, Feb. 12, 2004.

More generally, questions regarding the legal process afforded suspected terrorists and alleged "enemy combatants" held in U.S. custody has been the subject of continuous and sustained public interest. See, e.g., Jackie Northam, *Tapes Provide First Glimpse of Secret Gitmo Panels*, Nat'l Pub. Radio, Apr. 10, 2009 (reporting on the release of taped



recordings of the “combatant status review tribunals” of six detainees); Andy Worthington, *Bad News, Good News for the Guantanamo Uighurs*, Huffington Post, Feb. 19, 2009; Jane Perlez, Raymond Bonner and Salman Masood, *An Ex-Detainee of the U.S. Describes a 6-Year Ordeal*, N.Y. Times, Jan. 5, 2009; Jeffrey Toobin, *Camp Justice*, The New Yorker, Apr. 14, 2008; Scott Horton, *Military Lawyers and the Gitmo Commissions*, Harpers, Oct. 30, 2007; *Army Officer: Guantanamo Hearings are Flawed*, MSNBC.com, Aug. 6, 2007; Andrew C. McCarthy, *The Profession v. Gitmo*, Nat’l Review, June 25, 2007; Jeffrey Toobin, *Killing Habeas Corpus*, The New Yorker, Dec. 4, 2006; Daniel Eisenberg and Timothy J. Burger, *What’s Going On at Gitmo?*, Time, May 29, 2005; Carol D. Leonnig, *Judge Rules Detainee Tribunals Illegal*, Wash. Post, Feb. 1, 2005. In particular, the Supreme Court’s June 2008 ruling that Guantanamo Bay detainees had a constitutional right to *habeas* was the subject of significant public attention and media interest. See, e.g., Kevin Drum, *Boumediene v. Bush*, CBS News, June 22, 2008; Robyn E. Blumner, *Supreme Court Preserves a Razor-Thin Redemption*, St. Petersburg Times, June 22, 2008; Richard Epstein, *How To Complicate Habeas Corpus*, N.Y. Times, June 21, 2008; Jack Balkin, *Two Takes: With ‘Boumediene,’ the Court Reaffirmed a Basic Principle*, U.S. News & World Report, June 19, 2008; David Stout, *Justices Rule Terror Suspects Can Appeal in Civilian Courts*, N.Y. Times, June 13, 2008; Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. Times, June 13, 2008. Furthermore, the military commission proceedings held at Guantanamo in 2008 also generated substantial public interest. See William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. Times, Aug. 7, 2008; Editorial, *A Mixed Verdict on Hamdan*, L.A. Times, Aug. 7, 2008; Scott Shane and William Glaberson, *Judge Clears Way for Trial of Bin Laden’s Driver*, N.Y. Times, July 17, 2008; Joanne Mariner, *Arresting the 9/11 Suspects, Guantánamo-Style*, Salon.com, June 7, 2008; Jackie Northam, *Sept. 11 Suspects Arraigned at Guantanamo Bay*, Nat’l Pub. Radio, June 6, 2008; Adam Zagorin, *U.S. Justice on Trial at Gitmo*, Time, June 4, 2008; *Gitmo’s Courtroom Wrangling Begins*, Time, Apr. 25, 2008.

More broadly, there has been continued public interest in the treatment of suspected terrorists detained by the United States ever since allegations of abuse and mistreatment first surfaced in December 2002. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, Wash. Post, Dec. 26, 2002; see also Emily Bourke, *Red Cross Finds Doctors Present During CIA Torture*, ABC News, Apr. 8, 2009; Scott Shane, *Report Outlines Medical Workers’ Role in Torture*, N.Y. Times, Apr. 6, 2009; *Guantanamo Guard Admits Prisoner Abuse, ACLU Demands ‘Top to Bottom’ Review*, FoxNews.com, Dec. 18, 2008; *Detainee Abuse Linked to Bush Administration*, Assoc. Press, Dec. 12, 2008; *What FBI Agents Saw During U.S. Interrogations*, Int’l Herald

Tribune, May 22, 2008; Carrie Johnson & Josh White, *Audit Finds FBI Reports of Detainee Abuse Ignored*, Wash. Post, May 21, 2008; Scott Shane, David Johnston and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007; Jane Mayer, *The Black Sites*, The New Yorker, Aug. 13, 2007; Dana Priest, *Detainees Accuse Female Interrogators; Pentagon Inquiry Is Said to Confirm Muslims' Accounts of Sexual Tactics at Guantanamo*, Wash. Post, Feb. 10, 2005; R. Jeffrey Smith and Dan Eggen, *New Papers Suggest Detainee Abuse Was Widespread*, Wash. Post, Dec. 22, 2004; Neil Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. Times, Nov. 30, 2004; Neil Lewis, *Broad Use of Harsh Tactics is Described at Cuba Base*, N.Y. Times, Oct. 17, 2004; Dana Priest, *CIA Puts Harsh Tactics on Hold; Memo on Methods of Interrogation Had Wide Review*, Wash. Post, Jun. 27, 2004; Dana Priest and Bradley Graham, *Guantanamo List Details Approved Interrogation Methods*, Wash. Post, June 10, 2004; Dana Priest and Joe Stephens, *Pentagon Approved Tougher Interrogations*, Wash. Post, May 9, 2004.

The release of documents concerning the treatment of suspected terrorists detained by the U.S. has generated significant public interest and media attention. *See, e.g.*, Brian Knowlton, *Report Gives New Detail on Approval of Brutal Techniques*, N.Y. Times, Apr. 22, 2009; Joby Warrick and Peter Finn, *Harsh Tactics Readied Before Their Approval: Senate Report Describes Secret Memos*, Wash. Post, Apr. 22, 2009; Jonathan S. Landay, *Report Says Abusive Tactics Used to Link Iraq to Al Qaeda*, Miami Herald, Apr. 22, 2009; Jess Bravin, *Interrogation Views Spread with Help of Bush Aides*, Wall St. J., Apr. 22, 2009; Julian E. Barnes, *Military Helped With CIA Interrogation Tactics, Report Says*, L.A. Times, Apr. 22, 2009; Robert Baer, *Why Obama Needs to Reveal Even More on Torture*, Time.com, Apr. 20, 2009; Dan Froomkin, *How Many Others Were Tortured?*, Wash. Post, Apr. 7, 2009; Scott Shane, *Report Outlines Medical Workers' Role in Torture*, N.Y. Times, Apr. 6, 2009; Joby Warwick and Julie Tate, *Report Calls CIA Detainee Treatment 'Inhuman'*, Wash. Post, Apr. 6, 2009; Editorial, *The Tortured Memos*, N.Y. Times, Mar. 4, 2009; Devlin Barrett, *Officials: CIA Destroyed 92 Detainee Tapes*, Chicago Tribune, Mar. 3, 2009; David Johnston & Scott Shane, *Memo Sheds New Light on Torture Issue*, N.Y. Times, Apr. 3, 2008; *White House Denies Torture Assertion*, USA Today, Oct. 4, 2007; Jane Mayer, *The Memo*, The New Yorker, Feb. 27, 2006; Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq; Practice is Called Serious Breach of Geneva Conventions*, Wash. Post, Oct. 24, 2004; Dana Priest and Bradley Graham, *U.S. Struggled Over How Far to Push Tactics*, Wash. Post, June 24, 2004; Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002*, Wash. Post, June 8, 2004.

Indeed, the release of documents pursuant to the ACLU's past requests for records relating to the treatment of suspected terrorists in U.S. custody has been the subject of substantial and continuing public interest. To date, the ACLU has received over 100,000 pages of documents in response to its October 2003 request for such records, generating widespread attention from the public and the media. See, e.g., Mark Mazzetti and Scott Shane, *In Adopting Harsh Tactics, No Inquiry Into Their Past Use*, N.Y. Times, Apr. 22, 2009; Ben Feller, *Obama Open to Torture Memos Probe, Prosecution*, Wash. Post, Apr. 22, 2009; Sheryl Gay Stolberg, *Obama Won't Bar Inquiry, Or Penalty, On Interrogators*, N.Y. Times, Apr. 22, 2009; Michael Sniffen, *3 Lawyers Face Scrutiny for Torture Advice*, Wash. Post, Apr. 22, 2009; Peter Baker and Scott Shane, *Pressure Grows to Investigate Interrogations*, N.Y. Times, Apr. 21, 2009; *In CIA Visit, Obama Defends Interrogation Memo Release*, CNN.com, Apr. 20, 2009; *Sept. 11 Planner Waterboarded 183 Times*, Reuters, Apr. 20, 2009; Michael Scherer and Bobby Ghosh, *How Waterboarding Got Out of Control*, Time.com, Apr. 20, 2009; *Memo: Two al Qaeda Leaders Waterboarded 266 Times*, CNN.com, Apr. 20, 2009; Scott Shane, *2 Suspects Waterboarded 266 Times*, N.Y. Times, Apr. 20, 2009; Joshua Brustein, *Former C.I.A. Director Defends Interrogation*, N.Y. Times, Apr. 19, 2009; R. Jeffrey Smith, *Justice Dept. Memos' Careful Legalese Obscured Harsh Reality*, Apr. 19, 2009; Editorial, *The Torturers' Manifesto*, N.Y. Times, Apr. 18, 2009; John Hendren, *Ex-CIA Official: 'This Was Torture'*, ABC News, Apr. 18, 2009; Greg Miller, *Did Waterboarding Work?*, Chicago Tribune, Apr. 18, 2009; Dana Priest, *White House Releases Torture Memos, Won't Pursue Prosecutions*, Wash. Post, Apr. 17, 2009; Editorial, *Dealing With a Disgrace*, Wash. Post, Apr. 17, 2009; Editorial, *Close the Torture Loophole*, L.A. Times, Apr. 17, 2009; Mark Mazzetti, *C.I.A. Memos Could Bring More Disclosures*, N.Y. Times, Apr. 17, 2009; Greg Miller and Josh Meyer, *Memos Reveal Harsh CIA Interrogation Methods*, L.A. Times, Apr. 17, 2009; Matt Apuzzo, *Memos Describe CIA's Harsh Interrogation Program*, Assoc. Press, Apr. 17, 2009; Carrie Johnson and Julie Tate, *New Interrogation Details Emerge*, Wash. Post, Apr. 17, 2009; Justin Vogt, *Zubaydah's Sanity, Bybee's Clarity*, New Yorker, Apr. 17, 2009; Glenn Greenwald, *The Significance of Obama's Decision to Release the Torture Memos*, Salon.com, Apr. 17, 2009; Mark Mazzetti and Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. Times, Apr. 16, 2009; Ariane de Vogue, *DOJ Releases Controversial Torture Memos*, ABC News.com, Apr. 16, 2009; Michael Scherer, *Bush Approved Use of Insects*, Time.com, Apr. 16, 2009; Mark Mazzetti, *Obama Releases Interrogation Memos, Says CIA Operatives Won't Be Prosecuted*, N.Y. Times, Apr. 16, 2009; Terry Frieden, *More Delays in Release of 'Torture' Documents*, CNN.com, Apr. 2, 2009; Scott Shane, *Administration is Debating Release of Interrogation Memos*, N.Y. Times, Mar. 31, 2009; *New York Judge Orders Release of CIA 'Torture' Documents*,

FoxNews.com, Mar. 28, 2009; Scott Shane, *Documents Laid Out Interrogation Procedures*, N.Y. Times, July 25, 2008; Mark Mazzetti, '03 *U.S. Memo Approved Harsh Interrogations*, N.Y. Times, Apr. 2, 2008; Dan Eggen and Josh White, *Memo: Laws Didn't Apply to Interrogators*, Wash. Post, Apr. 2, 2008; Evan Perez, *U.S. 2003 Memo Allowed 'Enhanced' Interrogation*, Wall St. J., Apr. 2, 2008; Lara Jakes Jordan, *Pentagon Releases Memo on Harsh Tactics*, FoxNews.com, Apr. 1, 2008; *FBI Records: Detainees Allege Quran Abuse; ACLU Releases Hundreds of Documents Obtained in a Lawsuit*, CNN.com, May 26, 2005; *Harsh Tactics Were Allowed, General Told Jailers in Iraq*, N.Y. Times, Mar. 30, 2005; *U.S. Memo Shows Iraq Jail Methods*, BBC News, Mar. 30, 2005; Neil Lewis & Douglas Jehl, *Files Show New Abuse Cases in Afghan and Iraqi Prisons*, N.Y. Times, Feb. 18, 2005; Nat Hentoff, *What Did Rumsfeld Know? ACLU Releases Documents of U.S. Torture of Detainees by More than 'A Few Bad Apples'*, Village Voice, Dec. 28, 2004; Thomas Ricks, *Detainee Abuse by Marines is Detailed*, Wash. Post, Dec. 15, 2004; Paisley Dodds, *Unsealed Navy Documents Show More Prisoner Abuse*, Phila. Enquirer, Dec. 15, 2004; Richard A. Serrano, *Marines Burned, Shocked Prisoners, Documents Revealed*, Seattle Times, Dec. 15, 2004; *ACLU: Records Show Marines Tortured Iraqi Prisoners*, CNN.com, Dec. 15, 2004.

In addition, the records that the ACLU seeks include records relating to the "rendition" of suspected terrorists from their place of capture outside of Afghanistan to detention at Bagram Air Base. Rendition is an issue that is independently the subject of extensive public and media attention. See, e.g., Ariel David, *Italian Court Deals Prosecution a Blow in CIA Rendition Case*, San Jose Mercury News, Mar. 12, 2009; Julie Sell, *U.N. Report Says U.S. Led 'Black Site' Renditions in War on Terrorism*, Miami Herald, Mar. 11, 2009; Kevin Sullivan, *Former Guantanamo Prisoner Alleges Torture*, Wash. Post, Mar. 8, 2009; Paisley Dodds, *British Official Acknowledges Rendition Role*, Chicago Tribune, Feb. 27, 2009; Desmond Butler, *Alleged CIA Torture Victim Speaks Out*, FoxNews.com, Nov. 29, 2006; Jane Mayer, *The CIA's Travel Agent*, The New Yorker, Oct. 30, 2006; Jerry Markon, *Lawsuit Against CIA is Dismissed; Mistaken Identity Led to Detention*, Wash. Post, May 19, 2006; Scott Shane, *German Sues Over Abduction Said to Be at Hands of CIA*, N.Y. Times, Dec. 6, 2005; *German Claims Torture in Suing CIA's Ex-Director*, USA Today, Dec. 6, 2005; *Lawsuit Claims CIA Kidnapped, Tortured German Man*, CNN.com, Dec. 6, 2005; Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake; German Citizen Released After Months in 'Rendition'*, Wash. Post, Dec. 4, 2005; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, Wash. Post, Nov. 2, 2005; Scott Shane, *The Costs of Outsourcing Interrogation: A Canadian Muslim's Long Ordeal in Syria*, N.Y. Times, May 29, 2005;

Michael Hirsh, Mark Hosenball and John Barry, *Aboard Air CIA*, Newsweek, Feb. 28, 2005; Jane Mayer, *Outsourcing Torture*, The New Yorker, Feb. 14, 2005; DeNeen L. Brown and Dana Priest, *Deported Terror Suspect Details Torture in Syria; Canadian's Case Called "Typical" of CIA*, Wash. Post, Nov. 5, 2003.

### III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 22 C.F.R. § 171.17(a); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

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As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will significantly contribute to public understanding of the operations and activities of the Departments of Defense, Justice, State, and the Central Intelligence Agency with regard to the detention and treatment of prisoners at Bagram. *See* 22 C.F.R. § 171.17(a)(1)(ii); 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2)(ii). Moreover, disclosure is not in the ACLU's commercial interest. Any information disclosed by the ACLU as a result of this Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act").

We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii); 28 C.F.R. § 16.11(d). Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to "representatives of the news media").

The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); see also *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); cf. *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.” See *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of FOIA); see *supra*, section II.<sup>4</sup>

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\* \* \*

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. See 5 U.S.C. § 552(a)(6)(E)(ii)(I); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

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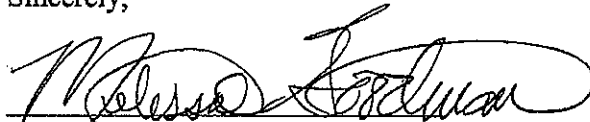
<sup>4</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request submitted that month regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Melissa Goodman, Staff Attorney, National Security Project  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,

A handwritten signature in cursive script, appearing to read "Melissa Goodman", written over a horizontal line.

Melissa Goodman  
American Civil Liberties Union Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
Tel: (212) 549-2622

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# Exhibit B





**DEPARTMENT OF DEFENSE  
OFFICE OF FREEDOM OF INFORMATION  
1155 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1155**

**28 JUL 2009**

Ref: 09-F-0890

Ms. Melissa Goodman  
American Civil Liberties Union Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004

Dear Ms. Goodman:

This is a partial response to your Freedom of Information Act (FOIA) request dated April 23, 2009. Your request seeks records "pertaining to the detention and treatment of prisoners held at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan ("Bagram"), including records concerning the process afforded these prisoners to challenge their detention and designation as 'enemy combatants.'"

Upon review of your request, it was determined that a report, or list, containing the names, citizenship, capture date, days detained, capture location and circumstances of capture would be responsive to items 1-5 of your request. The National Detainee Reporting Center (NDRC) provided a 12-page classified report, current as of June 22, 2009, containing these elements of information. Mr. Steve Dalbey, an Initial Denial Authority for the Office of the Deputy Assistant Secretary of Defense for Detainee Policy, has determined that this report is exempt from release pursuant to 5 U.S.C. § 552(b)(1), which pertains to information that is properly classified in the interest of national security pursuant to Executive Order 12958, as amended, section 1.4 (a) which pertains to military plans, weapons, or operations, and (c) which pertains to intelligence activities, and intelligence sources or methods; 5 U.S.C. § 552(b)(6) which pertains to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of individuals; and 5 U.S.C. § 552(b)(7)(c) which pertains to records or information compiled for law enforcement proceedings that could reasonably be expected to constitute an unwarranted invasion of privacy.

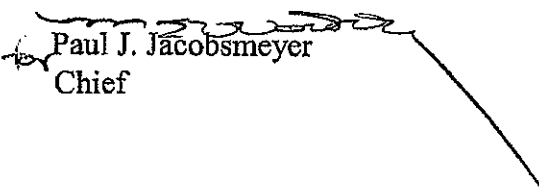
Please note that we are still processing your request as your 2 free hours of search have not yet been exhausted. In addition, we have requested that the U.S. Central Command provide this Office with an estimate of the time and fees required to fully comply with the remaining items of your request. We will contact you when we receive that estimate.

If you are not satisfied with this action, you may appeal to the appellate authority, the Director of Administration and Management, Office of the Secretary of Defense, by writing directly to the Defense Freedom of Information Policy Office, Attn: Mr. James

Hogan, 1155 Defense Pentagon, Washington, DC 20301-1155. Your appeal should be postmarked within 60 calendar days of the date of this letter, should cite to case number 09-F-0890, and should be clearly marked "Freedom of Information Act Appeal."

Although you have the right to file an administrative appeal at this time, I suggest that you wait until the processing of this request has been completed

Sincerely,

  
Paul J. Jacobsmeyer  
Chief

# Exhibit C



June 12, 2009

Mr. James Hogan  
 Defense Freedom of Information Policy Office  
 1155 Defenses Pentagon  
 Washington, D.C. 20301-1155

**Re: FOIA Appeal, Request #09-F-0890**

Dear Mr. Hogan,

Requesters American Civil Liberties Union and American Civil Liberties Foundation (collectively, "ACLU") write to appeal the Office of Freedom of Information's determination to deny the ACLU's request for expedited processing of FOIA Request #09-F-0890 ("Request") and to deny the ACLU's request for a fee limitation based on its status as a representative of the news media. The Request seeks records pertaining to the detention and treatment of prisoners at the Bagram Theater Internment Facility. *See* Exh. A (FOIA Request dated April 23, 2009). Chief Will Kammer's letter denying the ACLU's expedited processing and the fee limitation requests is dated May 6, 2009. *See* Exh. B (Mr. Kammer's Letter dated May 6, 2009).<sup>1</sup>

**News Media Requester Status**

A waiver of search and review fees is warranted here because the ACLU is a "representative of the news media" and the records requested are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. § 286.28(e)(7). *See* Exh. A at 7-8, 16-17. Notably, other federal agencies have determined that the ACLU is a representative of the news media with respect to other FOIA requests. *See* Exh. C (March 2009 determination by the State Department that the ACLU is a "representative

<sup>1</sup> The ACLU's separate request for a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 32 C.F.R. § 286.28(d) (its request for a "public interest" fee waiver) has not yet been decided. On June 1, 2009 the ACLU submitted a letter to Mr. Kammer that explained the ACLU's desire to have the "public interest" fee waiver determination to be made on the basis of all of the records it has requested, not only a two-hour search, and that indicated the ACLU's willingness to pay fees subject to its right to appeal or contest in court any Defense Department determination to charge fees. Accordingly, the ACLU appeals only the expedited processing and news media representative fee limitation determinations here.

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of the news media”); Exh. D (December 2008 determination by the Department of Justice that the ACLU is a “representative of the news media”); Exh. E (May 2005 determination by the Department of Commerce that ACLU is a “representative of the news media”).

Mr. Kammer concluded that the ACLU did not qualify as a “representative of the news media” because it does not “publish[ ] or disseminat[e] information as its primary activity.” Exh. B at 1. Mr. Kammer based this conclusion on one sentence from the ACLU website about how the ACLU engages in litigation and lobbying activities, in addition to its substantial publishing, public education, and information dissemination activities. *Id.* First, Mr. Kammer confuses the “primarily engaged in disseminating information” expedited processing standard with the “representative of the news media” fee waiver standard. The D.C. Circuit has ruled that any “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience” qualifies as a “representative of the news media” under FOIA’s fee waiver provisions. *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). As discussed further below, the ACLU plainly meets this standard.

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

Second, that the ACLU is engaged in litigation and lobbying activities *as well as* significant publication and dissemination of news, information, and editorial content does not disqualify it as a “representative of the news media.” Although organizations that qualify as news media requesters *also* qualify as organizations that are primarily engaged in disseminating information for the purposes of expedited processing, *see, e.g., ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004), no court has ever held that an organization that otherwise engages in the kinds of publishing, editorial, and public education activities that make it a “representative of the news media” must also show that this is the organization’s *sole or even primary activity*. Rather, the organization must simply be actively engaged in “gather[ing] information of potential interest to a segment of the public, us[ing] its editorial skills to turn the raw materials into a distinct work, and distribut[ing] that work to an audience.” *Nat’l Sec. Archive*, 880 F.2d at 1387; *id.* at 1386 (finding National Security Archive a news media representative even though it engaged in many other activities that did not “establish an entitlement to preferred status”); *see also Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 12 (D.D.C. 2003) (“the key” is not “the organization’s description” but rather “whether its activities qualify as those of a representative of the news media”) (internal citations omitted). In short, there is no requirement that a particular percentage of an organization’s efforts be dedicated to publishing and information dissemination or that it be the organization’s *only* activity.

Indeed many of the organizations that courts have found to be “representatives of the news media” – and whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s – engage in a wide variety of litigation and congressional advocacy. For example, the D.C. courts have found that the Electronic Privacy Information Center (“EPIC”) is a “representative of the news media” for the purposes of FOIA even though it engages in litigation and lobbying activities beyond its more traditional dissemination of information/public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5. EPIC, like the ACLU, is an advocacy organization that employs multiple strategies, including litigation, public education, and legislative and political advocacy to accomplish its policy goals. *See EPIC Annual Report 2007-2008*, 2008 Elec. Privacy Info. Ctr. at 1, available at [http://epic.org/epic/annual\\_reports/2007.pdf](http://epic.org/epic/annual_reports/2007.pdf) (describing itself as a public interest research center that engages in activities such as “policy research, public education, conferences, litigation, publications, and advocacy”). EPIC, like the ACLU, frequently serves as counsel and writes amicus briefs in federal litigation. *Id.* at 13-15. EPIC, like the ACLU, devotes substantial resources to advocating before Congress and the executive branch. *Id.* at 9-11, 16-18. In 2006 and 2007, EPIC’s staff testified or submitted comments to Congress on at least seven occasions and filed comments with federal agencies on at least 11 occasions. *Id.* Similarly, the D.C. Circuit has found that the National Security Archive is a “representative of the news media” for the purposes of FOIA even though it engages in litigation and lobbying activities beyond its more traditional dissemination of information/public education activities. *See Nat’l Security Archive*, 880 F.2d at 1387; *see also Judicial Watch, Inc. v. Dep’t of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” is a news media requester); *see also Cf. Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference to be primarily engaged in disseminating information even though it engages in substantial amounts of legislative advocacy beyond its publication and public education functions).

In any event, even if the ACLU were required to show that publishing and disseminating information was a primary activity, the ACLU meets that standard and, thus, Mr. Kammer’s determination to the contrary was incorrect. As discussed more fully below, obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and the public (in both its raw and analyzed form) is a critical and substantial component of the ACLU’s work and one of its primary activities.

Although the ACLU is perhaps most well-known for its litigation activities, it is far more than a large public interest law firm. The ACLU's principal mission is not to litigate important civil rights and civil liberties cases, but to preserve and defend the guarantees of the Bill of Rights and civil rights laws, using litigation as one just one of many major tactics. Every aspect of the ACLU's work in furtherance of this mission – including litigation – can fairly be described as information dissemination. Indeed, public education and dissemination of information is a key component of the ACLU's litigation efforts themselves; litigation is a highly effective vehicle for educating the press and public about a particular civil liberties problem. Most ACLU cases have dedicated webpages in which the ACLU publishes and disseminates information about the case itself (i.e. case developments, analyses of case developments, a comprehensive archive of court filings, judicial opinions), which, even standing alone, is a significant endeavor to publish and disseminate news. However, case webpages do not just disseminate information about case developments; these webpages also have educational material about the particular civil liberties issue or problem, recent news about the particular issue, analyses of congressional or executive branch action on the particular issue, government documents obtained through FOIA about the particular issue, and more in-depth analytic and educational multi-media features on the issue. For example, the ACLU's website about its national security letter ("NSL") cases, [www.aclu.org/nsl](http://www.aclu.org/nsl), includes, among other things, an explanation of what NSLs are; information about and document repositories for the ACLU's NSL cases, links to documents obtained through FOIA about various agencies' use of NSLs; NSL news in the courts, Congress, and executive agencies; links to original blog posts commenting on and analyzing NSL-related news; educational web features about the NSL gag power; public education reports about NSLs and the Patriot Act; news about and analysis of the Department of Justice Inspector General's reviews of the FBI's use of NSLs; the ACLU's policy analysis and recommendations for reform of the NSL power; charts with analyzed data about the government's use of NSL; myths and facts documents; and links to information and analysis of related issues.<sup>2</sup>

The ACLU regularly publishes a newsletter at least twice a year that reports on and analyzes civil liberties-related current events. The newsletter is widely disseminated to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is

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<sup>2</sup> For a sampling of other similar case pages with case information, reporting of news on the issue, blogs, and original analytic and educational content see: <http://www.aclu.org/lgbt/relationships/californiamarriage.html> (same-sex marriage case page); <http://www.aclu.org/safefree/rendition/index.html> (extraordinary rendition case page); <http://www.aclu.org/immigrants/detention/hutto.html> (immigration detention conditions case page).

distributed to subscribers (both ACLU members and non-members) by e-mail. The electronic newsletter is widely disseminated to approximately 300,000 people. Both of these newsletters often include descriptions and analysis of information obtained from the government through FOIA, as well as information about cases, government policies, pending legislation, abuses of constitutional rights, and polling data. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 13-14 (finding EPIC a representative of the news media under DoD regulations because it published a “bi-weekly electronic newsletter that is distributed to over 15,000 readers” about “court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements”); *Ctr. for Pub. Integrity v. Dep’t of Health & Human Serv.s*, 2007 WL 2248071 \*5 (D.D.C. Aug. 3, 2007) (finding CPI a news media requester because its journalist members “write and post an online newsletter” and post information obtained through FOIA in that newsletter); 32 C.F.R. § 286.28(e)(7)(i) (“The term “representative of the news media” refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. . . . [including] publishers of periodicals . . .”).

The ACLU regularly publishes reports about government activity and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA. This material is broadly circulated to the public and widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. *See Elec. Privacy Infor. Ctr.*, 241 F. Supp. 2d at 11 (finding EPIC a news media requester because it “researches issues on privacy and civil liberties, reports on this information, analyzes relevant data, evaluates the newsworthiness of material and puts the facts and issues into context, publishing and distributing this “news” through the sale of its books to the public.”); *see also Nat’l Sec. Archive*, 880 F.2d at 1386 (finding National Security Archive a news media requester because it intended to publish “document sets” on “topic[s] of current interest”).<sup>3</sup> Since 2007 alone, ACLU national projects have published over 25 reports in which they have gathered information and “use[d] [their] editorial skills to turn the raw materials into a distinct work, and distribute[d] that work to an audience.” *Id.* at 1387.<sup>4</sup> Many ACLU reports include description and

<sup>3</sup> In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

<sup>4</sup> *See, e.g., Mental Illness and the Death Penalty* (May 2009), available at [http://www.aclu.org/pdfs/capital/mental\\_illness\\_may2009.pdf](http://www.aclu.org/pdfs/capital/mental_illness_may2009.pdf);



analysis of government documents obtained through FOIA. See, e.g.,

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*Human Rights Begin at Home* (April 2009), available at [http://www.udhr60.org/human\\_rights\\_full.pdf](http://www.udhr60.org/human_rights_full.pdf); *Reclaiming Patriotism*, (March 2009), available at [http://www.aclu.org/pdfs/safefree/patriot\\_report\\_20090310.pdf](http://www.aclu.org/pdfs/safefree/patriot_report_20090310.pdf); *Missing the Mark: Alternative Schools in the State of Mississippi* (Feb. 2009), available at [http://www.aclu.org/pdfs/racialjustice/missingthemark\\_report.pdf](http://www.aclu.org/pdfs/racialjustice/missingthemark_report.pdf); *A Looming Crisis* (Dec. 2008), available at [http://www.aclum.org/lockingupkids/pdf/looming\\_crisis\\_web.pdf](http://www.aclum.org/lockingupkids/pdf/looming_crisis_web.pdf); *De Facto Disenfranchisement* (Oct. 2008), available at [http://www.aclu.org/pdfs/racialjustice/defactodisenfranchisement\\_report.pdf](http://www.aclu.org/pdfs/racialjustice/defactodisenfranchisement_report.pdf); *A Violent Education: Corporal Punishment of Children in US Public Schools* (Aug. 2008), available at [http://www.aclu.org/pdfs/humanrights/aviolenteducation\\_report.pdf](http://www.aclu.org/pdfs/humanrights/aviolenteducation_report.pdf); *Fusion Center Update* (July 2008), available at [http://www.aclu.org/pdfs/privacy/fusion\\_update\\_20080729.pdf](http://www.aclu.org/pdfs/privacy/fusion_update_20080729.pdf); *Enacting a Reasonable Federal Shield Law* (July 2008), available at [http://www.aclu.org/images/asset\\_upload\\_file113\\_35870.pdf](http://www.aclu.org/images/asset_upload_file113_35870.pdf); *Locking Up Our Children* (May 2008), available at [http://www.aclu.org/pdfs/racialjustice/locking\\_up\\_our\\_children\\_web\\_ma.pdf](http://www.aclu.org/pdfs/racialjustice/locking_up_our_children_web_ma.pdf); *Pandemic Preparedness: The Need for a Public Health—Not a Law Enforcement / National Security—Approach* (Jan. 2008), available at [http://www.aclu.org/images/asset\\_upload\\_file399\\_33642.pdf](http://www.aclu.org/images/asset_upload_file399_33642.pdf); *Race & Ethnicity in America: Turning a Blind Eye to Injustice* (Dec. 2007), available at [http://www.aclu.org/pdfs/humanrights/cerd\\_full\\_report.pdf](http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf); *What's Wrong With Fusion Centers?* (Dec. 2007), available at [http://www.aclu.org/pdfs/privacy/fusioncenter\\_20071212.pdf](http://www.aclu.org/pdfs/privacy/fusioncenter_20071212.pdf); *The Excluded: Ideological Exclusion and the War on Ideas* (Oct. 2007), available at [http://www.aclu.org/pdfs/safefree/the\\_excluded\\_report.pdf](http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf); *Reclaiming Our Rights: Declaration of First Amendment Rights and Grievances* (Sept. 2007), available at [http://www.aclu.org/images/asset\\_upload\\_file955\\_36822.pdf](http://www.aclu.org/images/asset_upload_file955_36822.pdf); *Even Bigger, Even Weaker: The Emerging Surveillance Society: Where Are We Now?* (Sept. 2007), available at [http://www.aclu.org/pdfs/privacy/bigger\\_weaker.pdf](http://www.aclu.org/pdfs/privacy/bigger_weaker.pdf); *Working in the Shadows: Ending Employment Discrimination for LGBT Americans* (Sept. 2007), available at [http://www.aclu.org/pdfs/lgbt/enda\\_20070917.pdf](http://www.aclu.org/pdfs/lgbt/enda_20070917.pdf); *Broken Promises: Two Years After Katrina* (Aug. 2007), available at [http://www.aclu.org/pdfs/prison/brokenpromises\\_20070820.pdf](http://www.aclu.org/pdfs/prison/brokenpromises_20070820.pdf); *The Persistent Problem of Racial Disparities in the Federal Death Penalty* (June 2007), available at [http://www.aclu.org/pdfs/capital/racial\\_disparities\\_federal\\_deathpen.pdf](http://www.aclu.org/pdfs/capital/racial_disparities_federal_deathpen.pdf); *Conditions of Confinement in Immigration Detention Facilities* (June 2007), available at [http://www.aclu.org/pdfs/prison/unsr\\_briefing\\_materials.pdf](http://www.aclu.org/pdfs/prison/unsr_briefing_materials.pdf); *History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement* (May 2007), available at [http://www.aclu.org/images/asset\\_upload\\_file893\\_29902.pdf](http://www.aclu.org/images/asset_upload_file893_29902.pdf); *Disavowed: The Government's Unchecked Retaliation Against National Security Whistleblowers* (May 2007), available at [http://www.aclu.org/pdfs/safefree/disavowed\\_report.pdf](http://www.aclu.org/pdfs/safefree/disavowed_report.pdf); *A Blueprint for Meeting the Needs of Girls in TYC Custody* (May 2007), available at [http://www.aclu.org/images/asset\\_upload\\_file373\\_29875.pdf](http://www.aclu.org/images/asset_upload_file373_29875.pdf); *Religious Refusals and Reproductive Rights: Accessing Birth Control at the Pharmacy* (Apr. 2007), available at [http://www.aclu.org/images/asset\\_upload\\_file576\\_29402.pdf](http://www.aclu.org/images/asset_upload_file576_29402.pdf); *Criminalizing the Classroom* (March 2007), available at [http://www.nyclu.org/files/criminalizing\\_the\\_classroom\\_report.pdf](http://www.nyclu.org/files/criminalizing_the_classroom_report.pdf); *Publish and Perish: The Need for a Federal Reporters' Shield Law* (Mar. 2007), available at [http://www.aclu.org/pdfs/freespeech/publishperish\\_20070314.pdf](http://www.aclu.org/pdfs/freespeech/publishperish_20070314.pdf); *No Real Threat: The Pentagon's Secret Database on Peaceful Protest* (Jan. 2007), available at [http://www.aclu.org/pdfs/safefree/spyfiles\\_norealthreat\\_20070117.pdf](http://www.aclu.org/pdfs/safefree/spyfiles_norealthreat_20070117.pdf).

*Reclaiming Patriotism*, (Mar. 2009), available at [http://www.aclu.org/pdfs/safefree/patriot\\_report\\_20090310.pdf](http://www.aclu.org/pdfs/safefree/patriot_report_20090310.pdf); *The Excluded: Ideological Exclusion and the War on Ideas* (Oct. 2007), available at [http://www.aclu.org/pdfs/safefree/the\\_excluded\\_report.pdf](http://www.aclu.org/pdfs/safefree/the_excluded_report.pdf); *History Repeated: The Dangers of Domestic Spying by Federal Law Enforcement* (May 2007), available at [http://www.aclu.org/images/asset\\_upload\\_file893\\_29902.pdf](http://www.aclu.org/images/asset_upload_file893_29902.pdf); *No Real Threat: The Pentagon's Secret Database on Peaceful Protest* (Jan. 2007), available at [http://www.aclu.org/pdfs/safefree/spyfiles\\_norealthreat\\_20070117.pdf](http://www.aclu.org/pdfs/safefree/spyfiles_norealthreat_20070117.pdf); *Unpatriotic Acts: The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You* (July 2003), available at [http://www.aclu.org/FilesPDFs/spies\\_report.pdf](http://www.aclu.org/FilesPDFs/spies_report.pdf).

The ACLU also regularly publishes books, "know your rights" publications, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties. Some of the more recent books published by the ACLU include: Lenora M. Lapidus, Emily J. Martin & Namita Luthra, *The Rights of Women: The Authoritative ACLU Guide to Women's Rights* (NYU Press, April 1, 2009); Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007) (a book based on documents obtained through FOIA).<sup>5</sup> Some of the more recent "know your rights" publications include: *Know Your Housing Rights: For Survivors of Domestic Violence* (Feb. 2008), available at <http://www.aclu.org/womensrights/violence/33978pub20080206.html>; *Know Your Rights! - Students Wallet Card* (June 2007), available at <http://www.aclu.org/lgbt/youth/30427pub20070615.html>. Some of the more recent ACLU fact sheets include: *The Truth About Torture* (Apr. 2009), available at [http://www.aclu.org/images/torture/asset\\_upload\\_file501\\_33165.pdf](http://www.aclu.org/images/torture/asset_upload_file501_33165.pdf); *Guantánamo Fact Sheet* (Nov. 2008), available at [http://www.aclu.org/pdfs/safefree/closegitmo/gitmo\\_factsheet.pdf](http://www.aclu.org/pdfs/safefree/closegitmo/gitmo_factsheet.pdf); *Torture & Secrecy* (Dec. 2008), available at [http://www.aclu.org/images/torture/asset\\_upload\\_file585\\_38059.pdf](http://www.aclu.org/images/torture/asset_upload_file585_38059.pdf); *America's Surveillance Society* (Nov. 2009), available at [http://www.aclu.org/images/asset\\_upload\\_file381\\_37802.pdf](http://www.aclu.org/images/asset_upload_file381_37802.pdf).<sup>6</sup> These

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<sup>5</sup> A search of Amazon.com conducted on June 5, 2009 produced over 60 books published by the ACLU.

<sup>6</sup> For many more ACLU fact sheets on various civil liberties topics see: [http://www.aclu.org/safefree/relatedinformation\\_fact\\_sheets.html](http://www.aclu.org/safefree/relatedinformation_fact_sheets.html), [http://www.aclu.org/lgbt/relatedinformation\\_fact\\_sheets.html](http://www.aclu.org/lgbt/relatedinformation_fact_sheets.html), [http://www.aclu.org/privacy/relatedinformation\\_fact\\_sheets.html](http://www.aclu.org/privacy/relatedinformation_fact_sheets.html), [http://www.aclu.org/womensrights/relatedinformation\\_fact\\_sheets.html](http://www.aclu.org/womensrights/relatedinformation_fact_sheets.html).

materials are specifically designed to be educational and widely disseminated to the public. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding EPIC to be a news media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties); *Nat'l Sec. Archive*, 880 F.2d at 1386 (finding National Security Archive a news media requester where it had previously published only one book); *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding Leadership Conference on Civil Rights to be "primarily engaged in the dissemination of information" because it "disseminate[d] information regarding civil rights and voting rights to educate the public, promote effective civil rights laws, and ensure their enforcement by the Department of Justice.").

The ACLU operates a widely-read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. *See* <http://blog.aclu.org/>. The ACLU also creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. *See* <http://www.aclu.org/multimedia/index.html>.

The ACLU also publishes, analyzes, and disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU's website also serves as a clearinghouse for news about ACLU cases, as well as analysis about case developments. *See, e.g., Judicial Watch, Inc. v. Dep't of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch a news media requester because it disseminated information to the press and public through its website).

The ACLU website specifically includes features on information obtained through the FOIA, including: [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia); <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; [www.aclu.org/patriotfoia](http://www.aclu.org/patriotfoia); [www.aclu.org/spyfiles](http://www.aclu.org/spyfiles); <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>; [www.aclu.org/exclusion](http://www.aclu.org/exclusion). For example, the ACLU's "Torture FOIA" webpage, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia), contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents,

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[http://www.aclu.org/reproductiverights/relatedinformation\\_fact\\_sheets.html](http://www.aclu.org/reproductiverights/relatedinformation_fact_sheets.html), and [http://www.aclu.org/intlhumanrights/relatedinformation\\_fact\\_sheets.html](http://www.aclu.org/intlhumanrights/relatedinformation_fact_sheets.html).

an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. Similarly, the ACLU's webpage about the Office of Legal Counsel ("OLC") torture memos it obtained through FOIA, [http://www.aclu.org/safefree/general/olc\\_memos.html](http://www.aclu.org/safefree/general/olc_memos.html), contains commentary and analysis of the memos, an original comprehensive chart about OLC memos (see below); links to web features created by ProPublica, an independent, non-profit investigative journalism organization based on information gathering, research, and analysis conducted by the ACLU; and ACLU videos created about the memos. See *Nat'l Security Archive*, 880 F.2d at 1386 (finding National Security Archive a news media requester because it intended to public "document sets" whereby Archive staff would "cull those of particular interest . . . supplement the chosen documents with detailed cross-referenced indices, other finding aids, and a sophisticated retrieval system in order to make it more accessible to potential users") (internal citations omitted); *Judicial Watch, Inc. v. Dep't of Justice*, 133 F. Supp. 2d at 53-54 (finding Judicial Watch a news media requester because it posted documents obtained through FOIA on its website).

The ACLU has also published a number of charts that collect, summarize, and analyze information it has obtained through FOIA. For example, through compilation and analysis of information gathered from various sources – including information obtained from the government through FOIA – the ACLU has created an original chart that provides the public and news media with a comprehensive index of Bush-Era Office of Legal Counsel memos relating to interrogation, detention, rendition and surveillance which describes what is publicly known about the memos and their conclusions, who authored them and for whom, and whether the memos remain secret or have been released to the public in whole or in part. The chart is available at [http://www.aclu.org/safefree/general/olcmemos\\_chart.pdf](http://www.aclu.org/safefree/general/olcmemos_chart.pdf). Similarly, the ACLU produced a chart of original statistics about the Defense Department's use of NSLs based on its own analysis of records obtained through FOIA. That chart is available at [http://www.aclu.org/safefree/nationalsecurityletters/released/nsl\\_stats.pdf](http://www.aclu.org/safefree/nationalsecurityletters/released/nsl_stats.pdf). See *Nat'l Sec. Archive*, 880 F.2d at 1387 (explaining that National Security Archive was a news media requester because it obtained "documents for its own purpose, which is to assemble them, along with documents from other sources, into an encyclopedic work that it will then offer to the public"); *id.* (explaining that National Security Archive was a news media requester because it "gather[ed] information from a variety of sources; exercise[d] a significant degree of editorial discretion in deciding

what documents to use and how to organize them; devise[d] indices and finding aids; and distribute[d] the resulting work to the public.”).

The ACLU has also produced an in-depth television series on civil liberties called “The Freedom Files.” See <http://aclu.tv/>. The Freedom Files is a series of half-hour documentaries that feature true stories about real people to highlight vital civil liberties issues, and include commentary and analysis from experts on particular civil liberties problems; some also include explanation and analysis of information the ACLU has obtained through FOIA. See <http://aclu.tv/episodes>. In addition to distribution through the ACLU’s website, The Freedom Files series aired on Court TV, Link TV, and PBS stations nationwide. With each episode, the ACLU distributed issue fact sheets, reports, and FAQs. See <http://aclu.tv/educate>. Season two of The Freedom Files came with a Teacher’s Guide as well. See <http://aclu.tv/teachersguide>.

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

In sum, the ACLU actively gathers news and information, analyzes it, creates distinct works, publishes that information, and disseminates it widely to the public. The ACLU plainly qualifies as a “representative of the news media” for FOIA fee waiver purposes. As Senator Leahy said during debate about FOIA’s fee waiver provisions: “It is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected . . . . In fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a ‘representative of the news media.’” 132 Cong. Rec. S14292 (daily ed. Sept. 30, 1986).<sup>7</sup>

### **Expedited Processing**

Expedited processing is warranted where the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged federal government activity. See 5 U.S.C. 552(a)(6)(E)(v); 32 C.F.R. § 286.4(d)(3)(ii). It is noteworthy that both the Department of Justice and the Department of State have granted the ACLU’s request for expedited processing for a FOIA request *identical* to this one. See Exh. F (May 2009 determination by Department of Justice that ACLU entitled to expedited processing of request identical to this Request); Exh. G (May 2009 determination by Department of State that ACLU entitled to expedited processing of request identical to this Request). The Department of Defense is the only agency that has denied expedited processing of this Request.

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<sup>7</sup> The ACLU plans to analyze, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the Requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost

For the reasons set out in the original Request, expedited processing is warranted here. *See* Exh. A at 6-16. Mr. Kammer, however, denied expedited processing on two grounds. First, he concluded that the ACLU was not primarily engaged in disseminating information because it not only disseminates information to the public but also engages in litigation and lobbying activities. Exh. B at 1. Second, Mr. Kammer concluded that the requested records were not “urgently needed” because “the information [would not] lose its value if not processed on an expedited basis,” and because the “broad and sustained media coverage” about Bagram, U.S. detention policy, and the treatment of detainees in U.S. custody abroad “belie[d the ACLU’s] contention that the request information relates to a breaking news story.” Exh. B at 3. Notwithstanding Mr. Kammer’s determination, the Request clearly meets statutory and regulatory requirements for expedited processing.

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#### The ACLU is Primarily Engaged in the Dissemination of Information

The ACLU is primarily engaged in the dissemination of information. *See* Exh. A at 7-8. As discussed above, obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and the public (in both its raw and analyzed form) is a critical and substantial component of the ACLU’s work and one of its primary activities. *See supra* at 3-10.

Courts have found organizations with missions similar to the ACLU and which engage in information dissemination activities similar to the ACLU to be “primarily engaged in disseminating information.” *See, e.g., Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding Leadership Conference – whose mission is “to serve as the site of record for relevant and up-to-the minute civil rights news and information” and to “disseminate[ ] information regarding civil rights and voting rights to educate the public [and] promote effective civil rights laws . . .” to be “primarily engaged in the dissemination of information”); *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information” (internal citation omitted)). These organizations have been found to be “primarily engaged in disseminating information” even though they engage in litigation and lobbying activities *in addition* to their publication and information dissemination activities. *See supra* at 2-3. Dissemination of information need not be the organization’s *sole* activity. *See id.* Mr. Kammer’s determination to the contrary was incorrect. Exh. B at 1.

Notably, other agencies routinely grant the ACLU's requests for expedited processing of FOIA requests, therefore recognizing the ACLU is primarily engaged in disseminating information. *See* Exh. F & G; Exh. H (December 2008 determination by Department of Justice that ACLU entitled to expedited processing); Exh. I (October 2008 determination by the National Security Agency that ACLU entitled to expedited processing); Exh. J (July 2006 determination by Department of the Army that ACLU entitled to expedited processing); Exh. K (March 2006 determination by the Defense Intelligence Agency that ACLU entitled to expedited processing); Exh. L (March 2006 determination by the Department of Justice Civil Division that ACLU entitled to expedited processing); Exh. M (January 2006 determination by the Department of Justice's Office of Information and Privacy that ACLU entitled to expedited processing).

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The Requested Records are Urgently Needed to Inform the Public  
About Federal Government Activity

There is an urgent need to inform the public about the detention and treatment of, as well as the status review process afforded, prisoners at Bagram. *See* Exh. A at 8-16. The records requested here are urgently needed to inform the national debate about U.S. policy with respect to the detention and treatment of suspected terrorists and individuals designated as enemy combatants. The Executive branch, Congress, and the public are already in the throes of resolving not only how to close Guantanamo and what to do with detainees held there, but what to do with suspected terrorists and combatants held at other off-shore detention facilities, and what to do with suspected terrorists and combatants captured in the future. It is vital that the debate about these serious and complex national questions be as informed as possible.

Information about the Bagram detention facility – which currently houses a large but unknown number of individuals captured not only in Afghanistan but from various places *outside* of Afghanistan – is a central to this debate. The most difficult detention policy questions (both what to do with people currently being detained and what to do with people captured in the future) cannot be resolved without an informed understanding of Bagram. *See* Exh. A at 8-10 (citing articles discussing the role of Bagram in the detainee policy debate); *id.* at 10 (citing editorials calling for policy change at Bagram); *see also* Tom Curry, *Bagram: Is it Obama's New Guantanamo?*, MSNBC.com, Jun. 3, 2009 (remarking that President Obama “didn’t mention Bagram at all” in his May 21st speech about detention policy but that human rights lawyers say “Bagram will play a critical role in shaping the Obama administration’s detainee policy”); *id.* (“Other legal experts said Obama’s decision to leave Bagram out of his May 21 speech won’t remove his need to confront the

legal problems posed by the site.”); *Special Report With Bret Baier: 'Special Report' Panel on Obama's Trip Overseas* (Fox News television broadcast June 8, 2009) (panelist on news program stating “[a]nd the hypocrisy is that detention without trial, even if you close Gitmo, is happening in Afghanistan at the Bagram Air Base”);<sup>8</sup> Jack Goldsmith, *The Detainee Shell Game*, Wash. Post, May 31, 2009; (op-ed noting that: “A little-noticed consequence of elevating standards at Guantanamo is that the government has sent very few terrorist suspects there in recent years. Instead, it holds more terrorists -- without charge or trial, without habeas rights, and with less public scrutiny -- at Bagram Air Base in Afghanistan.”); Richard A. Oppel, Jr., *U.S. Captain Hears Pleas for Afghan Detainee*, N.Y. Times, May 25, 2009 (“The Bagram prison – where about 600 people, mostly Afghans, are being held indefinitely and without charges – is a delicate issue for the Obama administration at a time when it is struggling to come up with a plan for detainees in the prison at Guantánamo Bay, Cuba, which it intends to close.”); Tim Reid, *Guantánamo is Not the Hell-Hole We Imagine*, Times of London, May 27, 2009 (“It is Bagram, not Guantánamo, that should trouble the world’s conscience.”); Editorial, *War and Justice*, Wash. Post, May 23, 2009 (discussing President Obama’s failure to address Bagram in his May 21<sup>st</sup> speech about detention policy and stating: “The United States is detaining foreign suspects in this Afghan prison without judicial oversight, and the administration has argued in court for the continuing right to do so....If it was wrong for the Bush administration to use Guantanamo Bay to evade judicial oversight in such cases, it can’t be right for the Obama administration to use Bagram to the same end.”); Eric Schmitt and Mark Mazzetti, *U.S. Relies More on Aid of Allies in Terror Cases*, N.Y. Times, May 23, 2009 (“How the United States is dealing with terrorism suspects beyond those already in the prison at Guantánamo Bay, Cuba, was a question Mr. Obama did not address in the speech he gave Thursday about his antiterrorism policies. . . . Some suspects are being imprisoned without charges at a United States air base in Afghanistan . . . .”); Daniel Hemel, *More Rights at Gitmo Than Bagram*, Letter to the Editor, Wall St. J., May 13, 2009; Joe Garofoli, *100 days: Half-Truths and Contradictions*, San Francisco Chron., Apr. 29, 2009 (“Bagram Airbase in Afghanistan holds more prisoners than Guantanamo and prisoners there have few rights.”).

However, there is currently a dearth of publicly-available information about Bagram. See Tim Reid, *Guantanamo is Not the Hell-Hole We Imagine*, Times of London, May 27, 2009 (“[T]he grossly underreported story is a US-run jail that Mr. Obama does not want the world to focus on - the makeshift prison on the US airbase at Bagram, Afghanistan. There, more than 600 prisoners, many held for years and all without charge and indefinitely, are packed into conditions far worse than

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<sup>8</sup> Transcript available at [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,525443,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,525443,00.html).



Guantánamo. They have virtually no access to lawyers. Journalists and human rights groups are barred.”); R. Jeffrey Smith, *Obama Follows Bush Policy on Detainee Access to Courts*, Wash. Post, Apr. 11, 2009 at A02 (“The government has not said publicly how many of the approximately 600 people detained there are non-Afghans”); Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. Times, Apr. 2, 2009 (“United States officials have never provided a full accounting of the prison population”); William Fisher, *U.S. Judge Gives Bagram Prisoners Right to Appeal*, Inter Press Service, Apr. 3, 2009 (“the U.S. has not released details of who is held [at Bagram]”); Tim Golden and Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. Times, Feb. 26, 2006 (“Bagram has operated in rigorous secrecy since it opened in 2002”); *see also* Exh. A at 3, 9-10. Without the release of basic information such as who is being detained at Bagram, for how long, where they were captured, and on what authority and basis they are being held, and without the release of information about the process that is afforded these prisoners to challenge their detention, the public debate about how to reform U.S. detention policy will be woefully uninformed.

The critical detention policy debate is happening *now* and it will reach its climax in the coming months. Mr. Kammer’s conclusion that the information requested here would not “lose its value if not processed on an expedited basis,” Exh. B at 3, entirely overlooks the importance of the requested records to illuminating an urgent public debate that is quickly coming to a head. By the time the Defense Department processes the 2,110 open requests in the queue before this Request, Exh. B at 4, it is highly likely that the executive branch (and Congress) will have already reached a policy resolution on these issues. *See Elec. Frontier Found. v. Office of Dir. of Nat’l Intelligence, et al.*, 542 F. Supp. 2d 1182, 1186 (N.D. Cal. 2008) (granting preliminary injunction for expedited processing of FOIA request where the requested information was “essential to inform the public debate over the possible FISA amendments [legislation]” and where “the requested information [would] be rendered useless in the effort to educate the American public about the issues pertinent to the legislation if such information is produced after Congress amends the law”); *Elec. Frontier Found. v. Office of the Dir. of Nat’l Intelligence*, 2007 WL 4208311, \*7 (finding “irreparable harm can exist in FOIA cases . . . because ongoing public and congressional debates about issues of vital national importance cannot be restarted or wound back” (internal quotation marks omitted)); *Gerstein v. CIA*, 2006 WL 3462658, \*7 (N.D. Cal. Nov. 29, 2006) (finding delaying response to a FOIA request in which national policy debate occurring would compromise a significant recognized interest “in enhancing public debate on potential legislative action”); *see also Payne Enterprises v. United States*, 837 F.2d 486, 495 (D.C. Cir. 1988) (“stale information is of little value”).

The executive branch is already in the midst of resolving these questions. On May 21st, President Obama gave an hour-long speech specifically about U.S. policy with respect to Guantanamo and detention policy more generally. *See, e.g.,* William Glaberson, *President's Detention Plan Tests American Legal Tradition*, N.Y. Times, May 23, 2009; Evan Perez, *Obama's Detention Plan Faces Scrutiny*, Wall St. J., May 22, 2009; Peter Finn, *Obama Endorses Indefinite Detention Without Trial for Some*, Wash. Post, May 22, 2009; *Washington News: Obama, Cheney Lay Out Views On Post-9/11 Policies*, U.S. News & World Report, May 22, 2009; Sheryl Gay Stolberg, *Obama Would Move Some Detainees to U.S.*, N.Y. Times, May 21, 2009; Peter Baker, *News Analysis: Obama Faces Pitfalls on Detainees*, May 21, 2009; Sheryl Gay Stolberg, *Obama Is Said to Consider Preventive Detention Plan*, N.Y. Times, May 20, 2009; *see also* Joseph Williams, *Obama Keeps Tribunals, Draws Ire*, Boston Globe, May 16, 2009; Amanda Ruggeri, *Obama Restarts Bush-Era Military Tribunals*, U.S. News & World Report, May 15, 2009. The executive branch task force reviewing detainee policy is expected to announce its findings and proposals in July. *See* Exh. A at 4, 9; *see also* Evan Perez, *Obama's Detention Plan Faces Scrutiny*, Wall St. J., May 22, 2009 (“A White House task force reviewing detention policy is set to make recommendations in late July.”). The question of what to do with prisoners at Bagram – again, both those who are already there and those who may be held there in the future – is a key piece of the debate. *See* Tom Curry, *Bagram: Is it Obama's New Guantanamo?*, MSNBC.com, June 3, 2009 (reporting human rights advocate's statement that “Bagram is certainly going to be the focus of concerns for the administration” and that “whatever recommendations [the detainee task force] makes are going to be driven by the present state of affairs at Bagram.

Courts have held that expedited processing is warranted where the requested records will inform an important national debate that is happening contemporaneously with the FOIA request. *See, e.g., ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 30 (finding expedited processing warranted where requested records would provide useful information for “ongoing national debate” about the Patriot Act); *Gerstein*, 2006 WL 3462658 at \*6 (finding expedited processing request must be granted where request concerned “matter of . . . current exigency to the American public” and concerned “subject of an ongoing national debate”); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (expedition of FOIA related to voting rights warranted where “importance of th[is] issue is paramount” and where “expedition of the[ ] documents could advance the current debate over the Voting Rights Act”); *see also Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 41 (granting preliminary injunction for expedited processing where “obtaining in a timely fashion information

[was] vital to the current and ongoing debate surrounding the legality of the Administration's warrantless surveillance program").

Debate on these issues is taking place in Congress as well, and is likely to intensify significantly after the release of the executive branch's proposal on detainee policy next month. President Obama has expressed his desire to work with Congress to craft new detention-related legislation. See, e.g., William Glaberson, *President's Detention Plan Tests American Legal Tradition*, N.Y. Times, May 22, 2009; William Glaberson, *Despite Plan, Guantánamo Trials Still Problematic*, N.Y. Times, May 18, 2009 ("senior administration officials said they planned to ask Congress for additional reforms of the military commission system"). Congressional hearings on detention policy have already been occurred. See *The Legal, Moral, and National Security Consequences of 'Prolonged Detention': Hearing Before the Subcomm. On the Constitution of the Comm. On the Judiciary*, 111th Cong. (June 9, 2009); see also Mark Murray, *Boehner: Obama 'Importing' Terrorists*, MSNBC.com, June 9, 2009 (reporting that Republicans in Congress were critical of the Obama administration's decision to bring Guantanamo detainee to U.S. for criminal trial in U.S. federal court); Indira A.R. Lakshmanan, *Democrats Aren't Yielding to Obama*, June 9, 2009; *Fate of Guantánamo Detainees Weighs Heavily on Spending Bills*, CQPolitics.com, June 4, 2009; Frank James, *Congress' Dems Still Irked By Obama On Gitmo, Tribunals*, NPR.org, June 3, 2009; David D. Kirkpatrick and David M. Herszenhorn, *Guantánamo Closing Hands Republicans a Wedge Issue*, N.Y. Times, May 23, 2009; Margaret Talev and David Lightman, *Guantánamo Closure is a Tough Sell for President*, Miami Herald, May 21, 2009; *GOP Attacks Obama Over Guantanamo Bay Plan*, United Press Int'l, May 17, 2009.

Courts have frequently held that expedited processing is warranted where the information requested would inform a debate occurring or imminently expected in Congress. See, e.g., *Elec. Frontier Found.*, 542 F. Supp. 2d at 1186 (granting preliminary injunction for expedited processing of FOIA request because "irreparable harm exists where Congress is considering legislation that would amend the [Foreign Intelligence Surveillance Act] and the records may engage the public to participate meaningfully in that debate"); *Elec. Frontier Found.*, 2007 WL 4208311 at \*7 (granting preliminary injunction for expedited processing of a FOIA request where information needed so that "plaintiff, Congress, and the public may participate in the debate over the pending legislation [to amend the Foreign Intelligence Surveillance Act] on an informed basis"); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding expedited processing warranted and urgency element satisfied where release of requested information could have "vital impact" on imminent legislative debate about amendment or reauthorization of parts of the Voting Rights Act); *ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 29

(finding expedited processing warranted where requested records concerned issue “of immediate public interest in view of the ongoing debate regarding the renewal and/or amendment of the Patriot Act” in Congress).

Ongoing court cases about the rights of Bagram detainees also continue to generate attention and have intensified public debate about U.S. detention policy. See MSNBC.com, June 3, 2009 (reporting that Judge “Bates’ ruling has fueled criticism of the Obama administration, in the United States and abroad” for its Bagram policies); Daphne Eviatar, *Judge Allows Government to Appeal (and Delay) Bagram Detainee Case*, Wash. Independent, June 3, 2009; Nedra Pickler, *Judge Holds Bagram Detainee Cases Pending Appeal*, Assoc. Press, June 2, 2009; Josh Gerstein, *W.H. Gets Breathing Room on Detainees*, Politico.com, June 1, 2009; Ruben Navarrette Jr., *Obama Cutting and Pasting Bush Policies*, San Francisco Chronicle, May 20, 2009 (criticizing Obama administration’s position in Bagram litigation). The debate about whether prisoners at Bagram should be entitled to file *habeas* petitions in U.S. courts has made it particularly urgent for the public to understand what kind of administrative process Bagram prisoners are given to challenge the basis for their detention, whether that process is meaningful, and whether it departs in any way from the process typically required by the Geneva Conventions and Army Regulation 190-8. See Exh. A at 8-12; see also Richard A. Oppel, Jr., *U.S. Captain Hears Pleas for Afghan Detainee*, N.Y. Times, May 25, 2009 (reporting on a Bagram detainee whom an Army Captain believes may be improperly detained as a case of mistaken identity and a *habeas* petition that will be filed on his behalf in U.S. courts); Spencer Ackerman, *McChrystal’s Full Letter to Levin on Detainees*, Wash. Independent, June 2, 2009.

Finally, the request also seeks records about the mistreatment of prisoners at Bagram, a matter of urgent public concern in its own right. Separate and apart from the looming national debate about whom the U.S. should be detaining around the world, on what basis, and with what process, the nation remains embroiled in a fundamental debate about the torture and mistreatment of detainees held in U.S. custody. More specifically, there is a vibrant public debate about whether those who authorized the torture of detainees held in U.S. custody should be investigated and prosecuted for alleged misconduct and how the nation can most accurately obtain a full accounting of detainee mistreatment since September 11. The release of the requested records will help inform this urgent and vital debate. See Exh. A at 12-16; see also Walter Pincus, *Army Report Shows How Rules That Don’t Work Are Ignored*, Wash. Post, June 9, 2009 (reporting on mistreatment of detainees at Bagram); Karen DeYoung and Ann Scott Tyson, *McChrystal to Face Questions on Plans for Afghanistan*, Wash. Post, June 2, 2009 (reporting on how members of

Congress probed McChrystal's knowledge of detainee abuse); Stan Grant, *Ex-Taliban Claims Abuse at Gitmo, Bagram*, CNN.com, May 24, 2009; Chris Good, *Obama's Evolving Opposition To A Truth Commission*, TheAtlantic.com, May 22, 2009; Alex Gibney, *Killing Wussification*, TheAtlantic.com, May 21, 2009 (discussing torture at Bagram); Liz Halloran, *Torture Debate Ties Washington In Partisan Knots*, NPR.org, May 20, 2009; Scott Shane, *Advocacy Groups Seek Disbarment of Ex-Bush Administration Lawyers*, N.Y. Times, May 18, 2009; Daphne Eviatar, *Hearing Lays Groundwork for Torture Prosecutions*, Wash. Independent, May 14, 2009; *Enhanced Interrogations' Don't Work, Ex-FBI Agent Tells Panel*, CNN.com, May 13, 2009; Spencer Ackerman, *FBI Agent's Account of Interrogations Conflicts with Report*, Wash. Independent, May 12, 2009; Walter Pincus, *U.S. Military Personnel Were Split on Past Interrogations, Report Says*, Wash. Post, May 12, 2009; Michael Isikoff, 'We Could Have Done This the Right Way,' Newsweek, May 4, 2009 (same); Bobby Ghosh, *A Top Interrogator Who's Against Torture*, Time, Apr. 24, 2009; Ali Soufan, *My Tortured Decision*, N.Y. Times, Apr. 23, 2009 (FBI interrogator Ali Soufan's first-hand account of his interrogation of Abu Zubaydah and his disagreements with the CIA over the use of "enhanced interrogation techniques").

The national importance of the detention and treatment policy debate, which underscores the urgency of releasing these records before the debate ceases, is evidenced by the widespread media attention to these issues generally, Exh. A at 11-16, and Bagram specifically, Exh. A at 8-11; *see also supra* at 12-18. Mr. Kammer's concluded that the "broad and sustained media coverage" about Bagram, U.S. detention policy, and the treatment of detainees in U.S. custody abroad, somehow negated the urgency of the ACLU's request. Exh B at 3. This conclusion, however, not only defies common sense but also the case law on this issue. Widespread media interest on these topics only *underscores* the importance of this issue to the public and *supports* the ACLU's entitlement to expedited processing under the "urgency to inform" standard here. *See, e.g., ACLU of N. Cal. v. Dep't of Def.*, 2006 WL 1469418 at \*6, 7 (N.D. Cal. May 25, 2006) (stating that "[i]f anything, extensive media interest usually is a fact *supporting* not *negating* urgency in the processing of a FOIA request" and holding that "intense [media] scrutiny" about DoD's TALON database "validated" argument that there was an "urgency to inform the public about the program") (internal citations omitted); *ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 29 (citing to news articles demonstrating "widespread public concern" about the government's surveillance activities under the Patriot Act in concluding expedited processing of FOIA request warranted); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (noting how numerous "news reports and magazine articles" on topic of FOIA request were in finding expedited processing warranted). In any event, although many news

stories have reported on the *treatment* of detainees at Bagram, many stories emphasize the *lack* of publicly-available details about the policies and rules that govern the U.S. government's detention of hundreds of people at Bagram; who, precisely, is being held there, for how long, and on what basis; where and under what circumstances these prisoners were captured; and whether the prisoners have a meaningful opportunity for challenging their detention. *See supra* at 13-14; *see also ACLU of N. Cal. v. Dep't of Def.*, 2006 WL 1469418 at \*6, 7 (finding an urgency to inform the public even where numerous press articles on a topic where "there were still important, unanswered questions" and where "valuable, time-sensitive information apparently remained unknown at the time of plaintiffs' request").

Again, Bagram is a key part of the national debate about detention policy. The requested records are urgently needed to inform the public about who is being held at Bagram, on what basis, with what kind of process, and under what conditions. The requested records are urgently needed to inform the public about whether Bagram is simply "another Guantanamo."

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In light of the above, we respectfully request that you reconsider Mr. Kammer's decision to deny the ACLU's request for a limitation of fees based on its status as a representative of the news media and its request for expedited processing. We look forward to your prompt response.

Sincerely,



Melissa Goodman  
Staff Attorney  
ACLU's National Security Project