06-3140-cv

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-3140-cv

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

Plaintiffs-Appellees,

—v.—

DEPARTMENT OF DEFENSE, AND ITS COMPONENTS DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE,

(*Caption continued on inside cover*)

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

BRIEF FOR DEFENDANTS-APPELLANTS

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Defendants-Appellants.

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Plaintiffs-Appellees,

—v.—

DEPARTMENT OF DEFENSE, AND ITS COMPONENTS DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF JUSTICE, AND ITS COMPONENTS CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE OF INFORMATION AND PRIVACY, OFFICE OF INTELLIGENCE POLICY AND REVIEW, FEDERAL BUREAU OF INVESTIGATION, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

PRELIMINARY STATEMENT

The Department of Defense ("DOD") and Department of the Army ("Army") (collectively, "Defendants") appeal from two orders, dated June 9, 2006 and June 21, 2006 (Joint Appendix ("JA") 508-09, 513-14), of the United States District Court for the Southern District of New York (Hon. Alvin K. Hellerstein, J.). In the two orders, the district court directed Defendants to release under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), twenty-one photographs depicting the treatment of detainees in Iraq and Afghanistan (the "Army Photos"). The district court rejected Defendants' invocation of FOIA Exemptions 6, 7(C), and 7(F) as a basis to withhold these images. In its orders requiring release, the district court relied upon the reasoning set forth in its prior opinion of September 29, 2005, reported at 389 F. Supp. 2d 547 (S.D.N.Y. 2005), which ordered the release of a separate set of images depicting detainees at Abu Ghraib prison in Iraq.

In this FOIA case, plaintiffs seek, *inter alia*, documents relating to the abuse or mistreatment of detainees in Iraq and Afghanistan. In response to their requests, Defendants released numerous written investigative reports concerning allegations of detainee abuse conducted by the Army's Criminal Investigation Command but withheld the Army Photos associated with those investigations. In withholding these images, Defendants invoked FOIA Exemptions 6, 7(C) and 7(F).

Exemption 7(F) permits the withholding of law enforcement records where their release "could reasonably be expected to endanger the life or physical

safety of any individual." In asserting Exemption 7(F), Defendants relied upon sworn declarations from United States Army Brigadier General Carter F. Ham and General Richard B. Myers, then the Chairman of the Joint Chiefs of Staff and the highest ranking uniformed officer in the United States military. Based upon their vast expertise, intimate knowledge of the current situation on the ground in Iraq and Afghanistan, and the assessments of military commanders in Iraq and Afghanistan, these declarants concluded that release of these images would pose a "grave risk of inciting violence and riots" against American troops, allied Coalition forces, and innocent American, Iraqi, and Afghan civilians. In particular, the declarants cited the violence that occurred after release of a false story of alleged Koran desecration at Guantanamo Bay, Cuba and widespread rioting after the publication of a cartoon of the Prophet Muhammad that many Muslims found offensive.

The district court, however, ruled that the Army Photos must be released. While the court correctly accepted the Government's predictive judgment that release of the photos would create a significant risk of violence against American service members and others, it concluded nonetheless that disclosure was required based on a balancing test of its own making. Specifically, the district court opined that, even if "a threat to life or safety is discerned," disclosure of the photographs should be made to "strengthen our purpose" and "show our strength as a vibrant and functioning democracy." In the district court's view, withholding documents "once a

threat to life or safety is discerned" from terrorists would be like "surrender[ing] to blackmail."

In weighing the predictive judgment about potential violence against the public interest in release, however, the district court erred. Exemption 7(F) does not provide for such a balancing test. Rather, the plain language of the statute asks only whether release can reasonably be expected to endanger the life or physical safety of "any individual." The declarations of Brigadier General Ham and General Meyers, both high-ranking military officers should be accorded deference. As their well-founded predictive judgments on matters of national security establish such a threat to the life or safety of American service members and others, these photographs clearly fall within the protection of Exemption 7(F).

Defendants also invoked FOIA Exemptions 6 and 7(C), which each permit the withholding of law enforcement records where release would result in an unwarranted invasion of personal privacy. Defendants invoked these privacy exemptions because the pictured detainees' expectation of privacy will be compromised by release of the Army Photos, even in redacted form. Furthermore, Defendants previously released to the public the investigative reports detailing not only the conduct depicted in these photographs but also other facts unearthed during the investigations associated with these images. Thus, release of the Army Photos would not significantly advance the public's understanding of the Government's operations or activities. Accordingly, Defendants determined that the privacy interest in with-

holding the images outweighed any public interest served by release.

The district court, however, concluded that redaction of the photos to hide identifying features of the detainees would render the intrusion into personal privacy "marginal and speculative," and that any such intrusion is outweighed by the public interest served by release. This ruling is wrong because it fails to properly acknowledge and weigh the interests at issue. The privacy rights of these detainees are informed by the Geneva Conventions, which protect detainees from, *inter alia*, public curiosity. Here, the pictured detainees may be able to be identified or identify themselves even with redaction, particularly given that the underlying reports of investigation provide extensive details about the events depicted in the photographs. Moreover, Defendants have already released to the public the underlying reports of investigation associated with the Army Photos, including descriptions of the conduct depicted in the photographs. Because release of the photographs thus would not add much to the public's knowledge of what transpired, the detainees' privacy rights outweigh any public interest served by release. Accordingly, these images fall within the protection of Exemptions 6 and 7(C).

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Did the district court err in rejecting Defendants' invocation of Exemption 7(F) where Defendants established, and the court acknowledged, that release of the Army Photos could reasonably be expected to endanger the lives or physical safety of numerous individuals.

2. Did the district court err in rejecting Defendants' invocation of Exemptions 6 and 7(C) where the detainees' privacy interests would be infringed by release of the Army Photos and the public's knowledge would not be significantly advanced.

STATEMENT OF THE CASE

In this case under the Freedom of Information Act, Plaintiffs filed their complaint on June 2, 2004. (JA 7). Pursuant to the district court's order of April 10, 2006 (JA 411), Defendants submitted declarations in support of their invocation of FOIA Exemptions 6, 7(C) and 7(F) for the Army Photos on April 26, 2006, and the Plaintiffs submitted their declarations in opposition on May 19, 2006. (JA 36, 416-459). By orders dated June 9, 2006 and June 21, 2006, the district court ordered release of the Army Photos. (JA 508-09, 513-14).

STATEMENT OF THE FACTS

A. The Global War on Terrorism and the Dangers Faced by United States Citizens and Personnel Abroad

Following the attacks on the United States on September 11, 2001, the United States military launched Operation Enduring Freedom to drive the Taliban regime—which provided support to Al-Qaeda terrorists—from Afghanistan. (JA 439). Subsequently, Operation Iraqi Freedom was launched to remove the regime of Saddam Hussein from power, with the aim of ending an active threat to the safety of the United States and to foster the establishment of a democratic government in Iraq. (*Id.*). To defend these emerging democracies, as of April 2006, over 132,000 U.S. troops were stationed in Iraq, and more than 23,000 U.S. troops remained on the ground in Afghanistan. (JA 440; *see* JA 272-73).

Despite the success of military and diplomatic operations in Iraq and Afghanistan, insurgents and terrorists continue to wage a violent campaign to disrupt the emergence of democracy in those countries. (JA 272, 439-440). Insurgent forces have mounted violent and deadly assaults against United States service members, allied Coalition troops, and innocent Iraqi and Afghani civilians. (*Id.*).

1. Insurgent Activity in Iraq

The situation in Iraq remains dynamic and dangerous in Baghdad and several other parts of the country. (JA 440). As of April 2006, there were ap-

proximately 1,700 insurgent attacks per month in Iraq. (*Id.*). Significant events can, however, cause the number of attacks to climb to 2,500 per month. (*Id.*).

Insurgent attacks often target Iraqi police and security forces, government personnel, and civilians. (JA 253). For example, 64 personnel under Chief of Mission authority were killed in Iraq between June 2004 and July 2005. (*Id.*). Similarly, there were 52 assassinations of Iraqi government officials during the three-month period ending June 27, 2005. (JA 275). In addition, attacks have targeted Iraqi civilians in an effort to terrorize the Iraqi population and prevent the establishment of the rule of law. (JA 253).

According to the declaration from General Myers, then Chairman of the Joint Chiefs of Staff, experience has shown that the insurgents will use any means necessary to incite violence. (JA 273). The insurgents justify their attacks with claims that U.S. and allied international military forces seek to dominate Iraq, that U.S. and Coalition forces have impugned the dignity and honor of Iraqis, and that the Iraqi government is complicit in these efforts. (JA 253).

Iraqi insurgents have often used visual images of real and imagined Iraqi suffering to incite violence against United States personnel. (JA 274). One Islamic media group, for instance, produces numerous videos featuring images of Iraqi women and children whose suffering is falsely attributed to U.S. actions in Iraq. (*Id.*). In one incident, DOD discovered doctored photographs and movies pur-

porting to reveal U.S. soldiers raping Iraqi women. (*Id.*). These images, distributed on pro-Islamist and Arabic news web sites as alleged examples of U.S. "barbarism," were in fact doctored images that had originated on a Hungarian pornography site. (*Id.*). Specific references to these images surfaced in subsequent Muslim sermons throughout the Middle East, which called for retaliatory violence. (*Id.*).

Similarly, insurgent and terrorist attacks increased after the disclosure of images depicting alleged abuse of Iraqi detainees. (JA 275). When photographs depicting mistreatment at Abu Ghraib were leaked in 2004, they were widely circulated in the regional Arabic press, much of which alleged that abuse of Arab prisoners by U.S. military forces was widespread and that Americans deserved harsh treatment by Islamist insurgent forces in return. (JA 253-54). Attacks against U.S. troops, Coalition forces and civilian personnel in Iraq—including improvised explosive devices, rocket and mortar fire, suicide bombings, shootings and kidnappings —rose significantly as a result. (JA 257). For instance, in January 2005—three days after 22 photographs of detainees in British custody were made public—an Iraqi insurgent suicide car bomber detonated his vehicle just outside the gate of a British base in southern Iraq, causing numerous injuries. (JA 275). An Al Qaeda leader described this attack as a "response to the harm inflicted by British occupation forces on our brothers in prison." (*Id.*).

More recently in February 2006, two British soldiers were killed and another wounded in Amarah, Iraq; the violence was linked to recent use

of a video of British soldiers beating Iraqi youths in the Amarah area. (JA 440-41). There had been prophetic warnings in the Arab media about possible reprisals against British forces as a result of the video. (JA 441). In addition, more than 1,000 individuals, including many supporters of Shia cleric Muqtada al-Sadr, protested the alleged abuse of the youths in Amarah. (*Id.*) The video also inflamed political tensions, leading the ruling counsel of the Maysan province to publicly announce that it would suspend cooperation with all British forces and officials. (*Id.*).

2. Insurgent Activity in Afghanistan

The situation in Afghanistan also remains volatile. (JA 276, 441). As of April 2006, there were an average of 250 insurgent attacks per month in Afghanistan against Coalition forces supporting the government of Afghanistan. (JA 276, 441). The Taliban has targeted candidates and electoral workers for the National Assembly elections, as well as Muslim clerics who support the Afghan government (some of whom have been assassinated since June 1, 2005), or who are otherwise reform-minded. (JA 276).

Insurgents in Afghanistan aggressively employ a sophisticated public relations campaign. (*Id.*). Taliban spokesmen quickly claim credit for successful attacks against Coalition or Afghan Forces. (*Id.*). The Taliban are also quick to spread disinformation about culturally sensitive issues, such as the Coalition's alleged mistreatment of Afghan women, as a means of turning public opinion

against the United States and other Western countries. (*Id.*).

3. The Rioting and Violence Following a False *Newsweek* Report of Alleged Koran Desecration at Guantanamo Bay, Cuba

On April 30, 2005, *Newsweek* magazine falsely reported that United States military personnel had desecrated copies of the Koran given to detainees held at Guantanamo Bay, Cuba. (JA 254-55, 277, 440). *Newsweek* later retracted its central allegations. (JA 254, 277, 440).

As a result of the false *Newsweek* report, massive, violent, and deadly anti-U.S. demonstrations quickly erupted in the Palestinian territories, Egypt, Sudan, Bangladesh, Pakistan, and Indonesia. (JA 254-55, 277, 440-42). DOD intelligence assessments indicate that organized anti-American extremists exploited the volatile public sentiments in these Muslim countries to foment demonstrations. (JA 277). In Afghanistan, violent demonstrations began in the eastern provinces and spread to Kabul. (JA 255, 277-78). In Jalalabad, two United Nations guest houses were attacked, government buildings and shops were targeted, and the offices of two international aid groups were destroyed. (JA 278, 441-42). The United Nations withdrew all of its foreign staff from the city as a precaution. (JA 278). At least 17 deaths in Afghanistan have been attributed to the reaction to the *Newsweek* Koran story. (*Id.*).

Despite *Newsweek's* published retraction, many Muslims still believe that United States personnel desecrate the Koran to humiliate Muslims. (*Id.*).

For example, the website of the Iraqi Sunni Clergymen Council asserts that desecration of the Koran is a daily occurrence in Iraq, and has posted numerous photographs of another alleged desecration. (*Id.*). According to the website: "To humiliate the Koran in Iraq is a well-known tactic of the occupation and allied forces. The Koran has been desecrated by the Crusaders and the Jews. The latest incident of this happened when American soldiers raided the Al-Quds Mosque in . . . Al-Ramadi. . . . The soldiers searched the entire mosque, tore the Koran, and beat the worshipers during the morning prayers." (*Id.*).

4. The Violence Associated with the Publication of a Danish Cartoon of the Prophet Muhammad

In January 2006, a Norwegian publication reprinted a Danish cartoon that depicted the Prophet Muhammad. (JA 442). As a result of the cartoon's publication, violence erupted. (*Id.*). At least eleven people died in Afghanistan. (*Id.*). Similarly, more than 150 people died in Nigeria, with thousands more displaced after five days of violence. (*Id.*). Five individuals were killed in Pakistan and one death was reported in both Somalia and Turkey. (*Id.*).

B. Investigations into Allegations of Detainee Abuse

Perceived mistreatment or humiliation of detainees in United States' custody has been exploited or misrepresented for violent purposes in both Iraq and Afghanistan, as well as elsewhere in the Middle

East. (JA 440). During the course of the conflicts in Iraq and Afghanistan, the Army has conducted numerous investigations into allegations of detainee abuse and mistreatment, including investigating mistreatment of detainees at Abu Ghraib prison in Iraq. (JA 136-38, 417-18, 425-29). A large number of these investigative files have been released to the public. (JA 417-18). *See, e.g., http://www.aclu.org/torturefoia/released/122104.html* (summaries and links to Army Reports of Investigation); *http://www.aclu.org/torturefoia/released/042105.html* (same); *http://www.aclu.org/torturefoia/released/030705.html* (same); *http://www.aclu.org/torturefoia/released/021605.html* (same); *http://www.aclu.org/torturefoia/released/012405.html* (same).

The twenty-one Army Photos at issue in this lawsuit are part of six investigative files from the Army's Criminal Investigations Command ("Army CID"). (JA 418, 425-29 (six investigations identified as Tabs A through F)).* All six of these Army CID

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* The declarations before the district court addressed seven investigations, identified as Tabs A through G, that included a total of 29 photographs. (JA 417-18, 421, 425-26, 428). However, the district court found that Defendants were not required to release eight of these 29 photographs, including all of the photographs in the last investigation file identified as Tab G. (JA 508-09, 513-14). As a result, the last of the seven investigations is not at issue in this appeal, leaving only the six investigations identified as Tabs A through F.

files have been released to the public. (JA 418, 425-29). In all six investigations, photographs were provided to Army CID in connection with allegations of mistreatment of detainees, including alleged assault or dereliction of duty. (JA 427-29, 464-466). For example, two investigations related to photographs of soldiers pointing weapons at the heads of bound and hooded detainees in Iraq and Afghanistan. (JA 425-29 (referencing photographs at Tabs C and Tab E)). *See http://www.aclu.org/torturefoia/released/012405.html* (Army Report of Investigation, dated July 21, 2004); *http://www.aclu.org/torturefoia/released/021605.html* (Army Report of Investigation, dated August 25, 2004). Another investigation related to a photograph of three fully clothed Iraqi detainees who are standing zip-tied to bars in a stress position with hoods over their heads and three soldiers posing in the background; one of those soldiers is pointing a broom at the buttocks of a detainee. (JA 425-29 (referencing photograph at Tab D)). *See http://www.aclu.org/torturefoia/released/012405.html* (Army Report of Investigation, dated December 30, 2004). A fourth investigation included an allegedly staged photograph of a soldier appearing ready to hit the head of an Iraqi detainee with the butt of his rifle. (JA 425-29 (referencing Tab F)). *See http://www.aclu.org/torturefoia/released/030705.html* (Army Report of Investigation, dated Dec. 28, 2004). The remaining two investigations similarly related to allegations of detainee mistreatment in Iraq and Afghanistan, including pictures of hooded detainees and individuals with their hands restrained. (JA 417-19, 425-29 (referencing

Tabs A and B). *See, e.g.*, *http://www.aclu.org/torturefoia/released/ 012405.html* (Army Report of Investigation, dated Dec. 19, 2003).

While Army CID determined that it lacked probable cause to believe detainee abuse occurred relating to the images in three of the six investigations (JA 427-29 (referencing Tabs A, B and F)), Army CID found probable cause in three of the investigations. As a result, soldiers involved in two of the investigations were punished under Article 15 of the Uniform Code of Military Justice. (*Id.* (referencing Tabs C, D and E)).

C. The Danger to Personnel Abroad from Release of the Army Photos

Government officers intimately familiar with the military and diplomatic situation in Iraq and Afghanistan have analyzed the likelihood of danger to U.S. personnel and others from release of the twenty-one Army Photos.

Brigadier General Carter Ham is the Deputy Director for Regional Operations of the Operations Division on the Joint Staff at the Pentagon. (JA 434-35, 437). As the principal advisor to the Director of Operations for operational matters outside the continental U.S., he coordinates frequently with the staffs of U.S. Central Command, U.S. Southern Command, U.S. European Command and U.S. Pacific Command to ensure that combatant command concerns are addressed by the Joint Staff. (JA 434). He also develops and coordinates operational orders which, once approved by the Secretary of Defense,

are communicated to the combatant commanders. (JA 434-35).

Brigadier General Ham has more than 30 years of service in the United States Armed Forces. (JA 437). His past experience includes being the senior U.S. Commander in Mosul, Iraq responsible for all U.S. and Coalition operations in the northern province of Iraq during the period of January 2004 to February 2005. (*Id.*). From August 2003 through February 2005, he was Deputy Commanding General for Training and Readiness of the U.S. Army's I Corps, which included duty as Commander of the Multi-National Brigade Northwest for Operation Iraqi Freedom. (*Id.*).

Based on his extensive military experience and his knowledge of the current situation in Iraq and Afghanistan, Brigadier General Ham concluded that release of these photographs "will pose a clear and grave risk of inciting violence and riots against American troops and Coalition forces . . . [and] expose innocent Iraqi, Afghan, and American civilians to harm as a result of the insurgency's reaction." (JA 443). Brigadier General Ham placed special emphasis upon the violence associated with the incorrect reporting in *Newseek* about desecration of the Koran and rioting associated with the publication of the cartoon of the Prophet Muhammad. (JA 441-42).

In reaching his conclusion, Brigadier General Ham solicited and relied upon the assessments and recommendations of three individuals: 1) General John P. Abizaid, Commander, U.S. Central Command; 2) General George Casey, Commander of the

Multi-National Forces-Iraq (the ultimate military commander in Iraq of Coalition armed forced); and 3) Lieutenant General Karl W. Eikenberry, Combined Forces Command Afghanistan (the ultimate military commander in Afghanistan of Coalition armed forces). (JA 438). Each of these three commanders agreed with Brigadier General Ham's conclusions that release of the Army Photos could reasonably be expected to result in violence against U.S. troops, Coalition forces or civilians in Iraq and Afghanistan. (*Id.*).

Brigadier General Ham also relied upon the opinions expressed by General Richard B. Myers, then Chairman of the Joint Chiefs of Staff, in a declaration previously submitted to the district court to justify the withholding of images of detainee mistreatment at Abu Ghraib prison in Iraq (the so called "Darby photos"). (JA 438). Like Brigadier General Ham, General Myers concluded that release of such images of detainee mistreatment would "pose a clear and grave risk of inciting violence and riots against American troops and Coalition forces," and "expose innocent Iraqi, Afghan, and American civilians to harm as a result of the insurgency's reaction, which will involve violence and rioting." (JA 280). General Myers reached that conclusion based on his 40 years' experience in the United States military, the assessments and evaluations of combat commanders in Iraq and Afghanistan, and intelligence reports from experts on the Middle East, Arab culture, and Islam. (JA 269). In light of that expertise, the ongoing insurgencies, the use of images by insurgents to gain support for their cause, and the violence surrounding the incor-

rect *Newsweek* story, General Myers concluded that "[i]t is probable that Al-Qaeda and other groups will seize upon these images and videos as grist for their propaganda mill, which will result in, besides violent attacks, increased terrorist recruitment, continued financial support, and exacerbation of tensions between the Iraqi and Afghan populaces and U.S. and Coalition Forces." (JA 280). General Myers stated that the official release of images of detainee abuse would be widely portrayed in the Islamic community "as part and parcel of the alleged, continuing effort of the United States to humiliate Muslims," and would be "used by the insurgents as propaganda to increase calls for violence against U.S. and Coalition personnel." (JA 281).

D. Plaintiffs' FOIA Requests and Proceedings Below

1. Plaintiffs' FOIA Requests

Pursuant to FOIA, Plaintiffs made requests for records from 13 different federal agencies or agency components on three different topics: (1) the treatment of individuals apprehended after September 11, 2001, and held by the United States at military bases or detention facilities outside the United States; (2) the deaths of any such detainees in custody; and (3) the government's purported practice of "rendering" detainees to countries known to use torture. (JA 52).

Given the sweeping scope of these requests, Plaintiffs created a priority list in August 2004 to facilitate the Government's search for and processing of responsive agency records. (JA 65-81). As

part of this priority list, Plaintiffs requested not only images of detainee abuse in Iraq but also sought a particular CD with detainee photographs that Joseph Darby, a military policeman assigned to Abu Ghraib, provided to Army CID. (JA 69, 81, 384). At that time, Defendants had not yet finished processing all images potentially responsive to Plaintiffs' FOIA requests, but had finished processing the images of detainees at Abu Ghraib on the CD from Joseph Darby. (JA 384-85). Defendants denied Plaintiffs' request for the Darby photos, withholding them on the basis of FOIA privacy Exemptions 6 and 7(C) and FOIA Exemption 7(F). (JA 384-85). The district court proceeded with litigation as to whether the Darby photos should be released under FOIA, so that any ruling on that issue could later be used as a basis for resolving whether other responsive detainee images could properly be withheld. (JA 384).

2. Proceedings Regarding the Darby Photos

In the spring and summer of 2005, the parties filed cross motions for summary judgment as to the Darby photos. (JA 18-24). The Government supported its motion with sworn declarations from General Myers, as well as Deputy Assistant Secretary Schlicher. (JA 249-91, 301-16). As noted above, General Myers' declaration related the serious dangers facing U.S. personnel and citizens in Iraq and Afghanistan, as well as circumstances surrounding the rioting that occurred as a result of a *Newsweek* story falsely alleging mistreatment of the Koran.

Ronald Schlicher, Deputy Assistant Secretary and Coordinator for Iraq in the Bureau of Near Eastern Affairs at the State Department, agreed with General Myers. Based on his extensive foreign service and knowledge of Iraq and Islamic culture (JA 249-52), Mr. Schlicher informed the court that the humiliation depicted in the Darby photos would be viewed not simply as an attack by renegade soldiers on individual detainees, "but as an attack by the United States against the wider cultural identity of Muslim society." (JA 260). He further stated that the release of the Darby photos "would be regarded by Iraqi public opinion, and opinion in the wider region, as an attack by the United States on Arab (Muslim) society as a whole." (*Id.*). This would provide terrorist organizations, such as al-Qaeda and Iraqi insurgent groups, "with a justification for attacks on Coalition personnel," and would "provide propaganda and fertile recruiting grounds" for such organizations. (*Id.*).

Moreover, Mr. Schlicher explained that anti-American media "would portray all available photographs in the worst possible light" (JA 261), and would show the photos "repeatedly and relentlessly." (JA 262). "False photographs could be generated (as has occurred in the past) detailing further abuses that never occurred," which would be difficult to debunk in light of the volume of Darby photos officially released. (*Id.*). For all of these reasons, Mr. Schlicher concluded that release of the Darby photos "could reasonably be expected to endanger the lives and physical safety of the American personnel, civilian and military, in Iraq as well as pose a significant threat to our diplomatic efforts

to bring democracy and stability to Iraq and the Middle East." (JA 264).

In an opinion dated September 29, 2005, the district court ordered release of the Darby photos, rejecting Defendants' invocation of Exemptions 6, 7(C) and 7(F). (JA 384-402). The district court first rejected Defendants' contention that the Darby photos were exempt from disclosure under the privacy-based Exemptions 6 and 7(C). The court asserted that release of the Darby photos, redacted (as agreed by Plaintiffs) to conceal the detainees' identifying features and genitalia, would not constitute an "unwarranted invasion of personal privacy." (JA 388). The court dismissed as "speculative" the Defendants' contention that detainees in the photos might recognize themselves or be recognized by members of the public. (*Id.*). The court also opined that, if someone were to see the redacted photos and identify an individual depicted in earlier leaked photos, "the intrusion into personal privacy is marginal and speculative, arising from the event itself and not the redacted image." (JA 391).

In addition, the district court held that any invasion of personal privacy from release of the redacted photos would be outweighed by the substantial public interest served by release of the photos, as "evidenced by the active public debate engendered by the versions previously leaked to the press." (JA 392). The court also concluded that "[t]here is no alternative, less intrusive means by which the information may be elicited," since the Darby photos are "more probative" of detainee abuse than are the public written accounts of that abuse. (JA 393).

The district court also rejected the contention that the United States' release of the Darby photos would be inconsistent with its international obligations under the Geneva Conventions, which prohibit subjecting prisoners of war to "public curiosity." (JA 393-94). The court stated that redactions alone "should protect civilians and detainees against 'insults and public curiosity.'" (JA 394).

The district court further held that Exemption 7(F) did not permit the withholding of the Darby photos. The court acknowledged the force of General Myers' sworn statements that insurgents will use the Darby photos to incite violence and to recruit others to their cause. (JA 397). Indeed, the court recognized that "[t]here is a risk that the enemy will seize upon the publicity of the photographs and seek to use such publicity as a pretext for enlistments and violent acts." (JA 401). Nonetheless, the court discounted the possibility of additional violence because, in the court's opinion, "[t]he terrorists in Iraq and Afghanistan do not need pretexts for their barbarism." (JA 397).

In any event, the court held that the risk of additional violence was insufficient to trigger Exemption 7(F), explicitly rejecting the view "that reasoning must stop once a threat to life or safety is discerned." (JA 400). Rather the district court instructed that any risk to life or safety must be balanced against the perceived benefits of disclosure. (JA 401). In performing that balance, the court stated: "Our nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory

command." (JA 396). To the contrary, the court expressed the view that, "[w]ith great respect to the concerns expressed by General Myers, my task is not to defer to our worst fears, but to interpret and apply the law, in this case the Freedom of Information Act, which advances values important to our society, transparency and accountability of government." (JA 397).

Applying this balancing test, the district court concluded that release of the Darby photos was justified despite the risk of violence. According to the court, the threat to life or physical safety did not warrant withholding the Darby photos because "the education and debate that such publicity will foster will strengthen our purpose" and "show our strength as a vibrant and functioning democracy to be emulated." (JA 401).

The Government filed a notice of appeal from the district court's decision ordering release of the Darby photos. (JA 408-09). However, the parties settled that appeal without further litigation after virtually all of the Darby photos were published on the Internet by a third party. (JA 412).

3. Proceedings Regarding the Army Photos

By order dated April 10, 2006, the district court established a procedure for resolving whether the Army Photos were properly withheld pursuant to FOIA Exemptions 6, 7(C) and 7(F). (JA 411-15). In support of their invocation of FOIA Exemptions 6, 7(C) and 7(F) as to the Army Photos, Defendants submitted the declarations of Brigadier General Carter Ham of the United States Army, Richard B.

Jackson, Chief of the Law of War Branch of the Army's Office of the Judge Advocate General, and Philip J. McGuire of Army CID. (JA 416-446). Plaintiffs submitted their declarations in opposition on May 19, 2006. (JA 447-59). The district court construed the parties' submissions as cross-motions for summary judgment. (JA 414). By orders dated June 9, 2006 and June 21, 2006, the district court ordered release of twenty-one photographs contained in the Army CID investigative files. (JA 508-09, 513-14). The Government filed its notice of appeal on June 30, 2006.* (JA 515-17).

SUMMARY OF THE ARGUMENT

The district court erred in ordering the release of images depicting Iraqi and Afghani detainees gathered during investigations into detainee mistreatment. These photos fall within the protection of FOIA Exemption 7(F) because their release "could reasonably be expected to endanger the life or physical safety of any individual," including U.S. troops, Coalition forces and civilians in Iraq and Afghanistan. *See* Section B, *infra*. In the expert judgment of

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* The district court ordered redaction of the faces of detainees pictured in the twenty one images. (JA 508-09, 513-14, 480). The district court also ordered redaction of the faces of U.S. military personnel pictured in the twenty one images, except for the faces of soldiers in two photographs that the district concluded had been posed. (JA 508-09, 513-14, 475, 491-94, 502-03). The district court's rulings regarding redaction are not at issue in this appeal.

Brigadier General Ham and General Myers, release of such images can reasonably be expected to incite violence. These predictive judgments on issues of national security, backed by the hard experience of deadly violence resulting from the incorrect *Newsweek* story concerning alleged abuse of the Koran and publication of a cartoon of the Prophet Muhammad, are entitled to substantial deference.

The district court properly acknowledged the significant danger that would accompany release of these photos. Nonetheless, the court remarkably determined that it could weigh the potential loss of life against the value of fostering "education and debate" over widely known detainee abuses. Such balancing is wholly inappropriate. Congress has provided—in no uncertain terms—that Exemption 7(F) applies once a threat to life or safety is discerned. The district court had no basis either for disregarding the predictive judgments of harm by Brigadier General Ham and General Myers, or for conducting its own dubious balancing test, placing "education and debate" (JA 401) over a "threat to [the lives] and safety of our soldiers" (JA 356).

In addition, Exemptions 6 and 7(C) independently justify Defendants' decision not to release photos of the detainees, many of whom are depicted in degrading or humiliating circumstances. *See* Section C, *infra*. Congress and the courts have recognized the substantial privacy interest crime victims have in avoiding widespread public access to evidence depicting their suffering. The Third and Fourth Geneva Conventions, which prohibit the

exposure of detainees to "public curiosity," recognize similar privacy interests.

The district court erred in concluding that redacting identifying features from the photos eliminated any cognizable privacy interest. The privacy interests protected by Exemptions 6 and 7(C) go beyond the mere identification of the person involved. Redacting identifying information does not change the fact that the individual detainees will recognize themselves and thus will witness their personal humiliation being displayed repeatedly throughout the world. Moreover, there is a risk that such individuals might be identified given the release of the investigative reports associated with these photographs.

In addition, while there is public interest in the issue of detainee mistreatment, all of the underlying investigative reports associated with these photographs have been released to the public, thus satisfying FOIA's mandate to inform the public of the operations or activities of the Government. Release of the Army Photos would not significantly advance the public's understanding of the activities of Government beyond the information contained in the already released investigative reports. Accordingly, any arguable value served by release is outweighed by the detainees' privacy interests under Exemptions 6 and 7(C).

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE ARMY PHOTOGRAPHS MUST BE RELEASED

A. Applicable Legal and Statutory Standards

1. Standard of Review

This Court reviews *de novo* a district court's grant of summary judgment in a FOIA case. *Wood v. FBI*, 432 F.3d 78, 82 (2d Cir. 2005).

2. The Freedom of Information Act

In enacting FOIA, Congress "balance[d] the public's need for access to official information with the Government's need for confidentiality." *Weinberger v. Catholic Action*, 454 U.S. 139, 144 (1981). While FOIA generally calls for "broad disclosure of Government records," Congress also "realized that legitimate governmental and private interests could be harmed by release of certain types of information." *Department of Justice v. Julian*, 486 U.S. 1, 8 (1988) (internal quotation omitted). Because "public disclosure is not always in the public interest," Congress "provided that agency records may be withheld" if they fall within one of the Act's nine exemptions. *CIA v. Sims*, 471 U.S. 159, 166-167 (1985). Those exemptions "are intended to have meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). FOIA thus "represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information

confidential." *Center for Nat'l Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency*, 493 U.S. at 152).

Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is the procedural vehicle by which most FOIA actions are resolved. "In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). "Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Id.* (footnote omitted); *see also Halpern v. Federal Bureau of Investigation*, 181 F.3d 279, 291 (2d Cir. 1999) (same). Although this Court reviews *de novo* the agency's determination that requested information falls within a FOIA exemption, *see* 5 U.S.C. § 552(a)(4)(B); *Halpern*, 181 F.3d at 287-88, the declarations submitted by the agency in support of its determination are "accorded a presumption of good faith," *Carney*, 19 F.3d at 812 (citation and internal quotation marks omitted).

Under the circumstances of this case, a meaningful application of FOIA Exemptions 7(F) and privacy Exemptions 6 and 7(C) compels the conclusion that the Army Photos are exempt from disclosure.

B. The Army Photos Are Exempt from Disclosure Because Their Release Could Reasonably Be Expected to Endanger the Life or Physical Safety of Any Individual

1. Exemption 7(F)

Exemption 7(F) of FOIA protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (F) could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7). Documents are "compiled for law enforcement purposes" if they are compiled for that purpose at the time the FOIA request is made, even if initially compiled for other purposes. *John Doe Agency*, 493 U.S. at 155; *see Ortiz v. Dep't of Health and Human Serv.*, 70 F.3d 729, 732-33 (2d Cir. 1995).

Here, it is undisputed that the Army Photos were complied as part of Army CID's investigations into allegations of the mistreatment of detainees. (JA 387-88, 417). Accordingly, the only question presented is whether release of the photos "could reasonably be expected to endanger the life or physical safety of any individual."

It is "axiomatic that the plain meaning of a statute controls its interpretation." *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir.1999). In extending protection where disclosure "could reasonably be expected to endanger the life or physical safety of *any individual*" (emphasis added), the text of Exemption 7(F) does not limit its protection to

some individuals at the exclusion of others. To understand the meaning of Exemption 7(F), it is "unnecessary to go beyond the plain language of the statute. 'Any' means 'any.'" *United States v. Ballistrea*, 101 F.3d 827, 836 (2d Cir. 1996) (internal quotations omitted).

The statutory history of Exemption 7(F) confirms this understanding. In its original form, Exemption 7(F) applied only to documents whose disclosure would "endanger the life of physical safety of any law enforcement officer." *See* 5 U.S.C. § 552(b)(7) (1982). In 1986, however, Congress expanded the exemption to encompass the life and physical safety "of any individual." Under familiar interpretive principles, the courts must give meaningful effect to that amendment. *Stone v. INS*, 514 U.S. 386, 397 (1995).

Consistent with its plain language, all courts that have addressed the issue have held that Exemption 7(F) encompasses any unspecified individual whose life or safety could reasonably be endangered by a disclosure. For example, in *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1314 (D. Utah 2003), the Government invoked Exemption 7(F) in response to a request for copies of inundation maps for the areas below the Hoover and Glen Canyon Dams. The maps assessed the potential effects of dam failure on downstream communities and power plants. *Id.* at 1315. According to the Bureau of Reclamation, the maps presented a "worst-case scenario . . . thus making the dam a more attractive target to [a potential] terrorist," and thereby risking "the life or

physical safety of those individuals who occupy the downstream areas." *Id.* at 1316, 1321.

The court upheld the Government's invocation of Exemption 7(F). In determining the breadth of the Exemption, the court reasoned that "Exemption 7(F) is neither limited to protect the lives of 'law enforcement personnel,' nor to known, named individuals only." *Id.* at 1321. The court also stressed that "[i]n evaluating the validity of an agency's invocation of Exemption 7(F), the court should 'within limits', defer to the agency's assessment of danger." *Id.* at 1321 (citation omitted). Applying that deference to the agency's risk assessment, the court held that the Bureau had properly withheld the maps pursuant to Exemption 7(F). *Id.* at 1322.

Other courts have applied Exemption 7(F) after finding a reasonable risk of violence against a broad range of unspecified individuals. For example, in *Center for Nat'l Security Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 108 (D.D.C. 2002), *aff'd in part and rev'd in part on other grounds*, 331 F.3d 918 (D.C. Cir. 2003), the court held that Exemption 7(F) applied to the locations of detention facilities holding individuals connected to the terrorism investigation after September 11, 2001. The court reasoned that disclosure would make the facilities "vulnerable to retaliatory attacks, and 'place at risk not only [ ] detainees, but the facilities themselves and their employees.'" *Id.*

Similarly, in *Brady-Lunny v. Massey*, 185 F. Supp. 2d 928, 932 (C.D. Ill. 2002), the court upheld the application of Exemption 7(F) where a reporter requested information about prisoners in the cus-

tody of a sheriff: "Risks such as these are always present in inmate populations given inmates' gang ties, interest in escape, and motive for violence against informants and rivals. If the Government was forced to disclose inmates' names, security issues in any one of these areas would abound." *Accord Anderson v. United States Marshals Service*, 943 F. Supp. 37, 40 (D.D.C. 1996) (holding that Exemption 7(F) applied to information relating to the plaintiff's inmate monitoring status, "including the identity and location of an individual who required separation from the Plaintiff" (who had no particular nexus to a law enforcement proceeding), because disclosure "could reasonably be expected to endanger the safety of that individual").

More recently in *Los Angeles Times Communications, LLC v. Department of the Army*, the court held that Exemption 7(F) protected from release information contained in Serious Incident Reports ("SIRs") submitted to the Army by private security contractors in Iraq. — F. Supp. 2d —, 2006 WL 2336457 (C.D. Cal. July 24, 2006). Notwithstanding plaintiffs' claim that the identity of private security contractors was a matter of great public interest,*

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* Plaintiffs in *Los Angeles Times* claimed that the withheld information was of great public interest because private security contractors had been hired to provide security for the U.S. Government, construction contractors, and others in Iraq. *Id.* at *4-6. DOD estimated that at least 60 contractors were working in Iraq employing as many as 25,000 people. *Id.* at *4. Plaintiffs argued that the level of

the court concluded that the names of the contractors in the SIRs were protected from release because that information, taken with other information, "may provide [insurgents] with enough information to organize attacks on vulnerable [private security contractor] companies or the projects they protect." *Id.* at *14.

In reaching that conclusion, the court accepted the "predictive judgments" of Army personnel that the disclosure of the company names "might very well be expected to endanger the life or safety of military personnel, [private security contractor] employees, and civilians in Iraq." *Id.* at *14-15. The court noted in that regard that " 'the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview.' " *Id.* at *14 (quoting *Center for Nat'l Security Studies*, 331 F.3d at 926-27). Thus, the court concluded that:

> "The test was not whether the court personally agrees in full with the [agency's] evaluation of the danger—rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign in-

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involvement of such private security contractors was "unprecedented," with contractors playing a "much more significant role" than they had previously played in military conflicts. *Id.* at *6 n.17.

> telligence in which the Agency is expert and given by Congress a special role."

Los Angeles Times Communications, 2006 WL 2336457, *14 (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (citations omitted) (brackets in original)).

2. Defendants Established That Release of the Army Photos Could Reasonably Be Expected to Endanger the Lives or Physical Safety of U.S. Soldiers, Coalition Forces and Civilians in Iraq and Afghanistan

The standards of Exemption 7(F) are plainly satisfied here. The declarations submitted by the Government, to which the district court was required to accord considerable deference, establish the dangers posed by release of the photos.

In the expert opinion of Brigadier General Ham and General Myers, release of such photographs of detainee mistreatment "will pose a clear and grave risk of inciting violence and riots" against American and Coalition troops, other U.S. personnel, and civilians in Iraq and Afghanistan. (JA 280-81, 443). This conclusion is based upon the vast military experience of these two high-level military officers, the assessments of combat commanders in Iraq and Afghanistan, and intelligence reports from experts on the Middle East, Arab culture, and Islam. (JA 269, 438). Indeed, Brigadier General Ham solicited and received the opinions of the combatant commanders in Iraq and Afghanistan, all of whom agreed with his conclusion about the risks of release. (JA 438).

The conclusions of Brigadier General Ham and General Myers are set forth in significant detail. Among other things, their analysis takes into consideration the sensitivity of allegations of detainee mistreatment within Iraq and Afghanistan, the specific content of these photographs, the increased violence following the unauthorized release of Abu Ghraib photos in 2004, the attacks on British interests following the release of photos of detainees in British custody, and the sophisticated propaganda and recruiting undertakings of insurgent and terrorist organizations. (JA 272-85, 439-43).

Indeed, the predictions of violence by Brigadier General Ham and General Myers are also corroborated by more recent events, such as violence resulting from the *Newsweek* Koran desecration story and publication of a cartoon unfavorably depicting the Prophet Mohammed. (JA 277-78, 440, 442). Given these factors, Defendants properly concluded that potential violence could occur with the release of these photographs, which include images suggesting physical peril to the pictured detainees.

Under settled FOIA and national security law, the declarations of Brigadier General Ham and General Myers are entitled to considerable deference. Exemption 7(F) turns on a predictive judgment: whether disclosure "could reasonably be expected" to endanger the life or physical safety of any individual. 5 U.S.C. § 552(b)(7)(F). Here, that judgment involves both military and national security expertise—areas in which deference is particularly appropriate. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting that "terrorism or other

special circumstances" warrant "heightened deference to the judgments of the political branches with respect to matters of national security"); *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

In the FOIA context specifically, courts "have expressly recognized the propriety of deference to the executive" with respect to "claims which implicate national security." *Center for National Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926-27 (D.C. Cir. 2003). Thus, a court "may rely on government affidavits to support the withholding of documents under FOIA exemptions," and it is "equally well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview." *Id.* (citation omitted). These principles apply in the specific context of Exemption 7(F), *see Living Rivers*, 272 F. Supp. 2d at 1320 ("In evaluating the validity of an agency's invocation of Exemption 7(F), the court should 'within limits, defer to the agency's assessment of danger.' ") (citation omitted), and in other contexts as well, *see, e.g.*, *Coastal Delivery Corp. v. United States Customs Serv.*, 272 F. Supp. 2d 958, 964 (C.D. Cal. 2003) (applying Exemption 7(E) to information regarding examination rates of containers at ports because declarations of Customs Service officials established that disclosure would "reasonably risk circumvention of the law" by terrorists and smugglers).

In addition to according deference to agency expertise, courts typically require an agency to demonstrate only that its concerns have some reasonable grounding in past experience or in actual threats, a threshold easily satisfied by the declarations of Brigadier General Ham and General Myers. For example, in *Albuquerque Publishing Co. v. Department of Justice*, 726 F. Supp. 851, 858 (D.D.C. 1989), the court held that the Drug Enforcement Agency "established the requisite nexus between disclosure and possible harm to its personnel" by pointing out that "past release of agents' identities has 'resulted in several instances of physical attacks.'" Similarly, in *Durham v. Department of Justice*, 829 F. Supp. 428, 434 (D.D.C. 1993), the court exempted from disclosure the names of third parties who knew about the plaintiff's involvement in a crime, because of the plaintiff's "past violent behavior." *Accord Shores v. FBI*, 185 F. Supp. 2d 77, 85 (D.D.C. 2002) ("In light of Plaintiff's conviction for murder and attempted retaliation against a key witness, Defendants may withhold the relevant documents under Exemption 7(F)"); *Amro v. United States Customs Service*, 128 F. Supp. 2d 776, 788-89 (E.D. Pa. 2001) (agency's past experience with violence "adequately supported" withholding of documents under 7(F)); *Manna v. Department of Justice*, 815 F. Supp. 798, 810 (D.N.J. 1993), *aff'd*, 51 F.3d 1158 (3d Cir. 1995) (withholding justified due to "violent and murderous nature of plaintiff and the [family] with which he is associated").

In seeking to refute the predictive judgment of Brigadier General Ham and General Meyers, Plaintiffs rely upon a declaration from Michael Pheneger,

an officer of the ACLU who last served in the United States Army more than a decade ago, and Khaled Fahmy, an Associate Professor at New York University. The gravamen of the declarations from both Mr. Pheneger and Mr. Fahmy is that violence and insurgent attacks will continue in Iraq and Afghanistan regardless of whether the Army Photos are released. (JA 447-59). For example, Mr. Fahmy notes that "[w]hile it is possible that insurgents may point to the abuse of prisoners by United States personnel as further justification for their actions, it is highly unlikely that such abuse would be the real justification." (JA 458). Thus, both believe that the public interest mandates the release of the images. (JA 454 (claiming Army Photos should be released to "ensure complete public accountability" for the actions of the Government); JA 294 (arguing Darby photos should be released because the "long-term benefits of openness and freedom of information outweigh the short-term costs that dissemination of [such] information may impose"); JA 459 (opining that release of images will win support of those Muslims who seek public accountability)).

Plaintiffs' declarants, however, do not provide a basis to challenge the Government's invocation of Exemption 7(F). As a threshold matter, Plaintiffs' declarants lack a basis for their opinions regarding the current military situation in Iraq and Afghanistan when compared with the views expressed by Brigadier General Ham and General Meyers, views which are echoed by the senior U.S. commanders responsible for current operations in both Iraq and

Afghanistan.* Plaintiffs' declarants also err by improperly imposing a balancing test upon a statute that does not provide for one. Like the district court, Plaintiffs' declarants improperly seek to weigh any public interest served by release against the possibility of violence. Finally, Plaintiffs' declarants improperly eviscerate the protections of Exemption 7(F) based upon the possibility of violence stemming from other causes. Nothing in the statute contemplates such an interpretation. Indeed, such an interpretation ignores the plain language of the statute, which requires a showing only that release of records gathered for law enforcement purposes could reasonably be expected to endanger the life or physical safety of any individual.

3. The District Court's Exemption 7(F) Analysis and Holding Are Erroneous

The district court did not question the predictive judgment of Brigadier General Ham or General Myers that release of the Army Photos would create a reasonable risk of harm to the life or safety of American service members, coalition forces, and innocent civilians. To the contrary, the court's September 29, 2005 opinion acknowledged a "risk that

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* With all due respect to Mr. Pheneger's military service more than ten years ago, there is nothing in his declaration to provide a basis for his claim that he possesses sufficient expertise to address the risks inherent in release of these images based upon the current military and political climate in Iraq, Afghanistan and elsewhere in the Middle East.

the enemy will seize upon the publicity of the photographs [of detainee mistreatment]" to incite violence (JA 401), and it professed "great respect for the concerns expressed by General Myers" (JA 397). Remarkably, however, the court held that even where a threat to life or safety exists, it could order the documents released if, after applying a newly-created balancing test, the court determined that the potential harm is outweighed by competing "values FOIA was intended to advance." (JA 401) (*See also* JA 400 (court stating that "[b]alancing and evaluation are essential" and rejecting notion "that reasoning must stop once a threat to life or safety is discerned")).

The district court's decision to balance the risk to American lives against the public interest in disclosure is flatly inconsistent with the governing statute. Exemption 7(F) provides, in straightforward and categorical terms, that FOIA's disclosure obligation "does not apply" if production of the records at issue "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). Nothing in the exemption suggests that a court may weigh the value of an individual's life or physical safety against competing goals.

Indeed, the language of Exemption 7(F) stands in stark contrast to other FOIA exemptions that require precisely the kind of balancing the district court erroneously applied here. For example, Exemptions 6 and 7(C) ask whether disclosure would result in an "unwarranted" invasion of privacy. *See* Section C, *infra*. It is Congress' use of the term

"unwarranted"—which appears nowhere in Exemption 7(F)—that permits the courts to balance an invasion of privacy against the competing public interest in disclosure. *See Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (1989). Not surprisingly, Congress declined to permit balancing where life or physical safety are at risk.

Several courts have recognized that Exemption 7(F) does not require or permit a balancing test. For example, in *Raulerson v. Ashcroft*, 271 F. Supp. 2d 17, 29 (D.D.C. 2002), the court expressly held that, "[u]nlike Exemption 7(C), which involves a balancing of societal and individual privacy interests, 7(F) is an absolute ban against certain information and, arguably, an even broader protection than 7(C)." Similarly, in *Shores v. FBI*, 185 F. Supp. 2d 77, 85 (D.D.C. 2002), the court recognized that Exemption 7(F), while covering material that may be subject to Exemption 7(C), "does *not* require any balancing test" (emphasis in original).*

Case law interpreting Exemption 7(D) confirms this reading. Employing language strikingly similar

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* The Department of Justice also has long interpreted Exemption 7(F) to foreclose a balancing test. The Attorney General's Memorandum on the 1986 Amendments to FOIA notes that Exemption 7(F)'s "protective scope is potentially broader than that of Exemption 7(C) in that it requires no balancing of interests whatsoever." *See* Attorney General's Memorandum on the 1986 Amendments to FOIA, at 18 n.33 (Dec. 1987).

to Exemption 7(F), Exemption 7(D) protects material compiled for law enforcement purposes where disclosure "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). Like Exemption 7(F), Exemption 7(D) does not use the term "unwarranted" or any similar language suggesting that courts may employ a balancing test. Courts therefore have concluded that once the Government establishes that release could reasonably be expected to disclose a confidential source's identity, "the judiciary is not permitted to undertake a balancing of conflicting interests, but is required to uphold a claimed 7(D) exemption." *Irons v. FBI*, 811 F.2d 681, 685 (1st Cir. 1987). *See also Schmerler v. FBI*, 900 F.2d 333, 336 (D.C. Cir. 1990) (collecting cases), *abrogated on other grounds*, *Department of Justice v. Landano*, 508 U.S. 165 (1993).

The district court thus erred in applying a balancing test. Once the district court found that release of the Army photos could reasonably be expected to endanger the lives or safety of American troops, Coalition forces or civilians in Iraq or Afghanistan, the court should have concluded its analysis and upheld the invocation of Exemption 7(F). Congress has determined that the life or safety of any individual is not an appropriate price to pay to foster "education and debate" on issues of public importance. It was not for the district court to strike a different balance.

Moreover, the district court's substitution of its own judgment regarding the likely motivation and response of terrorist and insurgent organiza-

tions—opining that terrorists do not need excuses to attack Americans (JA 397)—is both erroneous and beside the point. As discussed *supra*, in the face of the considered judgment of two high ranking military officers, including the Chairman of the Joint Chiefs of Staff—an individual with virtually unparalleled knowledge of the enemies faced by American troops—the district court should have deferred to their expert judgment and refrained from interjecting its own opinion. Moreover, the court's speculation regarding the motivations of terrorists misses the larger point that the photographs offer terrorists and insurgents more than just a supposed excuse to incite violence. As explained by Brigadier General Ham and General Myers, release of incendiary material such as this can inspire members of the public to undertake acts of violence, either with provocation or wholly apart from the urging of terrorist or insurgent leaders.*

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* The district court observed that the Nation should not "surrender to blackmail" by allowing the risk of death to its troops to hamper the cause of open government. (JA 396). The court opined that the risk is worth taking because release of the Darby photos would "strengthen our purpose and, by enabling such deficiencies as may be perceived to be debated and corrected, show our strength as a vibrant and functioning democracy to be emulated." (JA 401). While those may be laudable goals, the harsh reality is that there are many who do not share them and who wish to do violence. Indeed, the violence resulting from the incorrect *Newsweek* story and the cartoons of the Prophet Mohammed

4. Even Assuming a Balancing Test Could Be Applied, the District Court Erred in the Way it Balanced the Relevant Factors

Even assuming, *arguendo*, that the district court could apply a balancing test to determine whether the Army Photos should be released, the court erred in the way it balanced the factors. Specifically, the court failed to follow the principle that a FOIA inquiry "should focus not on the general public interest in the subject matter of the FOIA request, but rather on the incremental value of the specific information being withheld." *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. 2003). Here, the Government has released to the public all the investigative reports relating to the photographs and, therefore, the alleged mistreatment that is the subject of the photographs has already been well-documented. *See supra* at 13-15. Although the court's opinion discusses at length the benefits of openness, the court never evaluated the marginal benefit of releasing these photos. *See* Section C, *infra*. Such an evaluation reveals that the information necessary to satisfy the public's understanding of the operations and activities of the Government in connection with the Army photographs has already been released in the related investigative reports. *See Reporters Committee*, 489 U.S. at 775. Accordingly, any slight addition to the public's knowledge from release is

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aptly illustrate this point; while seen as an exercise of free speech in the West, they sparked massive protests and deadly violence throughout the Islamic world.

outweighed by the likely exacerbation of tensions and risk of violence.

C. The Army Photos Are Exempt from Disclosure Because Their Release Would Result in a Clearly Unwarranted Invasion of Privacy

1. Exemptions 6 and 7(C)

When Congress enacted FOIA, it was aware that vast amounts of personal information about individuals routinely accumulate in government records. *See, e.g.*, H.R. Rep. No. 89-1497, 89th Cong., 2d Sess. (1966), *reprinted in* Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., Freedom of Information Act Source Book 32 (Comm. Print 1974) (1974 Source Book). Accordingly, "[a]t the same time that a broad philosophy of 'freedom of information'" was enacted into law, Congress sought to "protect certain equally important rights of privacy with respect to certain information in Government files." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (quoted in *Department of the Air Force v. Rose*, 425 U.S. 352, 372 n.9 (1976)); *see also* S. Rep. No. 221, 98th Cong., 1st Sess. 21 (1983) ("Since passage of the FOIA in 1966, Congress has recognized the need to balance an open government philosophy against legitimate concerns for the privacy of individuals.").

To that end, two exemptions specifically protect the privacy of personal information in Government records. Exemption 7(C) protects records "compiled for law enforcement purposes" where disclosure "could reasonably be expected to constitute an un-

warranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Exemption 6, which is not limited to law enforcement records, protects information contained in "personnel and medical files and similar files" where disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) "is more protective of privacy than Exemption 6" because the former "applies to any disclosure that 'could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted,'" while the latter bars only disclosures "that 'would constitute' an invasion of privacy that is 'clearly unwarranted.'" *Department of Defense v. FLRA*, 510 U.S. 487, 496-497 n.6 (1994).

As there is no dispute that the Army photos are "records compiled for law enforcement purposes" under Exemption 7, the more protective standard of Exemption 7(C) governs here. Nonetheless, both exemptions require balancing the privacy interests at stake against the public's interest in disclosure. *Reporters Committee*, 489 U.S. at 762. In evaluating the public's interest in disclosure, courts look to whether disclosure of the withheld information itself will contribute "*significantly* to public understanding of the operations or activities of the government." *Id.* at 775 (emphasis added). As we discuss below, the balance in this case weighs in favor of privacy under either Exemption 6 or 7(C).

2. Release of the Army Photos Would Constitute a Significant Invasion of the Privacy of the Detainees Depicted in the Photos

The privacy interest recognized by FOIA is "at its apex" for documents discussing or depicting "a private citizen." *Reporters Committee*, 489 U.S. at 780. As the Supreme Court has made clear, moreover, Exemptions 6 and 7(C) protect more than a "cramped notion of personal privacy." *Reporters Committee*, 489 U.S. at 763. Indeed, the privacy interests protected by FOIA are more expansive than those protected by tort law or the Constitution. *Id.* at 762 n.13; *see also Marzen v. Department of Health & Human Servs.*, 825 F.2d 1148, 1152 (7th Cir. 1987) (the privacy interest protected under FOIA extends beyond the common law).

The district court concluded that the redaction of identifying features would eliminate *any* cognizable privacy interest. (JA 388). That reasoning is fundamentally flawed. The district court erred in supposing it is unlikely that individual detainees could be recognized despite the redactions. (JA 388). Given the release of the investigative reports associated with these photographs, it is possible that the details contained in those reports could be used to help identify the pictured detainees. Moreover, there also is a chance that the detainees could be recognized by other detainees or by themselves, and thus could witness their images being displayed repeatedly throughout the world.

Furthermore, the Army Photos here depict individuals who often were victims of mistreatment and

who took no action that could be construed as forfeiting or reducing their own privacy interests. Congress and the courts have recognized the privacy interest of crime victims in preventing unwarranted public access to evidence depicting their suffering. For instance, the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(8), requires courts to conduct proceedings "with respect for the victim's dignity and privacy." Consistent with this principle, courts have sought to avoid public disclosure of videotapes of sexual abuse. *See, e.g.*, *United States v. Kaufman*, No. 04-40141, 2005 WL 2648070, at *1 (D. Kan. Oct. 17, 2005) (in case involving allegations of sexual misconduct of mentally ill patients, some of which were "recorded in graphic detail on video tapes," the court ordered that the videos be displayed on a screen visible only to the jury, the court and the parties, "but not the people seated in the gallery"). Similarly, this Court has recognized a longstanding tradition of denying access to court records containing personal information where necessary to protect "the privacy and reputation of victims of crime." *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995).

The Supreme Court has recognized a strong privacy interest in such sensitive personal information. In *National Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004), for instance, the Supreme Court held that Exemption 7(C) applied to the autopsy photographs of Vincent Foster, formerly Deputy Counsel to the President, despite considerable public interest regarding the circumstances surrounding his apparent suicide. The Court unanimously recognized the privacy interest

asserted by Mr. Foster's relatives "to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility." *Id.* at 166-67. Moreover, the Court recognized that releasing the disputed photos, and thereby subjecting family members to constant reminders of the death of their loved one, would significantly impair that privacy interest. *Id.* As in *Favish*, the detainees here have a similar privacy interest in avoiding constant public reminders of their confinement and any related mistreatment. *See Reporters Comm.*, 489 U.S. at 763-64 & n.16 (emphasizing that privacy is the "right to control" information about oneself); *Department of State v. Ray*, 502 U.S. 164, 176 (1991) (Exemption 7(C) protects individuals' right to avoid "embarrassment in their social and community relationships").

The Seventh Circuit adopted similar reasoning outside of the FOIA context in *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004). In that case, the court refused to enforce a subpoena for medical records of patients who had received partial-birth abortions even after all patient-identifying information had been redacted. The court held that "[e]ven if there were no possibility that a patient's identity might be learned from a redacted medical record, there would be an invasion of privacy." *Id.* at 929. The court further explained: "Imagine if nude pictures of a woman, uploaded to the internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her. She would still feel that her privacy had been invaded." *Id.*

The same reasoning is applicable here. In many of the images at issue, the detainees were hooded, bound, or subjected to mistreatment. The fact that redaction might conceal their identities would do nothing to vitiate their important privacy interest in avoiding humiliation from republication of those images.

Moreover, in determining the scope of the privacy interests protected by FOIA, the Supreme Court has evaluated legal and cultural sources. *See Reporters Comm.*, 489 U.S. at 763-71 (examining such sources to determine that individuals have "substantial" privacy interests in their criminal rap sheets, even though the information contained therein is a matter of public record). For example, the Court has looked to relevant cultural traditions and long-standing norms as sources of relevant privacy interests. *See Favish*, 541 U.S. at 167-71 (relying on such sources to determine that surviving family members had "weighty" privacy interests in avoiding disclosure of death-scene photographs). In this case, the Geneva Conventions further confirm that there is a substantial privacy interest against being publicly depicted in humiliating circumstances.*

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* *See* Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 (the "Third Geneva Convention"); Geneva Convention Relative to the Protection of Civilian Persons In Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("the Fourth Geneva Convention"). The United States is

Article 13 of the Third Geneva Convention requires a detaining power to protect any prisoner of war within its custody, "particularly against acts of violence or intimidation and against insults and public curiosity." (JA 107; *see also* JA 100-01). The Fourth Geneva Convention, which protects certain civilian detainees, contains a similar requirement. Article 27 of that Convention states that covered detainees "are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof

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a party to both Conventions. (JA 107). In this case, individuals in Iraq depicted in the photographs were entitled at the time the photographs were taken to protection under the Third and Fourth Geneva Conventions. (JA 106-07). With regard to those detainee photos, FOIA should be interpreted consistent with the Geneva Conventions, if at all possible. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 81 (1804). Although the President determined on February 7, 2002, that members of Al Qaeda and the Taliban do not qualify as prisoners of war under the Geneva Convention Relative to the Treatment of Prisoners of War, the President also determined that U.S. armed forces will treat detainees "in a manner consistent with the principles of Geneva" to the extent appropriate and consistent with military necessity. *See http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html.*

and against insults and public curiosity." (JA 101-02, 107).

Three government officials submitted declarations in the district court setting forth the United States' official interpretation of these provisions: Richard B. Jackson, Chief of the Law of War Branch for the Office of the Judge Advocate General of the United States Army (JA 430-433); Geoffrey Corn, the prior Chief of the Law of War Branch (JA 98); and Edward Cummings, a State Department Assistant Legal Advisor who has had official responsibility for interpreting the Geneva Conventions for more than 25 years. (JA 104-05). As these officials make clear, the United States has historically interpreted the Conventions to prohibit the release of photographs depicting detainees in humiliating or degrading circumstances. (JA 102-03, 108-111, 432).*

Thus, the United States has consistently protested the display of American prisoners on television. (JA 108-09). In January 1991, for instance,

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* The interpretation of an international treaty by the Executive Branch is entitled to "great weight" from the courts. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). This is particularly true where, as here, the interpretation "follows from the clear treaty language," in which case the court "must, absent extraordinarily strong evidence, defer to that interpretation." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). In this case, the Executive's interpretation of the Geneva Conventions easily qualifies for deference.

President Bush decried the "brutal parading" of Allied pilots by the previous Iraqi regime, calling it a "direct violation of every convention that protects prisoners." (JA 115). And in 2003, after several photographs were published depicting the processing of incoming detainees at Guantanamo Bay, DOD issued specific guidelines to ensure compliance with its "policy of limiting photography [ ] in accord with treating detainees consistent with the protections provided under the Third Geneva Convention." (JA 109).

Indeed, this interpretation is consistent with military regulations. For instance, Army Regulation 190-8, paragraph 1-5d, provides that "[p]hotographing, filming, and video taping" of individual detainees "for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited." (JA 128). That provision expressly implements the Geneva Conventions. (JA 109).

For similar reasons, the mere lack of identifying information does not eliminate the obligation to respect the dignity of detainees or to avoid exposing them to "public curiosity." By the district court's logic, the Geneva Conventions would permit the public viewing of enemy prisoners being subjected to mistreatment through the streets, as long as the prisoners wore hoods to hide their identity. However, the Geneva Conventions protect against the release of humiliating images regardless of whether an individual detainee can be identified.

In sum, under both legal precedent in the FOIA context and the United States' historical interpreta-

tion of the Geneva Conventions, the privacy interests at stake here outweigh the public's interest in disclosure. Accordingly, the Government properly withheld the photographs in their entirety under Exemptions 6 and 7(C).

3. Release of the Photos Would Not Significantly Advance the General Public Interest

As set forth above, Defendants have released the six investigative reports relating to all twenty one of the Army Photos. These investigations include not only the allegations of mistreatment that are the subject of the investigations, but also describe the conduct depicted in the photographs. Despite this extensive trove of public information, the district court held that the public interest in releasing the Army Photos outweighed the significant privacy interests of the detainees. That decision was incorrect.

For purposes of balancing under Exemption 7(C), the only cognizable public interest is advancing "public understanding of the operations or activities of the government" or disclosing "what the government is up to." *See Reporters Committee*, 489 U.S. at 775, 780. Moreover, the public interest must be both "significant" and "likely" to be advanced by disclosure of the disputed information. *Favish*, 541 U.S. at 172; *Senate of the Commonwealth of Purto Rico v. Department of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987). Finally, and perhaps most significantly here, the public interest in disclosure must be measured against the amount of information already in the

public domain. *Department of State v. Ray*, 502 U.S. 164 (1991).

In *Ray*, for example, the Supreme Court upheld the withholding on privacy grounds of the identities of repatriated Haitian refugees who had been interviewed by the State Department. The court reasoned that the "public interest has been adequately served by disclosure of redacted interview summaries," and the "addition of the redacted identifying information would not shed any additional light on the Government's conduct." *Id.* at 178. *Accord Halloran v. Veterans Admin.*, 874 F.2d 315, 324 (5th Cir. 1989) (the public interest "in learning about the nature, scope, and results of the [Veterans' Administration]'s investigation of, and its relationship with, one of its contractors . . . has already been substantially served by the release of the redacted transcripts and the VA's report on the investigation, from which the full nature and extent of the VA's actions, as well as whatever the VA learned from its surreptitious recording of the conversations, can be discerned"); *Marzen v. Department of Health & Human Servs.*, 825 F.2d 1148, 1153-1154 (7th Cir. 1987) (while the circumstances surrounding the "life and death of Infant Doe are of substantial public interest, release of the intimate details contained in the medical records would not appreciably serve the ethical debate since most of the factual material concerning the details of the case, including the final HHS report, are already in the public domain"); *Bast v. Department of Justice*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) ("While these are important public interests, we note that they have been served to a large extent by the substantial

release of information already made in this case. Thus, it is the incremental advantage to the public of releasing the undisclosed portions of the twelve documents which must be weighed against the invasion of personal privacy."); *Stone v. FBI*, 727 F. Supp. 662, 666 (D.D.C. 1990), *aff'd*, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990).

Applying these principles, courts have been particularly wary of ordering disclosure of photographs or videos implicating privacy interests when narrative descriptions of the information have already been publicly disseminated. For example, in *New York Times Co. v. NASA*, 782 F. Supp. 628 (D.D.C. 1991), the court upheld the withholding under Exemption 6 of an audiotape of the last words of the astronauts on the Space Shuttle Challenger. Despite the unquestioned public interest in examining NASA's conduct in connection with the shuttle disaster, the court noted that "NASA has provided the public with a transcript of the tape," and it concluded that releasing the tapes themselves would not significantly contribute to an understanding of how NASA operates. *Id.* at 632-33. Similarly, despite the obvious public interest in the presumed suicide of Vincent Foster, the autopsy reports were released, but the autopsy photos were not. *See Favish*, 541 U.S. at 171-73; *Accuracy in Media, Inc. v. National Park Service*, 194 F.3d 120, 123 (D.C. Cir. 1999). Finally, in *Application of KSTP Television*, 504 F. Supp. 360, 362-64 (D. Minn. 1980), the court refused to order the release of videotape recordings of a blindfolded and bound kidnap and rape victim taken by the kidnapper. The court found no public interest in release of the tape, noting that

the information on it had already been made publicly available through testimony at the kidnapper's trial (at which a portion of the tape had been played). *Id.* at 363.

In this case, release of the Army Photos would not "contribute significantly to public understanding of the operations or activities of the government." *Reporters Committee*, 489 U.S. at 775. To the extent plaintiffs seek information about the alleged mistreatment implicated by these photographs, that information has already been disclosed in detail. Because public records already "reveal the entire course of the investigation and the facts it uncovered," *Miller v. Bell*, 661 F.2d 623, 630-631 (7th Cir. 1981) (per curiam), release of the Army Photos would not contribute significantly to the public understanding of these events.

Indeed, the district court got things backward in reasoning (JA 392-93) that the power of the medium (here, photos) works in favor of disclosure. On the one hand, the *only* relevant public interest is revealing the operations and activities of government, which already has been accomplished as to these investigations of mistreatment. *Favish*, 541 U.S. at 175 (it "would be quite extraordinary" for the court to "ignore" the substantial information and investigations already in the public domain). On the other hand, the Supreme Court has recognized that release of images, particularly of such a personal nature, represents a significant invasion of privacy. *Id.* at 166-67. Because the public has already been informed of "what their government is up to," the

release of these photographs will not serve interests protected by FOIA.

In sum, the district court erred in holding that the limited public interest in disclosure of these photographs, measured against the extensive information already publicly released about the conduct depicted in those photographs, outweighs the significant privacy and treaty interests that disclosure would inevitably undermine or frustrate.

CONCLUSION

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

Dated: New York, New York
August 15, 2006

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for defendant-appellee hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are 13,689 words in the brief.

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ANTI-VIRUS CERTIFICATION

Case Name: ACLU v. Dept of Defense

Docket Number: 06-3140-cv

I, Natasha R. Monell, hereby certify that the Appellant's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 8/15/2006) and found to be VIRUS FREE.

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Dated: August 15, 2006