

06-3140-cv

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

**BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF
THE PRESS AND OTHER NEWS MEDIA ORGANIZATIONS
IN SUPPORT OF APPELLEES AND URGING THE AFFIRMANCE OF THE ORDER
OF THE DISTRICT COURT**

Lucy A. Dalglish
Loren A. Cochran
Corinna J. Zarek
1101 Wilson Boulevard, Suite 1100
Arlington, VA 22209
Tel: (703) 807-2100
Fax: (703) 807-2109

*Counsel for The Reporters Committee for Freedom
of the Press*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the following *amici curiae* disclose their corporate status; parent corporations; and 10 percent or greater stock ownership by publicly held corporations, where applicable.

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

ABC, Inc. is an indirect, wholly-owned subsidiary of The Walt Disney Company, a publicly traded corporation. No publicly held corporation owns 10 percent or more of The Walt Disney Company's stock.

Advance Publications, Inc. has no parent corporations; no publicly held corporation owns 10 percent or more of its stock.

The American Society of Newspaper Editors has no parent corporation and no stock. ASNE is a "trade association" because it is a continuing association of numerous individuals operated for the purpose of promoting the general professional, legislative and other interests of the news media. It has no parent corporation and no stock.

The Associated Press is not a publicly held corporation and does not have a parent corporation.

Cable News Network LP, LLLP, is a division of Turner Broadcasting System, Inc., a private corporation owned by Time Warner Company. No publicly

traded corporation has a 10 percent or greater stock ownership in Time Warner, a publicly traded company.

CBS Broadcasting is an indirect wholly-owned subsidiary of CBS Corporation, whose shares are publicly-traded. CBS Broadcasting is not a publicly-traded company.

The E.W. Scripps Company, a publicly traded company, has no parent corporations and no publicly held corporation owns 10 percent or more of its stock.

Military Reporters & Editors, Inc. is a not-for-profit corporation with no parent corporation and no stock.

NBC Universal, Inc. is owned (through intermediate entities) by General Electric Company and Vivendi Universal, S.A., both of which are publicly held corporations. No other publicly held company owns more than 10 percent of the stock of NBC Universal, Inc.

The Newspaper Guild – CWA issues no stock and has no parent corporations.

The Radio-Television News Directors Association is a nonprofit organization with no parent company and does not issue stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

USA TODAY is a division of Gannett Satellite Information Network, Inc., which is a subsidiary of Gannett Co., Inc. Gannett Co., Inc. has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

The Washington Post is a wholly owned subsidiary of The Washington Post Company, a publicly held corporation. Berkshire Hathaway, Inc., a publicly held company, has a 10 percent or greater ownership interest in The Washington Post Company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF INTEREST 1

INTRODUCTION 6

STATEMENT OF THE ISSUE 7

STATEMENT OF THE CASE 7

SUMMARY OF ARGUMENT 9

ARGUMENT 14

 I. The core purpose of the Freedom of Information Act
 is to provide the public facts about government conduct 14

 A. Releasing the Army Photos will allow
 citizens to evaluate government activity
 and ensure accountability 15

 B. Photography is the closest many citizens
 get to viewing military action conducted on
 their behalf 18

 II. The Freedom of Information Act grants public access
 to government documents that are not exempted
 from release 20

 A. The government’s plea for the unprecedented
 expansion of Exemption 7(F) is inconsistent
 with the law’s history and would compromise
 FOIA’s intent 22

 B. The images could not reasonably invade the
 personal privacy of the subjects depicted within 25

CONCLUSION 28

CERTIFICATIONS 32

TABLE OF AUTHORITIES

CASES

<i>American Civil Liberties Union v. U.S. Dep't of Defense</i> , 389 F. Supp. 2d 547 (S.D.N.Y. 2005)	<i>passim</i>
<i>Anderson v. U.S. Marshals Serv.</i> , 943 F. Supp. 37 (D.D.C. 1996)	25
<i>Associated Press v. U.S. Dep't of Defense</i> , No. 05 Civ. 3941, 2006 WL 13042 (S.D.N.Y. Jan. 4, 2006)	26
<i>Brady-Lunny v. Massey</i> , 185 F. Supp. 2d 928 (C.D. Ill. 2002)	25
<i>Center for Nat'l Sec. Studies v. U.S. Dep't of Justice</i> , 331 F.3d 918 (D.C. 2003)	25
<i>County of Madison v. U.S. Dep't of Justice</i> , 641 F.2d 1036 (1st Cir. 1980)	14
<i>Dep't of Air Force v. Rose</i> , 425 U.S. 352 (1976)	14
<i>EPA v. Mink</i> , 410 U.S. 73 (1973)	14
<i>Four Navy Seals v. Associated Press</i> , No. 05CV0555JM, 2005 WL 3750156 (S.D. Cal. July 12, 2005)	17
<i>Grand Cent. P'ship, Inc. v. Cuomo</i> , 166 F.3d 473 (2d Cir. 1999)	10, 20-21
<i>Johnston v. U.S. Dep't of Justice</i> , No. 97-2173, 1998 U.S. App. LEXIS 18557 (8th Cir. Aug. 10, 1998) ...	23

<i>LaRouche v. Webster</i> , No. 75 Civ. 6010 (MJL), 1984 WL 1061 (S.D.N.Y. Oct. 23, 1984) . . .	12, 24
<i>Living Rivers, Inc. v. U.S. Bureau of Reclamation</i> , 272 F. Supp. 2d 1313 (D. Utah 2003)	12, 24
<i>McQueen v. United States</i> , 264 F. Supp. 2d 502 (S.D. Tex. 2003)	23
<i>Nat’l Archives & Records Adm’n v. Favish</i> , 541 U.S. 157 (2004)	13, 27
<i>Nat’l Council of La Raza v. U.S. Dep’t of Justice</i> , 411 F.3d 350 (2d Cir. 2005)	15, 21
<i>NLRB v. Robbins Tire & Rubber Co.</i> , 437 U.S. 214 (1978)	14
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980)	11
<i>Rugiero v. Dep’t of Justice</i> , 257 F.3d 534 (6th Cir. 2001)	23
<i>Shores v. FBI</i> , 185 F. Supp. 2d 77 (D.D.C. 2002)	23
<i>U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press</i> , 489 U.S. 749 (1989)	20
STATUTES	
Freedom of Information Act, 5 U.S.C. § 552 (2005)	<i>passim</i>
OTHER	
Appellants’ Brief in 06-3140-cv	18

David A. Anderson, <i>Freedom of the Press in Wartime</i> , 77 U. Colo. L. Rev. 49, 49-50 (2006)	15
Louis Brandeis, <i>Other People's Money</i> 62 (1933)	12
Michael Browning, <i>War photos that changed history</i> , Palm Beach Post, May 12, 2004 at 1D	19
Seymour Hersh, <i>Torture at Abu Ghraib</i> , May 10, 2004	16
Jeremy Scahill, <i>On CNN, the real Abu Ghraib scandal is the photos, not the torture</i> , The Huffington Post	16
Walter Shapiro, <i>Why we're publishing the new Abu Ghraib photos</i> , Salon, Feb. 16, 2003	16
<i>Breaking — New Abu Ghraib photos released</i> , Daily Kos	16
<i>Letters to the Editor</i> , Salon	16
<i>Q&A Iraq prison abuse scandal</i> , BBC News	28
S. Rep. No. 813, 89th Cong. 1st Sess. 3 (1965)	14
Susan Sontag, <i>Regarding the Pain of Others</i> (2002)	10

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee files this brief *amici curiae* on behalf of several media organizations and in support of the Plaintiffs-Appellees, the American Civil Liberties Union, Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense, and Veterans for Peace. The parties to the case have consented to the submission of this brief.

ABC, Inc. is a broad-based communications company with significant holdings in the United States and abroad. Alone or through its subsidiaries, ABC owns and operates ABC News, the ABC Radio Network, 72 radio stations and 10 television stations that regularly gather and report news to the public. ABC News produces the television programs “*World News Tonight*,” “*20/20*,” “*PrimeTime Live*,” “*Good Morning America*” and “*Nightline*,” among others.

Advance Publications, Inc., directly or through subsidiaries, publishes daily newspapers in more than 25 cities and weekly business journals in more than 40 cities throughout the United States. It also, directly or through subsidiaries, owns Condé Nast Publications, Parade Publications, and Golf Digest Publications, which together publish over 25 magazines with nationwide circulation, including *The New Yorker*, and many Internet sites that are related to its print publications.

The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing unfettered and effective press in the service of the American people.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 5,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and maintains bureaus in 240 cities worldwide. AP news reports in print and electronic formats of every kind reach a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 121 countries.

Cable News Network LP, LLLP, a division of Turner Broadcasting System, Inc., a Time Warner Company, is one of the world's most respected and trusted sources for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; four Web sites, including CNN.com, the first major news and information Web site; CNN Pipeline, an on-demand broadband video service; CNN Newsource, the world's most extensively syndicated news service; and partnerships for four television networks and one Web site. CNN employs more than 3,000 news professionals, who gather news throughout the world.

CBS Broadcasting Inc. produces and broadcasts news, public affairs and entertainment programming. Its CBS News division produces morning, evening and weekend news programming, as well as news and public affairs magazine programs such as *60 Minutes* and *48 Hours Investigates*. CBS also owns and operates broadcast television stations nationwide, and makes its programming available over the CBS Television Network.

The E.W. Scripps Company is a diverse media enterprise with 18 daily newspapers and numerous weekly publications reaching approximately 1 million readers, nine broadcast television stations, five national cable networks that reach

more than 90 million households, an electronic commerce and interactive media division and licensing and syndication division.

Military Reporters & Editors, Inc. is a not-for-profit corporation consisting of more than 150 journalists, journalism educators, and others from around the country involved in reporting on military, national security and homeland defense issues. Military Reporters & Editors, Inc. exists to advance public understanding of the military, national security and homeland defense; to educate and share information with its members and the public on best practices, tools and techniques for such coverage; to represent the interest of working journalists to the government and military; and to assure that journalists have access to places where the U.S. military and its allies operate. Its members heavily rely on public records and proceedings to inform themselves and the public about these issues.

NBC Universal, Inc., is one of the world's leading media companies. NBC Universal owns and operates the NBC television network, the Spanish-language network Telemundo, NBC News, television stations, and several news and entertainment networks, including MSNBC and CNBC. NBC News produces programs including the Today show, NBC Nightly News with Brian Williams, Dateline and Meet the Press.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America and is America's largest communications and media union, representing more than 700,000 men and women in both private and public sectors.

The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of news directors, news directors, news associates, educators and students in radio, television, cable and other electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma

Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

USA TODAY is the nation's largest-selling daily newspaper, with a circulation of approximately 2.3 million. USATODAY.com is one of the top newspaper sites on the Internet.

The Washington Post is a leading newspaper with a nationwide daily circulation of over 678,000 and a Sunday circulation of over 965,000.

INTRODUCTION

The Reporters Committee for Freedom of the Press and fellow *amici curiae* respectfully submit this memorandum of law with the prior consent of the parties in opposition to the government's claim that the Freedom of Information Act, 5 U.S.C. § 552 (hereinafter "FOIA"), permits the withholding of photographs and videos depicting detainee abuse in Iraq and Afghanistan. First, the government argues that the conduct and abuse documented in the requested records are so incendiary that their release "will pose a clear and grave risk of inciting violence and riots against American troops and Coalition forces" in Iraq and Afghanistan (FOIA Exemption 7(F)). Declaration of Brig. Gen. Carter Ham (Joint Appendix ("JA") 443). The government also argues that the disclosure of the records would

constitute an unwarranted invasion of personal privacy (Exemptions 6 and 7(C)). Under the government's reasoning, the more likely it is that disclosure will show objectionable government activities, the greater the need to shield the public from such information. *Amici* urge this court to decline the government's unprecedented invitation to expand the scope of Exemption 7(F) in this way and to reject the use of the personal privacy exemptions. Such a use of the statute would substantially erode meaningful news media coverage of official misconduct abroad during times of war, in derogation of the underlying purpose of FOIA.

Disclosure is called for because the more secretive the government becomes, the less likely the public is to obtain facts about government conduct through the news media and to hold government accountable through democratic institutions.

STATEMENT OF THE ISSUE

Must the government, acting through the Department of Defense and the Central Intelligence Agency, release documents requested by the American Civil Liberties Union under the Freedom of Information Act, 5 U.S.C. § 552, as ordered by the United States District Court for the Southern District of New York?

STATEMENT OF THE CASE

The American Civil Liberties Union and other civil rights groups

(hereinafter “the ACLU group”) seek government documents concerning foreign detainees in United States custody. As set forth in the Statement of the Case of the plaintiffs-appellees, the groups requested documents and photographs under the Freedom of Information Act, 5 U.S.C. § 552, in October 2003. By September 2004, the government had not yet produced or identified any documents, claimed any exemptions, or stated any objections to the request. The ACLU group filed this lawsuit to compel the government to comply with FOIA, and in a September 2004 order, the U.S. District Court for the Southern District of New York gave the government 30 days to produce the requested documents or provide the ACLU with a log of alleged privileged documents.

The government produced many of the requested documents. Certain additional documents held by the Department of Defense and the Central Intelligence Agency had not yet been released when both the ACLU group and the government moved for summary judgment. The district court held that while certain information was properly withheld under FOIA (which the ACLU group has not challenged), other photographs and videos produced by military policeman Joseph Darby at Abu Ghraib prison were not exempt from disclosure under FOIA. The government appealed the decision to this court, but later withdrew its appeal.

Calling the Darby photographs the “best evidence” of what occurred at Abu

Ghraib, the district court discussed the “substantial public interest” in the images and ordered their release, calling publication of the photographs “central to the purpose of FOIA.” *American Civil Liberties Union v. U.S. Dep’t of Defense*, 389 F. Supp. 2d 547, 578 (S.D.N.Y. 2005). The court ruled that with identifying features of the subjects redacted, the release of the photographs would not be an “unwarranted invasion of personal privacy” under Exemptions 6 or 7(C), nor would it likely “endanger the life or physical safety of any individual” under Exemption 7(F). *Id.*

Following the government’s withdrawal of its appeal, the district court ordered the release of additional images depicting detainee abuse in Iraq and Afghanistan, termed the “Army Photos.” Relying on its original analysis of the issue, the court ordered release of these images, also with identifying characteristics redacted. Orders of June 9, 2006, and June 21, 2006 (JA 508, 513). The government has appealed those orders to this court. The district court properly recognized the function of the images in holding that their release was both required by FOIA and consistent with the entire purpose of the law.

SUMMARY OF ARGUMENT

Photographs depict matters of importance in ways words cannot. There is significant truth to the axiom “a picture is worth a thousand words.” At mere

mention of an historic event, certain photographic images instantly come to mind: America's poor struggling through the Great Depression (Appendix A-1); mushroom clouds leaving thousands dead in their wake in Hiroshima and Nagasaki (App. A-2); soldiers raising the flag at Iwo Jima (App. A-3); liberated Jews cheering at the gates of Dachau (App. A-4); a naked Vietnamese girl running through the streets following a napalm attack (App. A-5); a jetliner on September 11 as it was about to crash into tower two of the WTC (App. A-6); families grieving over the bodies of the 2004 tsunami victims (App. A-7). The public absorbs these images, ingraining them with the events they represent, so as to preserve their record of history. "To remember is, more and more, not to recall a story but to be able to call up a picture." Susan Sontag, *Regarding the Pain of Others* 89 (2002). Photographic images are uniquely able to tell the truth simply and without embellishment.

The public depends on accurate evidence of government activity to evaluate its leaders and make educated choices at the polls. FOIA was enacted to "promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed." *Grand Cent. P'ship, Inc., v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999). In their constitutionally protected role, the media frequently serve as the primary conduit of government

information to the public. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

The so-called Army Photos held by the U.S. Department of Defense provide concrete, first-hand evidence of alleged mistreatment and abuse that occurred in Iraq and Afghanistan. The government's argument that the public should not see these images because the Geneva Conventions protect detainees' rights from "public curiosity" is off point — the public is not "curious" about what the government is up to; it is charged with a duty to learn about government conduct and hold officials accountable for it.

Exemption 7(F) of FOIA does not permit the government to hide records of *its own misconduct* or *the misconduct of its agents* based upon a fear of violent reactions to the disclosure. Exemption 7(F) is intended to protect the safety of *individuals* linked to law enforcement investigations. *Amici* do not dispute, as a general matter, the legitimacy of the government's interest in the safety of its military personnel, or even in the safety of foreigners living in American zones of conflict overseas. However, *amici* object to the government's misdirected effort to undermine FOIA by extending the reaches of Exemption 7(F) to all persons everywhere at once, asserting, in essence, that its own misconduct has created an indictment too damning for the public to see.

Exemption 7(F) is most frequently used to protect names from disclosure when publicity would ostensibly endanger individuals' personal safety. Two federal district courts have also allowed the use of Exemption 7(F) to suppress dam inundation maps and machine gun plans under the theory that the disclosure of technical information could be directly utilized to commit terrorism or criminal acts. *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1321-22 (D. Utah 2003); *LaRouche v. Webster*, No. 75 Civ. 6010 (MJL), 1984 WL 1061 at 8 (S.D.N.Y. Oct. 23, 1984). But the government errantly proposes a novel yet misguided application of Exemption 7(F) based upon the degree of outrage disclosure might provoke. In essence, the government's suggested remedy to the misconduct in Iraq and Afghanistan is to cloak everything in the darkness of secrecy. There is no precedent for the construction the government proposes in this case. Instead, *amici* submit that the better approach, to encourage critical dialogue regarding questionable government activity, is through open records. As Supreme Court Justice Louis Brandeis pointed out more than seventy years ago, "Sunlight is . . . the best of disinfectants."¹

Expanding Exemption 7(F) to accommodate the government's argument would significantly undermine both the intent of the exemption and the integrity

¹ Louis Brandeis, *Other People's Money* 62 (1933).

of the Act as a whole for two reasons. First, the government’s interpretation would result in a perverse outcome by rewarding state actors who commit activities that provoke fears of violent retribution should those acts be uncovered. Second, the government’s justification is so vague and overbroad with regard to improper military conduct that Exemption 7(F) would fast become an exception that entirely swallows the rule.

Exemptions 6 and 7(C) of FOIA protect unwarranted invasions of personal privacy. 5 U.S.C. § 552(b). The standard for Exemption 6 is higher — a *clear* showing of an unwarranted invasion of personal privacy — but in this case, the government falls short of even the lesser standard set in Exemption 7(C) — a *reasonable expectation* of an unwarranted invasion of personal privacy. In applying the balancing standard set forth to determine whether a privacy violation is warranted, the public’s “substantial interest” in these photographs far outweighs the minimal privacy invasion in releasing images of persons whose identifying features have been masked, and furthers the very purposes FOIA was intended to advance — allowing the public meaningful review of government action. *Nat’l Archives & Records Adm’n v. Favish*, 541 U.S. 157, 172 (2004).

The orders of the U.S. District Court for the Southern District of New York requiring release of the Army Photos should be affirmed.

ARGUMENT

I. The core purpose of the Freedom of Information Act is to provide the public facts about government conduct.

The core purpose of FOIA is “to establish a general philosophy of full agency disclosure.” S. Rep. No. 813, 89th Cong. 1st Sess. 3 (1965); *County of Madison v. U.S. Dep’t of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1980).

The U.S. Supreme Court has recognized lawmakers’ intent to break down the wall of government secrecy and promote accountability. Through FOIA, the Court held that Congress intended “[t]o make crystal clear the congressional objective, to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (*internal quotes omitted*).

Further, the Supreme Court has recognized that FOIA enables citizens to act as watchdogs, noting that the Act “seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.” *EPA v. Mink*, 410 U.S. 73, 80 (1973). FOIA is crucial in promoting an informed citizenry — a virtue vital to a functioning democracy and to preventing government corruption. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

A. Releasing the Army Photos will allow citizens to evaluate government activity and ensure accountability.

FOIA is the mechanism that provides the American people with accurate information about their government. As the district court found, production and publication of the Darby photos “coheres with the central purpose of FOIA, to ‘promote honest and open government and to assure the existence of an informed citizenry’” *ACLU*, 389 F. Supp. 2d at 551 (quoting *Nat’l Council of La Raza v. U.S. Dep’t of Justice*, 411 F.3d 350, 355 (2d Cir. 2005)).

While the military has traditionally attempted to suppress information that may prove damaging to public support for wartime activity, and has even banned reporters from war zones,² the press has traditionally fought to inform citizens on matters of war. In the current wartime climate, reporters are commonly “embedded” with military units. However, in this conflict, reporters have been denied access to military detention facilities, including Abu Ghraib, and did not report on the alleged abuse tactics in that matter until photographs were leaked in April 2004.³

²See David A. Anderson, *Freedom of the Press in Wartime*, 77 U. Colo. L. Rev. 49, 49-50 (2006) (discussing the history of press access to matters of war, arguing for a constitutional right for the press to cover war).

³The CBS news magazine program “60 Minutes II” first reported on the existence of the photographs depicting abuse at the Abu Ghraib prison on April

The public outcry that ignited in April 2004 and was rekindled upon release of additional photos in February 2006 makes clear that the public not only wants to exercise its right to know what its government is up to, but to continue to debate and discuss the issues raised by these images.⁴ “America — and the world — has the right to know what was done in our name,” the online media outlet *Salon* wrote in advocating release of the leaked images.⁵ Providing concrete visual

28, 2004. The photographs were also published in *The New Yorker* magazine along with a May 10, 2004, article. Seymour Hersh, *Torture at Abu Ghraib*, May 10, 2004, available at: http://www.newyorker.com/fact/content?040510fa_fact (last visited Aug. 24, 2006).

⁴*Salon*'s decision to publish some of the Darby photos on its Web site on Feb. 16, 2006, had generated 145 reader letters by Mar. 2, 2006 — more than three times as many as the next-responded piece, and more than 10 times as many as most *Salon* pieces that week. See *Letters to the Editor*, *Salon*, available at http://letters.salon.com/opinion/feature/2006/02/16/abu_ghraib_intro/view/?show=all (last visited Aug. 23, 2006). See also *Breaking — New Abu Ghraib photos released*, *Daily Kos*, available at <http://www.dailykos.com/story/2006/2/14/183059/640> (last visited Aug. 23, 2006) (displaying some of the photos with 330 reader comments posted) and Jeremy Scahill, *On CNN, the real Abu Ghraib scandal is the photos, not the torture*, *The Huffington Post*, available at http://www.huffingtonpost.com/jeremy-scahill/on-cnn-the-real-abu-ghrai_b_15758.html (last visited Aug. 23, 2006) (discussing the images and containing more than 30 posted remarks from readers).

⁵See Walter Shapiro, *Why we're publishing the new Abu Ghraib photos*, *Salon*, Feb. 16, 2003, available at: http://www.salon.com/opinion/feature/2006/02/16/abu_ghraib_intro/index.html (last visited Aug. 23, 2006) (discussing that releasing images in addition to those previously released allows the public to know what government is doing).

evidence allows individuals to evaluate for themselves what occurred and how and why the system failed. The public interest in military prisoner abuse was also recently discussed in *Four Navy Seals v. Associated Press*, No. 05CV0555JM, 2005 WL 3750156 (S.D. Cal. July 12, 2005), where the court rejected privacy arguments as a rationale for withholding photos of soldiers engaging in potential abuse activity. “[T]he public has demonstrated an intense interest in, and concern about, Iraqi prisoner abuse scandals involving the American military Plaintiffs voluntarily assumed a position of public notoriety when they photographed themselves engaged in actions that seemed to suggest possible mistreatment of captive Iraqis.” *Id.* at 6.

As the district court wrote in this case: “[T]he pictures are the best evidence of what happened, better than words, which might fail to describe, or summaries, which might err in their attempt to generalize and abbreviate.” *ACLU*, 389 F. Supp. 2d at 578. The government’s argument that accompanying investigative reports detailing the conduct would suffice to give the public an understanding of mistreatment and abuse in Iraq and Afghanistan is erroneous. Written reports and facts detailing conduct simply do not describe images as sufficiently as viewing the images themselves.

As suggested in the district court’s opinion, the “improper and unlawful

conduct of American soldiers” as well as “the command structure that failed to exercise discipline over the troops,” the “poor training” and “the regulations and orders” are all issues the media continues to report on and issues that citizens want information about. *Id.* at 578. To truly hold the government accountable for its actions, citizens must be allowed to evaluate the “best evidence” of what occurred. Arguing that “release of the photographs thus would not add much to the public’s knowledge of what transpired,” Appellants’ Brief at 5, puts the government in the position of choosing which evidence is “best,” and which would add to public knowledge and understanding. This position completely undermines the notion of allowing the public to independently evaluate government acts and ignores the entire purpose of FOIA — to allow the public the right to go to the government and obtain information as to official actions.

B. Photography is the closest many citizens get to viewing military action conducted on their behalf.

When Civil War photographer Matthew Brady received permission from President Lincoln to photograph the Civil War, he set in motion what would be a reliance by the public on visual images to depict important historical events. Photographs completely changed how Americans view war — they remove the physical barrier of distance and enable the viewer to be an eyewitness to history.

“Photography has marched arm-in-arm with war since its invention,” providing the public with a reality it would not otherwise know. Michael Browning, *War photos that changed history*, Palm Beach Post, May 12, 2004 at 1D.

Along with his team of photographers, Brady made it possible for American citizens to view images of the Civil War. It marked the first time most people would see images of the suffering of war, setting the precedent for military coverage to come. A century later, Associated Press photographer Eddie Adams brought the Vietnam War to the United States with his photograph of the South Vietnamese National Police Chief executing a Viet Cong officer on a Saigon street with a single pistol shot to the head (App. A-8). Then in the 1990s, the Gulf War came to life with freelance photographer Peter Turnley’s unforgettable image of the Iraqi soldier incinerated at the wheel of his vehicle (App. A-9). Few will forget the photographs that marked the beginning of the present war on terror: smoke filling the sky as the World Trade Center towers burned on September 11 (App. A-10). And the images of the war that followed: the Saddam Hussein statue toppling in Baghdad (App. A-11); Associated Press photographer Khalid Mohammed’s photo of the bodies of the four burned contractors hanging from an Iraqi bridge (App. A-12); and the American flag-draped caskets returning from the battlefield (App. A-13). These images remain a part of the historical record. They

have been used to paint a picture for Americans hundreds of miles from the lands in which they were taken to allow for meaningful evaluation and review, and to allow the public to see what is being done in its name.

Visual images are more searing than words. Images tell an entire story instantly where it would take a writer pages to describe what a single picture can convey. Photojournalism depicts what was occurring at a given place at a given time permitting the public to view the facts of an event with their own eyes instead of requiring them to rely on a conduit, such as a writer, to accurately convey the details of an event. Accurate information is one of the best tools to evaluate any situation. When provided with truthful information about government, citizens can best evaluate the choices their leaders have made and can best hold them accountable.

II. The Freedom of Information Act grants public access to government documents that are not exempted from release.

The “core purpose” of FOIA is to further “public understanding of the operations or activities of the government,” providing “that the Government’s activities be opened to the sharp eye of public scrutiny.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 775 (1989). The Act exists to “promote honest and open government and to assure the existence of

an informed citizenry [in order] to hold the governors accountable to the governed.” *Cuomo*, 166 F. 3d at 478. The ACLU initially requested documents — including photos and images of prisoners of war in degrading positions — under FOIA to “inform and educate the public, and to spark debate about the causes and forces that led to the breakdown of command discipline at Abu Ghraib prison, and perhaps elsewhere.” *ACLU*, 389 F. Supp. 2d at 573. The ACLU’s intentions in its request for those images, as well as in its renewed request for *all* images depicting military abuse of detainees, are “the very purposes that FOIA is intended to advance,” the district court wrote, pointing to the “substantial public interest” in the photos “evidenced by the active public debate” engaged in upon initial release of some photos in 2004. *Id.* It is undisputed that the ACLU request, which would allow the public to further discuss and debate the images, was properly made within the bounds of FOIA.

FOIA’s nine exemptions safeguard against dangers that could occur upon releasing information that requires protection. “Consistent with FOIA’s purposes, these statutory exemptions are narrowly construed.” *La Raza*, 411 F.3d at 355-56. The government’s argument against releasing these photos is flawed because it does not meet the criteria for the three privacy related exemptions raised.

A. The government’s plea for the unprecedented expansion of Exemption 7(F) is inconsistent with the law’s history and would compromise FOIA’s intent.

Statutory exemptions protect certain government records from release even when their content sheds light on government operations and activities. In the case of Exemption 7(F), FOIA protects from disclosure “records or information compiled for law enforcement purposes,” only to the extent that release “could reasonably be expected to endanger the life or physical safety of any individual.” 5 U.S.C. § 552(b)(7)(F). No court has interpreted Exemption 7(F) to protect the type of records at issue here — where content may reveal government conduct so disturbing that it could arguably be expected to provoke violent reactions against those who engaged in the conduct from the public that sees the images.

The government initially raised this argument in its first appeal to this court with a declaration from then-Chairman of the Joint Chiefs of Staff Gen. Richard B. Myers that the conduct and abuse documented in the Abu Ghraib images are so incendiary that their release “could reasonably be expected” to pose a threat to the physical safety of military personnel and civilians in Iraq and Afghanistan. Declaration of Gen. Richard B. Myers (JA 268). However, upon the government’s April 11, 2006, authentication of the Darby photos, no reports of increased terror activities or violence against U.S. personnel occurred. The government has failed

to produce any subsequent evidence substantiating its fears of rampant violence resulting from the release of the first images. With no reports of violent acts against U.S. personnel occurring from the recent release of images of this nature, there is no basis upon which the government or its generals Brig. Gen. Carter Ham and Gen. Richard B. Myers can claim release of similar images “can reasonably be expected to incite violence.” The only reasonable expectation for release of the Army Photos depicting mistreatment of Iraqi and Afghani detainees is that they will be received largely the same as the Darby photos depicting mistreatment of Iraqi and Afghani detainees — as public records that give citizens an opportunity to hold government officials accountable for their actions.

Examination of federal case law since Exemption 7(F)’s amendment shows the exception has been primarily used to protect the *names* of law enforcement agents, witnesses and informants, when that disclosure would endanger their life or physical safety. *See Rugiero v. U.S. Dep’t of Justice*, 257 F.3d 534, 552 (6th Cir. 2001) (withholding names of DEA agents); *Johnston v. U.S. Dep’t of Justice*, No. 97-2173, 1998 U.S. App. LEXIS 18557, at 2 (8th Cir. Aug. 10, 1998) (same); *McQueen v. United States*, 264 F. Supp. 2d 502, 521 (S.D. Tex. 2003) (withholding names of informants and undercover agents); *Shores v. FBI*, 185 F. Supp. 2d 77, 85 (D.D.C. 2002) (withholding names of witnesses).

At least two district court cases allow Exemption 7(F) to protect something other than information about named individuals, and in those instances courts allowed the exemption of technical information that could arguably have been directly used to commit crime or acts of terrorism. In *Living Rivers*, a district court withheld inundation maps for fear terrorists could use that information to place at risk the life or safety of downstream residents who would be flooded by dam breaches. 272 F. Supp. at 1321. In *LaRouche*, a district court endorsed the use of Exemption 7(F) to suppress machine gun plans that could potentially allow “individuals armed with homemade devices constructed from the expertise of other law enforcement people” to use them against law enforcement officers. 1984 WL 1061 at 8. In both cases, district courts found that technical information might be useful to terrorists or criminals.

The government’s argument in this case purports neither to protect named individuals from disclosures that endanger them, nor to withhold technical information that might assist in circumvention of the law. Rather, the government asks this Court to invoke the exemption simply because the records might strongly indict its operations and activities. An open government statute intended to permit the public to hold its government accountable cannot protect such an interest.

The government argues that three other district court decisions — two

which protect names in addition to other information, and a third which only protects names — should also extend the application of Exemption 7(F) beyond its current reach. In *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. 2003), names and other detention information regarding persons held for questioning in respect to the September 11 terrorist attacks was withheld because disclosure might make the *facilities* “vulnerable to retaliatory attacks,” but the court found that information protected under Exemption 7(A) — law enforcement records that could interfere with enforcement proceedings — rather than Exemption 7(F), reserving judgment as to whether Exemption 7(F) would allow them to be withheld. *Id.* At 925. Even if the case had been affirmed on Exemption 7(F) grounds, in this case the government does not argue that the Abu Ghraib *facility* needs protecting. Both of the other cases, *Anderson v. U.S. Marshals Service*, 943 F. Supp. 37, 40 (D.D.C. 1996) and *Brady-Lunny v. Massey*, 185 F. Supp. 2d 928 (C.D. Ill. 2002), address prisoner names or identities. In this case, with all identifying characteristics of the parties depicted in the Darby photos redacted or masked, these cases are improperly applied.

B. The images could not reasonably invade the personal privacy of the subjects depicted within.

Exemptions 6 and 7(C) of FOIA — which protect invasion of personal

privacy — do not apply to these images. 5 U.S.C. § 552(b). Exemption 6 allows withholding personnel and medical files whose release would amount to a “clearly unwarranted invasion of personal privacy,” *id.* at (b)(6), while Exemption 7(C) permits withholding law enforcement records that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” *Id.* at (b)(7)(C).

Although Exemption 6 presents a higher threshold, in this case the government cannot even make the lesser showing under Exemption 7(C) that producing the images could reasonably lead to an unwarranted invasion of personal privacy. All identifying characteristics of the persons in the photographs have been redacted. The government argues that based on details in accompanying reports, it may be possible to determine the identities of individual detainees depicted.⁶ No matter how detailed the discussion of a detainee’s characteristics may be in a report, with all the distinguishing characteristics redacted, there would be no way to use those characteristics for identification purposes. On balance, the public policy interest in evaluating these images far

⁶The U.S. District Court for the Southern District of New York recently ruled that detainees in U.S.-run prison facilities do not have a reasonable expectation of privacy in their identities. *Associated Press v. U.S. Dep’t of Defense*, No. 05 Civ. 3941, 2006 WL 13042 (S.D.N.Y., Jan. 4, 2006) (ordering the government to release identifying information on detainees held at Cuba’s Guantanamo Bay military facility).

outweighs the minimal invasion that “could” occur in viewing images of persons whose identifying features have been masked.

Neither party disputes that the images were compiled for law enforcement purposes, *ACLU*, 389 F. Supp. 2d at 570, so the standard under Exemption 7(C) for determining whether the government is warranted in releasing information that may invade personal privacy requires a showing “that the public interest sought to be advanced is a significant one” and that “the information is likely to advance that interest.” *Favish*, 541 U.S. at 172.

The public interest in military abuse photos is, as the district court explained, “substantial,” both considering the debate and discourse that followed the initial release of some of the Darby photos in 2004, and more recently following the publication of many more images in February 2006. Discovery of the Darby images and others like them has led to citizen discussion on military interrogation techniques, detainment facilities and command structure, and of the need for government accountability.⁷ Several members of the military were found guilty of abuse or dereliction of duty and several others have been court martialed over their suspected involvement; both the military and Congress are conducting

⁷See note 3, *supra*, pointing to citizen discussion and reaction on the images and government accountability issues surrounding them.

investigations on the issue.⁸ Releasing all military misconduct images to allow for meaningful evaluation of their contents would substantially advance the public's interest in knowing "what its government is up to," ensuring government accountability for actions it has conceded were wrong.

The district court correctly found no unwarranted invasion of personal privacy could occur by releasing the properly redacted images, based on the "substantial public interest" in the images, which it calls "the very purposes that FOIA is intended to advance." *ACLU*, 389 F. Supp. 2d at 573. Releasing these images will permit meaningful debate about the circumstances that led to their existence. With no justification exempting their release under FOIA, the Army Photos must be provided to the ACLU group.

CONCLUSION

The release of the Army Photos will inform and educate the public, and spark debate about the government's treatment of Iraqi and Afghani detainees. Providing citizens with information on government action is the very purpose that FOIA is intended to advance. The government has not demonstrated that the Army Photos were properly withheld under FOIA. The war against terror cannot

⁸See *Q&A Iraq prison abuse scandal*, BBC News, available at <http://news.bbc.co.uk/2/hi/americas/3701941.stm> (last visited Aug. 24, 2006) (discussing courts martial and a demotion stemming from the abuse scandal).

compromise the long-established values and institutions of a democratic society. Citizens must be allowed to receive and evaluate all information available to them in order to hold their government accountable for its actions. The media's role is crucial to ensure that evaluation and oversight occurs. The district court properly recognized the media's important public function in holding that the release of abuse images was not only required under FOIA, but illustrative of the entire purpose of the law. For these reasons, this Court should affirm the district court and order the release of the Army Photos, as redacted by the district court to protect certain privacy rights.

Respectfully submitted,

Lucy A. Dalglish /s/ _____
Lucy A. Dalglish
Loren A. Cochran
Corinna J. Zarek
1101 Wilson Blvd., Ste. 1100
Arlington, VA 22209
Tel: (703) 807-2100
Fax: (703) 807-2109

*Counsel for The Reporters Committee for
Freedom of the Press*

(Counsel continued on following pages)

OF COUNSEL:

Neil M. Rosenhouse
Sabin, Bermant & Gould LLP
Four Times Square, 23rd Floor
New York, NY 10036-6526
Counsel for Advance Publications

Kevin M. Goldberg
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street
Arlington, VA 22209
*Counsel for American Society of
Newspaper Editors*

Barbara L. Camens
Barr & Camens
1025 Connecticut Ave., NW, Ste. 712
Washington, DC 20036
*Counsel for The Newspaper
Guild-CWA*

Kathleen A. Kirby
Wiley Rein & Fielding LLP
1776 K St., NW
Washington, DC 20006
*Counsel for The Radio-Television
News Directors Association*

Charles D. Tobin
Holland & Knight, LLP
2099 Pennsylvania Ave., NW
Suite 100
Washington, DC 20006-6801
*Counsel for Military Reporters and
Editors, Inc.*

David H. Tomlin
Assistant General Counsel
Associated Press
450 W. 33rd St.
New York, NY 10001
Counsel for Associated Press

David M. Giles
The E.W. Scripps Company
312 Walnut St., Ste. 2800
Cincinnati, OH 45202
*Counsel for The E.W. Scripps
Company*

Bruce W. Sanford
Bruce D. Brown
Malena F. Barzilai
Baker & Hostetler, LLP
1050 Connecticut Ave., NW
Ste. 1100
Washington, DC 20036
*Counsel for Society of Professional
Journalists*

Mary Ann Werner
Eric Lieberman
The Washington Post
1150 15th Street, NW
Washington, DC 20071
Counsel for The Washington Post

Barbara W. Wall
V.P./Associate General Counsel
Gannett Co., Inc.
7950 Jones Branch Dr.
McLean, VA 22107
Counsel for USA Today

Johnita P. Due
Cable News Network LP, LLLP
One CNN Center
Box 105366
Atlanta, GA 30348-5366
Counsel for CNN

Craig Bloom
NBC Universal, Inc.
30 Rockefeller Plaza
New York, NY 10112
Counsel for NBC Universal, Inc.

Henry S. Hoberman
ABC, Inc.
77 West 66th St.
New York, NY 10023
Counsel for ABC, Inc.

Susanna M. Lowy
Anthony M. Bongiorno
CBS Broadcasting, Inc.
51 West 52nd Street
New York, NY 10019
Counsel for CBS

CERTIFICATIONS

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because when measured by WordPerfect version 10.0, the word processing program used to prepare the brief, it contains 6307 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect version 10.0 in 14-point Times New Roman.

3. The PDF version of this Brief of Amici Curiae in Support of Appellees sent by electronic mail to the Court and counsel has been scanned for viruses using Norton Antivirus Corp. Ed., version 7.60.926 and no viruses were detected.

Lucy A. Dalglish /s/

Lucy A. Dalglish

Attorney for *amicus curiae* The Reporters
Committee for Freedom of the Press

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2006, I caused to be served, by U.S. mail, an original and nine copies of the Brief of Amici Curiae in Support of Appellees to the Clerk of the Court; I further certify that on September 13, 2006, I sent an identical copy of that brief, in PDF format, to the Clerk of the Court; and I further certify that on September 13, 2006, I served two copies of the foregoing brief, by U.S. mail, first class, postage prepaid, to:

Amrit Singh
American Civil Liberties Union Found.
125 Broad St., 18th Floor
New York, NY 10004

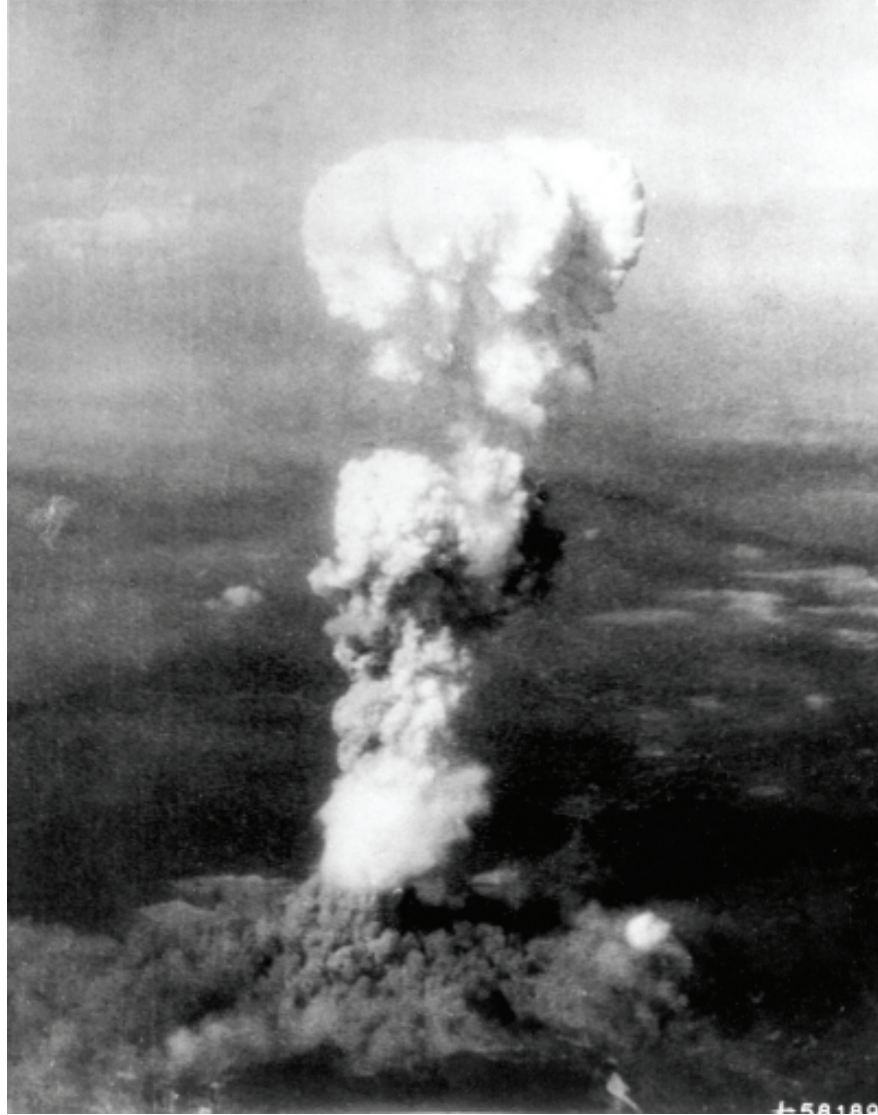
Sean H. Lane
Asst. United States Attorney
86 Chambers Street, 3rd Floor
New York, NY 10007

Lucy A. Dalglish /s/
Lucy A. Dalglish
Attorney for *amicus curiae* The Reporters
Committee for Freedom of the Press

Appendix A



Walker Evans photograph; Library of Congress



U.S. Air Force photograph



Associated Press photograph by Joe Rosenthal



Associated Press photograph by Jim Pringle



Associated Press photo by Nick Ut



Associated Press photograph by Carmen Taylor



Associated Press photograph by M. Lakshman



Associated Press photograph by Eddie Adams



Peter Turnley photograph



Associated Press photograph by Jim Collins



Associated Press photograph by Laurent Rebours



Associated Press photograph by Khalid Mohammed



U.S. Army photograph