10-4290 (L)

10-4289(CON), 10-4647(XAP), 10-4668(XAP)

United States Court of Appeals
for the Second Circuit

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

Plaintiffs–Appellees–Cross-Appellants,

v.

DEPARTMENT OF JUSTICE, and its component Office of Legal Counsel; CENTRAL INTELLIGENCE AGENCY,

Defendants–Appellants–Cross-Appellees,

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 STATE; DEPARTMENT OF JUSTICE components Civil Rights Division, Criminal Division, Office of Information and Privacy, Office of Intelligence, Policy and Review, Federal Bureau of Investigation,

Defendants.

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

BRIEF *AMICI CURIAE* OF CIVIL LIBERTIES AND HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS AND REVERSAL
(*See inside cover for list of* Amici Curiae)

Sidney S. Rosdeitcher,
Counsel of Record
Eric S. Tam
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Emily Berman
Brennan Center for Justice at NYU School of Law
161 Avenue of the Americas 12th Floor
New York, New York 10013-1205
(646) 292-8310

Attorneys for Amici Curiae

AMICI CURIAE

Brennan Center for Justice at New York University School of Law

Bill of Rights Defense Committee

Center for Justice and Accountability

High Road for Human Rights Advocacy Project

National Religious Campaign Against Torture

No More Guantánamos

North Carolina Stop Torture Now

PEN American Center

The Rutherford Institute

The World Organization for Human Rights USA

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Interest of the Amici[1]

Amici are ten civil liberties and human rights organizations that share a commitment to the proposition that the protection of America's national security can and must conform to the requirements of the U.S. Constitution, U.S. law, and U.S. international obligations. Amici maintain that government transparency and public access to government information are critical to the achievement of that goal. Details concerning each of the Amici are set forth in the Addendum to this brief.

Summary of Argument

Amici curiae submit this brief in support of the cross-appeal of the Plaintiffs-Appellees-Cross-Appellants ("Cross-Appellants") seeking reversal of the district court judgment insofar as it applied Freedom of Information Act ("FOIA") exemptions to deny access to Central Intelligence Agency ("CIA") documents pertaining to waterboarding, an activity publicly acknowledged by the President to be torture, and therefore, a serious violation of law.

The Cross-Appellants persuasively show that the use of waterboarding is outside the scope of the CIA's charter and that the CIA therefore may not

[1] This brief is filed with the consent of all parties. The brief was not authored in whole or part by any party or party's counsel, and no party or party's counsel—nor any other person other than the Amici Curiae, their members, and their counsel—contributed money intended to fund the brief's preparation or submission.

withhold information about its use requested under FOIA. In this brief, Amici show first the history of illegal activity conducted by the CIA under the cloak of secrecy, which underscores the compelling need to limit that secrecy. Amici then describe Congress' extensive efforts to deter such unlawful conduct by restricting secrecy through a program of legislation, of which FOIA is a critical component.

Although secrecy may be necessary to protect legitimate methods of intelligence gathering, Congress has repeatedly made it clear that using secrecy to conceal illegal CIA conduct is not in our nation's interest. The district court's interpretation of FOIA's exemptions to shield from public view the CIA's use of clearly unlawful methods of intelligence gathering such as waterboarding is inconsistent with Congress' intentions. It also subverts the rule of law and undermines the democratic process.

ARGUMENT

I. THE CIA'S HISTORY OF USING SECRECY TO CLOAK UNLAWFUL ACTIVITY DEMONSTRATES THE NEED FOR DISCLOSURE OF UNLAWFUL CONDUCT SUCH AS WATERBOARDING

The CIA is charged with grave responsibilities in helping to protect the nation against foreign threats. These responsibilities create pressure to use all available means to fulfill this mission, even if those means overstep legal limits. The temptation to do so is exacerbated by the sense of impunity conferred by the cloak of secrecy under which the CIA operates. The CIA's history of unlawful use

of its powers recounted below underscores the need to pierce that secrecy, at least where plainly unlawful conduct like waterboarding is involved.

A. Early History of the CIA and Its Unlawful Activities

The United States' experience with an institutionalized national foreign intelligence service began when the Truman administration recognized the need for a successor to the wartime Office of Strategic Services. Congress responded by authorizing the creation of a Central Intelligence Agency in the National Security Act of 1947, with further elaboration in the Central Intelligence Agency Act of 1949.[2]

These Acts constituted a statutory charter permitting the CIA to appropriate and spend funds, hire personnel, and conduct operations with great discretion—all with negligible congressional oversight. Under the regime established by the 1947 and 1949 Acts, "[t]he CIA [did] not as a general rule receive[] detailed scrutiny by the Congress."[3] Hence, until the enactment of the Hughes-Ryan Act of 1974, *infra* p. 23, the CIA's activities were almost exclusively subjected to oversight—if at all—only by the National Security Council ("NSC") and other executive bodies.

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[2] National Security Act of 1947, Pub. L. No. 80-235, §102, 61 Stat. 496, 497-99 (1947); Central Intelligence Agency Act of 1949, Pub. L. No. 81-110, 63 Stat. 208.

[3] Comm'n on CIA Activities Within the United States, *Report to the President* 14 (1975).

Although neither the 1947 Act nor its legislative history specifically authorized the CIA to conduct covert intelligence, subversion, or paramilitary operations,[4] the executive branch and the CIA inferred such authority from a provision directing the Agency "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct."[5] Before the 1970s, the CIA undertook an estimated 86% or more of covert action projects without prior approval by the NSC or any relevant supervisory body.[6] Furthermore, the executive branch committees responsible for supervising the CIA sometimes adopted a "plausible denial" doctrine, which aimed to shield the President from embarrassment if certain covert operations were disclosed, by refraining from informing him about them.[7]

Therefore, for the first three decades of its existence, the CIA possessed—and exercised—a largely unchecked ability to conduct covert activities outside its legal authority and in violation of the Constitution. These problems

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4 United States Senate, *Final Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities: Foreign Military Intelligence*, S. Rep. No. 94-755, bk. I, at 149 (1976) [hereinafter Church I].

5 National Security Act of 1947 § 102(d)(5); Church I, *supra* note 4, at 149.

6 *Id.*, at 56-57.

7 "The government was authorized to do certain things that the President was not advised of." Church I, at 46 (quoting Bromley Smith of the National Security Council).

began to come to light in the 1970s and attracted sustained public and congressional attention around the Watergate crisis, when the nation successively learned that several of the "plumbers" who had plotted the Watergate Hotel intrusion were ex-CIA employees, that the CIA had given them technical assistance, and that the CIA appeared to have at least partially acceded to requests from President Nixon to impede the FBI's Watergate investigation.[8] Government investigations became inevitable following Seymour Hersh's *New York Times* story in December 1974 revealing that the CIA had engaged in extensive domestic—and thereby patently unlawful—surveillance programs targeted at U.S. citizens and groups, including members of the antiwar, civil rights, and women's liberation movements.[9] The article also referred to an internal report—known within the CIA as the "Family Jewels"— conducted by the previous Director of Central Intelligence ("DCI") James Schlesinger that cataloged these and other unlawful activities conducted by the CIA since the 1950s.[10]

In response, a series of governmental investigative bodies—most prominently, a Senate committee chaired by and named for Senator Frank

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[8] Kathryn S. Olmsted, *Challenging the Secret Government* 15-16 (1996).

[9] Seymour Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. Times, Dec. 22, 1974, at A1.

[10] *Id*.

Church—emerged to address these and other alleged abuses.[11] By the time these investigative bodies had concluded their work, the American public had learned of numerous illegal activities conducted by the CIA under the cloak of secrecy in the name of national security.

1. Unlawful Domestic Surveillance

These investigations confirmed Hersh's allegations that the CIA had been involved in widespread illegal and unconstitutional domestic surveillance. Although the National Security Act of 1947 was vague in many respects, the Act unequivocally stated that "the [CIA] shall have no police, subpoena, law-enforcement powers, or internal-security functions."[12] Yet, to the dismay of Congress and the public, the Church Committee documented the CIA's engagement in numerous domestic intelligence activities.

The Church Committee confirmed that the CIA had conducted activities, under the codename "Operation CHAOS", which collected intelligence on civil rights, peace, and other social activist groups of the 1960s and early 1970s concerning the "extent of foreign influence on domestic dissidents."[13] The CIA

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[11] Timothy S. Hardy, *Intelligence Reform in the Mid-1970s*, Stud. in Intelligence, Summer 1976, at 1.

[12] National Security Act of 1947 § 102(d)(3).

[13] United States Senate, *Final Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities: Intelligence Activities and the Rights of Americans*, S. Rep. No. 94-755, bk. II, at 100 (1976)

compiled files on thousands of Americans who participated in these groups, many of which were forwarded to the FBI, and, on occasion, the White House.[14] It also recruited agents from these domestic organizations or planted recruits in them, ostensibly for the purpose of establishing cover to collect intelligence abroad regarding suspected foreign influence on these groups.[15] The CIA expanded these investigations at the White House's behest, despite the Agency's repeated conclusion that no foreign influence existed.[16] The Church Committee also found that the CIA's Office of Security had run two projects, MERRIMAC and RESISTANCE, targeting activist groups to determine if they were planning attacks against the CIA or the government.[17] Project MERRIMAC eventually included the infiltration of activist groups in the Washington, D.C. area.[18]

[hereinafter Church II]; United States Senate, *Final Report of the Select Committee to Study Government Operations with respect to Intelligence Activities: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans*, S. Rep. No. 94-755, bk. III, at 681 (1976) [hereinafter Church III].

[14] Church II, *supra* note 13, at 89-102.

[15] Church III, *supra* note 13, at 712-14.

[16] Church II, *supra* note 13, at 101-02; Church III, *supra* note 13, at 681, 699-701.

[17] *Id.* at 721-26.

[18] *Id.* at 724-25.

The Church Committee also found that the CIA participated, along with the FBI, in extensive covert and illegal mail-opening programs.[19] The CIA's largest program for over 20 years monitored millions of letters to and from Russia that transited through New York City and opened over 200,000 of them without distinguishing between the letters of foreigners and citizens.[20] At the FBI's request, the CIA focused on domestic targets, including "protest and peace organizations."[21]

The CIA recognized from the program's outset that "[t]here is no overt, authorized or legal censorship or monitoring of first class mails" and one Inspector General acknowledged: "[O]f course, we knew that this was illegal …. [E]verybody knew that it was [illegal] …."[22] The CIA went to significant lengths to conceal these illegal programs: it told the Postmaster General that the program involved only photographing envelope exteriors, and it appears no President or Attorney General was aware of these programs.[23]

The Church Committee also found that the CIA, when conducting programs that were otherwise legal, had employed unlawful investigative measures

[19] Church II, *supra* note 13, at 168.

[20] *Id.*

[21] *Id.* at 107-08.

[22] *Id.* at 142-43.

[23] *Id.* at 59, 149-50.

within the U.S., such as electronic surveillance and covert break-ins without a warrant or other equivalent authorization.[24]

2. Non-Consensual Testing of Chemical and Biological Substances

Among the Church Committee's most shocking revelations was the involvement of the CIA and military intelligence in "substantial programs for the testing and use of chemical and biological agents—including projects involving the surreptitious administration of LSD to unwitting nonvolunteer subjects."[25] The CIA's programs were aimed both at developing chemical and biological weapons, and at experimenting with their potential for use in interrogation and mind-control.[26] These experiments continued for a decade even after the death of one subject in 1953. The Church Committee pointedly noted that the CIA had made "no attempts to secure approval . . . from the executive branch or Congress" for many of these programs and that the details of some of these programs were kept secret even from the DCI—"[i]t was deemed imperative that these programs be concealed from the American people," as a classified 1957 report of the CIA's

[24] *Id.* at 13.

[25] Church I, *supra* note 4, at 393.

[26] *Id.* at 393-403.

Inspector General acknowledged, because of the "serious repercussions" of revealing that "the Agency is engaging in unethical and illicit activities."[27]

3. Foreign Affairs Activities Contrary to Stated U.S. Policy

During its first three decades, the CIA interpreted its legislative charter as authorizing its foreign activities very broadly, sometimes engaging in covert activities that were inconsistent with the United States' international commitments. The Church Committee highlighted as particularly problematic covert attempts by the CIA "to subvert democratic governments or provide support for police or other internal security forces which engage in the systematic violation of human rights."[28] Two examples of such CIA covert interventions were the harassment of Chile's Allende government and the Agency's intervention into Angola, which Congress ultimately terminated by exercising its power of the purse.[29]

The Church Committee was also sufficiently concerned by reports of the CIA's involvement in attempts to assassinate foreign leaders that it investigated the cases of Patrice Lumumba of the Congo, Rafael Trujillo of the Dominican Republic, Ngo Dinh and Nhu Diem of Vietnam, Gen. Rene Schneider of Chile, and

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[27] *Id.* at 394 (quoting the CIA Inspector General's *Survey of the Technical Services Division* 217 (1957)).

[28] Church I, *supra* note 4, at 160.

[29] *Id.* at 154.

Fidel Castro of Cuba. Although the Church Committee found that there was no evidence that any foreign leaders actually were killed by assassination plots initiated by U.S. officials, it did find that the CIA actively plotted to assassinate Lumumba and Castro, and "encouraged or were privy to coup plots which resulted in the deaths of Trujillo, Diem, and Schneider."[30] As with attempts to undermine democratic regimes, the Church Committee stated that the CIA's participation in assassination plots against foreign leaders was "incompatible with American principles and ideals and, when exposed, [has] resulted in damaging this nation's ability to exercise moral and ethical leadership throughout the world."[31]

* * *

The governmental investigations of the 1970s uncovered significant wrongdoing by the CIA, as well as the FBI and other United States intelligence agencies, many of which were enabled by their clandestine nature. These investigations concluded that as a result of a lack of sufficient "legal boundaries for intelligence activities, the Constitution has been violated in secret and the power of the executive branch has gone unchecked, unbalanced."[32] As the Church Committee found, a regime in which assertions of secrecy on the basis of national

[30] *An Interim Report of the Select Comm. to Study Governmental Operations with Respect to Intelligence Activities: Alleged Assassinations Involving Foreign Leaders*, S. Rep. No. 94-465, at 256 (1975).

[31] Church I, *supra* note 4, at 156.

[32] *Id.* at 16.

security are too easily made may "tempt[] . . . the Executive to use covert action as a 'convenience' and as a substitute for publicly accountable policies."[33] Given this temptation, as well as the tendency for "[s]ecrecy [to] shield[] intelligence activities from full accountability and effective supervision both within the executive branch and by the Congress," the Church Committee concluded that "illegal, improper or unwise acts are not valid national secrets."[34]

B. Covert Abuses and Unlawful Acts by the CIA since the Investigations of the 1970s

Notwithstanding the disclosures of the Church Committee and subsequent congressional reforms intended to deter unlawful intelligence activity (detailed *infra* Part II), the tendency of the CIA to evade oversight and to exceed the limits of its lawful authority has persisted. The CIA's role in the Iran-Contra affair and its counterterrorism practices following the September 11, 2001 attacks provide dramatic illustrations.

1. The Iran-Contra Affair

The CIA played an important support role in the most serious abuse of executive power of the 1980s—the unlawful scheme by the NSC and its staff member Oliver North to create a covert funding conduit known as "the Enterprise", which established an arms-for-hostages exchange with Iran and then diverted the

[33] *Id.* at 157.

[34] *Id.* at 16, 12.

funds obtained to support the Nicaraguan Contras in the face of an express congressional prohibition. According to North, DCI William Casey "saw the 'diversion' [of funds to the Contras and other covert operations] as part of a more grandiose plan to use the Enterprise as a 'stand alone,' 'off-the-shelf,' covert capacity that would act throughout the world while evading congressional review."[35] The CIA played a supporting role in key aspects of the Iran-Contra affair, including purchasing weapons and transporting them to Iran.[36] After the Enterprise's activities were revealed, a congressional inquiry concluded that the CIA provided logistical and tactical support to the administration's efforts in Nicaragua even after Congress had, through the Boland Amendments, barred the Agency from supporting the Contras.[37] Several CIA officials were subsequently charged with lying to and withholding information from Congress and two were ultimately convicted.[38]

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[35] *Report of the Cong. Comm. Investigating the Iran-Contra Affair*, S. Rep. No. 100-216, H. Rep. No. 100-433, at 8 (1987) [hereinafter *Iran-Contra Rpt.*].

[36] Lawrence E. Walsh, *Firewall: the Iran-Contra Conspiracy and Cover-up* 5–7 (1997).

[37] *Iran-Contra Rpt.*, *supra* note 35, at 4.

[38] Lawrence E. Walsh, 1 *Final Report of the Independent Counsel for Iran Contra Matters* xxiii (1993).

2. Post-September 11, 2001 Counterterrorism Activities

The terrorist attacks of September 11, 2001, the subsequent invasions of Afghanistan and Iraq, and the United States' conflict with Al Qaeda and related terrorist organizations triggered a massive mobilization of U.S. intelligence assets. Although CIA covert operations have doubtlessly been vital in dealing with the serious post-September 11, 2001 security concerns, the premium placed on covert action and the bias against oversight of executive power that have characterized the "War on Terror" have led the Agency to engage in secret activity that evaded meaningful congressional oversight and violated domestic and international law.

Governmental, NGO, and journalistic investigations have confirmed that the CIA instructed its interrogators and contractors to engage in "enhanced interrogation techniques" ("EITs"), which involved the use of physical force or other treatment that risked—and in some cases resulted in—injury or death of detainees and may have constituted torture or cruel, inhuman, or degrading treatment.[39] Such methods include: slamming a detainee into a false wall; slapping a detainee in the face; depriving a detainee of sleep for up to 11 days; placing a detainee in a cramped confinement box (along with a "harmless insect") for up to 18 hours; forcing a detainee to remain in uncomfortable "stress positions"; and

[39] *See* Jane Mayer, *The Dark Side* 142–81, 238–60 (2008).

waterboarding.[40] The media has further reported, and the CIA has admitted, that Agency interrogators and contractors have beaten detainees or deployed coercive interrogation techniques that went beyond even the officially authorized EITs—for example, choking and mock executions—and therefore likely amounted to either torture or cruel, inhuman, or degrading treatment in violation of U.S. and international law.[41] It appears that the permissive atmosphere and dehumanization of detainees arising from the use of EITs contributed to the abuse of detainees generally, both by CIA personnel and other intelligence and military personnel working with them.[42] As a result, detainees have suffered serious harm or died.

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[40] CIA Inspector General, *Special Review: Counterterrorism Detention and Interrogation Techniques* 15 (2004) [hereinafter CIA I.G., *Special Review*]; *see also* Mark Mazzetti & Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. Times, Apr. 16, 2009, at A1.

[41] CIA I.G., *Special Review*, *supra* note 40, at 6, 41-45, 69-79, 102-05; Jane Mayer, *The Experiment*, New Yorker, July 11, 2005, at 60. Torture is clearly established to be illegal under both U.S. and international law. U.S. Const. amend. VIII; 18 U.S.C. §§ 2340–2340A (2006); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, opened for signature Dec. 10, 1984, G.A. Res. 39146, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter Convention Against Torture]; *Ashcraft* v. *Tenn.*, 322 U.S. 143, 155 (1944); *Brown* v. *Miss.*, 297 U.S. 278, 285-86 (1936); *see also Filartiga* v. *Peña-Irala*, 630 F.2d 876, 884, 890 (2d Cir. 1980).

[42] *See, e.g.*, Maj.-Gen. Antonio Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade* 18 (2004) (finding that abuses at the Abu Ghraib prison in Iraq arose because Military Intelligence and CIA interrogators "actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses" in violation of Army regulations).

The most well-documented case of the serious consequences resulting from CIA interrogation is that of Manadel Al-Jamaidi, who, according to an investigation by the U.S. Army's Criminal Investigation Command, died at Abu Ghraib "[d]uring an interrogation at the prison conducted by CIA personnel."[43] The Army investigation ruled Al-Jamaidi's death a homicide, but the CIA employees who were responsible for his treatment ultimately suffered no serious consequences as a result of his death.[44]

To enable it to carry out the detention and interrogation of counterterrorism suspects free from accountability, the CIA operated a network of "black sites"—"secret detention facilities in unspecified locations in a number of different countries, outside the reach of any judicial or administrative system."[45]

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[43] U.S. Dep't of the Army, *CID Report of Investigation* 2 (2004), *available at* http://www.dod.gov/pubs/foi/detainees/CIDreport61219.pdf [hereinafter *CID Report*]; *see also* Mayer, *supra* note 39, at 238-60.

[44] *CID Report*, *supra* note 44, at 2; Adam Goldman & Matt Apuzzo, *At CIA, Grave Mistakes, then Promotions*, Associated Press, Feb. 9, 2011.

[45] International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody* 24 (2007) [hereinafter *ICRC Rpt.*], *available at* http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf. The report details the ICRC's exclusive interviews with fourteen detainees held in black sites and subsequently transferred to Guantánamo Bay. Initially confidential, it was published by the New York Review of Books in 2009. *See* Mark Danner, *The Red Cross Torture Report: What It Means*, The N.Y. Rev. Books (April 30, 2009), *available at* http://www.nybooks.com/articles/archives/2009/apr/30/the-red-cross-torture-report-what-it-means/?page=1.

For five years, the International Committee of the Red Cross ("ICRC") was denied access the CIA's prisoners held in such sites.[46] Detainees were transferred to these undisclosed locales and essentially "disappeared", often for years at a time,[47] which the ICRC maintains contravened international treaties to which the U.S. is a party.[48] Detainees were unable to inform their families of their status or whereabouts and had no recourse to legal process or any advocate or objective organization to ensure their humane treatment; according to the ICRC, these prisoners essentially became "missing persons."[49] Without such safeguards, the CIA was free to subject the prisoners in its secret detention program to severely dehumanizing treatment. A former member of the CIA transport team described the "takeout" process "as a carefully choreographed twenty-minute routine, during which a suspect was hog-tied, stripped naked, photographed, hooded, sedated with anal suppositories, placed into diapers, and transported by plane to a secret

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[46] Jane Mayer, *The Black Sites: A Rare Look Inside the C.I.A.'s Secret Interrogation Program*, New Yorker, Aug. 13, 2007, at 46, 48-49.

[47] *ICRC Rpt.*, *supra* note 45, at 3.

[48] *Id.* at 24 (citing, e.g., Geneva Convention Relative to the Treatment of Prisoners of War arts. 21, 118, Aug. 12, 1949, 75 U.N.T.S. 135; International Covenant on Civil and Political Rights, art. 9, Mar. 23, 1976, 999 U.N.T.S. 171)). *See also* Taguba, supra note 42, at 26-27 (finding that holding unregistered detainees for the purpose of evading legal accountability is "deceptive, contrary to Army doctrine, and in violation of international law").

[49] *ICRC Rpt.*, *supra* note 45, at 8.

location."[50] Numerous reports indicate that detainees were subject to intense EITs, some amounting "to torture and/or cruel, inhuman or degrading treatment."[51]

Other likely unlawful activities in which the CIA has secretly engaged under the mantle of the War on Terror include a "very serious" covert program apparently involving the assassination of terrorist suspects that the Agency had concealed from Congress for 8 years,[52] as well as the Agency's program of "extraordinary rendition." The latter term refers to the extrajudicial arrest and transfer of a detainee either so he can be held secretly by the U.S. (for example at one of the CIA's black sites), or so he can be turned over to another nation for interrogation using techniques that are unlawful for U.S. officials.[53] Rendering

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[50] Mayer, *supra* note 46, at 53.

[51] *ICRC Rpt.*, *supra* note 45, at 5.

[52] Mark Mazzetti & Scott Shane, *C.I.A. Had Plan to Assassinate Qaeda Leaders*, N.Y. Times, July 14, 2009, at A1. *Lawmaker: Panetta Terminated Secret Program*, Associated Press, July 10, 2009 (quoting House Intelligence Subcommittee Chair Rep. Jan Schakowsky as stating that "[t]here was a decision under several directors of the CIA and administration [sic] not to tell the Congress").

[53] *See, e.g.*, Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Rendition"* (2004), *available at* www.chrgj.org/docs/TortureByProxy.pdf [hereinafter *Torture by Proxy*].

persons to countries where there is reason to believe they may be tortured is a violation of U.S. and international law.[54]

One well-documented case of extraordinary rendition involved Khaled El-Masri, a German citizen who was abducted in December 2003 by the CIA at the Serbian-Macedonian border; held in Skopje where he was beaten and interrogated; transferred to a CIA black site in Afghanistan and subjected to further abuse; and only released, many months later, into the countryside in Albania.[55] El-Masri was never found to have any connections to terrorism—and, according to German Chancellor Merkel, the U.S. eventually admitted that his abduction was a case of mistaken identity.[56]

Similarly, Maher Arar, a Canadian citizen, was detained in September 2002 at JFK International Airport in New York while traveling to Ottawa; denied access to his attorney; transported to Jordan; and then handed over to Syrian intelligence. Arar was then tortured, interrogated, and imprisoned in a tiny cell for

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[54] *See* Convention Against Torture, *supra* note 41, art. 3; *see also* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 1242, 112 Stat. 2681, 2681-82 (codified as a note to 8 U.S.C. § 1231 (2006)).

[55] *See* Eur. Parl. Ass., *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe member states*, AS/Jur (2006) 16 Part II 24-29 (June 7, 2006).

[56] *Id*. at 32 n.107; *see also* Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, Wash. Post, Dec. 4, 2005, at A1.

over 10 months, before Canadian officials freed him.[57] As with El-Masri, no links between Arar and terrorism were ever found, either by Syrian intelligence during their brutal interrogation, or by the Canadian commission that spent over two years investigating his abduction.[58] The Canadian government eventually apologized to Arar and paid him over CDN $10.5 million in compensation.[59]

Another example is the February 2003 abduction of Egyptian cleric Hassan Mustafa Osama Nasr from Milan, Italy. Nasr claims that he was flown to Germany and then handed over to authorities in Egypt, where he was subjected to torture.[60] The Italian government charged 23 CIA agents who participated in the operation with kidnapping, and tried and convicted them *in absentia*.[61] It should be unsurprising that American legal scholars and respected members of the bar

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[57] Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendation* 54–57 (2006), *available at* http://www.ararcommission.ca/eng/26.htm.

[58] *Id.* at 59.

[59] Press Release, Office of the Prime Minister of Canada, *Prime Minister releases letter of apology to Maher Arar and his family and announces completion of mediation process* (Jan. 26, 2007), *available at* http://pm.gc.ca/eng/media.asp?id=1509.

[60] Rachel Donadio, *Italy Convicts 23 Americans for C.I.A. Renditions*, N.Y. Times, Nov. 4, 2009, at A15.

[61] *Id.*

have concluded that extraordinary rendition is illegal under U.S. and international law.[62]

* * *

The foregoing history confirms that the CIA has repeatedly used the cloak of secrecy to engage in activities that are unlawful or outside of its charter. This consistent pattern has not gone unnoticed or unaddressed by Congress, which has repeatedly acted to impose meaningful legislative limits on the CIA's activities.

II. FOIA'S EXEMPTION FOR METHODS OF INTELLIGENCE GATHERING SHOULD BE INTERPRETED IN LIGHT OF CONGRESS' EXTENSIVE EFFORTS TO PREVENT UNLAWFUL CIA ACTIVITY

The CIA's record of unlawful conduct under the cloak of secrecy has caused Congress to heed the Church Committee's well-considered conclusion that "illegal, improper or unwise acts are not valid national secrets"[63] and to enact various pieces of legislation designed to pierce the Agency's secrecy and to deter illegal, improper, or unwise acts. FOIA is a critical part of this congressional scheme and should be read in harmony with that scheme's objectives. Reading FOIA's exemptions to shield information pertaining to waterboarding, an activity

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[62] *Torture by Proxy*, *supra* note 53, at 5.

[63] Church I, *supra* note 4, at 12.

condemned by the President as torture and therefore a violation of U.S. and international law, would be inconsistent with these objectives.

A. Congress' Efforts to Deter Unlawful CIA Activity

Congress' attempts at reining in the CIA with legislation began in 1974 with the Hughes-Ryan Amendment, which focused on covert operations and has been supplemented over the ensuing years by ever-stricter legislation designed to improve Congress' ability to remain informed about the CIA's conduct and ensure its lawfulness.

1. Congressional Action in Response to Abuses Revealed in the 1970s

Congress' first effort to increase control over CIA activities came in response to the CIA's domestic spying and other abuses described in great detail by the Church Committee.

In 1976 the Senate created the Senate Select Committee on Intelligence Responsibilities and Activities ("SSCI"), whose role, in part, was to "provide vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States."[64] The House created a select committee charged with

[64] S. Res. 400, 94th Cong., 122 Cong. Rec. 4754 (1976).

similar responsibilities in 1975, which became the Permanent Select Committee on Intelligence in 1977, charged with similar responsibilities.[65]

The CIA's charter was also amended in 1974, when Congress passed the Hughes-Ryan Amendment. The amendment barred the CIA from using funds for covert actions outside of situations of declared war unless the President found that the operation was "important to the national security of the United States" and reported the operation to the appropriate congressional committees "in a timely fashion."[66]

The requirement that the President "inform" Congress of covert operations was not merely a disclosure requirement, but, given Congress' power to control appropriations, it was also designed to assert control over the CIA's activities: once informed of a covert operation, Congress could stop it by denying funding if it believed that the operation was unnecessary or harmful. This contrasted significantly with the previous arrangement, in which the Executive could run covert operations without congressional oversight because it could tap into the CIA's general fund, which Congress did not fully scrutinize.[67] The basic

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[65] H.R. Res. 658, 95th Cong., 123 Cong. Rec. 22,932 (1977).

[66] Hughes-Ryan Act of 1974, Pub. L. No 93-559, sec. 32, § 622, 88 Stat. 1795, *repealed by* Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, 103 Stat. 429.

[67] *See* William J. Daugherty, *Executive Secrets: Covert Action & the Presidency* 94-95 (2004).

structure of the new arrangement—requiring presidential findings to be submitted to Congress for covert operations—has persisted into the present.[68]

2. The Congressional Oversight Act of 1980

The presidential finding requirement was bolstered by the Congressional Oversight Act of 1980, which moved beyond covert action to require disclosure of *all* CIA operations to Congress' intelligence committees. The Act mandated, with certain narrow exceptions, that the DCI and "the heads of all departments, agencies, and other entities of the United States involved in intelligence activities" keep the intelligence committees "fully and currently informed of all intelligence activities."[69]

More importantly, the Act addressed the CIA's propensity for illegal activity by requiring that the above authorities "report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure."[70]

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[68] *See infra* Part II.A.3.

[69] Pub. L. No. 96-450, sec. 407, § 501(a)(1), 94 Stat. 1975, 1981, *repealed by* Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, § 601(a)(2), 105 Stat. 429.

[70] *Id.* sec. 407, § 501(a)(3).

3. The Intelligence Authorization Act of 1991

The Iran-Contra affair demonstrated weaknesses in the 1980 Act. The Intelligence Authorization Act of 1991, meant to "implement the lessons learned from the Iran-Contra inquiry," addressed those weaknesses and demonstrated a commitment to legislative control of the Executive's secret activities.[71]

The Act mandated that all covert actions be supported by a written finding that the action was necessary and important to national security.[72] The Act required disclosure of covert action to the relevant congressional committees "as soon as possible" and "before the initiation" (with certain narrow exceptions) of covert action.[73] Even where the President saw it as crucial to withhold information, the Act required that the finding be reported to at least eight specified members of Congress.[74]

The Act required that reports of illegal activity be made "promptly," replacing the looser "timely fashion" requirement of the 1980 Act.[75] The Senate Report noted that the new requirement reflected its "intent . . . that the committees

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[71] S. Rep. No. 101-358, at 24 (1990).

[72] Intelligence Authorization Act, Fiscal Year 1991, sec. 602, § 503(a) (codified as amended at 50 U.S.C. § 413b(a) (2006)).

[73] *Id.* sec. 602, § 503(c).

[74] *Id.*

[75] *Id.* sec. 602, § 501(b).

should be notified whenever a probable illegality is confirmed under the procedures established by the President."[76] The Report also noted that the Act required the executive branch to report to the intelligence committees its procedures for determining whether a probable violation occurred.[77]

4. The Intelligence Reform and Terrorism Prevention Act of 2004

Partly in response to issues raised by the National Commission on Terrorist Attacks Upon the United States,[78] Congress enacted the Intelligence Reform and Terrorism Prevention Act of 2004.[79] This Act imposed another layer of reporting and accountability, establishing the authority of the Director of National Intelligence over the CIA and requiring him to "ensure compliance with the Constitution and laws of the United States by the Central Intelligence Agency."[80] Congress also established a Civil Liberties Protection Officer and a bipartisan committee to oversee the CIA's activities as they related to civil liberties.[81]

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[76] S. Rep. No. 102-85, at 28 (1991), *reprinted in* 1991 U.S.C.C.A.N. 193, 224.

[77] *Id*. at 29.

[78] *See The 9/11 Commission Report* (2004).

[79] Pub. L. No. 108-458, 118 Stat. 3638.

[80] *Id.* sec. 1001(a), § 102A(f)(4) (codified at 50 U.S.C. § 403-1(f)(4) (2006)).

[81] *See id.* § 103D (codified at 50 U.S.C. § 403-3d (2006)); § 1061 (codified as amended at 42 U.S.C. § 2000ee (Supp. II 2008)).

The foregoing legislation established a regime of congressional and executive oversight to deter unlawful CIA activity. As weaknesses in oversight have been revealed, Congress has strengthened the regime, indicating a consistent intent to limit the secrecy under which the CIA operates to deter improper activities through meaningful supervision. It also confirms that unlawful and unconstitutional activities are outside the CIA's charter.

B. The CIA Information Act Affirmed the Importance of FOIA to Congress' Effort to Deter Unlawful Activity

Congress recognized that legislative oversight was only one element of a broader effort to check improper CIA activity, and that public oversight through FOIA was also critical to that effort. That recognition is reflected in the enactment of the Central Intelligence Agency Information Act of 1984, an amendment to FOIA. In that Act, Congress carefully exempted information from FOIA requests whose disclosure would harm legitimate CIA intelligence operations. But it chose not to protect information about illegitimate operations.

The original Freedom of Information Act, enacted in 1966, was a broad expansion of the public's ability to obtain government records. It burdened the government with citing a specific exemption authorizing nondisclosure of records in response to a request.[82] While it required amendments in 1974 and 1976

[82] Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2006)).

to make the Act an effective means for obtaining substantial information, it has always been intended as a tool for ensuring public oversight and deterring abuse. As the Senate Judiciary Committee stated: "It has been shown innumerable times that withheld information is often withheld only to cover up embarrassing mistakes or irregularities . . . . It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld."[83]

In the late 1970s, the CIA became overwhelmed with FOIA requests and attempted to persuade Congress to grant it a categorical exemption from FOIA.[84] After Congress repeatedly rejected proposed legislation granting the Agency a blanket exemption, the CIA's leadership saw it would need to compromise. It began negotiations with the civil liberties community, which also desired to reduce FOIA requests submitted to the CIA so that valid requests could be answered more quickly. The sides agreed to support legislation that would

[83] S. Rep. No. 88-1219 (1964), *reprinted in* Staff of the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary, 93d Cong., *Freedom of Information Act Source Book, Legislative Materials, Cases, Articles* 86, 93 (Comm. Print 1974).

[84] *See* Karen A. Winchester & James W. Zirkle, *Freedom of Information and the CIA Information Act*, 21 U. Rich. L. Rev. 231, 255-260 (1987).

exempt certain specifically defined "operational files"—files consisting of ongoing CIA intelligence-collection activities and the information they yielded.[85]

Congress did not, however, exempt all CIA files from FOIA.[86] Files containing the CIA's analysis of information it had collected remained searchable, as did three categories of operational files. Most importantly, Congress excluded from the exemption CIA files pertaining to the "specific subject matter of an investigation" for illegality or violation of Agency rules by certain internal, congressional, or executive branch entities.[87] The legislative history of this provision reveals concerns regarding abuse and illegality similar to those motivating the strict congressional controls of the CIA described in Part II.A.

Although the CIA assured the SSCI the provision was unnecessary, Senator Daniel Inouye was concerned by "some ambiguity" about whether a bill without such a provision would provide access to "all the details of the activities in question."[88] Similarly, Senator Patrick Leahy asked ACLU FOIA expert Mark Lynch whether "full access to all files relating to investigations of allegations of abuses or impropriety" could be ensured through "clear language in the legislative

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[85] *See id*.

[86] Central Intelligence Agency Information Act, Pub. L. No. 98-477, 98 Stat. 2209 (1984) (codified as amended at 50 U.S.C. §§ 431-432 (2006)).

[87] *Id.* sec. 2(a), § 701(c)(3).

[88] *S. 1324, An Amendment to the National Security Act of 1947: Hearings before the S. Select Comm. on Intelligence*, 98th Cong. 55 (1983).

history."[89] After Lynch said "it would be preferable to spell it out in the legislation,"[90] the committee amended the bill to explicitly provide for access to files about matters under investigation.[91]

The amendments to this version of the CIA Information Act—including Congress' rejection of the CIA's requests for a blanket exemption, and its insistence that files relevant to government investigations of CIA activities remain subject to FOIA—demonstrate Congress' intention to deploy FOIA as an important part of its efforts to deter unlawful CIA activity through oversight and limits on secrecy.

III. INTERPRETING FOIA TO AUTHORIZE THE CIA'S WITHHOLDING OF INFORMATION CONCERNING WATERBOARDING WOULD DEFEAT CONGRESS' INTENT, SUBVERT THE RULE OF LAW, AND UNDERMINE THE DEMOCRATIC PROCESS

Interpreting FOIA's exemptions to preclude disclosure of information relating to waterboarding would be contrary to the intent of Congress reflected in the legislation described above. As the history of CIA abuses and Congress' reaction to them shows, unauthorized and unlawful CIA conduct is not entitled to secrecy. FOIA remains crucial to the legislative regime aimed at revealing and

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89 *Id.* at 76-77.

90 *Id.* at 77.

91 Central Intelligence Agency Information Act, sec. 2(a), § 701(c)(3).

deterring unlawful conduct. Indeed, it has often been the work of journalists and organizations like the Cross-Appellants, employing FOIA, which has put an end to unlawful intelligence activities by exposing misconduct to public condemnation. It, therefore, would be inconsistent with Congress' extensive efforts to curb secret unlawful activities to interpret FOIA's exemptions to allow the CIA to withhold information concerning an unlawful activity such as waterboarding.

Permitting the Agency to withhold such information concerning unlawful conduct such as waterboarding also would undermine the rule of law by removing one of the important tools for assuring the CIA's accountability for unlawful conduct.

Finally, it would subvert the democratic process. The public is entitled to know the details of these unlawful acts in order to decide whether its government is engaging in actions that are not only unlawful but also damaging to our foreign relations and or inconsistent with our core values. The current debate, reignited by the killing of Osama Bin Laden, in which some are seeking to legitimize waterboarding and other acts of torture or cruel, inhuman, or degrading treatment as supposedly useful means of intelligence gathering, is a perfect example. The American people are entitled to make judgments about whether such unlawful conduct should be permitted armed with full knowledge of the details of that conduct. As the Supreme Court has stated, FOIA is "a means for citizens to

know what their Government is up to" and "should not be dismissed as a convenient formalism," but instead viewed as "a structural necessity in a real democracy."[92] Furthermore, "[t]he basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[93] This is no less true for democratic decisions about intelligence activities than it is in any other area.

[92] *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

[93] *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 171-72 (2004) (citation omitted).

Conclusion

For the foregoing reasons, Amici respectfully request that this Court reverse the district court's decision insofar as it denied the Plaintiffs-Appellees-Cross-Appellants' FOIA request for information relating to waterboarding.

Dated: New York, New York
June 10, 2011

Respectfully submitted,

/s/ Sidney S. Rosdeitcher
Sidney S. Rosdeitcher
Counsel of Record

Eric S. Tam
Austin C. Thompson*
Danielle M. Lang**

1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Emily Berman

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, New York 10013-1205
(646) 292-8310

Attorneys for Amici Curiae

* *Law clerk not yet admitted; under supervision of counsel of record.*

** *Law student not yet admitted; under supervision of counsel of record.*

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,928 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: June 10, 2011

/s/ Sidney S. Rosdeitcher
Sidney S. Rosdeitcher

ADDENDUM
DESCRIPTIONS OF AMICUS CURIAE

Amicus the Brennan Center for Justice at New York University School of Law ("Brennan Center") is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Its work ranges from voting rights to redistricting reform, from access to the courts to ensuring that counterterrorism laws and policies comply with our constitutional values and the rule of law. The Center is a proponent of government transparency and is committed to securing increased public access to government information on the principle that citizens' access to information about what the government does in their name is critical to both wise policy-making and accountability.

Amicus the Bill of Rights Defense Committee ("BORDC") is a national non-profit grassroots organization. The Committee defends the rule of law and rights and liberties challenged by overbroad national security and counter-terrorism policies by supporting an ideologically, ethnically, geographically, and generationally diverse grassroots movement and encouraging widespread civic participation. It is strongly committed to the U.S. Constitution and its vision of checks and balances among divided government powers and an engaged public, and acutely aware that the Founders' constitutional design cannot function in the

face of the unchecked executive secrecy that has largely pervaded the national security establishment.

Amicus the Center for Justice and Accountability ("CJA") is an international human rights organization dedicated to the protection and promotion of human rights through law. CJA is a non-profit legal advocacy center that works to deter severe human rights abuses through litigation, education, and outreach. CJA represents survivors and their families in both domestic and foreign tribunals. Many of these cases include claims of torture, giving CJA considerable experience litigating claims of torture practiced in secret, with or without government sanction. This experience leads CJA to conclude that FOIA's exemptions to shield from public view clearly unlawful methods of intelligence gathering such as waterboarding is inconsistent with the rule of law.

Amicus High Road for Human Rights Advocacy Project ("High Road") is a non-profit organization dedicated to protecting against human rights abuses through reforms of governmental and corporate policies and practices. The mission of High Road is to organize, support, and mobilize an extensive network of people to prevent and eliminate human rights abuses by: (1) elevating awareness about human rights abuses and available solutions, and (2) taking unified actions to achieve changes that will enhance the protection of human rights. High Road is particularly focused on governmental transparency and restoring the rule of law in

the United States, the undermining of which has permitted unprecedented impunity for kidnappings, disappearances, and torture—contrary to domestic law, treaty obligations, and customary international law.

Amicus the National Religious Campaign Against Torture ("NRCAT") is a national membership organization of religious organizations committed to ending torture that is sponsored or enabled by the United States. Since its formation on January 16, 2006, more than 300 religious organizations have joined and over 58,000 individual people of faith have participated in our activities. Members include representatives from the Baha'i, Buddhist, Catholic, evangelical Christian, Hindu, Jewish, Muslim, Orthodox Christian, mainline Protestant, Quaker, Sikh, and Unitarian Universalist communities. The members of NRCAT include national and regional religious organizations as well as congregations. One of NRCAT's four areas of work is working to end U.S.-sponsored torture and cruel, inhuman or degrading treatment of detainees without exception. As a part of that effort, NRCAT has been actively calling for a Commission of Inquiry to investigate all U.S.-sponsored torture since 9/11 and to make recommendations about safeguards needed to assure that torture never happens again. Because NRCAT is convinced that U.S.-sponsored torture will end only if the American people understand the nature of the torture practices done in our name, NRCAT joins as an amicus in this case, as it believes that documents

that describe U.S.-sponsored torture, including waterboarding should be made public.

Amicus North Carolina Stop Torture Now ("NCSTN") is a coalition of human rights supporters from many regions and walks of life in North Carolina. Since 2005, NCSTN has been seeking an investigation of North Carolina's role in hosting the CIA-affiliated aviation company, Aero Contractors, at its public airports. Aero Contractors has been implicated in the transport for secret detention and torture of numerous detainees in the "war on terror." Resolution of this issue is of special concern to NCSTN because several survivors of CIA waterboarding were transported by aircraft and pilots based in Smithfield and Kinston, North Carolina. Release of this information will assist the effort in North Carolina to achieve transparency regarding the fate of detainees transported using the state's public facilities.

Amicus No More Guantánamos is a nonprofit organization that educates the public about the prisoners at Guantánamo Bay, Bagram air base in Afghanistan, and other offshore prison sites maintained by the CIA and the Pentagon around the world. The organization focuses in particular on the prisoners' backgrounds and personal histories, their treatment, and their opportunities, if any, to challenge their detentions. It is concerned about the effect on public dialogue of public officials' claims that waterboarding of some of these

prisoners was justified because it saved American lives. It also believes that the public has a right and a need to know about men whom our government has detained on the basis of confessions or allegations secured through waterboarding, including those that were later determined to be false.

Amicus PEN American Center ("PEN") is an association based in New York City of approximately 3,300 authors, editors, and translators committed to the advancement of literature, the protection of writers and freedom of expression, and the unimpeded flow of ideas and information. It is the largest of the 145 centers of International PEN. PEN fulfills its mission and supports its approximately 3,300 members through conferences, readings, educational programs, public forums, and international exchanges. Through its Freedom to Write and Core Freedoms Programs, PEN conducts international and domestic advocacy campaigns to defend writers and free expression and provides direct support and advocacy assistance to hundreds of endangered writers around the world.

Amicus The Rutherford Institute is an international civil liberties organization that was founded in 1982 by its President, John W. Whitehead. The Rutherford Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated and in educating the public about constitutional and human rights issues. The Rutherford Institute is

greatly concerned that the rule of law is being systematically undermined by various tactics and techniques utilized by American governmental agents in the ongoing struggle against terrorism. In this respect, during its 29-year history, attorneys affiliated with The Rutherford Institute have represented numerous parties at all levels of the federal judiciary and before this Court. The Rutherford Institute has also filed amicus curiae briefs before this Court in cases dealing with critical constitutional issues arising from the current efforts to combat terrorism.

Amicus The World Organization for Human Rights USA ("Human Rights USA") is a non-profit human rights organization that employs legal strategies to ensure that U.S. law upholds internationally recognized human rights standards, to obtain justice for victims of human rights violations, and to punish the violators. Human Rights USA focuses primarily on the United States' compliance with international human rights norms, using litigation as the primary tool for securing compliance and for bringing public attention to these problems. Human Rights USA is a member of the World Organization Against Torture, an international network of human rights groups working to protect human rights in their own countries.