06-3140-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, THE HONORABLE ALVIN K. HELLERSTEIN

BRIEF FOR *AMICI CURIAE,* NATIONAL SECURITY ARCHIVE AND ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF THE *AMICI CURIAE*

Amici curiae submit this brief in support of Plaintiffs-Appellees American Civil Liberties Union (ACLU), Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense, and Veterans for Peace. This appeal stems from a judicial decision directing the Department of Defense (DOD) to release under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, twenty-one redacted images depicting alleged abuse of detainees by U.S. troops in Iraq and Afghanistan ("Detainee Abuse Images"). (Joint Appendix ("JA") 508-09, 513-514). In its orders directing release of the Detainee Abuse Images, the district court relied on its prior opinion of September 29, 2005. *ACLU v. Dep't of Defense*, 389 F. Supp. 2d 547, 575 (S.D.N.Y. 2005).

In this appeal, the Government argues that FOIA Exemption 7(F), 5 U.S.C. § 552(b)(7)(F), broadly justifies non-disclosure because publication of the requested photos may incite insurgents and terrorists in Iraq and Afghanistan to wage violence against American and Coalition forces, as well as American, Iraqi and Afghan civilians. The Government also argues that the records should be withheld because the graphic images may cause an unwarranted invasion of the personal privacy of the detainees pictured. This is the second appeal making these arguments concerning release of images of detainee abuse. The Government withdrew the first appeal, which concerned images of detainee abuse at Abu

Ghraib prison in Iraq, when the images at issue were published on a third-party Web site. JA 412.

The Government now appeals for a second time, arguing that the new set of images of detainee abuse should be withheld. The Government raises the same arguments in this appeal as in the earlier one. The Government does not allege that the online publication of the earlier images led to violence.

The National Security Archive (the "Archive") is an independent, non-partisan, non-governmental research institute located at the George Washington University, which collects and publishes declassified documents concerning U.S. foreign policy. The Electronic Frontier Foundation ("EFF") is a donor-supported membership organization that works to educate the press, policymakers, and the general public about civil liberties issues related to technology and to act as a defender of those liberties. *Amici* frequently use FOIA to seek information on important matters of significant public interest in order to inform the public debate, ensure government accountability, and defend the rights of U.S. citizens.

Amici's interest in this case is to preserve the principle that FOIA exemptions must be narrowly construed and government secrecy claims must be viewed in light of the underlying disclosure purpose of the FOIA, particularly where such disclosure will advance the interest of the public "to be informed about 'what their government is up to.'" *Dep't of Justice v. Reporters Comm. for*

Freedom of the Press, 489 U.S. 749, 773 (1989). The Government's argument would eviscerate FOIA's purpose and would prevent the type of information that most needs to be aired from ever becoming public. *Amici* contend that the law does not permit FOIA requesters' rights to be sacrificed based on speculation that third parties may respond in a violent manner to the disclosures, particularly in a case of clear public concern where the records at issue relate to possible government wrongdoing.

This brief is filed with the consent of counsel for all parties in the case.

SUMMARY OF ARGUMENT

The United States was founded on democratic principles recognizing the importance of informed public debate concerning government activities and the public's right to question and hold leaders responsible for their conduct. The purpose of FOIA, to allow the public to access information about the activities of its government, weighs heavily in favor of disclosure and permits withholding only in narrowly-defined circumstances.

In this case, the Government turns FOIA on its head, arguing that information more likely to expose improper official conduct—and so more likely to incite public antagonism and outrage—is properly withheld to prevent just such a public response. The Government also argues for an excessively broad and

unfounded interpretation of Exemption 7(F). No court has ever agreed that records could be withheld under FOIA Exemption 7(F) based on a concern about speculative future injury resulting from violent responses of unknown enemies to information released by the U.S. Government.

ARGUMENT

THE GOVERNMENT'S EXEMPTION 7(F) ARGUMENT FOR WITHHOLDING IMAGES OF ALLEGED DETAINEE ABUSE IN IRAQ AND AFGHANISTAN EVISCERATES THE FOIA

a. The purpose of FOIA is to ensure that the Government is held accountable to the public for its actions.

The Freedom of Information Act is the statutory embodiment of the democratic principle that the public is entitled to call on those who govern on the public's behalf to account for their conduct. The ability to access information about government conduct is a basic assumption of the U.S. Constitution, which specifically provides for a public role in governance. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) ("Implicit in th[e] structural role [of the First Amendment] is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.").

Congress enacted FOIA as the central mechanism for the public to seek information about government activities. The statute's purpose is "to promote honest and open government and to assure the existence of an informed citizenry 'to hold the governors accountable to the governed.'" *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (quoting *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978)). FOIA establishes a *presumptive right* for any person to obtain identifiable records from federal agencies, *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991), and creates "'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 89-813, at 3 (1965)).

The Supreme Court has recognized in its FOIA decisions that Congress was "principally interested in opening administrative processes to the scrutiny of the press and general public," *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 17 (1974) (citation omitted); "enabl[ing] the public to have sufficient information in order to be able . . . to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities," *id.*; ensuring "'an informed electorate,'" *id.* (quoting S. Rep. No. 89-813, at 3); and "promot[ing] honesty and reduc[ing] waste in government by exposing official conduct to public scrutiny." *Reporters Comm.*, 489 U.S. at 796 n.20. In short,

Congress enacted FOIA to make democratic participation and citizen oversight a reality. Throughout the statute's forty-year history, Congress has repeatedly reaffirmed these broad purposes,[1] most recently in 1996.[2]

Appellees have requested the Detainee Abuse Images to inform the public about alleged abuses committed by American troops and agents against individuals in detention facilities in Iraq and Afghanistan. The appellees have no personal interest in the photos nor in the identities of those pictured in them; rather, they are concerned members of the public who wish to foster an informed dialogue about the detention of prisoners in Iraq and Afghanistan and ensure government accountability. This is precisely the type of request FOIA envisions, one with great potential to shed "the light of public scrutiny" on the Government's execution of the people's business. *Rose*, 425 U.S. at 372.

The wrongdoing of American personnel at detention facilities around the world may be symptomatic of larger failures in leadership and policy within the military command structure or the federal government generally, and the question of whether senior officials ordered, authorized, or turned a blind eye to the abuse

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[1] Congress amended FOIA in 1974, 1976, 1986, and 1996.

[2] Electronic FOIA Amendments of 1996, P.L. 104-231, 110 Stat. 3048 (1996); *see* H.R. Rep. No. 104-795, at 19 (1996) ("Congress enacted the FOIA to require Federal agencies to make records available to the public through public inspection and at the request of any person for any public or private use.").

of prisoners remains an open issue for the American public.[3] U.S. military operations in Iraq and Afghanistan continue without a clear end in sight, and the conduct of the larger War on Terror, including the detention of suspected terrorists, remains indefinite in scope and duration. The issues surrounding U.S. treatment of detainees around the world are at least as ripe for debate today as when the Abu Ghraib prison abuse scandal was first disclosed in 2004. In fact, considerations of government detention policy have been brought to the forefront once again with the release this month of a revised Army Field Manual on Intelligence Interrogations, which changes prior policy by incorporating the protections of the Geneva Conventions for all detainees in U.S. custody.[4] The entire collection of Detainee Abuse Images is an essential component of this ongoing debate and should be made available to the American people as they weigh previous and new revelations about government detention of prisoners.

b. The government recasts FOIA so that the information most likely to warrant public outrage is the information that must be withheld because of the possible effects of that outrage.

The Department of Defense in its appeal asks this Court to close its eyes to settled conceptions of FOIA and the public's right of access to information. The Government's position is that, even where information exposes illegal conduct by

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[3] *See, e.g.*, Jane Mayer, *Annals of the Pentagon: The Memo*, New Yorker, Feb. 27, 2006, at 32.

[4] Press Release, U.S. Army, Army Publishes New Intelligence Manual (Sept. 6, 2006), http://www4.army.mil/ocpa/read.php?story_id_key=9524.

U.S. personnel, it should be hidden from the public if it has the potential to cause a violent reaction. This contention is in stark contrast to the well-established principle that FOIA was intended by its drafters to serve just the purpose the Government rejects—giving the public a tool to expose official corruption and government misdeeds.

Because FOIA fundamentally favors disclosure, the statute "requires the government to disclose its records unless its documents fall within one of the specific, enumerated exemptions set forth in the Act." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005). Therefore, courts must construe narrowly the statutory exemptions, "resolving all doubts in favor of disclosure." *Wood v. FBI*, 432 F.3d 78, 83 (2d Cir. 2005) (citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)); *see also Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988).

In this case, the Government relies on FOIA exemption 7(F), which permits information that has been compiled for law enforcement purposes to be withheld where disclosure "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). The Government argues that the possibility that evidence of abusive practices against detainees in Iraq and Afghanistan could cause a violent reaction should defeat the public's right of access to such evidence. This rationale, if accepted, would eviscerate the core

purpose of FOIA: ensuring an informed electorate and fostering democratic debate. Such a result would run counter to the longstanding recognition that a potentially violent reaction by an "offended" audience must not be allowed to define the boundaries of public discourse. The public oversight mechanism that FOIA provides is central to open and democratic debate on a host of critical policy issues. As the Supreme Court has observed, FOIA is "a means for citizens to know 'what the Government is up to.' This phrase should not be dismissed as a convenient formalism. *It defines a structural necessity in a real democracy*." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-172 (2004) (emphasis added) (citations omitted). Our constitutional jurisprudence has firmly established that a "heckler's veto"—which in essence is what the government asserts here—cannot be permitted to thwart the open and informed public debate that is essential to our democracy. *See, e.g., Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966).

More than fifty years ago, the Supreme Court squarely addressed the importance of "free debate," even in situations where it might cause "unrest" or "stir[] people to anger":

> The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937), it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

> Accordingly a function of free speech under our system of government is to invite dispute. *It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging*. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (emphasis added). The Court has thus recognized that "[p]articipants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence." *Brown*, 383 U.S. at 133 n.1 (citations omitted).

The principle was perhaps best summarized in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), where the Court held,

> in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Id. at 508-509 (citations omitted).

Rejection of the "heckler's veto" is thus firmly established in our democratic system. Indeed, this Court recently recognized that "allowing the public, with the

government's help, to shout down unpopular ideas that stir anger is generally not permitted under our jurisprudence." *Melzer v. Bd. of Educ.*, 336 F.3d 185, 199 (2d Cir. 2003). If FOIA is to fulfill its role as a "structural necessity in a real democracy," *Favish*, 541 U.S. at 172, its disclosure requirements cannot be thwarted by the possibility that some might react negatively—even violently—to the fruits of transparency. Such a result would defeat the core purpose of the statute and run counter to the longstanding principles of openness that uniquely characterize our "hazardous freedom." *Tinker*, 393 U.S. at 508.

Moreover, Judge Hellerstein's earlier decision ordering the release of some of the Abu Ghraib photos was grounded in part on the certainty that "[o]ur nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command." *ACLU*, 389 F. Supp. 2d at 575. The current administration has emphatically supported this principle since the attacks of September 11, 2001, assuring the public that we should not deviate from our values and convictions in the face of terrorist threats.[5] By allowing the prospect of a terrorist response to justify withholding records that

[5] *See, e.g.,* President George W. Bush, Address to the Nation, World Congress Center, Atlanta, Ga (Nov. 8, 2001) ("Throughout this battle, we adhere to our values. . . . In the face of this great tragedy, Americans are refusing to give terrorists the power. Our people have responded with courage and compassion, calm and reason, resolve and fierce determination.").

the agency would otherwise be obligated to provide under FOIA, the Government would sacrifice these democratic principles to a "heckler's veto."

c. The Government's Exemption 7(F) argument is so expansive that it swallows the rights guaranteed by the FOIA.

The Government's argument also fails because it expands Exemption 7(F) far beyond the scope envisioned by Congress.[6] The exemption protects law enforcement files from disclosure, "but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F) . Prior to 1986, the exemption applied only if disclosure of the records would endanger law enforcement personnel. Pub. L. No. 93-502, 88 Stat. 1561, 1563 (1974). In 1986, Congress amended Exemption 7(F) to permit nondisclosure when "any individual," not merely a law enforcement officer, might be harmed by

[6] The Court owes no deference to the military's interpretation of FOIA Exemption 7(F). In general, courts do not defer to an agency interpretation if the agency has construed a general statute that no single agency is charged with interpreting. *See Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 n.30 (1986) (where twenty-seven agencies had promulgated regulations under a particular statute, "[t]here is . . . not the same basis for deference predicated on expertise as we found . . . in [*Chevron, U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837 (1984)]"). Such reasoning plainly applies in the FOIA context. *Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997) ("The meaning of FOIA should be the same no matter which agency is asked to produce its records. One agency's interpretation of FOIA is therefore no more deserving of judicial respect than the interpretation of any other agency.").

disclosure of particular records. Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3248-50 (1986) (codified as amended at 5 U.S.C. § 552 (2002)).

The legislative history of the new Exemption 7 language, enacted in the midst of the 1980s War on Drugs, shows that both Congress and the Executive Branch intended the exemption to function as a domestic law enforcement tool by extending protection to informants and others who facilitate the government's investigation and prosecution of crimes. According to President Reagan, the amendments "contain[] several important provisions reforming [FOIA] that will considerably enhance the ability of Federal law enforcement agencies such as the Federal Bureau of Investigation and the Drug Enforcement Administration to combat drug offenders and other criminals." Statement by President Ronald Reagan Upon Signing H.R. 5484, P.L. 99-570, 22 Weekly Comp. Pres. Doc. 1436 (Nov. 3, 1986); *see also* 132 Cong. Rec. S14038 (daily ed. Sept. 27, 1986) (statement of Sen. Hatch) ("This section will protect a few narrow law enforcement files from mandatory disclosure" and "will directly improve drug enforcement.").[7]

Since 1986, a number of courts in this Circuit and elsewhere have regularly used Exemption 7(F) in precisely the way Congress intended when it enacted the

[7] For additional legislative history materials related to the consideration of the 1986 amendments to the Freedom of Information Act, *see* The National Security Archive, FOIA Legislative History, http://www.gwu.edu/~nsarchiv/nsa/foialeghistory/legistfoia.htm (last visited Sept. 12, 2006).

amendment—"to protect all those put at risk through their participation in law enforcement proceedings, whether as sources of information or as witnesses." *ACLU*, 389 F. Supp. 2d at 576; *see Garcia v. Dep't of Justice,* 181 F. Supp. 2d 356 (S.D.N.Y. 2002) (allowing agency to withhold investigatory records where requestor convicted of robbery and murder had previously attempted retaliation against individuals who testified against him); *Manna v. Dep't of Justice*, 815 F. Supp. 798 (D.N.J. 1993) (upholding agency's invocation of Exemption 7(F) where organized crime leader requested FBI reports that contained information about other suspects, crime victims, and members of the public).

In fact, many of the cases relied on by the Government support this limited application of Exemption 7(F). In *Center for National Security Studies v. Department of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002), *aff'd in part and rev'd in part on other grounds*, 331 F.3d 918 (D.C. Cir. 2003), the court—by permitting withholding of the locations of detention facilities—sought to protect detainees being held in connection with the September 11 terrorism investigation, the facilities in which they were held, and the employees of those facilities. Disclosing the unknown locations of those facilities would have enabled interference with the terrorism investigations and harm to individuals specifically connected to those investigations. *Id.* at 108. No similarly concrete threat or distinct class of persons is identified here; instead, the government claims it is trying to protect the safety of

a group that presumably includes every person in Iraq and Afghanistan, as well as Americans and other potential victims of terrorist attacks around the world. The long-established boundaries of FOIA Exemption 7(F) should not be dissolved to satisfy the Government's speculative fears of potential harm to an undefined category of individuals.

Several of the other cases relied on by the Government address Exemption 7(F) without substantial analysis, but concern the physical safety of identifiable individuals or groups of individuals—and not broad segments of the population generally. *See Brady-Lunny v. Massey*, 185 F. Supp. 2d 928, 932 (C.D. Ill. 2002) (relying on "gang ties, interest in escape, and motive for *violence against informants and rivals*" as justification for reliance on Exemption 7(F) to withhold federal inmates names) (emphasis added); *Anderson v. U.S. Marshals Serv.*, 943 F. Supp. 37, 40 (D.D.C. 1996) (protecting disclosure of inmate identity and location because the individual "required separation from the Plaintiff."); *see also Los Angeles Times Commc'ns, LLC v. Dep't of the Army*, --- F. Supp. 2d ---, 2006 WL 2336457 (C.D. Cal. July 24, 2006) (relying on Exemption 7(F) to withhold identity of private contractors in Iraq who submitted serious incident reports because the names of the contractors, along with information about vulnerable reconstruction projects, "may provide [insurgents] with enough information to organize attacks on vulnerable [private security contractor] companies . . . .").

The government also relies on an anomalous district court decision that deviated from the settled approach to Exemption 7(F) to justify its argument that Exemption 7(F) should indiscriminately protect from danger all unknown individuals or members of the public. *See Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313 (D. Utah 2003). *Living Rivers* does not bind the Second Circuit and, moreover, it is clearly distinguishable. In *Living Rivers*, the court held that the Bureau of Reclamation could withhold inundation maps that showed flooding areas and described potential loss of life and property damage that would occur in the event of a dam failure. *Id*. The court applied the exemption where the Government's release of information would have *facilitated* the commission of a crime by effectively providing individuals with instructions for carrying out or maximizing the lethality of their illicit activities.

In contrast, the Detainee Abuse Images cannot be used as a roadmap for criminals or terrorists, or otherwise reveal information that would aid in criminal activity. The potential harm the Government asserts is that the photographs, if released, could cause unnamed individuals to become angry and violent. There is no claim that this response would be enabled or assisted by the images, but only stimulated by them. No court has held that such a speculative future injury, the result of an emotional chain reaction set off by the released records, can justify withholding material that otherwise would be releasable under FOIA. This is not a

situation where publicizing the disputed information could assist an adversary in any concrete or physical way. FOIA Exemption 7(F) and courts' interpretations of it simply do not contemplate withholding information solely because that information might enrage or antagonize America's friends and enemies.

Further, the current situation in Iraq and Afghanistan betrays a fundamental weakness in the government's argument: violence in those countries is pervasive and ongoing. As Judge Hellerstein observed, sadly, the terrorists do not need these photographs as "pretexts for their barbarism; they have proved to be aggressive and pernicious in their choice of targets and tactics." *ACLU,* 389 F. Supp. 2d at 576. The Bush administration has similarly characterized our enemy in Iraq and in the global war on terrorism as irrational, incapable of reasoned negotiation, and unrelenting in its objective:

> Some have . . . argued that extremism has been strengthened by the actions of our coalition in Iraq, claiming that our presence in that country has somehow caused or triggered the rage of radicals. I would remind them that we were not in Iraq on September the 11th, 2001—and al Qaeda attacked us anyway. The hatred of the radicals existed before Iraq was an issue, and it will exist after Iraq is no longer an excuse.

President George W. Bush, Address on War on Terror at the National Endowment for Democracy, Washington, D.C. (Oct. 6, 2005).

In fact, statistics portraying widespread violence and ongoing insecurity in Iraq and Afghanistan belie the Government's claim that it can accurately assess

whether the release of certain records "could reasonably be expected to endanger the life or physical safety" of U.S. troops, 5 U.S.C. § 552(b)(7)(F), let alone Iraqi and Afghan civilians and the vast, undefined class of other potential victims. Absent any impact from the twenty-one photos at issue in this case, more than 2,100 U.S. troops have been killed in hostile incidents in Iraq since 2003,[8] along with more than 230 Coalition troops,[9] and more than 5,000 Iraqi police and guardsmen.[10] While estimates on civilian casualties vary widely, the United Nations recently reported that the total number of civilians killed in Iraq between January and June of 2006 was 14,338, and that the death toll in Iraq has risen significantly, to more than 100 per day.[11]

According to recent statistics issued by the Government Accountability Office (GAO), insurgents in Iraq carried out more than 34,000 attacks in 2005, compared to 26,500 in 2004—an increase of nearly thirty percent; the number of roadside bomb incidents rose from 5,607 to 10,953 between 2004 and 2005.[12]

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[8] Directorate for Information Operations and Reports, Dep't of Defense, Military Casualty Information (2006), http://www.dior.whs.mil/mmid/casualty/castop.htm.
[9] Icasualties.org, Iraq Coalition Casualty Count, http://icasualties.org/oif/ (last visited Sept. 12, 2006).
[10] *Id.*
[11] U.N. Assistance Mission for Iraq (UNAMI), Human Rights Report 1May - 30 June 2006, *available at* http://www.uniraq.org/documents/HR%20Report%20May%20Jun%202006%20EN.pdf (last visited Sept. 12, 2006).
[12] Government Accountability Office, Rebuilding Iraq: Stabilization, Reconstruction, and Financing Challenges, Statement of Joseph A. Christoff,

Also disturbing is the recent escalation of insurgent violence in Afghanistan—independent of any released photos depicting torture of prisoners in that country—with a record 47 bombing attacks so far this year carried out by suspected Taliban militants and others.[13] Since fighting began in Afghanistan in 2001, nearly 250 American and Coalition troops have been killed,[14] but NATO recently reported thirty-five casualties just since NATO forces took over operations in the south of the country in August 2006.[15]

The Government further argues that release of the Detainee Abuse Images would give terrorists justification for renewed violence and acts of terrorism. But photos depicting abuse and torture by U.S. soldiers have already been leaked to the media. The fact that detainees in U.S. custody have been mistreated is no secret. Even if it were possible to speculate that the actions of terrorists are sufficiently rational to be linked to specific grievances, the release of additional photographs showing abuse of detainees is unlikely to add measurably to the vast array of perceived grievances already fueling the violence in Iraq and Afghanistan.

Director International Affairs and Trade (2006), *available at* http://www.gao.gov/new.items/d06428t.pdf.

[13] Carlotta Gall, *Suicide Bomber Kills a Governor In Afghanistan*, N.Y. Times, Sept. 11, 2006, at A1.

[14] Icasualties.org, Operation Enduring Freedom: Coalition Fatalities, http://www.icasualties.org/oef/ (last visited Sept. 12, 2006).

[15] Paul Garwood, *NATO needs more troops to fight Taliban*, Associated Press, Sept. 7, 2006.

Yet the Government asks the Court for deference to its opinion in this matter, asserting it should be the sole arbiter of what the public ought to see. At its core, the Government's argument is that the courts should step aside and defer to the Executive Branch's assessment and, in so doing, shield it from scrutiny and full public accountability. Such deference, however, is not justified by the FOIA. The statute gives courts authority to conduct a *de novo* review of government withholding determinations. Congress, anticipating exactly the types of deference claims now being invoked by the Government, provided for *de novo* judicial review under the FOIA, "in order that the ultimate decision as to the propriety of the agency's action is made by the court and [to] prevent [review] from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 89-813, at 8.

With no apparent limits to its theory of Exemption 7(F), the Government is constructing a slippery slope, away from the accountability that FOIA is designed to ensure. At the base of this slope, the judiciary is deprived of any meaningful role in determinations of FOIA withholdings, a role which the statute mandates. The Court should not accept the Government's effort to marginalize the judiciary in secrecy matters and should not provide the Government a new tool for avoiding accountability.

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs-Appellees Brief, the Court should uphold the ruling of the District Court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for the *amici curiae* certifies that this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32 (a)(6) because it is proportionally spaced, prepared using Microsoft Word 2003, in 14-point Times New Roman typeface. This brief contains 4,898 words, and therefore complies with the type-volume limitation imposed upon *amicus curiae* briefs by Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B)(i).

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VIRUS PROTECTION CERTIFICATION

I hereby certify that the PDF version of the Brief for Amici Curiae National Security Archive and Electronic Frontier Foundation sent by electronic mail to the Court and counsel has been scanned for viruses using Symantec Anti-Virus and that no viruses have been detected.

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2006, I sent an original and nine copies and sent by electronic mail a PDF version of the foregoing amicus brief to the clerk of the court and served two copies of the forgoing *amicus curiae* brief by First Class U.S. Mail and in PDF format by electronic mail upon the following:

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