06-3140-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICANS 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,

Defendants-Appellants,

(*Caption continued on inside front cover*)

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

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PLAINTIFFS-APPELLEES FOR AFFIRMANCE OF THE DISTRICT COURT

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(*Caption continued)*

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.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO F.R.A.P. 26.1 AND 29

Amicus the Association of the Bar of the City of New York, a non-governmental corporation, states that it has no parent corporation and no publicly held corporation holds ten percent or more of its stock.

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CONSENT OF THE PARTIES

All parties have consented to the filing of this brief *amicus curiae* by the Association of the Bar of the City of New York.

INTEREST OF *AMICUS CURIAE*

The Association of the Bar of the City of New York, founded in 1870 and now with more than 22,000 members, is among the nation's oldest and largest bar associations.

The Association has long been committed to protecting, preserving, and promoting civil liberties, civil rights, and the democratic process. The Association has a strong interest in ensuring government accountability through an informed public, which is an essential condition for the democratic process and the rule of law. It also has a demonstrated interest in assuring that the United States lives up to its longstanding human rights traditions, laws and treaties, including prohibitions of torture and cruel, inhuman or degrading treatment of those in our government's custody. Among other things, the Association has published reports on interrogation standards applicable to detainees in the "war on terror" and the practice of "extraordinary rendition," by which detainees are sent to countries with a history of having engaged in or condoned torture.[1] The Association also

[1] Ass'n of the Bar of the City of New York, Comm. on Int'l Human Rights, & Comm. on Military Affairs and Justice, *Human Rights Standards Applicable to the United States' Interrogation of Detainees*, 59 The Record of the Ass'n of the Bar of the City of New York 183

played a major role in the preparation of American Bar Association resolutions and reports concerning the treatment of detainees.[2] The Association previously filed an amicus brief supporting Appellees in the government's appeal from the district court's earlier order requiring disclosure of a different set of photographs depicting abuse of Abu Ghraib prisoners. The government withdrew its appeal after those images were made public on various websites.

The Association submits this brief *amicus curiae* in support of Appellees and the decision of the district court.[3]

(2004); Comm. on Int'l Human Rights of the Ass'n of the Bar of the City of New York & the Ctr. for Human Rights and Global Justice, New York Univ. School of Law, *Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions,'* 60 The Record of the Ass'n of the Bar of the City of New York 13 (2005).

[2] *See, e.g.*, American Bar Ass'n & Ass'n of the Bar of the City of New York et al., Report to the House of Delegates, Aug. 9, 2004, http://www.abanet.org/leadership/2004/annual/dailyjournal/ABAFinalTortureReport081704.pdf.

[3] Amrit Singh, a member of the Association's Committee on International Human Rights, and Jameel Jaffer, a member of the Association's Committee on Civil Rights, are counsel for Appellees, but played no role in drafting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Association submits this brief to address the substantial threat to the democratic process and public accountability for government misconduct posed by the government's interpretation of Exemption 7(F) of the Freedom of Information Act, 5 U.S.C. § 552(b) (2002) ("FOIA"). Exemption 7(F) provides that government agencies may refuse to disclose, in response to a request under FOIA, "records or information compiled for law enforcement purposes, 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). The government invokes Exemption 7(F) as a basis for refusing to disclose twenty-one images depicting mistreatment of people detained by the United States government in Iraq and Afghanistan (the "Detainee Abuse Images"). The government contends that withholding of the Detainee Abuse Images is justified because their depictions of abuse and mistreatment of Iraqi prisoners reflect such egregious misconduct by government personnel that they would, if released, "pose a grave risk of inciting violence and riots against American troops, allied Coalition Forces, and innocent American,

Iraqi, and Afghan civilians." Appellants' Br. at 3 (internal quotation marks omitted).

The district court correctly rejected the government's invocation of Exemption 7(F)[4] and ordered disclosure of the Detainee Abuse Images.[5] The court noted that "Exemption 7(F) was enacted to protect the safety of individuals involved in law enforcement investigations," JA 397, and that because the government's rationale for withholding the Detainee Abuse Images had no "nexus to Exemption 7(F)'s central purpose" of protecting

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[4] In addition to rejecting the government's argument on Exemption 7(F), the district court also correctly held that the Detainee Abuse Images, once redacted to eliminate all identifying characteristics of the persons shown, could not be withheld under Exemptions 6 and 7(C) of FOIA. JA 390-394. Exemptions 6 and 7(C) permit withholding of information when certain privacy considerations are implicated. While *amicus curiae* agrees with and supports the district court's determination as to Exemptions 6 and 7(C), this brief addresses only the ruling on Exemption 7(F).

[5] References and citations herein to the district court's reasoning are drawn from the court's opinion and order dated September 29, 2005 (JA 353-402), which disposed of the parties' dispute over, *inter alia*, the applicability of FOIA Exemptions 6, 7(C), and 7(F) to a separate set of photographic depictions of detainee abuse. In the judgments appealed from in the instant appeal, the district court incorporated by reference the reasoning on the applicability of Exemptions 6, 7(C), and 7(F) contained in its September 29, 2005 opinion and order in which it ordered the government to disclose the Detainee Abuse Images.

individuals involved in law enforcement activities, the exemption did not apply. JA 399-400. While the government contends on appeal that Exemption 7(F) justifies withholding of any information "compiled for law enforcement purposes" if its release poses a threat to the safety of *any* individual, the district court held, and Appellees' brief amply demonstrates, that the government's interpretation is at odds with the clear purposes of FOIA and Exemption 7(F). *See* Appellees' Br. at 19-34. Furthermore, the government's interpretation, if accepted, would subsequently permit withholding of information of government wrongdoing virtually without limit, effectively rewarding outrageous violations of the public trust with a judicial guarantee of secrecy. This would be not only an intolerable vitiation of FOIA, but a reversal of established American jurisprudence, which has long embraced the principle that the threat of violence cannot deter the enforcement of the law. What is more, as Appellees correctly point out, *see* Appellees' Br. at 35-41, even if Exemption 7(F) were applicable to the Detainee Abuse Images as the government submits, the government has failed to meet its burden, necessary to justify exemption from disclosure, that the release of the Detainee Abuse Images "could reasonably be expected to endanger the life or physical safety of any individual." The government,

in appealing an earlier district court order requiring disclosure of another set of photographs portraying abuses at Abu Ghraib, similarly predicted that disclosure of those photographs would result in violent attacks on military and civilian targets. The government withdrew that appeal when those photographs were distributed on the Internet; notably, the violent consequences that the government predicted would follow the release of those images apparently did not occur.

This amicus brief addresses the serious harm that the government's interpretation of Exemption 7(F) would have on FOIA's ability to fulfill its core purpose: to require disclosure of information needed to inform the electorate and Congress about the performance of the government, to hold government accountable for misconduct, and to permit appropriate reforms that such misconduct may require. In this case, which involves allegations of the government's mistreatment of detainees in the "war on terror" in violation of United States and international law, the need for a robust and effective FOIA is profound. This need is particularly urgent where, as here, other avenues for discovering the full truth about the extent of the misconduct and the parties responsible have proven inadequate.

Without a robust mechanism for informing the American people on issues of the gravest public concern, the accountability of our government to its people is jeopardized; without an effective means of investigating and calling to account government actors responsible for violating international law, so is the United States' credibility on the world stage. The government's interpretation would undermine the ability of FOIA to advance the democratic ideal of government accountability. This Court should affirm the district court's decision rejecting this interpretation.

POINT I

THE GOVERNMENT'S INTERPRETATION OF EXEMPTION 7(F) IS INCOMPATIBLE WITH FOIA'S GOAL OF PROMOTING GOVERNMENT ACCOUNTABILITY.

The Supreme Court has acknowledged that FOIA is a vital instrument for public monitoring of the state's operation: its "central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774 (1989) (emphasis omitted). This Court has expressly recognized FOIA's efficacy as a means of ensuring elected representatives' direct accountability to voters:

> The broad legislative intent behind the enactment of the Freedom of Information Act . . . was to give the electorate greater access to information concerning the operations of the federal government. The ultimate purpose was to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities.

Frankel v. Secs. and Exchange Comm'n, 460 F.2d 813, 816 (2d Cir. 1972). The importance of FOIA is even more pronounced when the "governmental activities" at issue may be unlawful. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (FOIA provides a "check against corruption"); *Wood v. FBI*, 432 F.3d 78, 82 (2d Cir. 2005) (FOIA ensures "public access to information . . . in order to hold the governors accountable to the governed") (quoting *Tigue v. United States DOJ*, 312 F.3d 70, 76 (2d Cir. 2002) (citation and internal punctuation omitted)).

FOIA was enacted in 1967 to correct the "functional inadequacy"[6] of section 3 of the Administrative Procedure Act, which had allowed agencies

[6] House Subcommittee on Government Operations, 92d Cong., 2d Sess., H. Rep. No. 92-1419 (Sept. 14, 1972), *reprinted in* Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts, and Other Documents (1975) ("FOIA 1974 Amendment Source Book"), at 9.

to withhold any information "held confidential for good cause found." 5 U.S.C. 1002 § 3 (1964) (current version at 5 U.S.C. § 552), *quoted in* 1966 U.S.C.C.A.N. 2418, 2421. Legislators observed that the "for good cause found" provision had been abused by agencies as a means to "cover up embarrassing mistakes or irregularities" and "as an excuse for secrecy." Cong. Record, Sen. 26821 (Oct. 13, 1965); S. Rep. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, Senate Committee on the Judiciary (1974) ("FOIA Source Book"), at 38. The House Subcommittee reported, "Historically, Government agencies whose mistakes cannot bear public scrutiny have found 'good cause' for secrecy." H. Rep. No. 1497, *reprinted in* FOIA Source Book at 27.

In 1974, Congress amended FOIA, in large part because it observed that government agencies had failed to implement FOIA's regulations and policies or had exploited its loopholes. As a result, "in too many cases, information is withheld, overclassified, or otherwise hidden from the public to avoid . . . political embarrassment." H. Rep. No. 92-1419, *reprinted in* FOIA 1974 Amendment Source Book at 14, 15.

Department of Defense Secretary Rumsfeld, while a member of the House of Representatives during the deliberations on the original FOIA legislation, noted that the statute would "make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that the people should be denied access to information on the conduct of Government." 112 Cong. Rec. 13653 (June 20, 1966). Thirty years after then-Congressman Rumsfeld's pronouncements, Congress reaffirmed FOIA's critical role in enabling "disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government." Electronic FOIA Amendments of 1996, P.L. 104-231, § 2, 110 Stat. 3048 (1996).

Judicial authority and legislative history thus make it clear that the manifest purpose of FOIA is to foster transparency of government institutions, and force government to account to those it serves for its misdeeds, to the end that the people and their elected representatives may seek an appropriate remedy. *See Stern v. FBI*, 737 F.2d 84, 94 (D.C. Cir. 1984) ("One basic general assumption of the FOIA is that, in many important public matters, it is for the public to know and then to judge."). It is astonishing, therefore, that the government would advance an argument which, if accepted, would place beyond FOIA's reach precisely the sort of

information that the statute was intended to wrest from "possibly unwilling official hands," *EPA v. Mink*, 410 U.S. 73, 80 (1973), and expose to public scrutiny.

The government urges that it should be allowed to withhold information that appears to show government personnel abusing and violating the rights of foreign nationals captured and detained abroad, on the ground that the information reflects such egregious misconduct that it might incite anger and violent attacks. If this interpretation were accepted it would have the absurd result—plainly not contemplated by Congress—that the most appalling government misconduct, because it is most likely to provoke violent reactions, would have the strongest rationale for protection from public scrutiny.[7]

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[7] Even if the Court were to credit the government's assertion that the statute's language is unambiguous, the Court may expand its inquiry beyond the plain language where "the result reached by applying the plain language is sufficiently absurd to override its unambiguous terms." *Frank G. v. Bd. of Educ.*, --- F.3d ---, 2006 U.S. App. LEXIS 19029, at *28-29 (2d Cir. July 27, 2006) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 459 (2002)). The Court certainly is not obliged to adopt a construction of Exemption 7(F) patently at odds with the demonstrable purposes of FOIA. *See Barnhart*, 534 U.S. at 450 (if "the statutory scheme is coherent and consistent" the court may cease its inquiry beyond the statute's plain language).

Not only are the implications of the government's interpretation for future FOIA cases alarming, but they fly in the face of the strongly held principle, essential to the rule of law, that the threat of violence cannot deter the enforcement of the law. For instance, in a landmark decision following *Brown v. Board of Education*, the Supreme Court reversed a district court's order to suspend desegregation of Little Rock, Arkansas schools in the face of "conditions of chaos, bedlam and turmoil" in the schools. *Cooper v. Aaron*, 358 U.S. 1, 13 (1958) (per curiam). The lower court had found that the violent reaction against black students was due in part to the Arkansas governor's and legislature's unlawful and overt efforts to delay a court-approved school desegregation plan, which had fueled public hostility toward desegregation. The *Cooper* Court unanimously and in the strongest terms rejected the notion that enforcement of the law should give way to violence: "[C]onstitutional rights . . . are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature." *Id*. at 16.

The *Cooper* Court's words resonate powerfully in the instant case, in which the violence predicted by the government—like the violence that broke out in the Little Rock schools—would be the direct result of misconduct by the same government that now seeks to be excused from complying with the law. The principle of *Cooper* should apply *a fortiori* here, where the government's rationale for refusing to comply with a FOIA request is the mere speculation that its own conduct is so offensive that its disclosure would be used by our enemies to provoke violence. The notion that the risk of inciting violence can justify censorship has been rejected in the analogous arena of First Amendment jurisprudence:

> 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 [citing *Terminiello v. Chicago*]; 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.

Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

This Court should reject, as both untenable and incongruous with our legal system's privileging of rights, speech, and political openness, the government's interpretation of Exemption 7(F).

POINT II

THE GOVERNMENT'S INTERPRETATION OF EXEMPTION 7(F) WOULD PREVENT DISCLOSURE OF THE FULL TRUTH ABOUT ABUSE OF DETAINEES IN UNITED STATES CUSTODY AND OBSTRUCT EFFORTS TO ASCRIBE RESPONSIBILITY FOR SUCH WRONGDOING.

The government's interpretation of Exemption 7(F) not only would prevent the public's right of access to the Detainee Abuse Images, which are the best evidence of the type of abuse in which our service members engaged in Iraq and Afghanistan, but also would obstruct efforts to get at the truth about the nature and scope of the government's treatment of detainees in the "war on terror" and the assignment of responsibility for any misconduct. Appellees' brief demonstrates why disclosure of the Detainee Abuse Images is itself important to the public's full understanding of the gravity of the issues raised by the abuses in Iraq and Afghanistan and to the need for a full and thorough investigation of the treatment of detainees in U.S. custody. Appellees' Br. at 47-54. However, accepting the government's interpretation of Exemption 7(F) would have potentially adverse consequences going beyond the suppression of the Detainee Abuse Images. Because its interpretation could block disclosure of any records evidencing particularly egregious government misconduct that could be claimed to incite anger and violence among Muslim populations, it would

also enable the government to shield from scrutiny other information, possibly even more disturbing than the Detainee Abuse Images, which is needed to understand the full story of the government's conduct and policies regarding detainees captured on foreign soil.

The abuse of detainees in U.S. custody is more widespread than the government has acknowledged, and there is strong reason to believe that full responsibility and accountability for this misconduct extend well beyond the relatively low-level military personnel it has so far identified, all the way up to the highest levels of our military and civilian administrations. Calls for a more thorough and independent investigation than those already conducted have thus far gone unheeded. FOIA is therefore an essential instrument for obtaining the full story and holding the responsible parties accountable.

The military's own investigations have established that the abuses of detainees go beyond those thus far revealed to the public.[8] There is

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[8] *See Final Report of the Independent Panel to Review DoD Operations* 12-13 (Aug. 2004), http://www.defenselink/mil/news/Aug2004/d20040824finalreport.pdf ("Schlesinger Report") (reporting approximately 300 incidents of alleged detainee abuse, including 66 already substantiated cases of abuse occurring in Iraq, Afghanistan and Guantánamo).

substantiated evidence of torture and mistreatment in Iraq[9] and at Guantánamo Bay.[10] In addition, there are confirmed reports of homicides in

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[9] *See* Maj. Gen. Antonio M. Taguba, *Investigation of the 800th Military Police Brigade* 20 (March 2004), http:www.dod.gov/pubs/foi/detainees/taguba/ ("Taguba Report") (referring to incidents of physical abuse at Camp Bucca in Iraq); Int'l Comm. of the Red Cross, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* 3-4 (Feb. 2004) (stating that detainees in Iraq determined to have high intelligence value "were at high risk of being subjected to a variety of harsh treatments ranging from insults, threats and humiliations to both physical and psychological coercion, which in some cases was tantamount to torture").

[10] *See* Lt. Gen. Randall M. Schmidt & Brig. Gen. John T. Furlow, *Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility* 6-7, 19-20 (June 2005), http://www.dod.mil/news/Jul2005/d20050714report.pdf ("Schmidt-Furlow Report") (finding that interrogators at Guantánamo improperly impersonated F.B.I. agents and employed various "Ego Down" and "Futility" interrogation techniques, the combined effect of which resulted in degrading and abusive treatment); *Situation of detainees at Guantánamo Bay*, U.N. ESCOR, Comm'n on Human Rights, 62d Sess., Provisional Agenda Items 10-11, at 23-26, U.N. Doc. E/CN.4/2006/120 (2006) (describing abusive interrogation techniques and conditions of detention); Email from [Redacted] to [Redacted] (Aug. 2, 2004), http://www.aclu.org/torturefoia/released/FBI.121504.5053.pdf (detailing F.B.I. agent's account of interrogations at Guantánamo in which detainees were shackled hand and foot in fetal positions on the floor for 18 to 24 hours at a time and another occasion when a detainee, left in an unventilated, non-air-conditioned room, pulled out a pile of his own hair).

Afghanistan and Iraq, including numerous deaths resulting from torture.[11] Just last week, the President confirmed longstanding reports that the CIA, acting under his orders, has held a small group that "includes individuals believed to be key architects" of terror attacks on U.S. citizens in secret locations outside the United States and questioned them using "an alternative set of [interrogation] procedures."[12]

There is a strong need for further investigation to determine responsibility and accountability of high-level military and civilian government officials. The Administration has attributed the abuses at Abu Ghraib to the "isolated activity" of a few low-ranking, "rogue individuals,"

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11 *See* Schlesinger Report, *supra*, at 13 (finding five cases of detainee deaths as a result of abuse by U.S. personnel during interrogations); Human Rights First, *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* 1 (Feb. 2006), http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf ("*Command's Responsibility*") (identifying 45 cases of homicide of detainees in United States custody since August 2002, eight of which involved detainees who were tortured to death). The evidence cited in this report is derived in large part from documents obtained through FOIA. *See id*. at 103 n.2.

12 *See* Press Release, The White House, Office of the Press Secretary, *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, Sept. 6, 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.

JA 281, 284, has denied any mistreatment in Guantánamo,[13] and has allowed homicides in Afghanistan and Iraq to go largely unpunished.[14] However, an investigation convened by the Department of Defense concluded that responsibility for the abuses in Iraq, Afghanistan and Guantánamo may be attributable to higher levels of military and civilian leadership, although it failed to provide any details or identify any individuals.[15] Meanwhile,

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13 *See, e.g.*, Amy Westfeldt, *Rumsfeld Says U.N. Chief "Flat Wrong" to Advocate Closing Guantanamo Prison*, Assoc'd Press, Feb. 18, 2006 (describing comments by Secretary Rumsfeld that detainees at Guantánamo were trained to fabricate allegations of mistreatment and torture).

14 *See Command's Responsibility*, *supra*, at 35 (noting that only twelve detainee homicides have resulted in punishment of any kind for any U.S. official, and the most severe sentence for any official involved in a torture-related death has been five months in jail). A joint study undertaken by the Center for Human Rights and Global Justice at NYU Law School, Human Rights Watch and Human Rights First documented over 330 cases of detainee abuse or death implicating more than 600 U.S. military and civilian personnel, of which only 54 personnel are known to have been convicted by court-martial. Detainee Abuse and Accountability Project, *By the Numbers: Findings of the Detainee Abuse and Accountability Project* 2 (April 2006), http://hrw.org/reports/2006/ct0406/ ("*By the Numbers*"). The project found that 75% of the cases in which investigations were conducted did not appear to have resulted in any type of punishment. *Id*. at 7. The evidence cited in this report is derived in large part from documents obtained through FOIA. *Id*. at4.

15 *See* Schlesinger Report, *supra*, at 5 (finding "institutional and personal responsibility at higher levels").

disclosure of documents prepared by the White House, Department of Justice, and Department of Defense indicates that the abuses at Abu Ghraib, Guantánamo and elsewhere may have been at least encouraged by, if not directly attributable to, a climate of uncertainty and permissiveness regarding the limits of appropriate and legal interrogation techniques.[16] Many of these documents were first revealed after being leaked to the press or as a result of FOIA requests. Among the most disturbing are a series of memoranda prepared by the White House, Department of Justice and Department of Defense in 2002 and 2003[17] discussing legal and policy justifications for official determinations, including: (i) concluding that the Geneva Conventions do not cover al Qaeda or Taliban captives;[18] (ii)

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16 *See generally* Mark Danner, Torture and Truth: America, Abu Ghraib, and the War on Terror 26-49 (2004).

17 *See generally* David Luban, *Liberalism, Torture and the Ticking Bomb*, *reprinted in* The Torture Debate in America 35-83 (Karen J. Greenberg, ed. 2006); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681 (2005).

18 Memorandum from John Yoo, Deputy Assistant Att'y Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense, Jan. 9, 2002 ("Yoo Memorandum"), in The Torture Papers: The Road to Abu Ghraib 38, 38 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). After four years of contradictory pronouncements, *see generally* Scott Shane, *Terror and Power: Bush Takes a Step Back*, N.Y. Times, July 12, 2006, the Department of Defense, in response to the Supreme Court's decision in *Hamdan v.*

defining torture so narrowly so as to exclude all but the sort of extreme pain associated with death or organ failure;[19] (iii) asserting defenses to torture largely unsupported in existing legal doctrine;[20] and (iv) arguing that the President, acting in his capacity as Commander-in-Chief, is immune from legal restraints on torture.[21]

Rumsfeld, 126 S. Ct. 2749 (2006), issued a memorandum acknowledging that Common Article 3 of the Geneva Conventions "applies as a matter of law to the conflict with Al Qaeda," and directing that all orders and policies comply with this standard. Memorandum from Gordon England, Deputy Defense Sec'y, July 7, 2006, http://www.defenselink.mil/pubs. A new Army field manual incorporating Common Article 3 has also been issued. However, it does not apply to the interrogation methods of CIA officers and other non-DoD personnel. *See* Dept. of the Army, *FM 2-22.23, Human Intelligence Collector Operations*, at 9, Appx. A (Sept. 2006), www.army.mil/references/FM2-22.3.pdf.

19 Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, Aug. 1, 2002 ("Bybee Memorandum"), in The Torture Papers, *supra*, at 172, 176.

20 *Id.* at 207-13.

21 *Id*. at 200-07. The Bybee Memorandum has since been repudiated in large part by the Department of Justice. *See* Memorandum from Daniel Levin, Acting Assistant Att'y Gen., to James B. Comey, Deputy Att'y Gen., Dec. 30, 2004, http://www.usdoj.gov/olc/dagmemo.pdf. This does not, however, undo any impact it may have had on government policies in the nearly two years it was in effect. Indeed, evidence suggests that the legal analyses in the Yoo, Bybee and related memoranda provided the justification for official policies on interrogation techniques employed

The investigations conducted to date have been inadequate. Restrictions on the mandate[22] and information available to the military's investigators,[23] as well as the obvious bias inherent in investigating one's own misconduct, have limited the ability to attribute responsibility at high levels of military and civilian leadership.[24] Some of the conclusions reached by the investigators that could potentially touch on this issue have been

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first in Guantánamo and later in Iraq. *See* Memorandum from Alberto J. Mora, General Counsel of the Navy, to Vice Admiral Albert Church, Inspector General, Dep't of the Navy 18-20, July 7, 2004, http://www.newyorker.com/images/_pdfs/moramemo.pdf ("Mora Memorandum") (describing incorporation of legal memoranda into a Pentagon working group report on interrogation techniques subsequently approved for use at Guantánamo); Schlesinger Report, *supra*, at 37 (stating that interrogation policy in Iraq was based in part on approved Guantánamo policy).

22 The Taguba and Fay reports were both administrative investigations (Army Regulation 15-6 investigations) and, as such, could only investigate wrongdoing within, but not at the level of or higher than, the chain of command of the commander who initiated the investigation. *See Command's Responsibility, supra*, at 33 (citing Dep't of the Army, *Army Regulation 15-6, Procedure for Investigating Officers and Board of Officers*, at 2-1a (Sept. 30, 1996), http://www.usma.edu/EO/regspubs/r15_6.pdf).

23 *See, e.g.*, Schlesinger Report, *supra*, at 6 (noting "the Panel did not have full access to information involving the role of the Central Intelligence Agency in detention operations").

24 To date, no U.S. military officers have been held accountable for criminal acts committed by their subordinates under the doctrine of command responsibility. *By the Numbers*, *supra*, at 11.

shielded from public scrutiny.[25] In addition, hearings held in the Senate were perfunctory,[26] and there are indications that testimony given at these hearings was not accurate.[27] The limitations placed on the government's investigations have, in Senator Carl Levin's words, proven that "it is incapable of investigating itself."[28] Numerous organizations and professional associations therefore have called for an independent inquiry into the treatment of detainees in U.S. custody, but to no avail.[29]

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25 *See, e.g.,* Schmidt-Furlow Report, *supra*, and Report of Vice Adm. Albert T. Church (Mar. 2005), http://www.dod.mil/news/Mar2005/d20050310exe.pdf ("Church Report") (releasing only the executive summaries).

26 *See, e.g.*, Editorial, *An Abu Ghraib Investigation*, New York Times, May 22, 2004 (criticizing the hearings as mere "shifting of blame" simply adding to "the fog of misunderstanding").

27 *See, e.g., A General's Dishonor*, Wash. Post, Jan 15, 2006 (stating that the sworn testimony of former Guantánamo commander, General Miller, has been contradicted by numerous other witnesses). Moreover, at the time of the hearings, the Senate did not have access to most of the government records that have since been leaked or obtained under FOIA requests.

28 Statement of Senator Carl Levin, *Levin Amendment Calls for Independent Commission to Review U.S. Detainee Policies and Allegations of Detainee Abuse*, July 21, 2005, http://www.senate.gov/~levin/newsroom/release.cfm?id=241196.

29 *See, e.g.*, Letter to Pres. Bush from Eight Retired Military Leaders, Sept. 8, 2004, http://www.humanrightsfirst.org/ us_law/PDF/detainees/Military_Leaders_Letter_President_Bush_

In light of the demonstrated failures of other means for getting at the truth, FOIA is an essential instrument for obtaining crucial information needed to determine accountability for government misconduct in the "war on terror." Government records obtained through FOIA have directly led to the initiation of at least one official investigation into allegations of abuse of detainees.[30] Indeed, Senator Levin, who proposed the amendment calling for the establishment of an independent commission, has recognized that "Congress only learns of the existence of so many key documents, documents that are directly relevant, as a result of FOIA requests."[31]

FINAL.pdf; American Bar Ass'n & Ass'n of the Bar of the City of New York et al., Report to the House of Delegates, Aug. 9, 2004, http://www.abanet.org/leadership/ 2004/annual/dailyjournal/ ABAFinalTortureReport081704.pdf; Lawyers' Statement on Bush Administration's Torture Memos, Aug. 4, 2004, http://www.afj.org/spotlight/0804statement.pdf; Human Rights Watch, Press Release, *U.S.: Appoint Abu Ghraib Commission*, July 16, 2004, http://hrw.org/english/docs/2004/07/15/usint9077.htm.

30 *See* Schmidt-Furlow Report, *supra*, at 2 (stating that investigation was "in response to FBI agent allegations of aggressive interrogation techniques [at Guantánamo] that were disclosed in Dec 04 as a result of FOIA releases").

31 Sen. Carl Levin, *Senate Floor Speech on the Amendment to Establish an Independent Commission on Detainee Treatment*, Nov. 4, 2005, http://www.senate.gov/~levin/newsroom/release.cfm?id=248311.

The release of the Detainee Abuse Images under FOIA is even more compelling in view of the Administration's efforts to amend the War Crimes Act retroactively to eliminate from the Act's coverage conduct that could be considered to violate the Geneva Conventions' prohibition of humiliating and degrading treatment.[32] Public debate about the proper scope of the War Crimes Act should be informed by images of abuse which make concrete the kind of conduct that the proposed amendments might exclude from the Act's coverage. This is precisely why the government's interpretation of Exemption 7(F) must be rejected: it would undermine the most effective means currently available to the public to learn the full truth regarding the

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[32] The bill, known as the Military Commissions Act of 2006, proposes to amend the War Crimes Act, 18 U.S.C. § 2441, by, *inter alia*: (1) limiting violations of Common Article 3 to nine, enumerated "serious violations" and (2) narrowing Common Article 3's strict prohibition of "humiliating and degrading treatment" to conduct that "shocks the conscience." *See* Military Commissions Act of 2006, §§ 6, 7, *available at* http://www.law.georgetown.edu/faculty/nkk/documents/MilitaryCommissions.pdf. The Administration has argued that the amendments are necessary because the provisions of Common Article 3 are "vague and undefined." Press Release, The White House, Office of the Press Secretary, *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, Sept. 6, 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html. *But see* Adam Liptak, *Interrogation Methods Rejected by Military Win Bush's Support*, N.Y. Times, Sept. 8, 2006 (citing criticism of the proposed amendments by several legal scholars).

government’s activities and unjustifiably hamper public debate concerning the proper limits of such conduct.

CONCLUSION

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

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,603 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that the PDF version of the Brief of *Amicus curiae* sent by electronic mail to the Court and counsel has been scanned for viruses, and that no viruses have been detected.

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