

# Between Safety and Transparency: Prior Restraints, FOIA, and the Power of the Executive

by DEVIN S. SCHINDLER\*

## Introduction

The Department of Defense and the Central Intelligence Agency have in their possession a series of photographs taken at the Abu Ghraib military prison that depict American soldiers torturing detainees.<sup>1</sup> These photographs depict, among other things, an American soldier sodomizing a handcuffed detainee with a broom.<sup>2</sup> Nothing in the pictures is a secret; the fact that the United States tortured detainees having long ago been disclosed by the media.<sup>3</sup> Both Presidents George W. Bush and Barack Obama refused to release these photographs to the media, arguing that the dissemination of photographs showing the gross humiliation and

---

\* Associate Professor of Constitutional Law, Thomas M. Cooley School of Law. Professor Schindler received his J.D. from University of Michigan Law School, where he graduated *magna cum laude* and Order of the Coif, and his B.A. from James Madison College and the Honors College at Michigan State University.

1. *Am. Civil Liberties Union v. Dep't of Def.*, 543 F.3d 59 (2d Cir. 2008) (hereinafter "*ACLU v. DOD*").

2. The Attorney General described some of the photographs in its Petition for Certiorari from *ACLU v. DOD*, 543 F.3d 59 (2d Cir. 2008), *cert. granted, judgment vacated at* 130 S. Ct. 777 (2009) (mem.). This case, discussed in detail below, arose after the government rejected a Freedom of Information Act request filed by the American Civil Liberties Union seeking release of the photographs. Among other things, the government conceded in its Petition for Certiorari that the photographs "include an image showing several soldiers posing near standing detainees who are handcuffed to bars with 'sandbags covering their heads' while a soldier holds a broom as if 'sticking [its] end into the rectum of a restrained detainee.'" 130 S. Ct. 777 (2009) (mem.) (Petition for A Writ of Certiorari from *ACLU v. DOD*, 543 F.3d 59 (2d Cir. 2008)).

3. See *infra* notes 65–73 and text accompanying.

degradation of militant Islamic prisoners at the hands of the American military would result in violent acts of retaliation.<sup>4</sup> For nearly five years, courts in the Second Circuit in the case *American Civil Liberties Union v Department of Defense*,<sup>5</sup> struggled with the Bush Administration's argument that withholding the pictures was justified—despite the fact that they were not secret—because their release would result in harm to America and its interests.

The Abu Ghraib situation is not unique. At any given time, governments have in their possession volumes of highly inflammatory material, such as crime scene photographs,<sup>6</sup> the details of military operations,<sup>7</sup> the use of unmanned drones,<sup>8</sup> and technical data,<sup>9</sup> which contain inflammatory but ultimately “non-secret” information. Release of this kind of information may not directly implicate the government's legitimate interest in secrecy, but could have the long-term effect of making the world less safe for American interests. Inflammatory but nonconfidential information possessed by the government has historically fallen into a statutory and legal void, not

---

4. *ACLU v. DOD*, 543 F.3d at 63.

5. *Id.*; see also *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005).

6. See, e.g., *Michigan v. Mills*, 537 N.W.2d 909 (1995) (discussing the evidentiary standards for admission of inflammatory photographs of crime victim's injuries).

7. Most recently, the website wikileaks.org published approximately 76,000 military reports on the day-to-day operations of coalition forces in Afghanistan. *Afghan War Diary*, available at [http://www.wikileaks.org/wiki/Afghan\\_War\\_Diary\\_2004-2010](http://www.wikileaks.org/wiki/Afghan_War_Diary_2004-2010). The website has been heavily criticized by the Obama Administration, which believes that the leaked information will place troops serving in Afghanistan at risk. See, e.g., Stephen Condon, *White House Implores Wikileaks: Don't Post More Documents*, CBS NEWS, July 30, 2010, available at [http://www.cbsnews.com/8301-503544\\_162-20012177-503544.html](http://www.cbsnews.com/8301-503544_162-20012177-503544.html). As a result, the broad outlines of many military operations undertaken in Afghanistan are no longer “confidential.” As stated by one military official, the “genie is out of the bottle.” Craig Whitlock, *Pentagon Demands Wikileaks Return Documents*, WASH. POST, Aug. 5, 2010, available at [http://voices.washingtonpost.com/checkpoint-washington/2010/08/pentagon\\_demands\\_wikileaks\\_ret.html?hpid=moreheadlines](http://voices.washingtonpost.com/checkpoint-washington/2010/08/pentagon_demands_wikileaks_ret.html?hpid=moreheadlines). That being the case, this Article, among other things, addresses in further detail the President's inherent authority to prevent the release of further information regarding these military operations, notwithstanding the loss of confidentiality.

8. See, e.g., *Obama Administration Must Disclose Information About Illegal Use of Drones*, <http://www.aclu.org/national-security/obama-administration-must-disclose-information-about-illegal-use-drones> (last visited Sept. 27, 2010).

9. See, e.g., 22 U.S.C. § 2278(a)(2) (2010) (allowing the withholding of technical data that could injure national security interests).

directly protected by statute but still potentially harmful to American interests if released.<sup>10</sup>

The absence of any specific statutory authority or case law has resulted in a piecemeal and ultimately inconsistent approach to situations where the government has sought to prevent the dissemination of nonconfidential but inflammatory material. In the Abu Ghraib situation, for example, shortly before the case was scheduled to be heard by the Supreme Court, Congress passed specific legislation directed solely at preventing the disclosure of the pictures.<sup>11</sup> Such an ad hoc approach is ultimately unsatisfying, however, because it potentially undermines presidential authority and results in a lack of certainty as to when disclosure is, and is not, justified.

At its core, the debate over the release of this kind of information places two irreconcilable constitutional values in direct conflict. Protecting American lives is perhaps the most important of all values.<sup>12</sup> More amorphous, but equally important, is the transparency and accountability that democracy and the First Amendment demand.<sup>13</sup> Efforts by the executive branch to prevent the release of inflammatory but nonconfidential information place our constitutional commitment to transparent government in direct conflict with the President's duty to protect American interests. The answer to resolving this tension lies not in divining "moral imperatives" or "balancing" conflicting interests. Both sides to the debate have more than legitimate arguments and can correctly cite to any one of several constitutional values supporting their perspective. At the constitutional level, the answer to the question of what to do with inflammatory but nonsecret information lies in the debate over presidential powers. *Who* makes the decision to suppress information and *why* that decision was made are as important inquiries, in constitutional terms, as the issue whether this kind of information should be released at all.

---

10. See generally Stewart Harris, *The First Amendment and the End of the World*, 68 U. PITT. L. REV. 785 (2008) (providing a detailed discussion of this statutory void).

11. Pub. L. No. 111-83, § 565 (2009).

12. See, e.g., *The Prize Cases*, 67 U.S. 635, 638 (1862).

13. For a detailed discussion of the Founders' commitment to government transparency, see DANIEL N. HOFFMAN, *GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS* (1981).

The immediate problem of what to do with the Abu Ghraib photographs has now passed as a result of Congressional action.<sup>14</sup> The underlying question of the scope of the President's authority to prevent the release of inflammatory, nonconfidential information, however, remains unresolved. Answering that question implicates both the debate over Presidential powers, on one hand, and the depth of our country's commitment to open government, on the other. Ultimately, the manner in which both the lower courts and Congress responded to the Abu Ghraib photographs threatens the plenary authority granted to the President in areas touching upon war and foreign affairs. In future situations analogous to the debate over the Abu Ghraib photographs, the President should not be held at the mercy of Congress, hoping for the proverbial eleventh hour stay of execution. Rather, the President has the constitutional authority, within limits to be discussed below, to prevent the release of this kind of material.<sup>15</sup>

Section I of this article will frame the debate by defining the kind of "inflammatory material" over which the President should have the final say. Section II further frames the debate by outlining the current statutory and legal structure governing the release of inflammatory material by government, with a particular focus on how the three branches have treated the related subject of protecting "confidential" information. The Abu Ghraib case is considered in detail in Sections III and IV, highlighting how the Court misperceived or otherwise ignored the serious separation of powers issues raised by its decision(s) to order the release of the photographs. Section V critiques the current system and outlines a path towards creation of an "executive privilege" that would allow for some oversight of executive decisions regarding the release of such material, without sacrificing our country's commitment to transparency. Finally, section VI proposes an analytical framework for future disputes, using the Abu Ghraib situation as a "case study."

### **I. Inflammatory Material**

What is inflammatory material? The revelation that a politician hired a prostitute is certainly inflammatory, in the sense that it might

---

14. See Pub. L. No. 111-83, § 565 (2009).

15. Specifically, as will be argued below, the President's constitutional authority as Commander in Chief encompasses the power to prevent the disclosure of information that could be harmful to ongoing military actions. U.S. CONST. art. II, § 2, cl. 1.

lead some to become “arous[ed] . . . by strong emotion,”<sup>16</sup> but few would argue that there would be compelling safety justification to limit its disclosure. On the other end of the spectrum lies the case *United States v. Progressive, Inc.*<sup>17</sup> In 1979, *The Progressive*, a political magazine, was preparing to publish an article entitled “The H-Bomb Secret.”<sup>18</sup> Among other things, the article contained detailed but nonconfidential technical descriptions and drawings showing how the bomb was designed and worked. The government sought to restrain the publication on the grounds that widespread dissemination of such information could aid enemies of America in developing their own nuclear capacity.<sup>19</sup>

The Court ultimately issued an order restraining the publication, primarily because of the highly inflammatory information it contained.<sup>20</sup> As stated by the Court, “[a] mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.”<sup>21</sup>

The Abu Ghraib photographs fell between this continuum. On one hand, the photographs were most certainly more newsworthy but also more likely to cause acts of violence than the disclosure of infidelity by a public figure. On the other hand, the release of the photographs was unlikely to lead directly to the potential harm that animated the decision in the *Progressive* case. In this context, the definition of “inflammatory information” that will be adopted for purposes of this analysis comes from the Second Circuit in *ACLU v. DOD*, which assumed but did not decide that the photographs “could reasonably be expected to incite violence against United States troops, other coalition forces and civilians . . . .”<sup>22</sup>

---

16. THE AMERICAN HERITAGE COLLEGE DICTIONARY, 711 (4th ed. 2004).

17. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), *dismissed*, 610 F.2d 819 (7th Cir. 1979).

18. Howard Morland, *The H-Bomb Secret*, THE PROGRESSIVE, Nov. 1979, at 14.

19. The magazine and its author claimed that the article simply synthesized information that Morland lawfully found in the public domain and, therefore, was nonconfidential. *Id.* at 3.

20. *See Progressive*, 467 F. Supp. at 996–97.

21. *Id.* at 996. Ironically, the article was published several months later when the government agreed to dismiss its appeal following further public disclosures of the information contained in the article; *see also United States v. Progressive*, 610 F.2d 819 (7th Cir. 1979).

22. *ACLU v. DOD*, 543 F.3d at 67 n.3.

Applying this test here, to what extent can the Executive Branch acting alone prevent the dissemination of newsworthy but nonsecret information that could “reasonably be expected” to incite violence? Courts have struggled for years to resolve this question, against the backdrop of Freedom of Information Act (“FOIA”).<sup>23</sup> Ultimately, courts, as well as Congress, have been unwilling or unable to enunciate a workable and consistent standard to apply. This, in turn, has led to confusion in the courts and a series of ad hoc legislative enactments that fail to resolve the central tension between transparency and safety.

## II. The Freedom of Information Act and the Differing Treatment of Confidential Versus Nonconfidential Inflammatory Material

The struggle between transparency and the need to suppress inflammatory information has been debated since the adoption of the Constitution.<sup>24</sup> Indeed, much of First Amendment jurisprudence arises from efforts by the government to either criminalize or prevent the release of information that could cause harm to national security or public peace.<sup>25</sup> Consider the law of prior restraints. *The Pentagon Papers Case*,<sup>26</sup> to cite perhaps the most famous example, arose from the Nixon Administration’s efforts to prevent the publication of a study that was highly critical of the government’s handling of the Vietnam conflict. The case *Near v. Minnesota*, to cite another example, arose from efforts by the leadership of the city of Minneapolis to prevent further publication of information that (purportedly) undermined the “general welfare” as a result of its inflammatory effect.<sup>27</sup>

The “fighting words,” “imminent incitement” and the “true threats” doctrines likewise find common root in preventing the inflammatory effect that certain kinds of speech can have on the

---

23. See, e.g., *Id.*; *Living Rivers Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313 (D. Utah 2003); *Progressive*, 467 F. Supp. 990. See generally Harris, *supra* note 10.

24. See generally Kristian W. Murray, *National Security Veiled in Secrecy: An Analysis of the State Secrets Privilege in National Security Agency Wiretapping Litigation*, 199 MIL. L. REV. 1 (2009).

25. For a wide-ranging discussion of the Government’s ability to restrain speech because of its potential harmful effects, see generally, GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004).

26. *N.Y. Times Co. v. United States* (“*The Pentagon Papers*”), 403 U.S. 713 (1971).

27. *Near v. Minnesota*, 283 U.S. 697 (1931).

listener, specifically, and society, in general. Hence, in *Schenk v. United States*,<sup>28</sup> Justice Oliver Wendell Holmes created the “clear and present danger” test in ruling that the government could prosecute individuals whose speech had an inflammatory effect on listeners. In *Feiner v. New York*,<sup>29</sup> the Court similarly recognized and affirmed the government’s ability to arrest individuals engaged in speech that would likely have resulted in riots if not censored. At the other extreme are cases like *Cohen v. California*,<sup>30</sup> in which the Court ruled that speech cannot be censored merely because others find it offensive.

In each of these cases, the Court was called upon to balance the Constitution’s strong commitment to the free flow of information with the equally strong value of protecting against the very real harms that can arise when the release of some kinds of inflammatory information is not regulated. As stated by the Court in *Chaplinisky v. New Hampshire*, certain utterances are not an “essential part of any exposition of ideas, and are of such slight social value . . . that any benefit that may derived from them is clearly outweighed by the social interest in order and morality.”<sup>31</sup>

Congress faced a similar conundrum in its debate over FOIA. Originally enacted in 1966, FOIA arose from years of complaints by the media, lawyers and the public that government agencies were routinely denying access to critical public records for nefarious reasons.<sup>32</sup> The previous two laws that governed access to public information, the Administrative Procedures Act of 1946 (“APA”) and the arcane Housekeeping Statute of 1789, gave government agencies virtually unlimited discretion to withhold information for the thinnest of reasons.<sup>33</sup> Prior to the adoption of FOIA, administrative agencies had the discretion to withhold any information “for good cause,” or if they determined that the public interest required “secrecy.”<sup>34</sup> The nature of the requestor was also relevant under the

---

28. *Schenk v. United States*, 249 U.S. 47 (1919).

29. *Feiner v. New York*, 340 U.S. 315 (1951).

30. *Cohen v. California*, 403 U.S. 15 (1971); *see also* *Collin v. Smith*, 578 F.2d 1197, 1206 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

31. *Chaplinisky v. New Hampshire*, 315 U.S. 568, 572 (1942).

32. For a detailed discussion of the FOIA’s legislative history, *see* Martin E. Halstuk, *When Secrecy Trumps Transparency: Why the Open Government Act of 2007 Falls Short*, 16 *COMMLAW CONSPECTUS* 427 (2008).

33. *Id.* at 432–45.

34. Administrative Procedure Act § 3, Pub. L. No. 79-404, 60 Stat. 237, 238 (1946).

APA, which only required disclosure to those individuals “properly and directly concerned” with the requested information.<sup>35</sup>

This broad discretion essentially turned the APA statute designed to foster government accountability—into a tool to justify secrecy. As stated by the Supreme Court, the disclosure provisions of the APA “came to be looked upon more as a withholding statute than a disclosure statute,” as administrative agencies used the “good cause” standard as a justification to withhold whole categories of nonconfidential material.<sup>36</sup>

As the defects in the APA became evident, Congress became increasingly concerned that the general “secrecy” exemption was being misused by agencies to “cover up embarrassing mistakes or irregularities.”<sup>37</sup> As stated in one Congressional report, “[t]he [APA], which was designed to provide public information about government activities has become the Government’s major shield of secrecy,” and was being used primarily to “avoid . . . political embarrassment.”<sup>38</sup>

Despite the strong opposition of most government agencies, FOIA successfully replaced the cult of secrecy with a presumption in favor of full disclosure.<sup>39</sup> To prevent the abuses engendered by the general “public interest” standard of the APA, FOIA replaced it with nine specific exemptions.<sup>40</sup> In doing so, the statute successfully eliminated much of the discretion which had previously been abused by administrative agencies to avoid having to disclose potentially embarrassing information.<sup>41</sup> In light of FOIA’s commitment to transparency, courts have uniformly interpreted the exemptions narrowly.<sup>42</sup>

The FOIA exemptions reflect an attempt by Congress to balance the government’s occasional need to operate in secrecy with a democratic commitment to open and transparent government. The need for secrecy in selected circumstances scarcely needs to be debated. If the ultimate duty of government is to protect the

---

35. *Id.*

36. *EPA v. Mink*, 410 U.S. 73, 79 (1973).

37. S. REP. NO. 89-813, at 38 (1966); *see also* H.R. REP. NO. 89-1497 (1966).

38. H.R. REP. NO. 92-1419 (1966).

39. *See, e.g., John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989).

40. 5 U.S.C. § 552(b) (2010).

41. *See, e.g., Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

42. *Id.*



---

---

BETWEEN SAFETY AND TRANSPARENCY

---

to operate efficiently and effectively. For that reason, Exception 2 allows agencies to maintain the confidentiality of “internal personnel rules and practices,” while Exception 5 protects materials prepared by agencies in response to litigation.<sup>50</sup> Consider also Exceptions 7(A),

---

43. THE FEDERALIST NO. 3, at 20 (John Jay) (E. H. Scott, ed., 1898). (“Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the first.”).

44. \_\_\_\_\_, 283 U.S. at 697.

45. \_\_\_\_\_, 467 F. Supp. 990 (enjoining publication of an article describing in detail how the United States built its first nuclear bomb).

46. Indeed, the Intelligence Identities Protection Act of 1982, 50 U.S.C. §§ 421–426 (2010), criminalizes the disclosure of the identity of covert foreign agents.

47. 5 U.S.C. § 552 (b)(1)(A) (2010) (“This section does not apply to matters that are specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy.”).

---

---

Although the National Security and Law Enforcement Exceptions differ in their focus, the underlying principal of protecting information to prevent potential physical harm is the same. The need to protect from disclosure confidential information that could jeopardize national security seems self-evident. Protecting national security secrets is vital because the information being protected, if released, could result in tangible physical harm to Americans.<sup>52</sup>

The focus of each of these exemptions is on protecting information that has been designated as “secret” or “confidential.” In every case, Congress, in coordination with the President, has determined that certain categories of information must remain confidential irrespective of their value to public discourse because of the risk that release of that information could directly or indirectly lead to tangible harm to America.<sup>53</sup> Simply stated, military, law enforcement and foreign affair “secrets” are categorically protected for seemingly obvious reasons. But there has been no effort by Congress or the courts to create a categorical exception for nonconfidential but inflammatory material that general dissemination of this kind of material can cause the same kind of harm as information designated as “confidential.”

Instead, Congress and the courts have taken a piecemeal approach to the issue of nonconfidential inflammatory material. To cite one example, the Mutual Security Act of 1954 and its successor, authorize the President to prohibit the export of any weapons-related “technical data” that could potentially contribute to the development of weapons of mass destruction.<sup>54</sup> By regulation, the statute prohibits

---

51. 5 U.S.C. §§ 552(b)(7)(A), (b)(7)(D), (b)(7)(E) (2010).

52. RICHARD A. POSNER, NOT A SUICIDE PACT 106 (2006) (Civil liberties must be balanced with the “need to conceal information that either might aid the enemy directly, such as information about the design of weapons of mass destruction, or might weaken our response to terrorism by publicizing the distasteful methods that may be an indispensable element of that response.”).

53. H.R. REP. NO. 109-226, at 4 (2005) (As stated by the Committee on Government Reform, “[w]hile . . . FOIA . . . support[s] the disclosure of agency records . . . [it] . . . also recognize[s] the legitimate need to restrict disclosure of some information. For example, agencies may withhold information properly classified in the interest of national defense or foreign policy and criminal investigatory files.”).

54. 22 U.S.C. §§ 2278 (a)(2), (j)(4)(A) (2010).

the export of such “technical data” irrespective of its secrecy.<sup>55</sup> Most recently, the Homeland Security Act created a new FOIA exemption allowing the Executive Branch to withhold from production nonclassified documents relating the nation’s “critical infrastructure.”<sup>56</sup>

On rare occasion, courts have interpreted FOIA as protecting nonconfidential inflammatory material. In

,<sup>57</sup> for example, the court was presented with the question of whether “Technical Abstract Bulletins” published by the Department of Defense, which contain short summaries of research reports, should be protected from disclosure. Many of the underlying reports are released to the public and the abstracts themselves do not contain confidential information. The Court ruled that withholding the abstracts from public view was justified because, although any individual abstract may not harm national security, a “compilation” of those abstracts could be used to “draw useful inferences about the direction of U.S. research into weapons or defensive technologies.”<sup>58</sup>

Likewise, the fact that a general description of a confidential matter has reached the public domain does not waive the government’s right to prevent official disclosure of the information under the National Security Exception.<sup>59</sup> In rare cases, the government has even successfully reclassified information that had been previously declassified.<sup>60</sup>

With these very few exceptions, most categories of nonconfidential inflammatory information falls into a legal no man’s land, in the sense that neither Congress nor the courts have

---

55 \_\_\_\_\_, *United States v. Edler Indus., Inc.*, 579 F.2d 516 (9th Cir. 1978) (stating that technical information exported by the defendant was widely distributed in the United States did not preclude prosecution).

56. Critical Infrastructures Information Act of 2002, Pub. L. No. 107-296 § 214(a)(1)(A), 116 Stat. 2135, 2152 (2002).

57. *Am. Friends Serv. Comm. v. Dep’t of Def.*, 831 F.2d 441 (3d Cir. 1987).

58. \_\_\_\_\_ at 444; *Pub. Educ. Ctr., Inc. v. Dep’t of Def.*, 905 F. Supp. 19, 22 (D.D.C. 1995) (affirming decision to withhold videotapes of a failed raid by U.S. Army Rangers during the Somalia conflict despite the fact that the details of the raid were “well-known”).

59. *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1124 (D.C. Cir. 2007) (finding prior disclosure of a “secret” does not require the government to disclose “specific information” related to the formerly confidential matter).

60. Amanda Fitzsimmons, *National Security or Unnecessary Secrecy? Restricting Exemption 1 to Prohibit Reclassification of Information Already in the Public Domain*, & POL’Y 479 (2008).

developed a consistent legal structure to evaluate Executive claims that such information should remain outside of the public sphere because of the potential mischief its release could cause. The distinction between “classified” information, which is presumptively protected, and “unclassified” information, which is not, makes little sense when considered in light of the reason(s) why classified information is protected from disclosure. At bottom, the government protects classified information because of the physical harm that can result from its release. But certain kinds of information not formally designated as “confidential” raise these exact kind of concerns. The mere fact that the government has designated the materials as “confidential” is not a sufficient justification for the differential treatment. To treat the designation over the actual nature of the potential harm as dispositive is to exalt form over substance. Allowing the dissemination of information on how to build a bomb creates the exact same harm irrespective of whether that information has been designated “confidential.”

The same is true of the Abu Ghraib photographs. The harm their release could have caused is the same irrespective of whether they are labeled “confidential” or “nonconfidential.” As such, the Abu Ghraib photographs illustrate the illogic of treating inflammatory information differently based merely on its security classification. The way in which the case was decided by the Second Circuit also illustrates the need for a more comprehensive and logical structure for handling claims by the Executive that certain information needs to be withheld from the public sphere irrespective of its secrecy.

### ***ACLU v. DOD: A Case Study of the Dangers of Releasing Inflammatory Material***

\_\_\_\_\_ began in December 2002, when the \_\_\_\_\_ published a story disclosing that terrorism suspects were being tortured by the CIA.<sup>61</sup> Ten months later, the American Civil Liberties Union (“ACLU”) and several other organizations filed a FOIA request with (among others) the Department of Defense, the Department of Justice and the CIA requesting a long list of records related to treatment of the

---

61. Dana Priest & Barton Gellman, \_\_\_\_\_, WASH. POST, Dec. 26, 2002, at A1.

detainees.<sup>62</sup> With a few exceptions, the Defendants refused to produce any documents responsive to the request.<sup>63</sup>

In May of 2004, [redacted] published an article describing widespread “sadistic, blatant and wanton criminal abuse” of prisoners detained at Abu Ghraib prison.<sup>64</sup> The article was based largely on a secret fifty-three page investigative report prepared by the Army which had been leaked to the magazine. Almost simultaneously, the CBS television show “60 Minutes 2” aired an exposé on the scandal, in which it showed a number of photographs of guards abusing prisoners.<sup>65</sup>

The pictures broadcast by CBS were clearly inflammatory. Among other things, prisoners were forced into humiliating and dehumanizing poses and then photographed. One prisoner, for example, was posed, nude, to appear as if he were performing oral sex on another man. Another posed photograph shows a nude man with a sandbag over his head apparently masturbating.<sup>66</sup>

[redacted] and 60 Minutes exposés unleashed a flood of articles and commentaries detailing the torture of detainees in the custody of the United States, including several who apparently were tortured to death.<sup>67</sup> The reaction of the militant Islamic world was particularly savage. As stated by a contemporaneous report published in the *Bahrain Tribune*

---

. *Am. Civil Liberties Union v. Dep’t of Def.,  
Torture at Abu Ghraib,*

ORKER, May 10, 2004.

65. Rebecca Leung, *Abuse of Iraqi POW’s by GI’s Probed,*  
available at

. *Id.* see also

. See, e.g. *The Sickpuppy Defense*  
available at  
*Rules of the System,*

. *Iraqis’ Protest Against Jail Abuse*

RIBUNE, June 5, 2004.

disclosures.<sup>69</sup> Claims that the pictures “give [terrorists] the best motives to mobilize (sic) frustrated youths who care for their religion and dignity”<sup>70</sup> and calls to “pierce the eyes of [Americans]” and “castrate them on the banks of the Tigris and Euphrates rivers” were typical.<sup>71</sup> Several weeks after the publication of the photographs, a militant group associated with Al Qaeda, Muntada al-Ansarm, released a video showing the beheading of Nicholas Berg, a telecommunications businessman who had been kidnapped by terrorists in early April of 2004. The group claimed in the video that the beheading was in retaliation for prisoner abuses at Abu Ghraib.<sup>72</sup>

In response to these disclosures, on May 25, 2004, the ACLU renewed its FOIA request.<sup>73</sup> Again, the government did not timely respond to the request, which led to the filing of the lawsuit in early July of 2004.<sup>74</sup> Following wrangling between the parties as to the timing of disclosures, the court gave the government until October 15, 2004 to produce either the requested documents or a “Vaughn index” justifying nondisclosure.<sup>75</sup>

Ultimately the government refused to produce five categories of documents,<sup>76</sup> including 144 photographs and four videotapes taken by a military policeman at Abu Ghraib prison showing prisoner abuse.<sup>77</sup> The government justified withholding the documents under FOIA Exceptions 6 and 7(C), which deal with medical or other files the disclosure of which would constitute an “unwarranted invasion of personal privacy.”<sup>78</sup> As an afterthought, the government also cited

---

69

70. Editorial, AL- QUDS AL-ARABI, June 4, 2004.

71. note 68, [www.alsaha.net](http://www.alsaha.net).

72. Bill Nichols, *Video Shows Beheading of American Captive*, available at

at ¶ 45, *Am. Civil Liberties Union v. Dep’t of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005) (No. 04-cv-04151-AKH).

74

75

339 F. Supp. 2d at 505.

76

389 F. Supp. 2d at 551 (the five categories were: reports relating to the International Committee of the Red Cross, documents relating to interrogation activities, the “CIA’s refusal to confirm or deny the existence or possession of certain documents,” the CIA’s assertion that a request by its Director to Donald Rumsfeld “that a certain Iraqi suspect be held at a high-level detention center and not be identified” contained no segregable portions and the Abu Ghraib photographs).

77. at 568.

78. 5 U.S.C. §§ 552(b)(6), (b)(7)(C) (2010).

Exemption 7(F), which gives the government the authority to withhold any information, compiled for law enforcement activities, which “could reasonably be expected to endanger the life or physical safety of any individual”<sup>79</sup> (the “Law Enforcement Exception” or “Exception 7(F).”<sup>80</sup> To overcome the privacy claims the court ordered an in-camera review of both redacted and unredacted versions of the photographs. The court ultimately applied a balancing test in evaluating the privacy claim and concluded that the interest in “honest and open government” outweighed the minimal privacy concerns raised by the redacted photographs.<sup>81</sup>

The 7(F) claim presented both a legal issue and a larger philosophic issue. At the surface level, the court had to determine whether the “any person” language of 7(F) should be interpreted to encompass only individuals directly involved in the criminal justice process who could be harmed by a particular disclosure.<sup>82</sup> The government urged a broader definition of the “any person” language, arguing that it should be interpreted literally to include all individuals, including United States citizens, who could be subject to a retaliatory terrorist attack.<sup>83</sup>

The government’s argument for a broad definition of Exception 7(F) was supported by two cases, *Living Rivers Inc. v U.S. Bureau of Reclamation* and *Larouche v. Webster*.  
*Living Rivers*

---

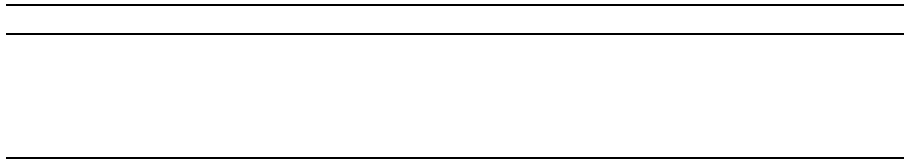
. *Am. Civil Liberties Union v. Dep’t of Def*

. *Id*

. *ACLU v. DOD*

. *Am. Civil Liberties Union v. Dep’t of Def*

. *Living Rivers*



*Larouche*

*in general*

*ACLU*

*Larouche*

*Living Rivers*

- 
- . *Living Rivers,*
  - . *Id.*
  - . *Larouche*
  - . *Am. Civil Liberties Union v. Dep't of Def.,*
  - . *Id*



---

---

BETWEEN SAFETY AND TRANSPARENCY

---

*Newsweek*

Koran at Guantanamo Bay.

In Afghanistan, in particular, where over 19,000 U.S. troops are currently serving in Operation Enduring Freedom, violence erupted as a result of the report. Demonstrations began in the eastern provinces and spread to the capital, Kabul. The United Nations, as a precautionary measure, withdrew its entire foreign staff from Jalalabad, where two of its guesthouses were attacked, government buildings and shops were targeted, and offices of two of two international aid groups were destroyed. At least 17 deaths in Afghanistan were attributed to the reaction to the Koran story.<sup>94</sup>

---

91 . . . at 578.

92. Decl. of Richard B. Myers at 25, Am. Civil Liberties Union v. Dep't of Def., 339 F. Supp. 2d 501 (S.D.N.Y. 2004) (No. 04-cv-04151-AKH).

93 . . . at Conclusion.

94. Second Am. Decl. of Richard B. Myers at 17 Am. Civil Liberties Union v. Dep't of Def., 339 F. Supp. 2d 501 (S.D.N.Y. 2004) (No. 04-cv-04151-AKH).

In a conclusion that would later come back to haunt the government, General Meyers also predicted that disclosure would increase the “likelihood of violence against US interests, personnel and citizens world-wide.”<sup>95</sup>

In performing its de novo balancing, the district court essentially disposed of the forty-eight pages of analysis provided by General Myers in four sentences, concluding “[w]ith great respect to the concerns expressed by General Myers, my task is not to defer to our worst fears, but to interpret and apply this law, in this case, the Freedom of Information Act, which advances values important to our society, transparency and accountability in government.”<sup>96</sup>

Having rejected General Myers’ concerns, the court ordered disclosure, concluding that the “education and publicity” engendered by release of the photographs “will strengthen our purpose and, by enabling such deficiencies . . . to be . . . corrected, show our strength as a vibrant and functioning democracy to be emulated.”<sup>97</sup> In essence, the court chose to order the release of the photographs despite the uncontradicted conclusion of General Myers that doing so would result in the death of some unidentifiable Americans or their allies.

The district court’s ultimate conclusion requires a slight detour to examine the question whether publication of these photographs truly added in any meaningful way to the underlying debate. Again, the fact that the United States had mistreated detainees was well known. The details of that abuse, including waterboarding and infliction of physical pain, had been widely disseminated and debated.<sup>98</sup> In light of the nonconfidential nature of the information portrayed in the photographs, the court’s conclusion was ultimately rooted in the old adage “a picture is worth a thousand words.”<sup>99</sup> Given the very vocal public debate about torture, the argument can be made that these pictures did not add to the so-called “marketplace of ideas” in any

---

95 at Conclusion.

96 389 F. Supp. 2d at 576.

97 . at 578.

98 text accompanying note 66

99 389 F. Supp. 2d at 578 (“[T]he pictures are the best evidence of what happened, better than words, which might fail to describe, or summaries, which might err in their attempt to generalize and abbreviate.”). The origin of the “picture is worth a thousand words” adage is in dispute. It has attributed to Frederick R Barnard, a 1920s-era advertising executive. Barnard, in turn, claimed the phrase arose from a Chinese Proverb. THE PHRASE FINDER, <http://www.phrases.org.uk>.

scholarly or cognitive sense. Rather, the pictures were valuable because of their emotive content.

Reliance on the emotive impact of the pictures to justify their release, however, misses the point of the underlying debate. Certainly, speech designed solely to play on the emotions of the listener has constitutional value.<sup>100</sup> Here, however, both sides rightfully could claim “emotive impact” as the basis for their entire claim. The government sought to prevent disclosure precisely because the pictures would cause (according to the government) a violent emotional reaction. The proponents of release make essentially the same argument, seeking disclosure because of the emotive reaction of disgust and anger that will result from publication. The question is not whether the pictures have value because of the emotions they engender, but rather whether violent acts that can be prevented are among the emotive responses that would result if they had been released.

## **V. The Appeal**

---

---

---

---

---

---

---

BETWEEN SAFETY AND TRANSPARENCY

---

jeopardize American troops:

---

109. The court's conclusion brings to mind Richard Matheson's famous story, "Button Button." In this story, a stranger offers a financially struggling family a black box containing a button. The stranger tells the family that if they push the button they will receive \$50,000 but someone, somewhere in the world who they do not know will die. The husband opposes the idea, but the wife pushes the button anyway. That night, the husband is killed in a train accident and the wife collects his \$50,000 insurance policy. The story, a play on an alienation theme, concludes with the stranger telling the wife that she never really knew her husband. To draw the analogy, the Second Circuit was willing to "push the button" and allow potential harm to come to American soldiers because the government could not identify with "reasonable" specificity those person(s) who would be harmed.

110. 5 U.S.C. § 552(b)(1) (2010).

111. 543 F.3d at 74.

112. Letter from Department of Justice to Hon. Alvin K Hellerstein (April 23, 2009) (on file with author).

113. Letter from Department of Justice to Hon. Alvin K Hellerstein (May 13, 2009) (on file with author).

“Well, obviously the photos are provocative . . . . They’ve had an inflammatory effect. They were used by our opponents and Al-Qaida as propaganda tools and recruiting devices. [¶]And so we don’t want to go back there again . . . . My fundamental understanding from the President is that he feels strongly that this would have a deleterious effect on our troops, that it would put them in jeopardy, and he wants to pursue all legal avenues to prevent their release.”<sup>114</sup>

Shortly before the petition for certiorari was set to be decided, Congress enacted the “Protected National Security Document Act of 2009,” which, by its plain language, gives the President the explicit authority to withhold the Abu Ghraib photographs.<sup>115</sup> Specifically, this Act gives the Secretary of Defense the authority to withhold from production any photograph taken between September 11, 2001, through January 22, 2009, that depicts “the treatment of individuals . . . detained . . . by the Armed Forces of the United States.”<sup>116</sup> Exercising this authority, the Obama Administration has chosen to not release the photographs.<sup>117</sup>

## V. Presidential Powers and FOIA

---

---

---

BETWEEN SAFETY AND TRANSPARENCY

---

---

---

---

---

---



---

---

BETWEEN SAFETY AND TRANSPARENCY

---

*United States v. Nixon,*

*United States v Burr*

---

*supra*

. See, e.g., *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*

*Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*

. See, e.g., *Executive Privilege With Respect to Clemency Decision*

*Assertion of Executive Privilege in Response to a Congressional Subpoena*

. *Nixon,*

. See, e.g.,

*The Constitution in Conflict: Espionage Prosecutions, the Right to Present a Defense, and the State Secrets Privilege* f.

---

---

---

*Burr*

---

. *Id.* .

. *Halkin*

---

---

BETWEEN SAFETY AND TRANSPARENCY

---

*Near v. Minnesota*

*Pentagon Papers Case.*

*New York Times*      *Washington Post*

- 
- . *See* \_\_\_\_\_ ,
  - . *Near*
  
  - . *The Pentagon Papers*
  - . *Id* *See also* \_\_\_\_\_ *An Interview with Daniel Ellsberg,*  
*available at*
  
  - . *The Pentagon Papers*
  - . *Id*
  - . *Id*



---

---

BETWEEN SAFETY AND TRANSPARENCY

---

*The Pentagon Papers*

*The Pentagon Papers Case*

*Papers Case*

*The Pentagon*

---

. *Id*  
. *Id*  
*See, e.g., id.*

---

---

---

‘invite’ ‘measures on independent presidential responsibility.’”<sup>155</sup>

Such is the case here. In addition to the previously discussed National Security Exception to FOIA, Congress—as part of the National Security Act of 1947—has gone so far as to impose an affirmative obligation on the Director of the CIA to protect intelligence sources.<sup>156</sup> The degree of deference that Congress and the courts have occasionally accorded the Executive is illustrated in the D.C. Circuit Court of Appeals opinion, *Gardels v. CIA*.

*Gardels*

*ACLU v. DOD.*

*ACLU v. DOD*

---

*Youngstown Steel*

*. Gardels*

---

---

BETWEEN SAFETY AND TRANSPARENCY

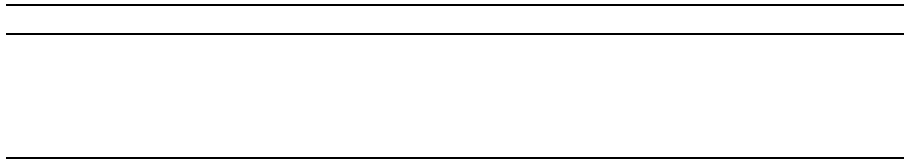
---

*Gardels*

contacts with California universities. Yet, the fact that the CIA had made “logical” and “plausible” arguments in support of its position was found to be sufficient to invoke the first and fourth exceptions to FOIA.<sup>160</sup> As stated by the court “it makes good sense” to deny access based on the admittedly speculative conjecture that disclosure could harm the public security.<sup>161</sup>

Granted, *Gardels* dealt with the National Security Exception and not 7(F). But this is a distinction without substance. The CIA was justified, according to the court, in withholding the information because of, *inter alia*, its statutory obligation to protect foreign  
*President’s*

- 
- . *Id.*
  - . *Id.*
  - . *Id.*
  - . *See supra* .



*United States v. Nixon*

*ACLU v. DOD*

*Youngstown Steel*

*specifically*

---

. *Id*

. *ACLU v. DOD*  
*Youngstown Steel,*



---

---

BETWEEN SAFETY AND TRANSPARENCY

---

*ACLU v. DOD*

*arising in the context of foreign affairs or war*

*any individual.*

---

. *Cf. Rose,*  
*see also*

. *ACLU v. DOD*  
. *See supra*

*The First Amendment and the End of the World,*

*Youngstown Steel*

---

---

*Protection Agency v. Mink*

*Environmental*

*Mink*

*Mink.*

---

. *See infra*  
. *Mink,*  
. *Id.*  
. *Id.*  
. *Id.*  
*Pentagon Papers Case,*

*superseded by statute,*

*The*

*See*

*National Security or Unnecessary  
Secrecy? Restricting Exemption 1 to Prohibit Reclassification of Information Already in the  
Public Domain,*

. *ACLU v. DOD,*

---

---

BETWEEN SAFETY AND TRANSPARENCY

---

*Near*                      *require*

---

*Vaughn*

*reprinted in*

. *Id.*

. *Near*

. *See, e.g.,*                      *supra*  
*The Commander in Chief at the Lowest Ebb – A Constitutional History,*  
*Constitutional Crisis or Déjà Vu, The War Power, the*  
*Bush Administration and the War on Terror,*      UQUESNE L. Rev. 702 (2007).

that irrespective of what theory of presidential power is followed, a court considering an effort by the executive to suppress the dissemination of inflammatory material must accord substantial—if not complete—deference in the context of an ongoing armed conflict. This is true irrespective whether the decision to withhold is considered in the context of FOIA or as an independent exercise of the President’s Article II war and foreign affairs powers.

The balance of power between Congress, the courts and the President in responding to hostile threats was described by Chief Justice Rehnquist as the “most difficult area of all of the Constitution.”<sup>189</sup> This difficulty is reflected in the famous *Youngstown Steel* case, which spawned seven different opinions and in which no single coherent theory of presidential power commanded a majority.<sup>190</sup> The Court’s inability to articulate a standard reflects the ongoing, underlying debate over the tension between the President’s authority as Commander-in-Chief and the collection of war powers accorded Congress under Article One.<sup>191</sup> Although the legal cognoscente has articulated any number of theories to shed light into this twilight zone, most fall into one of two overlapping categories.

#### **A. ‘The Preclusive Executive’**

---

---

---

BETWEEN SAFETY AND TRANSPARENCY

---

---

xxvi, 1897, 3225.

196

197

198. DEPARTMENT OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006) (quoting *Johnson v. Eisenstranger* 339 U.S. 763, 788 (1950)).

9/11 attacks, then-Attorney General Albert Gonzalez argued that the President's "chief responsibility under the Constitution to protect America from attack" gave him all authority available under the Constitution "to protect the people of the United States"<sup>199</sup> of congressional approval or disapproval.

Applying this view of presidential power leads to but a single conclusion. Irrespective of any congressional action, including FOIA, the President's decision that dissemination of certain material could lead to direct harm to the Nation's foreign affairs and military must be given virtually preclusive effect by the courts. This is particularly true when there is no evidence that the material is being withheld for any reason other than to protect those legitimate interests.

#### **B. 'Presidential Default Powers'**

---

---

---

BETWEEN SAFETY AND TRANSPARENCY

---

Federalist 23, where he observed “it must be admitted, as a necessary consequence, that there can be no limitation [on presidential] authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy.”<sup>204</sup> Recognition of

---

202. William Howard Taft,

25 YALE L.J. 599, 610 (1916). A third theory, now thoroughly discredited, suggests that President has no independent war powers and must rely exclusively on delegated authority from Congress when engaging foreign threats. That view was seemingly laid to rest by *The Prize Cases*,

*Id.*

*Id.*

*The Prize Cases*

*See, e.g., supra*

*see also*

—along with the necessary power—to protect the national security . . . .”); THE FEDERALIST NO. 70, at 385 (Alexander Hamilton) (the President has broad discretion to protect national security because “[d]ecision, activity, secrecy, and dispatch will generally characterize the

this power and responsibility, forms the foundation upon which the Executive Privilege,<sup>205</sup> the State Secrets privilege,<sup>206</sup> and even the law of prior restraints,<sup>207</sup> were constructed. Accordingly, one does not have to be a proponent of the “Unitary Executive” Theory of presidential power to recognize that the Executive has some, limited authority to prevent disclosure of nonconfidential material that could have immediate harmful repercussions if released.

**VI. Adopting the Proper Standard for Evaluating the  
President’s Authority to Withhold Inflammatory Material from  
Disclosure**

---



---

---

BETWEEN SAFETY AND TRANSPARENCY

---

---

*See, e.g., Z*

---

---

---

---

*See, e.g.,*

*See, e.g.,*

*aff'd in part*

. *See, e.g.,*

,

*quoting*

,

*supra*

---

---

BETWEEN SAFETY AND TRANSPARENCY

---

*requires*

*must*

*ACLU v. DOD*

*Goldberg v. Department of State,*

*Vaughn v. Rosen*

---

. *See, e.g.,*

. *Id.*

.  
. *Id.*

---

---

---

*Vaughn*

*inter alia*

---

*. Id*

,

---

---

BETWEEN SAFETY AND TRANSPARENCY

---

---

. *Id.*

. *Id.*

---

---

---

*Times*

*Washington Post*

*New York*

---

. *See supra*

. *See supra*

. *See supra*

. *See supra*

*DOD*  
*The Pentagon Papers*

*The Pentagon Papers.*

*ACLU v*

---

---

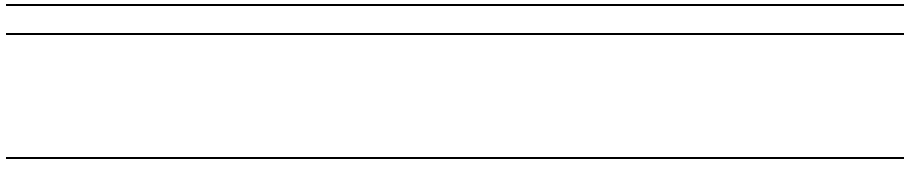
BETWEEN SAFETY AND TRANSPARENCY

---

*purpose. particularly when there is purity in his*

---

*McGhee v. Casey,*





---

---

BETWEEN SAFETY AND TRANSPARENCY

---