# RAYS OF SUNLIGHT IN A SHADOW "WAR": FOIA, THE ABUSES OF ANTI-TERRORISM, AND THE STRATEGY OF TRANSPARENCY

*by*
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*In the wake of the September 11 attacks, the "Global War on Terror" has marginalized the rule of law. From the dragnet detentions in the aftermath of the initial attacks, to novel and secretive surveillance authority under the Patriot Act, to the incarceration and torture of "enemy combatants," the administration's "war" has sought to establish zones of maneuver free of both legal constraint and of political oversight. In the first half decade of these efforts, the tripartite constitutional structure which is said to guard against executive usurpation remained largely quiescent. Opponents both inside and outside of the government turned instead to subconstitutional structures to expose this self-avowed "dark side," and to lay the foundation for a return to the rule of law. This Article examines four case studies of this strategy of transparency. At the center of each account lies the Freedom of Information Act (FOIA). The studies highlight, however, the crucial roles played by a broader complex of structures of transparency that have come to constitute the framework of national governance during the last generation, the importance of the integrity of the civil servants administering those structures, and the fulcrum of sustained advocacy.*

I. INTRODUCTION ..... 1142
II. TRANSPARENCY, TEXT, AND CONSTITUTIONAL PRACTICE 1144
III. STRUCTURES OF TRANSPARENCY AND A "GLOBAL WAR ON TERROR" ..... 1147
A. *A Low Speed Bump: The Case of the Post-September 11 Dragnet* ..... 1148
B. *Transparency Mechanisms as Audits: Guantanamo Tribunals and the Patriot Act* ..... 1164
1. *FOIA Alone: Sunlight on the Guantanamo Tribunals* ..... 1164
2. *The Campaign to Illuminate the Patriot Act* ..... 1168
C. *Transparency and Torture: Democracy and the Problem of "Unknown Unknowns"* ..... 1185
1. *The Policy that Dares not Speak its Name* ..... 1187
2. *Seeping Transparency: "Information Wants to Be Free"* ..... 1192
a. *Leaks and Hints* ..... 1192

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*b. Internal Scrutiny and Abu Ghraib* ..... 1197
*3. Transparency Deployed: The Slow March Toward Known Knowns* ..... 1200
*4. Sunlight and Disinfection?* ..... 1209
IV. THE STRATEGY OF TRANSPARENCY IN DARK TIMES ..... 1215

## I. INTRODUCTION

A story of which I have always been fond concerns a friend of W.C. Fields, the actor Thomas Mitchell, who approached the elderly comedian as Fields lay mortally ill. Observing Fields, a famous religious skeptic, deeply engrossed in the study of a Bible, the friend expressed some surprise: "You've never been interested in the Bible, Fields, what are you doing with it now?" Fields looked up, paused, and responded in his characteristic voice, "looking for loopholes m'boy, looking for loopholes."

The rule of law in the United States has just been through a near-death experience. The current administration has sought to flout constitutional principle by establishing law-free zones and constitutional black holes. It has engaged in duplicitous parsing of its legal obligations, and has invoked extralegal executive authority. In the process, it has undertaken what Vice President Cheney described from the outset as an effort to "work [through] . . . the dark side" and "spend time in the shadows" in pursuing what it characterizes as a "Global War on Terror."[1]

In the face of these initiatives, for the better part of six years, the tripartite constitutional structure which is said to guard against usurpation has remained largely quiescent. Congress was initially paralyzed by the aftershocks of the attacks of September 11, and, after the President's party gained control of the Senate in 2002, by party loyalty. The courts awaited justiciable controversies, delayed by a combination of secrecy and sequestration of potential plaintiffs. When confronted with legal challenges, judges often proved unwilling to exercise the power of judicial review.

Yet the Republic stands, and as we meet today our nation has begun slow progress toward effective limits to the abuses of the Global War on Terror. What follows is an effort to read the last six years with the eyes of W.C. Fields. Faced with a landscape apparently inhospitable to hopes for the rule of law, I will be "looking for loopholes." I seek to identify

[1] Interview by Tim Russert with Dick Cheney, Vice President, on Meet The Press (Sept. 16, 2001), *available at* http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html. Cheney continued by saying that "[a] lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. . . . [I]t's going to be vital for us to use any means at our disposal . . . ." *Id.*

unacknowledged resources that set the stage for a return to constitutional values.

I focus on four case studies in which challengers have sought to shine light on a shadow "war," turning from litigation that directly challenged an overreaching Executive to adopt a strategy of transparency. In each, critics have used legal tools to generate information regarding abuses; that information in turn has laid the groundwork for legal and political initiatives to return to the rule of law. At the center of each account lies the Freedom of Information Act (FOIA). The studies highlight, however, the crucial roles played by a broader complex of structures of transparency that have come to constitute the framework of national governance during the last generation, the importance of the integrity of the civil servants administering those structures, and the fulcrum of sustained advocacy. And in each of the case studies, the determined efforts of the administration to keep details of abuses from the public testify in a backhanded fashion to the existence of an ongoing constituency for the rule of law.

Part II begins with a brief account of the importance of transparency, the paucity of guarantees for it in the constitutional text, and the development of frameworks of transparency as part of our constitutional practice in the last generation. Part III.A traces the efforts to uncover the dimensions of the initial domestic dragnet for terrorist suspects in the aftermath of the trauma of September 11. It sets forth the interaction among state and federal Freedom of Information Act frameworks and litigation surrounding the closure of deportation proceedings. It concludes with the subsequent investigation and report by the Department of Justice (DOJ) Office of Inspector General, which retrospectively revealed many of the abuses of the dragnet.

Part III.B examines two efforts to use transparency mechanisms to audit ongoing antiterrorist initiatives. Part III.B.1 reviews the successful use of the Freedom of Information Act to pry loose transcripts of the Combatant Status Review Tribunals in Guantanamo along with information regarding individuals incarcerated there. Part III.B.2 sets forth the more complex campaign to bring to light the ways in which the novel surveillance mechanisms authorized by the Patriot Act have been used domestically in the "War on Terror." That campaign combined the efforts of a coalition deploying political advocacy, FOIA requests, and substantive constitutional litigation. It ultimately generated both investigations by the Department of Justice Inspector General and the imposition of further disclosure and auditing requirements as a condition for the renewal of the Patriot Act.

Part III.C details the efforts to expose the policy of coercive interrogation adopted by the current administration in the "War on Terror." Resistance to that policy within the government generated both internal records of opposition and initial leaks regarding abuses. FOIA requests and litigation, enabled both by the disclosure of the existence of

documents sought and by a public controversy that could ground a legal claim for expedited processing, in turn allowed external critics to obtain documents that authenticated the accusations. Those disclosures impeached the policy and sparked investigations by internal watchdogs, as well as judicial and congressional intervention. Throughout the process, the integrity of civil servants has proven an essential condition of effectiveness for the strategy of transparency.

Part IV concludes with reflections on the strategy of transparency.

## II. TRANSPARENCY, TEXT, AND CONSTITUTIONAL PRACTICE

It is common currency that transparency is a tonic to democratic legitimacy and to lawful government. On one hand, James Madison observed that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[2] On the other hand, Louis Brandeis famously proclaimed sunlight to be "the best of disinfectants."[3]

Yet the text of the American Constitution provides few explicit guarantees of transparency. Each house of Congress is constitutionally obligated to keep and publish a journal of its proceedings "excepting

[2] Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 690 (Philip B. Kurland & Ralph Lerner eds., 1987), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html. *Cf.* N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) ("In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.").

[3] LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (Nat'l Home Library Found. 1933); *see, e.g.*, JEREMY BENTHAM, POLITICAL TACTICS 29 (Michael James et al. eds., Oxford Univ. Press 1999) ("The greater the number of temptations to which the exercise of political power is exposed, the more necessary is it to give to those who possess it, the most powerful reasons for resisting them. But there is no reason more constant and more universal than the superintendance of the public."); JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 162–64 (Currin V. Shields ed., 1958) ("Publicity is inappreciable, even when it does no more than prevent that which can by no possibility be plausibly defended. . . . [C]ases exist . . . in which almost the only restraint upon a majority of knaves consists in their involuntary respect for the opinion of an honest minority."); LORD ACTON AND HIS CIRCLE 166 (Abbot Gasquet ed., 1968) ("Every thing secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity."); Immanuel Kant, *Eternal Peace*, *reprinted in* CARL JOACHIM FRIEDRICH, INEVITABLE PEACE 241, 277 (1948) ("[I]t is possible to call the following statement the *transcendental formula* of public law: 'All actions which relate to the right of other men are contrary to right and law, the maxim of which does not permit publicity.'").

When Kant agrees with Mill, Acton and Bentham on a proposition, one might think that proposition rests firmly at the root of modern liberal democracy.

such Parts as may in their Judgment require Secrecy."[4] This provision precluded a return to the blanket secrecy of parliamentary debate of seventeenth century England.[5] But in the founding decade, the constitutional framework proved consistent with largely open deliberations by the House, a presumption of secrecy for the deliberations of the Senate, and a variety of confidentiality privileges for the Executive branch.[6]

The President is required to "from time to time give to the Congress Information of the State of the Union".[7] He must provide information sufficient to persuade the Senate to consent to appointments and treaties, and if he seeks legislation, he must convince both houses of Congress to adopt it.[8] These, too, are mandates consistent with a wide range of transparency. The Framers contemplated that in some dimensions, the Executive branch would partake of the virtues of "decision, activity, secrecy, and dispatch."[9] Yet they envisioned no broad return to *arcana imperii*; the Executive's actions were to be "narrowly watched and readily suspected" by an informed public opinion.[10] For the popular branches of government, the constitutional text leaves the balance between secrecy and public accountability to rest largely in the interplay of political forces. Subsequent amendments have not altered the constitutional text in this regard.

Justice Stewart observed that "[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."[11] But what the

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[4] U.S. CONST. art. I, § 5.

[5] *See generally* DAVID ZARET, ORIGINS OF DEMOCRATIC CULTURE 44–55 (2000).

[6] DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS 47–55 (1981) (discussing provisions for open deliberations in the House); *id.* at 55–65 (detailing closure of Senate deliberations and the presumptive secrecy of "executive" journals); *id.* at 84–88 (describing the Senate's 1794 "open doors" resolution); *see generally id.* at 10 (describing political competition as an "emergent alternative to a stable system of legal controls on secrecy" in the founding decades).

[7] U.S. CONST. art. II, § 3.

[8] U.S. CONST. art. II, § 2.

[9] THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing "[d]ecision, activity, secrecy, and dispatch" as virtues of a single Executive); *see* THE FEDERALIST NO. 64, at 392–93 (John Jay) (referring to the necessity of secrecy and dispatch in foreign affairs).

[10] Federalist No. 70 argues that a single Executive is better subject to "the restraints of public opinion," since "multiplication of the executive adds to the difficulty of detection," including the "opportunity of discovering [misconduct] with facility and clearness." One person "will be more narrowly watched and more readily suspected." THE FEDERALIST NO.70 *supra* note 9, at 427-30. And No. 84 contemplates that "[t]he executive and legislative bodies of each State will be so many sentinels over the persons employed in every department of the national administration," whose "regular and effectual system of intelligence" will allow them to "communicate the same knowledge to the people." THE FEDERALIST NO. 84, at 516 (Alexander Hamilton).

[11] Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 636 (1975) ("The public's interest in knowing about its government is protected by the guarantee of a Free

"Constitutional" text omits, the last generation has embedded as a part of modern "small c" constitutional practice.[12] For forty years, America's governing structure has included a Freedom of Information Act. In the aftermath of Watergate, Congress implanted in law a framework of sub-constitutional structures protecting transparency. It strengthened the Freedom of Information Act, provided protections for whistleblowers, reporting obligations, and a network of Inspectors General empowered to investigate and report to Congress.[13] The Executive branch put in place another set of internal watchdogs.[14] And in the last generation, the Court recognized, at least implicitly, the constitutional importance of

Press, but the protection is indirect. . . . The Constitution, in other words, establishes the contest, not its resolution.") (quoted with approval in Houchins v. KQED, Inc., 438 U.S. 1, 14-15 (1978) (plurality opinion)).

[12] For a recent thoughtful analysis of legal materials that "constitute" the government, without being part of the constitutional text, see Ernest A. Young, *The Constitution Outside the Constitution* (Univ. of Texas Sch. of Law, Public Law & Legal Theory Research Paper No. 119, Feb. 2007), *available at* SSRN: http://ssrn.com/abstract=965865 (forthcoming, Yale L.J.).

[13] Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (codified as amended at 5 U.S.C. § 552 (2000)); Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (2000)); Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (codified as amended at 44 U.S.C. §§ 2201–2207 (2000)); Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 5 U.S.C.); *Id.* § 601 (codified as amended at 28 U.S.C. §§ 591–598) (providing for the appointment of a special prosecutor); Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1871 (2000)), Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. App. 3 §§ 1–12 (2000)); Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.) (providing whistle blower protection for federal employees) (amended by Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.) (enhancing whistleblower protections) and Act of Oct. 29, 1994, Pub. L. No. 103-424, 108 Stat. 4361 (codified as amended in scattered sections of 5 U.S.C.) (extending and enhancing whistleblower protections)); General Accounting Office Act of 1974, Pub. L. No. 93-604, 88 Stat. 1959 (establishing the GAO); GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (codified as amended in scattered sections of 31 U.S.C.) (providing increased resources and authority to the GAO).

For discussion of the system of post-Watergate transparency structures, see ALASDAIR ROBERTS, BLACKED OUT 59, 69–71 (2006). On the expansion of the network of Inspectors General, see PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 26 (1993) (noting the establishment of an Inspector General at the Defense Department in 1982; at the Justice Department in 1988; and at the CIA in 1989).

[14] *E.g.*, History of the Information Security Oversight Office, http://www.archives.gov/isoo/about/history.html ("President Jimmy Carter established ISOO with the signing of Executive Order 12065, 'National Security Information,' on December 1, 1978."); Mission and History: Assistant to the Secretary of Defense (Intelligence Oversight), http://www.defenselink.mil/atsdio/ (follow "mission/history" hyperlink) (established originally as Inspector General for Intelligence in 1976 pursuant to Executive Order (EO) 11905, redesignated in 1982).

constraining the government's authority to interfere with dissemination of information that might disclose malfeasance.[15]

During the first five years of the "War on Terror," secretive Executive action combined with the panic triggered by the attacks of 9/11 and single-party control of the electoral branches to render electoral oversight flaccid and courts compliant. As constitutionally explicit checks and balances lay supine, the frameworks of transparency that have come to constitute our governing practice were mustered into the breach.

## III. STRUCTURES OF TRANSPARENCY AND A "GLOBAL WAR ON TERROR"

Transparency can potentially discipline an overreaching Executive before, during, or after the fact. Before the fact, disclosure of dubious initiatives might serve as a speed bump, impeding adoption of problematic policies at the outset. Once policy is set, transparency in the execution of permissible initiatives might force corrections or deter excesses during the course of their deployment. Finally, ex-post disclosure of constitutional violations might precipitate discipline of malfeasant officials, and serve as a compass, disclosing where the government is headed and allowing political actors and the electorate to turn the political system back toward appropriate regard for constitutional values.[16]

In the case studies that follow, as we will see, advocates attempted to invoke each modality. First, they sought to use sub-constitutional transparency frameworks to establish an arena for contemporaneous debate about the dragnet detention of terrorist suspects domestically. Second, they endeavored to provide the opportunity for ongoing audits

[15] The Court established protections for government employees who seek to inform the public about official overreaching. *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 466 (1995); Pickering v. Bd. of Educ., 391 U.S. 563 (1968). *But cf.* Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006). It rebuffed efforts to gag the objects of public regulation. Butterworth v. Smith, 494 U.S. 624, 635–36 (1990) (rejecting a rule that would inhibit the ability of a grand jury witness "to make a truthful public statement"). It has provided shields for media which obtain such information and convey such information. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (reversing injunction against publication of the Pentagon Papers); *cf.* Bartnicki v. Vopper, 532 U.S. 514, 527–28 (2001) (reversing damage award against newscaster for broadcasting illegally intercepted conversation relating to public employees union; noting "state action to punish the publication of truthful information seldom can satisfy constitutional standards").

[16] Each of these mechanisms, of course, is premised on the proposition that constitutional values have a political constituency. If such a constituency is lacking, disclosure is likely to have minimal effect. And indeed, if the constituency for extralegal repression is strong enough, transparency could force marginally law-abiding Executives into still more extreme measures. What is striking about the "Global War on Terror," however, is that the Bush administration continued to give lip service to the rule of law while operating in the shadows, suggesting that the constituency for legality is in fact an operative constraint.

of the conduct of Combatant Status Review Tribunals and the deployment of the Patriot Act. Third, they tried to reveal and delegitimize a policy of coercive interrogation. It is in the second and third roles that the sub-constitutional transparency framework has proven most effective.

### *A. A Low Speed Bump: The Case of the Post-September 11 Dragnet*

In the aftermath of the attacks of September 11, the administration undertook a broad-ranging effort to detain individuals suspected of ties to the attacks or to other terrorist activities. On October 25, 2001, three weeks after the beginning of the invasion of Afghanistan, Attorney General John Ashcroft proclaimed that the "anti-terrorism offensive has arrested or detained nearly 1,000 individuals as part of the September 11 terrorism investigation."[17] In the early phases of the process, administration spokesmen regularly issued updates regarding the total number of individuals detained by this initiative, but officials also began to restrict the flow of information to Congress, advocacy organizations, and news media.[18] Of particular import for the effort to sweep up non-citizens, a September 21, 2001 directive by Chief Immigration Judge Michael Creppy required that immigration judges "close immigration

[17] John Ashcroft, Att'y Gen., Prepared Remarks for the U.S. Mayors' Conference (Oct. 25, 2001), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm; *see also* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 97 (D.D.C. 2002).

In tracking down thousands of leads and tens of thousands of tips, the practice was to "arrest any alien encountered in the course of investigating a JTTF [the FBI's New York Joint Terrorism Task Force] or PENTTBOM [the FBI's investigation into the September 11 attacks] lead who was found to be in the country illegally." OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS, at 14 (2003), *available at* http://www.usdoj.gov/oig/special/0306/full.pdf [hereinafter OIG REPORT].

Detainees labeled of "special interest" were held in indefinite detention until they were "cleared" by the FBI. *Id.* at 53–57. The criteria for a "special interest" designation were evidently quite broad. "[S]everal Middle Eastern men were arrested and treated as connected to the September 11 investigation when local law enforcement authorities discovered 'suspicious items,' such as pictures of the World Trade Center and other famous buildings, during traffic stops." *Id.* at 16. Another individual of Middle Eastern origin was incarcerated for six months because he initially sought to purchase a car in early September and put down a deposit, but failed to return to consummate the purchase. *Id.* at 42.

[18] Dana Milbank & Peter Slevin, *Bush Edict on Briefings Irks Hill*, WASH. POST, Oct. 10, 2001, at A1 (describing order that "briefings with sensitive information be limited to eight of the 535 members of Congress," the sealing of and refusal to release "customary paperwork" regarding detainees, and difficulties encountered by lawyers seeking information regarding detained clients); Memorandum from John Ashcroft, Att'y Gen., to Heads of All Federal Departments and Agencies (Oct. 12, 2001), *available at* http://www.usdoj.gov/oip/011012.htm (reversing prior presumption of FOIA disclosure in the absence of foreseeable harm and substituting a policy of defending agency refusals to disclose as long as the refusal had a "sound legal basis").

proceedings to the press and public (including family members of the deportee) in certain 'special interest' [deportation] cases."[19] On October 29, 2001, a coalition of twenty-three civil liberties organizations, concerned by reports of racial and religious profiling, incommunicado detention, and physical abuse, submitted FOIA requests to the FBI, the INS, and the DOJ's Office of Information Privacy, seeking information regarding the identity and circumstances of those detained.[20]

As information regarding the dragnet made its way to the public in bits and pieces,[21] the FBI granted expedited review, but rejected the coalition's FOIA request on November 1, 2001, on the ground that responsive materials "could reasonably be expected to interfere with enforcement proceedings."[22] On November 8, 2001, the administration ceased reporting the number of individuals questioned, detained, or arrested, and refused to release information regarding the identities of those detained.[23] The Attorney General defended that position both on

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[19] Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 941 (E.D. Mich. 2002).

[20] *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 97.

Contemporaneously, a group of members of Congress and Senators sought similar information by letter to the Attorney General. Marilee Miller, *22 Groups, Feingold Seek Names of 800+ Detainees*, CAP. TIMES, Oct. 30, 2001, at 3A; Letter from Sens. Russell D. Feingold, Edward M. Kennedy & Patrick J. Leahy and Reps. John Conyers, Jr., Jerrold Nadler & Robert C. Scott to John Ashcroft, Att'y Gen. (Oct. 31, 2001), *available at* http://www.cnss.org/feingoldletter.pdf.

[21] *See* Amy Goldstein, *A Deliberate Strategy of Disruption; Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror*, WASH. POST, Nov. 4, 2001, at A1 (describing investigation identifying the cases of 235 detainees "located through court records, news accounts, lawyers, relatives and friends").

[22] *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 98 (describing FBI reliance on 5 U.S.C. § 552(b)(7)(A) (2000)). On December 10, 2001, the FBI affirmed its denial, *id.*, on the basis that the requested material "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (2000).

[23] Amy Goldstein & Dan Eggen, *U.S. to Stop Issuing Detention Tallies; Justice Dept. to Share Number In Federal Custody, INS Arrests*, WASH. POST, Nov. 9, 2001, at A16 (The government would only release information "identifying how many people are being held on charges of violating immigration laws and how many are in federal custody." This "decision to narrow the visible picture of the terrorism investigation comes after senior government spokesmen have in recent days offered conflicting statements about the pattern of detentions. It also comes as legal, civil liberties and immigration groups have begun to protest, contending the Bush administration is being so secretive that it is unclear whether the detentions are constitutional."); *see also* OIG REPORT, *supra* note 17, at 1 n.2 ("[T]he Public Affairs Office stopped reporting the cumulative totals after the number reached approximately 1,200, because the statistics became confusing.").

On November 9, 2001, the Justice Department commenced an initiative seeking interviews with approximately 5,000 foreign nationals between the ages of eighteen and thirty-three who had entered the United States after January 2000 from countries "where there have been strong al Qaeda presences," and on March 20, 2002, the Justice Department undertook a second round of 3000 "voluntary" interviews. *See* Attorney General John Ashcroft, Press Conference (Mar. 20, 2002), *available at*

the ground that it protected the personal privacy of detainees, and that if the Department of Justice released information, "We might as well mail this list to the Osama bin Laden al Qaeda network . . . about which terrorists we have in our custody."[24]

On December 5, 2001, the coalition of twenty-three civil rights and human rights groups led by the Center for National Security Studies (CNSS) and the American Civil Liberties Union (ACLU) filed an action in D.C. District Court seeking relief from the denial of their FOIA requests.[25] In the course of this litigation, the Department of Justice provided a series of disclosures beyond its initial public offerings. A disclosure of documents listing the number and status of detainees accompanied the DOJ's January 11, 2002 answer to the FOIA complaint,[26] and a further proffer in June 2002 revealed details concerning the identity of individuals who had been charged under federal criminal law and the current number of individuals remaining in INS custody.[27] But

http://www.usdoj.gov/archive/ag/speeches/2002/032002agnewsconferenceedvainterviewprojectresultsannouncement.htm.

[24] Attorney General John Ashcroft, Press Conference, Provides Total Number of Federal Criminal Charges and INS Detainees (Nov. 27, 2001), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks11_27.htm. The Department of Justice was equally reticent in responding to congressional inquiries. *See* Russell Feingold, Editorial, *Name the Detainees*, WASH. POST, Dec. 23, 2001, at B7; Letter from Daniel J. Bryant, Assistant Att'y Gen., U.S. Dep't of Justice, to Sen. Russell D. Feingold (Nov. 16, 2001), *available at* http://www.cnss.org/bryantletterencl.pdf.

[25] Complaint ¶ 2, Ctr. for Nat'l Sec. Studies v. Dep't of Justice, No. 01-CV-02500 (D.D.C. Aug. 2, 2002) (filed Dec. 5, 2001), *available at* http://www.epic.org/open_gov/FOIA/detainee_complaint.pdf. For the complete case file, see The Center for National Security Studies v. The Department of Justice, *available at* http://www.cnss.org/cnssvdoj.htm.

[26] *See* Dan Eggen, *Delays Cited In Charging Detainees; With Legal Latitude, INS Sometimes Took Weeks,* WASH. POST, Jan. 15, 2002, at A1 (referring to newly released documents in the *CNSS* FOIA suit as providing "the clearest picture yet of the controversial and secretive dragnet" and using those documents to conclude that "[s]cores of immigrants detained after the Sept. 11 terror attacks were jailed for weeks before they were charged with immigration violations, according to documents released by the Justice Department"); Electronic Privacy Information Center, CNSS v. DOJ, http://www.epic.org/open_gov/foia/cnss_v_doj.html ("[O]f the 725 detainees listed in heavily redacted papers the groups received on Jan. 11, 2002, 344 are listed separately under the caption 'INACTIVE CASES,' which would seem to indicate that these individuals have been cleared of any link to terrorism."); Joint Terrorism Task Force Working Group, INS Special Interest List, http://www.cnss.org/insrelease011102.pdf (redacting identifying information from a partial list of detainees released in response to FOIA request); U.S. Dep't of Justice, List of Detainees, *available at* http://www.cnss.org/federalcomplaints011102.pdf (providing names, status, and charges for numerous detainees).

[27] Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 98 (D.D.C. 2002) ("For 718 of the 751 individuals detained, DOJ has revealed their place of birth and citizenship status, as well as the dates any immigration charges were filed, and the nature of those charges."). The disclosures also revealed that 338 of the individuals had been determined to be "not of current interest" to the September 11

individual information regarding those detained on immigration charges, including their names, details of their detention, and the identities of their attorneys, as well as the total number of individuals arrested and detained, remained sticking points for the administration.[28]

While the coalition's litigation proceeded, on January 22, 2002, the ACLU opened a second front by invoking New Jersey's Open Public Records Law to seek the identities of INS detainees lodged in New Jersey jails.[29] The New Jersey state trial judge initially ordered release of the requested information under state law, commenting that secret arrests are "odious to a democracy,"[30] but retroactive interim federal regulations issued in response to that decision effectively preempted disclosure.[31]

Even without judicial intervention, efforts to shield the identities of the detainees continued to fray. By the end of January 2002, for reasons of its own, the INS had effectively disclosed identifying information for the largest group of detainees. That group, held in Pasaic and Hudson County jails, was allowed to meet with advocacy groups for "know your rights" presentations.[32] And in March 2002, the Inspector General of the

investigation. Petition for Writ of Certiorari at 10, Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 540 U.S. 1104 (2004) (No. 03-472) (quotation marks omitted).

[28] The administration also refused to disclose the "the total number of individuals arrested and detained in connection with its September 11 investigation." *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 99. Having disclosed the number of individuals charged with violations of federal statutes and the number of individuals detained on immigration charges (and having subsequently disclosed that the number detained as material witnesses was small, with twenty-six identified at the time of trial), *id.* at 107, the refusal to disclose the total number arrested and detained is something of a mystery. My suspicious side wonders whether there is a hidden group which was arrested and summarily disappeared into CIA black sites or rendered to foreign jurisdictions whose existence would be disclosed by aggregate numbers.

[29] Elizabeth Llorente, *ACLU Sues over Detainees; Demands to Know Who Is in INS Custody and Why*, RECORD, Jan. 23, 2002, at A1; Press Release, ACLU, ACLU of New Jersey Files Lawsuit Seeking Information on Post-September 11 Detainees (Jan. 22, 2002), *available at* http://www.aclu.org/immigrants/detention/11654prs20020122.html.

[30] Press Release, ACLU, ACLU of New Jersey Wins Access to Information on Post-September 11 Detainees (Mar. 27, 2002), *available at* http://www.aclu.org/immigrants/detention/11677prs20020327.html?s_src=RSS; *N.J. Judge Orders Counties to Release Detainees' Names*, FREEDOMFORUM.ORG, Mar. 28, 2002, http://www.freedomforum.org/templates/document.asp?documentID=15972.

[31] Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19,508 (Apr. 22, 2002) (codified at 8 C.F.R. pts. 236 and 241) (forbidding any state or county jail from releasing information about INS detainees housed in their facilities, and making the rule effective on April 17, 2002, a week prior to publication); *see also* ACLU of N.J., Inc. v. County of Hudson, 799 A.2d 629, 655 (N.J. Super. Ct. App. Div. 2002) (reversing grant of disclosure on the basis of preempting regulations).

[32] Elizabeth Llorente, *INS Will Let Advocates Meet with Detainees*, RECORD, Jan. 30, 2002, at A1; Hanna Rosin, *Groups Find Way to Get Names of INS Detainees; Presentations on Rights Planned in N.J. Facilities*, WASH. POST, Jan. 31, 2002, at A16. This decision was contemporaneous with the issuance of an opinion by the INS General Counsel that "the INS has a duty to remove an alien with 'reasonable dispatch' and the removal

Department of Justice initiated an investigation into the September 11 detention program.[33]

During the next months, federal trial judges began to tug at the veil of secrecy that had been drawn over the dragnet, without substantively confronting the detentions themselves.[34] In April, in *Detroit Free Press v. Ashcroft*, a federal trial judge in Michigan held that the blanket closure of deportation hearings to the public in "special interest" cases related to the anti-terrorist sweep violated the First Amendment and due process rights of the subject of the hearings.[35] Characterizing the case as being "about the Government's right to suspend certain personal liberties in the pursuit of national security," the trial judge invoked the authority of Justice Murphy's comment on the imposition of martial law in Hawaii: "The . . . constitutional rights of an accused individual are too fundamental to be sacrificed merely through a reasonable fear of military assault."[36] In May, a federal trial judge in New Jersey came to a similar conclusion in *North Jersey Media Group, Inc. v. Ashcroft,* an action brought by newspapers seeking access to "scores, if not hundreds, of immigration hearings" in New Jersey that had been closed as "special interest" cases.[37]

could not be delayed for the exclusive purpose of allowing the FBI to conduct an investigation to see if the person is a terrorist." OIG REPORT, *supra* note 17, at 101.

[33] OIG REPORT, *supra* note 17, at 5.

[34] The Department of Justice adopted a strategy to avoid judicial review of the legality of efforts to hold immigration detainees indefinitely by mooting out habeas petitions once filed and continuing to hold detainees who had not filed habeas actions. *See* OIG REPORT, *supra* note 17, at 98–100. In April 2002, the Center for Constitutional Rights filed a class action on behalf of September 11 detainees seeking damages for abuse, Class Action Complaint and Demand for Jury Trial ¶ 1, Turkmen v. Ashcroft, No. 02 CV 2307 (JG), 2004 U.S. Dist. LEXIS 14537 (E.D.N.Y. July 29, 2004), but litigation on that case did not commence in earnest until two years later, Turkmen v. Ashcroft, No. 02 CV 2307 (JG), 2004 U.S. Dist. LEXIS 14537 (E.D.N.Y. July 29, 2004).

[35] Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 941 (E.D. Mich. 2002); *see also* Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 948, 952 (E.D. Mich. 2002) (rejecting exhaustion arguments). The court consolidated cases brought by the Detroit Free Press, the Detroit Herald News, Congressman John Conyers, and a defendant in a removal proceeding, Rabih Haddad. Haddad's hearings regarding detention and bail in December 2001 and January 2002 had been closed to the press and his family. The trial court rejected government claims that disclosing details regarding "special interest" detainees could impede terrorism investigations, in part because details regarding Mr. Haddad's arrest had already been published, and in part because he and his counsel remained at liberty to disclose any details revealed in the hearings. *Detroit Free Press*, 195 F. Supp. 2d at 947.

[36] *Detroit Free Press*, 195 F. Supp. 2d at 940 (citing Duncan v. Kahanamoku, 327 U.S. 304, 329–30 (1946) (Murphy, J., concurring)).

[37] N. Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288, 291 (D.N.J. 2002). The court again rejected the government's justifications for closure, commenting that:

> The problem with the Creppy Memo is that there is nothing in it to prevent disclosure of this very information by the "special interest" detainee or that individual's lawyer, both of whom are permitted to be present in the "special

After seeking relief from the Supreme Court, the administration was able to have the order to open the New Jersey immigration hearings stayed pending appeal.[38]

On August 2, 2002, with only 74 of the original 751 INS detainees remaining in custody, Judge Kessler in the District of Columbia resolved the FOIA controversy regarding the coalition request for the detainees' identities in favor of transparency in *Center for National Security Studies v. United States Department of Justice* (*CNSS*).[39] Commenting that "[s]ecret arrests are a concept . . . profoundly antithetical to the bedrock values that characterize a free and open [society] such as ours," she rejected the administration's justifications for denying FOIA requests for the identities of the detainees and their attorneys.[40] The core of the debate focused on FOIA Exemption 7(A), which allows agencies to withhold material "compiled for law enforcement purposes" that "could reasonably be expected to interfere with enforcement proceedings."[41] The administration asserted that revealing the names of the detainees could inhibit their future usefulness as informants once released, "allow terrorist organizations to map the progress of the investigation and thereby develop the means to impede them," and "allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence."[42]

The trial judge was unpersuaded by any of the justifications for withholding the names of the detainees. On the first point, the government had provided "no reason to believe that terrorist groups would [still] not know of the detentions" ten months after they had taken place, and moreover "utterly fail[ed] to demonstrate" that the individuals at issue "actually had some pre-existing link to or knowledge of terrorist activity."[43] On the question of possible interference with the investigation,

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> interest" proceedings. Furthermore, if an appeal is taken, the transcript of the proceedings below would be disclosed in any event.

*Id.* at 301. For additional discussion of the Creppy Memo, see *supra* text accompanying note 19.

[38] Ashcroft v. N. Jersey Media Group, Inc., 536 U.S. 954, 954 (2002). The INS had earlier mooted out an action by a detainee by removing the closure directive in that case. *N. Jersey Media Group*, 205 F. Supp. 2d at 291 & n.1.

[39] 215 F. Supp. 2d 94, 112–13 (D.D.C. 2002). She had previously denied the plaintiffs' efforts to use discovery in the case as a vehicle to further explore the dimensions of federal policy. Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, Civ. Action No. 01-2500 (GK), 2002 U.S. Dist. LEXIS 2983, at *7–8 (D.D.C. 2002).

[40] *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 96 (quotation omitted). She went on to invoke "the core democratic values of openness, government accountability, and the rule of law" and the Judicial branch's obligation "to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship." *Id.*

[41] *Id.* at 100.

[42] *Id.* at 101 (quoting government affidavits).

[43] *Id.* at 101, 102. Judge Kessler was offended by the government's refusal in response to questioning to provide any information regarding the "standard used to

she rejected the government's "mosaic theory" "that no information may be disclosed because 'bits and pieces of information that may appear innocuous in isolation, when assimilated with other information . . . will allow the [terrorist] organization to build a picture of the investigation.'"[44] No plausible argument from evidence supported the theory, since "the key Government affidavit on the mosaic theory was not even prepared for this case, but rather is a copy of the affidavit" prepared for the "special interest closure" litigation in Michigan, and did not provide a basis for concluding that the bare disclosure of names could have any adverse effect.[45] On the other hand, Judge Kessler accepted that the "dates and locations of arrest, detention, and release" could plausibly "provide insights into the past and current strategies and tactics of law enforcement agencies conducting the investigation."[46]

August 2002 saw the affirmance of the Michigan order barring blanket closures of "special interest" immigration hearings by the Sixth Circuit in *Detroit Free Press v. Ashcroft*. In a unanimous decision authored by Judge Damon Keith, the panel began by observing that the "political branches of our government enjoy near-unrestrained ability to control our borders" and that the "only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty."[47] Proclaiming that "[d]emocracies die behind closed

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arrest the detainees." The government rested on the proposition that it could not "rule out" possible connections to terrorism for every detainee, and that "dire consequences . . . would flow from even one unnecessary disclosure." *Id.* at 102.

[44] *Id.* at 103.

[45] *Id.* at 103–04. Judge Kessler rejected as well claims under Exemptions 7(C) and 7(F) that the privacy interests and personal safety of the detainees required that their identities not be disclosed, observing that privacy interests were subject to balancing in the FOIA analysis, and the interest in "verifying whether the Government is operating within the bounds of law" provides a more than sufficient offsetting consideration:

> Plaintiffs voice grave concerns about the abuse of this power, ranging from denial of the right to counsel and consular notification, to discriminatory and arbitrary detention, to the failure to file charges for prolonged periods of detention, to mistreatment of detainees in custody. . . . The concerns are sufficiently substantial that DOJ's Office of the Inspector General has initiated an investigation into the Government's treatment of the detainees.

*Id.* at 105–06. The relief required, however, that detainees be granted the opportunity to opt out of disclosure. *Id.* at 106. Judge Kessler also ordered a more thorough search for the requested policy documents because "it is simply not credible that no other documents are responsive to Plaintiffs' request." *Id.* at 110.

[46] *Id.* at 108 (quoting government affidavits). She also credited somewhat speculative fears that disclosure of the place of detention could target retaliatory attacks. *Id.* at 108.

[47] Detroit Free Press v. Ashcroft, 303 F.3d 681, 682–83 (6th Cir. 2002); *see also id.* at 693 ("Even though the political branches may have unfettered discretion to deport and exclude certain people, requiring the Government to account for their choices assures an informed public—a foundational principle of democracy.").

Lest readers miss the historic resonance of concern about secretive overreaching by government, Judge Keith referred repeatedly to the prevailing opinions in the

doors," the opinion rejected the claim that the administration had constitutionally illimitable plenary power over immigration matters.[48] It concluded that in light of the history of openness of deportation hearings and the importance of public access as "a check on the actions of the Executive . . . assuring us that proceedings are conducted fairly and properly," the closure of special interest cases was inconsistent with the commands of the First Amendment.[49] The opinion acknowledged the claim that a "mosaic" pieced together from information provided at open hearings could interfere with efforts to suppress terrorism, but concluded that a case-by-case evaluation of the threat was required before a hearing could be closed.[50] "[W]e do not believe speculation should form the basis for such a drastic restriction of the public's First Amendment rights."[51]

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Pentagon Papers case. *Id.* at 683 (citing N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (per curiam) (Stewart, J., concurring); *id.* at 683 n.1 (citing *N.Y. Times Co.*, 403 U.S. at 716 (Black, J., concurring)); *id.* at 692 n.9 (citing *New York Times Co. v. United States* for the proposition that threats to national security do not generate "deferential review"); *id.* at 693 (citing *New York Times Co. v. United States* for the proposition that "[t]he guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic"); *id.* at 710 (citing *New York Times Co. v. United States* concurrence for the argument that the Framers were "[f]ully aware of both the need to defend a new nation" and to protect free speech).

[48] *Detroit Free Press*, 303 F.3d at 683.

[49] *Id.* at 703–04.

[50] *Id.* at 709. The court noted that:

> [T]he Government subsequently admitted that there was no information disclosed in any of Haddad's first three hearings that threatened "national security or the safety of the American people." . . . The only reason offered for closing the hearings has been that the presiding immigration judge was told do it by the chief immigration judge, who in turn was told to do it by the Attorney General."

*Id.*

[51] *Id.* On remand, on September 17, 2002, the trial court found that Mr. Haddad's due process rights had been violated by the initial closure and ordered that the government either provide a *de novo* open hearing or release him. Haddad v. Ashcroft, 221 F. Supp. 2d 799, 805 (E.D. Mich. 2002). Parts of the subsequent hearing were closed to the public to allow the introduction of particular sensitive evidence, but the government's effort to use ex parte secret evidence was rebuffed, and Haddad's counsel was granted access to the contested evidence. Detroit Free Press v. Ashcroft, Nos. 02-70339, 02-70605, 2002 U.S. Dist. LEXIS 19991, at *3–4 (E.D. Mich. Oct. 7, 2002). On September 23, 2003, the appeals from those orders were dismissed as moot in light of the entry and effectuation of a final order of removal. Haddad v. Ashcroft, 76 Fed. App'x 672, 673 (6th Cir. 2003).

In August 2002, Judge Rakoff in *In re Material Witness Warrant*, 214 F. Supp. 2d 356, 363 (S.D.N.Y. 2002), ordered an investigation of the case of Abdallah Higazy, an Egyptian who had been detained as a "material witness" in the aftermath of September 11. Higazy was bullied into a "confession" by FBI interrogators who threatened his family in Egypt with torture by Egyptian security forces. The "confession" was reported to Judge Rakoff as a justification for further detaining Mr. Higazy. When Mr. Higazy was definitively exonerated and one of his accusers was shown to have misrepresented crucial physical evidence, Judge Rakoff rejected the efforts of the government to keep the records of the case sealed. *Id.* Subsequent

Two months later, a 2–1 decision of the Third Circuit reached a different conclusion. In *North Jersey Media Group v. Ashcroft*, the court reversed the New Jersey District Court order opening "special interest" deportation hearings to public scrutiny.[52] Writing for the majority, Judge Becker expressed skepticism that, as a matter of First Amendment doctrine, "the tradition of openness of deportation proceedings . . . meet[s] the standard required" to ground a First Amendment right of access.[53] More broadly, the opinion framed the issue as part of an "era that dawned on September 11" in which the "war against terrorism . . . has pervaded the sinews of our national life . . . reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches."[54] In this new era, Judge Becker wrote, it was sufficient to rely on the admittedly "speculative" assertions that opening any part of any special interest hearing could impede the effort to avoid terrorist attacks. In general, the opinion expressed hesitance "to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise."[55] In particular, the opinion somewhat paradoxically invoked the lack of public knowledge as a basis for resisting inquiry "at a time when our nation is faced with threats of such profound and unknown dimension."[56] Responding to Judge Keith's aphorism that "[d]emocracies die behind closed doors," Judge Becker quoted a columnist who maintained that the threat to democracy would be even greater if judicial review opened the door for a successful terrorist attack because "[i]f that happens, the public will demand, and will get, immense restrictions on liberties."[57]

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efforts to recover damages from the actors in the debacle ran aground on qualified immunity, Higazy v. Millennium Hotel & Resorts, CDL (N.Y.) L.L.C., 346 F. Supp. 2d 430, 452 (S.D.N.Y. 2004), although some of Mr. Higazy's claims were reinstated in *Higazy v. Templeton*, Docket No. 05-4148-cv, 2007 U.S. App. LEXIS 24443 (2d Cir. 2007), *available at* http://howappealing.law.com/HigazyVsTempleton05-4148-cv_opnWithdrawn.pdf (un-redacted opinion).

[52] N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 220 (3d Cir. 2002).

[53] *Id.* at 201.

[54] *Id.* at 202.

[55] *Id.* at 219.

[56] *Id.* at 220.

[57] *Id.* at 220–21 (quoting Michael Kelly, Editorial, *Secrecy, Case By Case*, WASH. POST, Aug. 28, 2002, at A23). With some irony, given the administration's efforts to avoid habeas petitions, Judge Becker also maintained that the availability of substantive habeas corpus relief to detainees obviated the need for public oversight of the deportation process. *Id.* at 221; *cf.* Rumsfeld v. Padilla, 542 U.S. 426 (2004).

Chief Judge Scirica's dissent responded by acknowledging the obligation to defer to national security concerns on a case-by-case basis, but refusing to abjure an independent role for judicial review, commenting that "deference is not a basis for abdicating our responsibilities under the First Amendment," and citing cases from the era of Richard Nixon. *Id.* at 226–27 (Scirica, J., dissenting) (citing *United States v. U.S. Dist. Court*, 407 U.S. 297, 321(1972) (holding that "domestic security" is not a sufficient basis for relaxing the requirements of a warrant and an independent

In the face of this division of authority between the Third and Sixth Circuits, the administration adopted a two-pronged response. As a matter of practice, the administration officially abandoned its blanket policy of "special interest" closures in favor of case-by-case evaluation of the concrete imperatives for secrecy.[58] As a legal matter, the administration sought to insulate the issue from Supreme Court review. Having unsuccessfully sought rehearing en banc of Judge Keith's decision in the Sixth Circuit,[59] the administration declined to seek certiorari. At the same time, the administration opposed a petition for certiorari directed to the Third Circuit's more congenial, and conflicting, decision. Administration advocates sought to convince the Court that the conflict was unworthy of review because the issue had "little continuing practical effect for the government" in light of the abandonment of the "special interest"

assessment of surveillance needs by a magistrate) and *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971)).

[58] *See Immigration Removal Procedures Implemented in the Aftermath of the September 11th Attacks: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 108th Cong. (June 30, 2005) (statement of Lily Fu Swenson, Deputy Associate Att'y Gen.), *available at* http://judiciary.house.gov/OversightTestimony.aspx?ID=438 [hereinafter Swenson testimony] ("[N]o alien has been subject to those procedures since December 2002. . . . All of the hearings that have been fully closed since December 2002 have been closed either on a case-by-case basis . . . or because the alien is a victim of child abuse. *See* 8 C.F.R. §§ 1003.27(b)–(c), 1208.6, 1240.11(c)(3)(i).").

Intriguingly, Ms. Swenson referred to 766 detainees whose cases had been designated "special interest cases," notwithstanding the administration's representation in *CNSS* that 751 individuals had been detained for immigration violations in connection with the September 11 sweep. Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 98 (D.D.C. 2002). This also conflicted with OIG's identification of 762 "September 11 detainees." OIG REPORT, *supra* note 17, at 20. Given the administration's penchant for disingenuous parsing of language, one wonders which cases were resolved off the books as "special interest cases," and how many other cases were not subjected to "these procedures," but were instead denied open hearings on other grounds.

We now know that during the period of September 27, 2002 to October 7, 2002, the Department of Justice played a game of three-card monte with the attorney for Maher Arar, misleading him as to Arar's location and rushing through Arar's compelled removal to Syria for torture on the basis of classified, but inaccurate, information. Arar v. Ashcroft, 414 F. Supp. 2d 250, 254 (E.D.N.Y. 2006).

[59] Detroit Free Press, Inc. v. Ashcroft, No. 02-1437, 2003 U.S. App. LEXIS 1278, at *1 (6th Cir. Jan. 22, 2003)

procedure and the effort to formulate revised regulations.[60] That opposition proved successful: review was denied.[61]

This allowed the administration to continue to invoke the Third Circuit's opinion and the "threats of . . . profound and unknown dimension"[62] as a justification for withholding information, and to maintain its ability to avoid the Sixth Circuit's mandate in immigration hearings by judicious geographical manipulation. The administration continued to proclaim that "except in the territorial region covered by the United States Court of Appeals for the Sixth Circuit, there is no legal bar to the implementation of measures such as those in the Creppy memorandum [because] the Supreme Court declined to review the issue, thus leaving the Third Circuit's decision undisturbed."[63]

In April 2003, a year and a half after the initial sweeps, as the invasion of Iraq began, the great bulk of the cases involved had been resolved by deportation, departure, or release.[64] The petition for certiorari in the New Jersey immigration closure case was pending, and the appeal from the *CNSS* FOIA case ordering disclosure of the identities of the individual detainees had been argued. On April 29, 2003, the Department of Justice Inspector General completed a report setting forth the parameters of the September 11 sweeps, the erratic process of designating "special interest" cases, the application of shackles, irons, and leg restraints, incommunicado detention regardless of actual level of suspicion, the often illegal process of indefinite detention for investigation, and the harassment and abusive treatment suffered by detainees in New York and New Jersey facilities.[65] The report's contents began to leak out in May 2003,[66] and it was officially released in redacted

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[60] Brief for the Respondents in Opposition at 13, N. Jersey Media Group Inc. v. Ashcroft, 538 U.S. 1056 (2003) (No. 02-1289) (filed Apr. 2003), *available at* http://www.usdoj.gov/osg/briefs/2002/0responses/2002-1289.resp.pdf. The government represented that there were only "three other aliens in the United States who remain designated as 'special interest' cases" and that "they face no reasonable likelihood of proceedings before an immigration judge at any time in the foreseeable future." *Id.* at 12 n.5.

[61] N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

[62] *Id.* at 220.

[63] Swenson testimony, *supra* note 58.

[64] *See* Brief for the Respondents in Opposition, *supra* note 60, at 12 (representing that only three "special interest" cases remained); OIG REPORT, *supra* note 17, at 105 fig. 8 (reporting release/removal dates ranging from September 2001 to August 2002). The OIG Report also notes sixty-eight cases for which no release or removal dates could be ascertained. *Id.* Again, this could denote either chaotic record-keeping or ghost detainees.

[65] OIG REPORT, *supra* note 17, at 111–85.

[66] Dan Eggen, *Report Criticizes Post-Sept. 11 Interviews*, WASH. POST, May 10, 2003, at A13 ("Several sources familiar with the draft report said it includes significant criticism of the government's conduct. . . . But a senior Justice official called that allegation unfounded and said the report, which has been beset with delays, should be released soon."); *Justice and 9/11 Detainees: Critical Report* (CNN television broadcast

form on June 2, 2003.[67] As released, the report continued to withhold the locations of apprehensions outside New York and New Jersey, as well as the identities of the detainees and their attorneys.[68]

In this environment, the DC Circuit addressed the appeal from the FOIA order to disclose the identity of detainees on June 17, 2003, in *Center for National Security Studies v. United States Dep't of Justice*.[69] Writing for a 2–1 majority, Judge Sentelle reversed the order below, and upheld the refusal to disclose the identities of detainees as information that could be "reasonably expected to interfere with enforcement proceedings." Invoking the danger of an enemy "with capabilities beyond the capacity of the judiciary to explore," Judge Sentelle began the analysis with the proposition that the Executive should be deemed to have "unique insights" and that claims of possible interference should be entitled to "deference."[70] Deferring to affidavits by "the government's top

May 20, 2003), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0305/30/se.16.html ("CNN learned the Justice Department's inspector general has found significant problems in the way immigration detainees . . . were treated.").

[67] OIG REPORT, *supra* note 17, at 16–17, 42.

[68] OIG REPORT, *supra* note 17, at 22 (redacting locations of arrest); *see generally id.* passim (referring to detainees and attorneys but not including names). A subsequent report, released in December 2003, confirmed in graphic detail the abuse of detainees in New York facilities. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (2003), *available at* http://www.usdoj.gov/oig/special/0312/final.pdf.

[69] 331 F.3d 918 (D.C. Cir. 2003).

[70] *Id.* at 920, 927–28. As a legal matter, the opinion inaptly conflates analysis in a line of precedent mandating deference in matters of national security under FOIA Exemption 1 which was not at issue because the information in dispute was not properly classified, and determinations under Exemption 3, which did not apply because the explicit statutory mandate of the CIA was irrelevant, with analysis of the law enforcement exception under FOIA Exemption 7(A) that was actually at issue. *Compare* 5 U.S.C. § 552(b)(1) *and* 5 U.S.C. § 552(b)(3) *with* 5 U.S.C. § 552(b)(7)(A) (2000).

The trial court had noted as much. Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 103 (D.D.C. 2002) ("[T]here is simply no existing precedent applying the mosaic theory to Exemption 7."). Commentators have concurred. *E.g.*, David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 660 (2005) (referring to "unwillingness to second-guess the Executive" as "brazenly ahistorical"); *id.* at 672 ("[M]osaic theory [is] ripe for agency opportunism and abuse."); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN L. REV. 131, 167 (2006) (commenting that the *CNSS* opinion was "remarkable . . . because it extended the concept of deference beyond its traditional domain" and plausible basis in legislative history); Christina E. Wells, CIA v. Sims*: Mosaic Theory and Government Attitude*, 58 ADMIN L REV. 845, 854 (2006) (criticizing mosaic theory as creating a "vacuum of knowledge that effectively paralyzes judicial assessment of the government's claims"); *cf.* Martin Halstuk & Eric Easton, *Of Secrets and Spies: Strengthening the Public's Right to Know about the CIA*, 17 STAN L. & POL'Y REV. 353, 373 (2006) (noting that Exemption 1 provides checks on discretion to withhold information because the classification must be appropriate).

counterterrorism officials," Judge Sentelle accepted the claims that "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view," that a "complete list of names informing terrorists of every suspect detained . . . would give terrorist organizations a composite picture of the government investigation," and that a list of the attorneys of those detained "would facilitate the easy compilation of a list of all detainees . . . [and] if such a list fell into the hands of al Qaeda, the consequences could be disastrous."[71] Rather than exploring the facts, highlighted by the dissent, that the government had acknowledged some of the detainees were entirely innocent, that disclosure of the identity of those individuals had not been alleged to carry a reasonable probability of disclosing a "mosaic" of investigative strategy, and that the publicly available records bore evidence of government abuses in the sweeps, Judge Sentelle aligned himself with "several federal courts that have wisely respected the executive's judgment in prosecuting the national response to terrorism."[72] He invoked the Third Circuit's opinion in *North Jersey Media Group*, which the administration had struggled to keep from Supreme Court review on the ground that it was of no practical importance,[73] and the Fourth Circuit's decisions in *Hamdi v. Rumsfeld*,[74] which would be reversed by the Supreme Court a year later.[75]

The *CNSS* plaintiffs sought review in the Supreme Court. In opposing certiorari, the administration portrayed the case as a matter that raised no real challenge to principles of open government. It emphasized that the litigation had already resulted in the release of a "significant amount of information,"[76] that detainees remained free to disclose information regarding their situations, that allegations of abuse had been "exhaustively evaluated in a publicly released report by the Department of Justice's Inspector General,"[77] and that the case presented a garden variety "record-bound" conflict raising no issues of legal principle.[78] The Supreme Court denied certiorari of *CNSS* six months later, in January 2004.[79]

Efforts by advocates had begun in 2001 as an attempt to shed light on an ongoing dragnet. Despite the defeats in *CNSS* and *North Jersey Media Group*, critics did in fact bring to public display details of the detentions in the immediate wake of September 11, and of the abuses

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[71] *Ctr. for Nat'l Sec. Studies*, 331 F. 3d at 928–29, 933.

[72] *Id.* at 932.

[73] *See supra* note 60 and accompanying text.

[74] Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (Jan. 2003); Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (July 2002).

[75] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[76] Brief for the Respondent in Opposition at 5, Ctr. for Nat'l Sec. Studies v. Dep't of Justice, 540 U.S. 1104 (2004) (No. 03-472) (filed Dec. 2003), *available at* http://www.cnss.org/Gov.%20Opposition%20to%20Cert.pdf.

[77] *Id.* at 11 n.3.

[78] *Id.* at 15.

[79] Ctr. for Nat'l Sec. Studies v. Dep't of Justice, 540 U.S. 1104 (2004).

that accompanied them. Some courts acquiesced in extraordinarily speculative national security claims for secrecy—secrecy more plausibly explained as a shield against outside inquiry into wrongdoing. But the institutional frameworks of transparency ultimately informed the public. Some information was gathered by assiduous news media from the subjects of government attentions.[80] Some was provided by conscientious civil servants.[81] Persistent advocacy of transparency met partial success in the courts, as administration officials disseminated the outlines of the initial sweep, and maneuvered to avoid determinative adverse decisions.[82] Legally, the administration established at worst an equivocal legal regime. Aided by a right of internal access, political insulation and bureaucratic integrity, the Department of Justice Inspector General exercised its office with diligence in both gathering information and analyzing it.[83]

These disclosures bolstered efforts to seek redress for some victims of the abuses immediately following September 11.[84] But they emerged too late to provide any practical impediment to the abuses accompanying the initial sweeps, and transparency mechanisms seem to have provided no initial check on the domestic initiatives that followed. The public record of litigation provides glimpses of the nature of the abuses accompanying the subsequent pursuit of "terrorists" in the continental United States.[85]

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[80] *See* Goldstein & Eggen, *supra* note 23 (describing investigation and piecemeal assembly of information).

[81] *See supra* notes 32–33.

[82] *See supra* notes 26–27, 58–61 and accompanying text.

[83] *See supra* notes 65–67 and accompanying text.

[84] *See* Turkmen v. Ashcroft, No. 02 CV 2307 (JG), 2006 U.S. Dist. LEXIS 39170 (E.D.N.Y. June 14, 2006) (sustaining against motion to dismiss claims of abuse in custody in class action by detainees, but dismissing claims of pretextual use of immigration charges and excessive detention); *id.* at *9–10 (noting that after oral argument on a motion to dismiss, "in light of the OIG Report, the plaintiffs sought leave by letter dated June 5, 2003 to amend their complaint. Around that time, the government withdrew from representing the named defendants in their individual capacities . . . ."); Elmaghraby v. Ashcroft, No. 04-CV-1409 (JG), 2005 U.S. Dist. LEXIS 21434, at *114 (E.D.N.Y. Sept. 27, 2005) (sustaining claim of abuse in custody and discriminatory treatment in custody against motion to dismiss in individual case); *id.* at *87 n.25 (citing OIG REPORT, *supra* note 17).

The Department of Justice Inspector General reports that some internal reforms advocated in its report have been effectuated. *See generally* Letter from Glenn A. Fine, Inspector Gen., to Reps. F. James Sensenbrenner, Jr. & John Conyers, Jr. (Jan. 5, 2004), *available at* http://www.usdoj.gov/oig/special/0401/final.pdf, but that efforts to put in place internal legal constraints on actions of the Department of Homeland Security remain stymied. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 8 (Mar. 2007), *available at* http://www.usdoj.gov/oig/special/s0703/final.pdf.

[85] *See, e.g.*, Al-Kidd v. Gonzales, No. CV: 05-093-S-EJL, 2006 U.S. Dist. LEXIS 70283, at *38 (D. Idaho Sept. 27, 2006) (sustaining against a motion to dismiss an action for damages by an American citizen from Idaho who, on March 16, 2003, "was handcuffed and arrested pursuant to a material witness warrant at the ticket counter of the Dulles International Airport while he was checking in for his flight to Saudi Arabia[,] . . . taken to various different detention centers and eventually transported

But there is still no broader public accounting of how many individuals have been arrested, detained, and deported, or who they were. Efforts to seek information on subsequent sweeps proved to be primarily retrospective.[86]

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back to Idaho where, on March 31, 2003, he was released pursuant to certain terms and conditions which precluded him from leaving a four-state area of the United States." He was never charged and never called as a witness. (citation omitted)); Adam Liptak, *Threats and Responses: The Detainees; For Post-9/11 Material Witness, It Is a Terror of a Different Kind*, N.Y. TIMES, Aug. 19, 2004, at A1 (reporting that "[a]bout 60 other men have been held in terrorism investigations under the federal material witness law since the Sept. 11 attacks"); Arar v. Ashcroft, 414 F. Supp. 2d 250, 279 (E.D.N.Y. 2006) (dismissing on grounds of "special factors counseling hesitation" and the need for secrecy an action by Maher Arar, an innocent Canadian citizen who was detained in September 2002, deported to Syria, imprisoned, and tortured for a year); COMM'N OF INQUIRY, REPORT OF THE EVENTS RELATING TO MAHER ARAR 9–10 (Sept. 18, 2006), *available at* http://www.ararcommission.ca/eng/AR_English.pdf (confirming Arar's allegations); *Maher Arar: Timeline*, CBC NEWS, Jan. 26, 2007, *available at* http://www.cbc.ca/news/background/arar/; United States v. Awadallah, 436 F.3d 125, 129, 137 (2d Cir. 2006) (refusing to dismiss prosecution of a material witness alleged to have falsely denied knowing an individual under investigation); *id.* at 129 ("After the questioning on September 21, Awadallah was arrested on a material witness warrant[,] . . . detained without bail based on judicial findings that he possessed information material to the grand jury's investigation of the September 11 attacks," shuttled around the country, held in solitary confinement, and subjected to physical abuse.); Habeeb v. Castloo, 434 F. Supp. 2d 899, 912 (D. Mont. 2006) (dismissing suit for arrest and attempted deportation in April 2003 of Iraqi refugee, on qualified immunity grounds); Class Action Complaint at 2–3, Rahman v. Chertoff, No. 05C-3761, 2007 U.S. Dist. LEXIS 54960 (N.D. Ill. July 26, 2007) (challenging the DHS practice of misidentifying U.S. citizens (and others) re-entering the U.S. as watch list members and their consequent prolonged and unreasonable detention); Complaint, Tabbaa v. Chertoff, No. 05-CV-582S, 2005 U.S. Dist. LEXIS 38189, at *52 (W.D.N.Y. Dec. 22, 2005) (dismissing claim regarding the search and detention of 5 Muslims returning from Islamic conference in Canada); *FBI's Anti-Terror "October Plan": Operation Intended To Prevent Terror Attack Timed To Election*, CBS NEWS, Sept. 17, 2004, *available at* http://www.cbsnews.com/stories/2004/09/17/eveningnews/main644096.shtml (reporting an "internal e-mail advisory to supervisory agents this week from the FBI's ''04 Threat Task Force'" setting forth a plan "'to foster the impression that law enforcement is focused on individuals who may be a threat,'" involving "'aggressive—even obvious—surveillance techniques to be used on a short list of people suspected of being terrorist sympathizers, but who have not committed a crime" and authorizing "'persons of interest,' including their family members, [to] be brought in for questioning"); Complaint for Declaratory and Injunctive Relief at 5, Am.-Arab Anti-Discrimination Comm. v. U.S. Dep't of Homeland Sec., No. 06-CV-01770 (D.D.C. Oct. 17, 2006), *available at* http://adc.org/PDF/ADC_Complaint.pdf (alleging an announcement by the Department of Homeland Security of 230 arrests and 900 "investigations").

[86] *See, e.g.*, *Arab-American Group Sues U.S. Government; Organization Files Lawsuit to Gain Access to Immigration Violators' Names*, MSNBC.COM, Oct. 17, 2006, http://www.msnbc.msn.com/id/15311533/ (reporting a FOIA action seeking access to information about the nationalities of more than 230 people arrested for immigration violations during the "October Program" in 2004); *Complaint*, *supra* note 85; Susan Jones, *Activists Smell a Rat in Homeland Security Efforts*, CNSNEWS.COM, Aug. 18, 2004, http://www.cnsnews.com/ViewNation.asp?Page=%5CNation%5Carchive%5C200408%5CNAT20040818a.html

This pattern is largely mirrored in other areas of transparency struggles regarding "anti-terrorist" initiatives.[87] The secrecy in which initiatives are shrouded, combined with resistance to FOIA requests, the slow pace of FOIA processing and litigation, and the tendency of investigations and leaks to occur only after the fact, has meant that transparency mechanisms have generally not functioned to provide occasions for public reflection on the adoption of problematic policy. With a few exceptions,[88] transparency mechanisms are reactive.

("Several groups in Illinois are now suing the federal government, seeking information . . . about the National Security Exit/Entry Program, known as Special Registration, which required thousands of immigrants to submit to registration and questioning."); *id.* ("'Reports across the nation indicated that many long-time residents were detained or deported after they voluntarily appeared as part of the Special Registration program.'").

[87] *See* discussion of Guantanamo litigation, Patriot Act, and torture litigation *infra* Part III.B–C.

[88] One partial success came in the efforts of Admiral Alberto Mora to derail approval of coercive interrogation methods by the Department of Defense. *See* Jane Mayer, *The Memo*, NEW YORKER, Feb. 27, 2006, at 32, *available at* http://www.newyorker.com/printables/fact/060227fa_fact. Admiral Mora deployed an article revealing existing coercive interrogation methods in December 2002 to argue in January of 2003 that approval of such techniques should be withdrawn because they could not remain secret and would prove embarrassing. Memorandum from Alberto J. Mora to Inspector General, Dep't of the Navy 9 (2004), *available at* http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf (citing Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1). *See also infra* notes 204–05 and accompanying text (discussing the partial recognition of Geneva Convention obligations after the leak of a memorandum referring to the Conventions as "quaint").

Somewhat more clearly, a series of FOIA requests by the ACLU lent efficacy to a campaign to persuade states to withdraw from the MATRIX (Multistate Anti-TeRrorism Information eXchange) surveillance network. *See* ACLU, Feature on MATRIX, *available at* http://www.aclu.org/privacy/spying/15701res20050308.html; ACLU, State-by-State Breakdown on Participation in MATRIX, http://www.aclu.org/safefree/resources/16906res20040116.html (providing links to FOIA requests and withdrawals from the program); The ACLU in the Courts Since 9/11, http://www.aclu.org/pdfs/safefree/since911pastcases_20061019.pdf (describing "simultaneous Freedom of Information Act requests in eight states concerning those states' participation in the 'MATRIX' database surveillance system" following an October 2003 federal FOIA request, resulting in the ultimate abandonment of the program in 2005). *Cf.* American Library Association, *Department of Justice Rescinds Order for Libraries to Destroy Documents* (July 30, 2004), *available at* http://www.ala.org/al_onlineTemplate.cfm?Section=American_Libraries&template=/ContentManagementDisplay.cfm&ContentID=72146 (describing rescission of order to destroy documents in depository libraries after American Library Association filed FOIA requests for the documents at issue).

### *B. Transparency Mechanisms as Audits: Guantanamo Tribunals and the Patriot Act*

To be reactive is not to be without effect. In corporate culture, the findings of audits after the initial implementation of policies can serve as spurs to correct mistakes. In national governance, disclosures of the manner in which initiatives are implemented can provide a basis to bring erring executives back into line with the requirements of policy.

In the two case studies that follow, FOIA inquiries concerned initiatives in the "War on Terror" that were publicly announced. In the case of the Guantanamo Combatant Status Review Tribunals, FOIA requests and litigation by news media levered information regarding the conduct of the tribunals and the identities of the subjects into the public arena; they provided a forum for a skeptical trial judge to publicly take the administration to task for its efforts to suppress information. In the case of the Patriot Act, a persistent and coordinated strategy of political opposition, FOIA requests, and substantive litigation combined to disclose overreaching and to catalyze internal oversight mechanisms and substantive reform.

#### *1. FOIA Alone: Sunlight on the Guantanamo Tribunals*

The existence of the prison camp at Guantanamo has never been a secret; the administration publicly stated an intent to place "enemy combatants" in Guantanamo on December 27, 2001,[89] and the arrival of prisoners in early January 2002 was heralded by a press conference announcement.[90] But during the next two years, details of the identities of the prisoners, their alleged misdeeds, and the treatment accorded them emerged only fitfully.

In response to the Supreme Court's trilogy of detainee cases in June 2004,[91] the Department of Defense (DoD) established a program of "Combatant Status Review Tribunals" to evaluate the justifications for holding the remaining Guantanamo detainees.[92] As a number of individuals subject to the tribunals continued challenges to their

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[89] DefenseLink News Transcript: DoD News Briefing – Secretary Rumsfeld and Gen. Myers (Dec. 27, 2001), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2696.

[90] DefenseLink News Transcript: DoD News Briefing - Secretary Rumsfeld and Gen. Myers (Jan. 11, 2002), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2031; Steve Vogel, *U.S. Takes Hooded, Shackled Detainees to Cuba*, WASH. POST, Jan. 11, 2002, at A10. The government did attempt to suppress pictures of the hooded and shackled detainees. Joe Williams, *Some Networks Nix Prisoner Video*, DAILY NEWS, Jan. 12, 2002, at 8.

[91] Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

[92] *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 450 (D.D.C. 2005). *See also* U.S. Dep't of Def., Detainee Related Documents, http://www.dod.mil/pubs/foi/detainees/index.html (providing lists of detainees and other information about them).

detention and the conduct of those tribunals in the courts, the Defense Department sought to shield information regarding both the identities of the Guantanamo prisoners and the functioning of the tribunals.[93] In November 2004 and January 2005 the Associated Press filed FOIA requests seeking transcripts of the tribunal proceedings, documents containing allegations or accounts of detainee mistreatment by DoD personnel, documents identifying resulting disciplinary action, documents provided to each detainee stating the basis for his detention as an enemy combatant, and other related documents.[94] The requests languished while the tribunal process lumbered toward its culmination, releasing only a small fraction of the prisoners.[95]

On April 19, 2005, the Associated Press filed suit to require the processing of its request and the release of transcripts. The Department of Defense began to release the bulk of the requested documents forthwith.[96] This alone is worthy of remark, given the prior efforts to shield Guantanamo from public review.[97] The thousands of pages of transcripts paved the way for analyses casting doubt on the claim that Guantanamo housed the "worst of the worst," even on the government's evidence.[98]

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[93] *E.g.*, *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 453 (discussing government's opposition to discovery regarding the functioning of tribunals); Brooks Egerton, *Losing a Fight for Detainees; Officer Says He Leaked List of Terror Suspects in the Name of Justice; Now Convicted, He Could Face Prison Term*, DALLAS MORNING NEWS, May 18, 2007, at 1A (describing prosecution, beginning in 2005, of Matthew Diaz, military lawyer who provided a list of the names of prisoners to civil rights attorneys). The Department of Defense continued its court martial proceedings against Cmdr. Diaz even after the names had been disclosed in response to FOIA litigation. *Id.* ("When asked why the government pressed on with its criminal case against Cmndr. Diaz, Navy spokeswoman Beth Baker said, 'I can't give you a philosophical answer.'").

[94] Associated Press v. U.S. Dep't of Def., No. 05 Civ. 5468 (JSR), 2006 U.S. Dist. LEXIS 67913, at *1–2 (S.D.N.Y. Sept. 20, 2006); Associated Press v. U.S. Dep't of Def., 395 F. Supp. 2d 15, 16 (S.D.N.Y. 2005).

[95] *Associated Press*, 395 F. Supp. 2d at 16 (noting that while 520 prisoners were classified as "enemy combatants," only 38 prisoners were exonerated).

[96] *Id.*

[97] *Cf. Guantanamo Inmates Defy American Guards*, MSNBC.COM, July 1, 2005, http://www.msnbc.msn.com/id/8435874 ("What emerges from 278 pages of the newly released documents is the degree of defiance by the terrorism suspects at Guantanamo.").

[98] *See* Eric Umansky, *Who are the Prisoners at Gitmo?*, COLUM. JOURNALISM REV., Sept./Oct. 2006, *available at* http://www.cjr.org/issues/2006/5/Umanskyb.asp; Corine Hegland, *Guantanamo's Grip*, NAT'L J., Feb. 4, 2006, *available at* http://nationaljournal.com/about/njweekly/stories/2006/0203nj1.htm; MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA, *available at* http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf (relying on initial transcript release).

Subsequent FOIA requests by counsel for detainees also facilitated their efforts to seek legal vindication. *See* Melissa Hoffer, *Torture in Guantanamo*, CAGEPRISONERS.COM, Apr. 20, 2006, http://www.cageprisoners.com/articles.php?id=13493 ("In April 2005,

At the same time, the Department redacted the names of the individuals involved, hindering efforts to evaluate the fairness of the proceedings and the plausibility of the charges. Administration lawyers did not seek to justify the excisions on the ground of any imperative of national security. Rather, they argued that the identities were shielded by FOIA Exemption 6, which allows the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[99] The administration maintained that if "terrorist groups or other individuals abroad are displeased by something the detainee said to the Tribunal, [the Department of Defense] believes that this could put his family at serious risk of reprisals," and that upon the hypothetical release of the prisoners, they themselves might be subject to reprisals.[100]

On August 29, 2005, Judge Jed Rakoff, who had previously encountered the administration's efforts to shield its abuses from public view in the case of Abdallah Higazy,[101] registered ironic skepticism regarding the administration's solicitude for the prisoners whom they had detained for over two years: "One might well wonder whether the detainees share the view that keeping their identities secret is in their own best interests. But—given that the detainees are in custody and therefore readily available—it is really not difficult to find out."[102] He ordered that the detainees each be provided with a brief written questionnaire inquiring whether they wished to have their identifying information released.

The administration responded by seeking reconsideration, provoking a more biting response from Judge Rakoff. He commented that "some might think it strange, even hypocritical, that the military officials who held the detainees incommunicado for so many months now express such solicitude for the detainees' privacy rights,"[103] rejected claims of logistical burden as "a model of hyperbole," and rebuffed the

my colleagues and I filed a Freedom of Information Act suit seeking records concerning our clients' treatment at Guantánamo. As a result, the U.S. produced thousands of documents, including one confirming medical personnel involvement in interrogation. Lakhdar has been interrogated between 100 and 200 times."); Carol Leonnig, *Guantanamo Detainee Suing U.S. to Get Video of Alleged Torture*, WASH. POST, Apr. 14, 2005, at A2.

[99] 5 U.S.C. § 552(b)(6) (2000); *see Associated Press*, 395 F. Supp. 2d at 16. Administration attorneys may have been constrained from invoking national security claims under Exemption 1 by the adverse reaction to the effort to classify reports of the Abu Ghraib abuse in 2004, and directions to Defense Department elements holding prisoners not to use national security classification to avoid embarrassment. *See* discussion *infra* notes 268–72 and accompanying text.

[100] *Associated Press*, 395 F. Supp. 2d at 16.

[101] *See supra* note 51.

[102] *Associated Press*, 395 F. Supp. 2d at 16-17.

[103] Associated Press v. U.S. Dep't of Def., 395 F. Supp. 2d 17, 18–19 (S.D.N.Y. 2005).

claim that the President's "constitutional authority to wage war as Commander in Chief" exempted Guantanamo from judicial oversight.[104]

When the questionnaires were finally administered, only 17 of the 317 prisoners queried manifested an objection to release of their identities.[105] In light of this response, as well as FOIA's presumption of disclosure, Judge Rakoff concluded that the government had not met its burden of demonstrating that disclosure of the identities "'would constitute' (as opposed to 'could reasonably be expected to constitute') a 'clearly unwarranted' (as opposed to simply 'unwarranted') invasion of personal privacy."[106] He entered an order requiring release of the identities.

Nothing daunted, administration lawyers sought reconsideration, asserting that the initial opinion had been inadequately attentive to the interests of friends and family members, though they declined the opportunity to provide a more particularized showing regarding expectations of privacy and possible retaliation. This provoked tart responses. Judge Rakoff first rejected the motion as procedurally improper,[107] but went on to reject it on the merits. As to friends and family members, he reiterated that "the Government has not introduced the slightest evidence that such embarrassment or retaliation is likely, confining itself . . . to wholly conclusory and grossly speculative assertions."[108] As to expectations of privacy, he observed that prisoners who elected to participate in tribunals had chosen to go forward without any assurance that their identities would remain private, observing that "it is hard to escape the inference that the Government's entire Exemption 6 argument before this Court is a cover for other concerns,

[104] *Id.* at 20 ("[H]ow long does it take to translate the six or seven sentences that constitute this simple questionnaire? In seeking to bring the Department's treatment of the detainees within the ambit of law, the Supreme Court has not hesitated to impose far greater logistical burdens." (citing Hamdi v. Rumsfeld, 542 U.S. 507 (2004))).

[105] Associated Press v. U.S. Dep't of Defense, 410 F. Supp. 2d 147, 150 (S.D.N.Y. 2006) (63 checked yes, 17 checked no, 35 returned the form without checking anything, and 202 declined to return the form).

[106] *Id.* at 150 (emphasis omitted) (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 756 (1989)). Judge Rakoff rejected the claim that the prisoners had a "reasonable expectation" of privacy, and observed that since the "Department of Defense has failed to come forward on this motion with anything but thin and conclusory speculation to support its claims of possible retaliation," it had entirely failed to meet its burden of establishing a clearly unwarranted intrusion on privacy. *Id.* at 151.

[107] Judge Rakoff began with the procedural observation that the DoD had not previously raised this argument: "[A]n argument made only in a footnote is not preserved for purposes of reconsideration. . . . To put it colloquially, a motion for reconsideration is not a game of 'gotcha.'" *Id.* at 153.

[108] *Id.* at 157.

such as the Government's desire, only recently modified by the courts, to keep the detainees incommunicado with the outside world."[109]

On April 19, 2006, a year after the filing of the FOIA action and twenty months after the Review Tribunals commenced, the Defense Department reversed the redactions of identities,[110] and on May 15, 2006, it released a list of all present and former Guantanamo detainees.[111]

*2. The Campaign to Illuminate the Patriot Act*

Few legislators had the opportunity to parse the "USA PATRIOT" Act in its entirety when it was proposed in October 2001. Concern about the expansion of unchecked surveillance opportunities, however, was great enough that a number of its provisions were subject to a four-year

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[109] *Id.* at 156 n.2 (citing Rumsfeld v. Padilla, 542 U.S. 426 (2004)).

[110] *Pentagon Releases First List of Names of Guantanamo Detainees*, USATODAY.COM, Apr. 20, 2006, http://www.usatoday.com/news/washington/2006-04-19-gitmo-names_x.htm; *see* U.S. Dep't of Def., Detainee Related Documents, *available at* http://www.dod.mil/pubs/foi/detainees/index.html (noting that detainee list was released on April 19, 2006).

[111] Ben Fox, *Diverse Group of Detainees at Guantanamo*, WASH. POST, May 16, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/05/16/AR2006051600124.html ("The list provides the first full official accounting of all those who have been held by the military in Guantanamo on suspicion of links to al-Qaida or the Taliban. The document provides the names, hometowns and dates of birth of 759 current and former detainees.").

In a subsequent chapter of the litigation, Judge Rakoff rejected Exemption 6 and 7(C) privacy claims and ordered the release of the identities of detainees who charged abuse by their captors, and who had been involved in detainee-against-detainee abuse, citing "evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." Associated Press v. U.S. Dep't of Defense, No. 05-CV-05468 (JSR), 2006 U.S. Dist. LEXIS 67913, at *12–13 (S.D.N.Y. 2006) (applying the standard set forth in Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004)). He also ordered the release of the identities of transferred and released detainees in the face of deliberative privilege claims under Exemption 5 and privacy claims under Exemption 6. *Id.* at 24, 34-35 (citing 5 U.S.C. § 552(b)(5), (6) (2000)).

In the next iteration, Judge Rakoff ordered the release of height and weight information regarding detainees in the face of privacy claims under Exemption 6, on the basis of the public interest in evaluating the effect of hunger strikes, but upheld withholding of the photographs of Guantanamo prisoners, which had been classified "secret," deferring to affidavits that "official public disclosure of such photographs would both increase the risk of retaliation against the detainees and their families and exacerbate the detainees' fears of reprisal, thus reducing the likelihood that detainees would cooperate in intelligence-gathering efforts." Associated Press v. U.S. Dep't of Defense, 462 F. Supp. 2d 573, 576 (S.D.N.Y. 2006). The outcome highlights the effect of classification, which is the gateway to deference under Exemption 1. In the face of any willingness of officials to submit particularized support for claims of possible harm to national security, even skeptical judges will accommodate withholdings based on national security.

On March 16, 2007, DoD released the heights and weights of detainees. *See* U.S. Dep't of Def., Measurements of Heights and Weights of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba, *available at* http://www.dod.mil/pubs/foi/detainees/measurements/index.html.

sunset requirement.[112] And once adopted, its contents were a matter of public record.

During the first years of the "War on Terror," however, the use of these provisions remained draped in secrecy. The process by which they were unveiled displays the interaction among transparency frameworks that have emerged outside of the constitutional text. Political advocacy by a network of nongovernmental organizations combined with substantive litigation to lay the groundwork for a series of invocations of the Freedom of Information Act. The information disclosed under FOIA in turn triggered further political pressure, leverage in substantive litigation and inquiries by the Department of Justice Inspector General. Finally, the information disclosed in that iteration generated legislative reform and further institutional oversight.

An initial request in June 2002 from the House Judiciary Committee for an accounting of the manner in which the Patriot Act's disputed provisions had been used was first ignored by the administration. When it responded in late July, the administration maintained that the answers to many of the questions involved classified intelligence information, and provided information only to the House Permanent Select Committee on Intelligence.[113] In August 2002, the ACLU, joined by the Electronic Privacy Information Center (EPIC) and librarian and bookseller organizations, filed a series of FOIA requests seeking information regarding the deployment of Patriot Act powers, including the backup documents used in preparing the responses that had been withheld from the House Judiciary Committee.[114]

Although the administration nominally granted expedited processing of the FOIA request, it adopted a not-uncommon gambit of passive resistance. After a month and a half, officials informed the requesters that a search for responsive records was still incomplete and processing of the records had not begun. On October 24, 2002, the requesters filed suit seeking both processing of their request and disclosure of wrongfully withheld documents.[115] In response to a motion for a preliminary injunction, the administration agreed to an order

[112] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 224, 115 Stat. 272, 295 [hereinafter, the "Patriot Act"]; Prominent controversy surrounded section 213, authorizing "sneak and peek" warrants; section 214, authorizing the issuance of pen register warrants on reduced standards of cause and connection to intelligence investigations; section 215, authorizing the issuance of secret warrants for access to "tangible things" on reduced standards of cause and connection to intelligence investigations; and section 505, which broadened authority for the FBI to issue national security letters (NSLs) without judicial authorization, obligating recipients to turn over consumer financial, telephonic, and electronic communication records. §§ 213–215, 115 Stat. at 285–88; § 505, 115 Stat. at 365–66.

[113] ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 24 (D.D.C. 2003).

[114] *Id.* at 25.

[115] *Id.*

requiring complete processing of the request by January 15, 2003.[116] In the succeeding months, the administration released 341 pages of responsive records, from which the plaintiffs determined that the FBI had deployed judicially unsupervised national security letters (NSLs) in large numbers, as well as pen register orders issued on less than probable cause.[117]

The documents also suggested that the FBI's concerns about possible oversight had some moderating influence on FBI policy regarding the newly available mechanism. A November 28, 2001 memorandum from the FBI General Counsel commented that:

> The USA PATRIOT Act greatly broadened the FBI's authority to gather this information. However, the provisions of the Act relating to NSLs are subject to a 'sunset' provision . . . . In deciding whether or not to re-authorize the broadened authority, Congress certainly will examine the manner in which the FBI exercised it. . . . Supervisors should keep this in mind when deciding whether or not a particular use of NSL authority is appropriate.[118]

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[116] *Id.* In the interim, another D.C. district judge had rebuffed efforts by the Department of Defense to frustrate EPIC's FOIA requests regarding the Information Awareness Office of the Department of Defense and its Director, John Poindexter. The Defense Department had sought to impose search costs on EPIC on the ground that EPIC was not a "representative of the news media" under the Freedom of Information Reform Act of 1986. Elec. Privacy Info. Ctr. v. Dep't of Def., 241 F. Supp. 2d 5, 5 (D.D.C. 2003).

[117] The documents released included both policy documents encouraging the use of the new surveillance powers and pages of blacked-out documents that indicated that large numbers of NSLs and pen registers had been utilized, but that withheld identifying characteristics. ACLU, The Patriot FOIA: The Government's Response, http://www.aclu.org/patriot_foia/foia3.html. Some of the documents disclosed are available at Electronic Privacy Information Center, Freedom of Information Documents on the USA PATRIOT Act, http://www.epic.org/privacy/terrorism/usapatriot/foia/.

[118] Memorandum from the General Counsel, Nat'l Sec. Law Unit, FBI, to All Field Offices (Nov. 28, 2001), *available at* http://www.aclu.org/patriot_foia/FOIA/Nov2001FBImemo.pdf. Although the names of the individuals who approved the memorandum were provided, the name of its author was redacted. After he left government employment, the drafter of the memo, Michael J. Woods, spoke on the record. Woods was struck by how starkly he misjudged the climate. The FBI disregarded his warning, and no one noticed:

> One thing Woods did not anticipate was then-Attorney General John D. Ashcroft's revision of Justice Department guidelines. On May 30, 2002, and Oct. 31, 2003, Ashcroft rewrote the playbooks for investigations of terrorist crimes and national security threats. He gave overriding priority to preventing attacks by any means available.
>
> Ashcroft remained bound by Executive Order 12333, which requires the use of the 'least intrusive means' in domestic intelligence investigations. But his new interpretation came close to upending the mandate. Three times in the new guidelines, Ashcroft wrote that the FBI "should consider . . . less intrusive means" but "should not hesitate to use any lawful techniques . . . even if intrusive" when investigators believe them to be more timely. "This point," he added, "is to be particularly observed in investigations relating to terrorist activities."

Many documents were withheld or redacted, but the requesters focused on the effort to obtain aggregate statistical data concerning the administration's use of the new Patriot Act surveillance mechanisms. This data had been withheld under FOIA Exemption 1[119] on the ground that they were properly classified SECRET and that their release "reasonably could be expected to result in damage to national [] security."[120] According to the administration's affidavits, even an aggregate account of the number of times particular surveillance authorities had been deployed "would enable the potential targets of such surveillance to conduct their intelligence or terrorist activities . . . more securely" by providing "critical information about whether taking evasive action . . . would provide a safe harbor from FBI counterintelligence and counter-terrorism efforts."[121] By keeping potential terrorists (along with the public) guessing about how often intrusive and thinly justified surveillance was deployed, the FBI could make the lives of their targets more uncertain.[122] Notwithstanding the fact that the Foreign Intelligence Surveillance Act (FISA) required information to be reported to congressional oversight committees,[123] Judge Ellen Segal Huvelle concluded that in light of the "special deference" appropriate in Exemption 1 national security cases, the "agency's expert judgment" that the material was properly classified and reasonably related to national security was sufficient to justify refusing disclosure.[124]

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Barton Gellman, *The FBI's Secret Scrutiny; In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, WASH. POST, Nov. 6, 2005, at A1.

[119] *See* 5 U.S.C. § 552(b)(1) (2000).

[120] ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 28 (D.D.C. 2003) (quotations omitted). A side dispute concerned internal e-mails discussing the response to the House Judiciary request that had been withheld under Exemption 5. Judge Huvelle examined the documents *in camera* and found that they lacked any segregable factual information that was subject to disclosure. *Id.* at 34.

[121] *Id.* at 28 (quotations omitted).

[122] The principle apparently deployed can be traced back to Bentham's Panopticon. As long as a guard could be watching, an inmate is impelled to act as if surveillance is occurring. The difficulty, of course, is that the same applies to the public at large.

[123] *ACLU*, 265 F. Supp. 2d at 24 n.7.

[124] *Id.* at 30 & n.11. Three years later, Judge Ronald Whyte rejected analogous claims that sought to shield the aggregate statistics regarding use of section 213 "sneak and peek" warrants as "law enforcement techniques" that can "reasonably be expected to risk circumvention of the law." Gerstein v. U.S. Dep't of Justice, No. C-03-04893 RMW, 2005 U.S. Dist. LEXIS 41276, at *38 (N.D. Cal. Sept. 30, 2005) (rebuffing claims under Exemption 7). Judge Whyte commented that "the 94 USAOs have issued only sixty Section 213 warrants. One does not need to be a statistician to recognize that the predictive value of such a small sample is exceedingly low. [T]he court finds the notion that criminals will plan illegal activity based on whether a particular USAO has invoked Section 213 to be dubious." *Id.* at *41.

The difference between *Gerstein* and *ACLU v. U.S. Dep't of Justice* could reflect either a different time, a different judge, or a different treatment of claims that did not explicitly invoke Exemption 1 classification authority.

Political controversy regarding the Patriot Act continued, and the ACLU commenced litigation on another front, returning to the jurisdiction of the Sixth Circuit, which had earlier warned that "[d]emocracies die behind closed doors."[125] The ACLU filed *Muslim Community Ass'n v. Ashcroft* in Detroit on July 30, 2003 on behalf of a national coalition of Muslim organizations. The suit challenged section 215 of the Patriot Act, as a violation of both Fourth and First Amendment rights.[126]

For his part, Attorney General Ashcroft launched a cross-country tour to defend the Patriot Act against criticism and to seek expansion of surveillance powers. On September 18, 2003, the Attorney General declassified "the number of times to date that the Department of Justice . . . has utilized Section 215 of the USA Patriot Act" and anticlimactically revealed that the number was "zero."[127] Deploying this information, the administration moved to dismiss *Muslim Community Ass'n* on October 2, 2003 as unripe.[128] The motion was set for argument in December 2003.[129]

The ACLU sought, in turn, to use the Ashcroft zero-based declassification as a lever of its own. On October 23, 2003, ACLU, EPIC, and the bookseller and librarian coalition renewed their request for information regarding "any and all records relating to Section 215 of the USA Patriot Act" and sought expedited processing, alleging that the Attorney General's efforts both underscored the need for more information and undercut justifications for withholding information.[130] In the prior round of FOIA requests, the administration had granted expedited processing to the coalition's request as one that "pertain[ed] to a matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence," implicitly acknowledging the controversy surrounding the Patriot Act.[131] This time, amidst its national surge of

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[125] Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

[126] Complaint, Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft, No. 03-72913 (E.D. Mich. July 30, 2003), *available at* http://www.aclu.org/FilesPDFs/complaint%20final%20pdf.pdf. The complaint alleged that in addition to its chilling effect and substantive privacy violations, section 215's gag provisions violated the First Amendment. *Id.* ¶¶ 156–57. A motion to dismiss was argued in December 2003, and ultimately denied. Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft, 459 F. Supp. 2d 592, 595, 601 (E.D. Mich. 2006). For pleadings in the case, see ACLU, MCA, et al. v. Ashcroft and Mueller (July 30, 2003), http://www.aclu.org/safefree/resources/16821res20030730.html.

[127] ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 27 (D.D.C. 2004); *see also id.* at 30 (referring to the Attorney General's "cross country tour"); *id.* at 31 n.8 (referring to proposals to expand surveillance powers).

[128] Defendants' Motion to Dismiss at 16–19, Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft, No. 03-72913 (E.D. Mich. Oct. 3, 2003), *available at* http://www.aclu.org/section215/gov_motion_100303.pdf.

[129] *Muslim Cmty. Ass'n of Ann Arbor*, 459 F. Supp. 2d at 595.

[130] *ACLU*, 321 F. Supp. 2d at 27.

[131] *Id.* at 32–33 (quoting Plaintiff's Cross-Motion, Ex. A, Attach. 2).

public advocacy seeking to quell insurgency against the Patriot Act, the administration determined that there was "no particular urgency to inform the public" and remitted the requesters to a FOIA queue that would delay processing for nineteen months, well past the 2004 presidential elections.[132]

FOIA, as amended in 1996, provides that expedited processing should be made available in cases where the requester "demonstrates a compelling need."[133] FOIA and its implementing regulations provide that compelling need can be demonstrated by "a person primarily engaged in disseminating information" who makes a showing of "urgency to inform the public concerning actual or alleged Federal Government activity."[134] The DOJ's implementing regulations also authorize expedited processing for matters "of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."[135] The administration refused expedited processing on either ground, denying the existence of current widespread controversy even as it campaigned to contain it. It also maintained,

[132] *Id.* at 29 n.5, 30. The administration had used similar tactics in responding to EPIC's September 2003 request regarding memoranda seeking to enlist U.S. Attorneys in the surge, by encouraging them to lobby legislators who had voted to deny funding for the execution of "sneak and peek" warrants authorized by the Patriot Act. Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice, 322 F. Supp. 2d 1, 5 (D.D.C 2003) (finding jurisdiction to review the claim, but denying expedited processing). According to EPIC, "the parties agreed to dismiss their appeals when the DOJ released the documents EPIC had requested, and the issue of expedited processing became moot." Electronic Privacy Information Center, EPIC Litigation Docket, http://www.epic.org/privacy/litigation; *see also* Elec. Privacy Info. Ctr. v. Dep't of Justice, No. 04-5063, 2004 U.S. App. LEXIS 24617, at *2 (D.C. Cir. Nov. 24, 2004).

[133] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 8, 110 Stat. 3048, 3051–52 (1996) (codified as amended at 5 U.S.C. § 552(a)(6)(E)(i)(I) (2000)).

[134] 5 U.S.C. § 552(a)(6)(E)(v)(II) (2000); *see also* 28 C.F.R. § 16.5(d)(1)(ii) (2006). The existence of a compelling need for information regarding federal activities is determined by evaluating "(1) whether the request concerns a matter of current exigency to the American public [and] (2) whether the consequences of delaying a response would compromise a significant recognized interest." *ACLU*, 321 F. Supp. 2d at 29.

[135] 28 C.F.R. § 16.5(d)(1)(iv) (2006). For both tracks, the existence of public controversy serves as a gateway to expedited processing. This is another reason that FOIA is ill-suited to erect barriers to secretive policies at the outset; it is only once a modicum of information has leaked out through other means and become a matter of contention in the public sphere, that anything close to real-time disclosure becomes possible. This also means that FOIA requests are synergistic with other sub-constitutional disclosure mechanisms. Leaks from disaffected civil servants or complaints by victims of policies set the stage for public discussion; independent media that can report without prior restraint produce controversy. Controversy in turn provides the predicate for fee waivers and expedited processing. Responses to FOIA requests, in turn, authenticate and substantiate the leaks.

As the possibility of disseminating information worldwide on the Internet becomes more and more available, the "media" exception will come under definitional pressure from bloggers and others.

through what was later characterized as "administrative error," that the requesters were not entitled to media treatment, notwithstanding the recent and un-appealed determination that EPIC was a media entity for FOIA purposes.[136] In December 2003, the coalition filed *ACLU v. Department of Justice* in D.C. District Court, seeking to require responses to its requests.

On May 10, 2004, Judge Huvelle, who had adjudicated the initial Patriot Act FOIA action, proved unsympathetic to the denial of expedited consideration. She reviewed the "ongoing debate regarding the renewal and/or amendment of the Patriot Act," newspaper articles submitted by the requesters, which manifested widespread public concern (e.g., the "many resolutions passed by local and state governments urging Congress to narrow the provisions of the Patriot Act"), as well as the Attorney General's Patriot Act tour and his zero-based declassification to counter criticism and restore "public confidence in law enforcement." She concluded that the administration erred in determining that the statutory prerequisite of "urgency to inform the public" was lacking.[137]

Judge Huvelle was more biting in her response to the administration's volte-face on the question of whether Patriot Act usage was a matter of "widespread and exceptional media interest" going to "possible questions about the government's integrity."[138] Judge Huvelle found "absolutely no justification for reversal," characterizing the government position as turning "a blind eye to the flurry of media attention" and "a deaf ear to the Attorney General[]."[139] Denial of expedited processing, she held, "fails to pass the reasonableness test," and ordered that the parties convene on May 20, 2004 to establish dates for production of documents.[140]

On May 19, 2004, the administration submitted an extraordinarily obscurely worded letter in *Muslim Community Ass'n* (pending in Michigan) reiterating its earlier representations in the case that section 215 had not been invoked between July 1, 2003 and September 18, 2003. Administration attorneys intimated that a classified report about to be

[136] *ACLU*, 321 F. Supp. 2d at 29 n.5; *see also Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (holding in a FOIA action that EPIC is a "representative of the news media" because it "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" (citation and quotation marks omitted)).

[137] *ACLU*, 321 F. Supp. 2d at 29.

[138] *Id.* at 32.

[139] *Id.* at 32–33.

[140] *Id.* at 31, 38. Judge Huvelle again sustained the administration's national security claim to withhold aggregate statistics under Exemption 1, however, notwithstanding the Attorney General's selective declassification. Given the "binding precedent" in *CNSS*, and its acceptance of the "mosaic theory," Judge Huvelle deferred to claims that such statistics "could signal to targets of investigations that it is comparatively safe to conduct certain operations . . . . This Circuit's law constrains the Court to conclude that the government's explanation is sufficiently detailed and persuasive . . . ." *Id.* at 35–38.

filed with the House and Senate Judiciary Committees, pursuant to the FISA requirements, could reveal uses of section 215, but maintained that those uses "fall outside of the time period encompassed by plaintiffs' factual allegations."[141]

Judge Huvelle's *ACLU v. DOJ* order resulted in a tender of documents to the ACLU/EPIC coalition on June 17, 2004 which revealed, among other things, that the FBI had in fact sought and obtained surveillance orders under section 215 less than a month after the Attorney General announced that the authority had never been used, and less than two weeks after administration lawyers had made similar representations in Michigan in *Muslim Community Ass'n*.[142] Two days later, the ACLU submitted those documents to the trial judge in *Muslim Community Ass'n*, along with a letter objecting to the administration's implicit misrepresentation in arguing that the case was "unripe" because section 215 rested unused.[143]

Amidst this maneuvering, another aspect of the Patriot Act—its authorization of the broad use of warrantless NSLs—began to emerge into public contention. In January of 2004, "[i]ndustry sources" were quoted by a Las Vegas newspaper as revealing that the FBI had used NSLs to obtain records on 270,000 visitors to Las Vegas from casino operators and hotels in late 2003 and early 2004 during an "elevated" threat level.[144] According to these reports—which were not entirely accurate—what happened in Las Vegas now stayed in an FBI database.[145]

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[141] Letter from Joseph W. LoBue, Senior Trial Counsel, Civil Division, U.S. Dep't of Justice, to Hon. Denise Page Hood, U.S. Dist Judge, E.D. Mich. (May 19, 2004), *available at* http://www.aclu.org/section215/gov_hood_051904.pdf.

[142] Gail Appleson, *FBI Asked for Secret USA Patriot Act Searches*, HOUS. CHRON., June 18, 2004, at A6 ("Last September, at a time when the section was drawing widespread criticism from librarians, booksellers and civil rights groups, U.S. Attorney General John Ashcroft said the power had never been used. Records obtained by the ACLU show that the FBI asked for permission to use the law a few weeks later.").

[143] Plaintiffs' Response to Defendants' Letter of May 19, Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft, No. 03-72913 (E.D. Mich. June 17, 2004), *available at* http://www.aclu.org/section215/aclu_letter_hood_061704.pdf.

Subsequent disclosures of documents regarding section 215 occurred in July 2004. *See* Elec. Privacy Info. Ctr., Freedom of Information Documents on the USA Patriot Act, http://www.epic.org/privacy/terrorism/usapatriot/foia/ (reproducing documents); ACLU, PATRIOT FOIA, http://www.aclu.org/safefree/patriot/17497res20040810.html (reproducing documents). The case before Judge Huvelle was ultimately settled in August 2004, with the tender of additional documents, including a copy of the procedural rules of the Foreign Intelligence Surveillance Court. *Id.*

[144] Rod Smith, *Sources: FBI Gathered Visitor Information Only in Las Vegas*, LAS VEGAS REV. J., Jan. 7, 2004, at 1A ("Casino operators said they turned over the names and other guest information on an estimated 270,000 visitors after a meeting with FBI officials and after receiving [NSLs] requiring them to yield the information.").

[145] FBI Chief Counsel Valerie Caproni has stated that NSLs did not actually call for most of the hotel records. Comments of Valerie Caproni, FBI Chief Counsel,

In early April 2004, the FBI served the president of a small Internet access and consulting business with a NSL which required him to turn over records on one of his clients and "'further advised' [him] that § 2709(c) prohibited him, or his officers, agents, or employees, 'from disclosing to *any person* that the FBI has sought or obtained access to information or records under these provisions," ordering that he not "even mention the NSL in *any* telephone conversation."[146] Notwithstanding the prohibition on disclosure, the internet service provider (ISP) president contacted the ACLU. ACLU attorneys filed suit, captioned *Doe v. Ashcroft*, under seal in the Southern District of New York challenging both the underlying NSL and the gag order.[147] It was three weeks before the ACLU obtained an order allowing it to publicly disclose that the suit had been filed. Alongside the substantive disputes, the ACLU and the administration fought a running battle over the administration's continued efforts to keep details of the NSLs and the litigation from public view.[148]

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Lewis & Clark Law School Symposium on "Crime and the War on Terror" (Apr. 20, 2007), *available at* http://lawlib.lclark.edu/podcast/?p=203; E-mail from Valerie Caproni to Seth Kreimer (June 6, 2007) (on file with author). Ms. Caproni's account is substantiated by OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (Mar. 2007), *available at* http://www.usdoj.gov/oig/special/s0703b/final.pdf [hereinafter OIG NSL Report], which reports a total of 39,000 NSL requests for the year 2003. *Id.* at xvi. Since each account sought constitutes a separate "request," the OIG report refutes the possibility that 270,000 hotel records were obtained in 2003. *Id.* at xvi.

Apparently the disclosure of 270,000 records resulted from grand jury subpoenas and "voluntary" cooperation. Ms.Caproni also stated that the Las Vegas material was kept in a separate computer database and purged once the investigation ended. E-mail from Valerie Caproni, *supra*.

[146] Doe v. Ashcroft, 334 F. Supp. 2d 471, 475, 479 (S.D.N.Y. 2004); *see* Editorial, *My National Security Letter Gag Order*, WASH. POST, Mar. 23, 2007, at A17.

[147] 334 F. Supp. 2d 471; *see* Motion For Leave to File Case Under Seal, Doe v. Ashcroft, 317 F. Supp. 2d 488 (S.D.N.Y. 2004) (No. 04-2614), *available at* http://www.aclu.org/FilesPDFs/motion%20for%20leave%20in%20aclu%20v.%20ashcroft.pdf.

[148] *See* Doe v. Ashcroft, 317 F. Supp. 2d 488, 490, 492 (S.D.N.Y. 2004) (granting motion to partially unseal, describing administration request "that the ACLU remove the briefing schedule from its website," establishing a "procedure by which those disputes can be resolved," and putting "the burden on the Government to quickly justify each particular redaction under the exacting First Amendment standards applicable"); ACLU, Government Gag Exposed, http://www.aclu.org/safefree/patriot/18491res20040819.html (disclosing unsealed documents).

The most ironic administration initiative was the effort to withhold from public view, as a danger to national security, a segment of an ACLU brief in the case quoting from *United States v. U.S. District Court for the Eastern District of Michigan (Keith)*, 407 U.S. 297, 314 (1972). The segment reads: "The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." *See* Letter from Ann Beeson, ACLU, to Hon. Victor Marrero, U.S. Dist. Judge (May 14, 2004), *available at* http://www.aclu.org/nsl/gagorder/acluLetter_051404.pdf; *see also* Dan

On September 29, 2004, Judge Victor Marrero held the Patriot Act's authorization of the promiscuous use of NSLs in national security investigations unconstitutional as applied.[149] Quoting the Supreme Court's recent *Hamdi* decision that "a state of war is not a blank check for the President when it comes to the rights of the nation's citizens,"[150] he held that the Patriot Act authority to issue NSLs lacked the "procedural protections necessary to vindicate constitutional rights," since the statute both provided no mechanism for challenging the letters in court and affirmatively barred recipients from disclosing their existence even to attorneys.[151] In rejecting the administration's contention that the rules invoked by the FBI were merely hortatory, and therefore infringed on no cognizable legal rights, Judge Marrero made reference to the information that had emerged in the ACLU's earlier Patriot Act FOIA request to support the conclusion that the commands of the NSLs functioned to effectively coerce recipients.[152]

On First Amendment grounds, Judge Marrero invalidated the provision prohibiting disclosure by the recipients of the letters. He acknowledged that cases supported the proposition that "the Government should be accorded a due measure of deference when it asserts that secrecy is necessary for national security purposes in a *particular situation* involving *particular persons* at a *particular time*."[153] He rejected, however, the claim that those principles permitted a statute to "impose perpetual secrecy upon an entire category of future cases."[154]

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Eggen, *U.S. Uses Secret Evidence in Secrecy Fight with ACLU*, WASH. POST, Aug. 20, 2004, at A17.

[149] *Doe*, 334 F. Supp. 2d at 526–27 (S.D.N.Y. 2004).

[150] *Id.* at 477. Judge Marrero also set the stage by reiterating his own resolve "to exert particular vigilance to safeguard against excess committed in the name of expediency, to ensure that Americans do not succeed where the terrorists failed, inflicting by their own hand the deeper wrongs to the nation's essence that the September 11 external attacks upon physical structures and innocent people were unable to realize." *Id.* at 478 n.7 (citation omitted).

[151] *Id.* at 494, 506.

[152] *Id.* at 502 ("The ACLU obtained, via the Freedom of Information Act ('FOIA'), and presented to the Court in this proceeding, a document listing all the NSLs the Government issued from October 2001 through January 2003. Although the entire substance of the document is redacted, it is apparent that hundreds of NSL requests were made during that period. . . . The evidence suggests that, until now, none of those NSLs was ever challenged in any court. First, the Department of Justice explicitly informed the House Judiciary Committee in May 2003 that there had been *no* challenges to the propriety or legality of any NSLs. Second, the Government's evidence in this case conspicuously lacks any suggestion either that the Government has ever had to resort to a judicial enforcement proceeding for any NSL, or that any recipient has ever resisted an NSL request in such a proceeding or via any motion to quash.").

[153] *Id.* at 524 (emphasis in original).

[154] *Id.* He quoted with approval the Sixth Circuit's conclusion in *Detroit Free Press*: "The Government could use its 'mosaic intelligence' argument as a justification to . . . operate in virtual secrecy in all matters dealing, even remotely with 'national security,' resulting in a wholesale suspension of First Amendment rights." *Id.* at 524

Political debate regarding the NSL process continued through the presidential election. After the election, another client approached the ACLU to challenge a gag order accompanying the issuance of an NSL to a library consortium. Filed on August 9, 2005 as *Doe v. Gonzales* to avoid violating the statutory gag order, the case identified the plaintiff as a "member of the American Library Association" who had been served with an NSL seeking "subscriber information, billing information and access logs."[155] Although Doe had refused to comply with the NSL, no enforcement proceeding had been brought. The anonymous librarian sought a preliminary injunction to allow him to participate in pending debate on the Patriot Act by publicly identifying himself as a recipient of an NSL.[156]

Judge Janet Hall's opinion in *Doe v. Gonzales*, issued September 9, 2005, began its discussion of the government's interest in using NSL gag orders by citing *Hamdi* and Judge Tatel's dissent in *CNSS*.[157] She concluded that the statutory gag language included in the NSL functioned as a prior restraint and was insufficiently justified to comply with First Amendment protections: "Nothing specific about this investigation has been put before the court that supports the conclusion that revealing Doe's identity will harm it. The record supplied by the defendants suggests that the disclosure of Doe's identity 'may' or 'could' harm investigations related to national security generally. . . . Just such a speculative record has been rejected in the past by the Supreme Court in the context of a claim of national security."[158] Judge Hall concluded by issuing the requested injunction allowing Doe to come out as a recipient of an NSL; she stayed the order temporarily to allow the administration to seek a further stay from the Second Circuit. On September 20, 2005, the Court of Appeals granted the Government's motion to stay Judge Hall's order, but the case swiftly became less anonymous when court

n.256 (quoting Detroit Free Press v. Ashcroft, 303 F. 3d 681, 709 (6th Cir. 2002)). He also noted,

> In general, as our sunshine laws and judicial doctrine attest, democracy abhors undue secrecy, in recognition that public knowledge secures freedom. Hence, an unlimited government warrant to conceal, effectively a form of secrecy *per se*, has no place in our open society. Such a claim is especially inimical to democratic values for reasons borne out by painful experience.

*Id.* at 519–20.

[155] Doe v. Gonzales, 386 F. Supp. 2d 66, 70 (D. Conn. 2005).

[156] *Id.*

[157] *Id.* at 76.

[158] *Id.* at 76–77 (citing Pentagon Papers Case, N.Y. Times v. United States, 403 U.S. 713, 725–26 (1971) (Brennan, J., concurring)). Judge Hall continued, "Further, the information that is before the court suggests strongly that revealing Doe's identity will not harm the investigation. SEALED MATERIAL CLASSIFIED MATERIAL." *Id.* at 77. "The court asked the defendants' counsel at oral argument if he could confirm there was a 'mosaic' in this case: were there other bits of information which, when coupled with Doe's identity, would hinder this investigation. Counsel did not do so." *Id.* at 78.

personnel neglected to redact the name of the plaintiff from the caption.[159] Notwithstanding this breach in the now notional security, on October 7, 2005, Justice Ginsburg declined to lift the stay.[160]

As the sunset date of the Patriot Act approached, further disclosures emerged. On the basis of leaks from "government sources," the Washington Post disclosed that, utilizing the Patriot Act's lenient procedures, the FBI annually issued 30,000 NSLs, "a hundredfold increase over historic norms."[161] It also made public the "unannounced decisions" to reverse policy and retain all records on innocent individuals and companies once investigations are closed, while making government data banks available to "state, local, and tribal" governments and "private sector entities."[162]

In March 2005, EPIC had filed a FOIA request seeking further information from the Department of Justice regarding the use of the Patriot Act.[163] The FBI officially granted a request for expedited processing,[164] apparently recognizing that administration attorneys had argued ineffectually before Judge Huvelle that the earlier Patriot Act request was not a matter of public urgency.[165] Still, the request languished in informal limbo, and EPIC filed an action to compel disclosures in April 2005 and a motion to compel the effectuation of the expedited processing on June 14, 2005 before Judge Gladys Kessler, who had earlier ordered the *CNSS* disclosures at the trial level. In late October, as a status

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[159] "[T]he parties learned that, through inadvertence, Doe's identity had been publicly available for several days on the District Court's Web site and on PACER, the electronic docket system run by the Administrative Office of the United States Courts. . . . The parties also learned that the media had correctly reported Doe's identity on at least one occasion." Doe v. Gonzales, 127 S. Ct. 1, 4 (2006) (citing Alison Leigh Cowan, *Librarians Must Stay Silent in USA Patriot Act Suit, Court Says*, N. Y. TIMES, Sept. 21, 2005, at B2).

The Cowan article states,

> "Though the plaintiffs' organization has not been named in the various proceedings, a close reading of the court record suggests that it is Library Connection in Windsor, Conn. A search of a court-operated Web site offered a pointer to the plaintiffs' identity. There, a case numbered 3:2005cv01256 is listed under the caption, 'Library Connection Inc. v. Attorney General.'"

*Id.*

[160] *Doe*, 127 S. Ct. at 5.

[161] Gellman, *supra* note 118. By "comparing unsealed portions of the file" in the case with "public records" and "information gleaned" from investigation, the article also identified George Christian as the "John Doe" librarian plaintiff in *Doe v. Gonzales*. *Id.*

[162] *Id.*

[163] Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice, Civil Action No. 05-845 (GK), 2005 U.S. Dist. LEXIS 40318, at *1 (D.D.C. Nov. 16, 2005); *see also* Elec. Privacy Info. Ctr., Freedom of Information Documents on the USA PATRIOT Act, http://www.epic.org/privacy/terrorism/usapatriot/foia/ (reproducing request and subsequent responses).

[164] *Elec. Privacy Info. Ctr.*, 2005 U.S. Dist. LEXIS 40318, at *1.

[165] *See* ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 33 (D D.C. 2004).

conference before Judge Kessler loomed, the FBI released a small set of documents, among which were items indicating that the FBI had "investigated hundreds of potential violations related to its use of secret surveillance operations," and had identified "at least a dozen violations of federal law or bureau policy from 2002 to 2004."[166] Judge Kessler found the government's response to be inadequate, commenting that the administration had released an "incredibly small amount of pages," and concluding that the administration's efforts "have been unnecessarily slow and inefficient."[167] She set a mandatory schedule for the processing and release of documents,[168] and another set of documents was released in December 2005, identifying further violations and triggering an investigation by the Office of the Inspector General of the Department of Justice.[169] The December release immediately preceded the December 16, 2005 decision in the Senate to block renewal of the Patriot Act.[170]

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[166] *Elec. Privacy Info. Ctr.*, 2005 U.S. Dist. LEXIS 40318, at *4 n.2 (reporting that as of a status conference held November 8, 2005, 250 pages had been released); Dan Eggen, *FBI Papers Indicate Intelligence Violations; Secret Surveillance Lacked Oversight*, WASH. POST, Oct. 24, 2005, at A1 (reporting "hundreds of potential violations"); Eric Lichtblau, *Tighter Oversight of F.B.I. Is Urged After Investigation Lapses*, N.Y. TIMES, Oct. 25, 2005, at A16 (reporting "at least a dozen" violations based on documents received by EPIC, and noting that "the bureau said on Monday that internal reviews had identified 113 violations since last year that were referred to a federal intelligence board"); Elec. Privacy Info. Ctr., *supra* note 163 (identifying documents disclosed in October).

[167] *Elec. Privacy Info. Ctr.*, 2005 U.S. Dist. LEXIS 40318, at *4.

[168] *Id.* at *5.

[169] Eric Lichtblau, *At F.B.I., Frustration Over Limits on an Antiterror Law*, N.Y. TIMES, Dec. 11, 2005, at 48 (noting evidence in EPIC documents that the Justice Department's Office of Intelligence Policy and Review had been criticized internally for being too protective of civil liberties, and that there had thus been efforts to "bypass" that office); Eric Lichtblau, *Justice Dept. Report Cites Intelligence-Rule Violations by F.B.I.*, N.Y. TIMES, Mar. 9, 2006, at A21 ("The inspector general's review grew out of documents, dealing with intelligence violations, that were released last year under a Freedom of Information Act request by the Electronic Privacy Information Center . . . . The inspector general then obtained more documents on violations and included an 11-page analysis of the problem as part of a broader report Wednesday on counterterrorism measures."); OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 20–30 (Mar. 2006), *available at* http://www.usdoj.gov/oig/special/s0603/final.pdf.

EPIC filed another request for reports submitted by the FBI Intelligence Oversight Board, which resulted in the release of more documents. EPIC, Litigation Docket, http://www.epic.org/privacy/litigation/ (discussing EPIC v. U.S. Dep't of Justice, No. 06-00029 (D.D.C. filed Jan 10, 2006)). The Inspector General apparently obtained an un-redacted set of the reports, which were used in its analysis. OFFICE OF THE INSPECTOR GENERAL, *supra*.

[170] Claims of causation are muddied by the contemporaneous publication of the existence of illegal NSA surveillance programs by the New York Times, *see* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts,* N.Y. TIMES, Dec. 16, 2005, at A1, as well as by disclosures that the Defense Department had engaged in aggressive surveillance of domestic dissenters, *see* Walter Pincus, *Defense Facilities Pass*

In March 2006, after nearly expiring, the sunsetted Patriot Act provisions were finally renewed until December 31, 2009.[171] But Congress imposed modifications. Among other things, the revised authority for NSLs explicitly allows recipients of letters to contact attorneys and to challenge the letters in court, and sets limitations on their scope and the procedure by which gag orders are issued.[172] In May 2005, the administration conceded in *Doe v. Gonzales,* the semi-secret Library Connection case, that the librarian could reveal his identity and the Second Circuit dismissed the appeal as moot.[173] The administration then withdrew the NSL.[174]

The still-anonymous ISP owner in the case before Judge Marrero remained under gag order. The changed legal landscape persuaded the Second Circuit to vacate Judge Marrero's order enjoining the enforcement of the NSL against the ISP, and remand the case so that the trial court "can address the First Amendment issues presented by the revised version."[175] On remand, Judge Marerro invalidated the gag order under the revised statute, but stayed his decision pending appeal.[176]

In September 2006, the long-gestating opinion in *Muslim Community Ass'n of Ann Arbor v. Ashcroft* was issued, denying the administration's motion to dismiss on ripeness and standing grounds.[177] The ACLU,

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*Along Reports of Suspicious Activity; 'Raw Information' From Military, Civilians Is Given to Pentagon*, WASH. POST, Dec. 11, 2005, at A12; Lisa Myers et al., *Is the Pentagon Spying on Americans?*, MSNBC.COM, Dec. 14, 2005, http://www.msnbc.msn.com/id/10454316.

[171] USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, § 102, 120 Stat. 192, 195 (2006).

[172] USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, § 115, 120 Stat. at 211–13 (allowing judicial review); § 116, 120 Stat. at 213–17 (restricting the scope of nondisclosure orders).

[173] Doe I v. Gonzales, 449 F.3d 415, 420–21 (2d Cir. 2006). The court refused the administration's request for a vacatur without substantial comment. Judge Cardamone's concurrence was more emphatic:

> To me, the government's request for vacatur in the Connecticut case is not surprising, but right in line with the pervasive climate of secrecy. It sought to prevent, through § 2709(c), the Doe plaintiffs from ever revealing that they were subjects of an NSL, effectively keeping that fact secret forever. Then, by requesting vacatur of the decision below, the government attempts to purge from the public record the fact that it had tried and failed to silence the Connecticut plaintiffs.

*Id.* at 423.

[174] Press Release, ACLU, Government Drops Demand for Library Records (June 26, 2006), *available at* http://www.aclu.org/safefree/nationalsecurityletters/25997prs20060626.html; *see also* Press Release, ACLU, Supreme Court Unseals Documents in USA Patriot Act Case (Aug. 3, 2006), *available at* http://www.aclu.org/safefree/nationalsecurityletters/26379prs20060803.html.

[175] *Doe I*, 449 F.3d at 419.

[176] Doe v. Gonzales, 500 F. Supp. 2d 379 (S.D.N.Y. 2007); *see* Editorial, *My National Security Letter Gag Order*, WASH. POST, Mar. 23, 2007, at A17.

[177] 459 F. Supp. 2d 592, 601-02 (E.D. Mich. 2006).

protecting its own victory from reversal, dismissed the action a month later.[178]

The Patriot Act renewal imposed new obligations of transparency. In addition to requiring reports to congressional committees on the use of NSLs, section 215, and data mining activities,[179] the Reauthorization Act mandated that the Department of Justice's Inspector General conduct a series of audits of "the effectiveness and use, including any improper or illegal use," of NSLs and section 215 orders issued and obtained by the Department.[180]

The first iteration of audits was published in March 2007.[181] The audit of section 215 usage revealed precisely the information that the administration had argued between 2002 and 2004 would endanger national security, by providing "'critical information' about whether taking evasive actions . . . would provide a safe harbor from FBI counterintelligence and counter-terrorism efforts."[182] As it turns out, section 215 authority has as yet become neither a broad threat to privacy nor a menace to terrorists. The authority generated no FISA orders

[178] *ACLU Withdraws Lawsuit Challenging Patriot Act*, WASH. POST., Oct. 29, 2006, at A10 ("The ACLU said Friday it is withdrawing the lawsuit because of 'improvements to the law.'").

[179] USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, § 106(h), 120 Stat. 192, 199–200 (2006) (enacting reporting requirements for section 215 orders); § 108, 120 Stat. at 203–04 (enacting reporting requirements for "multipoint electronic surveillance"); § 109, 120 Stat. at 204–05 (enacting reporting requirements for pen registers and physical searches); § 118, 120 Stat. at 217–18 (requiring that reports on NSLs be submitted to the Committee on the Judiciary, the Committee on Financial Services, and the Permanent Select Committee on Intelligence of the House of Representatives, and the Committee on the Judiciary, the Committee on Banking, Housing, and Urban Affairs, and the Select Committee on Intelligence of the Senate); § 126, 120 Stat. at 227–28 (requiring reports on data mining activities).

[180] USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, § 106A, 120 Stat. at 200–02 (requiring audits of the use of section 215); § 119, 120 Stat. at 219–21 (requiring audits of the use of NSLs). In addition to the fact that the Inspector General has proven willing to exercise independent judgment in other areas of the "War on Terror," congressional experience with unadorned reporting obligations has been decidedly mixed. *See* Gellman, *supra* note 118 (recounting the 2004 requirement of report on the "scope of" NSLs, and reporting that the "process and standards for approving them" had gone "[m]ore than a year . . . without a Justice Department reply" (quotation marks omitted)).

[181] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF SECTION 215 ORDERS FOR BUSINESS RECORDS (Mar. 2007), *available at* http://www.usdoj.gov/oig/special/s0703a/final.pdf [hereinafter OIG 215 Report].

[182] ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 28 (D.D.C. 2003). The report did redact some information regarding whether the targets of investigation were U.S. persons, and the details of the deployments. *See generally* OIG 215 Report, *supra* note 181, at 19–22.

during either 2002 or 2003, seven orders during 2004, and fourteen during 2005.[183]

The FISA court never denied a section 215 order. But the OIG audit identified thirty-one instances in which the FBI began the process of seeking a section 215 order, and then abandoned the effort. These cases highlight the impact of review from the chain of attorneys running from the FBI General Counsel's National Security Law Branch (NSLB), which was required to approve applications, through the Office of Intelligence Policy Review (OIPR), which then approved and submitted applications to the FISA court.[184] Many details regarding these "withdrawn" applications were redacted, but apparently applications for FISA warrants for library records were withdrawn on more than one occasion.[185] In one of these cases, an NSLB supervisor blocked the effort to seek a section 215 order for library records "because of the political controversy surrounding section 215 requests from libraries."[186] However, as the report tantalizingly put the outcome, "Once the field office was advised that NSLB would not send the application to OIPR, the field office sought [REDACTED] and eventually obtained [REDACTED]."[187]

The report on NSLs was more sobering. As it turns out, the figure of 30,000 annual NSLs which had leaked in 2005[188] represented less than half of the actual usage. According to the 2007 OIG audit, the actual number of NSL requests in 2004 was closer to 65,000.[189] Reporting of the

[183] OIG 215 Report, *supra* note 181, at 19 tbl.3.1; *see also id.* at xxii ("We found no instance where the information obtained from a section 215 order resulted in a major case development such as the disruption of a terrorist plot."); *id.* at 74 & n.90 (reporting that some field agents viewed section 215 as a "tool of last resort," while an OIPR attorney believed "nothing would be lost" if the authority were repealed). During 2005, in addition, the FISA court issued 141 orders under section 215 which were used to obtain subscriber information associated with numbers identified by trap and trace orders directed to telecommunications companies. *Id.* at vi, vi n.9, 35 (identifying "combination" orders seeking associated information, and noting that the Reauthorization Act rendered such orders unnecessary by allowing trap and trace orders to access the data).

[184] *Id.* at 23.

[185] *Id.* at 24 ("FBI field offices sought but did not obtain section 215 orders for library records on [REDACTED] occasions"). The report also identified situations in which OIPR refused to seek university records because it viewed them as being protected from disclosure by the Buckley Amendment. *Id.* at 29–33.

[186] *Id.* at 28.

[187] *Id.* at 28.

[188] Gellman, *supra* note 118, at A1.

[189] OIG NSL Report, *supra* note 145, at xix chart 4.1. The report revealed that official records for 2004 reported 56,507 NSL requests and 47,221 in 2005. *Id.* Moreover, an audit of FBI case files indicated that 17% more NSLs were issued than were reported. *Id.* at xvi. In addition, the OIG report estimated that roughly 6% of the properly docketed requests were actually not incorporated into the figures reported to Congress because of delays and incorrect data entries. *Id.* at xvii. Taken together, this information suggests that over 65,000 NSLs (17% more than 56,507) were actually issued in 2004. The audit was hampered because "an unknown amount of data . . . was lost from the OGC data base when it malfunctioned." *Id.; cf. Padilla*

letters was slipshod, and supervision was haphazard.[190] Previous classified reports required by Congress had substantially understated the number of NSLs issued because of delays and mistakes, and public reports had understated numbers because of creative use of definitions.[191] A random audit of seventy-seven investigative files revealed twenty-two possible violations of law and policy regarding NSLs.[192] The audit also delicately presented the "Noteworthy Fact" that "no clear guidance was given to FBI agents on how to reconcile the limitations expressed in the Attorney General Guidelines, which reflect concerns about the impact on privacy of FBI collection techniques, with the expansive authorities in the NSL statutes."[193]

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*Evidence Missing, Feds Say*, CBSNEWS.COM, Mar. 9, 2007, http://www.cbsnews.com/stories/2007/03/09/terror/main2554265.shtml.

[190] *See* OIG NSL Report, *supra* note 145, at xiv–xv (noting that there was "no policy or directive requiring retention of signed copies of national security letters").

[191] *Id.* at xvii (reporting that 4,600 NSL requests were not reported to Congress because of delays in reporting, and that the March 2006 FBI reported to Congress that data in reports "may not have been accurate"); *id.* at xix ("The number of NSL requests we identified significantly exceeds the number reported in Department's first public annual report . . . ."); *id.* (reporting that the OIG identified 47,221 requests in 2005, whereas the FBI had identified only 9,254 requests).

[192] *Id.* at xxxi. Twenty-two violations were identified in a review of 293 NSLs. *Id.* Especially troubling was the misuse of "exigent letters," which misrepresented the circumstances of their issuance. *Id.* at xxxiv. Projecting this out to the 44,000 NSLs issued during 2003 to 2005, see *id.* at xx chart 1.1, this suggests at least 4,000 violations. And these are only the violations that are revealed by a file review. This is to be contrasted with a total of twenty-six instances during the period 2003 to 2005 in which the FBI voluntarily reported possible violations to the Intelligence Oversight Board (IOB). *Id.* at xxix. Of course, the IOB's only authority is to report violations to the President, who has not in the past proven overly fastidious about violations of law in the pursuit of terrorists.

It appears that some of these issues had been raised internally and suppressed. Edmund L. Andrews, *Official Alerted F.B.I. to Rules Abuse 2 Years Ago*, N.Y. TIMES, Mar. 19, 2007, at A10; R. Jeffrey Smith & John Solomon, *Amid Concerns, FBI Lapses Went On*, WASH. POST, Mar. 18, 2007, at A1 ("Bassem Youssef, who currently heads the CAU, raised concerns about the tardy legal justifications shortly after he was assigned to the job in early 2005.")

[193] OIG NSL REPORT, *supra* note 145, at xli–xlii. The report noted as well that there is no requirement to purge databases when an investigation proves a target's innocence. "[O]nce information is obtained in response to a [NSL], it is indefinitely retained and retrievable by the many authorized personnel who have access to various FBI databases." *Id.*

Leaks in January of 2007 also revealed that the Defense Department and CIA investigators generated their own stock of information through judicially unsupervised and congressionally unauthorized NSLs. Eric Lichtblau & Mark Mazzetti, *Military Expands Intelligence Role in U.S.*, N.Y. TIMES, Jan. 14, 2007, at A1 ("[I]t was not previously known, even to some senior counterterrorism officials, that the Pentagon and the Central Intelligence Agency have been using their own 'noncompulsory' versions of the letters. Congress has rejected several attempts by the two agencies since 2001 for authority to issue mandatory letters, in part because of concerns about the dangers of expanding their role in domestic spying.")

The report provided one muted note of consolation for civil libertarians. Given the fact that each account accessed was treated as a separate "request," the order of magnitude of the NSL "requests" reported gives some assurance that NSLs are not being used to generate material for massive data mining programs. Since an effective data mining effort would review hundreds of thousands or millions of records, the fact that the FBI reviews less than 70,000 accounts per year confirms that the NSLs have not been put to such uses. The new bottom-line reporting regulations provide an ongoing check on a temptation to use NSLs for data mining.[194]

The Inspector General's report has in turn precipitated another round of FOIA requests regarding NSLs, as well as further oversight hearings from the now-opposition controlled Congress.[195] The FBI in turn has instituted an internal investigation and has issued new guidelines designed to discipline the use of NSLs.[196]

### *C. Transparency and Torture: Democracy and the Problem of "Unknown Unknowns"*

The "dark side" of the "War on Terror" was nowhere more prominent than in the use of brutally coercive methods against suspected opponents by an administration that kept its methods secret and publicly disavowed "torture." This divergence between word and deed may have arisen out of the involuntary homage of vice to virtue. It owed its source in part to the not-unprecedented belief that sufficient secrecy could impart legal impunity.[197] And it rested in part on the political calculation

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[194] I thank Valerie Caproni for this insight, but note that recent FOIA disclosures reveal that FBI NSLs have in the past demanded revelation of the "community of interest" of particular callers, which substantially broadens their scope. *See* Eric Lichtblau, *F.B.I. Data Mining Reached Beyond Initial Targets*, N.Y. TIMES, Sept. 9, 2007, at A1, *available at* http://www.nytimes.com/2007/09/09/washington/09fbi.html (describing NSLs calling for "which people the targets called most frequently, how long they generally talked and at what times of day," regarding "people and phone numbers 'once removed' from the actual target of the national security letters"). This tactic has apparently been suspended. *See id.*

[195] Ellen Nakashima, *FBI Gets Six Years for FOIA Request*, WASH. POST, Apr. 11, 2007, at A13 (describing FOIA request for NSL information, and earlier request regarding Investigative Data Warehouse); Elec. Frontier Found. v. Dep't of Justice, No. 07-0656 (JDB) (D.D.C. June 15, 2007), *available at* http://www.eff.org/flag/nsl/bates_order.pdf (setting a deadline for response to NSL FOIA request, and ordering FBI to process 2,500 pages of documents every thirty days.).

[196] Lara Jakes Jordan, *FBI Drafts Rules to Curb Privacy Abuse*, WASHINGTONPOST.COM, June 14, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/14/AR2007061400767.html.

[197] Letter from John Ashcroft, Att'y Gen., to President George W. Bush (Feb. 1, 2002), *reprinted in* MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 92 (2004) (arguing that the presidential determination would allow the use of forward leaning methods of interrogation, while minimizing the "legal risks of liability, litigation, and criminal prosecution"); Eric Schmitt & Carolyn Marshall, *In*

that a manifest policy of kidnapping and torture would impugn the administration's legitimacy in the eyes of the nation and the world and endanger its domestic political success.[198]

Whatever its basis, the secrecy gradually unraveled, and it is instructive to review the role sub-constitutional frameworks of transparency played in that process. Defense Secretary Rumsfeld, no mean analyst of political reality (whatever his other characteristics), observed in February 2002:

> [A]s we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.[199]

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*Secret Unit's 'Black Room,' A Grim Portrait of U.S. Abuse*, N.Y. TIMES, Mar. 19, 2006, at A1 ("Placards posted by soldiers at the detention area advised, 'NO BLOOD, NO FOUL.' The slogan, as one Defense Department official explained, reflected an adage adopted by Task Force 6-26: 'If you don't make them bleed, they can't prosecute for it.' . . . [P]risoners at Camp Nama often disappeared into a detention black hole, barred from access to lawyers or relatives. . . . 'The reality is, there were no rules there,' another Pentagon official said"); *see* Seymour M. Hersh, *The Redirection*, NEW YORKER, Mar. 5, 2007, at 54, 65 ("Iran-Contra was the subject of an informal 'lessons learned' discussion two years ago among veterans of the scandal. Abrams led the discussion. One conclusion was that even though the program was eventually exposed, it had been possible to execute it without telling Congress," suggesting that tighter security would assure immunity from interference.).

For an earlier version of this gambit, see *United States v. Stanley*, 483 U.S. 669, 688–89 (1987) (Brennan, J., concurring in part and dissenting in part) (quoting a U.S. Army document stating that "Any claim against the US Government for alleged injury due to EA 1729 [LSD] must be legally shown to have been due to the material. Proper security and appropriate operational techniques can protect the fact of employment of EA 1729.").

[198] The Working Group on Detainee Interrogation observed with understated foresight, "Should information regarding the use of more aggressive interrogation techniques than have been used traditionally by U.S. forces become public, it . . . may produce an adverse effect on support for the war on terrorism." DEP'T OF DEF., WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM (Apr. 4, 2003), *reprinted in* THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB 286, 346 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter WORKING GROUP REPORT].

Similarly, Adm. Mora argued that inevitable leaks would generate "severe" political fallout that could endanger political support for military initiatives. Memorandum from Alberto J. Mora to Inspector General, Dep't of the Navy 6, 9–10 (2004), *available at* http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf [hereinafter Mora Memo].

[199] DefenseLink News Transcript: DoD News Briefing - Secretary Rumsfeld and Gen. Myers (Feb. 12, 2002), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2636 (deflecting a question challenging the assumption that Iraq possessed weapons of mass destruction).

The next three years witnessed a gradual migration of the administration's policies of abuse from the third category toward the first.

*1. The Policy that Dares not Speak its Name*

Before the "Global War on Terror," policies of kidnapping potential opponents, then secreting them in "black sites" while subjecting them to incommunicado detention, psychic pressure, coercive interrogation, and physical abuse seemed to belong only to the official arsenals of America's enemies and less savory allies. America condemned the Third Reich for its "special interrogation" tactics and concentration camps, the Soviet Union for its brainwashing and gulags, and the People's Republic of China for its re-education camps. It viewed the "disappearances" of Argentina's "dirty war" as an embarrassment, and by the mid-1980s American courts had come to view the torturer, like the pirate and slave trader, as an enemy of humanity.[200]

September 11 was said to change many things. But officially, American repugnance for torture and regard for the rule of law were not among them. When the invasion of Afghanistan yielded prisoners, military spokesmen announced that while "[t]hese are potentially very dangerous people . . . [w]hen we get prisoners, we don't torture them . . . . We keep them warm, we keep them fed, we keep the rain off their heads."[201] When John Walker Lindh was indicted, Attorney General Ashcroft declaimed: "The United States is a country of laws, and not of men. . . . At each step in this process, Walker Lindh's rights, including his rights not to be—not to incriminate himself and to be represented by counsel, have been carefully, scrupulously honored."[202] Secretary of Defense Rumsfeld was said to be "visibly perturbed" by allegations of

[200] Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."); *see also* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Apr. 18, 1988, S. TREATY DOC. NO. 100-20 (ratifying the Convention).

I discuss the link between the rejection of torture and America's constitutional identity in Seth F. Kreimer, *Too Close to the Rack and Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 311–16 (2003); *see also* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1739–48 (2005) (outlining deep links between the prohibition of torture and the rule of law). To be sure, official practice often diverged from official policy; from CIA medical experiments and interrogation manuals to connivance in brutal repression and death squads. But official military doctrine did not permit abuse of prisoners, and official policy maintained allegiance to human rights norms.

[201] John Hendren, *U.S. Shifts Its Focus in Afghanistan to Prisoners*, L.A. TIMES, Dec. 30, 2001, at A1.

[202] Attorney General John Ashcroft, News Conference—Indictment of John Walker Lindh (Feb. 5, 2002), *available at* http://www.usdoj.gov/archive/ag/speeches/2002/020502transcriptindictmentofjohnwalkerlindh.htm.

detainee mistreatment and responded emphatically to uphold American honor:

> "Let there be no doubt . . . [t]he treatment of the detainees in Guantanamo Bay is proper, it's humane, it's appropriate and it is fully consistent with international conventions. . . . No detainee has been mistreated in any way. And the numerous articles, statements, questions, allegations and breathless reports on television are undoubtedly by people who are either uninformed, misinformed or poorly informed."[203]

In early 2002, President Bush was publicly confronted with a choice between pressure from the State Department to treat captured prisoners in accord with the Geneva Conventions and adherence to a memorandum from Alberto Gonzales—rapidly leaked to the public—arguing that a "new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions."[204] Bush's official response was to partially reverse his earlier decision to ignore the Geneva Convention. He announced that he had "determined that the Geneva Convention applies to the Taliban detainees, but not to the al-Qaida detainees" while maintaining that

> [t]he United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949. . . . The detainees will not be subjected to physical or mental abuse or cruel treatment.[205]

As the ranks of detainees swelled, and complaints of abusive conditions and interrogations were voiced, the administration continued to disavow "torture," to tout its adherence to the Convention Against Torture "as

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[203] Richard A. Serrano & John Hendren, *Rumsfeld Strongly Denies Mistreatment of Prisoners*, L.A. TIMES, Jan. 23, 2002, at A1.

[204] Rowan Scarborough, *Powell Wants Detainees To Be Declared POWs*, WASH. TIMES, Jan. 26, 2002, at 1.

[205] The White House, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), *available at* http://www.whitehouse.gov./news/releases/2002/02/print/20020207-13.html. Consistent with the disingenuous legalism that has characterized this administration, the announcement guaranteeing "humane" treatment applied only to detainees at Guantanamo, leaving open the possibility of treating al-Qaeda detainees elsewhere inhumanely since Bush had "determined" that the Geneva Convention did not cover them. *See* SEYMOUR HERSH, CHAIN OF COMMAND 5 (2004) (reporting that a "secret statement of the President's views, which he signed on February 7, 2002, had a loophole that applied worldwide. 'I . . . determine that none of the provisions of Geneva apply to our conflict with Al Qaeda in Afghanistan or elsewhere throughout the world.'"); *accord* Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106 (citing as an example of "painstakingly constructed . . . loopholes" the February 2002 directive regarding humane treatment: "A close reading of the directive, however, revealed that it referred only to military interrogators—not to C.I.A. officials.")

ratified," and to maintain that detainees were being treated "humanely."[206]

As would later become clear, this public posture coexisted with a quite different "off the books" reality. Beginning in September 2001, President Bush authorized the CIA to engage in kidnapping and secret coercive interrogations in the pursuit of "terrorists."[207] This authority did not lie fallow; suspects were "rendered" to countries where they could be tortured, and the CIA began to establish a network of "black sites" where "no holds barred" interrogation could proceed without interference.[208]

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[206] Letter from William J. Haynes II, Gen. Counsel, Dep't of Def., to Sen. Patrick J. Leahy (June 25, 2003), *available at* http://www.hrw.org/press/2003/06/letter-to-leahy.pdf ("United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with" U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment "as ratified."); *see also* Press Release, The White House, Statement by the President, United Nations International Day in Support of Victims of Torture (June 26, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html ("Torture anywhere is an affront to human dignity everywhere"); HERSH, *supra* note 205, at 19 (describing an "angry" lecture by Haynes asserting that "[w]e don't torture").

As has been extensively discussed, these assurances were rife with disingenuous language. "Torture" was defined extraordinarily narrowly and the obligations of the Convention "as ratified" were read to allow physical assaults short of "torture." For my own prior analysis, see Seth F. Kreimer, *"Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience*, 1 J. NAT'L SEC. L. & POL'Y 187, 189–201 (2005).

[207] Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html (reporting that intelligence officials "believe that the CIA general counsel's office acted within the parameters of" the September 17, 2001, presidential finding authorizing covert action against al-Qaeda in approving the black-site program, since the "black-site program was approved by a small circle of White House and Justice Department lawyers and officials, according to several former and current U.S. government and intelligence officials"); Mayer, *supra* note 205 ("[S]ince September 11th the C.I.A. 'has seemed to think it's operating under different rules, that it has extralegal abilities outside the U.S.' Agents, [a former FBI agent] said, have 'told me that they have their own enormous office of general counsel that rarely tells them no. Whatever they do is all right. It all takes place overseas.'"); John Barry, Michael Hirsh & Michael Isikoff, *The Roots of Torture*, NEWSWEEK, May 24, 2004, *available at* http://www.why-war.com/news/2004/05/24/theroots.html ("One Justice Department memo, written for the CIA late in the fall of 2001, put an extremely narrow interpretation on the international anti-torture convention, allowing the agency to use a whole range of techniques—including sleep deprivation, the use of phobias and the deployment of 'stress factors'—in interrogating Qaeda suspects. . . . According to knowledgeable sources, the president's directive authorized the CIA to set up a series of secret detention facilities outside the United States, and to question those held in them with unprecedented harshness. Washington then negotiated novel 'status of forces agreements' with foreign governments for the secret sites. These agreements gave immunity not merely to U.S. government personnel but also to private contractors.").

[208] HERSH, *supra* note 205, at 53 (describing December 18, 2001 kidnapping of Ahmed Agiza, Muhammed al-Zery, two Egyptians who had sought asylum in Sweden); *see* Craig Whitlock, *A Secret Deportation of Terror Suspects*, WASH. POST, July 25, 2004, at A1 *available at* http://www.washingtonpost.com/wp-dyn/articles/A11976-

Secret authority for military coercion followed. In December 2001, the confidential official guidance to interrogators of John Walker Lindh was that "the secretary of Defense's counsel has authorized him to 'take the gloves off.'"[209] Lindh was "fed sparingly and given only minimal medical attention," "blindfolded and bound with plastic cuffs so tight they cut off the circulation to his hands," and "threatened . . . with death and torture." His "clothes were cut off him, his hands and feet were again shackled, and he was bound tightly with duct tape to a stretcher. Still blindfolded and completely naked, he was then placed in a metal shipping container," and he was then questioned.[210] When, as part of his defense in a criminal prosecution, Lindh's lawyers threatened to make a public record of the abuse to which he had been subjected, the administration entered into a lenient plea agreement rather than risk that exposure.[211] In the same time period, the President authorized the Defense Department to establish a top secret "special-access program" authorized to assassinate, kidnap, and harshly interrogate "high-value" al Qaeda suspects in "secret interrogation centers."[212]

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2004Jul24.html; Larisa Alexandrovna & David Dastych, *Soviet-Era Compound in Northern Poland Was Site of Secret CIA Interrogation, Detentions*, RAW STORY, Mar. 7, 2007, http://www.rawstory.com/ news/2007/Sovietera_compound_in_Poland_was_site_0307.html ("Only the Polish prime minister and top Polish intelligence brass were told of the plan, in which agents of the United States quietly shuttled detainees from other holding facilities around the globe for stopovers and short-term interrogation in Poland between late 2002 and 2004."); *id.* (describing use of these sites for "no holds barred" interrogations).

[209] Richard Serrano, *Prison Interrogators' Gloves Came Off Before Abu Ghraib*, L.A. TIMES, June 9, 2004, at A1 ("Lindh was being questioned while he was propped up naked and tied to a stretcher in interrogation sessions that went on for days, according to court papers. In the early stages, his responses were cabled to Washington hourly, the new documents show.")

[210] Richard A. Serrano, *Lindh Defense Team Offers Abuse List*, L.A. TIMES, Mar. 24, 2002, at A1.

[211] *See* Jane Mayer, *Lost in the Jihad*, NEW YORKER, Mar. 10, 2003, at 50 *available at* http://www.newyorker.com/archive/2003/03/10/030310fa_fact2?currentPage=1 ("'The Defense Department was really worried about the claims of mistreatment,' George Harris [one of Lindh's lawyers] said. 'They said the deal had to be struck before the suppression hearing, so the details wouldn't get out. They really wanted us to agree to drop any claims of intentional mistreatment. That was key to Rumsfeld.'"); Andrew Cohen, *Lindh Layers are Peeling Away*, CBSNEWS.COM, Mar. 11, 2003, http://www.cbsnews.com/stories/2003/03/11/news/opinion/courtwatch/main543497.shtml ("It was clear, although the government never explicitly conceded so, that prosecutors were open to a deal with Lindh because of the brutal way in which he was treated by his military captors in Afghanistan and the spurious way in which federal law enforcement officials had observed Lindh's constitutional rights. It is no coincidence that the Lindh deal came about on the eve of a scheduled week-long hearing that was going to bring into the open the specifics of how he was treated and by whom.").

[212] HERSH, *supra* note 205, at 16.

As interrogations in Guantanamo and other sites continued between August 2002 and March 2003, and preparations for the war in Iraq proceeded, administration lawyers and policy makers generated further secret legal and policy memoranda legitimizing a variety of "Counter-Resistance Techniques" that contemplated psychic and physical assaults on prisoners in the search for intelligence.[213] Details that have emerged from this period again establish that these authorities were not mere thought experiments.[214]

In late 2002, FBI agents at Guantanamo registered complaints regarding the legality of interrogation practices.[215] Internal military reports of these abuses provoked struggles in late 2002 and early 2003 by principled members of the military to turn policy and practice away from barbarism—efforts that proved only partially and temporarily successful.[216] Approval for a memorandum authorizing severe physical

[213] Again, these memoranda have been widely discussed. My own account can be found in Kreimer, *supra* note 206, at 190–94. For one salient example of manipulative use of language, consider Memorandum from James T. Hill, Gen., U.S. Army, to Chairman of the Joint Chiefs of Staff on Counter-Resistance Techniques (Oct. 25, 2002), *reprinted in* DANNER, *supra* note 197, at 167, 179 (expressing the belief that the following techniques are "legal and humane": "use of stress positions . . . for a maximum of four hours"; denial of "non-emergent" medical care; "[d]eprivation of high and auditory stimuli"; hooding; removal of clothing; "[f]orced grooming (shaving of facial hair etc.)"; and using "fear of dogs . . . to induce stress").

[214] *See, e.g.*, HERSH, *supra* note 205, at 2 (describing CIA analyst who examined interrogations at Guantanamo in mid-2002 and "came back convinced that we were committing war crimes"); *id.* at 6 (reporting FBI complaints of "slapping, . . . stripping, . . . pouring cold water, . . . making [prisoners] stand until they got hypothermia"); Jane Mayer, *The Memo*, NEW YORKER, Feb. 27, 2006, at 32 (Official logs described a detainee being "subjected to a hundred and sixty days of isolation in a pen perpetually flooded with artificial light, . . . interrogated on forty-eight of fifty-four days, for eighteen to twenty hours at a stretch" and being "stripped naked; straddled by taunting female guards . . . forced to wear women's underwear on his head, and to put on a bra; threatened by dogs; placed on a leash; and told that his mother was a whore. By December [2002], Qahtani had been subjected to a phony kidnapping, deprived of heat, given large quantities of intravenous liquids without access to a toilet, and deprived of sleep for three days.")

[215] 152 CONG. REC. S9998–99 (2006) (statement of Sen. Carl Levin on the nomination of Kenneth Wainstein to be Assistant Attorney General for National Security), *available at* http://www.senate.gov/~levin/newsroom/release.cfm?id=263599 (describing statement by former FBI Deputy General Counsel Marion Bowman that in late 2002, he "recommended [to FBI General Counsel Wainstein] that we notify DoD's general counsel that there were concerns about the treatment of detainees at Guantanamo.").

[216] *See, e.g.*, Mayer, *supra* note 214 (providing an account of efforts beginning in December 2002 by Admiral Alberto Mora, General Counsel of the Navy, triggered by whistleblowing investigators and psychologists to change policy and stem "escalating levels of physical and psychological abuse" in Guantanamo interrogations); Mora Memo, *supra* note 198; HERSH, *supra* note 205, at 2–10 (describing efforts of General John A. Gordon, Deputy National Security Advisor, in fall 2002 to seek high-level review of Guantanamo policies, which were met with a "full-court stall" by the Pentagon).

abuse was revoked, the abuse at Guantanamo was suspended, and a "working group" was convened to examine the problem. In the course of the deliberations, high-level JAG officers tabled strenuous objections to the prospect of legitimizing abuse.[217] The working group, however, ultimately disseminated an opinion authorizing prisoner abuse, but concealed its contents from potential opponents within the government.[218]

*2. Seeping Transparency: "Information Wants to Be Free"*

*a. Leaks and Hints*

Official denials notwithstanding, the policy of abuse was not entirely hidden from view. In deliberating internally, the administration apparently adopted an analysis that placed almost unlimited weight on avoiding dangers that could arise from the possible direct actions of opponents and discounted the possible doubts or adverse collateral effects of its own actions.[219] In the immediate aftermath of September 11,

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> [B]y the fall of 2002, some senior Justice Department officials were uneasy with the Pentagon's handling of the detainees . . . .
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> "[Counsel to the Vice-President David] Addington's position was, 'We think what we're doing is right—why should we stop doing it?' a former White House official said. 'If the courts tell us we're wrong, we'll stop then." . . .
>
> At Ms. Rice's urging, Mr. Rumsfeld also agreed to give comprehensive briefings on Guantanamo to cabinet-level national-security officials and their deputies. Officials said the higher-level presentation was delivered on Jan. 16, 2003. . . . 'It was basically a sales job . . . .'

Tim Golden, *Tough Justice; Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, at A1. The Mora Memo maintains that reports of abusive interrogation practices at Guantanamo ceased on January 15, 2003. Mora Memo, *supra* note 198, at 21. It does not purport to opine on actions elsewhere, and in December of 2003, FBI agents were complaining of "torture" tactics at Guantanamo. *See* E-mail from unknown author to Gary Bald (Dec. 5, 2003) (regarding Impersonating FBI at U.S. Naval Station Guantanamo Bay, Cuba), *available at* http://www.aclu.org/torturefoia/released/FBI.121504.3977.pdf; *cf.* Detainee Interviews (Abusive Interrogation Issues) (May 6, 2004), *available at* http://www.aclu.org/torturefoia/released/FBI_4194.pdf (reporting that the FBI objected to interrogation tactics in 2002 and 2003).

[217] Office of the Judge Advocate Gen., Unclassified Memoranda, *collected at* Balkinization, http://balkin.blogspot.com/jag.memos.pdf.

[218] WORKING GROUP REPORT *supra* note 198; *see* Mayer, *The Memo*, *supra* note 214; Mora Memo, *supra* note 198; Posting of Marty Lederman to Balkinization, http://balkin.blogspot.com/2005/09/silver-linings-or-strange-but-true.html (Sept. 21, 2005) (describing back-channel promulgation of policy and marginalization of JAG officers).

[219] RON SUSKIND, THE ONE PERCENT DOCTRINE 62 (2006) (describing "the Cheney Doctrine": "Even if there's just a one percent chance of the unimaginable coming due, act as if it is a certainty. It's not about 'our analysis,' as Cheney said. It's about 'our response.'"); *id.* at 166 ("Essentially the 'war on terror' was being guided by little more than 'the principle of actionable suspicion . . . . [T]he whole concept was that not having hard evidence shouldn't hold you back.").

intimations of this attitude began to emerge in public discussion as members of an administration frantic to gather information regarding a threat of unknown dimensions contemplated barbaric measures.[220] As what President Bush later referred to coyly as "an alternative set of procedures"[221] began to be deployed, their traces appeared in media reports.[222] Administration officials projecting a posture of toughness hinted at these measures in public statements.[223] But the administration

[220] *E.g.* John Cloud, *Hitting the Wall*, TIME, Nov. 5, 2001, at 65 ("Last week the *Washington Post* reported that some frustrated officials were actually discussing whether to seek approval for using truth drugs on the detainees. (The FBI denied the story.) Another option, since the U.S. would not formally condone torture, is to extradite the most intransigent detainees to allied nations known for bare-knuckle police work—a legally questionable move made on rare occasions even before Sept. 11.").

[221] President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html.

[222] Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1 ( giving an account of "renditions" to Egypt and Guantanamo, and quoting "U.S. officials" and "diplomats" as stating that "dozens" of renditions had occurred to "get information from terrorists in a way we can't do on U.S. soil"); Eric Umansky, *Failures of Imagination*, COLUM. JOURNALISM REV., Sept./Oct. 2006, *available at* http://cjrarchives.org/issues/2006/5/Umansky.asp (describing the genesis of the Chandrasekaran and Finn article, *supra*: "Chandrasekaran was reporting from Pakistan and saw a reference in a local paper to an al Qaeda suspect who had been flown away in the middle of the night by the U.S. Chandrasekaran ran the plane's tail number, which had been published, through an FAA database and quickly suspected that a CIA front was involved. 'I tried finding the number for the company listed and couldn't get anything,' . . . . The following spring, in early 2002, Chandrasekaran was stationed in Indonesia and saw a squib in a local paper about an Arab handed over to foreigners at a military air base. 'I went to the guy's neighborhood, talked to Indonesia intel sources, and one opened up to me,' he remembers."); Jess Bravin, *Interrogation School Tells Army Recruits How Grilling Works*, WALL ST. J., Apr. 26, 2002, at A1 (describing tactics "just a hair's-breadth from being an illegal specialty under the Geneva Convention"); Philip Shenon, *Officials Say Qaeda Suspect Has Given Useful Information*, N.Y. TIMES, Apr. 26, 2002, at A12 ("[S]uspects will not be subjected to any form of torture. But officials said other, nonviolent forms of coercion were being used, including sleep deprivation and a variety of psychological techniques that are meant to inspire fear."); Jess Bravin & Gary Fields, *How Do U.S. Interrogators Make a Captured Terrorist Talk?*, WALL ST. J., Mar. 4, 2003, at B1 ("[T]he treaty has no enforcement mechanism, as a practical matter, 'you're just limited by your imagination,' a U.S. law-enforcement official says."); *id.* (describing physical assaults and extradition "to some other country that'll let us pistol whip this guy").

[223] *Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of Sept. 11, 2001: Hearings Before the S. Select Comm. on Intelligence and the H. Permanent Select Comm. on Intelligence*, 105th Cong. 590 (2002) (testimony of Cofer Black) ("Operational flexibility: This is a highly classified area. All I want to say is that there was a 'before' 9/11 and there was an 'after' 9/11. After 9/11 the gloves come off. Nearly three thousand al-Qa'ida terrorists and their supporters have been detained."); Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1.

struggled to keep hard confirmation of abuses out of the public record.[224] In the absence of such confirmation, administration spokesmen and apologists could seek to portray accusations of abuse as based in political animus and misinformation.[225] The canons of responsible journalism combined with faith in the efficacy of traditional American values and the threat of accusations of unpatriotic rumor-mongering to limit reporting of thinly confirmed abuses.[226]

Still, facts are stubborn things, and by early 2003, the combination of off-the-record statements by American officials, reports by third party observers, and corroborating details began to congeal into accounts of abuses that were publishable in mainstream American media. The most prominent initial report appeared in the Washington Post in December 2002, as military lawyers struggled to reverse official approvals of abusive interrogation.[227]

Other domestic accounts followed over the next three months,[228] while foreign newspapers ran similar reports.[229] But amidst the fog of war

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[224] *See, e.g.*, discussion of Lindh plea bargain, *supra* notes 210–11; *Pentagon Photos Whodunnit*, CBSNEWS.COM, Nov. 8, 2002, http://www.cbsnews.com/stories/2002/11/08/attack/main528709.shtml ("The Pentagon Friday was investigating to find out who took and released photographs of terror suspects as they were being transported in heavy restraints aboard a U.S. military plane. Four photographs of prisoners—handcuffed, heads covered with black hoods and bound with straps on the floor of a plane—appeared overnight on the web site of radio talk show host Art Bell. 'Anonymous mailer sends us photos taken inside a military C-130 transporting POWS,' the headline said."); Bruce Kennedy, *The Truth is Out There: How "Detainees" Are Really Treated*, Nov. 8, 2002, *available at* http://www.jihadunspun.com/inHumanTerms/humanitarian/ttio.html (displaying the four photographs); Richard Sisk, *POW Pix Stir Furor; Military Denies Abuse*, DAILY NEWS, Nov. 9, 2002, at 2.

[225] *See, e.g.*, *supra* note 203 and accompanying text (discussing statements by Rumsfeld); Center for Defense Information, Q & A with Rear Adm. (Ret.) Stephen H. Baker, U.S.N, Senior Fellow, CDI (Jan. 25, 2002), http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1185 ("I think the 'outcry' is unfounded and primarily the result of the notorious British tabloids, Islamic groups in London, and political critics that have specific agendas to pursue. I think the majority of the American public, and the world, understands that inhumane treatment of prisoners is not the American way."); Office of the Press Sec'y, Press Briefing by Ari Fleischer (Mar. 3, 2003) ("The standard for any type of interrogation of somebody in American custody is to be humane and to follow all international laws and accords dealing with this type [of] subject.").

[226] *See* Umansky, *supra* note 222.

[227] Priest & Gellman, *supra* note 88 (providing accounts of interrogation techniques in American detention facilities, including "stress and duress" methods, criminal investigation into death of two prisoners at U.S. Air Force base, and alleged abuses); *id.* (quoting one official as commenting, "If you don't violate someone's human rights some of the time, you probably aren't doing your job").

[228] Umansky, *supra* note 222 (reporting that after a *New York Times* reporter filed a story on death in custody in Afghanistan, it was held back by editors because of doubts about sourcing); Carlotta Gall, *U.S. Military Investigating Death of Afghan in Custody*, N.Y. TIMES, Mar. 4, 2003, at A14 (the story by Umansky); Knut Royce, *Mixed Reviews from Experts; Critics: Makes Case on Deceit, Not Terror*, NEWSDAY, Feb. 6, 2003, at A7 (quoting Vincent Cannistraro, the former director of CIA's counterterrorism

in Afghanistan and the mounting public relations campaign for invading Iraq, it was difficult to establish or scrutinize underlying policy.[230]

The invasion of Iraq brought the prospect of further prisoners. In April 2003, internal military dismay with the prospect of abandoning limits that had constrained abuse for two generations impelled military lawyers to confidentially approach civilian human rights advocates in an effort to spark opposition.[231] Although advocates began to undertake these initiatives, they gained relatively little public traction, and in the absence of hard evidence, the administration's disavowal of "torture" and "inhumane" treatment continued to dominate general public discussion.[232] Inquiries from Congress were deflected;[233] complaints from

center, referring to "a senior al-Qaida detainee who had been held in the U.S. base at Guantanamo, Cuba, and was 'rendered' to Egypt after refusing to cooperate[, and 't]hey promptly tore his fingernails out and he started to tell things'"); Bravin & Fields, *supra* note 222 (quoting an unnamed "U.S. law-enforcement official" saying that "because the [Convention Against Torture] has no enforcement mechanism, as a practical matter, 'you're just limited by your imagination,' . . . . You go to some other country that'll let us pistol whip this guy."); Raymond Bonner et al., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1 ("Senior American officials said . . . interrogation would rely on what they consider acceptable techniques like sleep and light deprivation and the temporary withholding of food, water, access to sunlight and medical attention . . . covering suspects' heads with black hoods for hours at a time and forcing them to stand or kneel in uncomfortable positions in extreme cold or heat . . . some suspects had been turned over to security services in countries known to employ torture."); Mayer, *supra* note 211 (describing the interrogation of Lindh).

[229] *E.g.*, *Al-Qaeda Operatives Running Scared—Countdown to Conflict*, DAILY TELEGRAPH, Mar. 5, 2003, at 4 ("CIA interrogators continued questioning Khalid [Sheikh Mohammed] yesterday. He is likely to be bound hand and foot and kept awake for days in solitary confinement. US intelligence officers will use psychological 'stress and duress' techniques to break him . . . .").

[230] At the same time, the D.C. Circuit affirmed the District Court's decisions denying relief to Guantanamo detainees in *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003).

[231] Barry, Hirsh & Isikoff, *supra* note 207 ("Covertly, though, the JAGs made a final effort. . . . The JAGs told Horton they could only talk obliquely about practices that were classified. But they said the U.S. military's 50-year history of observing the demands of the Geneva Conventions was now being overturned."); Seymour M. Hersh, *The Gray Zone*, NEW YORKER, May 24, 2004, at 38, 42 ("In 2003, Rumsfeld's apparent disregard for the requirements of the Geneva Conventions while carrying out the war on terror had led a group of senior military legal officers from the Judge Advocate General's (JAG) Corps to pay two surprise visits within five months to Scott Horton, who was then chairman of the New York City Bar Association's Committee on International Human Rights. 'They wanted us to challenge the Bush Administration about its standards for detentions and interrogation' . . . .").

[232] David E. Kaplan, *Playing Offense: The Inside Story of How U.S. Terrorist Hunters Are Going After al Qaeda*, U.S. NEWS & WORLD REP., June 2, 2003, at 18 (providing a largely admiring account of the administration's "lock[ing] up" nearly 1,000 al Qaeda members and supporters in 2002, establishing "a network of holding centers and prisons the United States began using in the war on terrorism," and carrying out renditions of "dozens" of prisoners ); Peter Slevin, *U.S. Pledges Not to Torture Terror Suspects*, WASH. POST, June 27, 2003, at A1 (reporting on a statement by Defense

the International Committee of the Red Cross were buried.[234] By the fall of 2003, the administration sought to bolster its flagging efforts in Iraq by bringing to bear the interrogation techniques it had deployed elsewhere.[235]

In this environment, advocacy groups turned to the Freedom of Information Act. Notwithstanding the earlier bleak reception before the DC Circuit in *CNSS*,[236] in early October 2003 the ACLU and a coalition of civil rights organizations filed a Freedom of Information Act request. Citing the news reports and complaints of abuse, it sought documents regarding "policies, procedures or guidelines," and legal discussion of abuse of prisoners in American custody, as well as documents regarding enforcement of such guidelines, violations, and treatment of detainees.[237] Allegations continued to leak into the news media,[238] and Maher Arar,

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Department General Counsel Haynes that the U.S. would not engage in "cruel, inhuman or degrading treatment").

[233] *See* Press Release, Sen. Patrick Leahy, Statement on the Abuse of Prisoners in U.S. Military Custody (May 5, 2004), *available at* http://leahy.senate.gov/press/200405/050504c.html (describing inquiries from his office and Sen. Specter's in summer and fall 2003).

[234] Douglas Jehl, *Earlier Jail Seen as Incubator for Abuses in Iraq*, N.Y. TIMES, May 15, 2004, at A1 ("After several visits to Camp Cropper, where they interviewed Iraqi prisoners, officials of the I.C.R.C. in early July 2003 cited at least 50 incidents of abuse reported to have taken place in a part of the prison under the control of military interrogators."); Umansky, *supra* note 222 ("Charles Hanley, a special correspondent for The Associated Press . . . came across a little-noticed Amnesty International report charging that 'very severe' human rights abuses were occurring at U.S. prisons [in Iraq] . . . [that] suggested that the Amnesty allegations were based at least in part on leaks from the International Committee for the Red Cross . . . .").

[235] Seymour M. Hersh, *Rumsfeld's Dirty War on Terror (Part 2)*, GUARDIAN, Sept. 13, 2004, *available at* http://web.archive.org/web/20040914004848/books.guardian.co.uk/extracts/story/0,6761,1303429,00.html. ("By the autumn of 2003, a military analyst told me, the extent of the Pentagon's political and military misjudgments in Iraq was clear. The solution, endorsed by Rumsfeld and carried out by Cambone, was to get tough with the Iraqi men and women in detention—to treat them behind prison walls as if they had been captured on the battlefields of Afghanistan."); HERSH, *supra* note 205, at 59–62 (describing abuse so extreme that the CIA "checks with their lawyers and pulls out.").

[236] Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003).

[237] Letter from Amrit Singh, Staff Attorney, ACLU, to Freedom of Information Officer (Oct. 7, 2003), *available at* http://www.aclu.org/torturefoia/legaldocuments/nnACLUFOIArequest.pdf.

[238] Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51; *see* Josh Gerstein, Op-Ed, *Selective Secrecy*, N.Y. SUN, Oct. 15, 2004, at 11 (giving an account of October of 2003 when "Red Cross officials expressed their concerns about Guantanamo for articles published or aired by the Associated Press, National Public Radio, and the New York Times," as well as publishing "emotional first-hand audio accounts from its staff" on its website, but noting that the author's FOIA request for Red Cross complaints had been denied); *cf.* Gerstein v. Dep't of Defense, No. 03-5193 (N.D. Cal. Dec. 21, 2004) (denying FOIA request) (referred to in Nat'l Inst. of Military Justice v. U.S. Dep't of Def., 404 F. Supp. 2d 325, 340 (D.D.C. 2005)).

a Canadian deported by the U.S. to be tortured in Syria a year earlier was released to begin his campaign for vindication.[239] Yet, the Defense Department denied expedited processing of the ACLU request on the ground that the subject lacked urgency.[240]

*b. Internal Scrutiny and Abu Ghraib*

In late 2003, complaints of abusive interrogation techniques again began to make their way up the hierarchy of the administration. FBI agents stationed at Guantanamo complained of "torture techniques";[241] FBI and CIA agents objected to military abuses in Iraq and withdrew from cooperation;[242] complaints from the field in Iraq by officials of the Coalition Provisional Authority and the State Department provoked discussions at high-level national security meetings;[243] and Army reports began to note potential human rights violations.[244] In December 2003,

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[239] *See* Arar v. Ashcroft, 414 F. Supp. 2d 250, 255 (E.D.N.Y. 2006) ("On October 5, 2003, Syria, without filing any charges against Arar, released him into the custody of Canadian Embassy officials in Damascus."); Letter from Sen. Patrick Leahy to William J. Haynes II, General Counsel, Dep't of Def. (Sept. 9, 2003), *available at* 150 CONG. REC. S781, S783–84 (daily ed. Feb. 10, 2004) (raising questions about the treatment of Arar).

[240] Letter from H.J. McIntyre, Dir., Directorate for Freedom of Info. and Sec. Rev., Dep't of Def., to Amrit Singh, Staff Attorney, ACLU Found. (Oct. 30, 2003), *available at* http://www.aclu.org/torturefoia/legaldocuments/mmDODrejectexpproc.pdf (denying expedited processing). At the same time, the administration sought to suppress information regarding the custodial treatment of Jose Padilla. Tim Grieve, *Trust Us*, SALON.COM, May 17, 2004, http://dir.salon.com/story/news/feature/2004/05/17/trust/index.html (When the Department of Defense allowed Padilla's counsel to interview him in late 2003, according to counsel, "We were prohibited from asking him about the conditions of his confinement.").

[241] *See* E-mail from unknown author to Gary Bald (Dec. 5, 2003) (regarding Impersonating FBI at the U.S. Naval Station Guantanamo Bay, Cuba), *available at* http://www.aclu.org/torturefoia/released/FBI.121504.3977.pdf; Counterterrorism Interdepartmental Memorandum (Nov. 25, 2003), *available at* http://www.aclu.org/torturefoia/released/FBI_4625_4629.pdf (documenting the impersonation of FBI agents by DoD interrogators).

[242] Mark Bowden, *The Ploy*, ATLANTIC MONTHLY, May 2007, *available at* http://www.ocnus.net/artman/publish/article_28511.shtml. ("In early 2004, both the CIA and the FBI complained to military authorities about such practices. The spy agency then banned its personnel from working at [one facility.]").

[243] Johanna McGeary, *The Scandal's Growing Stain*, TIME, MAY 18, 2007, *available at* http://www.time.com/time/printout/0,8816,994176,00.html ("Aides to Bremer and Secretary of State Colin Powell say that as early as last fall, both men raised the issue in meetings with the rest of the Administration's national-security team. Yet no action was taken . . . .").

[244] HERSH, *supra* note 205, at 28 (citing Nov. 5, 2003 report by General Ryder to General Sanchez regarding potential "human rights violations" and "serious concerns" about interrogation in Iraq); *see also* INT'L COMM. OF THE RED CROSS, THE ICRC REPORT: 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

Jack Goldsmith, who had been appointed to head the Office of Legal Counsel (OLC) in October 2003, advised the Department of Defense that the earlier OLC memo defining away the prohibition on torture "was under review" and "should not be relied upon."[245] Fatefully, on January 13, 2004, Sgt. Joseph Darby submitted a complaint and a compact disc of Abu Ghraib pictures to a military investigator for the Criminal Investigative Division.[246] The Army issued a one-paragraph press release referring to an investigation of prisoner abuse at an unspecified prison in Iraq, withholding specific details.[247] A week later, reports of the nature of the abuse began to circulate.[248] On January 28, 2004, the Canadian government announced a full public inquiry into the deportation to Syria and alleged torture of Maher Arar.[249] On January 31, 2004, General

AND INTERROGATION (Feb. 2004), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 384 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

[245] Letter from Daniel Levin, Acting Ass't Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes II, General Counsel, Dep't of Def. (Feb. 4, 2005), *available at* http://balkin.blogspot.com/Levin.Haynes.205.pdf.

At roughly the same time, American agents kidnapped an innocent German citizen, Khalid El Masri. El-Masri v. Tenet, 437 F. Supp. 2d 530, 532–33 (E.D. Va. 2006) (reporting that he was detained on December 31, 2003; flown to Kabul by CIA agents, and then beaten, detained, and interrogated). Also, American military operators in Iraq began to increase abusive interrogations in an effort to suppress insurgents. *See, e.g.*, Eric Schmitt & Carolyn Marshall, *In Secret Unit's "Black Room," A Grim Portrait of U.S. Abuse*, N.Y. TIMES, Mar. 19, 2006, at A1 (describing abuses by special forces in early 2004 "[a]s the Iraqi insurgency intensified"); Seymour M. Hersh, *Moving Targets*, NEW YORKER, Dec. 15, 2003, at 48, *available at* http://www.newyorker.com/printables/
fact/031215fa_fact ("The Bush Administration has authorized a major escalation of the Special Forces covert war in Iraq. . . . A new Special Forces group . . . has been assembled . . . . Its highest priority is the neutralization of the Baathist insurgents, by capture or assassination.").

[246] *See, e.g.*, John Shattuck, *On Abu Ghraib: One Sergeant's Courage a Model for US Leaders*, CHRISTIAN SCI. MONITOR, May 16, 2005, at 9, *available at* http://www.csmonitor.com/2005/0516/p09s02-coop.html; Hersh, *supra* note 231, at 43 ("The abuses at Abu Ghraib were exposed on January 13th, when Joseph Darby, a young military policeman assigned to Abu Ghraib, reported the wrongdoing to the Army's Criminal Investigations Division. He also turned over a CD full of photographs. Within three days, a report made its way to Donald Rumsfeld, who informed President Bush.").

[247] Sherry Ricchiardi, *Missed Signals*, AM. JOURNALISM REV., Aug./Sept. 2004, at 22, 24 (quoting a release: "An investigation has been initiated into reported incidents of detainee abuse at a Coalition Forces detention facility. The release of specific information concerning the incidents could hinder the investigation, which is in its early stages. The investigation will be conducted in a thorough and professional manner.").

[248] Barbara Starr, *Details of Army's Abuse Investigation Surface*, CNN.COM, Jan. 21, 2004, http://www.cnn.com/2004/US/01/20/sprj.nirq.abuse/ ("U.S. soldiers reportedly posed for photographs with partially unclothed Iraqi prisoners, a Pentagon official told CNN on Tuesday . . . Defense Secretary Donald Rumsfeld has been briefed on the investigation . . . .").

[249] *Maher Arar: Timeline*, CBC NEWS, Jan. 26, 2007, *available at* http://www.cbc.ca/news/background/arar/ (reporting that on January 22, 2004,

Antonio Taguba was appointed at the request of General Ricardo Sanchez, the commander of coalition forces in Iraq, to investigate prisoner abuse at Abu Ghraib.[250]

General Taguba completed his report in early March, setting forth both the "sadistic, blatant and wanton" prisoner abuse by guards and apparent collusion and acquiescence by officers.[251] For reasons that are still unexplained, the report was classified "Secret," although the administration subsequently conceded that this classification was an error.[252]

In the next month, intimations regarding the report began to leak into the public media, and the administration continued to seek to suppress them. As fighting raged in Iraq, and the administration prepared to argue before the Supreme Court for unreviewable power over detainees, the Chairman of the Joint Chiefs of Staff, General Richard Myers, personally persuaded CBS news anchor Dan Rather to delay the network's broadcast of the pictures and its account of the Taguba report on Abu Ghraib.[253] On the afternoon of April 28, 2004,

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Arar filed suit against the U.S. Government); *dismissed in part,* Arar v. Ashcroft, 414 F. Supp. 2d 250, 287–88 (E.D.N.Y. 2006).

[250] ANTONIO M. TAGUBA, U.S. DEP'T OF DEF., ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 6 (2004), *available at* http://www.npr.org/iraq/2004/prison_abuse_report.pdf [hereinafter TAGUBA REPORT].

[251] *Id.* at 14–20.

[252] *Torture Report May Have Broken Classification Rules*, SECRECY NEWS, May 5, 2004, *available at* http://www.fas.org/sgp/news/secrecy/2004/05/050504.html (quoting Pentagon spokesmen and Secretary Rumsfeld as disavowing any knowledge of why the report was classified). In response to complaints from transparency advocates, the Information Security Oversight Office (ISOO) opened an inquiry. FAS Project on Government Secrecy, *ISOO Will Investigate Secrecy of Torture Report*, SECRECY NEWS, May 7, 2004, *available at* http://www.fas.org/sgp/news/secrecy/2004/05/050704.html. ISOO ultimately generated remedial actions by the Department of Defense. Letter from J. William Leonard, Dir., Info. Sec. Oversight Office, to Steven Aftergood, Dir., Project on Gov't Secrecy (Oct. 29, 2004), *available at* http://www.fas.org/sgp/news/2004/10/isoo102904.pdf. ("[P]ursuant to Section 5.2 of Executive Order 12958, as amended, I have pursued with the Department of Defense (DoD) the issues you identified in your letter. This is to advise you that I have been informed by DoD that they have declassified the majority of the classified information [in the Taguba Report noting a] recent DoD-wide message from the Secretary of Defense emphasizing command responsibility for holding both original and derivative classifiers of information accountable for the accuracy of their classification decisions."); Memorandum from Sec'y of Def. Donald Rumsfeld, DOD Information Security Program (Sept. 4, 2004), *available at* http://www.fas.org/sgp/bush/secdef091604.pdf (emphasizing importance of not using classification to avoid "embarrassment" or "conceal violations of law" in memo directed particularly to "corrective action" regarding "information related to detainees [or] prisoner abuse").

[253] Umansky, *supra* note 222, at 22 ("As Dan Rather, the segment's correspondent, noted, CBS had held the story for two weeks at the request of Richard Myers, chairman of the joint chiefs of staff, who, citing the major fighting in Fallujah, a Shiite uprising in Najaf, and two American civilians being held hostage in Iraq, had argued that the photos would further inflame matters in the region."); *see, e.g.*, David

then-Associate Solicitor General Paul Clement, arguing in *Rumsfeld v. Padilla*, entered into a colloquy with Justice Ginsburg regarding the possibility of prisoner abuse, and again disavowed any policy of abusive interrogation.[254] That evening, as the *New Yorker* magazine prepared to break the Abu Ghraib story, CBS *60 Minutes II* broadcast the story and some of the graphic pictures.[255]

Once breached, the secrecy and dissimulation regarding the pictures and the Taguba report crumbled. Pictures ricocheted around the globe, and copies of the Taguba report began to appear on the Internet. By early May, the administration was reduced to issuing threats of criminal prosecution for the leakers of the report and sending internal e-mails adjuring military personnel to "1) NOT GO TO FOX NEWS TO READ OR OBTAIN A COPY[;] 2) NOT comment on this to anyone[;] 3) NOT delete the file if you receive it via e-mail, but 4) CALL THE ISD HELPDESK AT 602–2627 IMMEDIATELY."[256]

*3. Transparency Deployed: The Slow March Toward Known Knowns*

The outlines of the Abu Ghraib abuses themselves became rapidly known, but the background of the abuses, the scope of parallel barbarities, and the broader policies regarding interrogation and

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Folkenflik, *Iraq Prison Story Tough To Hold Off On, CBS Says*, BALT. SUN, May 5, 2004, at 1D.

[254] [Justice RUTH BADER GINSBURG]: But if the law is what the executive says it is, whatever is necessary and appropriate in the executive's judgment . . . [w]hat is it that would be a check against torture? . . .

> [Justice GINSBURG:] Suppose the executive says mild torture we think will help get this information. It's not a soldier who does something against the Code of Military Justice, but it's an executive command. Some systems do that to get information.
>
> Mr. CLEMENT: Well, our executive doesn't . . . .

Transcript of Oral Argument at 22–23, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1027.pdf.

The Department of Justice refused to comment on whether Clement was aware of the abuse at Abu Ghraib. Grieve, *supra* note 240 ("An employee in Clement's office referred a call from Salon last week to Justice Department spokesperson Monica Goodling. Asked what Clement or Ashcroft knew of the Abu Ghraib situation at the time of oral arguments in the Hamdi and Padilla cases, Goodling said: "We wouldn't have any comment.").

[255] *60 Minutes II* (CBS television broadcast Apr. 28, 2004) (transcript on file with the Lewis & Clark Law Review); *see* Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42, 43, *available at* http://www.newyorker.com/fact/content/articles/040510fa_fact?040510fa_fact (quoting from a copy of the Taguba report "obtained by *The New Yorker*," describing some of the graphic abuses); *cf.* Sewell Chan & Jackie Spinner, *Allegations of Abuse Lead to Shakeup at Iraqi Prison*, WASH. POST, Apr. 30, 2004, at A24 (describing abuses and the content of "sealed charging papers").

[256] E-mail from Information Services Customer Liaison, U.S. Dep't of Defense, to All ISD Customers, U.S. Dep't of Defense (May 6, 2004), *available at* http://www.time.com/time/world/article/0,8599,634637,00.html.

detainee treatment were less transparent. Under the pressure of worldwide condemnation, the administration in turn decried the specific abuses and abusers at Abu Ghraib, and the CIA, the Defense Department, and the FBI embarked on internal investigations.[257] Inquiries in the Republican-controlled Congress, however, were met with a combination of disingenuous disavowals, misleading misdirection, and outright obstruction.[258]

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[257] For a discussion of the CIA investigation, see *ACLU v. Dep't of Def.*, 351 F. Supp. 2d 265, 268 (S.D.N.Y. 2005) ("[O]n May 11, 2004, the CIA's Office of Inspector General (the 'OIG') 'commenced a criminal investigation of allegations of impropriety in Iraq.'").

For a discussion of the DoD investigation, see Michael Hirsh & John Barry, *The Abu Ghraib Scandal Cover-Up?*, NEWSWEEK, June 7, 2004, at 34, *available at* http://www.newsweek.com/id/53972 (describing apparently cursory Defense department investigations and efforts to silence witnesses to Abu Ghraib abuses).

For a discussion of the FBI investigations, see, e.g., Letter from T. J. Harrington, Deputy Ass't Dir., Counterterrorism Div., FBI, to Maj. Gen. Donald J. Ryder, Criminal Investigation Command, U.S. Dep't of the Army (July 14, 2004), *available at* http://www.aclu.org/torturefoia/released/010505.html (detailing prior FBI complaints); E-mail regarding GTMO-Related E-mails, Notes, etc. (May 10, 2004), *available at* http://www.aclu.org/torturefoia/released/FBI_4142.pdf (directing BAU members to preserve backup data); R. Jeffrey Smith, *Justice Redacted Memo on Detainees: FBI Criticism of Interrogations Was Deleted*, WASH. POST, Mar. 22, 2005 at A3 (referring to a different May 10, 2004, FBI memo documenting a chronology of prior FBI objections to abusive interrogation); Mark Isikoff & Mark Hosenball, *Has the Government Come Clean?*, NEWSWEEK, Jan. 5, 2005, *available at* http://www.newsweek.com/id/48419 ("After Mueller's testimony [on May 20, 2004], [FBI spokesman Michael] Kortan said the FBI general counsel's office began a more systematic effort to document the abuses that had been recorded by its agents in Iraq, Afghanistan and Guantanamo. The result was a flood of alarming reports . . . .").

[258] *See, e.g.*, Isikoff & Hosenball, *supra* note 257 (describing May 2004 testimony from the FBI Director as "confusing" and "obfuscatory"); Hirsh & Barry, *supra* note 257, at 36 ("On Capitol Hill, legislators on both sides of the aisle complain testily that the Pentagon has turned into an informational black hole. Some 2,000 out of 6,000 pages were missing from the copy of the Taguba report delivered from the Pentagon to the Senate Armed Services Committee. Pentagon spokesman Larry DiRita last week called this merely an 'oversight.'"); Press Release, Reaction of Sen. Patrick Leahy to Attorney General Ashcroft's Refusal to Provide Memos on Torture Policy (June 8, 2004), *available at* http://leahy.senate.gov/press/200406/060804a.html; *see also* DEMOCRATIC STAFF OF H. COMM. ON THE JUDICIARY, THE CONSTITUTION IN CRISIS: THE DOWNING STREET MINUTES AND DECEPTION, MANIPULATION, TORTURE, RETRIBUTION, AND COVERUPS IN THE IRAQ WAR 149–50 (2005) *available at* http://rawstory.com/other/conyersreportrawstory.pdf (describing thwarted efforts to seek information on approval of abusive interrogation in the aftermath of Abu Ghraib disclosures).

The prospect of exposure may have generated some positive change in the CIA's detention program. On May 28, 2004, Khalid El-Masri was released. *See* El-Masri v. Tenet, 437 F. Supp. 2d 530, 534 (E.D. Va. 2006) (filed Dec. 6, 2005; dismissed on state secrets privilege ground on May 12, 2006) ("El-Masri says he remained imprisoned in Kabul until May 28, 2004, after which he was flown in a private jet, again blindfolded, from Kabul to Albania, where he was deposited by his captors on the side of an abandoned road."), *aff'd*, 479 F.3d 296 (4th Cir. 2007).

With congressional investigation stymied, other mechanisms started to fill in the picture. In May and June 2004, internal whistleblowers began to disseminate to the media and the Internet both legal memoranda authorizing abusive interrogation, and the supporting documents of the Taguba report.[259] Ultimately, in late June, the administration officially released some of the memoranda.[260]

Based on these disclosures, the ongoing public controversy, and the emerging hints of documentary evidence, on May 25, 2004, the ACLU coalition renewed its October 2003 FOIA requests regarding detainee abuse, this time seeking specific documents identified in the media.[261] The coalition filed suit a week later in the Southern District of New York, beyond the precedential reach of the D.C. Circuit's *CNSS* opinion, to compel processing and production.[262] The Department of Justice, in

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[259] E.g., Barry, Hirsh & Isikoff, *supra* note 207, at 29 (describing memoranda); Jess Bravin, *Pentagon Report Set Framework for Use of Torture; Security or Legal Factors Could Trump Restrictions, Memo to Rumsfeld Argued*, WALL ST. J., June 7, 2004, at A1 (reporting contents of memoranda); *Morning Edition: Ashcroft Won't Release Torture Memos to Senate* (NPR radio broadcast June 9, 2004), *recording available at* http://www.npr.org/templates/story/story.php?storyId=1950677 (at 1:00) ("The memorandum, first reported by The Wall Street Journal on Monday, has since been obtained by NPR and is on the NPR Web site."); Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002*, WASH. POST, June 8, 2004, at A1 (reporting on the August 2002 Bybee memo); Opinion, *Tormented Truths; Secrecy Obscures Why Administration Sought Memos on Uses of Torture*, NEWSDAY, June 10, 2004, at A42; Osha Gray Davidson, *The Secret File of Abu Ghraib*, ROLLING STONE, July 28, 2004, *available at* http://www.rollingstone.com/politics/story/6388256/the_secret_file_of_abu_ghraib/ (describing Taguba report appendices leaked to the author in June, but not posting them); *see* Alexander Cohen, *The Abu Ghraib Supplementary Documents*, CENTER FOR PUB. INTEGRITY, Oct. 8, 2004, *available at* http://www.publicintegrity.org/report.aspx?aid=396&sid=100 (posting files forwarded by Osha Gray Davidson after reviewing them for sensitive information October 8, 2004).

[260] Nat'l Sec. Archive, The Interrogation Documents: Debating U.S. Policy and Methods (July 13, 2004), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127 (compiling documents, and describing leaks, culminating in partial releases of documents by the White House and Defense Department).

[261] Letter from Lawrence S. Lustberg to H.J. McIntyre, Dir., Directorate for Freedom of Info. & Sec. Review, U.S. Dep't of Def. (May 25, 2004), *available at* http://www.aclu.org/torturefoia/legaldocuments/jjACLUSecondFOIArequest.pdf (requesting records regarding the treatment of post-September 11 detainees).

[262] Complaint, ACLU v. Dep't of Def., 339 F. Supp. 2d 501 (S.D.N.Y. 2004) (No. 04-CV-4151 (AKH)), *available at* http://ccrjustice.org/files/CCR_ACLU_FOIATortureComplaint.pdf ACLU, Responsive Records Specifically Identified in Plaintiffs' May 25, 2004 Torture FOIA Request, http://www.aclu.org/torturefoia/Documents_081604.pdf (table of identified documents).

Under FOIA, venue lies in the district in which the claimant resides as well as the District of Columbia of the location of the requested records. Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) (2000).

Other NGOs also began to deploy FOIA to bring detainee abuses to light. *See, e.g.*, *Photos of Iraqi Prisoner Abuse Sought Under FOIA*, SECRECY NEWS, May 12, 2004, *available at* http://www.fas.org/sgp/news/secrecy/2004/05/051204.html; Human Rights First, *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan*,

which the FBI was marshaling the record of its objections to abuses, granted expedited processing on June 2, 2004. The State Department, which had opposed suspension of the Geneva Conventions, followed suit on June 18, 2004, although neither agency was able to provide a schedule for that processing.[263] The Defense Department, joined by the CIA, however, again saw no "compelling need" in the request and denied expedited processing on June 21, 2004.[264] On June 28, 2004, the Supreme Court issued its opinions rebuffing the administration in *Hamdi* and *Rasul*, and reaffirming that "a state of war is not a blank check for the President."[265] On July 6, 2004, the ACLU filed an amended FOIA complaint and a motion for preliminary relief.

After a month and a half of motion practice and negotiation, the matter came for a hearing before Judge Alvin Hellerstein in the Southern District of New York. Judge Hellerstein was unsympathetic to what he referred to as the government's "scant production," its delaying tactics, and its claims of national security as justification for the delay.[266] Setting a deadline of October 15, 2004 for the production or identification of responsive documents, Judge Hellerstein observed:

> [T]he glacial pace at which defendant agencies have been responding to plaintiffs' requests shows an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires. If the documents are more of an embarrassment than a secret, the public should know of our government's treatment of individuals captured and held abroad. "[H]istory and common sense teach us that an unchecked system of

http://www.humanrightsfirst.org/us_law/etn/dic/index.asp; Human Rights First, *Human Rights First's Freedom of Information Act Requests Relating to Deaths in Custody*, http://www.humanrightsfirst.org/us_law/etn/dic/foia.asp; Sam Hananel, *Amnesty Int'l Seeks Military's Taser Files*, ASSOCIATED PRESS, Nov. 30, 2004 (reporting an Amnesty International FOIA request regarding the use of Tasers in Iraq and Afghanistan).

[263] Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 5 n.2, ACLU v. Dep't of Def., 339 F. Supp. 2d 501 (S.D.N.Y. 2004) (No. 04-CV-4151 (AKH)), *available at* http://www.aclu.org/torturefoia/legaldocuments/ffACLUExpProcMemo.pdf.

[264] Letter from C.Y. Talbott, Chief, Office of Freedom of Info. and Sec. Rev., U.S. Dep't of Def., to Jennifer Ching, Att'y for ACLU (June 21, 2004), *available at* http://www.aclu.org/torturefoia/legaldocuments/iiDODDenyExpProc.pdf.

[265] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004); Rasul v. Bush, 542 U.S. 466 (2004); *cf.* Rumsfeld v. Padilla, 542 U.S. 426 (2004). It appears that the Justices were cognizant of the mounting tide of disclosures regarding the administration's abuses. *See* Grieve, *supra* note 240 ("Justices Anthony Kennedy and Sandra Day O'Connor met with a panel of Iraqi judges in the Netherlands earlier this month, and they said afterward that they had conveyed to the Iraqis—subtly, for fear of exposing any bias in court-martial cases to come—their concern over the Abu Ghraib abuses. In a follow-up interview with the Associated Press, Kennedy said the Iraqi judges 'innately knew, instinctively knew, how concerned we were' about what happened at Abu Ghraib.").

[266] ACLU v. Dep't of Def., 339 F. Supp. 2d 501, 503–04 (S.D.N.Y. 2004)*; see id.* at 502 ("Ours is a government of laws . . . . No one is above the law . . . ."); *id.* at 504 ("Merely raising national security concerns can not justify unlimited delay.").

detention carries the potential to become a means for oppression and abuse."[267]

As it moved to respond to Judge Hellerstein's deadline, one might have expected that the administration would claim the right to withhold documents on the basis of national security under FOIA Exemption 1 that had proven so efficacious in beating back efforts to uncover information concerning the use of the Patriot Act. The administration had, after all, classified the Taguba report and threatened to prosecute those who had leaked it, and it could rely on precedent according "special deference" to the government's expertise regarding national security. But no such claims were raised.

The full reason for this uncharacteristic restraint remains unclear, but traces of an answer emerge in the public record. William Leonard, Director of the Information Security Oversight Office which has responsibility for monitoring and reviewing government decisions and policies regarding classified national security information, had been appointed by President Bush in 2002, after a career that included service at the head of the Pentagon's Information Security program.[268] In May of 2004, as the Abu Ghraib story broke, open government activists officially requested that he investigate the classification of the Taguba report.[269] Mr. Leonard, who had served on the Interagency Security Classification Appeals Panel, apparently took the request seriously. According to one report, he "made a personal visit to the Defense Department to ask why elements of Maj. Gen. Antonio Taguba's report on the abuse of prisoners in Iraq had been classified," commenting, "On the surface, they gave the appearance that the classification was used to conceal violations of law which is specifically prohibited."[270] In July 2004, Mr. Leonard publicly challenged the classification of portions of the Working Group report authorizing coercive interrogation.[271] In apparent response to Mr.

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[267] *Id.* at 504–05 (quoting Hamdi v. Rumsfeld, 542 U.S. 507 (2004)).

[268] Information Security Oversight Office, Director J. William Leonard, http://www.archives.gov/isoo/about/director.html; *see* Classified National Security Information, Exec. Order No. 12,958, 68 Fed. Reg. 15,315 (Mar. 28, 2003), *available at* http://www.archives.gov/isoo/policy-documents/eo-12958-amendment.html#part-5 (setting forth authority of ISOO).

[269] *ISOO Will Investigate Secrecy of Torture Report*, SECRECY NEWS, May 7, 2004, *available at* http://www.fas.org/sgp/news/secrecy/2004/05/050704.html; *see also* Classified National Security Information, 68 Fed. Reg. at 15,327 (The ISOO has authority to "require of each agency those reports, information, and other cooperation that may be necessary to fulfill its responsibilities" and "consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the program established under this order.").

[270] Paul Shukovsky, *U.S. Moves to Classify Abuse Suit Documents*, SEATTLE POST-INTELLIGENCER, June 24, 2004, at A1.

[271] Shaun Waterman, *Pentagon Classifying "Impulse" Criticized*, WASH. TIMES, July 8, 2004, at A6. (reporting on Leonard's demand for an explanation of classification of the observation that, "Consideration must be given to the public's reaction to

Leonard's efforts, on September 16, 2004, Secretary Rumsfeld distributed a memorandum calling for "corrective action . . . at DoD components that generate information related to detainees and prisoner abuse" to eschew the use of classification to conceal violations of law.[272] Because Exemption 1 can be invoked only where government officials certify that material is properly classified, it appears that Mr. Leonard's integrity precluded the "national security" gambit before Judge Hellerstein.

On October 14, 2004, the administration released the first 6,000 pages of documents, including the annexes to the Taguba report.[273] Partially redacted FBI memoranda documenting both military interrogation abuses and the FBI's tabled objections to them began to emerge in December 2004 after the presidential election,[274] along with a tide of other evidence of abusive policies.[275] The flow of documents has not slackened in the subsequent three years. As motion practice

methods of interrogation that may affect the military commission process. The more coercive the method, the greater the likelihood that the method will be met with significant domestic and international resistance.").

[272] Memorandum from Sec'y of Def. Donald Rumsfeld, DOD Information Security Program (Sept. 16, 2004), *available at* http://www.fas.org/sgp/bush/secdef091604.pdf ("It is important to state that classifiers shall not: a) use classification to conceal violations of law, inefficiency, or administrative error; b) classify information to prevent embarrassment to a person, organization, or agency; c) classify information to prevent or delay the release of information that does not require protection in the interest of national security."); *see* Letter from J. William Leonard, Dir., Info. Sec. Oversight Office, to Steven Aftergood, Dir., Project on Gov't Secrecy (Oct. 29, 2004), *available at* http://www.fas.org/sgp/news/2004/10/isoo102904.pdf (noting declassification of Taguba report after Leonard's having "pursued" the issue with the Department of Defense, and noting a series of "ancillary initiatives" to enhance "command responsibility" and "reinforce sound classification").

[273] *See* Press Release, ACLU, Federal Government Turns Over Thousands of Torture Documents to ACLU (Oct. 21, 2004), *available at* http://www.aclu.org/intlhumanrights/gen/13803prs20041021.html. Many of the documents are available at http://www.aclu.org/torturefoia/released/101504.html.

[274] *See, e.g.*, Press Release, ACLU, FBI E-Mail Refers to Presidential Order Authorizing Inhumane Interrogation Techniques (Dec. 20, 2004), *available at* http://www.aclu.org/safefree/general/18769prs20041220.html; Isikoff & Hosenball, *supra* note 257 ("The result was a flood of alarming reports that have now been turned over to the American Civil Liberties Union in its Freedom of Information lawsuit seeking the release of government documents on the treatment of prisoners. The release of these documents has exacerbated tensions between the FBI and the Pentagon over the issue. Defense officials have privately complained that bureau officials affirmatively decided to turn over the documents in the lawsuit in order to protect itself from charges that it was complicit in the improper treatment of prisoners. 'This is cover [your] a— at its finest,' one Pentagon official told NEWSWEEK."). FBI documents released in the first wave had been almost entirely redacted. *See* Press Release, ACLU, *supra* note 273.

[275] *See* ACLU, Torture Documents Released Under FOIA, http://www.aclu.org/safefree/torture/torturefoia.html (reflecting waves of released documents released from 2005 to 2007, including "reprocessed" documents where redacted material was restored under pressure); ACLU, List of FOIA Releases, http://www.aclu.org/safefree/torture/logs.html (same for 2004 to 2005).

continued before Judge Hellerstein, by the end of 2006 the New York litigation had resulted in the release of over 100,000 pages of documents.[276]

The process was a matter of trench warfare as administration lawyers tenaciously sought to delay and excuse production, while attorneys from the ACLU, augmented by trial practitioners from the private sector, doggedly pressed for disclosure.[277] In these battles, in September 2005, Judge Hellerstein reluctantly accepted the CIA's claim that revealing the presence or absence of a memorandum granting authority to set up detention facilities would "reveal intelligence sources or methods," but he required the CIA to reveal the existence of an OLC memorandum to the CIA interpreting the Convention Against Torture.[278]

At the same time, Judge Hellerstein rejected the Defense Department's efforts to withhold from public disclosure photographs and videotapes depicting abuse of detainees, in particular the contents of the compact disc that specialist Darby had used to expose the abuses at

[276] Press Release, ACLU, FBI Inquiry Details Abuses Reported by Agents at Guantanamo (Jan. 3, 2007), *available at* http://www.aclu.org/safefree/torture/27816prs20070103.html. The ACLU has provided a searchable data base of the documents at http://www.aclu.org/torturefoia/search/search.html.

[277] ACLU v. Dep't of Def., No. 04 Civ. 4151 (AKH), 2004 U.S. Dist. LEXIS 24387, at *2–4 (S.D.N.Y. Dec. 2, 2004) (ordering briefing schedule, identification of documents, and processing by the Defense Department at the rate of 10,000 documents per month); ACLU v. Dep't of Def., 351 F. Supp. 2d 265, 277 (S.D.N.Y. 2005) (refusing CIA request for stay of identification order, because investigation of impropriety was being carried out by the CIA Inspector General); *id.* (commenting that "Congress has set the laws, and it is the duty of executive agencies to comply with them"); ACLU v. Dep't of Def., 357 F. Supp. 2d 708, 709–10 (S.D.N.Y. 2005) (refusing to allow stay pending appeal of order to CIA, characterizing CIA's position as "implausible"); ACLU v. Dep't of Def., 389 F. Supp. 2d 547, 554 (S.D.N.Y. 2005) (upholding withholding of Red Cross documents under exemption 3); *id.* at 556, 568–69 (accepting a Defense Department representation that it could not find documents which had been identified in the media); *id.* at 567–68 (accepting redactions based on in camera review of taking a twenty percent sample of the redacted documents for in camera examination, and accepting redactions).

[278] *ACLU*, 389 F. Supp. 2d at 561, 564–65 (lamenting that "[t]he danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods," and observing that "[t]he discussions of these documents in the public press, undoubtedly arising from numerous leaks of the documents, raise concern, however, that the purpose of the CIA's Glomar responses is less to protect intelligence activities, sources or methods than to conceal possible 'violations of law' in the treatment of prisoners, or 'inefficiency' or 'embarrassment' of the CIA," but concluding that "there is small scope for judicial evaluation in this area"); ACLU v. Dep't of Def., 396 F. Supp. 2d 459, 462 (S.D.N.Y. 2005) (denying reconsideration by CIA of order requiring disclosure by CIA of memorandum regarding Convention Against Torture); ACLU v. Dep't of Def., 406 F. Supp. 2d 330, 332–33 (S.D.N.Y. 2005) (denying reconsideration of order allowing Glomar response by plaintiffs on the basis of further admissions by the CIA that the agency involved itself in detainee interrogations).

Abu Ghraib. As they had in the *CNSS* litigation, and as they were doing contemporaneously in the *Associated Press* Guantanamo transcript litigation, the administration's lawyers sought to invoke the privacy rights of the victims of abuses as a basis for refusing disclosure, claiming that disclosure of the photographs would constitute an "unwarranted invasion of personal privacy" under FOIA Exemptions 6 and 7(C).[279] Judge Hellerstein began by observing he had ordered the redaction of identifying features of the photographs, and that with such redactions, publication of personally unidentifiable photographs would invade no cognizable privacy interests.[280] More importantly, he held, any invasion of privacy interests would not be "unwarranted."[281] Given the conceded wrongdoing, the ongoing public discussion of previously leaked photos, and the importance of "debate about the causes and forces that led to the breakdown of command discipline at Abu Ghraib prison and, possibly, by extension, to other prisons in Iraq, Afghanistan, Guantanamo, and perhaps elsewhere," disclosure "coheres with the central purpose of FOIA, to 'promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed.'"[282]

Judge Hellerstein closed by addressing what he referred to as the government's "eleventh-hour" argument, raised two months after the initial argument of the motions in the case, that the photographs were exempt from disclosure under FOIA Exemption 7(F) because disclosure "could reasonably be expected to endanger the life or safety of any individual."[283] Relying on an affidavit from General Myers (who had persuaded Dan Rather to delay publication of the Abu Ghraib story a year and a half earlier), the administration maintained that publication of the photographs was "likely to incite violence against our troops and Iraqi and Afghan personnel and civilians."[284] The administration argued that once any possibility of violence could be shown, the wording of Exemption 7(F) precluded any countervailing justification for disclosure. Judge Hellerstein firmly rebuffed the administration's gambit.[285]

As a matter of fact, Judge Hellerstein evidenced skepticism that release of the photographs would discernibly increase the danger to American lives or safety:

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[279] *ACLU*, 389 F. Supp. 2d at 569.

[280] *Id.* at 572.

[281] *Id.* at 571.

[282] *Id.* at 573–74 (partially quoting *National Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005), in which the Second Circuit four months earlier had rejected an administration effort to avoid disclosing an OLC legal opinion regarding the use of local authorities in immigration enforcement). Judge Hellerstein relied as well on the balancing of privacy and accountability interests in *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004).

[283] *ACLU*, 389 F. Supp. 2d at 574 (quoting 5 U.S.C. § 552(b)(7)(F)).

[284] *ACLU*, 389 F. Supp. 2d at 575.

[285] *Id.*

> The terrorists in Iraq and Afghanistan do not need pretexts for their barbarism; they have proven to be aggressive and pernicious in their choice of targets and tactics. . . . With great respect to the concerns expressed by General Myers, my task is not to defer to our worst fears, but to interpret and apply the law, in this case, the Freedom of Information Act, which advances values important to our society, transparency and accountability in government.[286]

As a matter of law, Judge Hellerstein held that Exemption 7(F) could not be read to defeat the underlying purposes of FOIA, and that the possibility of hostile reaction would not "blackmail" the court into suppressing evidence that could spark accountability for substantial wrongdoing.[287] Turning the question of patriotism of the administration, he wrote:

> Publication of the photographs is central to the purposes of FOIA because they initiate debate, not only about the improper and unlawful conduct of American soldiers . . . but also about other important questions as well—for example, the command structure that failed to exercise discipline over the troops, and the persons in that command structure whose failures in exercising supervision may make them culpable along with the soldiers who were court-martialed . . . .
>
> The fight to extend freedom has never been easy, and we are once again challenged, in Iraq and Afghanistan, by terrorists who engage in violence to intimidate our will and to force us to retreat. Our struggle to prevail must be without sacrificing the transparency and accountability of government and military officials. These are the values FOIA was intended to advance, and they are at the very heart of the values for which we fight . . . .[288]

In March of 2006, while an appeal from Judge Hellerstein's order was pending, the online publication *Salon* obtained copies of contested Abu Ghraib photos and published them on the Internet.[289] Two weeks later, the administration abandoned its appeal and identified the *Salon* photos as authentic.[290] The release of the photographs had no discernable effect on the welfare of American forces at home or abroad, nor, it must be admitted, on the quest for accountability.

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[286] *Id.* at 576.

[287] *Id.* at 575–76.

[288] *Id.* at 578; *see* ACLU v. Dep't of Def., No. 04 Civ. 4151 (AKH), 2006 U.S. Dist. LEXIS 40894, at *3 (S.D.N.Y. June 21, 2006) (ordering release of one further redacted photograph).

[289] Joan Walsh, *The Abu Ghraib Files*, SALON.COM, Mar. 14, 2006, http://www.salon.com/news/abu_ghraib/2006/03/14/introduction/.

[290] Mark Benjamin & Michael Scherer, *U.S. Agrees To Release Abu Ghraib Photos*, SALON.COM, Mar. 29, 2006, http://www.salon.com/news/feature/2006/03/29/aclu_abu_ghraib/; Josh White, *Government Authenticates Photos From Abu Ghraib*, WASH. POST, Apr. 11, 2006, at A16.

*4. Sunlight and Disinfection?*

While their policies remained in shadow, administration apologists shaped public discourse by touting disavowals of "torture," portraying particular leaks as "rumor, innuendo, and assertions,"[291] and denigrating critics as "either uninformed, misinformed or poorly informed."[292] After October 2004, these ploys became less effective. FOIA had not served to reveal "unknown unknowns," but to authenticate leaks that established the existence of "known unknowns." As documents finally began to emerge in the ACLU coalition litigation before Judge Hellerstein, the patterns of abusive interrogation began to move from the realm of speculation to the realm of fact in public debate. It is difficult (though not impossible) to characterize a hard copy of an FBI e-mail, or memorandum to a top Defense Department aide from the Defense Intelligence Agency as the "breathless" effusions of soft-headed alarmists.[293] When the strained and parsimonious definition of "torture" is available verbatim in black and white, it becomes harder (though again not impossible) to use verbal misdirection as a means of deflecting critique.[294]

The ACLU took advantage of emerging technology and the resources of its law firm partners to highlight the solidity of the evidentiary pieces as they were pried loose. It issued regular press releases highlighting the most striking items. But it also backed up its claims with copies of the revelatory documents available to the world on its website, and made the entire documentary corpus available in searchable form. As well as providing authentication, this approach allowed the public access to the haphazard and obfuscatory patterns of redactions as they took place.

The documents released in what the ACLU labeled its "Torture FOIA" litigation formed the basis for a gathering series of accounts in the mainstream media highlighting both the barbarity of the practices and the implausibility of administration denials of knowledge and

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[291] Press Release, U.S. Dep't of Def., Statement from Pentagon Spokesman Lawrence DiRita on Latest Seymour Hersh Article (Jan. 17, 2005), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=8134.

[292] Richard A. Serrano & John Hendren, *Rumsfeld Strongly Denies Mistreatment of Prisoners*, L.A. TIMES, Jan. 23, 2002, at A1.

[293] For one reported attempt by Alberto Gonzales, see Eric Lichtblau, *Justice Dept. Opens Inquiry Into Abuse of U.S. Detainees*, N.Y. Times, Jan. 14, 2005, at A20 ("Alberto R. Gonzales . . . said the administration did not condone torture of prisoners in American custody. . . . Mr. Gonzales expressed skepticism about some details in the bureau's internal reports, pointing to one e-mail message from an agent in Iraq that cited a supposed executive order from President Bush authorizing abusive techniques. . . . He said: 'That never occurred. And so, if something like that is wrong in these e-mails, there may be other facts that are wrong in the e-mails.'").

[294] *Cf.* 151 CONG. REC. S699 (daily ed. Feb. 1, 2005), (statement of Sen. Feinstein) *available at* http://feinstein.senate.gov/05speeches/cr-gonzales.htm (quoting Gonzales as taking the position that torture is forbidden but there is no prohibition of "cruel, inhuman or degrading treatment" of aliens overseas).

responsibility.[295] The revelation of the FBI reports triggered internal investigations by the Department of Justice Inspector General[296] and a specially commissioned Army investigation team,[297] as well as hearings by

[295] *E.g.*, Barton Gellman & R. Jeffrey Smith, *Report to Defense Alleged Abuse By Prison Interrogation Teams*, WASH. POST, Dec. 8, 2004, at A1 ("The American Civil Liberties Union released 43 [documents] after compelling the Bush administration to provide them—many still heavily censored—in a lawsuit under the Freedom of Information Act."); R. Jeffrey Smith & Dan Eggen, *New Papers Suggest Detainee Abuse Was Widespread*, WASH. POST, Dec. 22, 2004, at A1 ("The details of the abuse appeared to catch some administration officials by surprise, although five agencies for weeks have been culling releasable records from their files, under an agreement worked out by U.S. District Judge Alvin K. Hellerstein."); Isikoff & Hosenball, *supra* note 257 ("[A] stack of newly disclosed and startling FBI documents recording agents' reports about serious abuses at [Gitmo] have been released largely as a result of a [FOIA] lawsuit brought by the [ACLU] in New York."); Nat Hentoff, *What Did Rumsfeld Know?*, VILLAGE VOICE, Jan. 11, 2005, at 22 ("But now, with the release by the ACLU of actual government documents not intended for the public to see, the president is confronted with irrefutable evidence of continued violations of not only the 1949 Geneva Conventions and the U.N. Convention Against Torture, but also our own torture statute forbidding such practices."); Schmitt & Marshall, *supra* note 197 ("Some of the serious accusations against Task Force 6-26 have been reported over the past 16 months by news organizations including NBC, The Washington Post and The Times. Many details emerged in hundreds of pages of documents released under a [FOIA] request by the [ACLU].").

[296] Eric Lichtblau, *Justice Dept. Opens Inquiry Into Abuse of U.S. Detainees*, N.Y. TIMES, Jan. 14, 2005, at A20 ("In a letter to the Justice Department inspector general on Dec. 21, [2004,] after the first batches of documents from the [ACLU] became public, Representative John Conyers Jr. of Michigan, the ranking Democrat on the House Judiciary Committee, and five other lawmakers, all Democrats, made an 'urgent request' for the office to investigate the reports of torture and to determine how presidential or military directives played into such tactics. Glenn A. Fine, the inspector general at the Justice Department, responded on Jan. 4 , [2005,] saying that his office had already begun 'examining the involvement of [the] Federal Bureau of Investigation.'"). The investigation had still not concluded two years later. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT, at 11 (Mar. 2007), *available at* http://www.usdoj.gov/oig/special/s0703/final.pdf ("The OIG is reviewing FBI employees' observations and actions regarding alleged abuse of detainees at Guantanamo Bay, Abu Ghraib prison, and other venues controlled by the U.S. military. . . . The OIG investigative team is in the process of drafting the report summarizing the results of the investigation.").

[297] U.S. DEP'T OF THE ARMY, ARMY REGULATION 15-6: FINAL REPORT—INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY (2005), *available at* http://www.defenselink.mil/news/Jul2005/d20050714report.pdf [hereinafter Schmidt/Furlow Report] (submitting report of investigation of abuse by military personnel, triggered by FOIA releases, but avoiding comment on legality of guidance from Secretary of Defense). Military investigations had not infrequently proven to be less than aggressive, and other FOIA inquiries had revealed this quality. *See, e.g.*, Mark Benjamin & Michael Scherer, *A Miller Whitewash?*, SALON.COM, Apr. 25, 2006, http://www.salon.com/news/feature/2006/04/25/miller/ (giving an account of a Dec. 20, 2005 Army Inspector General report, revealed by a FOIA inquiry, which distinguished between "briefing" and "discussions" in order to exonerate General Geoffrey Miller from allegations that he lied to Congress when he stated that "he had 'no direct discussions'" with Rumsfeld aide

Congress.[298] Under congressional scrutiny, the Defense Department General Counsel rescinded the 2003 Working Group Report which had authorized coercive interrogation.[299]

The weight of documents released in the Torture FOIA litigation provided leverage for further inquiry by skeptical members of Congress in confirmation hearings.[300] Synergistically, congressional inquiry extracted materials which had been redacted from the initial Torture FOIA disclosures.[301]

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Stephen Cambone about Abu Ghraib); *cf.* Josh White, *Bad Advice Blamed for Banned Interrogation Tactics*, WASH. POST, June 17, 2006, at A16 ("Pentagon officials released a heavily redacted version of [Army General] Formica's [investigation] report Friday, more than a year and a half after its completion, as part of its response to a [FOIA] lawsuit from the [ACLU]. The final report was issued on Nov. 8, 2004, and Pentagon officials briefed members of Congress last year on its contents.").

[298] *E.g.*, *Hearing on Guantanamo Bay Detainee Treatment Before the S. Armed Servs. Comm.*, 108th Cong. (July 13, 2005) (opening remarks of Sen. Warner) ("Today we meet to receive the testimony of the U.S. Southern Command investigation into the e-mails that came to light as a consequence of a FOIA request in December of 2004.").

[299] Josh White, *Military Lawyers Fought Policy on Interrogations*, WASH. POST, July 15, 2005, at A1 (reporting a March 17, 2005 memo "that rescinded the working group's report").

[300] United States Senate Committee on the Judiciary, Notice of Committee Hearing, Hearing Before the Senate Judiciary Committee on "Detainees" (June 8, 2005), *available at* http://judiciary.senate.gov/hearing.cfm?id=1542; Press Release, Sen. Carl Levin, Statement of Senator Carl Levin on the Nomination of Judge Michael Chertoff to be Secretary of Homeland Security (Feb. 14, 2005), *available at* http://levin.senate.gov/newsroom/release.cfm?id=232095 (relying on Torture FOIA disclosures to cross-examine Michael Chertoff on confirmation).

The OLC memorandum approving a narrow definition of "torture" was rescinded in the immediate aftermath of its disclosure in the aftermath of the Abu Ghraib disclosures. *See* Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES, Sept. 9, 2007, (Magazine), *available at* http://www.truthout.org/docs_2006/090407E.shtml ("In April 2004, however, Goldsmith's priorities were reversed when the Abu Ghraib scandal broke." In June 2004, "Yoo's August 2002 opinion was leaked to the media. . . . A week after the leak of Yoo's August 2002 memo, Goldsmith withdrew the opinion."); JACK GOLDSMITH, THE TERROR PRESIDENCY 156–62 (2007) (describing incentive to "rectify" an "egregious and now public error," "precipitated" by "public outcry").

The prospect of cross-examination of Gonzales on the basis of the Torture FOIA materials surely contributed to the incentives to issue a public replacement for the memorandum on December 30, 2004. *See* Memorandum from Daniel Levin, Acting Ass't Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Deputy Att'y Gen., U.S. Dep't of Justice (Dec. 30, 2004), *available at* http://www.usdoj.gov/olc/18usc23402340a2.htm; *see also* Daniel Klaidman, Stuart Taylor Jr. & Evan Thomas, *Palace Revolt*, NEWSWEEK, Feb 6, 2006, at 34 (describing the "fierce behind-the-scenes bureaucratic fight" leading up to the December 2004 memo).

[301] *See* Letter from William E. Moschella, Office of Legislative Affairs, U.S. Dep't of Justice, to Sen. Carl Levin, Comm. on Homeland Security & Governmental Affairs (Mar. 18, 2005), *available at* http://levin.senate.gov/newsroom/supporting/2005/DOJ.032105.pdf (producing un-redacted versions of previously redacted material, including the statement that FBI agents viewed material obtained by coercion at Guantanamo as "suspect at best").

Material obtained by the Torture FOIA litigation figured prominently in the debates leading to the adoption of the McCain anti-torture amendment in December 2005.[302] The documents provided substance for legal actions filed in both U.S. and foreign venues by former detainees seeking redress for abuse.[303] They provided

[302] *See* Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd(a) (2006) (enacting a prohibition on "cruel, inhuman, or degrading treatment or punishment" of any "individual in the custody or under the physical control of the United States Government").

After consideration of the McCain Amendment commenced in July 2005, the disclosure in the Washington Post of an account of CIA "black sites," based on leaks by outraged officials, strengthened the hand of proponents. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; *see* R. Jeffrey Smith, *Fired Officer Believed CIA Lied to Congress; Friends Say McCarthy Learned of Denials About Detainees' Treatment*, WASH. POST, May 14, 2006, at A1 ("A senior CIA official, meeting with Senate staff in a secure room of the Capitol last June, promised repeatedly that the agency did not violate or seek to violate an international treaty that bars cruel, inhumane or degrading treatment of detainees, during interrogations it conducted in the Middle East and elsewhere. . . . But . . . the agency's deputy inspector general, who for the previous year had been probing allegations of criminal mistreatment by the CIA and its contractors in Iraq and Afghanistan—was startled to hear what she considered an outright falsehood . . . during the discussion of legislation that would constrain the CIA's interrogations. That CIA officer was Mary O. McCarthy, 61, who was fired on April 20 for allegedly sharing classified information with journalists . . . ."); *see also* Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1 ("The CIA inspector general is investigating a growing number of what it calls 'erroneous renditions,' according to several former and current intelligence officials."); Dana Priest, *Covert CIA Program Withstands New Furor; Anti-Terror Effort Continues to Grow*, WASH. POST, Dec. 30, 2005, at A1 ("[A] former CIA officer said the agency 'lost its way' after Sept. 11.").

The first leaked information regarding the NSA's ongoing warrantless surveillance program further undercut the administration. Risen & Lichtblau, *supra* note 170.

[303] For the domestic cases, see *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (filed Dec. 6, 2005; dismissed on state secrets privilege ground on May 12, 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007); Complaint, Ali v. Rumsfeld (N.D. Ill.) (filed Mar. 1, 2005), *available at* http://www.humanrightsfirst.org/us_law/etn/lawsuit/PDF/rums-complaint-022805.pdf, *transferred sub nom.*, *In re* Iraq and Afghanistan Detainees Litigation, 374 F. Supp. 2d 1356 (D.D.C. 2005), *dismissed*, 479 F. Supp. 2d 85 (D.D.C. 2007); *see also* ACLU, Fact Sheet: Legal Claims in Ali et al., v. Rumsfeld (Mar. 1, 2005), *available at* http://www.aclu.org/safefree/resources/17595prs20050301.html (reviewing claims in *Ali*). Internationally, in 2004, the Center for Constitutional Rights unsuccessfully asked the German government to indict Secretary Rumsfeld for war crimes. *See* Center for Constitutional Rights, *CCR Seeks Criminal Investigation in Germany of U.S. Officials for War Crimes in Abu Ghraib Torture*, *available at* http://www.ccr-ny.org/v2/reports/report.asp?ObjID=TCRlT9TuSb&Content=471 (reporting a November 30, 2004 criminal complaint by Iraqi torture victims lodged with the "Generalbundesanwalt" [Federal Prosecutor's Office] in Karlsruhe, Germany). *But see Germany Rejects Attempt to Prosecute Rumsfeld*, EXPATICA, Feb. 10, 2005, *available at* http://www.expatica.com/actual/article.asp?channel_id=2&story_id=16810. That effort was followed by a complaint to the United Nations about the German government's failure to prosecute. *See* Center for Constitutional Rights, *Complaint to*

background, as well, for efforts in litigation to obtain further information regarding the conditions of detainees.[304]

Most strikingly, the documents were deployed before the Supreme Court by advocates challenging the administration's claim of unreviewable power over detainees. As documentary evidence of abuses continued to emerge from Judge Hellerstein's order in late 2005 and 2006, the Supreme Court considered the petition for certiorari and the merits of *Hamdan v. Rumsfeld*.[305] Advocates for the detainees adduced both the Torture FOIA documents themselves and the resulting public commentary and investigation to argue that restraints on treatment of detainees were necessary to assure adherence to minimal requirements of human rights.[306]

Again, proof of causation is difficult, but when the smoke cleared in June of 2006, the majority opinion in *Hamdan* not only granted relief to Mr. Hamdan and his compatriots in Guantanamo, but was crafted to

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*the United Nations Charges German Prosecutor Caved in to U.S. Pressure in Dismissing Torture Case Against Rumsfeld and Other High-Ranking Officials for Torture and War Crimes*, *available at* http://www.ccr-ny.org/v2/reports/report.asp?ObjID=kRrFM3yEeF&Content=716 (describing a February 27, 2006 complaint by human rights groups to the United Nations Special Rapporteur on the Independence of Judges and Lawyers, claiming that the German Federal Prosecutor's dismissal of a torture case filed by Iraqi citizens against Secretary of Defense Donald Rumsfeld and others was dismissed for political reasons); *see also* Amnesty International, Amnesty International's Supplementary Briefing to the U.N. Committee Against Torture (May 3, 2006), *available at* http://web.amnesty.org/library/Index/ENGAMR510612006 ("Memos obtained by the ACLU in December 2004 under Freedom of Information Act requests, for example, revealed that four members of a US special operations unit had been disciplined for excessive force, including improperly using tasers on prisoners. According to the memos, dated June 2004, detainees held in Iraq often arrived at prisons bearing 'burn marks' on their backs.").

[304] *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 474 (D.D.C. 2005) (holding, based on documents received in Torture FOIA litigation, that plaintiffs stated a claim for due process violations arising from mistreatment of detainees), *vacated*, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007); Associated Press v. U.S. Dep't of Def., No. 05 Civ. 5468, 2006 U.S. Dist. LEXIS 67913, at * 2 (S.D.N.Y. Sept. 20, 2006) (citing Torture FOIA documents in support of grant of FOIA request regarding Guantanamo records).

[305] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (argued March 2006, decided June 29, 2006); Hamdan v. Rumsfeld, 546 U.S. 1002 (2005) (granting certiorari November 7, 2005).

[306] Brief for Appellee at 13, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393), 2004 WL 3080434; Brief for Human Rights First as Amicus Curiae Supporting Petitioner at 14–15, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2005 WL 2178808; Brief for American Civil Liberties Union as Amicus Curiae Supporting Petitioner at 20–21, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 53969; *id.* at 20 n.27 ("Voluminous documentation of the above is *available at* http:// www.aclu.org/torturefoia."); Brief for Human Rights First et al. as Amici Curiae Supporting Petitioner at 4–5, 5 n.3, 26–28, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 53968.

impose legal restraints on abuse by American operatives overseas.[307] This, indeed, was the administration's understanding of *Hamdan*, for in September of 2006, President Bush publicly acknowledged for the first time that "a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency," and announced that these "suspected terrorists" were being transferred to Guantanamo for trial before military commissions.[308] Although still coy about the "details of their confinement," Bush admitted that those detainees had been the subject of a tough "alternative set of procedures," while continuing to maintain that the procedures "were safe, and lawful, and necessary." He assured the public (yet again) that the "United States does not torture." The reason for this disclosure and transfer, said Bush, was that *Hamdan* "has put in question the future of the CIA program" by prohibiting "outrages upon personal dignity" and "humiliating and degrading treatment."[309] With looming congressional elections, the administration sought legislation that would reverse the legal restraints.

The ensuing maneuvers before the still Republican-controlled Congress were far from transparent. The resulting legislative landscape disavows "cruel, inhuman and degrading treatment," but largely withholds effective judicial relief from its victims; the Supreme Court is poised to address part of Congress' handiwork.[310] The administration continues to seek means of suppressing the disclosure of its abuses,[311]

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[307] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795 (2006) (determining that Common Article III of the Geneva Conventions applies to detainees).

[308] President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html. A grassroots indication of the import of the decision was the boom in efforts to insure CIA operators against damage actions. R. Jeffrey Smith, *Worried CIA Officers Buy Legal Insurance; Plans Fund Defense in Anti-Terror Cases*, WASH. POST, Sept. 11, 2006, at A1 ("CIA counterterrorism officers have signed up in growing numbers for a government-reimbursed, private insurance plan that would pay their civil judgments and legal expenses if they are sued or charged with criminal wrongdoing . . . .").

[309] President George W. Bush, *supra* note 308.

[310] *See* Boumediene v. Bush, 127 S. Ct. 3078 (2007) (granting certiorari to address suspension of habeas corpus for detainees in Guantanamo).

[311] *E.g.*, El-Masri v. United States, 479 F.3d 296, 313 (4th Cir. 2007) (holding that the government could invoke the state secrets doctrine); Arar v. Ashcroft, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006) (dismissing case in part on claims for secrecy, thereby supporting the government's efforts not to cooperate with the Canadian inquiry); Transcript of Gonzales-Leahy Exchange on Arar, TORONTO STAR, Jan. 18, 2007, *available at* http://www.thestar.com/article/172671; Tim Harper, *Senators Still Seek Answers on Arar; Want Name Added to Probe of U.S. List*, TORONTO STAR, Feb. 2, 2007, at A10 (noting that Sen. Leahy agreed to be gagged as the price of receiving a classified briefing regarding Arar); Carol D. Leonnig & Eric Rich, *U.S. Seeks Silence on CIA Prisons*, WASH. POST, Nov. 4, 2006, at A1; Press Release, ACLU, Government Backs Down in Its Attempt To Seize "Secret" Document From ACLU (Dec. 18, 2006),

while deploying secret legal opinions claiming the authority for the CIA to continue to administer "torture lite" in the teeth of statutes prohibiting "cruel inhuman and degrading" treatment.[312] The trench warfare in the FOIA case before Judge Hellerstein continues.[313]

## IV. THE STRATEGY OF TRANSPARENCY IN DARK TIMES

Civil libertarians like me are fond of constitutional morality tales with clean and satisfying endings. The archetype runs from Thomas Jefferson's triumphal pardons of the Sedition Act defendants to Richard Nixon's resignation in penance for constitutional transgressions. That fondness is strengthened by the training of legal advocacy: a winning case should be resolved on the merits, and that resolution should generate a "holding."[314]

Judged by this standard, the results of a strategy of transparency could be cause for despair. Commentators have deplored the outcome of FOIA litigation regarding the "War on Terror," which has resulted in judicial opinions that acquiesce in suppression of information on the

*available at* http://www.aclu.org/safefree/general/27727prs20061218.html (discussing the government's effort to subpoena "all copies" of a document regarding photographing of detainees, detailing the unsuccessful effort to seal proceedings before Judge Rakoff).

[312] *See* Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement Of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1 (describing secret legal opinions authorizing a "combination of painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures"); Dan Eggen & Michael Abramowitz, *Congress Seeks Secret Memos On Interrogation*, WASH. POST, Oct. 5, 2007, at A1.

[313] Dan Eggen, *CIA Acknowledges 2 Interrogation Memos*, WASH. POST, Nov. 14, 2006, at A29 ("After years of denials, the CIA has formally acknowledged the existence of two classified documents governing aggressive interrogation and detention policies for terrorism suspects, according to the American Civil Liberties Union. But CIA lawyers say the documents—memos from President Bush and the Justice Department—are still so sensitive that no portion can be released to the public."); Press Release, ACLU, Pentagon Wrongfully Withholding Images of Detainee Abuse, ACLU Tells Court (Nov. 20, 2006), *available at* http://www.aclu.org/safefree/torture/27453prs20061120.html (detailing argument in appeal to the Second Circuit of an order to release twenty-one photographs depicting abuse of detainees by U.S. forces in Afghanistan and Iraq); ACLU v. Dep't of Def., No. 04 Civ. 4151 (AKH), 2006 U.S. Dist. LEXIS 40894 (S.D.N.Y. June 21, 2006), *available at* http://www.aclu.org/torturefoia/legaldocuments/DistrictCourtOrder060906.pdf (ordering release of photographs).

[314] Even this expectation forgets the lesson, for example, of *Korematsu*, a case whose holding was transformed from precedent to anti-precedent, and whose dictum regarding "strict scrutiny" of racial classifications became the keystone of two generations of equal protection analysis. *See* Bolling v. Sharpe, 347 U.S. 497, 499 n.3 (1954) (citing *Korematsu* for the proposition that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.").

flimsiest of speculations when "national security" is invoked.[315] Even where abuses have been revealed, critics have lamented, revelation has not been followed by repudiation.[316] But the standard is wrong and the despair is excessive.

To be sure, judicial opinions regarding the strategy of transparency in the first years of the "War on Terror" contain prominent examples of supine acquiescence to the threat of unknown dangers.[317] But the administration carefully avoided pushing those cases to resolution in the Supreme Court.[318] Even at the height of the terror, the legal landscape was at worst equivocal.[319]

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[315] *See, e.g.*, Pozen, *supra* note 70 at 632, 654; Fuchs, *supra* note 70 at 166–67; Wells, *supra* note 70 at854; Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 891 (2006) ("[O]pen government seems more like a distant, deferred ideal than an actually existing practice."); *id.* at 906 ("The events of September 11 seem to have reinforced" judicial deference.); *id.* at 913 ("[T]he public remains largely ignorant . . . ."); *id.* at 939 (arguing that the judiciary has proved a "weak enforcer" of open government requirements).

[316] The comments of Professor Roberts typify the laments. ALASDAIR ROBERTS, BLACKED OUT 233–37 (2006) (mourning the "wildly misplaced" hopes that the revelation of detainee abuse would result in public referendum on torture in the 2004 presidential election); *see* Umansky, *supra* note 222 ("As a result of the administration's stonewalling, the abuse story has been deprived of the oxygen it needs to move forward and stay in the headlines. . . . The abuse story has become what Mark Danner, writing in *The New York Review of Books*, memorably dubbed a "frozen scandal."); Tom Engelhardt, *When Facts Fail*, SALON.COM, Feb. 28, 2006, http://www.salon.com/opinion/feature/2006/02/28/engelhardt/print.html (quoting Danner: "With this administration, we've got revelation of torture, of illegal eavesdropping, of domestic spying, of all kinds of abuses when it comes to arrest of domestic aliens, of inflated and false weapons of mass destruction claims before the war; of cronyism and corruption in Iraq on a vast scale. You could go on. But no official investigation follows.").

In some sense this is the obverse of the claims of Professor John Yoo, that the election of 2004 was an approval of the imperial presidential decisions to engage in torture. Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106 (quoting Yoo as suggesting "that President Bush's victory in the 2004 election, along with the relatively mild challenge to Gonzales . . . was 'proof that the debate is over[,] . . . [t]he issue is dying out[, and t]he public has had its referendum'").

[317] N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 220 (3d Cir. 2002) (discussed *supra* notes 52–57); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003) (discussed *supra* notes 69–72); ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 28 (D.D.C. 2003) (discussed *supra* notes 113–21, relying on *CNSS*).

[318] *See supra* notes 58–61 and accompanying text (describing strategy of declining to appeal *Detroit Free Press*, opposing certiorari in *North Jersey Media Group*, and abandoning challenged policy); *supra* notes 76–77 and accompanying text (describing successful arguments against review in *CNSS* based on the claim that the DOJ Inspector General had already released a report of investigation); *supra* note 34 (describing strategy of mooting habeas petitions by Sept. 11 dragnet detainees); *supra* note 173 and accompanying text (describing rejected effort to vacate order declaring gag rule unconstitutional in *Doe v. Gonzales*, 449 F.3d 415, 420–21 (2d Cir. 2006)); *supra* notes 210–11 (describing plea bargain with John Walker Lindh designed to prevent disclosure of the coercive interrogation to which he had been subject); *supra*

By the end of George W. Bush's first term, internal acts of bureaucratic integrity began to remove the option of promiscuous use of national security classification authority to bar FOIA inquiries into abuse of detainees,[320] and internal resistance by military officers and civil servants of principle had laid a paper trail revealing the scope and origin of those abuses.[321]

In June 2004, the Supreme Court had declared that "a state of war is not a blank check for the President."[322] This direction, combined with the often disingenuous lengths to which the administration had gone to prevent disclosure, led lower courts to view speculative justifications for secrecy with a significantly more skeptical eye in important cases involving detainees at Guantanamo,[323] use of intrusive surveillance,[324] and coercive interrogation.[325]

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note 254 and accompanying text (describing disavowal of coercive interrogation before the Supreme Court in oral argument).

[319] Lower courts had initially been skeptical of attempts to conceal information. *See* ACLU of N.J., Inc. v. County of Hudson, 799 A.2d 629, 655 (N.J. Super. Ct. App. Div. 2002) (discussed *supra* notes 29–31 and accompanying text); Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 941 (E.D. Mich. 2002) (discussed *supra* notes 35–36 and accompanying text); N. Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288, 291 (D.N.J. 2002) (discussed *supra* notes 37–38 and accompanying text); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94 (D.D.C. 2002) (discussed *supra* notes 39–46 and accompanying text); *In re* Material Witness Warrant, 214 F. Supp. 2d 356, 363 (S.D.N.Y. 2002) (discussed *supra* note 51); *see also* Haddad v. Ashcroft, 221 F. Supp. 2d 799, 805 (E.D. Mich. 2002) (on remand discussed *supra* note 51); Detroit Free Press v. Ashcroft, Nos. 02-70339, 02-70605, 2002 U.S. Dist. LEXIS 19991, *3–4 (E.D. Mich. Oct. 7, 2002) (discussed *supra* note 51); ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20 (D.D.C. 2003) (ordering timely processing of Patriot Act FOIA request discussed *supra* note 113 and accompanying text); Elec. Privacy Info. Ctr. v. Dep't of Def., 241 F. Supp. 2d 5 (D.D.C. Jan. 2003) (rejecting efforts to impose search costs on public interest FOIA requester seeking information regarding "Total Information Awareness" program).

While the D.C. Circuit in *CNSS* and the Third Circuit in *North Jersey Media Group* reversed the lower courts, each case generated a strong dissent and the Sixth Circuit in *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 682–83 (6th Cir. 2002) (discussed *supra* notes 47–51) emphatically rejected speculation as a justification for concealment.

[320] *See supra* notes 268–72 and accompanying text (describing intervention of William Leonard, Director of the Information Security Oversight Office in the summer of 2004 and subsequent reiteration of mandate not to use classification to shield wrongdoing). No battle is ever permanently won, however. In 2006, criticism in the Department of Defense Inspector General's *Review of DoD Directed Investigations of Detainee Abuse* was classified "SECRET/NOFORN." It was declassified and released in May 2007. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., REVIEW OF DOD-DIRECTED INVESTIGATIONS OF DETAINEE ABUSE (2006) *available at* http://www.fas.org/irp/agency/dod/abuse.pdf, *and* Posting of Steven Aftergood to Secrecy News Blog, http://www.fas.org/blog/secrecy/2007/05/dod_inspector_general_reviews.html.

[321] *See supra* notes 215–17; *supra* notes 241–45; *supra* note 250 (Taguba report).

[322] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

[323] *See supra* notes 99–109 and accompanying text, discussing Associated Press v. U.S. Dep't of Def., 395 F. Supp. 2d 15, 16–17 (S.D.N.Y. 2005) (expressing skepticism regarding justifications for withholding release of attorneys names); Associated Press

A balanced judgment, moreover, must focus not only on information withheld, but on information revealed. Given the volatility of information, it takes only one success to achieve disclosure, while efforts at concealment must be renewed with each threatened revelation.[326] If the goal is not to optimize national decision-making, but to provide a fail-

v. U.S. Dep't of Def., 395 F. Supp. 2d 17, 18–19 (S.D.N.Y. 2005) (rejecting arguments for reconsideration as "strange, even hypocritical"); Associated Press v. U.S. Dep't of Def., 410 F. Supp. 2d 147, 151 (S.D.N.Y. 2006) (ordering release of names of detainees, rejecting "conclusory speculation"); *id.* at 153, 157 (rejecting motion for reconsideration, expressing annoyance at effort to play a "game of 'gotcha,'" and rejecting "wholly conclusory and grossly speculative assertion" viewed as a "cover" for illegitimate efforts to impose incommunicado detention); *see* Associated Press v. U.S. Dep't of Def., No. 05 Civ 05468 (JSR), 2006 U.S. Dist. LEXIS 67913 (S.D.N.Y. Sept 20, 2006) (ordering release of names of detainees who had charged abuse by their captors); Associated Press v. U.S. Dep't of Def., 462 F. Supp. 2d 573, 576 (S.D.N.Y. 2006) (ordering the release of height and weight information).

[324] Gerstein v. U.S. Dep't of Justice, No. C-03-04893 RMW, 2005 U.S. Dist. LEXIS 41276 (N. D. Cal. Sept 30, 2005) (rejecting "parade of horribles" based on "conclusory assertion" as basis for withholding compilation of uses of section 213 "sneak and peek" warrants, and commenting on "unsavory" tactics by government); *see* ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 32–33 (D.D.C. 2004) (discussed *supra* notes 137–40; rejecting delays as having "absolutely no justification," characterizing administration's litigation position as "turn[ing] a deaf ear to the Attorney General"); Elec. Privacy Info. Ctr. v. Dep't of Justice, Civ. Action No. 05-845 (GK), 2005 U.S. Dist. LEXIS 40318 (D.D.C. Nov. 16, 2005) (discussed *supra* notes 163–69, describing document production as "incredibly . . . slow and inefficient" and ordering processing schedule); Doe v. Ashcroft, 334 F. Supp. 2d 471, 475 (S.D.N.Y. 2004) (discussed *supra* notes 146–54, declaring gag provision of Patriot Act regarding NSLs unconstitutional as applied to ISP, and rejecting efforts to seal pleadings); Doe v. Gonzales, 386 F. Supp. 2d 66, 70 (D. Conn. 2005) (discussed *supra* notes 155–59 and accompanying text, declaring unconstitutional effort to gag librarian who had received NSL).

[325] *See supra* notes 259–90 and accompanying text, describing "torture files" litigation; ACLU v. U.S. Dep't of Def., 339 F. Supp. 2d 501, 502, 504 (S.D.N.Y. 2004) (decrying "glacial pace" of production and delaying tactics, admonishing administration that "[n]o one is above the law," and ordering processing and production schedule); ACLU v. Dep't of Def., No. 04 Civ. 4151 (AKH), 2004 U.S. Dist. LEXIS 24387, at *2–4 (S.D.N.Y. Dec. 2, 2004) (ordering briefing schedule, identification of documents, and processing by the Defense Department at the rate of 10,000 documents per month); ACLU v. Dep't of Def., 351 F. Supp. 2d 265, 277 (S.D.N.Y. 2005) (refusing CIA request for stay of identification order, because investigation of impropriety was being carried out by the CIA Inspector General); *id.* (commenting that "Congress has set the laws, and it is the duty of executive agencies to comply with them"); ACLU v. Dep't of Def., 357 F. Supp. 2d 708, 709–10 (S.D.N.Y. 2005) (refusing to allow stay pending appeal of order to CIA, characterizing CIA's position as "implausible"); ACLU v. Dep't of Def., 389 F. Supp. 2d 547, 575–76 (S.D.N.Y. 2005) (ordering release of Abu Ghraib photos, refusing to "defer to our worst fears," or to accede to "blackmail").

[326] *See, e.g.*, Timothy Besley &Andrea Pratt, *Handcuffs for the Grabbing Hand? Media Capture and Government Accountability*, 96 AM. ECON. REV. 720, 725 (2006) (arguing that a government seeking to avoid accountability will bribe media outlets only if it can persuade all media outlets to accept the bribe).

safe against egregious abuses by the current regime, sporadic lightning flashes may be adequate to reveal the outlines of the landscape.

Reported litigation successes, moreover, understate the information actually revealed. A significant amount of information has come to light through leaks which trigger subsequent official and journalistic inquiry and set the stage for FOIA requests.[327] A wealth of other data has been officially revealed without authoritative judicial intervention in the shadow of both FOIA litigation and other frameworks of transparency. The cases above detail such revelations regarding the post September 11 dragnet,[328] the MATRIX program,[329] the Combatant Status Review Tribunals in Guantanamo,[330] the implementation of the Patriot Act, [331] and the physical abuse of prisoners detained overseas during the "War on Terror."[332]

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[327] *See supra* note 144 (describing leak of surveillance activities in Las Vegas in 2003); *supra* notes 161–62 (describing leak regarding magnitude of NSL surveillance and record retention policy); *supra* note 169 (describing reports of illegal wiretapping and gathering of information by military intelligence); *supra* notes 220, 222, 224, 227, 228 (describing leaks and journalistic investigation that revealed abuse of detainees); *supra* note 231 (describing efforts by JAG officers to mobilize resistance to abusive interrogation practices); *supra* note 248 (describing leaks regarding initial Abu Ghraib investigation); *supra* notes 255, 259 (describing leaks and publication of Abu Ghraib photos, Taguba report, and authorizations for coercive interrogation).

[328] *See supra* note 21 (describing journalistic investigation and interviews identifying 235 detainees); *supra* notes 25–27 and accompanying text (describing materials revealing the number and status of post-September 11 detainees in January 2002 and June 2002 in response to FOIA requests and filing of suit ); *supra* note 32 (describing INS permission for "know your rights" presentations); *supra* notes 33, 65–68 (describing DOJ Inspector General's investigation begun March 2002; report filed in April 2003, leaked in May 2003, and released in June 2003 regarding September 11 dragnet).

[329] *See supra* note 88.

[330] *See supra* notes 91–93 and accompanying text (describing the release of Guantanamo CSRT transcripts in response to filing of FOIA action), *supra* note 98 (describing successful FOIA requests by attorneys for detainees).

[331] *See ACLU*, 265 F. Supp. 2d at 24 (describing release of 341 pages of documents in response to FOIA request, discussed *supra* notes 113–20); *supra* notes 140–42 (describing the release of documents demonstrating misrepresentations regarding usage of section 215 after expedited processing ordered in *ACLU*, 321 F. Supp. 2d at 27); *supra* note 166 and accompanying text (describing release of 250 pages of documents revealing abuses of NSL process in response to filing of *Elec. Privacy Info. Ctr.*, 2005 U.S. Dist. LEXIS 40318); *supra* notes 167–69 and accompanying text (describing further release of documents in response to processing order in *EPIC v. Dep't of Justice,* and resulting Office of Inspector General inquiry); *supra* notes 180–94 and accompanying text (describing publication of Department of Justice Inspector General report on use of Patriot Act authorities).

[332] *See supra* notes 258–60 and accompanying text (describing release of documents regarding coercive interrogation policy, after portions had been leaked); *supra* notes 273–76 (describing release of 100,000 pages of documents regarding coercive interrogation after order requiring processing of FOIA request); *supra* note 274 (describing release by FBI of documents detailing abuses by CIA and Defense Department).

Most importantly, the failure of the public to immediately repudiate the administration in the election of 2004 is not a "holding." It is part of an ongoing political negotiation for the soul of America. In that negotiation, the strategy of transparency has had a long term impact on the legitimacy of an overreaching administration in the eyes of the judges who review its claims, the civil servants who make up the government, and the electorate who evaluate the administration's statements.

The era of a "Global War on Terror" that can conduct abuse entirely in the shadows seems to be drawing to a close. The public is increasingly cognizant of the outrages committed in its name, and the Legislative branches, freed from one-party control by the election of 2006, are beginning to reassert their constitutional oversight authority, backed by the subpoena power. Whether these developments will suffice to turn the nation's policy back toward its tradition of respect for human dignity is a tale yet to be told.

As our democracy begins to confront former Secretary Rumsfeld's now "known knowns," there is some hope to be gained from his analysis of the impact of transparency on an earlier presidency. On June 14, 1971, Chief of Staff H.R. Haldeman spoke to Richard Nixon about the publication of the Pentagon Papers by the New York Times. Referring to a young and canny Counselor to the President, Haldeman was recorded as saying:

> Rumsfeld was making this point this morning. . . . [T]o the ordinary guy, all this is a bunch of gobbledygook. But out of the gobbledygook, comes a very clear thing: [unclear] you can't trust the government; you can't believe what they say; and you can't rely on their judgment[. A]nd the . . . implicit infallibility of presidents . . . is badly hurt by this, because it shows that people do things the president wants to do even though it's wrong . . . .[333]

Counselor Rumsfeld's concern that the exposure of abuses and blunders would contribute to the unraveling of the carefully constructed patriotic enthusiasm for the Executive who perpetrated them proved prescient a generation ago. It may again in our time, a testament to the resilience of the constitutional mechanisms we inherited from the repudiation of Watergate, and the ongoing constituencies for the rule of law.

[333] Nixon Presidential Materials Project, Transcript: Oval Office Meeting with Bob Haldeman (June 14, 1971), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/oval.pdf.