



October 20, 2009

Robert M. Gates  
Secretary of Defense  
U.S. Department of Defense  
1000 Defense Pentagon  
Washington, DC 20301-1000

Dear Secretary Gates,

AMERICAN CIVIL LIBERTIES  
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SUSAN N. HERMAN  
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ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

RICHARD ZACKS  
TREASURER

The American Civil Liberties Union has been litigating since 2004 for the release of photographs depicting the abuse and torture of detainees in American custody. Today, Congress passed a law authorizing you to withhold such images of governmental misconduct if you certify that release would endanger U.S. citizens, troops, or employees. We urge you not to exercise that discretion in this case.

As you know, images of detainee abuse have been withheld until now under a law-enforcement exception to the Freedom of Information Act (“FOIA”) on the grounds that their disclosure could provoke violence against U.S. troops and others in Afghanistan and Iraq. Two federal courts have now considered and rejected that argument, finding instead that there is a “significant public interest in the disclosure of these photographs,” and that the FOIA exception relied upon by the government was never intended to serve as “an all-purpose damper on global controversy.”

Congress has now passed a law, however, that authorizes you to withhold photographs relating to “to the treatment of individuals engaged, captured, or detained after September 11, 2001” by U.S. troops. Respectfully, you should not invoke the legislation in this case.<sup>1</sup> The photographs at issue depict wide-ranging governmental mistreatment from detention facilities throughout Afghanistan and Iraq. The pervasiveness of the abuse undermines the official assertion that abuse was aberrational, and the photos’ release would shed light on the connection between the abuse and the decisions of high-level officials. The photos are also a crucial part of the historical record and are of critical relevance to an ongoing national debate about accountability. Their release would allow the public to understand better what took place in the military’s detention centers, and why. They might show patterns that have until now gone unnoticed. They

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<sup>1</sup> We do not waive any legal challenges we might raise to the legislation, to your invocation of it, or to its application in this case.

would surely convey, better than mere text ever could, the cruelty of such practices as stress positions, hooding, and mock executions.

The U.S. district judge who first ordered release of these photographs explained their importance in this way:

The interest at stake arises from pictures of flagrantly improper conduct by American soldiers—forcing prisoners under their charge to pose in a manner that compromised their humanity and dignity. . . . [T]he pictures are the best evidence of what happened, better than words, which might fail to describe, or summaries, which might err in their attempt to generalize and abbreviate. 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, “rogue” soldiers, as they have been characterized, 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 for perpetrating the wrongs; the poor training that did not create patterns of proper behavior and that failed to teach or distinguish between conduct that was proper and improper; the regulations and orders that governed the conduct of military forces engaged in guarding prisoners; the treatment of prisoners in other areas and places of detention; and other related questions.

Those favoring suppression of the images of detainee abuse and torture have stated their concerns in the language of national security, but no democracy has ever been made stronger by concealing evidence of its wrongdoing. The prior administration’s decision to endorse torture undermined the United States’ moral authority and compromised its security. The failure of the country’s current leadership to fully confront the abuses of the prior administration—a failure embodied by the suppression legislation at issue now—will only compound these harms.

For these reasons, you should not invoke your new and discretionary authority to suppress images of abuse. If you choose to do so, however, we request that you carefully consider each photograph individually as required by subsection (d)(1) of the new law, and that, with respect to each photograph you withhold, you provide (1) a detailed textual description of the photograph, (2) a cross-reference to the public files that the government has already claimed describe the image, and (3) a detailed explanation of the

basis for the withholding of the photograph. The government has previously asserted that disclosing these photographs poses risks in part because it is a “particularly critical time” in Iraq, Afghanistan, and Pakistan. We accordingly ask that you review any decision to withhold any photographs every ninety days to account for changing circumstances.<sup>2</sup>

Thank you for your consideration. We would welcome the opportunity to meet with you to discuss the issues raised above.

Sincerely,

*Jameel Jaffer / LT*

Jameel Jaffer  
Alexander A. Abdo

cc: Jeh Johnson  
Sean Lane

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

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<sup>2</sup> We request this information and reevaluation with respect to the 21 responsive images initially identified, the 23 images identified as responsive on June 29, 2006, and the “substantial number” of additional responsive images acknowledged to exist on May 28, 2009.