

06-3140-cv

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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

Plaintiffs-Appellees,

v.

DEPARTMENT OF DEFENSE, and its components DEPARTMENT
OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR
FORCE, DEFENSE INTELLIGENCE AGENCY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

**BRIEF OF AMICI CURIAE
PROFESSORS OF LAW OF ARMED CONFLICT
IN SUPPORT OF PLAINTIFFS-APPELLEES
FOR AFFIRMANCE OF THE DISTRICT COURT**

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INTEREST OF AMICI

Amici, professors of the law of armed conflict, will address the proper application of the Geneva Conventions to the release of photographs of prisoner abuse. Amici take no position on any other issue in this case.

A list of the amici appears in Appendix A. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Geneva Conventions exist to protect those captured in armed conflict from mistreatment. One form of mistreatment addressed by the Conventions is the humiliation of prisoners for propaganda purposes or to satisfy a lust for vengeance. War crimes prosecutions have rightly sought to hold captors responsible for such mistreatment.

Exposing a captor's mistreatment of prisoners, however, has never been regarded as mistreatment, for such exposure deters prisoner abuse and promotes accountability. The United States has played a leading role in using images of prisoner abuse to build worldwide support for humanitarian norms, culminating in the negotiation and ratification of the 1949 Geneva Conventions.

Although the Geneva Conventions protect against "insults and public curiosity," those protections have been consistently interpreted to bar public humiliation for the purpose of propaganda. The consensus interpretation of those

protections – to which the United States had adhered until now – allows images of prisoners to be released if the images have been redacted to prevent the identification of individual prisoners. Such redactions protect the dignity of the prisoners and the safety of their families while allowing legitimate newsgathering and informed debate on matters of vital public concern. To be sure, publicizing the images at issue here will focus attention on misconduct by the United States. But that is precisely why the Geneva Conventions require the images to be published, not suppressed.

ARGUMENT

I. IMAGES OF PRISONER ABUSE GALVANIZED ADOPTION OF THE GENEVA CONVENTIONS.

Vivid images of wartime atrocities set the stage for the negotiation and ratification of the 1949 Geneva Conventions. Indeed, “[m]uch of the impetus for the restatement of the Geneva Conventions issued in 1949 came from powerful images of the survivors of concentration camps maintained by the Germans and Japanese during World War II.” Horton Aff. ¶ 12 at JA 146.

The United States itself pioneered the use of photographs of prisoners to strengthen international humanitarian norms, including the Geneva Conventions. At the end of World War II, the United States “disseminated large volumes of photographs from the liberated [concentration] camps to media; this included photographs of corpses and remains of prisoners as well as of emaciated and

poorly clothed survivors.” Horton Aff. ¶ 17 at JA 147. These photographs helped to expose the mistreatment of prisoners.

General Eisenhower recognized the power of images to seize the public imagination and impact public policy. He personally toured concentration camps and pushed government officials and journalists to do the same, in order to impress upon the public the full horror of Nazi atrocities. He later wrote:

I have never felt able to describe my emotional reactions when I first came face to face with indisputable evidence of Nazi brutality and ruthless disregard of every shred of decency. Up to that time I had known about it only generally or through secondary sources. I am certain, however that I have never at any other time experienced an equal sense of shock . . . as soon as I returned to Patton's headquarters that evening I sent communications to both Washington and London, urging the two governments to send instantly to Germany a random group of newspaper editors and representative groups from the national legislatures. I felt that the evidence should be immediately placed before the American and British publics in a fashion that would leave no room for cynical doubt.

Dwight D. Eisenhower, *Crusade in Europe* (1977), at 408-09.

At the time these photographs were taken and disseminated to the public, the 1929 Geneva Conventions, like the 1949 Conventions today, prohibited the United States from exposing prisoners to “insults and public curiosity”. Convention

Relative to the Treatment of Prisoners of War, July 27, 1929, art. 2.¹ Nonetheless, the United States did not contend that the use of these photographs violated any norms against humiliating the victims of Nazi atrocities. Rather, the United States correctly understood that the dissemination of these photographs did not expose prisoners to “insults and public curiosity” but exposed the Nazis’ barbaric treatment of the prisoners.

The United States also pioneered the use of photographic evidence in war crimes prosecutions. “[T]he United States has historically been a principal expositor of the view that photographic evidence can and should be used to bear witness to the abuse of detainees and for the purpose of seeking justice in their name.” Horton Aff. ¶ 17 at JA 147.

For example, in the Nuremberg Trials, the American prosecutors introduced as evidence *Nazi Concentration Camps*, a motion picture. One observer described the impact of the film:

Several in the darkened courtroom were faint or sobbed quietly at the scenes described by a burly British lieutenant-colonel as he stood among the dead and dying of Belsen . . . During the showing of the film, the dock, as a measure of security, was picked out by small spotlights. Few of the defendants could bear to watch the whole film .

¹ The 1949 Geneva Conventions extended the prohibition on “insults and public curiosity” to civilian prisoners. See Section II A, *infra*.

. . I cannot forget the sudden vision of those twisted guilty faces . . .
with tears on their cheeks. I sometimes dream of it.

Lawrence Douglas, Essay, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 Yale L. J. 449, 456 (1995) (citing Airey Neave, *On Trial at Nuremberg* 247 (1978)).² Also submitted as evidence at the Nuremberg Trials were photographs of the Germans' treatment of Soviet prisoners of war,³ photographs of starving children at Auschwitz,⁴ and photographs of Soviet corpses in mass graves.⁵

Today, war crimes images continue to play a large role in the enforcement of international humanitarian norms. Such photographs were introduced as evidence in the proceedings before the International Criminal Tribunal for Rwanda.⁶

² *Nazi Concentration Camps* became the centerpiece of an Academy-Award winning motion picture, *Judgment at Nuremberg* (1961). The millions who have watched *Judgment at Nuremberg* and are convinced of the justice of the final verdict have implicitly decided that they have the right to see those disturbing images and to decide on their value themselves.

³Nuremberg trial transcript (1946), available at <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-06/tgmwc-06-58-18.html>.

⁴*Id.*, available at <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-07/tgmwc-07-61-05.shtml>.

⁵*Id.*, available at <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-07/tgmwc-07-62-01.shtml>.

⁶*See, e.g.*, Minutes of Proceedings, ICTR-98-41-T, available at <http://65.18.216.88/ENGLISH/cases/Bagosa/minutes/2003/011003.pdf> (listing exhibits).

Any interpretation of the Geneva Conventions that prohibits the use of photographs to raise public awareness of prisoner mistreatment would be inconsistent with the central purpose of the Conventions as well as the United States' own historical practice and important role in strengthening humanitarian norms. It is no answer that the abuse depicted in the images has been disclosed in written accounts. *See Gov't Br. at 57.* Images make the abstract real, and they have special power to command attention and generate public debate. Unless the public can see the images, it cannot know whether the written accounts capture the extent and horror of the abuse.

II. THE GENEVA CONVENTIONS PERMIT THE RELEASE OF REDACTED IMAGES OF PRISONER ABUSE.

The Geneva Conventions permit the release of images of prisoner abuse if the images do not identify the victims. This interpretation has been adopted by the International Committee for the Red Cross and other international authorities, and, historically, the United States. Furthermore, this interpretation advances the purpose of the Conventions – to dissuade captors from abusing prisoners.

A. The Conventions Prohibit Public Humiliation of Particular Individuals But Encourage the Exposure of Abuse.

The Geneva Conventions do not by their terms bar the release of photographs of prisoners. However, the Government contends that such a bar may

be read into the prohibitions against “insults and public curiosity” in the following provisions:

Prisoners of war must at all times be humanely treated . . . Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13.

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug, 12, 1949, art. 27.

Historically, these protections were understood to serve the principal goal of banning public humiliations directed at captives, such as the parading of prisoners for propaganda. There have been only two war crimes prosecutions concerning this prohibition; both involved such public parading. The first was the U.S. military commission prosecution of Lieutenant General Kurt Maelzer in Florence, Italy in 1946. In 1944, 200 American POWs had been paraded through the streets of Rome, while the crowd threw sticks and stones at the prisoners. Photographs appeared in Italian newspapers with the caption “Anglo-Americans enter Rome after all . . . flanked by German bayonettes.” The Nazi army disseminated the

photographs to publicly scorn and humiliate the prisoners personally. *See Trial of Lt. Gen. Kurt Maelzer* (U.S. Mil. Comm., Florence, Italy, Sept. 9-14, 1946), in 60 *International Law Studies: Documents on Prisoners of War* (Howard S. Levie ed., 1979) at 355-56.

The second such prosecution was the International Military Tribunal for the Far East against Sadao Araki in 1948, which found certain Japanese officers guilty of “submitting Allied prisoners of war to violence, insults and public humiliation to impress other peoples of Asia with the superiority of the Japanese race.” *See United States v. Sadao Araki* (Int. Mil. Trib. Far East, Nov. 4-12, 1948), in 60 *International Law Studies*, at 460. In 1942, approximately 1,000 Allied prisoners captured in the fighting at Singapore “previously . . . subjected to malnutrition, ill-treatment and neglect so that their physical condition would elicit contempt from those who saw them” were “paraded before 120,000 Koreans and 57,000 Japanese.” *Id.* at 461. In 1944, 25 Allied prisoners of war were paraded through Burma. “They were in an emaciated condition and were forced to carry notices in Burmese, falsely stating that they had been recently captured on the Arakan front. They were ridiculed and held up to contempt by a Japanese officer who accompanied the parade.” *Id.* at 462. These parades were designed to humiliate

Allied prisoners of war and to demonstrate “Japanese superiority” to civilians. *Id.* at 461.⁷

Straying far from the well-established interpretation of these provisions, the Government contends that simple release of redacted images of prisoner abuse will expose the depicted prisoners to “insults” or “public curiosity.” Gov’t Br. at 52. The government’s position finds no support in the history, purpose, or common interpretation of the Geneva Conventions.

Authoritative commentary teaches that the Geneva Conventions are to be interpreted with a view to their fundamental purpose. Humane treatment for persons captured in armed conflict is the “basic theme of the Geneva Conventions” and that aspiration must guide interpretation of each provision. Jean de Preux, *Commentary III to Geneva Convention Relative to the Treatment of Prisoners of War* 140-41 (Jean S. Pictet ed. 1960).

The purpose of the prohibition at issue is to protect a prisoner’s “honour,” *Id.* at 141 (“It is . . . a positive obligation for the Detaining Power at all times . . .

⁷ The International Military Tribunal for the Far East against Sadao Araki in 1948 condemned as further evidence of violations of the law of war the attempts of the Japanese government to conceal the ill treatment of prisoners by preventing the disclosure of photographs showing detainee abuses. *See International Law Studies, supra*, at 472, 476.

to treat prisoners humanely. The protection extends to . . . his honour (protection against insults and public curiosity)"). A prisoner's honor, however, cannot be besmirched by a photograph if that individual cannot be identified. *Cf. Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952) (no action for defamation for the statement that some Neiman-Marcus salesgirls were call girls where there was no way to identify the 30 plaintiffs out of a group of 382).

The Government's proffered interpretation of the prohibition against exposure to public curiosity does not easily accord with the purpose of that prohibition, and so should be rejected. Although the redacted images depict inhumane treatment of prisoners, their release would not constitute further inhumane treatment of any particular prisoner because the abused prisoners cannot be identified:

'Public *curiosity*' . . . must be distinguished from public *concern*. It is probably true that the dissemination of the photographs will generate renewed public concern for prisoners held by United States forces indeed, for prisoners of war and protected persons more generally. The possibility that the Photographs will generate public concern, however, does not mean that their dissemination will violate the Geneva Conventions. In my opinion, it is highly unlikely that those who view the Photographs will view them with disdain or contempt towards the prisoners depicted. On the contrary, the dissemination of the Photographs is likely to elicit concern for the prisoners depicted and for the treatment of prisoners of war and protected persons generally.

Sassoli Aff. ¶ 15 at JA 167-68.

B. International Consensus Permits the Release of Redacted Images.

The International Committee for the Red Cross (“ICRC”) is the recognized authority on the Geneva Conventions. *See* Geneva Convention III, art. 125 (“The special position of the International Committee for the Red Cross in this field shall be recognized and respected at all times”). The ICRC interprets the Conventions to prohibit the release of photographs if they depict prisoners who can be individually identified.

ICRC spokesman Florian Westphal, when asked about the release of “humiliating photos” of abuse at Abu Ghraib, stated “My interpretation would be that you are not exposing them to ‘public curiosity’ if their faces are obscured.” News24.com, *Pics ‘Not Breaching Convention’* (May 21, 2004), available at www.news24.com/News24/World/Iraq/0,,2-10-1460_1530825,00.html. The photos included one showing a “cornered inmate [with face visible] cowering in the face of a US soldier restraining a large black dog,” and another showing “a baton-wielding soldier appearing to order a naked detainee covered in a brown substance to walk a straight line, although his ankles are shackled.” *Id.* Although another ICRC spokesperson suggested that the release of photos resulted in a minor transgression of the Geneva Conventions, that transgression was caused by the exposure of the face of a detainee in one of the photos, not the depiction of humiliating circumstances in all of them. *Id.* Indeed, the ICRC clearly adopted the view that the source of the humanitarian concern was not the release of the

photographs but the underlying abuse. “[W]e aren’t going to make a big story of this. The problem now is not in publishing the picture as much as in what has happened in the prison.” *Id.*⁸

Other international organizations and foreign authorities agree. Two high-ranking ICRC legal advisors⁹ wrote that while various legal tests have been proposed for determining whether an act constitutes exposure to ‘public curiosity’, “ultimately the bottom line should be whether the prisoner can be recognized or not, in order to avoid any possible reprisals against the prisoner or his family.” Knut Dörmann and Laurent Colassis, *International Humanitarian Law in the Iraq Conflict*, in German Yearbook of International Law, 293, 335 (Jost Delbrück, Rainer Hofmann, and Andreas Zimmermann, eds., 2004). These legal advisors

⁸ See also Jennifer Elsea, *CRS Report for Congress, Lawfulness of Interrogation Techniques under the Geneva Conventions*, at 19 (Sept. 8, 2004) (“The ICRC considers the use of any image ‘that makes a prisoner of war individually recognizable’ to be a violation.”); Anthony Dworkin, *The Geneva Conventions and Prisoners of War* (Mar. 4, 2003), available at www.crimesofwar.org/special/Iraq/brief-pow.html (citing ICRC spokesman Florian Westphal for the proposition that any photograph “that makes a prisoner of war individually recognisable” violates the Conventions).

⁹ Knut Dörmann was the Deputy Head of the Legal Division of the ICRC, and Laurent Colassis the Head of Unit of the Legal Advisers to Operations, Legal division of the ICRC. However, their article reflected “the views of the authors and not necessarily those of the ICRC.” Dörmann and Colassis, at 293.

understood that permitting the release of redacted photographs strikes the proper balance between protecting prisoners' dignity and the need to keep the public informed:

Given the increasingly intensive coverage of conflicts by the media and the expanding role of the major communication networks, it remains all the more important to uphold safeguards that protect the dignity of prisoners of war. To ensure this respect of human dignity, States parties to the conflict should prevent the publication or broadcast of images of prisoners of war who could be individually recognized. On the contrary, showing prisoners of war at distance, from behind or blurring their faces to prevent them from being recognized individually would be acceptable as it neither violates their dignity, nor jeopardizes their families or their return to their country. Prohibiting the transmission of images of prisoners of war as individuals, whilst permitting images of prisoners of war who cannot be individually recognized, seems the best way for a party to the conflict to reconcile protection of the prisoners of war's dignity with the public's need to be informed.

Id., at 335-336; see also Horst Fischer, *Protection of Prisoners of War*, in *The Handbook of Humanitarian Law in Armed Conflicts* 321, 330 (Dieter Fleck ed., 1995) ("First, photographic reports about prisoners of war do not violate the principle of humane treatment if the photographs do not enable the identification of individual prisoners."); Anthony Dworkin, *The Geneva Conventions and Prisoners of War* (Mar. 4, 2003), available at www.crimesofwar.org/special/Iraq/brief-pow.html (citing Françoise Bouchet-Saulnier, legal advisor to Médecins Sans Frontières, for similar proposition); Anthony Dworkin, *The Limits on How POWs Can Be Portrayed – And Why Both Iraq and Embedded Journalists May Be*

Testing Them, Writ, (Mar. 26, 2003), available at http://writ.news.findlaw.com/commentary/20030326_dworkin.html (“A picture that shows a group of prisoners in a humiliating light, but where none of them can be recognized, would not seem in itself to violate the Geneva Conventions.”).

Indeed, this interpretation appears to be nearly unanimous among the relevant authorities.¹⁰

[T]he proscription against exposing prisoners to “insult and public curiosity” does not mean that photographs of prisoners being abused may not be disseminated at all. Rather, it means that photographs of prisoners being abused may not be disseminated if they depict prisoners who are individually recognizable. I am not aware of any academic commentator who has taken a contrary position.

Sassoli Aff. ¶ 14 at JA 167; *see also* Horton Aff. ¶ 25 at JA 149.

C. Past U.S. Policy and Practice Permit the Release of Redacted Images.

¹⁰ In fact, in 1991, the British Red Cross proposed codifying this consensus interpretation of the prohibition on “insults and public curiosity.” The proposal would have “prohibit[ed] the transmission of images of prisoners of war as individuals, whilst permitting images of prisoners of war who cannot be individually recognized.” *See* Gordon Risius & Michael A. Meyer, *The Protection of Prisoners of War Against Insults and Public Curiosity*, 295 Int’l Rev. Red Cross 296 (1993) at JA 157. This proposal was not adopted because the conference at which it was to be presented, the 26th International Conference of the Red Cross and Red Crescent, was cancelled. “As the conference was ultimately postponed, *sine die*, the draft resolution was not discussed, but the interpretation it put forward remains valid” *See* Risius & Meyer, at 295 and JA 156.

Until recently, the United States consistently took the position that photographs of prisoners would be permitted if the subjects were not individually identifiable. A Congressional Research Service report described the United States' position:

The Department of Defense interprets the provisions to protect POWs from being filmed or photographed in such a manner that viewers would be able to recognize the prisoner. Photos and videos depicting POWs with their faces covered or their identities otherwise disguised does not, in the view of the Department of Defense, violate GPW art. 13.

See Jennifer Elsea, CRS Report for Congress, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, Sept. 8, 2004, at 19.¹¹

Department of Defense (“DOD”) guidelines on photographs of Guantanamo Bay prisoners also allow the release of photographs where individual prisoners cannot be identified. In a section entitled “External News Media Coverage of Detainees,” the DOD imposes the following restriction: “News media coverage, including photo/video coverage, will not identify individual prisoners, by name(s) or by image (*i.e.*, close-up images of individual face(s) that would allow

¹¹ The report also notes that other experts would allow disclosure photos even where POWs could be individually identified where necessary to “report[] on prisoners and their conditions of captivity, in order to enforce international humanitarian law and to improve their conditions in captivity.” *Id.*

individuals to be identified will not be permitted).” *See* Cummings Decl. Ex. B at JA 120. The guidelines say nothing about restricting photographs in which individuals cannot be identified, even where those photographs show the prisoner in a humiliating light.¹²

The United States also consistently acted in accord with its position that the Geneva Conventions permit disclosure of photographs that do not show individually identifiable prisoners of war. For example, during the Gulf War, United States and coalition forces allowed photographs of prisoners so long as individual prisoners could not be identified. *See* A.P.V. Rogers, *Law on the*

¹² The Government’s reliance on the DOD guidelines for embedded news media during the Iraq war and Army Regulation 190-8 is misplaced. The DOD guidelines for embedded news media imply that photography is permissible: “[N]o photographs or other visual media showing an enemy prisoner of war or detainee’s recognizable face, name tag, or other identifying features or item may be taken.” Later guidelines for embedded media provide that “EPWs or detainees at an EPW facility will not be photographed or filmed,” but the stated basis for this prohibition is that “its publication or broadcast could jeopardize operations and endanger lives.” Photographs of prisoners of war (so long as not individually identifiable) are permissible so long as the prisoners are not at an “EPW facility.” *See* Cummings Decl. Ex. D at JA 133-34.

The prohibition in 190-8 of all photographs of prisoners “for other than internal Internment Facility administration or intelligence/counterintelligence purposes” applies only to photographs by military personnel. It says nothing about whether third parties are entitled to access to such photographs if they are taken or whether disclosure of appropriately redacted photographs would violate prisoners’ rights under the Geneva Conventions. *See* Cummings Decl. Ex. C at JA 125, 128.

Battlefield 53 (2d ed. 2004) (“the policy was adopted in the coalition forces of allowing photographs of prisoners of war to be shown so long as they were not close-up enough for individuals to be identified”). This policy recognized that the “interests of prisoners of war have to be balanced against the legitimate interest of the media in reporting on developments in a war.” *Id.*¹³

Similarly, in 2002, the United States released images of prisoners from Afghanistan being transferred to the prison at Guantanamo Bay. The prisoners in the photographs were blindfolded and shackled, but could not be identified. *See* Dworkin, *Limits on How POWs Can Be Portrayed*, available at http://writ.news.findlaw.com/commentary/20030326_dworkin.html.

Now the Government seeks deference for its recent reinterpretation of the Conventions, Gov’t Br. at 52 n.* – an interpretation that flies in the face of the

¹³ According to secondary sources, the Assistant Secretary of Defense for Public Affairs issued a guidance in 1991 that sought to balance the privacy rights of prisoners with the public’s legitimate right to see images depicting the Government’s actions during the war. *See* W. Hays Parks, *The Gulf War: A Practitioner’s View*, 10 Dick. J. Int’l L. 393, 418 (citing Assistant Secretary of Defense for Public Affairs, Memorandum, Photography of Enemy Prisoners of War (Feb. 2, 1991)). The Government has told amici’s counsel that it would release the memorandum only in response to an FOIA request. Counsel filed such a request; the request is pending.

consensus interpretation and the Government's own past practice. The Government is not entitled to such deference.

To be sure, the “reasonable” construction of a treaty by the Executive Branch, *El Al Israel Airlines v. Tseng*, 525 U.S. 155, 168 (1999) – when “consistently adhered to by the Executive Department of the Government,” *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921) – is “of weight.” *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933).¹⁴

But courts accord the Government little deference where, as here, the Government has not maintained a consistent interpretation of a treaty. *See, e.g., Perkins v. Elg*, 307 U.S. 325, 348-49 (1939) (overruling State Department interpretation of citizenship treaty where the Government had previously taken a different position on similar treaties with other countries); *Clark v. Allen*, 331 U.S. 503, 513 (1947) (according no deference to a Government position on the interpretation of treaty provision governing right of alien to inherit real property

¹⁴ Even where the construction is reasonable and has been consistent, the construction is “not conclusive upon courts called upon to construe” the treaty. *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933). *See, e.g., Johnson v. Browne*, 205 U.S. 309 (1907) (declining to adopt the Government's interpretation of an extradition treaty with Great Britain).

where “the attitude of the State Department has varied,” and ruling against a Government interpretation of a similar provision governing personal property).

Because the Government’s current litigation position is not consistent with its past practices or prior interpretation of the Geneva Conventions, the Government is not entitled to deference.

D. The Images Will Provoke Public Curiosity About the Government’s Role in the Abuse, Not the Identity of the Victims.

Releasing the images would further the fundamental purposes of the Geneva Conventions. As scholars and authorities on the Conventions, both in the United States and abroad, have recognized, the context and purpose of a release matter: A photograph of prisoners being tortured published in a government newspaper as pro-war propaganda is surely a violation; that same photograph released under a sunshine law meant to foster public debate on government practices is not. Release of the images at issue here would be intended not to humiliate prisoners but to expose their abuse – an intent consistent with the Geneva Conventions’ purpose.

During the war in Iraq, the Iraqi government showed footage of U.S. prisoners “disoriented and fearful, and . . . clearly trying to frame responses to the questions thrown at them that will avoid provoking the anger of their captors” giving “[t]he strong impression . . . of captives being put through a kind of performance under conditions of vulnerability.” *See* Dworkin, *Limits of How*

POWs Can Be Portrayed, available at <http://writ.news.findlaw.com>

/commentary/20030326_dworkin.html. Anthony Dworkin, director of the Crimes of War Project, argued that broadcasting that film clearly subjected the captives to “insults and public curiosity.” But he recognized that U.S.-redacted photographs of captured Iraqi prisoners of war, disseminated as part of “straightforward factual recording of the unfolding progress of the war,” did not, based on the context of each release and the intent of the respective government. *Id.*

Two professors at the Judge Advocate General School for the U.S. Army – including one cited by the Government in its brief, Gov’t Br. 52 – endorse this reasoning. Discussing the depiction by Serbian television of captured U.S. soldiers, they wrote:

The assertion that showing the prisoners on television is illegal, absent being coerced into making statements or being shown in a humiliating fashion, is questionable. In this case, the benefits to the prisoners of being shown on television arguably outweighed any “insult” or “humiliation” they may have experienced. They were accounted for, the fact they were in Serb control was irrefutable, a record of their condition upon capture was to a degree preserved, and they had the satisfaction of knowing that the world, the United States and their families knew all this as well. The protections of the GPW against public insult and humiliation belong to the prisoner of war, not to the sending state and its policies.

Major Geoffrey S. Corn & Major Michael L. Smidt, “*To Be or Not to Be, That is the Question*”: *Contemporary Military Operations and the Status of Captured Personnel*, *The Army Lawyer*, June 1999, at 11 n. 84.

The former Chief of the International Law Branch and Special Assistant for Law of War Matters for the Judge Advocate General of the Army stated that during the Gulf War,

U.S. officials were aware that the capture of enemy personnel is a news event, as is their care in conformity with the GPW. A clear balancing between media interest and protection of the dignity of Iraqi prisoners of war had to be accomplished . . . Accordingly, guidance was issued by the Assistant Secretary of Defense for Public Affairs that balanced these competing requirements.

See W. Hays Parks, The Gulf War: A Practitioner's View, 10 Dick. J. Int'l L. 393, 418 (1992).

International authorities agree. Gordon Risius, a colonel in the legal services branch of the British Army, and Michael Meyer, head of international law at the British Red Cross, argued that whether photographs violate the Conventions depends upon (i) whether the prisoner's honor is impugned by the photograph; (ii) the consequences for the prisoner or his family of appearing in the photograph; (iii) the intent of the photographer or dissemination; and (iv) whether the photograph is staged.

Few would dispute that Article 13 is contravened where the photographer's intention is to humiliate the prisoner by taking and publishing a picture showing him in degrading circumstances. But what if the photographer is a journalist anxious to record and report degrading conditions in a prisoner-of-war camp, in the hope that international outrage will result in improvements?

See Risius & Meyer at 293 and JA 155. Risius and Meyer recognized the media's "significant role and responsibilities in implementing international humanitarian law." *Id.* They endorsed the ICRC's interpretation, prohibiting dissemination of photographs in which prisoners can be individually identified.

Former British Army Major General A.P.V. Rogers, now a member of the law faculty at Cambridge University, wrote:

Is it permissible to show prisoners of war on television? This issue arose during the Gulf war of 1991. There was adverse reaction in the West to the showing of captured pilots on Iraqi television as humiliating and degrading treatment. The interests of prisoners of war have to be balanced against the legitimate interest of the media in reporting on developments in a war, so the policy was adopted in the coalition forces of allowing photographs of prisoners of war to be shown so long as they were not close-up enough for individuals to be identified.

See Rogers at 53; see also Fischer at 330 ("The examples of reports on prisoner of war camps in the former Yugoslavia illustrate the requirement to weigh the need to preserve prisoners' lives against the rule prohibiting their exposure to public curiosity. In the case of reporting by international observers, preservation of the prisoners' lives must prevail."); Robert Cryer, *The Fine Art of Friendship: Jus in Bello in Afghanistan*, 7 J. Conflict & Security L. 37, 77 (2002) ("As public opinion is important during wartime, and media coverage of violations of humanitarian law has an impact on opinion, the media may have a legitimate role in encouraging

compliance with the law. Therefore a broader contextual analysis of the circumstances in which such material is publicised is preferable.”)

Public release of redacted photographs of prisoner mistreatment in Iraq and Afghanistan is intended to raise public awareness, encourage investigation, and, if necessary, promote reform. Release of the photographs would not constitute exposure of the prisoners to “insults and public curiosity” in violation of the Geneva Conventions, but would serve the Conventions’ principal purpose – to deter abuse of prisoners.

CONCLUSION

The Geneva Conventions represent a signal achievement in reducing suffering in war, and should be interpreted in keeping with their purposes. For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B), as amended by Circuit Rule 32, because it contains 5,382 words, excluding parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

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