UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE, and VETERANS FOR PEACE, Plaintiffs, v. DEPARTMENT OF DEFENSE, Defendant.	No. 1:04-CV-4151 (AKH)

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S RENEWED SEVENTH MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF PLAINTIFFS' SEVENTH MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Even in an age in which information, whether photographs or cartoon images, the written word or even satirical cinema, may give rise to horrific terroristic reaction, the Freedom of Information Act ("FOIA"), and withholding statutes given effect by FOIA, like the Protected National Security Documents Act ("PNSDA"), provide legal standards that, if correctly applied, stand as a bulwark against excessive government secrecy, thereby assuring the informed citizenry that is so critical to the survival of our democracy. This case applies those principles to photographs pertaining to this nation's treatment of detainees, photographs that have long been sought in this litigation, and withheld by our government. Specifically, this case presents the question whether, given a new opportunity to do so, the government has now produced evidence that would require this Court to alter its prior ruling that the Secretary of Defense's 2012 certification, which asserted that release of the photographs would endanger Americans, "is insufficient to meet the government's burden to justify its withholding . . . photographs from disclosure." *ACLU v. DOD*, 2014 U.S. Dist. LEXIS 120147 at *33 (S.D.N.Y. Aug. 27, 2014). In its Opinion granting in part Plaintiffs' Motion for Partial Summary Judgment, the Court held that "[t]he government [had] failed to submit . . . evidence supporting the Secretary of Defense's determination that there is a risk of harm, and evidence that the Secretary of Defense considered whether each photograph could be safely released." *Id.* Given an opportunity to supplement this certification by creating a fuller record, the government has still not provided support for either proposition.

Specifically, even as it held that the government had failed to justify its continued refusal to disclose photographs depicting U.S. treatment of detainees more than a decade ago, the Court permitted the Department of Defense ("DOD") to develop a record that "show[s] an accountability, by the Secretary of Defense, of having considered and having made a finding

with regard to each and every photograph, individually and in relation to the others." *Oct. 21 Tr.* at 11:14-16 (Dkt. No. 526). But the documents submitted by the DOD show no such thing. To the contrary, far from performing the "individual review" required by the Court, *ACLU*, 2014 U.S. Dist. LEXIS 120147 at *32, the government concedes that three senior military leaders charged with evaluating the risk of releasing each and every photograph were only provided with a sample of 15 to 30 photographs for their review. *See Declaration of Megan Weis* at ¶ 8, 9.

Moreover, DOD's entire case for withholding the photographs at issue comes down to an assertion that release of the photographs will result in violence similar to the unrest that followed three prior revelations of extreme disrespect towards Muslims. *See Recommendation of General John R. Allen* at ¶ 3, *Recommendation of General James N. Mattis* at 2. DOD never asserts that any, let alone all, of the withheld images capture similar behavior, or otherwise "show[s] why" release of these pictures would incite violence. *ACLU*, 2014 U.S. Dist. LEXIS 120147 at *29. Further, the generals seek to support withholding these images based in large part upon political and diplomatic concerns that are entirely irrelevant to the criteria enunciated by the PNSDA. Finally, even as DOD pretends to attempt to satisfy this Court's concerns, it submissions, in fact, are so spare as to preclude the Court from in any way evaluating the "adequa[cy of the] basis for the [Secretary's] certification." *Id.* at 5.

Accordingly, DOD's submission should not alter this Court's prior order holding that the government has not satisfied its burden of proving that the photographs fall within an exemption to the FOIA, *id.* at *13-14 (citing *Am. Civil Liberties Union v. Dep't of Justice*, 681 F. 3d 61 (2d Cir. 2012)). The Court should, therefore, finally order the release of documents requested more than a decade ago.

PROCEDURAL HISTORY

A. The Court's August 27, 2014 opinion and order

Since plaintiffs first filed their FOIA request in 2003, the government has refused to release a group of photographs depicting detainee abuse abroad based, in part, on its assertion that release of any of these photographs would incite violence against Americans. The DOD has maintained its view even though, as this Court has noted, "large numbers of similar photographs [have been] freely circulating on the internet" since 2006. *Id.* at *3, 6. DOD has suppressed even those photographs that this Court has characterized as "relatively innocuous." *Id.* at *31. The Department did not revise its opinion even after the United States' military withdrew from Iraq in 2011. *Id.* at *18. Indeed, today, the government still asserts that it cannot safely make the photographs public, *see Declaration of Rear Admiral Sinclair M. Harris*, even though last month the President declassified, and made public, a 500-page report rife with gruesome, graphic details of the physical and psychological torture inflicted on detainees from 2001 to 2009, the same time period covered by plaintiffs' request. *See* Senate Select Committee on Intelligence, *Study of the Central Intelligence Agency's Detention and Interrogation Program*, released on December 9, 2014, available at http://www.intelligence.senate.gov/study2014/sscistudy1.pdf.[1]

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[1] It should be noted that, among the disturbing revelations of that Report are that the CIA made misrepresentations to this Court in the context of their *Glomar* response to Plaintiffs' FOIA request. *See Fourth Decl. of Marilyn A. Dorn*, March 30, 2005 (Dkt No. 79). Specifically, the CIA's declarant represented that confirming or denying the existence of records pertaining to its detention and interrogation policies would endanger national security by revealing the CIA's interest and involvement in detention and interrogation of War on Terror detainees, *id.* at 4-12, an assertion this Court largely credited. *ACLU v. DOD*, 389 F. Supp. 2d 547, 564-66 (S.D.N.Y. 2005) (upholding *Glomar* response as to two of the three item requests). However, it has subsequently come to light that, even as the CIA was asserting to this Court that disclosing its interest in these practices would endanger national security, CIA officials were widely disseminating information about the CIA's involvement in interrogation and detention practices to garner favorable press coverage. Indeed, internal correspondence by CIA personnel demonstrates that they were fully aware that their *Glomar* representations to the Court were false. *See Senate Select Committee on Intelligence Study* at 404-05 (quoting a CIA's lawyer's admission that the *Glomar* declaration was "a work of fiction"). This disturbing admission of genuinely

In sum, despite the many changes in "war, the news cycle, and the international debate over how to respond to terrorism," *ACLU*, 2014 U.S. Dist. LEXIS 120147 at *17, the government has expressed the same, static view year after year — that each and every requested photograph, if disclosed, would trigger an attack on Americans.

In August, this Court ordered the government to provide some justification for this unwavering conviction. As this Court noted, under the PNSDA, the government may withhold these photographs only "if certain criteria are met," *id.* at 24, namely that disclosure "would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States," *id.* at *23 (quoting PNSDA § (d)(1)). The statute instructs that the Secretary of Defense "shall issue a certification" memorializing his determination. *Id*. At issue in the Court's prior order, as well as now, is the Secretary of Defense's 2012 certification, which explained the suppression of all the requested photographs in a single, spare sentence; "[u]pon the recommendations of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, and the Commander, International Security Assistance Force/United State Forces-Afghanistan . . .," the Secretary wrote, "I have determined that public disclosure of these photographs would [endanger Americans]." *Slip Opinion* at Ex. 1 (Dkt No. 513).

This Court held that this conclusory sentence did not provide a sufficient basis for withholding the requested photographs for two reasons. First, the Court held, the certification failed to explain "why, on November 9, 2012, the release of pictures taken years earlier would continue to 'endanger [Americans abroad]'." *Id.* at *29 (quoting PNSDA § (d)(1)). The

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contumacious conduct may, once again, require that Plaintiffs make an appropriate application to the Court.

government had contended that the PNSDA should be read to strip courts of the power to review the basis for the Secretary's suppression of documents, arguing that the Court's role was limited to "establish[ing] that the Secretary of Defense had issued a certification," *id.* at *9, but the Court rejected that sweeping interpretation. Instead, the Court noted that "FOIA litigation, by requiring the government to identify responsive documents, serves to call the government to account," *id.* at *27, and that, when drafting the PNSDA, Congress must have been "aware that [c]ourt[s] had construed FOIA as creating a background norm of broad disclosure of Government records, and [had] provided *de novo* judicial review of agency invocations of FOIA exception," *id.* at *25 (citations and quotation marks omitted). Thus, "the PNSDA should be read as providing for judicial review of the basis for the Secretary of Defense's certification." *Id.* at *27. For that review to be meaningful, the government was required to provide some evidence that "support[ed] the factual basis for its assertion that these photographs should be withheld." *Id.*

Second, the Court held that "[the 2012 Recertification] suggests that the Secretary of Defense has reviewed the photographs as a collection, not individually," as mandated by the statute. *Id.* at *32 (quotation marks omitted). The Court reasoned that the plain text of the PNSDA "refers to the photographs individually — '*that* photograph' — and therefore requires that the Secretary of Defense consider each photograph individually, not collectively." *Id.* at *30. The Court further explained that this textual interpretation made practical sense in light of the Court's own experience in this litigation: "Even if some of the photographs could prompt a backlash that would harm Americans, it may be the case that the innocuous documents could be disclosed without endangering the citizens, armed forces or employees of the United States. Considering the photographs individually, rather than collectively, may allow for more photographs to be released, furthering FOIA's 'policy of full disclosure.'" *Id.* at *31-32 (quoting

Halpern v. FBI, 181 F.3d 279, 284-85 (2d Cir. 1999)). Given that the 2012 Recertification only referred to the photos in the aggregate (*i.e.*, as "these photographs"), the Court held that "the 2012 Recertification is insufficient to meet the government's burden of showing that the photographs were individually considered by the Secretary of Defense." *Id.* at *33.

The Court, however, gave the government an "opportunity to create a record to justify its invocation of the PNSDA." *Id.* at *33. At a later status conference, the Court made clear what such a showing, at a minimum, required. "[W]hat is necessary, is that the submission to me show an accountability, by the Secretary of Defense, of having considered and having made a finding with regard to each and every photograph, individually and in relation to the others." *Oct. 21 Tr.* at 11:13-16. "[The government's] burden," the Court elaborated, "is to be specific, photograph by photograph." *Id.* at 13:4-5. The Court also requested that the government provide a revised opinion regarding whether the photographs could be safely disclosed today. This would aid the Court in its evaluation of the soundness of the 2012 certification: "[P]art of what you are doing is making estimates[,] [a]nd estimates, as of . . . 2012, either would be more or likely to be true or less likely to be true, according to the conditions that have occurred since that time." *Id.* at 7:13-16.

The Court, then, gave the government a clear instruction — if it wished to continue to prevent these photographs from being made available to the American public, it was required to develop and present a record that "show[s] an accountability, by the Secretary of Defense, of having considered and having made a finding with regard to each and every photograph, individually and in relation to the others," *id.* at 11:14-16, and, to borrow the government's words, to provide evidence "[r]egarding the harms that underlie the certification of 2012, . . . that prompted th[e] certification . . . that harm would result from the release of the photographs,"

id. at 6:20-23. As detailed below, the government's declarations do not provide an adequate response to either request.

B. The Department's December 19, 2014 filing

DOD's filing reveals that the Secretary's 2012 recertification was deficient in two respects. First, the Secretary certified all of the photos for withholding even though the military experts who recommended certification only reviewed a subset of the images. The required evaluation of "each and every photograph," *id.* at 11:15-16, then, admittedly never occurred. Second, the Secretary relied upon recommendations that do not provide a "factual basis for [the] assertion that these photographs should be withheld," *ACLU*, 2014 U.S. Dist. LEXIS 120147 at *27; indeed, insufficient information is provided to allow the Court to evaluate whether such a basis even existed.

According to the government's filing, Associate Deputy General Counsel Megan M. Weis at DOD spearheaded the certification process. *Declaration of Megan Weis* at ¶ 7. Weis "gathered all of the photographs subject to 2009 certification and reviewed all of them." *Id.* at ¶ 8. Weis, however, did not evaluate whether release of any of the images might endanger Americans abroad. Rather, she "placed the photographs into three categories, and created a representative sample of five to ten photographs in each category to provide to senior military commanders for their review and judgment of the risk from public disclosure of each category." *Id.* Weis used four criteria to create the three "categories" of photos: "the content of each photograph," "the extent of any injury suffered by the detainee," "whether U.S. service members were depicted," and "the location of the detainee in the photograph." *Id.* Weis's declaration does not explain why these criteria were relevant to assessing potential threat to Americans, nor does it describe in any way the groups that resulted from the use of these criteria. Nonetheless,

Weis asserts that, with the help of "leadership in the DoD Office of the General Counsel," she "ensure[d] that the representative sample accurately characterized all of the photographs." *Id.*

Weis then sent the sample of 15 to 30 photographs to senior lawyers for the three military leaders tasked with assessing whether disclosure of the images might endanger American lives. *Id.* at ¶ 9. She asked that "each attorney provide the representative sample to his commander and seek a written recommendation regarding whether the Secretary of Defense should renew the certification of the photographs." *Id.* Weis does not attest that she also provided the attorneys with copies of all the images; instead, she only "provided the DoD General Counsel with . . . a compact disk with all of the photographs." *Id.* at ¶ 13.

After the three generals reviewed the small sample, they each recommended, in writing, that the Secretary withhold all of the photographs from the public. *Id.* at ¶ 10-12. Based upon those recommendations, Weis prepared a draft certification for the Secretary's review and signature. *Id.* at ¶ 13. She provided the General Counsel of DOD with the draft, the representative sample, the generals' recommendations, and the disk mentioned above. *Id.* Whether the General Counsel or the Secretary ever reviewed the sample, let alone all the images on the disk, is not established by Weis's declaration; indeed, she "did not attend [the] meeting" between the General Counsel and the Secretary. *Id.* Rather, she merely "received the signed renewal of the certification with respect to all of the photographs" at a later date. *Id.*

The generals submitted their recommendations in short memoranda, which are spare and conclusory. Thus, if the generals had a basis for believing that release of any one of the withheld photographs (most of which they did not see) would result in harm to Americans, they did not set forth the basis for that belief, or for their recommendations that not one single photograph could be released without endangering Americans. General Dempsey wrote only that "[b]ased on my

familiarity with these photos, the fragile situation in the USCENTCOM Theater of Operations, particularly in Afghanistan and Pakistan, and the factual description provided by the memos, it is my view that public disclosure of these photos would endanger [Americans]." *Recommendation of General Martin E. Dempsey* at 1. Much of Generals Allen's and Mattis's recommendations discuss not potential danger to Americans, as the statute requires, but the political fallout that might result from disclosure. General Allen, for example, worried that disclosure might lead the "U.S. [to] suffer more generally from negative publicity as media outlets allow the story to proliferate throughout the U.S. and abroad," and that "releasing such photographs would almost certainly exacerbate our current impasse with the Government of the Islamic Republic of Afghanistan . . . over the issue of transferring detainees to Afghan Custody." *Recommendation of General John R. Allen* at ¶ 5, 6. General Mattis echoed these political and diplomatic anxieties, noting that "[t]his is an extraordinarily sensitive time in Afghanistan, [as] . . . the negotiations for the Bilateral Security Agreement will soon begin." *Recommendation of General James N. Mattis* at 2.

Indeed, General Allen and General Mattis's declarations provide only the vaguest factual basis to believe that disclosure will incite violence against Americans. Both reference unrest that followed the public airing of instances of extreme disrespect towards Muslims on three prior occasions. Thus, General Allen writes that "release of the film 'Innocence of the Muslims,' . . . generated 38 protests in a number of cities across Afghanistan, including three that turned violent." *Recommendation of General John R. Allen* at ¶ 3. He goes on to note that "[t]he mishandling of religious materials at Bagram in February 2012 also caused a similar outcry and led to at least 74 demonstrations and 30 coalition and Afghans deaths," and the "January 2012 . . . internet release of videos showing U.S. Marines urinating on corpses in Helmand

province led to violence and Coalition deaths." *Id.* General Mattis's recommendation also invokes these three episodes; "[t]he Koran burnings in early 2012, the images of Marines urinating on corpses and the 'Innocence of the Muslims' video release, have all sparked violence that has resulted in the death and endangerment to members of the Armed Forces." *Recommendation of General James N. Mattis* at 2. Neither recommendation explains how any (let alone all) of the withheld pictures were similarly inflammatory to the privately-produced film, the reports of Koran burnings at Bagram, or the images of Marines mistreating corpses. Nor do the recommendations explain how officials knew that the violence that followed these three episodes in time were in fact caused by them. In sum, the recommendations speculate that disclosure of photos that might depict Americans in an unflattering light could lead to unrest much like that which followed the public airing of other unrelated crass conduct, but provided no basis for this speculation.

ARGUMENT

A. The Secretary did not conduct an individualized determination of the risk posed by release of "each and every photograph."

This Court has explained to the government how it can show that the Secretary's recertification was sufficient: "[W]hat is necessary," the Court has stated, "is that the submission to me show an accountability, by the Secretary of Defense, of having considered and having made a finding with regard to each and every photograph, individually and in relation to the others." *Oct. 21 Tr.* at 11:13-16. But Weis's declaration, far from satisfying this Court's requirements, makes clear that no such "item by item" evaluation occurred. *Id.* at 12:9.

The Secretary's recertification, spare as it is, makes clear that he relied on the recommendations of only three people in making his determination: "the Chairman of the Joint Chiefs of Staff [General Martin E. Dempsey], the Commander of the U.S. Central Command

[General James N. Mattis], and the Commander, International Security Assistance Force/United States Force-Afghanistan [General John R. Allen]." *ACLU*, 2014 U.S. Dist. LEXIS at *10-11. According to Weis, however, she never provided the three generals or their staffs with copies of every photograph, electing instead to send only a sample of 15-30 photographs for review. *Declaration of Megan Weis* at ¶ 9.[2] This was not done out of necessity, since the military leaders could easily have been provided with every photograph — Weis attests that the photos fit on one compact disk. *Id*. at ¶ 13. Thus, the generals' blanket recommendation that release of any photographs would endanger American lives could not and did not follow upon an evaluation of the risks posed by "each separate photograph" because, quite simply, the generals did not have copies of most of them. *ACLU*, 2014 U.S. Dist. LEXIS at *4.

Indeed, the government never asserts that anyone but Weis reviewed every photograph.[3] But she admits that she did so only for the purposes of creating "a representative sample," *Declaration of Megan Weis* at ¶ 8, not to conduct the analysis required by the PNSDA, that is, to review each image and determine whether "disclosure of that photograph would endanger [Americans]." PNSDA § (d)(1). Only the "senior military commanders" were asked to evaluate

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[2] Even the means of selecting the sample demonstrates that the Department treated the photographs as a "collection, not individually." *ACLU*, 2014 U.S. Dist. LEXIS at *32. Weis "placed the photographs into three categories," *Declaration of Megan Weis* at ¶ 8, again employing a process whereby they would be evaluated in groups rather than individually.

[3] Indeed, nothing in the Department's declarations establishes that the Secretary or his General Counsel looked at any of the photographs, let alone all of them. Nor does the Department argue that the Secretary did so. *See Defendant's Renewed Seventh Motion for Summary Judgment* at 5 n.3 (Dkt No. 529). Instead, the Department argues that the Secretary can be deemed to have reviewed the photos because he delegated the task to a subordinate, in this case, Weis. *Id*. But even assuming that 10 U.S.C. § 113(d) allows such delegation, it is undisputed that the Secretary did not deputize Weis to conduct the risk assessment mandated by the PNSDA; she simply prepared the photographs for review by others. Thus, neither the Secretary, nor any of his subordinates, ever "considered whether each photograph could be safely released." *ACLU*, 2014 U.S. Dist. LEXIS at *33.

images to render a "judgment of the risk from public disclosure." *Declaration of Megan Weis* at ¶ 8. Nor did DOD rectify its failure to review the photos individually notwithstanding the Court's conclusion, in August, that this is what was required. Rather, DOD's recommendation, four months later, was still based solely on the assessment of a subset of them. Rear Admiral Sinclair M. Harris declared that he "reviewed a representative sample of the photographs." *Declaration of Rear Admiral Sinclair M. Harris* at ¶ 6.

For this reason alone, the recertification does not meet the demands of the PNSDA. As this Court has already ruled, "[t]he condition provided by the PNSDA for withholding disclosure is that each individual photograph, if disclosed, alone or with others 'would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.'" *ACLU*, 2014 U.S. Dist. LEXIS at *33. A certification that results after reviewing a sample "collection" of the photos, rather than assessing each photo "individually . . . is insufficient to meet the government's burden." *Id.* at 32-33. The photos should be released.

B. A "representative sample" was an inappropriate and unnecessary shortcut where individualized review would take at most a few days time.

Throughout the course of this litigation, DOD has refused to disclose the number of photographs responsive to plaintiffs' request. *See Oct. 21 Tr.* at 6:4-5 ("Your Honor, the Department of Defense has never acknowledged a number of photos that are at issue."). Despite this reticence, DOD contends that the number of responsive images is so voluminous that it had to winnow the group to a representative sample before senior military leaders could conduct their review. This defies what little record evidence DOD has submitted to this Court, as well as commonsense.

In general, "[s]ampling procedures have been held to be 'appropriately employed, where . . . the number of documents is excessive and it would not realistically be possible to review each and every one.'" *Meeropol v. Meese*, 790 F.2d 942, 958 (D.C. Cir. 1986) (quoting *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1490 (D.C. Cir. 1984)). In *Meeropol* — a seminal FOIA case upholding the use of sampling to evaluate the propriety of a decision to withhold documents from disclosure — the D.C. Circuit upheld a lower court decision allowing the government to produce only a sample for *in camera* review. *Id*. at 959. The vastness of the *Meeropol* request is instructive: The agency withheld over 20,000 responsive documents, some of which ran for over one hundred pages, *id.* 948, 959; at one point, review of the FOIA request required the work of "sixty-five full-time and twenty-one part-time FBI employees," *id.* at 951. The "scope of the request was therefore enormous," and in the interest of efficiency, the district court agreed to review only a random sample of the withheld documents. *Id.* at 945. Thus, as *Meeropol* demonstrates, the purpose of sampling in FOIA cases is to "reduce a voluminous FOIA exemption case to a manageable number of items." *Bonner v. United States Dep't of State*, 928 F.2d 1148, 1151 (D.C. Cir. 1991). Indeed, it is for that reason that sampling procedures have been employed in the past in this case. *See Letter from Sean H. Lane*, January 28, 2008 (Dkt No. 277).

But the need for sampling is absent in this case, where the record shows that one person — here, Ms. Weis — can review (and indeed has reviewed) every withheld document in a relatively short amount of time, and, therefore, an individual assessment of each document has already proven entirely manageable. *Declaration of Megan Weis* at ¶ 8. Weis commenced her analysis sometime in August and the Secretary issued his final certification in early November. Within that time period — and there is no evidence that Weis worked anywhere near full time on

the project — Weis was able to view each image, develop criteria for grouping the photographs into three categories, sort the photos, choose the sample, check with "leadership in the DoD Office of the General Counsel" to ensure that the sample "accurately characterized all of the photos," load all the photos onto a single compact disk, "raise the issue" with the senior staff for Generals Allen, Mattis, and Dempsey, transmit the photos to those staff members, await the generals' recommendations, meet with the General Counsel to review the generals' memoranda, and allow the General Counsel and the Secretary to confer about the certification. *Id.* at ¶ 7 – 13. Given this sequence of events, it simply cannot be that review of each image took an inordinate amount of time. Indeed, the largest estimate of the number of photos withheld is just over 2,000, *see Memorandum in Support of Plaintiffs' Seventh Motion for Partial Summary Judgment* at 6 (Dkt. No. 493), and at the generous rate of one photograph a minute, review would take at most a few days.

Moreover, even if sampling were necessary in this case, DOD has not produced a record that is sufficient for this Court to review the methodology employed. As, Justice Ginsberg, then of the D.C. Circuit, explained in *Bonner*, only "[i]f the sample is well-chosen, [can] a court . . ., with some confidence, 'extrapolate its conclusions from the representative sample to the larger group of withheld materials.'" *Bonner*, 928 F.2d at 1151 (quoting *Fensterwald v. United States Central Intelligence Agency*, 443 F. Supp. 667, 669 (D.D.C. 1977)) (Ginsburg, J.). A "technique will yield satisfactory results only if the sample employed is sufficiently representative, and if the documents in the sample are treated in a consistent manner." *Id.* For that reason, courts review a sample's "reliability" to ensure that the sample accurately represents the gamut of withheld documents. *Id.* at 1152.

Here, DOD's methodology is entirely opaque. Weis does not define the categories she chose, or detail the differences between them. She attests that she used four criteria to create the categories, but does not explain the relationship between these criteria and the three chosen groups. Moreover, she provides no explanation for why the criteria were even a relevant, appropriate measure of a photograph's likelihood to incite violence. Thus, this Court is left only with DOD's assurance that the photos differed along three unstated lines, differences that have some unstated connection to four criteria, which were themselves chosen for unstated reasons. That vague description does not provide the court with a basis to assure that Weis's "technique" yielded a "sample [that was] sufficiently representative" of the range of conduct captured in the full complement of withheld images. *Bonner*, 928 F.2d at 1151.[4]

C. The generals' recommendations do not provide sufficient information for this Court to determine whether the Secretary had a "factual basis for its assertion that these photographs should be withheld."

In August, this Court rejected DOD's attempt to stymie judicial review of the facts supporting its certification. Noting that "executive determinations generally are subject to judicial review and . . . mechanical judgments are not the kind federal courts are set up to render," *ACLU*, 2014 U.S. Dist. LEXIS 120147 at *27-28 (citations and quotation marks omitted), this Court held that "the PNSDA should be read as providing for judicial review of the basis for the Secretary of Defense's [decision]." *Id.* at *28. But DOD's submission does not reveal what the "factual basis for [the] assertion that these photographs should be withheld" was,

[4] This is why, in a typical FOIA case, parties will confer and submit a proposed sampling method to the court for approval. Indeed, that has been the practice in this litigation. *See e.g. Letter from Sean H. Lane* (advising court that "parties are working towards an agreed-upon representative sample" of withheld documents relating to abuse of prisoners). But as they prepared the certification pursuant to which it would seek to continue to withhold photographs that have been sought for over ten years, the government gave neither the Court nor the plaintiffs notice that they intended to analyze only a sample of the photographs in this case.

at least not in a manner that sufficient to allow for meaningful review rather than the "rubberstamp[]" that this Court has already rejected. *Id.*

That is, in order for the government to correct for what DOD "failed" to establish in its prior submission, *id.* at *33, it would have to now "show why, on November 12, 2012, the release of pictures taken years earlier would continue to endanger [Americans]," *id.* at *29. The submission provided, however, does not do so, for at least three reasons.

First, the generals' memoranda focus largely upon irrelevant diplomatic and strategic worries that have no bearing on whether the withheld photos will trigger violence against Americans. As this Court noted, the PNSDA imposes "strict criteria for when photographs should be certified;" withholding is only appropriate where release might endanger Americans. *Id.* at *24. Thus, General Allen's fears that release will "[lead the] U.S. [to] . . . suffer more generally from negative publicity," "exacerbate our current impasse with the Government of the Islamic Republic of Afghanistan . . . over the issue of transferring detainees," "[a]ffect . . . our planning for NATO's post-2014 presence," and "further erode the trust-based relationship the U.S. has forged with its Afghan partners," are, even assuming the thrust of these statements, completely irrelevant to the inquiry mandated by the PNSDA. *Recommendation of General John R. Allen* at ¶ 5-8. The same is true for General Mattis's assertion that release "could reasonably be expected to adversely impact the political, military and civil efforts of the United States," and that "[t]his is an extraordinarily sensitive time in Afghanistan, [as] . . . the negotiations for the Bilateral Security Agreement will soon begin." *Recommendation of General James N. Mattis* at 1, 2. The release of photos that depict Americans in an unflattering, comprising light may make it more difficult for the United States to achieve its political and strategic goals. But Congress

did not create an exemption to FOIA for inconvenient truths, only for photographs that would actually endanger Americans, and, thus, those concerns do not justify resisting disclosure.

Second, the generals' recommendations expressly rest on a loose, unsupported analogy to several instances of extreme disrespect for Muslims. Generals Allen and Mattis both attest that they believe release will incite violence against Americans because unrest followed the release of the film the "Innocence of Muslims," reports of Koran burnings by United States soldiers, and videos of American soldiers urinating on corpses. *Recommendation of General John R. Allen* at ¶ 3-4, *Recommendation of General James N. Mattis* at 2. But the memoranda do not provide a basis to believe that any of the withheld photographs in this lawsuit, let alone all of them, depict similarly offensive conduct. Rather, in order for these three episodes to provide the required "factual basis" for non-disclosure, each withheld photograph would have to evince the same deep contempt for Islam as (1) a movie "depicting the Prophet Muhammed as a child of uncertain parentage, a buffoon, a womanizer, a homosexual, a child molester, and a greedy, bloodthirsty thug" David D. Kirkpatrick, *Anger Over a Film Fuels Anti-American Attacks in Libya and Egypt*, N.Y. TIMES, September 11, 2012, at A4; (2) reports that personnel burned holy books, "generally regarded as one of the most offensive acts in the Muslim world," Sangar Rahimi and Alissa J. Rubin, *Koran Burning in NATO Error Incites Afghans*, N.Y. TIMES, February 21, 2012, at A1; and (3) a video depicting "desecration," in particular, soldiers "urinating over . . . three bodies" and mocking the dead with the quip "[h]ave a great day, buddy." Graham Bowley and Matthew Rosenberg, *Video Inflames a Delicate Moment for U.S. in Afghanistan*, N.Y. TIMES, January 12, 2012, at A4.

But even if all the withheld photos somehow depict comparable contempt for Muslims – a dubious proposition given that this Court has characterized some of the photos as "relatively

innocuous" — nothing in the generals' memoranda provides a basis to so conclude. *ACLU*, 2014 U.S. Dist. LEXIS 120147 at *31. The memoranda do not even describe the photos, let alone attest that the photos are similar to the cited episodes or show how this is so. The Court is thus asked to blindly defer to DOD's speculative assertion that these photos will cause unrest because release of other unflattering information may have sparked backlash in the past. This the Court has refused to do in the past, and should not do now.

Moreover, the notion that each and every photograph is of comparable offensiveness to the items to which the generals analogize them also fails even the most rudimentary test of commonsense, given the reality of the passage of time, upon which this Court is focused. *Id.* at *18 ("Given the passage of time, I have no basis for concluding either that the disclosure of photographs depicting the abuse or mistreatment of prisoners would affect United States military operations at this time, or that it would not."). That is, the unrest that followed the release of "Innocence of the Muslims" came in the days immediately following release of a trailer for the film. Kirkpatrick, *supra*. Protests denouncing Koran burnings came the same day as reports of the incineration first surfaced. Rahimi and Rubin, *supra*. And video of the urinating soldiers depicted such unprecedented, "utterly deplorable" conduct that then Secretary of State Hilary Clinton expressed "total dismay" upon learning of it. Bowley and Rosenberg, *supra*. In each of these instances, unrest followed closely on the heels of a revelation.

In contrast, the nature of the government's detention program has been public for many years. Reports of inhumane conditions were circulating as early as 2004 when plaintiffs filed suit. *Original Complaint* at ¶ 3 (Dkt No. 1). Photographs of mistreatment of detainees at Abu Ghraib prison have been circulating on the internet since 2006, *ACLU*, 2014 U.S. Dist. LEXIS 120147 at *3, 6, and the Bush administration publicly acknowledged its detention and rendition

program that same year, Sheryl Gay Stolberg, *President Moves 14 Held in Secret to Guantanamo*, N.Y. TIMES, September 7, 2006, at A1. The declarations do not provide any basis to believe that there is anything new in the withheld images. While the photographs might confirm some of what is already known, they no longer have the potential to shock the conscience with fresh and inflammatory evidence of misconduct.

Third and finally, we now have a factual basis to question whether the revelation today of conduct long ago, which is what would be depicted in the pictures, would provoke the reaction feared by the generals. Indeed, the Senate Committee Report exhaustively detailed the most repugnant facets of the detention and interrogation program, a fact that Rear Admiral Harris does not address despite completing his statement after the report's release. *Compare Study of the Central Intelligence Agency's Detention and Interrogation Program*, released December 9, 2014 *and Declaration of Rear Admiral Sinclair M. Harris*, dated December 10, 2014. At the time of the report's release, a spokesman for the President warned that "release of the report could lead to a greater risk that is posed to U.S. facilities and individuals all around the world." Erin Kelly, *Officials Fear Torture Report Could Spark Violence*, USA TODAY, December 9, 2014. But the predicted uprising never came to fruition, likely because, as noted above, much of the report, though gruesome, covered conduct already known to the public. Thus, contrary to the Department's assertion, not every disclosure of American misconduct inevitably triggers a violent backlash. It is, under this Court's ruling, the government's burden to provide a basis from which to draw the necessary causal link, and nothing in the generals' recommendations allows the court to understand the basis for such an inference in this case. It has not done so.

To be sure, Plaintiffs cannot and do not say that there is no danger whatsoever that the release of images will result in violence. One need look no further than the recent tragedy in

Paris to see that some people react violently and irrationally to even cartoons.[5] But that potentiality has always existed side-by-side with FOIA's clear mandate 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." *ACLU*, 389 F. Supp. 2d at 551 (quoting *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir. 2005)). For this reason, Congress created procedural safeguards in the PNSDA, namely a certification process in which DOD was required to provide a basis for its decision to withhold each image, and, as this Court has made clear, judicial review of that basis. Without those safeguards, "[o]ur nation [would] surrender to blackmail, and fear of blackmail," as this Court has powerfully noted, "is not a legally sufficient argument to prevent us from performing a statutory command." *Id.* at 575.

In sum, without evidence, on an image-by-image basis, that each such image mirrored the cited instances of extreme disrespect for Muslims, and evidence of a causal link between disclosure of the photo and violence against Americans, the Court simply does not have a basis to review the "why" of the Secretary's certification. *ACLU*, 2014 U.S. Dist. LEXIS at *29. To be sure, as the Court noted in its prior order, courts accord "substantial deference to the submissions of military and intelligence officers." *ACLU*, 2014 U.S Dist. LEXIS at *27. But "'deference is not equivalent to acquiescence.'" *Azmy v. U.S. DOD*, 562 F. Supp. 2d 590, 597 (S.D.N.Y. 2008) (quoting *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998)). As the D.C. Circuit noted in the related context of documents withheld to protect national security, an agency's declarations are only entitled to deference where they contain "reasonable specificity of detail rather than merely conclusory statements," and where "they are not called

[5] Notably, the cartoons that provoked the attack on Charlie Hebdo were, like the images described, supra at 17, particularly offensive to Muslims, in particular, including cartoons depicting "the prophet naked and in pornographic poses," Miriam Krule, *Charlie Hebdo's Most Controversial Religious Covers, Explained*, SLATE, January 7, 2015, *available at* http://tinyurl.com/l85ntgw.

into question by contradictory evidence in the record." *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (internal quotation marks omitted); *accord Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009) (requiring affidavits describing justifications for nondisclosure to contain "reasonably specific detail"). Here, the Department relied on a vague, speculative analogy to support its conclusion that release would endanger Americans, and provided no other basis upon which the Court can perform its Constitutional function, as it has concluded it must.

CONCLUSION

In August, this Court gave the Department one final opportunity to explain the definitive factual basis for its decision to withhold documents.[6] The government's response not only fails to do so, but it also reveals that the Department failed even to conduct the individualized determination required by the Court. For these reasons, and those set forth above, the government has failed to meet its burden to prove that the withheld documents fall under an exemption to the FOIA, and this Court should not alter its prior order. The photographs should be ordered disclosed.

[6] Indeed, asked to provide updated information so that the Court could test whether "estimates, as of . . . 2012, [were] more or likely to be true or less likely to be true, according to the conditions that have occurred since that time," *Oct. 21 Tr.* at 7:13-16, DOD has instead provided a wholly new reason for withholding the photographs — release would allow ISIS to create inflammatory propaganda. *See Declaration of Rear Admiral Sinclair M. Harris.* Not only is this concern as speculative and blanket as the justifications underlying the 2012 certification, it also rests on the faulty assumption that our enemies need an excuse to create inflammatory images, which, of course, they do not. *See ACLU*, 389 F. Supp. 2d at 576 ("The terrorists in Iraq and Afghanistan do not need pretexts for their barbarism.").

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Respectfully submitted,

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