



JOHN J. GIBBONS FELLOWSHIP IN
PUBLIC INTEREST & CONSTITUTIONAL LAW

HONORABLE JOHN J. GIBBONS

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February 13, 2015

Honorable Alvin K. Hellerstein
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl St.
New York, New York 10007-1312

**Re: American Civil Liberties Union, et al. v. Department of Defense, et al,
04-cv-4151**

Dear Judge Hellerstein:

Please accept this letter in very brief response to the government's letter requesting further clarification from Your Honor regarding "the legal requirements for effecting and demonstrating a valid certification under the [Protected National Security Documents Act]." *Government's February 11, 2015 Letter* at 1. Although we do not, of course, oppose the notion of an Order that would clarify the Court's ruling, we most respectfully do not share the government's confusion, and are concerned that, whatever the government's intentions in this regard, the effect, at least, of this request will be the very delay to which the Court pointed during the hearing last week. In our view, Your Honor has provided the parties with a clear explanation of what the Protected National Security Documents Act ("PNSDA") requires on three occasions over the last six months — in the Court's August 27, 2014 Order, during our October 17, 2014 status conference, and at last week's (February 4, 2015) hearing. As set forth below, in each instance, the Court provided the government with clear, straight-forward guidance: the PNSDA requires an individualized, photograph-by-photograph determination that the release of each such photograph would endanger American lives. Absent evidence of such a determination, the Secretary's certification is insufficient, and without it, the government cannot lawfully withhold photographs from the public. No further clarification is necessary or, in our view, even possible. That said, we here address the concerns raised by the government.

First, the government complains that the Court has confused it with regard to whether one or multiple certifications are required. *Government's Letter* at 1. But whether the Secretary executes one or multiple certifications is not and never has been the point — or the Court's

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concern. Rather, “what DoD must do to demonstrate compliance with the PNSDA” is entirely straightforward and does not call for a fourth elucidation from the Court. *Government’s Letter* at 2. The Court stated it clearly in Your Honor’s August 27 order: “[the 2012 Recertification] suggests that the Secretary of Defense has reviewed the photographs as a collection, not individually,” and, thus, “the 2012 Recertification is insufficient to meet the government’s burden of showing that the photographs were individually considered by the Secretary of Defense.” *ACLU v. DOD*, 2014 U.S. Dist. LEXIS 120147, at *32-33 (S.D.N.Y. Aug. 27, 2014). As Your Honor reiterated on October 21, “what 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.” *October 21 Transcript* at 11:13 -16. And as the Court again explained on February 4, “it’s the obligation of the Secretary of Defense to certify each picture in terms of its likelihood or not to endanger American lives.” *February 4 Transcript* at 25:24 - 26:1. The government’s burden, then, is clear: it must review each photograph and assess whether “that photograph” would endanger American lives. PNSDA § d(1). And, while the Court has indicated that it would be satisfied with a declaration similar to a *Vaughn* index, explaining the “reason” for withholding, *see Feb. 4 Tr.* at 13:8-15, the point remains: whether in one certification or multiple documents, the government failed to comply with the legal requirements of the PNSDA in 2012 and, thus, the Secretary has not lawfully certified the subject photographs for withholding.

Nor, despite the government’s purported confusion on the issues, has the Court (or for that matter, the Plaintiffs) taken issue with the Secretary’s delegation of responsibility for performing certain functions to a subordinate. *Government’s Letter* at 2. Contrary to the government’s assertion, the issue in this case has never been the reach of 10 U.S.C. § 113(d). As Plaintiffs noted in our brief, *see Plaintiffs’ Response Brief*, Dkt. #533, at 11 n.3, even assuming that the Secretary could permissibly delegate his obligation to review each of the photos in this case, he did not do so. That is because, as the Court knows, it is undisputed that the only subordinate to view every photograph in 2012 was Associate Counsel Weis, and that she only looked at the photos for the purposes of creating a “representative sample.” *Declaration of Megan Weis* at ¶8. Thereafter a number of high level military officer reviewed a sample of the photographs before concluding that it would pose a danger to Americans abroad to release them. But the officers were not provided with all of the subject photographs and did not review each one, but only a sample. And neither Ms. Weis, nor anyone else, conducted the individualized risk assessment mandated by the PNSDA, let alone provided the factual basis for such assessment and for withholding of each photograph not disclosed, as correctly required by this Court. That failure will not be cured by an answer to the tangential question of the Secretary’s power to deputize a junior official to manage the project.

Finally, Plaintiffs cannot help but echo Your Honor’s apt observation of last week that the “consequence of what the government is doing is a sophisticated ability to obtain a very substantial delay.” *Feb. 4 Tr.* at 23:3-4. Despite this reservation, the Court allowed the

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government yet one more week to “say one of two things,” either that “the secretary does not want to certify . . . individual photographs,” or that it wanted “time to satisfy [the court’s] ruling.” *Id.* at 21:4-7. The government’s response is neither; it has chosen instead to attempt to reopen a thrice settled issue, with all of the consequences of delay foreseen by the Court, even as the certification here at issue comes closer to expiration. *See Government’s Letter* at 2. Plaintiffs respectfully request that the Court reject the government’s unnecessary and, in light of the Court’s prior rulings, specious request.

Thank you for Your Honor’s kind consideration of this submission.

Respectfully submitted,

/s/ Lawrence S. Lustberg

Lawrence S. Lustberg

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