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' MEMORANDUM OF LAW IN REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Lawrence S. Lustberg
Ana Muñoz
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
Phone: 973-596-4500
Fax: 973-639-6285
llustberg@gibbonslaw.com

Jameel Jaffer
Alexander Abdo
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
jjaffer@aclu.org

Counsel for Plaintiffs

This Court has repeatedly made clear what the Department of Defense ("DOD") must do to withhold documents pursuant to the Protected National Security Documents Act ("PNSDA") and the Freedom of Information Act ("FOIA"). As Plaintiffs argued in their opening brief, DOD has failed to comply with those orders, and Plaintiffs are therefore entitled to summary judgment. *See* Plaintiffs' Memorandum in Support of Cross-Motion for Summary Judgment at 1 ("Plaintiffs' Brief"). DOD's arguments opposing Plaintiffs' motion are, as set forth below, and in their initial brief (the arguments in which are not here repeated) unavailing.[1]

1. As this Court previously held, the PNSDA requires that the Secretary make an individualized determination of the risk posed by release of each withheld photograph.

    a. This Court held that the PNSDA mandates that the DOD review photos for certification one by one, and the DOD does not have discretion to veer from the statutorily required process.

In their cross-motion, Plaintiffs noted that this Court had already held that the Secretary must follow "a simple, but critical process" to meet his burden. Plaintiffs' Cross-Motion at 28. In responding to Plaintiffs' motion, DOD argues that "the PNSDA does not dictate any specific process that the Secretary must follow to issue a certification." Instead, "the Secretary has discretion to employ any process so long as it is reasonable and not otherwise prohibited by law." Defendant Department of Defense's Memorandum of Law in Further Support of its Eighth Motion for Partial Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment (ECF No. 571) (April 1, 2016) (hereinafter, "DOD Response") at 21. Of

[1] Plaintiffs endeavor to reply here only to those arguments that DOD marshaled to oppose Plaintiffs' cross-motion, which Plaintiffs based on DOD's failure to comply with this Court's clear instructions regarding their burden of proof in this case. *See* Memorandum of Law in Opposition to Defendant's Eighth Motion for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment, (ECF No. 570) (March 18, 2016) (hereinafter, "Plaintiffs' Cross-Motion"). Other of DOD's arguments were addressed in Plaintiffs' Brief; by not rebriefing them here, Plaintiffs of course do not waive them.

course, Plaintiffs have never argued that the Secretary lacks discretion to select the method by which he complies with the process mandated by the PNSDA. He may, for example, delegate aspects of his review to others. He may choose to sort and then review the photos according to reasonable criteria, grouping them chronologically or by subject matter, for example. But what the Secretary may not do is ignore the language of the PNSDA, the requirements of FOIA, or this Court's orders, and review a subset of photographs rather than conduct the "individual review of each photograph" as required by law. *Am. Civil Liberties Union v. Dep't of Def.*, 40 F. Supp. 3d 377, 389 (S.D.N.Y. 2014) ("*ACLU III*").

The DOD is, thus, wrong when it suggests that Plaintiffs have "made-up" a process that the Secretary must follow. DOD Response at 22. It is Congress and this Court that have determined what the Secretary must do. He may issue a certification only "if [he] determines that disclosure of *that* photograph" would lead to the requisite harm. PNSDA § (d)(1) (emphasis added). And as this Court held, FOIA and the PNSDA require the Secretary to then *defend* that certification, by "show[ing]" a court "that the photographs were individually considered by the Secretary of Defense." *ACLU III* at 390.

In response to Plaintiffs' motion, DOD once again invokes the black letter principles that the head of an agency may rely on their subordinates to fulfill their statutory obligations, and that courts should not interrogate the Secretary's personal mindset absent a showing of bad faith. See DOD Response at 22. Plaintiffs do not, of course, disagree with this well-established doctrine. *See Yaretsky v. Blum*, 629 F. 2d 817, 823-24 (2d. Cir. 1980) (concluding that commissioner could rely on hearing transcripts rather than live testimony to reach his decision) (citing *Morgan v. United States*, 298 U.S. 468 (1936)); *National Nutritional Foods Assoc. v. FDA*, 491 F.2d 1141, 1144-45 (2d Cir. 1974 (relying on *Morgan* line of cases to hold that court would not

"probe the mental processes" of the Commissioner of Food and Drugs). But these cases do not stand for the proposition that the Secretary may simply ignore a statutory mandate. Indeed, *Morgan*, the Supreme Court case those cases rely on, holds quite the opposite. There, a complaining party alleged that the Secretary of Agriculture had issued a commodity rate order without reviewing evidence presented at the hearing required by statute. 298 U.S. at 477. Over the course of four successive appeals to the Supreme Court, the Court arrived at and refined the rule referenced in *Yaretsky* and *National Foods*, but always made clear that the Secretary had to afford parties the process — in that case, a "full hearing" — prescribed by the Packers and Stockyard Act. *United States v. Morgan*, 313 U.S. 409, 413 (1941); *see also* Jerry L. Mashaw, Richard A. Merrill, and Peter M. Shane, ADMINISTRATIVE LAW at 431 (2003) (explaining that the Supreme Court "repeatedly reversed the Secretary of Agriculture's decisions in the interest of providing a personal hearing" as required).

The DOD has declined to follow the process mandated by statute, as that statute has been correctly interpreted by this Court. That is a clear violation of the PNSDA and FOIA, but it is also contrary to the basic principles of administrative law that the DOD purports to invoke, which, of course, provide that the process chosen by the Secretary may not be "prohibited by law." Summary judgment for Plaintiffs should therefore be granted.

b. <u>The sole declaration submitted in this case does not establish that the Secretary based his certification on an individualized review of each photograph.</u>

DOD argues that, in fact, it has complied with the PNSDA, relying entirely upon the Declaration of Liam M. Apostol, Deputy General Counsel in the Office of the General Counsel of DOD, *see* (ECF No. 566) (Feb. 26, 2016) (hereinafter "Apostol Decl."). Specifically, DOD argues that "[e]ach of the photographs was independently studied on three separate occasions, by

three different sets of DoD officials," and that "[i]n each one of these multiple reviews, each image was independently examined for the explicit purpose of assessing the likelihood that its disclosure would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United State Government." DOD Response at 17. But, as Plaintiffs have previously shown, neither the Secretary, nor anyone at his direction, assessed the harm that would be caused by each photograph to determine whether "that photograph" should be certified for withholding. Instead, the Apostol Declaration describes a "multi-phase process" that had one aim — "to enable military commanders and the OGC [Office of the General Counsel] to provide guidance to the Secretary about possible recertification of some or all of the photographs." Apostol Decl. ¶ 3. Specifically, the Declaration sets forth the roles that those military commanders and the OGC played: Thus, the OGC oversaw a three-tiered process in which DOD lawyers and military officials reviewed each photograph in order to sort the photographs into categories in order to "ensure that a true representative sample that contained the full spectrum of what the full group of photographs depicted would be created for the Secretary's review." *Id*. at ¶ 5. Staff provided military commanders — four Generals — with that sample so that they could recommend a disposition to the Secretary. The Secretary's certification reflects that division of labor; he attests that he certified the photos "upon the recommendation" of the Generals, which he differentiated from the "review" conducted by his staff. Certification Renewal of the Secretary of Defense of Nov. 7, 2015 ¶ 2, *see* (ECF No. 566) (Feb. 26, 2016) (hereinafter, "Carter Certification"). In other words, what was true before when the Court rejected the government's process is true now — no one other than top military brass has reviewed the photographs to determine whether the risk of disclosure justifies withholding, and that top

military brass only examined a sample of the photographs, not each one, as this Court has required.

In its response, the DOD attempts to revise this straightforward narrative. It argues that staff's initial review had "twin purposes" — to create a representative sample *and* to assess the potential harm of release. DOD Response at 5. But if that is true, the Declaration does not say so; specifically, it does not state that staff reached any determination about the risk posed by release, or that they forwarded any recommendation to the Secretary. Thus, DOD's new and convenient gloss on its submission simply belies the text of its Declaration, in at least three significant ways.

First, the Declaration makes clear that the staff "sorted" the photos based on the risk of harm, but only "to ensure that a true representative sample [was] created for the Secretary's review." Apostol Decl. ¶ 5. As DOD concedes, the paragraphs that describe the first and second tier of review explicitly reference this purpose. Response at 6; *see also* Apostol Decl.¶ 5, 6.[2] And the paragraph that describes the third tier of review makes equally clear that that was the purpose of that phase as well: it states that a team of lawyers "conducted a third review . . . of the combined work product of the initial attorney and the officers [that conducted the second phase]," *id.* at ¶ 7; given the preceding paragraphs, that "work product" was, of course, the "creat[ion]" of "a true representative sample," *id.* at ¶ 5.[3] Indeed, if the DOD were correct that

[2] With regard to the second tier, that Apostol Declaration makes express that the purpose was the same as the first tier: "to independently review each photograph based upon the likelihood of harm that the PNSDA was intended to prevent and to independently assess whether the initial sorting of the photographs would ensure a true representative sample." Apostol Decl. ¶ 6.

[3] To be sure, paragraph 7 also states that this third group of reviewers looked at each photograph and gauged the risk posed by release. But it does not explain why the reviewers did so. The answer, to the extent the Declaration provides one, is found in the preceding paragraphs, which

staff reviewed photos in order to make a recommendation as to their risk, then the Declaration would say as much in the four paragraphs that describe that review. But Apostol states only that staff passed their sample onto the generals, and never states that they made any direct recommendation to the Secretary.[4]

Second, the Declaration makes perfectly clear that the Generals, and not the staff, recommended withholding to the Secretary. Paragraph 8 explains that staff divided the photos into two groups – those 198 photos upon which there was no apparent basis to withhold, and an untold number of others that might pose a risk upon release. That second set is, of course, the only one still at issue in this case. And with regard to them, the Declaration states that staff "developed a sample of the remaining photographs for review [by the Generals], *so that they* could provide informed recommendations to the Secretary regarding the potential harms that could be posed by release of any." *Id.* at ¶ 8 (emphasis added). That is, only the Generals, and not the staff, made recommendations with regard to withholding all but the 198 photographs that were released, but undisputedly did so based on a sample of the photographs, and not a review of each one.

Third, the staff's efforts to create and then refine "categories" of photos, as DOD describes, would make little sense if the staff, and not the Generals alone, had determined the risk of release. DOD invested significant time and resources into grouping photos in the appropriate categories; three sets of lawyers, as well as military officers participated in that

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make clear that staff evaluated risk in order to group photographs into categories, *id.* at ¶ 5, not to recommend a disposition to the Secretary.

[4] Indeed, even with regard to the 198 photographs that were not certified for withholding, as DOD concedes, *see* Response at 6, the staff did no more than determine that they were "least likely to cause harm and should be considered for non-certification," Apostol Decl. ¶ 7, as a result of which all 198 were provided to the Secretary for consideration, along with the representative sample that was otherwise created. *Id.* at ¶ 8, 19.

multi-tiered process. Now, DOD argues that, while they endeavored to perfect those categories, those lawyers and officers had already determined that most of the photographs in those groups should be withheld. DOD Response at 6. But this contention is unsupported by the record[5] and defies common sense: were that so, why would such care have to be taken to derive a sample of the photographs? The much more logical interpretation, and the one supported by the text of the Declaration, is that staff took care to create and refine the categories precisely because a sample derived from those groups would form the basis of the critical risk evaluation performed by generals at a later date.[6] And that, of course, is precisely what happened: the Secretary received recommendations from the Generals (not from the staff) based upon their review of a sample of the photographs, notwithstanding that this Court has made clear that a review other than of each photograph is insufficient as a matter of law. The resulting Certification thus fails to comply with the PNSDA.

2. The Generals' excerpted recommendations do not adequately explain why release would lead to harm as required by this Court.

This Court has repeatedly ordered the DOD to "show that it had an adequate basis for [its] certification." *ACLU III* at 381. This showing must include the reason "why any withheld photographs fall within an exemption [to the FOIA]." *Id.* at 383. But as Plaintiffs have previously shown, the Generals' excerpted recommendations are too vague to meet this standard. *See* Plaintiffs' Brief at 8-10, 14-15, 26-27. Indeed, as Plaintiffs previously noted, the language of

[5] DOD cites paragraphs 8 and 19 of the Apostol Declaration for this proposition, *see* DOD Response at 6, but neither says that the three-tiered process included a recommendation that the remaining photographs should be withheld.

[6] In addition, even if the staff had conducted the necessary risk assessment, the description of their work is deficient for a second reason: The Declaration provides absolutely no explanation of "why" the staff believed that release of the withheld photographs would trigger harm. *ACLU III* at 390.

the declaration makes clear that the generals viewed the photographs "as a collection," not individually, *ACLU III* at 390; that is clear from the fact that the Generals consistently refer to the photographs only in the plural. *See* Plaintiffs' Cross-Motion at 8 (citing Apostol Dec. ¶¶ 9-18).

Rather than refuting those arguments, or providing the required "factual basis" for its position, *ACLU III* at 388, DOD responds by pointing to three excerpts from the Apostol Declaration, Response at 18-19, none of which "show why on [the date of the Certification], the release of pictures taken years earlier would continue to 'endanger citizens of the United States, members of the United States Armed Forices, or employees of the United States Government deployed outside the United States." *ACLU III* at 388-89. Thus, General Austin's observation that extremist organizations use "social media" does not explain why the internet — no longer a novel means of communication — increases the risk of harm posed by release of "*the photographs*" (as a collection, not individually). DOD Response at 19 (citing Apostol Decl. ¶ 10). Nor does DOD explain why, as General Rodriguez fears, that "extremists in his area of command will likely use *the photographs* [as a collection not individually] 'as evidence of U.S. noncompliance with international and humanitarian law,'" resulting in a potential attack on a well-known base that would not otherwise occur. DOD Response at 19 (emphasis added) (citing Apostol Decl. ¶ 13). The same is true for General Buchanan's worries that "public disclosure of *the photographs* [as a collection not individually] will result int insider attacks that, as he himself attests, existing "conditions" already "foster." DOD Response at 19 (citing Apostol Decl. ¶ 15). Thus, even the DOD's best evidence of the danger posed by release — the evidence it "cherry-pick[ed]," to use a term that it employed to characterize Plaintiffs' argument, *see* Response at 18 — does not meet the standard established by this Court; it simply does not explain "why . . . the

release of pictures taken years earlier" would create the requisite risk, *ACLU III*, 40 F. Supp. 3d at 388, let alone why that is true for each and every photograph, as DOD must show.

3. As this Court has held, the PNSDA did not repeal FOIA's judicial review provision.

This Court previously held that "[w]hile the PNSDA was meant to place a limit on the documents that would be disclosed under FOIA, nothing in the statute or legislative history indicates that Congress intended for the PNSDA to depart from [the norm of judicial review]." *ACLU III* at 387 (S.D.N.Y. 2014). As it has done over and over in the past, DOD simply ignores this clear holding, now arguing, in response to Plaintiffs' motion, that the phrase "[n]otwithstanding any other provision of law" followed by a reference to the FOIA eliminates judicial review under the statute. DOD Response at 10. In fact, however, while the opening words of the PNSDA establish a ground to resist disclosure, they say nothing about a court's power to review a decision to withhold under the FOIA, let alone expressly deprive the Court of jurisdiction.

In its brief, DOD fails to cite even a single case in which a court has held that a provision beginning with "notwithstanding" abolished judicial review. Indeed, as Plaintiffs pointed out in their prior brief, in the FOIA context, courts have routinely treated similar provisions as a ground to withhold rather than as a bar to judicial review. Plaintiffs' Cross-Motion at 15. So, for example, in *Newport Aeronautical Sales v. Dep't of Air Force*, 684 F.3d 160, 165 (D.C. Cir. 2012), the Department of the Air Force justified its choice not to disclose a document by pointing to a provision that began "[n]otwithstanding any other provision of law." Relying on that phrase, the Court held that the provision qualified as a FOIA Exemption 3 statute and went

on to review the agency's determination *de novo*. *Id.*[7] Likewise, in *Public Citizen v. F.A.A.*, 988 F.2d 186 (D.C. Cir. 1993), the Court reasoned that, in adding the phrase "Notwithstanding [FOIA]" to a statute, Congress specifically provided an agency grounds to withhold documents under Exemption 3, but did not hold that the new phrase removed the resulting withholding from the scope of FOIA altogether, as DOD argues. *Id.* at 186. As DOD correctly points out, the central issue in that case was whether an agency could withhold documents under a different statute. Response at 11. But to answer that question, the Court had to parse the legislative history and meaning of the phrase "Notwithstanding [FOIA]." In doing so, the Court expressly reasoned that Congress inserted the phrase into the statute issue in order to "overrule . . . lower court cases" holding that a prior version did not qualify as an Exemption 3 statute under the FOIA. In other words, Congress specifically added the phrase to provide a substantive avenue to withhold, but allowed courts to scrutinize those decisions under FOIA's judicial review provision. The government is thus simply wrong to argue that a clause that begins with "notwithstanding" and references FOIA signals that Congress intended to jettison judicial review. Indeed, all available precedent is to the contrary: in the FOIA context, courts have routinely treated provisions that begin with "notwithstanding" as grounds to withhold under Exemption 3 to the FOIA, but continue to subject withholding under those provisions to *de novo* judicial review.

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[7] The government argues that *Newport* is inapposite because the PNSDA contains more specific language than the statute at issue in that case. DOD Response at 10. But a proper reading of *Newport* supports precisely the opposite conclusion: the statute in *Newport* swept more broadly than the PNSDA, and thus was more likely to reflect a Congressional intent to insulate decisions from review under "any" statute, including FOIA. That the D.C. Circuit did not interpret that more capacious language to eliminate judicial review suggests that the analogous but more limited words of the PNDSA should not be read to accomplish more. Thus, the DOD is simply wrong that the court "did not address the effect of the [relevant] statute's 'notwithstanding' clause in analyzing the withholding under FOIA Exemption 3." *Id.*; *see Newport*, 684 F.3d at 165.

CONCLUSION

For the reasons set forth above and in Plaintiffs' opening brief, this Court should grant summary judgment for the plaintiff and order the withheld photographs released.

Respectfully submitted,

/s/ Lawrence S. Lustberg

Lawrence S. Lustberg
Ana Muñoz
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
Phone: 973-596-4500
Fax: 973-639-6285
llustberg@gibbonslaw.com
amunoz@gibbonslaw.com

Jameel Jaffer
Alexander Abdo
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
jjaffer@aclu.org
aabdo@aclu.org

Counsel for Plaintiffs

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 15, 2016, I caused the foregoing Memorandum of Law to be electronically filed with the Clerk of the United States District Court for the Southern District of New York through the Court's CM/ECF system, and will have paper copies delivered by sending two copies of the filing to chambers via FedEx.

I hereby certify that on April 15, 2016, I caused the foregoing Memorandum of Law to be served upon the following counsel of record for Defendants through the Notice of Docketing Activity issued by this Court's CM/ECF system:

Tara LaMorte
Assistant United States Attorney
Southern District of New York
86 Chambers Street, 3rd Floor
New York, NY 10007

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg
Dated: April 15, 2016