17-779

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 17-779

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

Plaintiffs-Appellees,

—v.—

UNITED STATES DEPARTMENT OF DEFENSE, its components DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY, UNITED STATES DEPARTMENT OF THE ARMY,

Defendants-Appellants,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX
VOLUME II OF II
(Pages JA-241 to JA-414)

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UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES DEPARTMENT OF JUSTICE, and its Components CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE OF INFORMATION AND PRIVACY, OFFICE OF INTELLIGENCE, POLICY AND REVIEW, FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF STATE, CENTRAL INTELLIGENCE AGENCY, FEDERAL BUREAU OF INVESTIGATION,

Defendants.

TABLE OF CONTENTS

PAGE

Civil Docket Sheet for Case No. 04 Civ. 4151 (AKH) (S.D.N.Y.).....JA-1

Declaration of Richard B. Myers in
Support of Motion for Summary Judgment
with attachments dated July 28, 2005.....JA-62

Declaration of Michael E. Pheneger
dated August 11, 2005 .....JA-90

Second Amended Declaration of Richard B. Myers in
Support of Motion for Summary Judgment
with attachments dated August 29, 2005.....JA-95

Opinion and Order of Judge Hellerstein
dated September 29, 2005, granting in part and
denying in part Motion for Partial Summary Judgment.....JA-120

Declaration of Carter F. Ham
dated April 26, 2006 .....JA-170

Declaration of Michael E. Pheneger
dated May 19, 2006 .....JA-183

Declaration of Khaled Fahmy
dated May 19, 2006 .....JA-191

Certification of the Secretary of Defense
dated November 13, 2009.....JA-196

Conference Summary: Homeland Security Appropriations
dated October 7, 2009.....JA-197

Transcript of Proceedings of Oral Argument
held on July 20, 2011, before Judge Hellerstein JA-202

Certification Renewal of the Secretary of Defense
dated November 9, 2012.....JA-240

Order and Opinion of Judge Hellerstein
dated August 27, 2014, granting, in part, Plaintiffs'
Motion for Partial Summary Judgment and denying
Defendants' Motion for Partial Summary Judgment JA-241

Transcript of Proceedings of Conference held
on October 21, 2014, before Judge Hellerstein JA-264

Declaration of Megan M. Weis
dated December 19, 2014 .....JA-280

Exhibit A: Memorandum from General John R. Allen
dated October 28, 2012.....JA-286

Exhibit B: Memorandum from General James N. Mattis
dated October 29, 2012.....JA-289

Exhibit C: Memorandum from General Martin E. Dempsey.....JA-291

Declaration of Rear Admiral Sinclair M. Harris
in Support of Seventh Motion for Summary
Judgment dated December 19, 2014 .....JA-293

Transcript of Proceedings of Conference held
on February 4, 2015, before Judge Hellerstein.....JA-301

Order of Judge Hellerstein dated February 18, 2015
clarifying instructions for defendants' submissions JA-327

Order of Judge Hellerstein dated March 20, 2015,
granting judgment for plaintiff JA-330

Order of Final Judgment by Judge Hellerstein
dated April 1, 2015, in favor of plaintiffs with regard
to all responsive photographs JA-333

Notice of Appeal, dated May 15, 2015 ..... JA-335

Letter dated January 28, 2016, to Hon. Alvin K. Hellerstein JA-336

Declaration of Liam M. Apostol
dated February 26, 2016 ..... JA-337

Exhibit 1: Certification Renewal of the Secretary of Defense
dated November 7, 2015 ..... JA-343

Transcript of Proceedings of Conference
held on May 11, 2016, before Judge Hellerstein JA-344

Opinion and Order of Judge Hellerstein
dated January 18, 2017, granting
summary judgment to Plaintiff JA-382

Judgment, entered January 19, 2017 ..... JA-413

Notice of Appeal, dated March 17, 2017 ..... JA-414

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION et al,	:	**ORDER AND OPINION GRANTING, IN PART, PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**
Plaintiffs,	:	
-against-	:	
DEPARTMENT OF DEFENSE et al,	:	
Defendants.	:	04 Civ. 4151 (AKH)

ALVIN K. HELLERSTEIN, UNITED STATES DISTRICT JUDGE:

In September 2005 and June 2006, I ruled that the Department of Defense was required by the Freedom of Information Act ("FOIA") to release photographs depicting the prisoners at Abu Ghraib prison and other sites in degrading portrayals. All photographs had been redacted to mask individual identities. *See Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547, 571 (S.D.N.Y. 2005) ("*ACLU I*"); *Am. Civil Liberties Union v. Dep't of Def.*, 2006 WL 1638025 (S.D.N.Y. June 9, 2006); *Am. Civil Liberties Union v. Dep't of Def.*, 2006 WL 1722574 (S.D.N.Y. June 21, 2006). The Court of Appeals affirmed. *Am. Civil Liberties Union v. Dep't of Def.*, 543 F.3d 59 (2d Cir. 2008) ("*ACLU II*"). At that point, President Obama announced that the photographs would be made public. At that time, large numbers of similar photographs were then freely circulating on the internet.

In that context, Nouri al-Maliki, Prime Minister of Iraq, asked President Obama not to release the photographs for fear of the consequences. The government filed a petition for *certiorari* and, at President Obama's request, Congress enacted the Protected National Security

Documents Act ("PNSDA").[1] The law amended FOIA to provide that the photographs could be made exempt from disclosure for a three-year certification by the Secretary of Defense to the effect that publication would endanger American lives.

In a previous order, I upheld the certification of Secretary of Defense Robert Gates of November 13, 2009. *See* Dkt. Nos. 469, 474. The issue now at hand is whether or not I should uphold Secretary of Defense Leon Panetta's Certification of November 9, 2012. Both sides tender the issue to me by separate motions for summary judgment.

I hold, for the reasons discussed below, that Secretary Panetta's certification is not sufficient to prevent publication of redacted photographs. It was conclusory as to all, when it should have been focused on each separate photograph as the PNSDA requires. And the government failed to show that it had adequate basis for the certification.

BACKGROUND

This litigation has its origin in FOIA requests the plaintiffs filed on October 7, 2003, seeking records related to the treatment and death of prisoners held in United States custody abroad after September 11, 2001, and records related to the practice of "rendering" those prisoners to countries known to use torture. On June 2, 2004, having received no records in response to the requests, the plaintiffs filed their complaint in this case, alleging that the defendant agencies, the Central Intelligence Agency, the Department of Homeland Security, the Department of Justice, the Department of Defense, Department of State (and some of their components) had failed to comply with the law. I held that defendants were required by FOIA to

[1] Section 565 of the Department of Homeland Security Appropriations Act, 2010, Pub.L. 111–83, Title V, § 565, Oct. 28, 2009, 123 Stat. 2184-85.

identify responsive documents, and to produce those that were not covered by exemptions. *Am. Civil Liberties Union v. Dep't of Def.*, 339 F. Supp. 2d 501 (S.D.N.Y. 2004).

In August 2004, the plaintiffs provided the defendants with a set of documents to illustrate the type of records that would be responsive to their request, including photographs and videos that Army Specialist Joseph Darby had provided to the Department of the Army Criminal Investigative Command ("Darby Images"). The Darby Images were taken at Abu Ghraib prison in Iraq and included images of unclothed detainees posed in "dehumanizing, sexually suggestive ways." *ACLU II*, 543 F.3d at 64. In March 2006, the Darby Images, and others like them, were published by a third-party on the internet and the government stopped fighting their release. *Id.* at 65.

In April 2006, the government acknowledged that it possessed 29 additional photographs responsive to the plaintiffs' FOIA request. These 29 photographs "were taken in at least seven different locations in Afghanistan and Iraq," and involved additional detainees and different U.S. U.S. military personnel. *Id.* The government is believed to possess many more, perhaps hundreds or thousands of such photographs.[2] It has agreed that any additional responsive documents that it has withheld on the same basis as the 29 images would also be governed by any final ruling on appeal regarding those 29.

In June 2006, I supervised redactions to eliminate the possibility of identification of the individuals who were depicted in the photographs, and I ordered the release of 21 of the disputed photographs. The Second Circuit affirmed my decision on September 22, 2008. *Id.* In its affirmance, the Second Circuit rejected the government's arguments that these photographs

[2] Senator Lieberman stated that the government had "nearly 2,100 photographs depicting the alleged mistreatment of detainees in U.S. custody. 155 Cong. Rec. S5987 (daily ed. June 3, 2009). The executive branch has not specified how many photographs they are withholding.

should not be disclosed under FOIA. Among the arguments rejected by the Second Circuit was the government's argument that the photographs fell under FOIA Exemption 7(F), because their disclosure could reasonably be expected to incite violence against United States troops, other Coalition forces, and civilians in Iraq and Afghanistan. *Id.* at 67.

The government filed a petition to the United States Supreme Court for *certiorari* on August 7, 2009. However, on October 28, 2009, the PNSDA became law, as part of the Department of Homeland Security Appropriations Act of 2010, providing a framework for withholding publication of the photographs.

Secretary of Defense Robert Gates then certified, on November 13, 2009, pursuant to the PNSDA, that "a collection of photographs . . . assembled by the Department of Defense that were taken in the period between September 11, 2001 and January 22, 2009, and that relate to the treatment of individuals engaged, captured or detained after September 11, 2001 by the Armed Forces of the United States in operations outside the United States," not be published. The photographs covered by the Secretary's certification included the photographs that were mentioned in the Second Circuit's decision, *ACLU II*, 543 F.3d 59. Secretary Gates certified that "[u]pon the recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of U.S. Central Command, and the Commander of the Multi-National Forces-Iraq," he had determined that "public disclosure of the photographs 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." Secretary Gate's certification did not elaborate on the bases of the recommendations given to him by the Joint Chiefs of Staff, the Commander of U.S. Central Command, and the Commander of the Multi-National Forces-Iraq.

Following Secretary Gate's Certification, the United States Supreme Court granted *certiorari* and remanded this case to the Second Circuit for further proceedings in light of the PNSDA and the certification. *See Dep't of Def. v. Am. Civil Liberties Union*, 558 U.S. 1042 (2009). On July 7, 2010, the Second Circuit then remanded the case to me.

The parties again cross-moved for partial summary judgment, to uphold and to impeach, the Secretary's Certification. The plaintiffs argued that the Court was required to conduct a review, *de novo*, of the Secretary of Defense's determination that release of the photographs would endanger U.S. citizens, service members, or employees. The government argued that the Court's only role was to establish that the Secretary of Defense had issued a certification.

On July 20, 2011, after oral arguments on that motion, I denied the plaintiffs' motion, and granted the government's motion. Without specifically ruling on the standard of review I should apply, I ruled that "it [i]s clear to me that Secretary Gates had a rational basis for his certifications and that I could not second guess-it." Tr. at 36:6-8. I stated that, "by reason of my familiarity with the case," I had effectively conducted a *de novo* review of Secretary Gates's decision, had found that there was a rational basis for it, and would not 'opine' on whether there is or is not a danger in the battlefield because of the disclosure of pictures of this sort." Tr. at 23:21-24:2. I ruled that the legislative history of the statute, especially statements by Senators Lieberman and Graham who sponsored the bill, made clear that the PNSDA was passed in order "to provide authorizing legislation to support the President's determination that these images should not be disclosed." Tr. at 37:16-19. The Obama administration had changed its attitude following a request from the Prime Minister of Iraq that the United States government not publish the photographs for fear that their publication would fuel insurrection and make it

impossible to have a functioning government. *See* Tr. at 34:7-23. From that history, I upheld Secretary Gates' certification.

Under the PNSDA, Secretary Gate's 2009 Certification was to expire on November 13, 2012. Several days before expiration, Secretary of Defense Leon E. Panetta issued his certification ("the 2012 Certification), virtually identical to the 2009 Certification. Referring to the Second Circuit opinion and the photographs it identified, the 2012 Certification stated that "[u]pon the recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, and the Commander, International Security Assistance Force/United States Forces-Afghanistan," Secretary Panetta had determined that "public disclosure of the photographs 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." It did not elaborate on the bases of those recommendations.

The parties again move for partial summary judgment upholding and impeaching the Secretary's 2012 Certification.[3]

DISCUSSION

The current dispute concerns the legal effect of Secretary Panetta's 2012 Certification. Since my review in this case is to determine whether the 2012 Certification was properly issued and justifies the withholding of the photographs, the 2012 Certification must be judged as of its date, November 9, 2012.

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[3] The government asserts that the photographs in question can also be withheld under FOIA Exemption 7(F), an argument which this Court rejected in *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005), and the Second Circuit rejected in *Am. Civil Liberties Union v. Dep't of Def.*, 543 F.3d 59 (2d Cir. 2008). The government does not present any legal arguments as to why I should not adhere to those decisions and appears to raise this point only for purposes of preserving its position.

FOIA calls for "broad disclosure of Government records." *CIA v. Sims*, 471 U.S. 159, 166 (1985). To that end, the Act "requires the government to disclose its records unless its documents fall within one of the specific, enumerated exemptions set forth in the Act." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005) (citation omitted). FOIA contains nine exemptions against disclosure. *See* 5 U.S.C. § 552(b)(1)-(9). The third is pertinent here. Exemption (3) applies to documents that are:

> specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—
> (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
> (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

5 U.S.C. § 552(b)(3). The PNSDA is an exemption (3) statute, since it provides criteria for the withholding of certain documents from the public under FOIA and it was enacted before the OPEN FOIA Act of 2009.

The PNSDA provides that:

> Notwithstanding any other provision of the law to the contrary, no protected document, as defined in subsection (c), shall be subject to disclosure under section 552 of title 5, United States Code or any proceeding under that section.

Subsection (c) defines protected documents as photographs, taken between September 11, 2001 and January 22, 2009, relating to the treatment of individuals by the United States military abroad "for which the Secretary of Defense has issued a certification, as described in subsection (d), stating that disclosure of that record 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." Subsection (d) provides that

> [T]he Secretary of Defense shall issue a certification if the Secretary of Defense determines that disclosure of that photograph 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.

The PNSDA provides further that each certification expires after three years, but can be renewed at any time. PNSDA § (d)(2), (3).

"The agency asserting the exemption [from FOIA] bears the burden of proof, and all doubts as to the applicability of the exemption must be resolved in favor of disclosure." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 69 (2d Cir. 2009). To meet its burden of proof, the agency can submit "[a]ffidavits or declarations giving reasonably detailed explanations why any withheld documents fall within an exemption." *Am. Civil Liberties Union v. Dep't of Justice*, 681 F.3d 61, 69 (2d Cir. 2012) (internal quotation marks omitted).

The government contends that Secretary Panetta's 2012 Certification satisfies its burden why the photographs in issue should not be produced. The 2012 Certification is practically identical to the certification given by Secretary Gates three years earlier.[4] The certifications are expressed in conclusory fashion, and relate to all the photographs at issue—likely hundreds or thousands. The certifications track the language of the statute, without providing any specific explanation for why the Secretary certified the photographs, except to state that based on the recommendations of certain senior military officials, the Secretary determined that the photographs met the criteria of the statute.

Two issues are presented. Plaintiffs contend that Secretary Panetta's 2012 Certification is inadequate because it fails to address the photographs on an individualized basis and because it does not provide sufficient information to allow the court to determine if

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[4] Copies of the certifications are appended to this order.

disclosure of each photograph would endanger the citizens, armed forces, or employees of the United States. The government contends that the PNSDA allows the Secretary of Defense to issue a single certification for all of the photographs and that this Court may not, and should not, review the basis for the Secretary of Defense's decision.

A. The Law of the Case Doctrine Regarding my Ruling of July 20, 2011:

The PNSDA was enacted on October 28, 2009. Secretary of Defense Gates issued his certification on November 13, 2009. On July 20, 2011, I ruled that Secretary Gates' certification, coming so soon after the intervention of Prime Minister Maliki with President Obama and the resulting enactment of the PNSDA, was adequate and justified the government's withholding the photographs. I held that my familiarity with the entire record of these photographs was the equivalent of a *de novo* review.

The PNSDA was enacted in the context of the ongoing war in Iraq, in which the United States military was involved in active military operations. As I noted on July 20, 2011, the statute was passed in response to a request from the Prime Minister of Iraq that the United States government not publish the photographs for fear that their publication would fuel insurrection and make it impossible to have a functioning government. *See* Tr. at 34:7-23. The legislative history of the statute—especially statements by Senators Lieberman and Graham who sponsored the bill—made clear that the PNSDA was passed in order "to provide authorizing legislation to support the President's determination that these images should not be disclosed." Tr. at 37:16-19.[5]

[5] For example, on the Senate floor, Senataor Lieberman stated that "the language in the bill . . . is clear . . . in that it would apply to [this] lawsuit and block the release of these photographs, preventing the damage to American lives that would occur from that release," 155 Conf. Rec. S5987-88 (daily ed. June 3, 2009), and Senator Graham stated that the PNSDA would "help the President win [this lawsuit]," *id.* at S5674 (daily ed. May 20, 2009).

Given that history, I concluded that "it was clear to me that Secretary Gates had a rational basis for his certifications and that I could not second guess-it." Tr. at 36:6-8. I also commented that, "by reason of my familiarity with the case," I had effectively conducted a *de novo* review of Secretary Gates's decision, had found that there was a rational basis for it, and would not "opine" on whether there is or is not a danger in the battlefield because of the disclosure of pictures of this sort." Tr. at 23:21-24:2.[6]

The government contends that, under the law of the case doctrine, I should reach the same result now. The law of the case doctrine provides that "when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case." *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991). But, the doctrine is "flexible" and allows courts to modify or reconsider their rulings on the basis of new evidence. *Id.*

Three years is a long time in war, the news cycle, and the international debate over how to respond to terrorism. Secretary of Defense Panetta's certification of November 9, 2012, was issued under different circumstances from the 2009 certification of Secretary Gates. On November 9, 2012, the United States' combat mission in Iraq had ended (in December 2011), and all (or mostly all) American troops had been withdrawn from Iraq. I am aware of no impassioned plea from the Prime Minister of Iraq relating to the photographs made at that time. The 2009 Certification was based on the recommendation of the U.S. Commander responsible for the continuing deployments on active battlefields of our forces in Iraq. The 2012

[6] In addition to the 2009 Certification, defendants had also submitted for my consideration a May 27, 2009 declaration by General David H. Petraeus, the then Commander of the United States Central Command, and a May 27, 2009 declaration by General Raymond T. Odierno, the Commander of the Multi-National Force-Iraq. These declarations put on the record some of the United States military's reasons for concluding, in 2009, that the release of the photographs would cause harm.

Certification was based on the recommendation of the U.S. Commander responsible for the deployment of our troops in Afghanistan. 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.

In short, while the entire legislative history of the PNSDA supported the 2009 certification, the factual basis for the 2012 recertification is uncertain. As John Maynard Keynes supposedly quipped, "When the facts change, I change my mind. What do you do, sir?" My July 20, 2011 decision does not compel any result in this case.

B. The Adequacy of the Certification:

I now turn to the parties' dispute regarding the adequacy of the Secretary of Defense's certification. The government bears the burden of showing that the photographs withheld fall within the PNSDA's scope. *See A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138, 143 (2d Cir. 1994). To invoke the statute, the government must establish that "(1) the statute invoked qualifies as an exemption 3 withholding statute, and (2) the materials withheld fall within that statute's scope." *Id.*

The parties agree that the Court should conduct a *de novo* review of the government's claim to entitlement to an exemption. *See id.* at 143 ("It is the responsibility of the federal courts to conduct *de novo* review when a member of the public challenges an agency's assertion that a record being sought is exempt from disclosure."); *Halpern v. F.B.I.*, 181 F.3d 279, 287 (2d Cir. 1999) (applying a *de novo* review); 5 U.S.C. § 552(a)(4)(B) (providing for *de novo* review). But, they disagree as to what that *de novo* review means in the context of the PNSDA. The government contends that my *de novo* review is limited to determining whether a certification has issued. Plaintiffs contend that I must review the adequacy of the certification: to

determine if the Secretary of Defense's review was of each photograph individually, and if the Secretary was correct in invoking the risk of harm to American lives as a basis for withholding that individual photograph.

I. Judicial review of the basis for the Secretary of Defense's certification:

The parties first ask me to address whether the PNSDA requires judicial review of the basis for the Secretary of Defense's determination that a "photograph 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." PNSDA § (d)(1). The government contends that *de novo* review requires the Court merely to ascertain whether the Secretary of Defense issued a certification. Plaintiffs contend that the Court should review the basis for the Secretary of Defense's certification and make a *de novo* determination of whether the Secretary of Defense was correct in determining that the photograph would endanger United States citizens, military personnel or employees.

To resolve this issue, I must interpret the PNSDA. Because the PNSDA is an exemption (3) withholding statute, I follow the Second Circuit's decision in *A. Michael's Piano* and construe the PNSDA by "looking to the plain language of the statute and its legislative history, in order to determine legislative purpose." 18 F.3d at 144.[7] This is in accord with the

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[7] Plaintiffs argue that my interpretation of the PNSDA should be informed by the Ninth Circuit's decision in *Long v. Internal Revenue Serv.*, 742 F.2d 1173 (9th Cir. 1984), in addition to *A. Michael's Piano*.

Long was premised on the Ninth Circuit's conclusion that, as a rule, FOIA exemption (3) statutes should be interpreted in line with the legislative history indicating Congress' intent when it created exemption (3). *Id.* at 1180-81. However, in *A. Michael's Piano*, the Second Circuit explicitly declined to follow decisions that, like *Long*, adopted a *per se* rule about how exemption (3) statutes should be construed. *See* 18 F.3d at 144 (declining to follow courts giving a narrow reading to FOIA exemption (3) statutes based on because "the Supreme Court has never applied a rule of narrow or deferential construction to withholding statutes"). As a Southern District Judge, I follow *A. Michael's Piano* and therefore do not rely on *Long*.

Second Circuit's more recent guidance about how to construe statutes: "In construing a statute, we begin with the plain language, giving all undefined terms their ordinary meaning. . . We will resort to legislative history and other tools of statutory interpretation only if we conclude that the text is ambiguous." *United States v. Desposito,* 704 F.3d 221, 226 (2d Cir. 2013) (citations omitted). Accordingly, I begin with the PNSDA's language.

The PNSDA limits the government's disclosure obligations as to photographs taken between September 11, 2001 and January 22, 2009 relating to the treatment of individuals by the United States military abroad. The PNSDA provides that those photographs that are subject to a certification issued by the Secretary of Defense need not be disclosed. *See* PNSDA § (c)(1). Regarding certifications, the statute provides that,

> For any photograph described under subsection (c)(1), the Secretary of Defense shall issue a certification if the Secretary of Defense determines that disclosure of that photograph 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.

PNSDA § (d)(1). Every three years, a fresh certification is to be given. PNSDA § (d)(2), (3).

Plaintiffs also cite five other cases which reached a similar result to *Long*. *Currie v. Internal Revenue Serv.*, 704 F.2d 523 (11th Cir. 1983); *Linsteadt v. Internal Revenue Serv.*, 729 F.2d 998 (5th Cir. 1984); *Grasso v. Internal Revenue Serv.*, 785 F.2d 70 (3d Cir. 1986); *DeSalvo v. Internal Revenue Serv.*, 861 F.2d 1217 (10th Cir. 1988); *Seaco, Inc. v. Internal Revenue Serv.*, No. 86 Civ. 4222, 1987 WL 14910 (S.D.N.Y. July 21, 1987).

I cannot rely on the reasoning of those cases for the same reason that I cannot rely on the reasoning of *Long*. Three of these cases (*Currie*, *Linsteadt*, and *Grasso*) were expressly mentioned in *A. Michael's Piano* as cases that the Second Circuit declined to follow. 18 F.3d at 144. The fourth case (*DeSalvo*), used the same methodology as *Long*. And the fifth case (*Seaco*), which this Court decided seven years prior to the Second Circuit's decision in *A. Michael's Piano*, expressly relied on *Long*.

[7] The parties agree that the disputed documents are all photographs, taken between September 11, 2001 and January 22, 2009 and relating to the treatment of individuals by the United States military abroad.

In this case, the plain language of the PNSDA does not address the question of judicial review, and the structure of the PNSDA is ambiguous. On one hand, the PNSDA is structured to condition disclosure on a determination by the Secretary of Defense to issue a certification. He determines, and then has to certify, that "disclosure of [a] photograph 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." One could argue that, by placing the decision whether to issue a certification in the executive branch's hands, Congress intended to give the executive branch the final say over whether withholding is appropriate. But, on the other hand that same subsection also provides strict criteria for when photographs should be certified by the Secretary of Defense. Subsection (d)'s use of the word "shall" in the phrase "the Secretary of Defense shall issue a certification" if certain criteria are met, suggests that certification is a mandatory act, not a discretionary one, and is therefore particularly apt for judicial review.

The legislative history of the PNSDA is not much clearer. The statute was enacted by Congress in order to allow the government to withhold the disputed photographs in 2009 even though the decision of the Second Circuit Court of Appeals mandated their disclosure. However, the PNSDA did not simply suspend the obligation to disclose. It attached a condition—the Secretary's certification—and it limited the effect of the certification to three years. But Congress did not say if it expected the Secretary of Defense's certification to be subject to judicial review.

Since the text, structure and legislative history of the statute are unclear, I turn to familiar cannons of interpretation. *See Desposito*, 704 F.3d at 226. First, it is well-established that statutes should be interpreted in line with other similar statutes. *See* ANTONIN SCALIA &

BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS at § 39 (2012) (noting the "Related-Statutes Canon": that "Statutes *in pari material* are to be interpreted together, as though they were one law). This is because courts "generally presume that Congress is knowledgeable about existing law pertinent to legislation it acts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Accordingly, I presume that Congress was aware that Court had construed FOIA as creating a background norm of "broad disclosure of Government records," *Sims*, 471 U.S. at 166, and provided for *de novo* judicial review of agency invocations of FOIA exceptions, *see Halpern*, 181 F.3d at 287,[8] when it enacted the PNSDA. While the PNSDA was meant to place a limit on the documents that would be disclosed under FOIA, nothing in the statute or its legislative history indicates that Congress intended for the PNSDA to depart from those norms.

Second, I turn to the general principles of judicial review that exist in our legal system. There is a "strong presumption that Congress intends judicial review." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (considering whether a statute created an exception to judicial review under the Administrative Procedures Act and concluding that the statute did not because of the presumption of judicial review). For example, in *Gutierrez de*

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[8] In *Halpern*, the Second Circuit explained the importance of *de novo* review to the FOIA framework by quoting *A. Michael's Piano*, 18 F.3d at 141:

> In striking a balance between the incompatible notions of disclosure and privacy when it enacted FOIA in 1966, Congress established—in the absence of one of that law's clearly delineated exemptions—a general, firm philosophy of full agency disclosure, and provided *de novo* review by federal courts so that citizens and the press could obtain agency information wrongfully withheld. *De novo* review was deemed essential to prevent courts reviewing agency action from issuing a meaningless judicial imprimatur on agency discretion.

181 F.3d at 288.

Martinez v. Lamagno, the Supreme Court considered a statutory scheme which made an executive branch official responsible for certifying whether a tort committed by a federal employee was committed in the scope of the employee's employment. 515 U.S. 417 (1995). Because the statutory scheme was ambiguous and "reasonably susceptible to divergent interpretation" as to whether the certification was subject to judicial review, the Supreme Court "adopt[ed] the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review and that mechanical judgments are not the kind federal courts are set up to render." *Id.* at 434; *see also id.* at 429 (rejecting a construction of the statute which would assign to the federal courts the role of "rubber-stamp[ing]" executive branch decisions).

These background rules of construction favor judicial review, both in light of the specific policies underlying FOIA and the general presumption of judicial review. There is no evidence that Congress intended to depart from those principles when it enacted the PNSDA. Accordingly, the PNSDA should be read as providing for judicial review of the basis for the Secretary of Defense's certification that disclosure of the photographs "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." PNSDA § (d)(1).[9]

As discussed below, the Court will allow the government to submit documents supporting the factual basis for its assertion that these photographs should be withheld. The

[9] Such a reading of the PNSDA is consistent with the Second Circuit's decision in *A. Michael's Piano*. In that case, the Second Circuit, construed § 21(f) of the Federal Trade Commission Act, which allowed the Federal Trade Commission ("FTC") to withhold certain documents that were "provided voluntarily in place of such compulsory process." The Second Circuit, after considering the text and legislative history of the statute, concluded that the district court should review the factual basis for the FTC's invocation of § 21(f) as a ground for withholding documents under FOIA. 18 F.3d at 146.

Court is, of course, mindful of the security concerns that are at issue in this case. Accordingly, in conducting any review of the Secretary of Defense's certification the Court will, in the words of the Second Circuit, adopt a "workable standard," *id.* at 145, as it did with respect to other sensitive documents in this case, when I gave substantial deference to the submissions of military and intelligence officers.[10] *See ACLU I*, 389 F. Supp. 2d at 564-65. As Professor Goldsmith noted, with approval, FOIA litigation, by requiring the government to identify responsive documents, serves to call the government to account. *See* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 at 114-18 (2012). But, once it has done so, courts have largely deferred to the submissions of military and intelligence officers, certifying the government's need to maintain secrecy. As plaintiffs' counsel observes, this Court has ordered the disclosure of "relatively few documents." *Id.*

As applied to this case, the government must show why, on November 9, 2012, the release of pictures taken years earlier would continue to "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." PNSDA § (d)(1).

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[10] For example, the National Security Act, 50 U.S.C. § 403(d)(3) requires the Director of the Central Intelligence Agency ("CIA") to protect intelligence sources and methods from unauthorized disclosure. Courts considering that statute have given "substantial weight and due consideration to the CIA's affidavits" in determining whether withheld material relates to intelligence sources or methods because courts lack expertise in intelligence methods. *Maynard v. C.I.A.*, 986 F.2d 547, 555 (1st Cir. 1993) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 762 (D.C. Cir. 1990)); *see also New York Times Co. v. U.S. Dep't of Justice*, 13-422 L, 2014 WL 1569514 (2d Cir. Apr. 21, 2014) (noting that when the government invokes a FOIA exemption "involving classified documents in the national security context, the Court must give *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record") (quotation omitted; emphasis in original).

II. Individual or collective review of the photographs:

The second question posed by the parties is whether the PNSDA requires the Secretary of Defense to issue an individual certification for each separate photograph. The statute provides that the Secretary of Defense shall issue a certification "[f]or any photograph" if the "disclosure of that photograph" would meet certain criteria. PNSDA § (d)(1). This plain language refers to the photographs individually—"*that* photograph"—and therefore requires that the Secretary of Defense consider each photograph individually, not collectively. *See A. Michael's Piano*, 18 F.3d at 144 (noting that "the Supreme Court in construing [FOIA] withholding statutes, look[s] to the plain language of the statute and its legislative history, in order to determine legislative purpose").

Reading the PNSDA as requiring individual review is supported by the way the Supreme Court has read FOIA, the legislation that forms the background and context of the PNSDA. As discussed above, I presume that Congress had FOIA's background norm of "broad disclosure of Government records," *Sims*, 471 U.S. at 166, in mind when it enacted the PNSDA. *See also Halpern*, 181 F.3d at 284-85 (noting that FOIA's "policy of full disclosure of all information not exempted serves the need for citizens to know what their government is up to and, generally, where the information sought sheds light on an executive agency's performance of its official duties, full access to the information serves FOIA's purposes").

Reading the PNSDA as requiring the individual review of photographs, rather than collective review, will further that goal of broad disclosure. It has been estimated that the government is withholding approximately 2,000 photographs. *See* 155 Cong. Rec. S5987 (daily ed. June 3, 2009) (statement of Senator Lieberman) (stating that the government had "nearly 2,100 photographs depicting the alleged mistreatment of detainees in U.S. custody"). During the

course of this litigation, I have reviewed some of these photographs and I know that many of these photographs are relatively innocuous while others need more serious consideration. 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." *Halpern*, 181 F.3d at 284-85.

However, while the PNSDA requires individual review of each photograph, it does not prescribe what form the certification must take. Nothing in the statute prevents the Secretary of Defense from issuing one certification to cover more than one photographs. What is important is that the government, to invoke the PNSDA, must prove that the Secretary of Defense considered each photograph individually. *See Wilney*, 592 F.3d at 69 (noting that the government bears the burden of proving that withholding is appropriate under FOIA); *A. Michael's Piano*, 18 F.3d at 143 (noting that the government's bears the burden of proving that documents fall under an exemption (3) FOIA withholding statute).

The 2012 Recertification refers to "a collection of photographs . . . assembled by the Department of Defense." It states that, upon the recommendations of certain advisors, Secretary Panetta "determine[d] that the public disclosure of these photographs" would meet the requisite criteria for withholding disclosure. This document suggests that the Secretary of Defense has reviewed the photographs as a "collection," not individually. Thus, standing alone, the 2012 Recertification is insufficient to meet the government's burden of showing that the photographs were individually considered by the Secretary of Defense. The 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." PNSDA § (d)(1).

C. Next Steps

As set forth above, the 2012 Recertification, standing alone, is insufficient to meet the government's burden to justify its withholding the photographs from disclosure. The government has failed to submit to this Court 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.

It would, however, be prudent to allow the government the opportunity to create a record in this Court justifying its invocation of the PNSDA. *See Am. Civil Liberties Union v. Dep't of Justice*, 681 F.3d at 69 (noting that an agency invoking a FOIA exemption may meet its burden of proof by submitting "[a]ffidavits or declarations giving reasonably detailed explanations why any withheld documents fall within an exemption" (internal quotation marks omitted)).

Accordingly, counsel are directed to attend a conference at 3pm on September 8, 2014 to address whether the government intends to submit additional evidence into the record or to produce redacted versions of the photographs.

CONCLUSION

For the foregoing reasons, plaintiffs' motion is granted in part and the government's motion is denied. Counsel shall attend a conference at 3pm on September 8, 2014.

The Clerk mark the motions (Doc. Nos. 493 and 495) terminated. The case shall remain open for two issues: the issue discussed in this Order and Opinion and the issue of fees and allowances.

SO ORDERED.

Dated: New York, New York
August 27, 2014

ALVIN K. HELLERSTEIN
United States District Judge

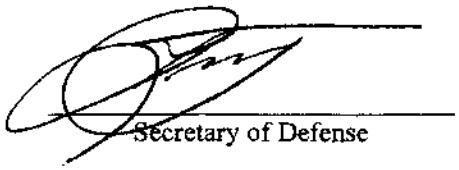
CERTIFICATION RENEWAL OF THE
SECRETARY OF DEFENSE

This Certification Renewal pertains to a collection of photographs (as that term is defined in Section 565(c)(2) of the Department of Homeland Security Appropriations Act, 2010 (Pub. L. 111-83) ("DHS Appropriations Act")) assembled by the Department of Defense that were taken in the period between September 11, 2001 and January 22, 2009, and that relate to the treatment of individuals engaged, captured, or detained after September 11, 2001 by the Armed Forces of the United States in operations outside the United States. These photographs are contained in, or derived from, records of investigations of allegation of detainee abuse, including the records of investigation processed and released in *American Civil Liberties Union v. Department of Defense*, 04 Civ. 4151 (AKH) (S.D.N.Y.). The photographs include but are not limited to the 44 photographs referred to in the decision of the United States Court of Appeals for the Second Circuit in *American Civil Liberties Union v. Department of Defense*, 543 F.3d 59, 65 & n.2 (2d Cir. 2008), *vacated & remanded*, 130 S. Ct. 777 (2009).

Upon the recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, and the Commander, International Security Assistance Force/United States Forces-Afghanistan and by the authority vested in me under Section 565(d)(1), (3) of the DHS Appropriations Act, I have determined that public disclosure of these photographs 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."

Therefore, these photographs continue to meet the standard for protected documents, as that term is defined in Section 565(c)(1) of the DHS Appropriations Act and are exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and in all proceedings pursuant to that law. As required by Section 565(d)(4) of the DHS Appropriations Act, I hereby direct that notice of this Certification Renewal be provided to Congress.

Date: NOV 09 2012



Secretary of Defense

CERTIFICATION OF THE
SECRETARY OF DEFENSE

This certification pertains to a collection of photographs (as that term is defined in Section 565(c)(2) of the Department of Homeland Security Appropriations Act, 2010 (Pub. L. 111-83) ("DHS Appropriations Act")) assembled by the Department of Defense that were taken in the period between September 11, 2001 and January 22, 2009, and that relate to the treatment of individuals engaged, captured or detained after September 11, 2001 by the Armed Forces of the United States in operations outside the United States. These photographs are contained in, or derived from, records of investigations of allegations of detainee abuse, including the records of investigation processed and released in *American Civil Liberties Union* v. *Department of Defense*, 04 Civ. 4151 (AKH) (S.D.N.Y.). The photographs include but are not limited to the 44 photographs referred to in the decision of the United States Court of Appeals for the Second Circuit in *American Civil Liberties Union v. Department of Defense*, 543 F.3d 59, 65 & n.2 (2d Cir. 2008), petition for cert. filed, 78 U.S.L.W. 3083 (Aug. 7, 2009) (No. 09-160).

Upon the recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of U.S. Central Command, and the Commander of Multi-National Forces-Iraq, and by the authority vested in me under Section 565(d)(1) of the DHS Appropriations Act, I have determined that public disclosure of these photographs 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.

Therefore, these photographs meet the standard for protected documents, as that term is defined in section 565(c)(1) of the DHS Appropriations Act and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C § 552, and in all proceedings pursuant to that law. As required by Section 565(d)(4) of the DHS Appropriations Act, I hereby direct that notice of this Certification be provided to Congress.

Date: 11-13-09

Secretary of Defense

eal0aclc Conference

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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AMERICAN CIVIL LIBERTIES UNION, et al,

Plaintiff,

v. 04 CV 4151

DEPARTMENT OF DEFENSE, et al,

Defendant.

----------x

New York, N.Y.
October 21, 2014
2:31 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE (NEWARK)
BY: LAWRENCE S. LUSTBERG
Attorneys for Plaintiff

AMERICAN CIVIL LIBERTIES UNION, WOMEN'S RIGHTS PROJECT
BY: ALEXANDER ABRAHAM ABDO
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AMERICAN CIVIL LIBERTIES UNION FOUNDATION
BY: MARCELLENE ELIZABETH HEARN
Attorneys for Plaintiff

U.S. ATTORNEY'S OFFICE, SDNY
BY: TARA MARIE LAMORTE
Attorneys for Defendant

(In open court, case called)

THE COURT: Hello, everybody. Be seated.

I think we can start. So we have a conference regarding status in the case of ACLU against the Department of Defense and others, 04 CV 4151. And there are some other numbers, as well.

We have Lawrence Lustberg, and Ms. Hearn, and Mr. Abdo. Good afternoon, folks.

ALL: Good afternoon.

THE COURT: And we have Tara Lamorte, one person against three. Helped by?

MS. LAMORTE: This is Jaba -- he will pronounce his last name for you. And he is an intern at our office.

MR. TSITSUASHVILI: *Tsitsuashvili*.

THE COURT: Thank you.

So Mr. Lustberg, what do we have to do today?

MR. LUSTBERG: So Ms. Hearn is going to speak for us today.

THE COURT: Ms. Hearn, what do we have to do today?

MS. HEARNE: Good afternoon.

THE COURT: Please stand.

MR. LUSTBERG: Oh, stand. Good afternoon.

The final issue here today, as your Honor is well aware --

THE COURT: I would ask you to take the podium,

otherwise you block Ms. Lamorte.

MR. LUSTBERG: Okay.

Good afternoon, your Honor. The final issue here today is, as you are well aware, is the government's withholding of as many as 2100 photographs of detainee abuse --

THE COURT: Sorry?

MS. HEARNE: -- under the Protected National Security Documents Act of 2009.

The final issue here, today, as your Honor is well aware, is the government's withholding of as many as 2100 photos of detainee abuse under the Protected National Security Documents Act of 2009, and any related attorneys fees.

On August --

THE COURT: Any what?

MS. HEARNE: Attorneys fees.

THE COURT: I thought the attorneys fees issue was solved.

MS. HEARNE: It is, except for if we prevail on this motion, there is also fees for this motion.

THE COURT: What about the appeal?

MS. HEARNE: So, meaning what about the appeal, which appeal?

THE COURT: You may want to have attorneys fees on the appeal.

MS. HEARNE: Yes. Today we are here to talk about the

withholding of the photographs.

THE COURT: Okay.

MS. HEARNE: So on August 27, your Honor ruled that the Secretary of Defense's 2012 certification, standing on its own, was insufficient to justify withholding of photographs. And the recertification failed to certify each photograph on an individual basis as required by the statute. And the government failed to show that the Secretary of Defense had a basis for his certification.

Your Honor has invited the parties here today to hear what the government plans to do. Will it release the photographs, or will it take the opportunity to submit additional evidence into the record?

THE COURT: And so you have two things for me today. One is something having to do with the photographs that you say should be subject to the same orders and rulings of August 27, 2014 as with the others, and the second is attorneys fees.

MS. HEARNE: No, today we are here just to talk about the photographs. I mentioned the fees only to talk about what was not finally resolved in the case.

THE COURT: My interest, Ms. Hearn, is in wrapping this up.

MS. HEARNE: Okay.

THE COURT: I had this case for 10 years.

MS. HEARNE: That's correct, yes.

THE COURT: Time to finish.

Ms. Lamorte.

MS. LAMORTE: Good afternoon, your Honor.

THE COURT: Good afternoon.

MS. LAMORTE: In your order of August 27, 2014, you provided the government with various options that you set forth in light of the rulings that you made in your order. And one option was to submit additional evidence into the record to address this Court's concerns regarding our justification, our harms justification, for certification, as well as the process leading to certification. And the government is here to report that it would like the opportunity to submit additional evidence into the record.

We do stand by our initial arguments, however, we would take the Court up on that offer and we would like 30 days to submit such information. And I imagine that it would include a declaration, as well as some sort of brief that ties everything together.

THE COURT: Give me some more background.

MS. LAMORTE: In what respect, your Honor.

THE COURT: We have 2100 photos. And I have forgotten what conditions I put down.

MS. LAMORTE: We have 2100 photos. And I didn't hear the second part.

THE COURT: What were the conditions I put down with

regard to those photos.

MS. LAMORTE: The conditions?

THE COURT: Yeah.

MS. LAMORTE: Your Honor, the Department of Defense has never acknowledged a number of photos that are at issue.

THE COURT: Not important. Where are we today. What do we need to do, what do you need to do. You need to make some kind of a listing, right?

MS. LAMORTE: Where we are, is you had ruled that the secretary's certification was deficient for two reasons. One is we did properly provide justification of harm as of 2012 when it was issued. And the other was that it did not indicate, one way or the other, whether an individualized review of the photos was undertaken. However, as I stated, you had provided the government with the opportunity to rectify that situation in your order. And that's what we would like to do.

THE COURT: Okay. And what would you like to do, put in some kind of evidence regarding, what?

MS. LAMORTE: Regarding the harms that underlie the certification of 2012. So the harms that prompted that certification, or that determination, by the secretary, that harm would result from the release of photographs, as well as a declaration that outlines the process leading to the certification. And that would go to your Honor's concern about

whether there was -- I'm sorry, whether the photographs were viewed individually or collectively, or sort of what process there was. And, finally, just an analysis of some sort to tie that together for the Court.

THE COURT: We are two years along the way, further along the way. Should it be relevant to what's conditioned now?

MS. LAMORTE: Our position, it was based our reading of the Court's order, which stated that the relevant harm would be as of the time that the certification issued. And we agree with that.

THE COURT: I think that's technically correct. But part of what you are doing is making estimates. And estimates, as of whatever date, I forget, in 2012, either would be more likely to be true or less likely to be true, according to the conditions that have occurred since that time. Since that time, we're out of Iraq all together. Now we seem to be partly coming back. So I think it would be useful to me, and maybe to the government, to present a snapshot as of the critical day in 2012 but, as it were, a moving image going forward to current times. I don't think it is difficult for you, Ms. Lamorte. Naturally, you will be citing events that occurred after 2012, to show that you're correct. And I think you might also bear that period in mind in case you feel that your concerns were not substantial, or showed not to be substantial. I would like

you to update it, as well.

MS. LAMORTE: Yes, your Honor.

One question I then have is, given that we were not anticipating having to provide the updated harms information from the 2012 period forward, I was wondering if we could have a 45-day time period to comply, which I still think is a reasonable time period to submit that information to the Court. I haven't had a chance to talk to the agency about what it would put together.

THE COURT: In the past, whatever time has been set has proved to be more of a target than a fixed date. I will give you 45 days, subject to hearing from Ms. Hearn. But I would be more likely to give it if I knew it was a firm date.

MS. LAMORTE: Your Honor, you have my word that I, personally, will do my utmost to comply with the date and I will not come to you unless there really is some exceptional need for an extension.

THE COURT: How about if I give you to December 12th.

Is there an objection, Ms. Hearn?

MS. HEARNE: That's fine.

THE COURT: So all justifications --

MS. HEARNE: I have --

THE COURT: -- by declaration and by memorandum will be due by December 12th.

MS. HEARNE: Excuse me, your Honor, could we make one

additional suggestion? Which is that in addition to a declaration, we would like a Vaughn index in the case. We still, at this point in time, don't even know the number of photos. The government has never acknowledged that. As Ms. Lamorte said today, we feel in this case a Vaughn index, which describes each photograph and indicates when and where it was taken, what it depicts, and the basis for the secretary's determination that the release of that photograph would endanger Americans, is what is warranted in this case. So we don't object to the 45-day or December time limit that you set, but we would request that the Court additionally order the government to produce the Vaughn index.

THE COURT: Ms. Lamorte.

MS. LAMORTE: Your Honor, this is now the third time that we have heard this request from the plaintiffs. You have already rejected it twice. In your first order, on our sixth motion for summary judgment, you ruled that we did not need to provide a photo-by-photo Vaughn index. And in this most recent order, you ruled we did not need to provide a photo-by-photo Vaughn index. And pursuant to the PSDA, which is the government statute, and that's the statute that the Court acknowledges in its order that it must look to, there is no requirement for a photo-by-photo Vaughn index as the plaintiffs are now, for the third time, suggesting. And, indeed, even in general FOIA case law, as we pointed out in our briefs, when

the government is withholding information categorically, as it is doing here, it is the government's burden. And we have options to be able to meet that burden in various different ways. And we submit that, here, a Vaughn index is not required as the Court has ruled twice.

THE COURT: So I held in the last section of my opinion, captioned *Next Steps*, that it would be prudent to allow the government the opportunity to create a record justifying its invocation of the PNSDA.

And I called for a conference as to whether the government intended to submit additional evidence into the record, or to produce redacted versions of the photographs. I ruled that because the recertification by Secretary of Defense Panetta suggested that he review the photographs as a collection, not individually, that standing alone, that certification was insufficient to meet the government's burden of showing that the photographs were individually considered by the Secretary of Defense. I held that the condition of the statute would allow withholding of the disclosures, that each individual photograph be 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.

The statute requires that the Secretary of Defense issue a certification, quote, "For any photograph," close

quote. If the quote, "disclosure of that photograph" would meet certain criteria. That requires that the photographs be considered individually, and not collectively.

MS. LAMORTE: Your Honor.

THE COURT: Just a minute, Ms. Lamorte.

MS. LAMORTE: I just wanted --

THE COURT: Just a minute.

MS. LAMORTE: I'm sorry, I didn't hear you.

THE COURT: I don't recall having ruled whether anything like a Vaughn index was or was not required. And I haven't ruled whether there has to be an identification of each and every photograph. At least I don't remember so ruling.

But what is necessary, is that the submission to me show an accountability, by the Secretary of Defense, of having considered and having to make a finding with regard to each and every photograph, individually and in relation to the others. I don't know how that can be done without indicating, at least to me, the specifics of what the secretary is seeing. The best way of doing it is to give the information that the Vaughn case requires. But there could be alternatives. I don't know how to deal with it. I remember when the issue first came up, it was an in-camera proceeding in chambers. And I don't remember if plaintiff's lawyers were there or not. I think they were not. I looked at every photograph and made suggestions about redactions, which the government uniformly accepted. And then

made a finding that the photographs, as redacted, should be produced. So in that way, we considered every single document, every single photograph. The estimate of 2100 photographs is taken from comments that the Congress made, and Senator Lieberman, and others. You're right, Ms. Lamorte, we have never had a true accounting of how many there are. But I think we need to know what is at stake. I think it can be summed up in two criteria. One is that the government must show and prove, item by item; the second is that once the government does that, the law requires the Court substantially to defer to the judgment exercised by the government. So the transparency arises, and this is written in very good fashion by Professor Jack Goldsmith, from Harvard in a recent book, is that the accounting by the government, in specifics, shows the compliance by the government with the statute. And once the government does that, the Court should not overstep its role and arrogate to itself the judgment and discretion that the law gives to the secretary.

That's the two criteria I want to follow. And I'm not going to call it Vaughn or something else, but if the government wants to satisfy its burden, it has to be a burden relating to document by document.

Now, that can be done in camera, as we did the last time. I will then search, with the government, to provide maximum possible disclosure without compromising the

government's need for secrecy, as the government determines it. At least until I rule differently.

So, I've not made a ruling, but neither have I given you a mission to deal with everything engross. Your burden is to be specific, photograph by photograph. And I don't care whether we call it a Vaughn index or anything else.

Questions? Comments?

So, Ms. Hearn, after Ms. Lamorte makes her submissions on December 12th, what's the next thing.

Mr. Lustberg, maybe you want to do this, I don't -- I don't mean to diminish anything that Ms. Hearn does, but we're not dealing with items of law. And only you, on your team, would have had the background to be with this case from the beginning.

MR. LUSTBERG: Glad to be here again, Judge. I was just talking about how much time we would need.

THE COURT: Before we do that --

MR. LUSTBERG: Pardon me?

THE COURT: Do you have an impression in terms what I have said?

MR. LUSTBERG: No, we agree that there needs to be an individualized determination. And we also agree that the form of it could be something like a Vaughn or something different. So we're satisfied with the Court's ruling --

THE COURT: Ms. Lamorte, do you have any problem with

how I formulate the issue, what I'm looking for?

MS. LAMORTE: I agree, actually, with how Mr. Lustberg characterized it, which is that I understand the Court's ruling to mean that the secretary had do an individualized review. We're going to attempt to make a record to show the Court that that was done. You may either accept or reject our record, but I understand what the Court is looking for.

THE COURT: Okay. So I think I should give you time to react.

MR. LUSTBERG: That's right.

So the government will file its submission on December 12. Given the holiday, we would ask for a due date shortly after the new year.

THE COURT: How about January 9?

MR. LUSTBERG: That's fine, Judge.

And let me just, so that the record is clear, I mean obviously this will have to abide the time. But we will, of course, request that we be able to participate in the process as much as is possible under the circumstances. We understand the Court's --

THE COURT: Let's make that decision after we see what Ms. LaMorte's submissions are.

MR. LUSTBERG: Agreed, Judge.

THE COURT: So you'll be delivering your materials on January 9. Why don't I hear you on January 20 at 2:30.

Now, this would be in open -- unless we change things, it will be in open court. And what we will try to do is to create methods and procedures from dealing with Ms. LaMorte's submissions.

Meanwhile, the case is not finished and, therefore, there is no time running on an appeal. All appellate rights, as of this point, don't yet exist.

Both agree?

MR. LUSTBERG: Yes, Judge.

MS. LAMORTE: Yes, there is no disclosure order, so no appellate rights yet.

THE COURT: The only thing that bothers me is that we're taking up a lot of time.

MR. LUSTBERG: Congress could have avoided that by not passing that statute.

THE COURT: Yeah.

And as to fees, we've resolved everything up to this proceeding.

MR. LUSTBERG: And, your Honor, that was clearly the parties' intention at the time. As of now, we have not yet prevailed, at least we are not conceding anything, but so that --

THE COURT: You prevailed on everything except this issue.

MR. LUSTBERG: Right. So the issue of fees will have

to, again, abide the results of these proceedings.

THE COURT: Right.

MR. LUSTBERG: And that's been the understanding we have had with the government, as well.

THE COURT: We'll issue an order that summarizes where we are.

Okay, thanks again.

ALL: Thank you, your Honor.

MR. LUSTBERG: You can keep my copy of your opinion.

THE COURT: We have another.

(Adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION et al, Plaintiffs, v. DEPARTMENT OF DEFENSE et al, Defendants.	04 Civ. 4151 (AKH)

DECLARATION OF MEGAN M. WEIS

Pursuant to 28 U.S.C. § 1746, I, Megan M Weis, hereby declare under penalty of perjury that the following is true and correct:

1. I am an Associate Deputy General Counsel in the Department of the Army, Office of General Counsel ("OGC"). OGC provides legal advice to the Secretary of the Army and other leaders within the Army. I have held my current position since June 2014. I previously served as an Associate Deputy General Counsel in the Department of Defense (DoD), Office of General Counsel, from April 2009 to June 2014. In that role, I oversaw Freedom of Information Act ("FOIA") activities including administrative responses and litigation involving DoD. The statements in this declaration are based upon my personal knowledge and upon information made available to me in my official capacity.

2. On October 7, 2003, the American Civil Liberties Union (ACLU) filed a FOIA request for records related to the treatment, death, and rendition of detainees held in United States custody abroad after September 11, 2001. The ACLU filed a complaint in the above captioned case on June 2, 2004.

3. In April 2006, the government asserted it was properly withholding from release 29 photographs it identified as potentially responsive to plaintiffs' request; the Court ordered that a final ruling on the FOIA appeal as to the 29 photographs would govern any additional responsive images. In June 2006, this Court held that eight of the photographs were not responsive to ACLU's request, and ordered the release of the remaining 21 photographs in redacted form. The Second Circuit affirmed this Court's decision in an opinion dated September 22, 2008. The government filed a petition to the United States Supreme Court for certiorari on August 7, 2009. On October 28, 2009, Congress enacted the Protected National Security Documents Act of 2009 (PNSDA), Pub. L. No. 111-83, 123 Stat. 2184. The PNSDA precludes disclosure pursuant to Section 552 of title 5 of any photograph, taken between September 11, 2001, and January 22, 2009, that relates to the treatment of individuals engaged, captured, or detained by U.S. Armed Forces after September 11, 2001, in operations outside of the U.S., upon a certification by the Secretary of Defense that public disclosure of such photographs 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."

4. Since the time of the district court's order directing the release of 21 photographs, the government processed and withheld a substantial number of additional images potentially responsive to plaintiffs' FOIA request (the original 21 photographs and the additional images to be referred to collectively as the "photographs"). These photographs were gathered by the U.S. Army Criminal Investigation Command in response to law enforcement investigations of alleged detainee mistreatment.

5. On November 13, 2009, Secretary of Defense Robert Gates certified that disclosure of the photographs 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." Upon remand in light of the certification, on July 11, 2011, this Court noted the Secretary's certification and granted the government's motion for summary judgment, ruling that the photographs were not subject to disclosure under FOIA Exemption 3.

6. Under the PNSDA, the Secretary of Defense's certification expires after three years, and the Secretary may renew the certification at any time. On November 9, 2012, Secretary of Defense Leon Panetta issued a renewed certification regarding the photographs. In his certification renewal, Secretary Panetta determined, upon the recommendations of the Chairman of the Joint Chiefs of Staff, Commander, United States Central Command, and Commander, International Security Assistance Force/United States Forces-Afghanistan, that public disclosure of the photographs 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."

7. In August 2012, I began the process of addressing the upcoming expiration of the 2009 certification. The process by which the certification renewal was executed was similar to the one that was used for the original certification. The government adopted a similar approach in light of the Court's acceptance of Secretary Gates's certification as sufficient to uphold the Government's assertion of FOIA Exemption 3.

8. The General Counsel of the Department of Defense designated me to conduct the review of the photographs on the Secretary's behalf. *See* 10 U.S.C. § 113(d) ("Unless specifically prohibited by law, the Secretary may . . . perform any of his functions or duties, or

exercise any of his powers through . . . such persons in, or organizations of, the Department of Defense as he may designate."). I gathered all of the photographs subject to the 2009 certification and reviewed all of them. During this review, I 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. In creating these three categories, I considered the content of each photograph, to include 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 (e.g., at point of capture, at a medical facility). Although the photographs had previously been reviewed and categorized in 2009, I conducted a full review of all of the photographs and recategorized them where appropriate before creating the representative sample. I worked with leadership in the DoD Office of the General Counsel to ensure the representative sample accurately characterized all of the photographs.

9. I then set out to obtain the recommendations of the senior military leadership and field commanders as to whether public release of the photographs would endanger U.S. citizens and government personnel serving overseas. After raising the issue with the senior lawyers for the Chairman of the Joint Chiefs of Staff, the Commander of U.S. Central Command, and the Commander, International Security Assistance Force/United States Forces-Afghanistan, I provided each attorney with the representative sample. I asked each attorney to 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.

10. On October 28, 2012, General John R. Allen, then the Commander, International Security Assistance Force/United States Forces-Afghanistan, provided a written

recommendation that the Secretary of Defense recertify all of the photographs. A copy of General Allen's recommendation is attached as Exhibit A to this declaration.

11. On October 29, 2012, General James N. Mattis, then the Commander of U.S. Central Command, concurred in General Allen's recommendation and further explained his view, as the commander of all U.S forces in the Middle East, that the certification should be renewed as to all of the photographs. A copy of General Mattis's recommendation is attached as Exhibit B to this declaration.

12. General Martin E. Dempsey, the Chairman of the Joint Chiefs of Staff, concurred in the recommendation of the two field commanders and described why he believed the certification should be renewed as to all of the photographs. A copy of General Dempsey's recommendation is attached as Exhibit C to this declaration.

13. After receiving those written recommendations, I met with the General Counsel of the Department of Defense to discuss the recommendations of the military leadership and to review the representative sample. I also prepared a draft memorandum for the Secretary of Defense that would renew the certification as to all of the photographs. This certification renewal was based on the certification memorandum used in 2009 that was accepted by this Court as sufficient in connection with the government's invocation of FOIA Exemption 3. I provided the DoD General Counsel with the draft renewal of the certification, the representative sample, the recommendation memorandums, and a compact disk with all of the photographs. The DoD General Counsel then met with the Secretary of Defense and discussed with him whether to renew the certification. Although I did not attend that meeting, afterward, I received the signed renewal of the certification with respect to all of the photographs, which I ensured was promptly provided to staff from the appropriate committees of Congress.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and information.

Dated this 19th day of December, 2014, in Washington, DC.

Megan M. Weis

[redacted]

[redacted]

HEADQUARTERS
United States Forces-Afghanistan
Kabul, Afghanistan
APO AE 09356

USFOR-A-CDR

28 October 2012

MEMORANDUM THRU
COMMANDER, USCENTCOM
CHAIRMAN, JOINT CHIEFS OF STAFF

FOR SECRETARY OF DEFENSE

SUBJECT: Impact of Releasing Detainee Photographs Previously Certified Pursuant to the Protected National Security Documents Act of 2009 [redacted]

1. [redacted] This memorandum provides my current assessment of the impact of publicly releasing the photographs referenced in the *United States Department of Defense v. American Civil Liberties Union*, 543 F.3d 59 (2d Cir. 2008), *vacated & remanded*, 130 S. Ct. 777 (2009), as well as other photographs of similar character taken in the period between 11 September 2011 and 22 January 2009, that are also related to the treatment of individuals engaged, captured or detained after 11 September 2001 by U.S. Armed Forces in operations outside of the United States (hereinafter, the "photographs").

2. [redacted] Under the Protected National Security Documents Act of 2009, certain photographs, as defined in the statue, are exempt from disclosure under the Freedom of Information Act when the Secretary of Defense certifies 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.*" Having served in the U.S. Central Command Area of Operations for most of the past six years, and as current Commander, United States Forces – Afghanistan (USFOR-A) and Commander, International Security Assistance Forces (ISAF), it is my opinion that the public release of these photographs, even if redacted to obscure identifying information, would result in the harm the statute is intended to prevent.

3. [redacted] I strongly believe the release of these photographs will endanger the lives of U.S. Soldiers, Airmen, Marines, Sailors and civilians presently serving in Afghanistan, as well as the lives of our Coalition partners. The release of these photographs will significantly and adversely impact the USFOR-A/ISAF mission to develop a strategic partnership with a stable, secure, prosperous, and democratic Afghanistan, that stands as an ally in the war on terror, and contributes to peace and stability in the region. The photographs will likely cause a very public and emotional response in Afghanistan and the larger Muslim world. These responses can be devastating, like that caused by a release of the film "Innocence of Muslims," which generated 38 protests in a number of cities across Afghanistan, including three that turned violent. The 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. Finally, in January 2012 an internet release of videos showing U.S. Marines urinating on corpses in Helmand province led to violence and Coalition deaths. The release of these photographs will only intensify existing resentment and emotional fervor harbored by the Afghan public.

4. [redacted] The release of these photographs will almost certainly exacerbate the conditions that foster "insider threat" attacks. Since January 2012, 38 insider threat attacks have caused

[redacted]

[redacted]

SUBJECT: Impact of Releasing Detainee Photographs Previously Certified Pursuant to the Protected National Security Documents Act of 2009 [redacted]

the deaths of 53 individuals and 89 non-death casualties. These conditions will likely be aggravated with the release of images purporting to show detainee mistreatment, and the threat to ISAF forces, particularly U.S. forces, will increase. Of the insider attacks occurring in the last year, many were inspired by the mishandling of religious materials, the film "Innocence of Muslims," and the desecration of bodies by the Marines. Extremist groups, who already encourage this form of attack, would undoubtedly use the release of these photographs to further justify and encourage members of the Afghan National Security Forces (ANSF) to commit these attacks as worthy acts of righteous retribution.

5. [redacted] Anti-U.S. groups will likely attempt to misrepresent the photos as evidence of U.S. noncompliance with international law and basic standards of a humane and civilized society. Leaders within the Taliban will likely exploit released photographs for the purposes of recruitment and financial solicitation. The U.S. will likely suffer more generally from negative publicity as media outlets allow the story to proliferate throughout the U.S. and abroad. This could seriously affect the U.S. mission as some viewers will not understand the fact that the photographs depict incidents that occurred several years ago, in another theater of operation; they may be led to believe that this type of conduct is ongoing in detention facilities across Afghanistan. Finally, the release of the photographs is likely to harden any existing anti-US opinion in local and regional media.

6. [redacted] I have additional concerns that releasing such photographs would almost certainly exacerbate our current impasse with the Government of the Islamic Republic of Afghanistan (GIRoA) over the issue of transferring detainees to Afghan Custody, and increase the pressure to fully release individuals that U.S. forces are currently holding. Over the past two years, Afghan national detainees have been transferred to Afghan custody in a safe and orderly fashion. Considering the current discord over U.S. detention operations, the release of these photographs could embolden President Karzai to call for the immediate release of the over 3,000 detainees transferred to GIRoA custody, undermining the delicate security balance in Afghanistan. Many of these detainees continue to pose a serious risk to U.S. forces and U.S. domestic security.

7. [redacted] The release of these photographs may have some effect on our planning for NATO's post-2014 presence. Despite significant long-term commitments made at the NATO Summit in Chicago, and Tokyo Donors Conference in 2012, public support in the U.S. and among the members of the Coalition, for a post-2014 military mission in Afghanistan remains fragile. Release of these photos could undermine public and political support for our enduring presence in Afghanistan, as we enter a critical period for planning and national-level decisions on the scope and nature of our long-term military presence – a military presence that remains essential to achieving our vital national interests and defending the homeland.

8. [redacted] Afghanistan today is safer, but it is not without risk. There are still attacks against Coalition and Afghan forces, and the release of the photographs would likely boost the recruiting and fundraising that enables those attacks. While no attack has a solitary motivation, such as may be the case in the attack against the U.S. Embassy in Libya, it is my belief, based on my years of experience and judgment, that the release of the photos could be expected to destabilize the country and endanger the U.S., the Coalition, and Afghan lives. Finally, these photographs will likely only further erode the trust-based relationship the U.S. has forged with its Afghan partners, a trust already damaged by the increase in insider attacks that occurred over the last year.

[redacted]

[redacted]

SUBJECT: Impact of Releasing Detainee Photographs Previously Certified Pursuant to the Protected National Security Documents Act of 2009 [redacted]

9. [redacted] For the reasons described above, I recommend that the Secretary of Defense, in accordance with the authority granted under the Protected National Security Documents Act of 2009, renew the certification of Secretary Gates, that public disclosure of these photographs would endanger citizens of the United States, members of the U.S. Armed Forces or employees of the U.S. Government deployed outside the United States.

Very respectfully,

JOHN R. ALLEN
General, United States Marine Corps
Commander
International Security Assistance Force/
United States Forces-Afghanistan

[redacted]

COMMANDER
UNITED STATES CENTRAL COMMAND
7115 SOUTH BOUNDARY BOULEVARD
MACDILL AIR FORCE BASE, FLORIDA 33621-5101
ACTION MEMO

29 October 2012

FOR: SECRETARY OF DEFENSE
CHAIRMAN, JOINT CHIEFS OF STAFF

FROM: General James N. Mattis, Commander, U.S. Central Command

SUBJECT: Request for Certification Renewal of Photographs Pursuant to the Protected National Security Documents Act of 2009

Mr. Secretary, Chairman,

This is my assessment of the impact of publicly releasing the photographs previously certified by Secretary Gates as being not subject to release pursuant to the Protected National Security Documents Act of 2009.

BACKGROUND

- Under the Protected National Security Documents Act of 2009, certain photographs are exempt from disclosure under the Freedom of Information Act upon certification by the Secretary of Defense (SECDEF) that public 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."

- On 29 October 2009, my predecessor, GEN David H. Petraeus, recommended that the SECDEF certify that public disclosure of the photographs referenced in the *United States Department of Defense v. American Civil Liberties Union,* 543 F.3d 59 (2d Cir. 2008), *vacated & remanded*, 130 S. Ct. 777 (2009), as well as other photographs of similar character taken in the period between 11 September 2001 and 22 January 2009 that also relate to the treatment of individuals engaged, captured or detained after 11 September 2001 by U.S. Armed Forces in operations outside of the United States (hereinafter, the "photographs"), would endanger the persons described above. On 13 November 2009, Secretary Gates concurred with this recommendation and made the requested certification.

DISCUSSION

- At the time of the initial certification in 2009, the situation in the CENTCOM area of responsibility (AOR) was described as fragile, particularly in Afghanistan. That characterization is still applicable at this time. Based on my intimate familiarity of the current situations in Pakistan, Afghanistan and other locations in the CENTCOM AOR, it is my conclusion that public release of these photographs, even if redacted to obscure identifying information, could reasonably be expected to adversely impact the political, military and civil efforts of the United States by fueling civil unrest, causing increased targeting of U.S. and Coalition forces, and providing a recruiting tool for insurgent and violent extremist groups thereby destabilizing partner nations.

- This request should also be considered in light of the increased insider threat activity which is much more prevalent in Afghanistan than when the original certification was made in 2009. It is my opinion that the release of images which could be construed as showing detainee mistreatment, especially in this context, would pose a far greater threat to U.S. forces than at the time of the original certification.

- I have seen first-hand the tremendous violence that the publication of certain images has incited within the CENTCOM AOR. The Koran burnings in early 2012, the images of Marines urinating on corpses and the "Innocence of Muslims" video release, have all sparked violence that have resulted in death and endangerment to members of our Armed Forces. Given the recent violence sparked by release of inflammatory imagery, I believe that the potential adverse impact from release of these photographs is even higher now than it was in 2009.

- This is an extraordinarily sensitive time in Afghanistan. Specifically, the negotiations for the Bilateral Security Agreement will soon begin. Additionally, U.S. and Coalition forces are drawing down as we continue the process of transferring the responsibility of overall security to the Government of the Islamic Republic of Afghanistan (GIRoA). Detention operations in Afghanistan have become a contentious issue, especially regarding the transfer of detention responsibility to the GIRoA. The release of these photographs along with the potential violence incited would have a major strategic impact that must be considered alongside the serious risks to U.S. forces.

- For the reasons described above, I conclude that release of the photographs at this time would endanger citizens of the United States, members of the U.S. Armed Forces and employees of the U.S. Government deployed outside the United States.

RECOMMENDATION

- I recommend that you renew the certification of Secretary Gates, that public disclosure of the photographs would endanger citizens of the United States, members of the U.S. Armed Forces or employees of the U.S. Government deployed outside the United States.

Copy to:
OSD
DEPSECDEF
USD-P
CCJ2
CCJ3

[redacted]

CHAIRMAN OF THE JOINT CHIEFS OF STAFF

WASHINGTON, D.C. 20318-9999

ACTION MEMO

FOR: SECRETARY OF DEFENSE DepSec Action _____

FROM: General Martin E. Dempsey, CJCS Martin E Dempsey 18

SUBJECT: Impact of Releasing Photos Implicated in DoD v. American Civil Liberties Union

The Commander, U.S. Central Command (CDR, USCENTCOM), and Commander, U.S. Forces-Afghanistan (CDR, USFOR-A), request your exemption from public disclosure under the Freedom of Information Act (FOIA) of certain detainee photos described in their memorandums at TAB A. Their requests are in accordance with the Protected National Security Documents Act (PNSDA) of 2009. I strongly concur with their requests.

- Under the PNSDA of 2009, certain photos, as defined in the statute, are exempt from disclosure under FOIA upon certification by the Secretary of Defense 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."
- On 13 November 2009, my predecessor, Admiral M. G. Mullen, recommended that Secretary Gates issue such a certification for the photos referenced in the United States Department of Defense v. American Civil Liberties Union, 543 F.3d 59 (2d Cir. 2008), vacated & remanded, 130 S. Ct. 777 (2009), as well as other photos of similar character taken between 11 September 2001 and 22 January 2009 that also relate to the treatment of individuals engaged, captured, or detained after 11 September 2001 by U.S. Armed Forces in operations outside of the United States.
- Secretary Gates concurred with this recommendation and made the requested certification. Since the statute provides that a certification "shall expire 3 years after the date on which the certification or renewal, is issued by the Secretary of Defense," certification must be renewed no later than 13 November 2012 to continue exempting the photos from disclosure.
- Based 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 at this time would endanger citizens of the United States, members of the U. S. Armed Forces, or employees of the U. S. Government deployed outside the United States.

RECOMMENDATION: Renew the exemption authorized under the PNSDA of 2009 by again certifying that public disclosure of the photos would endanger citizens of the United States,

[redacted]

members of the U. S. Armed Forces, or employees of the U. S. Government deployed outside the United States by signing TAB B.

Approve _____ Disapprove_____ Other_____

COORDINATION: TAB C

Attachments:
As stated

Prepared By: Brigadier General Richard Gross, USA; OCJCS/LC; [redacted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, et al, Plaintiffs,	)	
v.	)	04 Civ. 4515 (AKH)
DEPARTMENT OF DEFENSE et al, Defendants.	)	

Pursuant to 28 U.S.C. § 1746, I, Sinclair M. Harris, Rear Admiral, United States Navy, hereby declare under penalty of perjury that the following is true and correct:

1. ~~(U)~~ I am the Vice Director of Operations for the Joint Staff at the Pentagon and have served in this capacity since April 28, 2014. In my capacity as the Vice Director of Operations, I assist in the execution of all Department of Defense (DoD) operational matters outside of the continental United States. As such, I coordinate and communicate frequently with the staffs of the Unified Combatant Commands, to include U.S. Africa Command, U.S. Central Command, U.S. European Command, U.S. Pacific Command, U.S. Southern Command, U.S. Strategic Command, U.S. Transportation Command and U.S. Special Operations Command, as well as with the Intelligence Community, to ensure on behalf of the Chairman of the Joint Chiefs of Staff that the President of the United States' and Secretary of Defense's direction and guidance are conveyed and executed, and that combatant command concerns are addressed by the Joint Staff. I evaluate and synthesize such concerns and advise and make recommendations to the Chairman of the Joint Chiefs of Staff regarding our worldwide military operations.

2. (U) I make the following statements based upon my years of service and experience in the United States military, personal knowledge, and information made available to me in my official capacity. My conclusions are based on my years of service in the United States military and on my assessments and evaluations of the current situation worldwide as it relates to individuals and organizations that are hostile to the U.S. Government and its efforts, as well as the historical precedents discussed below. I have served in the United States Armed Forces for over thirty years at various levels of command and staff. As a commander of U.S. forces, I commanded the Expeditionary Strike Group 5 and served as the Commander of U.S. Naval Forces Southern Command and U.S. 4th Fleet. As the Vice Director of Operations, I receive and review daily operational plans and briefings, reports, and intelligence analyses from the Combatant Commands, the Joint Staff, and the Intelligence Community. I assist with the supervision of the National Military Command Center, which is responsible for monitoring worldwide events affecting national security and U.S. interests twenty-four hours a day, seven days a week. I have traveled in an official capacity to a number of countries where U.S. forces are conducting ongoing operations against Al Qaeda and other terrorist groups, engaging with senior military and government officials. As a result of my experiences, I have extensive knowledge of our military forces and their capabilities, current operations, and the conventional and unconventional forces and capabilities of the enemies arrayed against us.

3. (U) I am aware that the American Civil Liberties Union (ACLU) requested, through the Freedom of Information Act (FOIA), records related to the treatment and death of individuals held abroad in United States custody after 11 September 2001. I am also familiar with the Protected National Security Documents Act of 2009 (PNSDA).

4. (U) I have been informed that this Court has requested that the government explain the present day harm that would ensue from official release of the photographs referenced in the opinion in *United States Department of Defense v. American Civil Liberties Union*, 543 F.3d 59 (2d Cir. 2008), vacated & remanded, 130 S. Ct. 777 (2009), as well as other photographs of similar character taken between 11 September 2001 and 22 January 2009 that also relate to the treatment of individuals engaged, captured, or detained after 11 September 2001 by U.S. Armed Forces engaged in operations outside the United States (hereinafter the "photographs").

5. (U) I am familiar with the 9 November 2012 certification renewal issued by Secretary of Defense Leon Panetta pursuant to the PNSDA and the supporting recommendations of the Chairman of the Joint Chiefs of Staff, Commander, United States Central Command, and Commander, International Security Assistance Force/United States Forces-Afghanistan, that all concluded that public disclosure of the photographs would "endanger citizens of the United States, members of the Armed Forces, or employees of the United States government deployed outside the United States."

6. (U) This declaration provides my assessment of the present day harm that would occur if the photographs were released. I have reviewed a representative sample of the photographs and, for the reasons set forth in this declaration, I have concluded that the official release of the photographs, in whole or in part, could reasonably be expected to "endanger citizens of the United States, members of the Armed Forces, or employees of the United States government deployed outside the United States."

7. (U) The danger associated with release of these photographs is heightened now, at a time when numerous groups continue in their efforts to attack U.S. personnel and interests both abroad and within the continental United States. In recent months the Islamic State of Iraq and

the Levant (ISIL) have called on members to commit attacks in retaliation for the actions of the United States in Syria and Iraq. On 16 September 2014, an Arabic-language document titled "A Message to 2.6 Million Muslims in the United States This Is How to Respond To Obama's War on Islam" was posted to the Al-Minbar al_I'lami Jihadist Forum which called upon Muslim Americans and Muslims in other Western countries to commit "open source jihad, or lone wolf operations" against certain individuals. The message advocated "focusing on human targets," specifically, "military personnel…police and law enforcement…Department of State and Defense Department personnel." The message advocates for these lone-wolf attacks because they are "impossible for the security authorities to abort," and offer extreme flexibility, without any "training, preparation or any channel of communication with any party or individual" required in advance. On 21 September 2014, an audio message attributed to the ISIL spokesman was posted in a forum which advocated for lone offenders in the West to attack "soldiers, patrons, and troops…their police, security and intelligence members." He indicated that lone offenders should kill such government personnel in any manner and that such attacks are legitimate.

8. ~~(U)~~ Western countries such as the UK, Australia and Canada have recently disrupted plotting, or otherwise suffered attacks by, individuals linked to ISIL. On 18 September 2014, Australian officials detained 15 ISIL-linked individuals suspected of plotting a terrorist attack on Australian citizens which would consist of publicly beheading random Australians similar to videos recently released by ISIL. On 8 October 2014, UK officials arrested five British individuals believed to be in the early stages of planning a significant attack in the UK that allegedly had links to ISIL. In October 2014, Canada suffered two attacks by what are believed to be ISIL-inspired terrorists, resulting in the deaths of two Canadian military personnel. These

events further the concern that calls to violence by ISIL and its supporters are being answered and could motivate attacks on U.S. personnel.

9. ~~(U)~~ As described below, public release of the photographs is the type of event that could lead to further encouragement of attacks against the United States by these groups. ISIL would use these photographs to further encourage its supporters and followers to attack U.S. military and government personnel.

10. ~~(S//NF)~~ The photographs are susceptible to use as propaganda to incite a public reaction and could be used as recruiting material to attract new members to join enemy forces. This risk is much greater with respect to photographs than mere written descriptions. [redacted] Significantly, ISIL has a particular interest in using imagery associated with U.S. detention practices as part of its propaganda and recruitment efforts. For example, in early September 2014 , when ISIL released a video showing the beheading of journalist Steven Sotloff, Mr. Sotloff was forced to make

a statement that he was paying the price for U.S. intervention in Iraq. In addition, Mr. Sotloff was clothed in an orange jumpsuit at the time of his execution, as were James Foley, Alan Henning, and David Haines, a symbol commonly associated with the detainees housed at Guantanamo Bay based on imagery of Guantanamo Bay detainees released in 2001. Imagery such as that found in the photographs and descriptions of such imagery would similarly be particularly useful to ISIL's propaganda and recruitment efforts [redacted]

11. (~~U~~) Al Qaeda also remains active in its efforts to spur members to action against the United States and its citizens. For example, Al Qaeda in the Arabian Peninsula (AQAP) recently released a video threatening to kill U.S. citizen Luke Somers if the U.S. government did not meet its demands. Mr. Somers appeared in the video identifying himself.

12. (~~U~~) One of Al Qaeda's primary propaganda tools is the online magazine "Inspire", an English language magazine published by AQAP, aimed at Westerners and meant to inform and persuade followers to take action, to include committing attacks against non-Muslims. Among other things, Inspire informs readers exactly what steps they can take to launch attacks against the United States and other Western countries, and invokes the USG's treatment of detainees to encourage such attacks. For example, the Spring 2014 edition of Inspire follows a theme of encouraging lone-wolf attacks by individuals who cannot obtain more formal training and provides instruction on how to make a car bomb and plan a car bomb attack, to include advice on how to avoid being detected by authorities. The article advises that this type of car bomb is used to kill individuals and says jihadists should target places such as sports events and festivals where there will be thousands of potential victims. The article states that America is "our first target, followed by United Kingdom, France and other crusader countries". The magazine also includes an article written by a former Guantanamo Bay detainee transferred in 2006, Sheikh Ibrahim Ar-Rubaysh. The article criticizes President Obama's comments that Al Qaeda is on the

road to defeat and points out that "most of America's action lately are either retreating or preparation to retreat", arguing that Al Qaeda are the ones "making events" happen now, not America. The magazine also contains an article discussing recent history as showing a decline of the United States' power and discussing the "Immoral States of America"; notably, the article specifically highlights the USG's treatment of its detainees abroad. The pertinent portion of the article reads:

> "Later, when the cold war came to an end, many more believed America will face no match. It will police the world and the world would become a safer place. However, did this turn out to be the true state of affairs? Did this sweet dream come true?...we are certain that the sweet dream America propagated vanished into a terrifying nightmare: Abu Ghraib, black sites, Guantanamo and the US soldiers' crimes in Afghanistan and Iraq are too clear to need clarification. Actually, there is no possible way to express these inhumane crimes perpetrated against human rights. Here we could say America has lost the most important element of global leadership: morals and principles."

The photographs, which depict detainees in U.S. custody, who sustained visible injuries, would likely be seized upon by Al Qaeda for use in its continued propaganda war against the United States. This risk is much greater with respect to photographic images of detainees than mere written descriptions.

13. (S) Consistent with the 2012 determination of the Secretary of Defense and the recommendations of the Chairman, Joint Chiefs of Staff, Commander, United States Central Command, and Commander, International Security Assistance Force/United States Forces-Afghanistan, the release of these photographs is likely to endanger U.S. military and civilian personnel who continue to operate in various locations in the Central Command (CENTCOM)

UNCLASSIFIED//FOR PUBLIC RELEASE
~~SECRET//NOFORN~~

region, such as Afghanistan and Iraq. At this time, we still have [redacted] U.S. citizens (both military and civilian USG personnel as well as non-USG personnel) on the ground in Afghanistan, and [redacted] U.S. citizens (both military and civilian USG personnel as well as non-USG personnel) on the ground in Iraq, with a plan to double the number of military personnel in Iraq (from 1,500 to 3,000), as the President has stated. The subject of U.S. detainee operations remains extremely sensitive with the governments and citizens of these countries as well as other countries whose nationals we detain. Public release of the photographs would facilitate the enemy's ability to conduct information operations and could be used to increase anti-American sentiment, thereby placing the lives of U.S. personnel serving in Afghanistan and Iraq at risk. These concerns are not hypothetical, as evidenced by the prior violence that resulted from release of other information, videos and photographs as referenced in the 2012 Commander, United States Central Command, and Commander, International Security Assistance Force/United States Forces-Afghanistan memorandum.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 16 day of December 2014 in Arlington, VA.

Rear Admiral Sinclair M. Harris, USN

Vice Director of Operations, J-3, Joint Staff

F24eaclc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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AMERICAN CIVIL LIBERTIES
UNION, et al.,

Plaintiffs,

v. 04 CV 4151(AKH)

DEPARTMENT OF DEFENSE,

Defendant.

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February 4, 2015

4:57 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

GIBBONS, PC
Attorneys for Plaintiffs
BY: LAWRENCE S. LUSTBERG
ANA MUNOZ

AMERICAN CIVIL LIBERTIES UNION
Attorneys for Plaintiffs
BY: JAMEEL JAFFER
ALEX ABDO

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: TARA LAMORTE
SARAH NORMAND
Assistant United States Attorneys

(In open court)

THE COURT: So we have plaintiff represented by Mr. Lustberg and colleagues.

MR. LUSTBERG: Good afternoon, your Honor.

THE COURT: Hello, Mr. Lustberg and your colleagues.

Mr. Jaffer, nice to see you again. You've been with this case from the beginning.

And I don't think I have your two colleagues, Mr. Jaffer.

MR. LUSTBERG: Well, one is one of my colleagues, Judge. This is Anna Munoz, recently joined with us at Gibbons.

THE COURT: Congratulations. And?

MR. ABDO: Alex Abdo with the ACLU.

THE COURT: Ms. LaMorte and Ms. Normand?

MS. LAMORTE: Yes, your Honor. Good afternoon.

THE COURT: Let me ask Ms. LaMorte first. I've ruled in my decision of August 27, 2014, that the certifications by the Secretary of Defense had to be individual to each photograph. That's not how it comes down, does it?

MS. LAMORTE: Well, your Honor, you actually ruled that the Secretary of Defense had to undertake an individualized consideration of each photograph. And we submit that the record shows that that, in fact, has been done.

Your Honor, I would just go back for a moment to the sixth motion for summary judgment, which your Honor granted in

favor of the government. And there, as your Honor --

THE COURT: Would you like to sit down?

MS. LAMORTE: I'm actually okay. I'll let you know, your Honor. Right now I'm okay, but I appreciate that. I'm okay right now. I prefer to stand.

THE COURT: Okay.

MS. LAMORTE: So, your Honor, I'll just note that in connection with the sixth motion for summary judgment covering the same photographs but involving Secretary of Defense Gates' certification, your Honor granted summary judgment in favor of the government.

THE COURT: I did that. And I explained that in the order, that it was close to the time that I had reviewed the photographs. It was in the context of a raging war in Iraq. It was very close in time to the representations made by the Prime Minister of Iraq Nouri al-Maliki -- did I get his name correct?

MS. LAMORTE: Yes.

THE COURT: -- to the President of the United States urging him not to publicize the photographs --

MS. LAMORTE: That is correct.

THE COURT: -- and ensuing legislation protecting it. And therefore, as a practical matter, I accepted the certification. But I distinguished that from this current certification.

MS. LAMORTE: Yes, your Honor. There's a couple things I will note, however.

First, as your Honor noted, you had previously not, in connection specifically to the sixth motion for summary judgment, but prior to that you had only reviewed a sample of the photos. You had not yourself conducted a review of every single photo, as you explain in your August 2014 opinion. And now, based on that, and based on your knowledge of what --

THE COURT: Ms. LaMorte, my recollection is that in the case of redactions, I reviewed if not every single photograph, a large number, to cover every single photograph.

MS. LAMORTE: You reviewed --

THE COURT: The defendants came to my office in chambers, and we went over as many photographs as were necessary to cover every kind of example.

MS. LAMORTE: Your Honor, it is my understanding -- and we obviously can confirm this, because I was not there at the time -- but it was my understanding that your Honor reviewed 29 photographs, which were the photographs that the Department of Defense had at the time. They were not at that time a sample of any larger number of photographs. You had ruled that I believe seven to nine of them were nonresponsive -- I don't remember the exact number.

And then the Court also stated that your ruling on appeal, or the ruling on appeal as to those 29 photographs,

would cover, you know, all the remaining photographs that were to be found by the Department of Defense.

THE COURT: Did I not do that on consent of both sides?

MS. LAMORTE: Yes, your Honor, you did. But my point, your Honor --

THE COURT: And was it the understanding that that sample was adequate to understand the entire field of photographs?

MS. LAMORTE: Your Honor, I'm not so sure about that, because I don't believe that all of the photographs at that time had been collected. So I can't say now that that was representative of the full universe --

THE COURT: It wasn't --

MS. LAMORTE: -- of photographs that were ultimately subject to the certification in 2009. Your process --

THE COURT: You're correct.

MS. LAMORTE: -- occurred earlier than that. I believe your process -- I believe you must have reviewed the photos in 2005 or 2006.

THE COURT: I don't remember now as I sit here when. But I do remember clearly that as the case progressed, more and more photographs came to light.

MS. LAMORTE: Yes.

THE COURT: We thought when we did this exercise in

chambers ex parte that the source of the photographs was limited to two or three soldiers and an investigation. It turned out that there were many more photographs.

MS. LAMORTE: Yes. They were all derived in connection with full criminal investigations into detainee abuse.

THE COURT: And then the parties stipulated, and I accepted, that whatever was the substance of the order in the Court of Appeals dealing with the photographs that went up would apply to all.

MS. LAMORTE: That's correct, your Honor.

THE COURT: Then it was affirmed, and it applied to all. And then the President received the representations, and there was not specified as to which photographs.

The problems come down now -- and it's only at this time that it was posed to me whether the certification of the Secretary of Defense en gros and covered each specific photograph. I found the certification has to be individual; if not on the type required by one index, something resembling it. And that's the tension right now.

MS. LAMORTE: Your Honor, let me just review --

THE COURT: So let me see what -- I can state the grounds, because I don't think that Mr. Lustberg has been privy to as much of this, and I think needs to know. Or he may be. I don't know.

We have competent declarations from officials in the Department of Defense to whom were delegated by the secretary the job of reviewing all these photographs and subjecting them to a classification, whether they could or could not be produced. There's a satisfactory declaration that was shown to me that that work was done. And it was the subject of recommendations made to hire military and civilian officials in the Department of Defense. I don't recall right now if Secretary Panetta was included among them. But if he wasn't included personally, the level of inclusion was at a very high level.

So I'm not quarreling -- are you familiar with this, Mr. Lustberg --

MR. LUSTBERG: Not --

THE COURT: -- this process.

MR. LUSTBERG: I'm generally familiar with the process. Are we talking about the first time around, now or this time?

THE COURT: Now, this time.

MR. LUSTBERG: I understand what happened this time, yes, because it's set forth in Ms. Weiss's declaration.

THE COURT: So I thought when I read this that the process of an item-by-item review was performed. But an item by item certification was not performed. We have a certification that deals with everything. And a certification

that deals with everything is suspect, because the world doesn't work that way. And I noticed when I did my own review of photographs that some were irrelevant, some were harmless and some were highly prejudicial. That's the way things tend.

So I ask of you: Why should I accept a certification en gros when my reading of the law requires individualized certifications?

MS. LAMORTE: Because the --

THE COURT: I may be wrong, Ms. LaMorte. I may be wrong, but that is my view.

MS. LAMORTE: Because the process that DOD had undertook in connection with issuing the Secretary Panetta's certification was a process that included an individualized review of each and every photograph that was subject to the certification. So the general counsel of the Department of Defense delegated lawfully, pursuant to statute, the task of having counsel in the office of general counsel review each and every photograph. They were previously individually reviewed in connection with the Gates certification. And notwithstanding that, they were individually reviewed at that time. The Secretary Panetta process required and demanded that they be individually reviewed again. They were.

THE COURT: That's because I required it.

MS. LAMORTE: Huh?

THE COURT: That's because I required it.

MS. LAMORTE: No, your Honor, because at the time this process was undertaken, you had not issued your 2014 opinion. This process with the Secretary Panetta certification occurred in 2012, after we won summary judgment on the sixth motion for summary judgment.

So this was not in response to litigation. There was no litigation pending. There was no appeal from the sixth summary judgment ruling. This was the process that DOD undertook on its own in good faith. It was a deliberate and thorough process, and they took it seriously.

THE COURT: So what happened is that lower-level employees looked at every photograph?

MS. LAMORTE: A particular counsel, an associate deputy general counsel, looked at each and every photograph. She --

THE COURT: And we don't know the number?

MS. LAMORTE: No. The number has never been revealed. And again, your Honor, never required the number to be revealed.

THE COURT: Well --

MS. LAMORTE: Your Honor ruled that the statute never required the number to be revealed.

THE COURT: Yes, but a certification of individual photographs would have been easy to count.

MS. LAMORTE: Sure, okay.

THE COURT: So that's not fair. But --

MS. LAMORTE: But the --

THE COURT: Let me make sure I understand the process.

MS. LAMORTE: Sure.

THE COURT: Who was it that reviewed -- not by name; I mean by category or by title -- who was this that reviewed every single photograph?

MS. LAMORTE: Associate deputy general counsel. And we submitted her declaration. And upon her review --

THE COURT: Can we state the name?

MS. LAMORTE: Yes, Megan Weiss. It's a publicly filed declaration.

THE COURT: And it was not a sample that she did but everything?

MS. LAMORTE: Everything. And then she categorized them into three different categories, based on factual issues with respect to the photos, which included the extent of injuries on the detainee, the location of the detainee -- and by that I don't mean country; I mean whether the detainee's on the battle field versus in a hospital or something like that. And then thirdly, the presence of US military personnel and what they were doing in the photographs. So she divided those up into categories.

THE COURT: How could she know all that?

MS. LAMORTE: She looked at every photograph.

THE COURT: But many photographs don't show anything but the person who was being detained --

MS. LAMORTE: Right.

THE COURT: -- subjected to treatment.

MS. LAMORTE: Not every photograph depicted US military personnel, of course, your Honor. But that was a factual issue that formed her categorization of the photos, is what I'm saying. Of course every photo doesn't depict everything. She divided them up into these three categories, and then she consulted with senior personnel. They are not named in her declaration. I actually don't know who they are. She consulted with senior personnel in general counsel's office.

So senior leadership, to ensure that the categories that she created accurately reflected the entirety of the universe of photographs, and then samples from each of those categories, five to ten photographs of each of those categories, were then sent to three of the most senior officers within the Department of Defense -- the Joint Chiefs of Staff, the Commander of US forces in Afghanistan and the Commander of US Central Command -- for them to review and to make a determination -- not determination, I'm sorry, a recommendation to Secretary Panetta about whether or not all of these photographs as shown through this representative sample should be certified or not.

And again, this was not a litigation-driven process, your Honor. Again, we had won the sixth motion for summary judgment. There was no appeal. These recommendation memos that you see are not post hoc rationales. They're not litigation-driven rationales. These are what the senior-most people at DOD believed strongly will happen in 2012, if these photographs were released, all of them.

THE COURT: What happens if they're identified? What's the harm?

MS. LAMORTE: If, what, if the photographs --

THE COURT: Individual photographs were identified by some kind of a -- for example, Bates stamp them all. You can have a general description, which can or cannot be classified, and a reason, same as you do with an index. What would be the prejudice?

MS. LAMORTE: Your Honor, there's nothing in the statute, the Protected National Security Documents Act that requires a Vaughan index. You had ruled that the statute required an individualized consideration of each photograph. Neither your ruling or the statute describes a particular method for doing that. So you ruled that so long as there's an individualized review and a determination of harm that is made, and that harm is rational, then the secretary may certify the photographs in connection with the sixth motion for summary judgment.

And even in connection with your Honor's ruling on the seventh motion for summary judgment, you never required a Vaughan from the government. And the statute, the PNSDA, does not require a Vaughan either. And so I submit -- and we adhere to our arguments that we had made in connection with both motions, for the reasons stated therein, that Congress did not intend for a Vaughan to be required.

And another important point I think about this particular statute that the Court should bear in mind is that there is congressional oversight of this process. So in passing this statute, Congress decided to maintain oversight of the certification process. And after Secretary Panetta issued a certification, that certification was provided to the Speaker of the House, the president of the Senate, the chairman and the ranking members of the House and Senate on Services Committees, other committees. And I will inform the Court that not a single Congressperson or any committee expressed any question or concern about Secretary Panetta's certification.

Congress bestowed the Secretary of Defense with this power. Congress can modify it. Congress can take it away. And in response to the 2012 certification, Congress did none of those things.

And so the idea that there is a lack of accountability of this process is unfounded. I submit that the process, again, undertaken without litigation in mind, was one that was

deliberate, thorough, taken very seriously by DOD and one that is subject to accountability.

THE COURT: Mr. Lustberg?

MR. LUSTBERG: Thank you, your Honor. Judge, this Court's opinion -- let me just address that, the issue that you've been discussing with Ms. LaMorte.

In your Honor's ruling in this past August, what you said was, what is important is that the government to invoke the PNSDA must prove that the Secretary of Defense considered each photograph individually. But the question there becomes, what does consideration mean? And you were not silent on that point.

What you said is, in discussing next steps, the government has failed to submit to this Court 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. Each photograph.

Let's talk about what happened here. What Ms. Weiss did was no such consideration. Yes, she examined each photograph. That's what she did. And then what she did is she took samples of certain types of photographs. How she sampled them is unknown to us, and as far as I know, is unknown to the Court, unless it's in one of the classified declarations.

THE COURT: No, I do not know what criteria she used.

MR. LUSTBERG: What she tells us, that there were four criteria that she applied, but she doesn't tell us how those resulted in the groups. What we think --

THE COURT: Am I right, Ms. LaMorte?

MS. LAMORTE: It was actually three criteria, your Honor. And I stated them before.

THE COURT: You said three, but I don't know what they are.

MS. LAMORTE: They are the extent of injuries on the detainee; the location of the detainee; and whether the photograph depicts US military members in the photograph. Those were the criteria that she used.

THE COURT: The third one is a yes or no.

MS. LAMORTE: Yes.

THE COURT: But the first two don't tell me very much.

MR. LUSTBERG: And the fourth one that I was alluding to from her declaration was the content of each photograph, which also doesn't tell --

MS. LAMORTE: That's actually -- this is just really for clarity. The way the declaration reads, it's the content of each photograph to include these three things. Content was not a separate -- that's just a misunderstanding on the wording of the declaration. I just wanted to make that clear.

MR. LUSTBERG: Whatever. But, Judge, we have no explanation. You, most significantly, have no information.

And respectfully, your Honor, you deserve it, notwithstanding that various Congressman may have taken a look at this; because, as your Honor held in August, there is judicial review that is, in fact, applied to the PNSDA, just as it would be to other FOIA exemptions.

THE COURT: Well, I ruled that.

MR. LUSTBERG: Yes, you did. And I guess --

THE COURT: The second question posed by the parties is whether the PNSDA requires the Secretary of Defense to issue an individual certification, read, separate paragraph, and I ruled it requires that.

MR. LUSTBERG: In any event --

THE COURT: Page 18, Ms. LaMorte, top. Very first sentence of the section.

MR. LUSTBERG: So, Judge, if I might, it's very important to understand precisely the process that did take place, because Ms. Weiss is the only person that is identified in all these declarations that have been provided to the Court who reviewed each photograph, period.

Now, again, you're quite right that we have no idea how many there are. But we do know how many photographs were sampled to be provided to the various military experts who reviewed them. And let's be clear: It was a sample. And unlike other samples that have been employed in this case and in other FOIA cases, it was not a sample as to which we

understand the methodology. We don't know what was chosen and why. We don't know what percentage of the total photographs it was.

THE COURT: We don't know the magnitude -- we don't know the denominator, and we don't know the numerator.

MR. LUSTBERG: We might have some sense of the numerator, because it looks to us like somewhere that each of three got between 15 and 30 photographs, each of the three military experts, which means that somewhere between 45 and 90 photographs in total, if there was no overlap.

So, you're right, we don't know the numerator because we don't know whether there was any overlap. But if there was no overlap, it was between 45 and 90. And we're told by Senator Lieberman, for example, that there were over 2,000 photographs. But truly we don't know the denominator. I'm sorry.

THE COURT: And take the category of injury. What is the demarcation of injuries? Scratched nose? Wound on the hand? Some serious gash to the body? We don't know.

MR. LUSTBERG: Judge, we have no idea whatsoever. But all --

THE COURT: In terms of detention, we don't know the detention in a prison camp, detention on the front lines, whether the picture was taken on the capture, whether the picture was taken on detention, what is the relationship

between the location of the person and whatever was involved in the picture. We don't know.

MR. LUSTBERG: And most significantly --

THE COURT: And in terms of servicemen, if it wasn't someone from the United States that was shown in the picture, was the person someone that was trained by the United States? Was it someone who was doing a delegated act from the United States soldier? We don't know that either.

MR. LUSTBERG: Most significantly, your Honor, what we don't know is how any of these factored into a determination of whether it would be safe to release the picture. That is to say, whatever criteria were used, there's no explanation that's been provided to this Court which required it as to why the release of those categories of photos, let alone the individual photos, could in any way endanger the safety of US servicemen, citizens or employees abroad, which is what the statute demands.

THE COURT: I observed when I originally reviewed the Abu Ghraib photographs that a number of them required no redaction and were, in all respects, harmless and could be produced. And I feel that in a large number of sets that will be the case as well. So I'm highly suspicious of something that is certified en gros. It's too easy to do and too --

MR. LUSTBERG: Obviously, Judge, we agree with that.

THE COURT: There's also an issue of dealing with a

sample. We don't know the sample, but then you have to make the ultimate decision: Will release of the items in this sample or some of them endanger US personnel? And it's hard to understand the relationship.

Let me ask this of Ms. LaMorte. We could go on with this process, and I could give you more time to satisfy my rule. I have a feeling that we're at a point of, to make up a phrase, a line in the sand.

What would you like, Ms. LaMorte? Because I'm not changing my view.

MS. LAMORTE: Okay. One moment. (Pause)

Your Honor, if you would, I would appreciate a brief opportunity to confer with the client to make sure I'm not making a representation that they're not on board yet. I have my own views on what I believe they may like, but I would like confirmation. And so I'm just asking for one week to submit a letter to the Court as to what -- you know, how we suggest proceeding, or how we would like to proceed.

THE COURT: You don't object, do you?

MR. LUSTBERG: No to one week, Judge. And obviously we agree with the Court's determination. Not much more I can say.

THE COURT: Can you get it to me by noon on February 11?

MS. LAMORTE: Yes. That's no problem.

THE COURT: Because I think the Court is off the next -- okay.

So I think your letter will say one of two things: If the secretary does not want to certify individuals, individual photographs, he'll say that, along -- you'll have the judgment for plaintiffs and you'll have the ability to appeal. If you want to have time to satisfy my ruling, tell me how much time you need.

MS. LAMORTE: Can I ask for a time in the letter? And I will confer with the plaintiffs, if that's the course that we choose to take. And if they object, they can let you know and we can figure out how much time we need.

THE COURT: Okay. Any other possibilities? I think there may be others, but you'll identify them in the letter. If we need to get together, we'll do it on short notice.

Mr. Lustberg, that's satisfactory?

MR. LUSTBERG: Yes, your Honor. I mean, obviously we may have to have further discussion with the Court, if the second avenue is pursued as to what the nature of the disclosure would be. But I think that's probably for another day.

THE COURT: Okay. Thank you very much.

MR. LUSTBERG: Thank you, your Honor. Good to see you again.

THE COURT: So I need to issue an order.

MS. LAMORTE: Your Honor, before we conclude --

THE COURT: I don't think I'll issue an order. I'll wait for the week, then issue an order.

MS. LAMORTE: Just for the record, and so I'm clear and so I can bring this back to DOD, can you just clarify exactly what you would have us do to satisfy your order?

THE COURT: I need to read off you, first of all, because I don't want to impose something that doesn't make sense. If there's a reason that the Secretary of Defense does not want to identify the number of photographs involved, that has to be made the subject of some representation and the reasons stated for that. Right now all I have is a declaration on the part of the secretary to follow my order. So that's one thing. And we haven't discussed that at all.

The second, there may be some midpoints that should be addressed. The one midpoint is an in camera proceeding where the government accounts to me for what it is doing. That's the way we operated in earlier stages of the case. And then I would discuss with you how much can be made public, how much can be shared by Mr. Lustberg and other gradations of disclosure, which is another way to approach the subject. I have to think that this is not an all-or-nothing case. But the way the government has litigated it, it's made it that way. And I don't know if you really want that.

MS. LAMORTE: Okay. That's helpful, your Honor. I

will consult with DOD.

THE COURT: The other thing here is that the consequence of what the government is doing is a sophisticated ability to obtain a very substantial delay.

Let's say the government takes the position I can satisfy by certifying en gros an order as added by me for the plaintiffs. You appeal. By the time you get to the appeal, maybe two years go by. The issue is not easy. It may be longer. The downside for you is that you can always produce and disclose. And realistically, postponing the day of reckoning of something that is considered to be sensitive is itself a victory, because it postpones an unpleasant decision to a succeeding generation. And then we have successive certifications that are required. I would not want to feel that this is the purpose of the government.

MS. LAMORTE: And, your Honor, I just want to --

THE COURT: I want to make very clear: You're a soldier here. You're doing what others decree.

MS. LAMORTE: I would guess, your Honor. I just want to state for the record that we are not acting in anything other than good faith. I have no reason to believe that the government is taking the positions that it has for purposes of delaying or reckoning or anything like that. And I just want to make that clear for the record that that's not -- I have no even hint or reason to even think that that is what is

motivating our position here.

THE COURT: So I'll say this also: When I first decreed that the Abu Ghraib photographs should be released, it was in the midst of a very hot war in Iraq. I had representations by the Chairman of the Joint Chiefs of Staff that I did not follow in terms of my order to disclose. I said some things that our enemies do not need pretexts to aim lethal force against us, and in the aftermath of September 11, 2001, unfortunately an axiomatic statement.

But we did not confront an enemy like ISIS before, an enemy whose cruelty and willful attitudes about the common standards of civility are so lacking as to shock everyone's conscience. And I can understand why, from the perspective of a senior official of the United States government, the benefit of the doubt should be given to not produce. Only an institution like the ACLU could concern itself with failures to conform to the Freedom of Information Act. It is much easier for a government official to say "don't produce" than to say, "produce." As against the theoretical obligation of law and the practical concern of deaths of Americans, the interest in saving lives can be easily thought to outweigh the obligation to produce.

In my Abu Ghraib opinion I expressed my faith in the basic tenets of our society: Openness, free debate, free discussion, information available to the citizenry, even to the

extent that it might be embarrassing to government officials. I've thought the strengths of our society and persuasiveness of our ideas required production. The Second Circuit agreed.

Basically the conditions now are really not different from the conditions then. We were involved in hostile areas. Our soldiers and our citizens were in danger of their lives, and yet the courts championed openness. I think the same thing is true now.

But I have to respect those who have responsibility to safeguard Americans for their points of view as well. And so what I say is not a statement of complete confidence in the correctness of my view. The fallback position is that even though there may not be production, there is accounting in the courts. There is an assurance that if the executive department accounts to the courts and shows what it has done in good faith performance of obligations of law, that society achieves much the same benefits as it could from production of the documents themselves.

The government is not allowing itself to account. I think that's a mistake. It's not because I want to see these pictures. I would rather not. I did not enjoy seeing the pictures last time, and I have absolutely no interest to see them again. But as a judge of the court and the government, under laws I feel it's the obligation of the Secretary of Defense to certify each picture in terms of its likelihood or

not to endanger American lives and why.

I think that's as much of a statement I can make now.

MS. LAMORTE: I appreciate that, your Honor. Thank you.

THE COURT: Thank you all.

MR. LUSTBERG: Thank you, Judge.

(Adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION et al, Plaintiffs, -against- DEPARTMENT OF DEFENSE et al, Defendants.	**ORDER CLARIFYING INSTRUCTIONS FOR DEFENDANTS' SUBMISSIONS** 04 Civ. 4151 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

On February 4, 2015, I heard argument regarding the sufficiency of the Government's most recent submissions in support of Secretary Panetta's November 9, 2012 Certification under the Protected National Security Documents Act ("PNSDA"). I found that the Certification remained deficient, and I instructed the Government on what was required to bring the Certification into compliance. On February 11, 2015, counsel for the Government submitted a letter requesting clarification of my instructions.

In my August 27, 2014 Order denying the Government's motion for summary judgment, I explained that, although the PNSDA does not prevent the Secretary "from issuing one certification to cover more than one photograph[]," it "requires that the Secretary of Defense consider each photograph individually, not collectively." Doc. No. 513, at 18-19. Subsequently, at the October 21, 2014 status conference, I ordered that "the Government must prove [its burden], item by item . . . [and] document by document." Doc. No. 526, at 12-13. I also said, "[y]our burden is to be specific, photograph by photograph." *Id.*

The Government's subsequent submissions did not satisfy these criteria. It submitted a declaration by an Associate Deputy General Counsel in the Department of the Army, who purportedly reviewed all of the photographs and compiled three "samples," totaling 15-30 photographs, for senior commanders to review. According to the declaration, the commanders each recommended renewing the certification based on these samples.

The declaration did not indicate the criteria used to categorize the pictures or to select the samples from each category. It did not indicate how many pictures fell into each category, so there was no way to determine what proportion of the pictures the commanders had reviewed. It also did not indicate whether the Secretary himself had reviewed any of the pictures, let alone all of them. For those reasons and others stated on the record at the February 4, 2015 hearing, I held that the *en grosse* certification was not sufficient and I reiterated that "the certification has to be individual; if not on the type required by [a Vaughn] index, something resembling it." Tr. of Feb. 4, 2015 Oral Argument, at 7-10.

Congress provided that a "photograph" (using the singular) could be excused from production if the Secretary of Defense certifies that disclosure "of the photograph" (again, the singular) "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." PNSDA § (d). While I did not hold that there could be no delegation, the Secretary is required, at a minimum, to explain the terms of his delegation so it is the Secretary, and not any subordinate, who takes responsibility for his knowing and good faith Certification that release of a particular photograph would result in the harm envisioned. In order to make such a Certification, the Secretary must demonstrate knowledge of the contents of the individual photographs rather than mere knowledge of his commanders' conclusions. He may obtain such knowledge either by

reviewing the photographs personally or having others describe their contents to him, but he may not rely on general descriptions of the "set" or "representative samples," as such aggregation is antithetical to individualized review without precise criteria for sampling.

Further, the Certification must make the Secretary's factual basis for concluding that disclosure would endanger U.S. citizens, Armed Forces, or government employees clear to the Court. Without such a record, judicial review is impossible, and judicial review is fundamental to FOIA and the APA. *See Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667 (1986). A Vaughn index would satisfy this requirement, but there may be other ways for the Government to meet its burden as well. At minimum, the submission must describe the categories of objectionable content contained in the photographs, identify how many photographs fit into each category, and specify the type of harm that would result from disclosing such content. As before, these submissions may be filed under seal or exhibited to the Court *in camera*.

The Government will have one more opportunity to satisfy these criteria. If, by March 17, 2015, proper certifications are not filed, judgment against the Government will be filed.

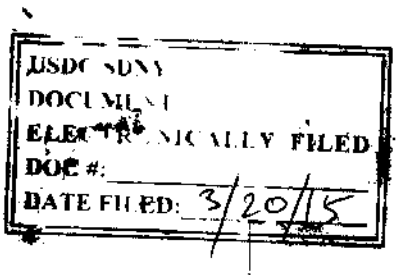
SO ORDERED.

Dated: New York, New York
February 12, 2015

ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION et al, Plaintiffs, -against- DEPARTMENT OF DEFENSE et al, Defendants.	**ORDER GRANTING JUDGMENT FOR PLAINTIFF** 04 Civ. 4151 (AKH)



ALVIN K. HELLERSTEIN, U.S.D.J.:

On February 4, 2015, I heard argument regarding the sufficiency of the Government's most recent submissions in support of Secretary Panetta's November 9, 2012 Certification under the Protected National Security Documents Act ("PNSDA"). I found that the Certification remained deficient because it was not sufficiently individualized and it did not establish the Secretary's own basis for concluding that disclosure would endanger Americans. I instructed the Government on what was required to bring the Certification into compliance at the February 4th hearing. In my February 18, 2015 order, I clarified those instructions and warned that judgment would be entered against the Government if it did not bring the Certification into compliance by March 17, 2015.

In a March 17, 2015 letter to the Court, the Government declined to file any further submissions in response to the February 18th Order. The Government's refusal to issue individual certifications means that the 2012 Certification remains invalid and therefore cannot exempt the Government from responding to Plaintiff's FOIA requests. Accordingly, judgment is hereby entered in favor of Plaintiff. The Government is required to disclose each and all the

photographs responsive to Plaintiff's FOIA request, unless it moves promptly to cure its failure to submit an individualized certification. *See Am. Civil Liberties Union v. Dep't of Defense*, No. 40 F.Supp.3d 377, 388 (S.D.N.Y. Aug. 27, 2014) ("The statute provides that the Secretary of Defense shall issue a certification '[f]or any photograph' if the 'disclosure of that photograph' would meet certain criteria. . . . This plain language refers to the photographs individually—"*that* photograph"—and therefore requires that the Secretary of Defense consider each photograph individually, not collectively.") (citing PNSDA § (d) (1)) (emphasis added).

In its letter, the Government requests that this order be stayed on two grounds. First, it proposes that staying the order until the conclusion of the 2015 recertification process would promote judicial economy, as it could render the appeal of the 2012 Certification moot. However, I have already found that the 2012 Certification is inadequate and, having declined to follow my instructions for bringing the 2012 Certification into compliance, the Government gives the Court no reason to believe that the 2015 Certification would fare better. Second, the Government proposes a 60-day stay so that the Solicitor General may make a determination regarding appeal. *See* Fed. R. App. P. 4(a)(1)(B). The order is hereby stayed for 60 days, even though the Government has had ample time to evaluate its legal position and the desirability of an appeal. The Government has known since August 27, 2014 that I considered a general, *en grosse* certification inadequate. Certainly, that has been clear since the hearing on February 4, 2015. I commented on February 4th that it appeared the Government's conduct reflected a "sophisticated ability to obtain a very substantial delay," tending to defeat FOIA's purpose of prompt disclosure. Tr. of Feb. 4, 2015 Hearing at 23:2-4. Accordingly, any subsequent stays must be issued by the Court of Appeals.

The parties shall settle the terms of judgment. Plaintiff shall serve its proposal on the Government by March 25, 2014, and then a composite form can be submitted to me by noon on March 27, 2015, showing whatever differences there may be in a single document.

SO ORDERED.

Dated: New York, New York
March 20, 2015

ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

-against-

DEPARTMENT OF DEFENSE, et al.,

Defendants.

No. 04 Civ. 4151 (AKH)

ORDER OF FINAL JUDGMENT

WHEREAS, Plaintiffs' complaint in the above-captioned case sought the release of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, from, among others, the Department of Defense ("DoD");

WHEREAS, Plaintiffs and DoD filed Cross Motions for Summary Judgment relating to responsive photographs withheld as exempt from public disclosure under FOIA pursuant to a 2012 certification issued by the Secretary of Defense under the Protected National Security Documents Act (PNSDA), *see* docket entry # 493, 495;

WHEREAS, the Court granted Plaintiffs' motion for summary judgment in part and denied DoD's cross motion on August 27, 2014, *see* docket entry #513;

WHEREAS, the Court granted DoD leave to provide the Court with evidence supporting the Secretary's 2012 certification, *see* docket entry #513;

WHEREAS, DoD filed a Renewed Motion for Summary Judgment together with declarations describing its 2012 certification process, *see* docket entry # 528;

WHEREAS, the Court reviewed submissions from DoD and plaintiffs regarding the sufficiency of that process;

WHEREAS, the Court held that the Secretary of Defense's 2012 certification failed to

satisfy the requirements for withholding under the PNSDA, *see* docket entries # 543, 549;

WHEREAS, the Court accordingly ordered DoD to release the requested photographs, *see* docket entry #549; and

WHEREAS, on March 20, 2015, the Court granted DoD a 60 day stay of its Order, *see* docket entry #549,

IT IS HEREBY ORDERED, consistent with the Court's rulings referenced above, that

1. The Court enters final judgment in favor of plaintiffs with regard to all responsive photographs.

2. The judgment is stayed for 60 days from March 20, 2015.

3. After those 60 days have passed, and absent a further stay, DoD shall release any and all responsive photographs to the plaintiffs, redacted to mask identities.

4. The Clerk shall enter judgment accordingly.

SO ORDERED this 1st day of March, 2015, as follows:

Honorable Alvin K. Hellerstein
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF DEFENSE et al.,

Defendants.

---------- x

04 Civ. 4151 (AKH)

Notice of Appeal

Notice is hereby given that defendants the United States Department of Defense and United States Department of the Army (collectively, "DoD") in the above-named case hereby appeal to the United States Court of Appeals for the Second Circuit from the Order of Final Judgment entered in this action on April 1, 2015, ordering DoD to release "any and all responsive photographs to the plaintiffs, redacted to mask identities," Docket 552, and related interlocutory orders.

Dated: New York, New York
May 15, 2015

Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: /s/ Sarah S. Normand
SARAH S. NORMAND
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TO: Clerk of Court
United States Court of Appeals for the Second Circuit
United States Courthouse
500 Pearl Street
New York, New York 10007

Lawrence Lustberg, Esq.
Counsel for Plaintiffs

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

January 28, 2016

By ECF & Hand Delivery
Hon. Alvin K. Hellerstein
United States District Court
Southern District of New York
500 Pearl Street, Room 1050
New York, New York 10007

Re: *ACLU v. Department of Defense et al.*, No. 04 Civ. 4151 (AKH)

Dear Judge Hellerstein:

I am the Assistant United States Attorney representing the Department of Defense (the "Government") in the above-referenced Freedom of Information Act lawsuit. I write to update the Court regarding the Government's anticipated release of approximately 198 previously certified photographs which have not been certified by Secretary of Defense Carter. While the Government intended to publicly release these photographs by the end of this month, several extra days are required to complete internal coordination and notifications in light of the recent snow storm which caused Washington D.C. to shut down for several days. The Government intends to release the photographs on February 5.

I thank the Court for its consideration of this matter.

Respectfully,

PREET BHARARA
United States Attorney
Southern District of New York

By: */s/ Tara M. La Morte*
TARA M. La MORTE
Assistant United States Attorney
Telephone: (212) 637-2746
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cc: Lawrence Lustberg, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, et al.,	)	
Plaintiffs,	)	
v.	)	04 Civ. 4151 (AKH)
DEPARTMENT OF DEFENSE, et al.,	)	
Defendants.	)	

DECLARATION OF LIAM M. APOSTOL

Pursuant to 28 U.S.C. § 1746, I, Liam M. Apostol, hereby declare under penalty of perjury that the following is true and correct:

1. I am an Associate Deputy General Counsel in the Office of the General Counsel for the Department of Defense (OGC). OGC is a component of the Office of the Secretary of Defense and provides legal advice to the Secretary of Defense, Office of the Secretary of Defense organizations and, as appropriate, other Department of Defense components. I have held my current position since September 2012 and have worked as an attorney for the Department of Defense since 2001. The statements in this declaration are based upon my personal knowledge and upon information made available to me in my official capacity.

2. The purpose of this declaration is to provide the Court with information regarding the process used to assist Secretary of Defense Ashton Carter in making his determination to certify certain photographs in accordance with the Protected National Security Documents Act of 2009 (PNSDA).

3. Approximately six months before the November 9, 2015, expiration of Secretary Panetta's 2012 certification, this office began to implement a robust, multi-phase process of reviewing the photographs that were previously certified under the PNSDA in order to enable military commanders and OGC to provide guidance to the Secretary about possible recertification of some or all of the photographs.

4. Attorneys from OGC and commissioned officers from the office of the Joint Staff, Deputy Director for Special Operations, Counterterrorism and Detainee Operations (Joint Staff J37) devised this review by considering the process undertaken for prior PNSDA certifications and the views of this Court. These offices re-examined and enhanced the thoroughness of the

review process previously undertaken. The review contained only photographs that were previously certified and no additional photographs.

5. In the first step of this process, an attorney from OGC conducted an individualized review of each photograph one-by-one, on behalf of the Secretary. The OGC attorney sorted the photographs into different categories based on what the photographs depicted and then further/additionally sorted based on how likely it was that the public release of the photographs would result in the harm the PNSDA was intended to prevent, which is the endangerment of citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the U.S. The purpose of this sorting was 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.

6. Upon completion of this first phase of review, the photographs were then reviewed by commissioned officers assigned to Joint Staff J37, again on behalf of the Secretary. These officers conducted an independent second phase of review with the same purpose – to independently review each photograph based on 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. The officers, based on their years of military service, past and present duties and responsibilities and military training, collectively have extensive knowledge of the Armed Forces and of the tactics, techniques and means employed by the enemies of the United States in Afghanistan, Iraq, and other regions of the Middle East and Africa.

7. After completion of the second phase of review by the officers in Joint Staff J37, three attorneys in OGC and one uniformed attorney attached to the Department of the Army, conducted a third review, on behalf of the Secretary, of the combined work product of the initial attorney and the officers assigned to Joint Staff J37. Neither the attorney who conducted the initial review for OGC, nor the officers attached to Joint Staff J37 took part in this third review. This third review consisted of the attorneys reviewing each photograph to assess the likelihood of harm it would cause to U.S. citizens, Armed Forces, and employees deployed abroad if publicly disclosed. Upon completion of this third review, the attorneys coordinated with the Joint Staff J37officers and uniformed attorneys from the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff to reach final consensus.

8. A determination was made that 198 photos were least likely to cause harm and should be considered for non-certification. OGC developed a representative sample of the remaining photographs for review by the Commander of U.S. Central Command (USCENTCOM), the Commander of U.S. Africa Command (USAFRICOM), the Acting Commander of U.S. Forces, Afghanistan (USFOR-A), and the Chairman of the Joint Chiefs of Staff, so that they could provide informed recommendations to the Secretary regarding the potential harms that could be caused by release of any of the remaining photos. The goal of developing this representative sample was to provide the Secretary, and his advisors, with the full understanding of the nature of the all of the photographs. This included the full scope of what the imagery in the photographs depicted as well as the full range of the gravity of the content.

9. Commander, USCENTCOM, General Lloyd J. Austin, U.S. Army, has served in a wide variety of command and staff positions throughout his 40-year career, including commanding United States Forces – Iraq from September 2010 through the completion of OPERATION NEW DAWN in December 2011. Most recently General Austin served as the 33d Vice Chief of Staff of the Army from January 2012 to March 2013. General Austin assumed command of USCENTCOM on 22 March 2013.

10. General Austin stated in his recommendation to Secretary Carter that Within the USCENTCOM area of responsibility (AOR):

> [P]olitical transitions, civil wars, and aggressive Violent Extremist Organizations (VEOs) threaten global security and stability. Multiple groups seek to destabilize the region to promote their own interests, degrade our military posture, and put our core national interests at greater risk. Based on my familiarity with these trends, the public release of these photographs, even if redacted to obscure identifying information, could reasonably be expected to adversely impact U.S.' civil and military efforts by fueling unrest, increasing targeting of U.S. military and civilian personnel, and providing a recruiting tool for insurgent and VEOs. These actions would further destabilize the region and create a situation ripe for political upheaval and anarchy.
>
> There are a number of tremendous challenges present in the USCENTCOM AOR that require U.S. military engagement and strategic partnerships. These include U.S. and Coalition-led operations in Afghanistan, Iraq, Syria, Yemen, and Egypt. The potential adverse impact from the release of the photographs to our engagements and partnerships is high. The photographs would be used to fuel distrust, encourage insider attacks against U.S.military forces, and incite anti-U.S. sentiment across the region.
>
> I assess that the release of the photographs will inspire extremist behavior by VEOs. VEOs successfully use social media to inspire and recruit individuals in support of their causes, plan and launch attacks within the AOR, and to encourage attacks within the U.S. Homeland, threatening regional security as well as U.S. core national interests. The VEOs will undoubtedly use the photographs in their propaganda efforts to encourage threats to U.S. service members and U.S. Government personnel.
>
> The release of these photographs should also be considered in context of Al Qaeda, ISIL, and Iranian malign influence. These groups can be reasonably assessed to enflame sectarian tensions in the region. In my opinion, the release of the photographs could be used by these groups to have a major strategic impact to USCENTCOM's mission and priorities.

11. Commander, USAFRICOM, General David M. Rodriguez, U.S. Army, has served nearly 40 years since earning his commission from the United States Military Academy at West Point, New York in 1976. General Rodriguez has commanded at every level, including the United States Army Forces Command, the International Security Assistance Force - Joint Command in Afghanistan, and the 82nd Airborne Division. He became the third commander of USAFRICOM, on April 5, 2013.

12. In his recommendation to Secretary Carter, General Rodriguez detailed the USAFRICOM mission, operating environment, and regional threats. He noted that "Africa continues to present a broad spectrum of dynamic and uncertain global security challenges to the United States and our allies and partners, including the existence of transnational terrorist and criminal networks, regional armed conflict, health epidemics and other humanitarian disasters, corruption, exploitation of natural resources, unstable populations and governance, and maritime crime." He further noted that, "[i]n North and West Africa, Libyan and Nigerian insecurity increasingly threatens U.S. interests. Terrorist and criminal networks are gaining strength and interoperability. Armed groups control large areas of territory in Libya and operate with impunity. Al-Qaida in the Lands of the Islamic Maghreb, Ansar al-Sharia, al-Murabitun, Boko Haram, the Islamic State of Iraq and the Levant (ISIL) and other violent extremist organizations are exploiting weak governance, corrupt leadership, porous borders across the Sahel and Maghreb to train and move fighters and distribute resources."

13. General Rodriguez cited the potential for exploitation by extremist adversaries, misrepresentation of the photographs as evidence of U.S. noncompliance with international and humanitarian law, and the potential increased effort to attack personnel at Camp Lemonier, Djibouti. He determined that "[b]ased on my familiarity with the current trends in the African states and their regional partners, and the terrorist and criminal networks that link Africa with Europe, the Middle East, Southeast Asia, and North and South America, it is my conclusion that public release of the Detainee Photographs designated for recertification, even if they were redacted to obscure identifying information, would endanger the lives of U.S. servicemen, U.S. citizens, and government personnel serving overseas in the USAFRICOM AOR."

14. Acting Commander, USFOR-A, Major General Jeffrey S. Buchanan, U.S. Army, has served for over 30 years since commissioning in 1982. He has been deployed multiple times to Iraq and Afghanistan.

15. General Buchanan stated in his recommendation to Secretary Carter that:

> [t]he release of these photographs will significantly and adversely impact the USFOR-A and NATO-led Resolute Support Mission (RSM) to build a stable, secure, prosperous, and democratic Afghanistan that stands as an ally and contributes to the peace and stability in the Central and South Asia sub-region in the USCENTCOM area of responsibility. The designation of RSM as a non-combat mission does not eliminate the fact that U.S. and Coalition Forces and Civilians operate in a hostile environment. Our personnel will continue to be exposed to many risks in the remainder of 2015 and beyond.

16. General Buchanan opined that "[t]heir release could intensify existing and lingering resentment and exacerbate the conditions that foster insurgent 'insider threat' attacks," and cited the killing of Major General Harold Greene by an Afghan military police officer in August 2014 as an high-profile example of an insider threat attack. He stated his belief that the photographs

would be used by VEOs to recruit, inspire violence, and as propaganda in strategic misinformation campaigns.

17. General Buchanan also stated:

> [t]he release of the Detainee Photographs should also be considered in light of the emergence of the Islamic State of Iraq and the Levant (ISIL). We have seen some evidence of recruiting efforts in Afghanistan, and some Taliban members have rebranded themselves as ISIL. This rebranding is most likely an attempt to attract media attention, solicit greater resources, and Increase recruitment. The budding presence of ISIL in the Afghanistan-Pakistan border areas offers an opportunity for both countries to work together in trust. However, the release of the photographs could erode the Afghanistan-Pakistan military-to-military relationship and the willingness to cooperate to prevent ISIL from establishing a credible presence in Afghanistan.

18. Based upon the assessments of these three senior military officers with decades of experience, the Chairman of the Joint Chiefs of Staff, General Joseph F. Dunford, U.S.M.C., "strongly concur[ed]" with their recommendation to certify the remaining photographs. General Dunford, with nearly 40 years of service since commissioning in 1977, has served as an infantry officer at all levels, to include command of 2nd Battalion, 6th Marines, and command of the 5th Marine Regiment during Operation IRAQI FREEDOM. As the 19th Chairman of the Joint Chiefs of Staff, he is the nation's highest-ranking military officer, and the principal military advisor to the President, Secretary of Defense, and National Security Council. General Dunford concluded in his recommendation to Secretary Carter that:

> [d]isclosure of any of the photographs recommended for recertification would result in a substantially increased level of danger to citizens of the United States, members of the United States Armed Forces, or employees of the United States government deployed outside the United States. The potential for exploitation and the potential for use as a tool by violent extremist organizations could result in attacks on citizens of the United States, members of the United States Armed Forces, or employees of the United States government deployed outside the United States.
>
> Based on my familiarity with the collection of photographs recommended for recertification, as well as my assessment of the strategic environment, the situations in the USCENTCOM, USFOR-A and USAFRICOM Areas of Responsibility and Theaters of Operations, and the factual descriptions provided by the Commanders, I concur with their recommendations. It is my view that public disclosure of the photographs contained in the collection of photographs would endanger citizens of the United States, members of the U.S. Armed Forces or employees of the U.S. Government deployed outside of the United States.

19. These recommendations, the 198 photographs recommended for non-certification, and the representative sample of the remaining photographs were provided to the Secretary of Defense for his review. The Secretary of Defense declined to certify the 198 photographs. On

November 7, 2015, the Secretary of Defense pursuant to the authority vested in him by the Protected National Security Documents Act, certified the remaining photographs. That certification is attached as Exhibit 1. The 198 non-certified photographs were released on February 5, 2016.

20. I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and information. Dated this 26th day of February, 2016, in Arlington, VA.

Liam M. Apostol, Esq.

CERTIFICATION RENEWAL OF THE
SECRETARY OF DEFENSE

This Certification Renewal pertains to each photograph (as that term is defined in Section 565(c)(2) of the Department of Homeland Security Appropriations Act, 2010 (Pub. L. 11-83) ("DHS Appropriations Act")) contained in a collection of photographs assembled by the Department of Defense that were taken in the period between September 11, 2001, and January 22, 2009, and that relate to the treatment of individuals engaged, captured, or detained after September 11, 2001, by Armed Forces of the United States in operations outside the United States. These photographs are contained in, or derived from, records of investigations of allegations of detainee abuse, including the records of investigations processed and released in *American Civil Liberties Union v. Department of Defense*, 04 Civ. 4151 (AKH) (S.D.N.Y.). The photographs include but are not limited to the 44 photographs referred to in the decision of the United States Court of Appeals for the Second Circuit in *American Civil Liberties Union v. Department of Defense*, 543 F.3d 59, 65 & n.2 (2d Cir. 2008) *vacated & remanded,* 558 U.S. 1042 (2009).

Upon the recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, the Commander of U.S. Africa Command, and the Commander, U.S. Forces – Afghanistan and after a review of each photograph by my staff on my behalf, and by the authority vested in me under Section 565(d)(1), (3) of the DHS Appropriations Act, I have determined that public disclosure of any of the photographs 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."

Therefore, each of these photographs continues to meet the standard for protected documents, as that term is defined in Section 565(c)(1) of the DHS Appropriations Act, and are exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. §552, and in all proceedings pursuant to that law. As required by Section 565(d)(4) of the DHS Appropriations Act, I hereby direct that notice of this Certification Renewal be provided to Congress.

Date: NOV - 7 2015

Ash Carter
Secretary of Defense

G5BHACLC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

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

Plaintiffs,

v. 04 CV 4151 (AKH)

DEPARTMENT OF DEFENSE,

Conference

Defendants.

----------x

New York, N.Y.
May 11, 2016
12:00 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

GIBBONS P.C.
Attorneys for Plaintiffs
BY: LAWRENCE S. LUSTBERG
ANA I. MUNOZ

- and -

AMERICAN CIVIL LIBERTIES UNION
BY: JAMEEL JAFFER
ALEXANDER ABDO

U.S. ATTORNEY'S OFFICE S.D.N.Y.
Attorneys for Defendant
BY: TARA M. LaMORTE
BENJAMIN H. TORRANCE
SARAH S. NORMAND

(Case called)

THE COURT: All right. We have the 17th summary judgment motion in this case. First we'll call the roll call. Lawrence Lustberg and Ana Munoz and Jamal Jaffer and Alex Abdo for the plaintiff, American Civil Liberties Union.

For the defense, Tara LaMorte, coming back into action.

MS. LaMORTE: That's right, your Honor.

THE COURT: And Benjamin Torrance.

MR. TORRANCE: Good afternoon, your Honor.

THE COURT: How are you?

You both made motions, but we'll take the ACLU motion first. So you may go ahead, Mr. Lustberg.

MR. LUSTBERG: Thank you, Judge. Our motion came second, but I'm happy to go first, your Honor.

THE COURT: Well, you're really the proponent of activity in the case.

MR. LUSTBERG: I'm happy to go first.

THE COURT: Yes. Well, both of you want judgment; both of you want disclosure. The government wants the efficacy of the certificate. I think you're the proponent of activity under the Freedom of Information Act. You should go first.

MR. LUSTBERG: No problem. Thank you, your Honor.

THE COURT: Would you take the podium, please.

MR. LUSTBERG: Yes. In many ways, Judge Hellerstein,

this is an easy case. The government concedes that --

THE COURT: Which ways? Could you explain.

MR. LUSTBERG: Well, where we are today is not new. The government fundamentally concedes that its new process does not comply with this Court's requirement that, I quote, "at minimum describe the categories of objectionable content contained in the photographs, identify how many photographs fit into each category, and specify the type of harm that would result from disclosing that content." That's on page 23 of its motion. But it says that the process that's described in the new Apostol -- I'm not sure how you pronounce his name, but I'll do it that way -- declaration does address your Honor's core concerns. Respectfully, that is not so.

First, the Court made clear and has made clear repeatedly that individualized consideration of the photographs as mandated by the PNSDA was a core concern of the Court.

THE COURT: Could it be done by delegation?

MR. LUSTBERG: We absolutely have always conceded and concede today that it can be delegated.

THE COURT: Well, it was delegated. The delegation may not have been legally sufficient or it may have been, but I think from what I read, each photograph was carefully examined at several levels and decisions were made. You may take issue with the decisions. You may take issue with the process, but I think if you concede that the secretary can operate by

delegation, then each particular photograph was looked at. I think I have to agree with that.

MR. LUSTBERG: Right. Each particular photograph was undoubtedly looked at, and I will note that the last time your Honor looked at this issue, each individual photograph had been looked at specifically.

THE COURT: Well, it wasn't that that was objectionable, in my opinion. It was something else.

MR. LUSTBERG: Well, your Honor, you wrote your opinion and then you gave the government an opportunity to set forth its process. At that time its process was that counsel looked at each photograph for purposes of categorizing them and then sent them along to somebody who would, in fact, make a recommendation to the secretary. We have never contended that the secretary has to look at every single photograph. What we have contended is that somebody has to look at every single photograph with an eye toward whether that photograph should or should not be disclosed. That is what did not happen here.

Now, there are three different groups that look at it, but in each case, if you read the Apostol declaration, and I'd like to walk the Court through it carefully because that's what the record in this case is, what happens is each person who looks at photographs individually in each case is doing nothing more than categorizing them for purposes of a sampling process. A sampling process that, by the way, exactly as your Honor

expressed concern about last time, remains entirely opaque. We have no idea what the categories are that are used for sampling. There's no insight into what different conduct is sampled. We have no sense of whether they're in different places. There's no description whatsoever. And this Court has written about that and has talked about how sampling cannot be adequate without at least some sense of what the basis for the sampling is.

So what happened here, according to the Apostol declaration was -- and your Honor has it presumably before you -- but in the first step -- ready?

THE COURT: Yes.

MR. LUSTBERG: In the first step of the process, an attorney from the Office of General Counsel of DOD conducted an individualized review of each photograph, one by one, on behalf of the secretary. That individualized review happened this time and it happened last time when your Honor found it inadequate. But what was the purpose of that review? If you read the paragraph, it then says the OGC attorney sorted the photographs into different categories based on what the photographs depicted and then sorted them all for purposes of creating a sample that could then be sent on to the military personnel for use in making a recommendation to the secretary.

After the first phase of review, the photographs were then reviewed by commissioned officers. These officers, the

Apostol declaration tells us, conducted an independent second phase of review with the same purpose, to independently review each photograph based on the likelihood of harm that PNSDA was intending to prevent and to independently assess whether the initial sorting of the photographs would ensure a true representative sample. So, again, the purpose of the second phase, even if that second phase is assessing harm, even if that second phase is looking at each photograph individually, which we accept because that's the record, the purpose of it is to ensure a true representative sample.

Let me interrupt this flow for one moment to rhetorically ask the question: Why would they need a representative sample if they were going to provide all of the photographs to the people who were going to actually assess whether they were going to cause the type of harm that PNSDA contemplated? There would be no reason. Instead, they go through an elaborate process -- it used to be one step; now it's three steps -- to make sure the sampling is correct.

So maybe the sampling is better. Candidly, this Court will never know, or at least it won't know unless it asks more questions, because we have no way of knowing whatsoever how that sampling was actually conducted. We don't know whether they were grouped into certain types of activities and one photograph of each of those activities was taken. We don't know whether there was one photograph taken from each region.

We simply don't know. We don't know the size of the sample. We don't know the percentage of photographs that were taken. We don't even know the number of photographs in total that we're dealing with to this day. What we do know is they go through a three-step process, all in an effort to create a sample. And then they go through a third phase.

THE COURT: We don't know if the second and third phase were reviews of the first phase or were they de novo?

MR. LUSTBERG: So we know a little bit about that based upon the declaration, what it says. What we know is what your Honor knows and what the government has written. The photographs were reviewed, and the second phase is called an independent review. Now, we don't know. It appears not to be --

THE COURT: Suggests to me de novo review.

MR. LUSTBERG: It sounds like de novo, but the third phase does appear to be more of a review of what happened earlier.

THE COURT: The purpose of the sorting, paragraph 5, was 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.

MR. LUSTBERG: Right.

THE COURT: That's all we know.

MR. LUSTBERG: That is the sum total of what we know.

THE COURT: We do not know the methodology. We don't know if there was a review. We don't know the criteria. We don't know the numbers. So it's very hard to believe that it can be an intelligent judicial review of the methodology that was used. That's your point; right?

MR. LUSTBERG: That's our argument. At the end of the day, here's what it means. It means that when the sample is ultimately provided, and we know what happens, after these three phases, that are conducted largely by lawyers, although some of them with military expertise, after that process takes place, the photographs are then provided to military personnel, the commanders who are quoted in the declaration, and then ultimately to the secretary.

THE COURT: Well, the second step described in paragraph 6 is called independent.

MR. LUSTBERG: Right.

THE COURT: For the same purpose, independently review each photograph. So there was a photograph-by-photograph review based on the likelihood of harm that the PNSDA is intending to prevent.

MR. LUSTBERG: Yes.

THE COURT: The likelihood of harm has to do with -- the harm has to do with the death or personal injury of Americans serving in theaters of operation.

MR. LUSTBERG: We guess.

THE COURT: Well, that's statutory.

MR. LUSTBERG: Well, no.

THE COURT: That's statutory.

MR. LUSTBERG: The statute --

THE COURT: The likelihood, we don't know how likelihood was defined, and we don't know really what the harm was that was feared. It said later on that the harm was the propagandistic value of the photographs in relation to the recruitment capability of our enemies, and we may have some discussion on that.

So it is said that these officers in the second stage, based on their years of military service and their past and present duties and responsibilities and military training -- although that's not really laid out too well, we can, I think, take judicial notice that these officers serving on joint staff J37 -- I don't know what that is, or 137. What is it, Ms. LaMorte?

MS. LaMORTE: It's joint staff J37, which is the joint staff for special operations, detainee operations, and counterterrorism operations. They're officers assigned to that.

THE COURT: I'm going to assume that the officers had substantial experience, and they're the ones that reviewed the process again based on likelihood of harm and whether the initial sorting of the photographs would ensure a true

representative sample. I don't know, again, the criteria. I don't know what is a sample, how many photographs constitute a sample, how many photographs in each category constitute a sample, what the total number of the photographs were.

I contrast this with the initial review that was taken with the photographs when this case first broke. We had an in camera proceeding in chambers with a reporter. I looked at each and every photograph with the help of Judge Advocate officers and made a review at that time with their help in terms of redacting personal identities. That was the only objection at that time. But there was a photograph review by the Court with the assistance of Judge Advocate officers coming to a determination, and then there was a summary of the proceedings that we put on the public record where you were present. Here, this is all done outside of any judicial review based on methodologies and criteria that are not expressed and are not known.

MR. LUSTBERG: Let me just quote a wise jurist who said: "At minimum, the submission must describe the categories of objectionable content contained in the photographs, identify how many photographs fit into each category, and specify the type of harm that would result from disclosing such content. That is to say, what your Honor ordered -- and this is in your February 17, 2015, order which you issued in response to the government's request that requirements that you were imposing

upon them be clarified -- what you made clear, precisely what you would have to know in order to agree to the type of sampling that was done here, at minimum, but you also have always rigorously adhered to the notion that the language of the statute makes 100 percent clear that there has to be individualized review, and not individualized review for purposes of sampling, individualized review by the decision-maker who's going to decide whether or not the photographs caused the harm that is described in the PNSDA.

THE COURT: Supposing the secretary himself did the review and determined on the basis of his review that a certain identified number gave rise to the danger identified in the statute and kept those hidden and others could be disclosed and were disclosed. He did not explain why he has made a determination. He didn't tell us what methodology he used or what criteria he applied. Do you think that would be a proper certificate under the statute?

MR. LUSTBERG: I do. I do, your Honor. I think that, as you've described it, it would be improper. I do think --

THE COURT: It would be proper?

MR. LUSTBERG: It would not be proper.

THE COURT: Because we don't know the methodology?

MR. LUSTBERG: Not as much the methodology in that case. If I understood your hypothetical correctly --

THE COURT: If the secretary himself did an

individualized review and determined without telling us what methodology or criteria he used.

MR. LUSTBERG: The Court has spoken to this question already, and so what your Honor has said is that the certification -- and we can talk in a second what form that would have to be -- must make the secretary's factual basis for concluding that disclosure would endanger U.S. citizens, armed forces, or government employees clear to the Court. This goes to the essence of the judicial --

THE COURT: Let me narrow the task.

MR. LUSTBERG: Okay.

THE COURT: I believe it was an individualized review in the process described by Mr. Apostol. However, judicial review, which I believe is required, must seek out the rational basis for what the executive did, not second-guess the executive, but to assure that there was a methodology, an objective set of criteria, that were used. That, I believe, is my task. And where, to distill your argument, the advice remains that we do not know the field, we do not know the sample, and we do not know the methodology or criteria, and for this reason, it's your argument that the secretary's certificate is invalid or inadequate.

MR. LUSTBERG: Let me just add one aspect to that, which is the individualized review must be a review that is done for the purpose of ascertaining whether the requisite harm

under the statute has been demonstrated. That is to say, if the only purpose or even the main purpose of the review was to just figure out what the sample is going to be, that's not sufficient. There has to be individualized review this Court has held.

THE COURT: I think Ms. LaMorte would argue that the sampling was in aid of the secretary's determination. So I don't know that I would go that way.

Ms. Norman, do you want to take your spot at counsel's bench.

MS. NORMAN: Thank you, your Honor.

THE COURT: This is Sarah Norman.

MR. LUSTBERG: Yes, we know.

THE COURT: But for the record.

Good afternoon. It's a pleasure to see you.

MS. NORMAN: Thank you, your Honor.

MR. LUSTBERG: So there's no question that the sampling is in aid of the process. Leaving aside the methodological problems that the Court has identified which, of course, we agree with, what this Court has previously held is that somebody must examine each photograph, not for purposes of figuring out which ones are going to be shown to the secretary but to figure out whether each photograph, "that photograph" was the words that your Honor focused on in your opinion --

THE COURT: Well, I think I'm not going to agree with

you on this, Mr. Lustberg, because I think what was involved was, to enable the secretary to make a determination, it was determined that there were too many photographs and it would take too much time for the secretary to look at each one and that he could effectively make his determination by a representative sample, assuming that representative sample could be found. I'm not sure that would violate the statute.

MR. LUSTBERG: But, Judge, that part, respectfully, you're just making up. There's nothing in this record to indicate that anybody ever said that there were too many photographs for a decision-maker, with respect to harm, to review each one.

THE COURT: I'm assuming.

MR. LUSTBERG: I think --

THE COURT: I'm assuming.

MR. LUSTBERG: But you know what happens when we assume.

THE COURT: Yes, you're right. But why else would there be a sampling? Certainly not to shield the secretary from having to look at the photographs.

MR. LUSTBERG: Well, it certainly is making his life easy, but we're talking about legal rights here. This is the Freedom of Information Act, and that act by its terms, as well as by the terms of this Exemption 3 statute, requires an individualized review of each record. Why is that

individualized review so important? It's so important because, as this Court has repeatedly pointed out, it's the Court's obligation to release anything it can and to not release those things it shouldn't. In order to do that kind of segregation analysis, it's critical that each item be examined. But this is not my gloss on the statute. This is your Honor's gloss on the statute based on a very close reading of the actual plain language of that statute. So the need for somebody to assess the harm and to say this photograph will cause this harm is paramount.

Now, there may be circumstances under which sampling can occur, perhaps at a different phase of the process or perhaps with a different Exemption 3 statute. But so the record is clear, our position is that somebody who is making the determination of harm has to make that determination with respect to each photograph and cannot do that based on a sample.

Now, it may be that when it comes time for the appropriate declaration -- we can call it a *Vaughn* declaration, but it may be something different in this case -- that that can be done by category. That there could be categories that say these photographs all have this in common, these photographs all have that in common, and the description of why they're therefore being withheld could be done in some sort of categorical basis. But there can be no question, based upon

this Court's rulings and based upon the language of the statute, that somebody has to do an individualized review, not for purposes of creating a sample but for purposes of actually adjudicating whether that photograph, the language of the statute, will cause the harm that is set forth in the PNSDA.

THE COURT: Let me elicit your comments on one further aspect, and that is the expression "the danger perceived." So the danger perceived that was the likelihood of harm was the recruitment of soldiers by our terrorist enemies. And as I understand and elaborate a little bit on what was found, these photographs, the ones that were not released, were susceptible of use through various social media by our terrorist enemies to recruit personnel from Europe and other places to add to the number of combatants and terrorist activities that afflict Americans abroad and endanger us in our homeland. That was the danger. So the danger is the propagandistic value of the paragraphs that were not disclosed.

Is that a fair statement, in your opinion, of what the danger was?

MR. LUSTBERG: Actually, I pulled out the various phrases, and I didn't pull out every single one, but here's what the government, what Mr. Apostol says in his declaration were the potential dangers. That the release of the photographs -- and, by the way, each and every time it's in the plural, the photographs, when you look at what he says the

general's position was, and this would be in his declaration starting at paragraph 9 and goes through. But here's what he says would happen. It would "fuel unrest." It would "destabilize the region." It would "inspire extremist behavior." It would "inflame sectarian tensions." It would "intensify existing and lingering resentment." It would "erode the Afghanistan/Pakistan military-to-military relationship." It would "have the potential for use as a tool by violent extremist organizations."

You may have been summarizing it in the term "propaganda," but these are the sorts of things, very general, that the military personnel say will happen as a result. Whether or not that's harmful is not, I think, for us to second-guess. But I think what is demanded by way of responsible judicial review under the Freedom of Information Act and under this statute is that the Court examine on a photograph-by-photograph basis whether each photograph would do those things.

Ultimately, it could be justified, perhaps, on a categorical basis in whatever the government submits. We haven't crossed that bridge yet. But you have no way of knowing, based upon this declaration, if each photograph would do any one of those things. The analysis is not on a photograph-by-photograph basis, and in a very revealing sense, it's to the contrary.

When your Honor reads those paragraphs, what you see is that each and every military official talks about the photographs as a group. So General Austin says: I assess that the release of the photographs. It's not an assessment on a photograph-by-photograph basis. General Rodriguez, the same thing. Over and over it's done in precisely the plural that this Court decried as inappropriate under this statute, and you did that based upon your reading of the plain language of the statute.

THE COURT: I did that in 2005.

MR. LUSTBERG: No, your Honor, you did that -- no, you didn't. You did that in August of 2014.

THE COURT: I did it also in September 2005 --

MR. LUSTBERG: You did.

THE COURT: -- at the first time I wrote on these photographs. It's reported at 389 F.Supp.2d 547 at page 576. I wrote as follows: "The terrorists in Iraq and Afghanistan do not need pretexts for their barbarism; they have proven to be aggressive and pernicious in their choice of targets and tactics. They have drivers exploding trucks with groups of children at play and men seeking work; they attack doctors, lawyers, teachers, judges, and legislators as easily as soldiers. Their pretexts for carrying out violence are patent hypocrisies, clearly recognized as such except by those who would blur the clarity of their own vision. With great respect

to the concerns expressed by General Myers," then the chief of staff, "my task is not to defer to our worst fears, but to interpret and apply the law, in this case, the Freedom of Information Act, which advances values important to our society, transparency and accountability in government."

It seems to me that those comments apply as well to the remaining pictures that are before me. Congress in enacting the statute did not rule that the pictures should be kept hidden; indeed, they said they should be disclosed except in the case of a three-year certificate given by the Secretary of Defense. That is to say that the field of these pictures which then and now give fuel to the hypocrisies and, as I wrote, the barbarism of our enemies continues to do so, then as now. And we have to examine ourselves, in the spirit of my decision, what kind of nation are we?

Clearly, if there are particular pictures that give rise to specific dangers, they should be held back; otherwise, they should be disclosed, at least there should be a determination that lends itself to judicial review. I think that is the spirit of what I take from your arguments, Mr. Lustberg, and in terms of commenting on the various issues that you see in the case. Thank you.

Let me hear --

MR. LUSTBERG: If I might, Judge, just one last small point.

THE COURT: Yes.

MR. LUSTBERG: Which is I think that Ms. LaMorte will get up and will talk about the 198 photographs that were released as part of this process and will say that that shows that there was an individualized review that mattered at those first three phases.

We think it's very good that 198 photographs were released. This litigation is about the remaining photographs, of course, that were not released and whether the appropriate --

THE COURT: Have you examined those 198?

MR. LUSTBERG: Yes.

THE COURT: Tell me about them.

MR. LUSTBERG: I would hearken back to this Court's own words one of the last times we were here where you described the fact that you had examined a number of the photographs and found many of them to be innocuous, and you could not understand why there were such a problem with releasing them. I think when you examine those 198 photographs, you see why you had that reaction. Some of them are just shots of people with no apparent problem. Some of them show some scratches and bruises, perhaps not surprising for people who are in detention, but nothing that is clearly inflammatory by any means.

By the way, they were released in February, and I

haven't seen any evidence that the result of the release of those photographs has been that there's been any increased tensions or any of the things that I just described has occurred. It makes one wonder how much deference is, in fact, owed with regard to the judgments that are being made by military which would tend towards secrecy in any event.

THE COURT: You wonder why they were held back in the first place?

MR. LUSTBERG: In the first place. But be that as it may, it also, I think, bespeaks the reason why there needs to be the individualized consideration that we request here. Because if somebody would actually review these on an individual basis and we could see that the decision-makers would review them on an individual basis to see whether the harm is there, then more would be released. And as your Honor points out, how many are released is a matter that, on the one hand, is just about this case, but on another is very much about the kind of society that we have; about what is necessary for democracy to work; and, honestly, about what makes our country great if it's to be great. Thank you.

THE COURT: Thank you.

Ms. LaMorte.

MS. LaMORTE: Afternoon, your Honor.

THE COURT: Good afternoon.

MS. LaMORTE: The last time that we confronted this

issue, you said that DOD needs to be held to account; that it needs to implement a certification process to show that any photos that are certified are pursuant to a knowing and good faith process. And you also said and emphasized repeatedly, actually, the importance of an individualized review of the photographs because, in your view, it would be such an individualized review that would most likely lead to increased transparency.

Now, I have to say that the government stands behind its legal arguments that the PNSDA is not subject to FOIA or FOIA proceedings and that judicial review does not, in fact, extend beyond the face of the certification. However, I think, as the Apostol declaration makes clear, the agency heard your concerns, your Honor. Even though those are our legal arguments and we don't think judicial review is appropriate beyond a certification, we don't think that we need to do an individualized review under the statute, we, in fact, did that because we heard the Court.

What we did was a multiphased, robust process. It wasn't just done by attorneys. It was done by attorneys and it was done, as your Honor acknowledged, by military officers that have expertise to make national security judgments. Those officers independently reviewed every single photo. Every single photo was reviewed, and they separated them out, those that would be least likely to cause harm and those that they

believe would cause harm. And when I say "harm," I mean the PNSDA-described harm. Those photographs that --

THE COURT: So that was delegation of authority from the secretary?

MS. LaMORTE: Yes. And that is even in his certification, the secretary's certification.

THE COURT: Should the delegation be adequate without criteria?

MS. LaMORTE: Yes, your Honor. Again, we believe that it's within the secretary's complete discretion to design any reasonable process for reviewing the photographs. So long as it's reasonable, the Court must defer to it, and that is what the secretary did here.

THE COURT: Even if there are no criteria established?

MS. LaMORTE: Well, the criteria is established by the statute, your Honor. You mean in terms of the delegation?

THE COURT: Yes.

MS. LaMORTE: Each photograph, per the statute, needs to meet the test that there is a prediction that disclosure would result in harm to U.S. troops, U.S. citizens, or personnel abroad. It would result in their endangerment, that is the standard. And each photograph was viewed by an officer with that standard in mind, each and everyone. For each and every photograph, that harm determination was made by someone with the expertise to make it.

THE COURT: That's not really a standard; that's an end result.

MS. LaMORTE: Well, it's the standard by which the secretary --

THE COURT: There has to be a criteria of judgment. How does the inferior subordinate officer know what to look for in terms of a likelihood of harm? Any harm?

MS. LaMORTE: Because those officers have experience, actually, abroad. They have -- per the declaration, they know of the events on the ground in Iraq, Afghanistan, Yemen, Egypt, all those places we are at. Those officers have served in those locations. Those officers are assigned to the portion of the Department of Defense that deals with --

THE COURT: When the original decision for the Abu Ghraib photographs were made, the argument had been made not to disclose because the photographs would lead to the kind of harm you're now talking about. And I cap it with the propagandistic value of the photographs, namely, that our enemies would say that from these photographs showing how U.S. military personnel degraded various people who are Iraqis, whether in jail or not, would have great propagandistic value in recruitment, inciting terror, and fomenting incidents as the whole, as the whole. I rejected the argument after a great deal of deliberation. It was not an easy decision. The Second Circuit affirmed, and petition for certiorari was pending when events changed the

course of dealings.

The prime minister of Iraq at the time importuned President Obama not to release the photographs because he felt it would endanger Iraqi security and the Iraqi governance at the time. The result was the law that we now have.

Now, the interesting thing to me in this aspect is that the law does not say release all the photographs and it doesn't say don't release all the photographs. It, in effect, reinforces the FOIA by saying if there is a specific determination of a specific photograph giving rise to a specific danger to life or personal injury, then the photograph may be withheld. It seems to me that Congress is saying don't deal with this en masse, notwithstanding the adverse publicity that could be given to these photographs through social media and the like, but look at each particular one to see if they come up with a specific danger. That hasn't been done, or if it has been done, I can't know because it hasn't been told to me. That's why I say there must be a delegation with direction and criteria or it's not a proper delegation. The review that was had was photograph by photograph, clearly, but it was made at various tiers with methodologies that are opaque.

MS. LaMORTE: Well, the methodology, in fact, is not opaque because that determination of harm from each photo, the methodology was that commissioned officers and attorneys looked at each photo separately to make that determination. That is

the methodology they used.

Just a couple points to respond to your Honor. Your Honor's first point was that you had initially held back in 2005 that the propaganda rationale was not a rationale to which you could defer, and then you noted that the Second Circuit affirmed. From my recollection, the Second Circuit's affirmance had nothing to do with whether the propaganda rationale was, in fact, the acceptable rationale but, rather, the scope of Exemption 7(F). And the Second Circuit at that time ruled that 7(F) could not be held to apply to endanger a whole group, unnamed group of individuals.

Second, there was a Second Circuit opinion --

THE COURT: Well, we still have the same thing.

MS. LaMORTE: I'm sorry?

THE COURT: We have the same thing now.

MS. LaMORTE: That was under the scope of Exemption 7(F), which says the government must show harm to "any individual."

THE COURT: Can reasonably be expected to endanger the life or physical safety of any individual.

MS. LaMORTE: The Second Circuit held that we would have to identify who that individual is. That was the basis of the Second Circuit's ruling. It did not reach the propaganda rationale. However, the Second Circuit has subsequently reached the propaganda rationale in a case brought by the

Center for Constitutional Rights which, I have to add, myself and Mr. Lustberg litigated together. And in that case, we were seeking to --

THE COURT: I dealt with the subject in my opinion.

MS. LaMORTE: Yes, your Honor. But I'm talking about a Second Circuit opinion which deferred --

THE COURT: Okay.

MS. LaMORTE: I'm sorry.

THE COURT: I was not reversed in my ruling.

MS. LaMORTE: No, but it wasn't reached. It was not reached. Whether the propaganda rationale is, in fact, an acceptable rationale to which the court should defer was not reached in the context of the first appeal on these photos in the case.

But what I am saying is that rationale was reached by the Second Circuit in *Center for Constitutional Rights*, and that case involved photographs of the so-called 20th hijacker that were taken at Guantanamo Bay. And the government submitted a number of declarations, including a declaration that said in light of this person's notoriety, 20th hijacker, even disclosing mugshot photos that were taken at Guantanamo could be used by enemies for purposes of propaganda to inspire terrorist acts and recruit individuals. And the Second Circuit deferred to that rationale in the context of the case.

THE COURT: If that rationale were made here, I would

defer also.

MS. LaMORTE: Right.

THE COURT: I have typically, in all the decisions I've made in this case, deferred to all articulations made by the executive.

MS. LaMORTE: So this should Court defer to these articulations because what we have in this declaration --

THE COURT: But they've not been made.

MS. LaMORTE: They were made, your Honor. Let me just point your Honor to a couple examples.

THE COURT: I tell you, Ms. LaMorte, if that were the articulation that were made to the specific photographs, I would have deferred. I've deferred every time something like that came up to me for ruling. Whether it was words or whether it was pictures, I have deferred to the articulation of danger by the executive. And that's been consistent throughout. Even when the president released the memos of the legal counsel, when they were released, they were redacted. I upheld all the redactions, or practically all the redactions.

So whenever the executive has articulated a reason, I've deferred to him. My complaint is that there are no articulations except the ultimate conclusory statements, a danger based on the propagandistic value of the photograph.

MS. LaMORTE: But, your Honor, let me just point you to other portions of the record.

THE COURT: It's not been said what it is in the photograph that has this propaganda value. It's not been said why this particular photograph is dangerous. There's been no in camera review. If the government said we'd like to show you the sample, we'd like to show you why the sample is a proper sample and gone through this whole methodology with me in camera, on the record, which would be sealed, it would probably have been sufficient; but they didn't do that.

MS. LaMORTE: Yes, sir.

THE COURT: It just made its own ipse dixit, and it cannot be reviewed to an ipse dixit.

MS. LaMORTE: Well, your Honor, what we do know about the photos is that they arise in the context of allegations of detainee abuse, right. We do know that about the photos because that is part of the public record, and we do know from --

THE COURT: We do not know which photographs are which. We don't know which are -- which are after the fact, which are contemporaneous. We don't know which photographs show American personnel. We don't know what the conditions of the photographs were. We know nothing. We don't know if they're clear. We don't know if they're opaque. We don't know anything about the photographs.

MS. LaMORTE: With all respect to the Court, this statute was designed in a way that it is not the Court's

province to make that determination and to undertake that review, with all respect to the Court.

THE COURT: You made that argument before. I rejected it. I wrote on that subject. That was to be submitted for appellate review, and the Court of Appeals didn't function on it. So we are where we were. You made that point; I rejected it. I've written on it. I believe my ruling is correct. I'll stand by it until I'm reversed, if I'm reversed.

MS. LaMORTE: That's right, your Honor. I understand that. I guess the point that I wanted to make, though, was that -- and I said this before, but notwithstanding that that is our argument and that we believe that there is not judicial review, but to the extent it is, it would be APA judicial review, the material submitted to the --

THE COURT: It would be what?

MS. LaMORTE: I'm sorry. Administrative Procedure Act judicial review. Our argument in our papers initially is that there is no judicial review beyond the face of the certification, but that if the Court were to reject that and impose a standard of judicial review, it should be under the Administrative Procedure Act. And the reason that we made that argument --

THE COURT: What would that be? It's a rationale basis test, isn't it?

MS. LaMORTE: It would be rationale basis. But,

again, the only bases for the Court to --

THE COURT: If I felt, looking at the methodology and criteria that were used, that there was a rational basis, I would affirm; I would approve what the secretary did. But I can't do that because I don't know what he did. I don't know what was the basis for the sample that went up except that it was said to be a representative sample. That's ipse dixit. That's because someone said so doesn't make it so.

MS. LaMORTE: That's true, but we know there was a very thorough process that was a process that -- look at the process.

THE COURT: There were three layers to the process. We don't know if at each layer the field of nondisclosure was added to or subtracted from.

MS. LaMORTE: I'm sorry?

THE COURT: We don't know with respect to each process whether, at the end of that, photographs were added to those that were not to be disclosed or subtracted from. Did they add to the disclosure? Did they subtract from the disclosure? We don't know. We don't know what happened. We know there was a review, then we know there was a second review. And we don't know to what extent it was de novo, to what extent it was deferential, to what extent it was completely independent, whatever that means. We just know it's said to be independent, but we don't know what the criteria were. Similar with the

third review. We don't know what the criteria were. At the end of which, samples were shown to highly qualified generals to make recommendations to the secretary.

I'm prepared to say there was a photograph-by-photograph review, but that's not all that's required. I need to know, in order to apply a rational basis test, what was done and why, why it was done. What were the criteria? Same thing that applies to an appeal from a Social Security administrator's ruling. I need to know the rational basis for the ruling. The same things that goes to the environmental protection administration. I need to know the rational basis for the ruling. The same thing the Court of Appeals does when it reviews and the same thing I do when I review another decision for rational basis test. I can't do that here.

MS. LaMORTE: Let me just add one thing, your Honor. I realize I have a losing battle here, uphill battle, I should say.

THE COURT: You were very good.

MS. LaMORTE: Thank you, your Honor. I want to distinguish for the Court review under FOIA versus review under the APA. If we were in FOIA-land, then, yes, we would have a sample and we would have all of those factors that the Court just set out. But as I started out saying a couple moments ago, if judicial review applies, which, again, we don't think

it does, but if it does, then we would have rational basis review under APA. And as your Honor knows, because you've had APA cases, not only is it deferential, but it's extremely differential, and especially in the context of national security which is undisputedly what we have here.

THE COURT: I've applied that.

MS. LaMORTE: Right.

THE COURT: I have no quarrel with that.

MS. LaMORTE: Under the APA standards in the Second Circuit, the Court's role is to just ensure that the agency examine the relevant data and has a satisfactory explanation. It does not go into the level of detail of having to go through each photo and describing the categories and describing the level of detail that the Court is telling me now.

So I would say if this Court were to apply the APA standard and look at the Second Circuit cases as to what factors the Court should be looking at in terms of applying that standard, the Court should defer to the secretary here. I think there should be no dispute that we examined all the relevant data, as each photograph was, in fact, individually reviewed by experts.

The "satisfactory explanation" to which the Court has to defer is found in the Apostol declaration, and it is not conclusory. It does explain why, for example, we think that photographs depicting allegations of detainee abuse would be

used in this manner by violent extremist organizations. It discusses how these organizations use social media, are savvy with the use of social media, and how they would use these photographs in that context to inspire and recruit individuals to commit attacks.

I just want to be clear that under the APA standard, it would not be that level of detail that the government would have to supply in order to prevail under the APA.

THE COURT: But you provide no details whatever.

MS. LaMORTE: I take dispute with that, your Honor. We don't provide the level of detail that the Court has wanted, I grant that, but I would not agree that we provided no detail. I think what this record reflects is that the government listened to the Court in connection with its first orders and, notwithstanding legal basis to resist application of any judicial review process, nonetheless designed a process that was designed to ensure that photographs that should be released were in fact released, and that is what happened here.

THE COURT: You want to say anything more, Mr. Lustberg?

MR. LUSTBERG: Just really briefly. Just a couple of things, Judge, if I might. First, of course, and just so that the record is clear, it is our view that we are very much in FOIA-land here. This Court wrote an opinion about the Freedom of Information Act.

THE COURT: I've ruled on that.

MR. LUSTBERG: Okay.

THE COURT: You don't need to go over that. I'm standing by that ruling.

MR. LUSTBERG: Thank you, your Honor.

The other thing I just wanted to say is just to correct one statement that Ms. LaMorte made, which is that she described the process, that individualized review that occurred, as one that identified, first, those photographs that were least likely to cause harm -- and that's correct, it did identify those -- and those that would cause harm.

Respectfully, you can search the Apostol declaration from top to bottom, and you will not find anything where Mr. Apostol says that that process identified those that would cause harm. What that process did was identify a sample of documents that would be provided to the generals and to the secretary so that he and they could determine what would cause harm. But the individualized review did not end in a result of a list of documents that would cause harm, and that's critical because that's what's required on an individualized basis based upon your Honor's prior ruling. Thank you.

THE COURT: Just a parting comment, which I'm taking from my original opinion with these pictures. The government, in response to 7(F) exemptions and others that touch upon foreign policy and military policy, can state a Glomar, which

is essentially -- I don't know if it occurred, but if it did occur, I deny it. It's a reflection of a very interesting case. The Glomar Explorer was a scientific ship that was stationed in the South Pacific, ostensibly, to conduct scientific experiments of the ocean bottom but, as an important adjunct, to spy on Russian submarines.

When president Carter's administration came into play in response to a great deal of publicity that exposed the secret, the Carter administration admitted the secret. In a subsequent administration, the FOIA request was made for all documents for the Glomar Explorer. And the argument was made that since there has been a great deal of public disclosure, it's no longer secret, and the government should come out with all the documents.

The D.C. Court of Appeals held that even though all of this was true, nevertheless, it was an important addition to this mix of information that the government was now giving official authorization and sanctions to the information. And because of that, the government's refusal to give it, by way of what has now been called a Glomar response, would be upheld. In other words, it's a case that shows how extensive the deference a court must apply when a government official states that there is cause to hold back a document because of national interest, the fear of injuring the national interest in a particular way that could do harm to the nation's foreign

relations or military personnel, and the like.

This is the backdrop to what we have here. If, because of this concern, we do not work on criteria that we expect from government agencies, that is to say, specific delegations with specific criteria and methodologies that are transparent and objective and capable of judicial review, we compromise some of the basic tenets of our democracy. Fear of the enemy is important. One who does not know fear can act in a very foolish manner. But to give in to fear or its concomitant, blackmail, is to surrender some of our dearest held tenets.

I wrote then at page 575 of the decision: "Our nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command. Indeed, the freedoms that we champion are as important to our success in Iraq and Afghanistan as the guns and missiles with which our troops are armed. As President Bush stated in his 2005 State of the Union Address, the attack on freedom in our world has reaffirmed our confidence in freedom's power to change the world. We're all part of a great venture: to extend the promise of freedom in our country, to renew the values that sustain our liberty, and to spread the peace that freedom brings."

It is to that end that we have judicial review. It is to that end that we have a Freedom of Information Act. And it

is to that end that the ability for the Court to examine and then defer has to be exercised. It cannot be exercised on the basis of ipse dixit conclusory statements. The methodologies and criteria that are used by the secretary, by himself or through delegation, must be expressed. And unless they're expressed, unless some comparable methodology is employed, there cannot be judicial review, and the certificate not allowing judicial review cannot be applied.

I reserve decision. I'll express my views extensively in a decision I hope will come out in the near future, but I wanted to let you know how I felt at the present time examining the statements about these photographs. Thank you very much.

MR. LUSTBERG: Thank you, your Honor.

MS. LaMORTE: Thank you, your Honor.

(Adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, et al., Plaintiffs, -against- DEPARTMENT OF DEFENSE, et al., Defendants.	**ORDER AND OPINION GRANTING SUMMARY JUDGMENT TO PLAINTIFF** 04 Civ. 4151 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiffs seek release under the Freedom of Information Act of a cache of photographs taken at the Abu Ghraib prison and other military detention facilities in Iraq and Afghanistan by U.S. Army personnel between 2003 and 2005, which depict individuals apprehended and detained abroad after September 11, 2001. The Government resists production. Both plaintiffs and the Government move for summary judgment, the eighth such motion in this case.

This Court has previously ordered these photographs, or similar photographs, to be produced. Similar photographs have been published widely, without apparent repercussions. Nevertheless, the Government resists production and certifies, through a certification issued by Secretary of Defense Ashton Carter dated November 7, 2015, that production of these photographs would endanger the lives of Americans deployed outside the United States.

In 2005, when over 140,000 American troops in Iraq were fully deployed and suffering casualties daily, General Richard B. Myers, Chairman of the Joint Chiefs of Staff, urged this Court not to order the release of the Abu Ghraib photographs. General Myers stated in

his declaration that release of the photographs would endanger Americans in Iraq and Afghanistan by "inciting violence and riots against American troops and coalition forces." Myers Decl., Dkt. No. 115. Nevertheless, I ordered that the important values of both FOIA and judicial review of the executive's duty to carry out the will of Congress required disclosure of the photographs. *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005). The Second Circuit affirmed. *Am. Civil Liberties Union v. Dep't of Def.*, 543 F.3d 59 (2d Cir. 2008).

Now, eleven years later, facing a different enemy in Iraq, with far fewer troops deployed, serving in an advisory rather than combat capacity, and with many fewer civilians deployed, the position of Secretary Carter, the current Secretary of Defense, remains unchanged: publication of additional photographs, he has certified, will endanger Americans deployed outside the United States.

The issues that I must decide are whether, as required by the Protected National Security Documents Act ("PNSDA"),[1] Secretary Carter's certification was based on an individualized review of the photographs at issue, and whether the Government has made clear to the Court the criteria and factual bases upon which the Secretary concluded that disclosure of each such photograph would endanger the safety of Americans deployed outside the United States. Resolutions of those questions are necessary to determine whether the Government has satisfied its burden to show that the photographs are exempt from production under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. For the reasons discussed in this opinion, I hold

[1] Section 565 of the Department of Homeland Security Appropriations Act, 2010, Pub. L. 111–83, Title V, § 565, Oct. 28, 2009, 123 Stat. 2184–85.

that Secretary Carter's certification is not a sufficient basis to withhold production of the photographs. Summary judgment for plaintiffs is granted.

Background

This litigation has its origin in FOIA requests filed by plaintiffs thirteen years ago, on October 7, 2003, seeking records related to the treatment of individuals apprehended abroad after September 11, 2001, and held by the United States at military bases or detention facilities outside the United States. *See* Compl., Dkt. No. 1 (June 2, 2004). Plaintiffs' requests have resulted in substantial waves of production by the Department of Defense ("DoD"), the Central Intelligence Agency ("CIA"), and other government agencies. As reflected by scores of orders, I have conducted public and *in camera* proceedings to regulate the Government's obligation to produce under FOIA. I have granted requests and overseen substantial productions, but I have also upheld exceptions to FOIA and overseen redactions to guard against breaches of national security. *See generally, Am. Civil Liberties Union v. Dep't of Def.*, 339 F. Supp. 2d 501 (S.D.N.Y. 2004); *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005) ("*ACLU I*"); *Am. Civil Liberties Union v. Dep't of Def.*, No. 04 CIV. 4151 (AKH), 2006 WL 1638025 (S.D.N.Y. June 9, 2006); *Am. Civil Liberties Union v. Dep't of Def.*, No. 04 CIV. 4151 (AKH), 2006 WL 1722574 (S.D.N.Y. June 21, 2006); *Am. Civil Liberties Union v. Dep't of Def.*, 543 F.3d 59 (2d Cir. 2008) ("*ACLU II*"), *vacated*, 558 U.S. 1042 (2009); *Am. Civil Liberties Union v. Dep't of Def.*, 40 F. Supp. 3d 377 (S.D.N.Y. 2014) ("*ACLU III*"), *vacated and remanded* (2d Cir. Jan. 6, 2016).

One category of documents has been the subject of repeated motion practice: photographs taken by U.S. personnel of enemy combatants in U.S. custody at the Abu Ghraib prison in Iraq. The Government's first motion for summary judgment in 2005 asked to exempt

photographs taken by Sergeant Joseph Darby at Abu Ghraib ("Darby photographs") on the ground that production would compromise the privacy of the individuals depicted in the photographs. *See* 5 U.S.C. § 552(b)(6), (b)(7)(C). After I conducted an *in camera* review of all the Darby photographs and ordered redactions of all personal characteristics, the Government changed its position and instead invoked FOIA Exemption 7(F), which exempts from production records compiled for law enforcement purposes to the extent that disclosure "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). Relying on declarations of the commanding general of American forces in Iraq and the Chief of Staff of all U.S. armed forces, the Government argued that publication of the Darby photographs would incite violence against American troops and Iraqi and Afghan personnel and civilians, and that redactions would not avert the danger. The Government further argued that terrorists would use the re-publication of the photographs, under order of a U.S. court, as a pretext for further acts of terrorism.

I denied the Government's motion, held that none of the FOIA exemptions applied, and ordered the Darby photographs to be produced. *ACLU I*, 389 F. Supp. 2d at 579. I held that because of the redactions, the Government's concern about unwarranted invasions of privacy lacked merit. *Id.* at 571. As to Exemption 7(F), I allowed the Government's late argument, and denied its applicability on the merits. I held that a general threat to an unspecified group of individuals was not enough to justify withholding under Exemption 7(F), that FOIA favored production, and that this policy underlying FOIA outweighed a generalized concern that individuals might be exposed to increased risk of harm. "The terrorists in Iraq and Afghanistan," I ruled, "do not need pretexts for their barbarism; they have proven to be aggressive and pernicious in their choice of targets and tactics. They have driven exploding trucks into groups

of children at play and men seeking work; they have attacked doctors, lawyers, teachers, judges and legislators as easily as soldiers. Their pretexts for carrying out violence are patent hypocrisies, clearly recognized as such except by those who would blur the clarity of their own vision." *Id.* at 576. Accordingly, I ordered the Government to produce the Darby photographs.

The Government appealed. After a third party published the Darby photographs, the Government withdrew its appeal as to those photographs. *See* Order, Dkt. No. 184, at 2 (April 10, 2006). The Government continued its appeal, however, against 29 additional photographs and one further batch that the Government identified after the record closed, and which I ordered should be governed by my underlying order. *Amer. Civil Liberties Union v. Dep't. of Def.*, 04 Civ. 4151 (AKH), 2006 WL 1638025 (S.D.N.Y. June 9, 2006); 2006 WL 1722574 (S.D.N.Y. June 21, 2006).

The Second Circuit affirmed. *ACLU II*, 543 F.3d 59 (2d Cir. 2008). The Second Circuit ruled that Exemption 7(F) for law enforcement records that could reasonably be expected to endanger "any individual" did not apply to the photographs because the exemption, "by conditioning its application on a reasonable expectation of danger *to an individual*, excludes from consideration risks that are speculative with respect to any individual," such as the risk that release of the photographs might endanger "a group so vast as to encompass all United States troops, coalition forces, and civilians in Iraq and Afghanistan." *Id.* at 71. The Second Circuit also affirmed my rulings on the privacy exemptions. It reviewed the *in camera* proceedings, and was satisfied that "all identifying characteristics of the persons in the photographs" had been redacted. *Id.* at 85.

On April 23, 2009, the Government informed this Court that in light of the Second Circuit's decision, in addition to the photographs previously identified, it was

"processing for release a substantial number of other images contained in Army CID reports" that were also responsive to plaintiffs' initial FOIA request. *See* Barcelo Decl. Ex. B, Dkt. No. 458 (Apr. 1, 2011). The Government represented that all photographs would be released by May 28, 2009.

However, following a public statement by President Obama on May 13, 2009, made in response to the Prime Minister of Iraq's request that the photographs not be produced, the Solicitor General filed a petition for a writ of certiorari seeking review of the Second Circuit's opinion. While the petition for certiorari was pending, in response to continuing pressure on the President by the Prime Minister of Iraq, Congress passed the Protected National Security Documents Act. Pub. L. No. 111-83, 123 Stat. 2142. The PNSDA provided a temporal and qualified exception to the Government's obligation to produce the photographs under FOIA:

> Notwithstanding any other provision of the law to the contrary, no protected document, as defined in subsection (c), shall be subject to disclosure under section 552 of title 5, United States Code, or any other proceeding under that section. PNSDA § 565(b).

Under the PNSDA, a "protected document" must:

> (a) be a "photograph" that "relates to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States," *id.* § 565(c)(1)(B)(ii);
>
> (b) have been created "on September 11, 2001 through January 22, 2009," *id.* § 565(c)(1)(B)(i); and
>
> (c) be a record "for which the Secretary of Defense has issued a certification, as described in subsection (d), stating that disclosure of that record 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.* § 565(c)(1)(A).

Subsection (d), in turn, provides:

> The Secretary of Defense shall issue a certification if the Secretary of Defense determines that disclosure of that photograph 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.* § 565(d)(1).

The statute further provides that any such certification "shall expire 3 years after the date on which the certification" – or a renewed certification if the original certification has expired – is issued by the Secretary of Defense. *Id.* § 565(d)(2). Finally, the PNSDA provides for direct Congressional oversight of any certification issued under the PNSDA, by requiring the Secretary to provide "timely notice" to Congress when he issues a certification or a renewal certification pursuant to the PNSDA. *Id.* § 565(d)(4).

In November 2009, shortly after the passage of the PNSDA, then-Secretary of Defense Robert Gates signed a certification exempting the photographs then at issue in this litigation.[2] On the basis of the Gates certification, the Supreme Court granted the Government's petition for certiorari, vacated the Second Circuit's judgment upholding this Court's September 2005 disclosure order, and remanded the action for further consideration in light of the PNSDA and the Gates certification. *See Dep't of Def. v. Am. Civil Liberties Union*, 558 U.S. 1042 (2009). The Second Circuit, in turn, remanded the case to me.

The parties again cross-moved for partial summary judgment based on the adequacy of Secretary's certification. On July 21, 2011, after oral argument on the motions, I denied plaintiffs' motion and granted the Government's motion, and upheld Secretary Gates' certification. *See* Dkt. No. 469. Without specifically ruling what standard of review should apply, I found that it was clear from the record that "Secretary Gates had a rational basis for his

[2] It is unclear to the Court whether the photographs certified by Secretary Gates in 2009 are the exact same set of photographs that Secretary Carter certified in 2015.

certifications and that I could not second guess-it." Hr'g Tr., Dkt. No. 474, at 36:6–8 (July 20, 2011). I stated that, "by reason of my familiarity with the case," I had effectively conducted a *de novo* review of Secretary Gates's decision, had found that there was a rational basis for it, and would not "opine" as to whether "there is or is not a danger in the battlefield because of the disclosure of pictures of this sort." *Id.* at 23:21–24:2.

I ruled that the legislative history of the statute, especially statements by Senators Lieberman and Graham who sponsored the bill, made clear that the PNSDA was passed in order "to provide authorizing legislation to support the President's determination that these images should not be disclosed." *Id.* at 37:16–19. President Obama had made this determination in response to a request from the Prime Minister of Iraq that the United States government not publish the photographs for fear that their publication would fuel insurrection and make it impossible to have a functioning government. *Id.* at 34:7–23. In light of that history, I upheld Secretary Gates' certification.

Under the PNSDA, the Gates certification was set to expire on November 13, 2012. Several days before expiration, Secretary of Defense Leon E. Panetta issued a certification, virtually identical to the 2009 Gates certification. The parties once again moved for partial summary judgment upholding and impeaching the 2012 Panetta certification. I granted plaintiffs' motion in part. I first resolved whether the PNSDA qualified as an exemption statute under FOIA Exemption 3, which protects from disclosure documents that are "specifically exempted from disclosure by statute," provided that certain conditions are met. I held that "[t]he PNSDA is an exemption (3) statute, since it provides criteria for the withholding of certain documents from the public under FOIA[.]" *ACLU III*, 40 F. Supp. 3d at 382. Accordingly, "[t]he agency asserting the exemption [from FOIA] bears the burden of proof, and all doubts as

to the applicability of the exemption must be resolved in favor of disclosure." *Id.* at 383 (internal quotation marks omitted). I then rejected the Government's argument that the Panetta certification, standing alone, satisfied the Government's burden to show why the photographs at issue could be withheld.

The Government's review of the photographs leading up to the 2012 Panetta certification began approximately three months prior to the scheduled expiration of the 2009 certification. One attorney, Megan Weis, a deputy general counsel in the Army Office of the General Counsel, carried out the review. She began by gathering and reviewing all the photographs subject to the 2009 certification. She then 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." Weis Decl., Dkt. No. 530, ¶ 8 (Dec. 19, 2014). Factors for creating the three categories included the "extent of any injury suffered by detainee, whether U.S. service members were depicted, and the location of detainee in the photograph." *Id.*

Weis then sent the samples of five to ten photographs from each category to three high level generals, who each reviewed the samples and recommended recertifying all the photographs. *Id.* ¶¶ 9-12. Weis then provided DoD's General Counsel with the representative sample, the Generals' recommendations, a draft renewal of the certification, and a CD containing all of the photographs. *Id.* ¶ 13. The DoD General Counsel met with Secretary of Defense Panetta, and discussed whether to renew the certification. Panetta then signed the draft certification prepared by Weis. *Id.*

I held that the Government had not satisfied its burden. The Panetta certification was "expressed in conclusory fashion, and relate[d] to all the photographs at issue—likely

hundreds or thousands." It "track[ed] the language of the statute, without providing any specific explanation for why the Secretary certified the photographs, except to state that based on the recommendations of certain senior military officials, the Secretary determined that the photographs met the criteria of the statute." *ACLU III*, 40 F. Supp. 3d at 383. Noting that Congress enacted the PNSDA against the "background norm of broad disclosure of Government records," and that Congress was aware that FOIA "provided for *de novo* judicial review of agency invocations of FOIA exceptions," I held that "the PNSDA should be read as providing for judicial review of the basis for the Secretary of Defense's certification." *Id.* at 387-88. Finally, after noting that the "condition provided by the PNSDA for withholding disclosure is that each individual photograph, if disclosed, alone or with others" would endanger Americans abroad, I held that "the government, to invoke the PNSDA, must prove that the Secretary of Defense considered each photograph individually." *Id.* at 389-90. I then gave the Government the opportunity to supplement the record by submitting documents and affidavits explaining the factual basis for withholding the documents under the Panetta certification.

In response, the Government supplemented the record with additional declarations and renewed its motion for summary judgment. By order dated February 18, 2015, I found that the Government had not met its burden, and provided criteria that it could use if it wished again to supplement the record. Regarding the Government's burden, I stated that the Government "must make the Secretary's factual basis for concluding that disclosure would endanger U.S. citizens, Armed Forces, or government employees clear to the Court," and "[a]t minimum, the submission must describe the categories of objectionable content contained in the photographs, identify how many photographs fit into each category, and specify the type of harm that would result from disclosing such content." Order Clarifying Instructions for Defendants' Submissions

("February 18, 2015 Order"), Dkt. No. 543, at 2 (Feb. 18, 2015). Without such information, "judicial review is impossible, and judicial review is fundamental to FOIA and the APA." *Id.* at 3. In the event the Government feared its submission, by itself, would endanger Americans deployed abroad, I encouraged the Government to present any supplementary information *in camera*. *Id.*

Regarding individualized review, I held:

> [T]he Secretary is required, at a minimum, to explain the terms of his delegation so it is the Secretary, and not any subordinate, who takes responsibility for his knowing and good faith Certification that release of a particular photograph would result in the harm envisioned. In order to make such a Certification, the Secretary must demonstrate knowledge of the contents of the individual photographs rather than mere knowledge of his commanders' conclusions. *Id.* at 2.

The Government declined to submit additional declarations. I entered judgment for plaintiffs but stayed the order for 60 days to allow the Government to appeal. Order Granting Judgment for Plaintiffs, Dkt. No. 549 (Mar. 20, 2015). The Government filed a timely appeal.

Following briefing of the appeal, the 2012 Panetta certification expired and, on November 7, 2015, Secretary of Defense Ashton Carter issued a new certification. On motion by the Government, the Second Circuit vacated the prior judgment and remanded the case to me, noting that the Carter certification and the process that led to it might have "the potential to obviate many of the issues cited by the district court in granting relief." Corrected Mandate, Dkt. No. 558 (Jan. 6, 2016).

The Carter certification – the current, extant certification – is the subject of this opinion and order. The process leading to the Carter certification began six months before the Panetta certification expired. According to a declaration submitted by Liam M. Apostol, an associate deputy general counsel in the DoD's Office of General Counsel, an unnamed attorney

from that office collected all the photographs and reviewed each. Apostol Decl., Dkt. No. 566, ¶ 5 (Feb. 26, 2016). The Government does not disclose the number of photographs. The attorney sorted the photographs into categories according to what they depicted, and then sorted them again based on the perceived likelihood of harm from publication. The attorney performed this sorting "on behalf of the Secretary." *Id.* According to the Government, "[t]he purpose of this sorting was 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.* However, the Government has not disclosed the definitions or parameters of the categories, the criteria used to sort the photographs into those categories, or the criteria used, if any, for determining the likelihood of harm upon production.

This first review was then followed by a second-level review by commissioned officers, also unnamed, from the office of the Joint Staff, Deputy Director for Special Operations, Counterterrorism and Detainee Operations ("Joint Staff J37"). This second review was also conducted "on behalf of the Secretary." *Id.* ¶ 6. The second review, like the first, was of each photograph, and the photographs were again sorted based on the likelihood of harm from production. The purpose of the second review was to "assess whether the initial sorting of the photographs would ensure a true representative sample." *Id.* However, no reason is given why the first review was deficient or needed to be improved, and the Government has not explained when, if at all, the second-level reviewers were made privy to the first-level reviewer's determinations. Nor has the Government disclosed the criteria by which the second-level reviewers conducted their review and sort, or whether the criteria they used differed in any respect from those used in the first-level review.

A third-level review was then conducted by four new attorneys, three from the Department of Defense's Office of General Counsel and one uniformed attorney from the Department of the Army. Again "on behalf of the Secretary," the four attorneys reviewed the combined work product of the previous two reviews to assess the likelihood of harm from publication. The Government has not disclosed the criteria used by the four attorneys. They reviewed the "combined work product" of the first two reviews, but it is unclear whether their review was *de novo* or in any way built on or deferred to the first two reviews. *Id.* ¶ 7. After the third review, the "attorneys coordinated with the Joint Staff J37 officers and uniformed attorneys from the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff to reach a final consensus." *Id.* It remains unclear what coordination occurred, who participated, or how a final consensus was reached.

This process led to a recommendation to Secretary Carter: 198 photographs should be released, and the rest, an unspecified number, should be kept secret. A "representative sample" of the remaining photographs was then created. The Government does not disclose the size of the sample, whether the sample was broken down by category, the criteria used to create the sample, or why the third-level reviewers concluded that the photographs should not be released. The sample was then sent to four high ranking generals: General Lloyd J. Austin, Commander of U.S. Central Command; General David M. Rodriguez, Commander of U.S. Africa Command; Major General Jeffrey S. Buchanan, Commander of U.S. Forces- Afghanistan; and General Joseph F. Dunford, Chairman of the Joint Chiefs of Staff. Each general, after reviewing the sample, recommended that the entire set be certified as likely, if published, to endanger Americans deployed outside the United States. *Id.* ¶¶ 10-18.

Finally, the generals' recommendations, the 198 photographs recommended for release, and the representative sample of the remaining photographs were given to Secretary Carter. *Id.* ¶ 19. On November 7, 2015, Secretary of Defense Ashton Carter, acting according to the recommendations and pursuant to the PNSDA, certified the entire set of photographs, other than the 198, as properly withheld from publication. *Id.* On February 5, 2016, the Government released the 198 photographs. *Id.* The Apostol Declaration does not disclose what kind of review Secretary Carter made, whether he examined photographs beyond the sample, whether he looked at any of the 198 photographs ultimately released, or whether he applied any specific criteria in conducting his review other than accepting the generals' recommendation.

The Carter certification states that as to each photograph, public disclosure would cause harm to Americans deployed abroad based "[u]pon the recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, the Commander of U.S. Africa Command, and the Commander, U.S. forces – Afghanistan and after a review of each photograph by my staff on my behalf[.]" Apostol Decl. Ex. 1 (Nov. 7, 2015). The certification provides no other basis for withholding the photographs at issue.

The Pending Cross-Motions for Summary Judgment

The Government offers three arguments in support of its motion. First, it maintains its position, asserted in prior briefing, that because the photographs are "protected documents" as defined under the PNSDA, the Court's role is solely limited to determining "whether the Secretary issued a certification and the documents otherwise satisfy the PNSDA." Second, it argues that even if broader judicial review of the certification is permitted, the Court must apply the deferential "arbitrary and capricious" standard of the Administrative Procedure Act. The Government contends that it has easily satisfied this standard because the Secretary's

process for issuing the certification was reasonable and because it complied with this Court's prior ruling that the Secretary of Defense consider "each photograph individually, not collectively." *ACLU III*, 40 F. Supp. 3d at 389. Third, the Government continues to argue a proposition that I rejected and which the Second Circuit affirmed, *see ACLU I*, 389 F. Supp. 2d at 574-78; *ACLU II*, 543 F.3d at 66-83, namely, that the photographs are exempt under FOIA Exemption 7(F), which exempts materials "compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F).

Plaintiffs argue that the Government failed to comply with this Court's prior orders in two key respects. First, plaintiffs argue that Secretary Carter failed to make an individualized determination as to each photograph because he merely relied on the recommendation of the generals, who themselves only reviewed a sample of the photographs. Second, plaintiffs argue that there is no support in the record for the Secretary's assertion that release of the photographs would endanger Americans deployed outside the United States. The record, plaintiffs argue, does not identify the categories into which photographs were sorted, the number of images in each category, the total number of photographs examined, any description of the subject matter depicted in the photographs, or the criteria that were used to determine that release of the photographs would endanger Americans deployed outside the United States.

Standard of Review

1. The PNSDA is an Exemption Statute within the Meaning of FOIA Exemption 3

As a threshold matter, the PNSDA is an exemption statute within the meaning of FOIA Exemption 3. *See ACLU III*, 40 F. Supp. 3d at 382. That exemption permits the

Government to withhold documents from disclosure that are "specifically exempted from disclosure by statute," provided that statute either "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to types of matters to be withheld." 5 U.S.C. § 552(b)(3).[3] Here, the PNSDA "establishes particular criteria for withholding" because a "protected document" under the PNSDA must be (a) a photograph; (b) that was taken within a particular time period and "relates to the treatment of individuals engaged, captured, or detained after September 11, 2011, by the Armed Forces of the United States in operations outside of the United States"; and (c) was the subject of a certification issued by the Secretary of Defense stating that "disclosure of that record 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." PNSDA § 565(c)(1).

Nevertheless, the Government argues that the PNSDA should operate independently of FOIA, with a judicial role limited to asking only if the Carter certificate is authentic. Under the Government's proposed approach, the Court would be precluded from considering FOIA at all, and could not review the Government's invocation of a statutory exemption.

There is nothing in the PNSDA that supports the Government's argument. Congress may not supersede FOIA through subsequently passed legislation unless it does so

[3] Exemption 3 also states that if the statute was "enacted after the date of enactment of the OPEN FOIA Act of 2009," then it must "specifically cite[]" to Exemption 3. The OPEN FOIA Act of 2009 amended FOIA Exemption 3 to include this very requirement: that any statute exempting documents from disclosure under Exemption 3 specifically cite to Exemption 3, but only if that statute was enacted after Exemption 3 was amended to include this requirement. This provision of Exemption 3 does not apply here because the PNSDA was enacted on the same date as the OPEN FOIA Act of 2009, not after it. *See* H.R. 2892, 111th Cong. (2009).

expressly. As the Supreme Court has held, "FOIA is a structural statute, designed to apply across-the-board to many substantive programs … and it is subject to the provision, governing all of the Administrative Procedure Act of which it is a part, that a 'subsequent statute may not be held to supersede or modify this subchapter ... except to the extent that it does so expressly.'" *Church of Scientology of California v. I.R.S.*, 792 F.2d 146, 149 (D.C. Cir. 1986) (quoting 5 U.S.C. § 559). More simply, FOIA's provisions cannot be "*sub silentio* repealed" by subsequent statutes. *Id.*

The PNSDA does not repeal any provision of FOIA. Rather, through its use of the phrase "notwithstanding any other provision of the law to the contrary," Congress stylized the PNSDA as creating an *exception* to FOIA for certain materials. Courts have identified other statutes containing similar "notwithstanding" clauses as FOIA Exemption 3 statutes. *See, e.g.*, *Newport Aeronautical Sales v. Dep't of Air Force*, 684 F.3d 160, 165 (D.C. Cir. 2012) (holding that statute beginning with the phrase "notwithstanding any other provision of law" "readily qualifies as an Exemption 3 statute."); *O'Keefe v. U.S. Dep't of Def.*, 463 F. Supp. 2d 317, 325 (E.D.N.Y. 2006) (same).

Additionally, courts "generally presume that Congress is knowledgeable about existing law pertinent to legislation it enacts." *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 184–85 (1988). This is particularly so with FOIA. When it passed the PNSDA, "Congress was aware that [the Supreme] Court had construed FOIA as creating a background norm of 'broad disclosure of Government records.'" *ACLU III*, 40 F. Supp. 3d at 387 (quoting *C.I.A. v. Sims*, 471 U.S. 159, 166 (1985)). The PNSDA's legislative history indicates that Congress had no intent to "change FOIA, in its basic construct." 155 Cong. Rec. S5650, S5672 (statement of Sen. Graham). That construct provides for *de novo* judicial review of an agency's invocation of a

FOIA exemption. 5 U.S.C. § 552(a)(4)(B). In fact, the PNSDA itself refers to "proceedings" brought under FOIA – such as this one – but does nothing to disturb FOIA's requirement that courts apply *de novo* review in such proceedings. PNDSA § 565(b).

More broadly, there is also a "strong presumption that Congress intends judicial review." *Bowen v. Mich. Acad. of Family Physicians,* 476 U.S. 667, 670 (1986). There is nothing in the legislative record to suggest that when passing the PNDSA, Congress intended to depart from both "the specific policies underlying FOIA and the general presumption of judicial review." *ACLU III*, 40 F. Supp. 3d at 388. Judicial review under FOIA is the norm, even when reviewing certifications made under the PNSDA. I therefore reject the Government's argument that the PNSDA precludes judicial review.

2. A District Court Must Review an Agency's Invocation of a FOIA Exemption *De Novo* and the Government Must Provide the Court with Sufficient Information to Conduct that Review

"FOIA clearly contemplates judicial review of agency decisions to withhold information." *Halpern v. F.B.I.*, 181 F.3d 279, 287 (2d Cir. 1999). FOIA provides that upon an agency's invocation of a FOIA exemption, the "court shall determine the matter de novo" and that "the burden is on the agency to sustain its action" of withholding production. 5 U.S.C. § 552(a)(4)(B). As the Second Circuit has explained, FOIA establishes a "general, firm philosophy of full agency disclosure." *A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138, 141 (2d Cir. 1994). It "provided *de novo* review by federal courts so that citizens and the press could obtain agency information wrongfully withheld. *De novo* review was deemed essential to prevent courts reviewing agency action from issuing a meaningless judicial imprimatur on agency discretion." *Id.*

This "essential" *de novo* review should strike "a proper balance between plaintiffs' right to receive information on government activity in a timely manner and the

government's contention that national security concerns prevent timely disclosure or identification." *Am. Civil Liberties Union v. Dep't of Def.*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004). Navigating this fundamental tension between two competing, legitimate interests is one of the judiciary's most important functions with respect to FOIA, and courts have grappled with it for decades.

When the documents at issue pertain to national security, and in particular when the Government asserts that release of the documents may jeopardize national security, the Court must give a certain degree of deference to the executive branch, which is tasked with protecting our national security. *See, e.g.*, *ACLU I*, 389 F. Supp. 2d at 564 ("Clearly, the need for such deference is particularly acute in the area of national security."); *Am. Civil Liberties Union v. Dep't of Def.*, 723 F. Supp. 2d 621, 627 (S.D.N.Y. 2010) (noting that judicial review of a CIA Director's affirmation is "limited and deferential."). Indeed, both the Supreme Court and the Second Circuit have made clear that "it is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies regarding whether disclosure of [information] would pose a threat to national security." *Am. Civil Liberties Union v. Dep't of Justice*, 681 F.3d 61, 70-71 (2d Cir. 2012) (internal quotation marks omitted).

This rule of deference is subject to an important qualification. Deference is not owed to the executive unless the executive provides the Court with enough information to permit the Court to carry out its own duty of judicial review. Specifically, the Government "'must supply the courts with sufficient information to allow [the courts] to make a reasoned determination that they were correct' in withholding certain materials." *Nat'l Immigration Project of Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec.*, 868 F. Supp. 2d 284, 291

(S.D.N.Y. 2012) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980)).

Here, the Government argues that judicial review of "national security judgments" is precluded entirely, and that the Secretary's certification alone is sufficient to trigger exemption. But that is not the law. Deference with respect to national security issues may limit the *scope* of judicial review, but it does not *preclude* judicial review. And no matter what the degree of deference, judicial review cannot occur unless the Government describes why, "with reasonably specific detail," disclosure of documents should not be required. *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984). *See also Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (denying agency invocation of FOIA exemption where "the agency has failed to supply us with even the minimal information necessary to make a determination.").

The Government's burden is clear. "Summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith. Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009) (internal quotation marks and citations omitted). The Government must provide an accounting of *how* it reached its conclusion, so that the court has "an adequate foundation to review" whether the Government has satisfied its burden. *Campbell v. United States Dep't of Justice,* 164 F.3d 20, 30 (D.C. Cir. 1998). Once the court is "satisfied that the proper procedures have been followed and that the information logically falls into the exemption

claimed," the Government has met its burden. *Gardels v. Cent. Intelligence Agency*, 689 F.2d 1100, 1104 (D.C. Cir. 1982).

3. The Administrative Procedure Act's "Arbitrary and Capricious" Standard of Review Does not Apply But, Even if it Did, the Government Must Still Articulate a Rational Basis for Its Invocation of an Exemption

The Government argues that the standard of review should not be *de novo*, the standard for FOIA cases, but "arbitrary and capricious," the standard of review under the Administrative Procedure Act ("APA") for review of final determinations of administrative agencies. *See* 5 U.S.C. § 706. Under the latter standard of review, a reviewing court may overturn an agency action only if the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

The Government's argument is misplaced. It has not identified a single case in which a court applied the arbitrary and capricious standard when reviewing an agency's invocation of a FOIA exemption. That is because, as the Supreme Court has explained, "[u]nlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 755 (1989) (quoting 5 U.S.C. § 552(a)(4)(B).

The question before the Court is not whether the Department of Defense acted arbitrarily or capriciously in reviewing the photographs and preparing the certification for Secretary Carter's signature. Rather, it is whether the Government has satisfied its burden to show that the photographs qualify as "protected documents" under the PNSDA, so that they may be withheld under FOIA Exemption 3. That inquiry is subject to *de novo* review. *See A. Michael's Piano, Inc. v. F.T.C.*, 18 F.3d 138, 144 (2d Cir. 1994) ("Conducting a *de novo* review

we must determine whether the FTC met its burden of proving that the documents withheld pursuant to Exemption 3 fell within the scope of [the exemption statute].").

Furthermore, even under the arbitrary and capricious standard of review, the Government is not excused from articulating a rational basis for its action. Under the APA, a "court must be satisfied from the record that 'the agency … examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.' Further, the agency's decision must reveal 'a rational connection between the facts found and the choice made.'" *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 151 (2d Cir. 2008) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Accordingly, regardless whether the Court conducts an "arbitrary and capricious" review or a *de novo* review, the Government, at a bare minimum, must disclose the criteria upon which it based its decision that release of the photographs would endanger Americans deployed outside the United States.

Discussion

1. **Summary Judgment for Plaintiffs is Proper Because The Government Has Failed to Disclose the Criteria For Concluding That The Photographs, If Released, Would Endanger Americans Deployed Outside the United States**

There has been no adequate judicial review of the Government's invocation of Exemption 3. None has been possible because the Government has failed to provide the Court with the criteria it used to withhold the mass of photographs from disclosure. This is true regardless of whether I conduct *de novo* review or apply the APA's "arbitrary and capricious" standard of review.

In prior orders, the Government was instructed to provide "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." *ACLU III*, 40 F. Supp. 3d at 390. The Government was instructed to "indicate the criteria used to

categorize the pictures or to select the samples from each category." February 18, 2015 Order, at 2. The Government was instructed to "describe the categories of objectionable content contained in the photographs, identify how many photographs fit into each category, and specify the type of harm that would result from disclosing such content." *Id.* at 3. The Government was instructed to "make the Secretary's factual basis for concluding that disclosure would endanger U.S. citizens, Armed Forces, or government employees clear to the Court" because, "without such a record, judicial review is impossible, and judicial review is fundamental to FOIA and the APA." *Id.*

The Government has not complied with these instructions.[4] As a result, I cannot review whether it has satisfied its burden under FOIA, as I am required to do under the statute. Thus, summary judgment for plaintiffs is appropriate.

First, the Government has not provided any meaningful information as to how it sorted the photographs into categories. It asserts that its sorting process resulted in a "true representative sample that contained the full spectrum of what the full group of photographs depicted," Apostol Decl. ¶ 5, but it has not disclosed the parameters used to define each category, the criteria used to determine whether a photograph fell into one category or another, or how many categories or photographs there were.

Second, the Government has not adequately explained the relationship between the various levels of review. It remains unclear whether the reviewers from each level used the

[4] The Government, had it wanted to comply, could have done so *in camera*, as it did with the photographs covered by my earlier decision. *See ACLU I*, 389 F. Supp. 2d at 568. It could have exhibited the entire set of withheld photographs ex parte, and explained the criteria by which the photographs were sorted, a sample was created, and by which the Secretary or his delegates reached the conclusion that release of the photographs would endanger Americans deployed abroad.

same or different criteria, and whether they reached the same or different conclusions with respect to categorization and the potential for harm upon release. The second-level review is described as "independent" from the first-level review, but was conducted "for the same purpose." Apostol Decl. ¶ 6. The Government states that the third-level reviewers assessed the "combined work product" of the prior two reviews, but it is unclear whether that review deferred to prior findings or was conducted *de novo*. The third-level review team then "coordinated" with the second-level review team and with attorneys from the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff "to reach a final consensus," but no further details are provided regarding how the "final consensus" was reached. *Id.* ¶ 7. A "representative sample" of the photographs to be withheld was then prepared for the generals' review, but no further information regarding that sample was provided. *Id.* ¶ 8. Based on this scant information, it is impossible to know how this tiered review process yielded the recommendations that Secretary Carter adopted.

In short, the Government has not provided any information regarding the criteria it applied to reach the conclusion that release of each withheld photograph would endanger Americans deployed outside the United States. The Government concluded that 198 photographs could be released, but we do not know what distinguishes those photographs from all the others, nor do we know how many photographs the Government seeks to withhold. No matter how many levels of administrative review took place, the Government may not rely on a process that the Court is unable to review.

Under FOIA, the Government's submission must be "sufficiently detailed to permit meaningful review of the claim of exemption." *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009). Withholding may be warranted when "the affidavits describe the

justifications for nondisclosure with *reasonably specific detail*, demonstrate that the information withheld *logically falls within the claimed exemption*, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Id.* (emphases added). Because the Government has not provided reasonably specific detail as to why the photographs fall within Exemption 3, I cannot determine whether the Government's invocation of Exemption 3 is logical or plausible.

Nor can I assess whether there is in fact a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (citation omitted). The generals, for example, concluded that the photographs "would be used to fuel distrust, encourage insider attacks against U.S. military forces, and incite anti-U.S. sentiment across the region." Apostol Decl. ¶ 10. But they did not explain what it was about the photographs that would produce these results. Without knowing the relationship between the substance of the photographs and the specific endangerment referred to in the PNSDA, the Court cannot discharge its Article III duty of judicial review.

It is not as if relevant criteria cannot be applied. Relevant factors might include the type and extent of injury suffered by a detainee, the presence or absence in the photograph of Americans potentially responsible for the injury, the environment depicted in the photograph, and other like considerations. Since many photographs have been publicly disseminated, albeit not under Government sponsorship, the Government should compare those photographs with those covered by the Carter certification, and consider whether there have been previous episodes of violence caused by the released photographs. The Government should also consider the fact that the U.S. troop presence in Iraq has declined significantly, from over 100,000 in 2009 when the PNSDA was enacted, to approximately 5,000 today. The scope of operations has also

significantly narrowed. In *ACLU III*, I observed that "three years is a long time in war, the news cycle, and the international debate over how to respond to terrorism." *ACLU III*, 40 F. Supp. 3d at 384. Seven years is even longer. And while President Obama's desire to withhold these photographs in 2009 was animated by his desire to bolster the government of the Prime Minister of Iraq, that is not now the statutory consideration for withholding publication.

I take seriously the level of deference owed to the executive branch in the realm of national security decision making. The record of this long-pending lawsuit, and the many orders and decisions that I have issued, reflects that deference. As I noted at oral argument, "whenever the executive has articulated a reason, I have deferred to him." Hr'g Tr. at 28:14-23 (May 11, 2016). My complaint is that the executive has failed to articulate the reasons supporting its conclusion that release of the photographs would endanger Americans deployed abroad.

In *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court sanctioned the government's internment of Japanese-Americans during World War II. Justice Murphy, who dissented, agreed with the majority that in judging military action, "it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage." *Id.* at 235 (Murphy, J., dissenting). However, as Justice Murphy noted, the report prepared by General DeWitt, who ordered the internment, and upon which the government based its "military necessity" argument, contained "no reliable evidence" that Japanese-Americans were in fact disloyal. *Id.* Similarly, Justice Jackson dissented because he concluded that he could not judge whether General DeWitt's measures were reasonably expedient based on the evidence before him: "How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or

any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable." *Id.* at 245 (Jackson, J., dissenting). But, Justice Jackson commented, once the court sanctions the order, the "principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Id.* at 246.

Today, portions of Iraq have been overrun by ISIS, a barbaric terrorist organization whose pernicious campaign of public beheadings, enslavement, and indiscriminate killings of people it considers apostates are indisputable proof that its members, like many other terrorists that the United States has fought in Iraq and Afghanistan, "do not need pretexts for their barbarism." *ACLU I*, 389 F. Supp. 2d at 576. To give in to fear of our enemies, their propaganda, or their blackmail, is to surrender some of our dearest held values. Twelve years after this litigation began, and now fifteen years since the devastating attacks of September 11, it remains the case that "our nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command." *Id.* at 575. It is to that end that we have the Freedom of Information Act. The Secretary's methodologies and criteria, whether by himself or through delegation, must be disclosed. Until then, there cannot be judicial review. A submission that precludes judicial review cannot be the basis for a withholding under FOIA.

2. The Government's Individualized Reviews, However Ample, Are Legally Insufficient Unless the Criteria of Delegation and Review Are Set Out

Plaintiffs continue to argue that the review process leading up to the Carter certification was not sufficiently individual as to each photograph. On its face, the Carter certification differs from the Panetta certification in that instead of referring to "a collection of

photographs" and to "these photographs," it refers to "each photograph" and to a "review of each photograph by my staff on my behalf." Additionally, the Apostol Declaration makes clear that at each of the first three levels of review, each photograph was reviewed individually. Plaintiffs argue that this is insufficient because even though each photograph was in fact individually reviewed at several points in the process, the Secretary relied upon the recommendation of the four generals, who reviewed only a sample of the photographs.

When previously analyzing the PNSDA, I found that because the plain language of the statute refers to photographs individually ("*that* photograph"), the statute requires the Secretary of Defense to consider "each photograph individually, not collectively." *ACLU III*, 40 F. Supp. 3d at 389.

However, I also have consistently stated that the Secretary need not *personally* review each photograph. The Secretary may delegate the individual reviews, for "[f]ederal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent." *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 566 (D.C. Cir. 2004). This is logical. Courts should not require an agency head to "personally familiarize himself" with all evidence related to a decision he is responsible for, or else "government would become impossible." *Nat'l Nutritional Foods Ass'n v. Food & Drug Admin., U. S. Dep't of Health, Ed. & Welfare*, 491 F.2d 1141, 1146 (2d Cir. 1974).

The PNSDA, however, makes the Secretary personally responsible for the certification as to each photograph. He may delegate the work to his staff, but he must establish the criteria to be utilized in categorizing the photographs and assessing the likely harm upon release. He must also "explain the terms of his delegation so it is the Secretary, and not any

subordinate, who takes responsibility for his knowing and good faith Certification that release of a particular photograph would result in the harm envisioned." February 18, 2015 Order, at 2.

The Secretary has failed to sufficiently explain the terms of his delegation. As discussed above, the Government has not disclosed the criteria by which the Secretary's staff categorized the photographs and concluded that some, but not all, the photographs should be released. Additionally, the four generals, who were the individuals ultimately responsible for executing the Secretary's delegation of decision-making authority, only reviewed a sample of the photographs. This disconnect between the staff that conducted the individual reviews and the generals who made the final recommendation to the Secretary is further indication that the Secretary's certification does not comply with the requirements of the PNDSA.

3. The Photographs are Not Exempt Under Exemption 7(F)

Separate and apart from the Carter certification issued pursuant to the PNSDA, the Government also contends that the photographs are exempt under Exemption 7(F), which protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). The Government first raised this argument in 2005 with respect to specific photographs taken by American military personnel at Abu Ghraib prison in Iraq. I rejected the argument, and the Second Circuit affirmed that decision.

I ruled that Exemption 7(F) was animated by a desire to "protect individuals involved in law enforcement investigations and trials, as officials and as private citizens providing information and giving testimony," but that the purpose of FOIA as a whole was to "advance[] values important to our society, transparency, and accountability in government."

ACLU I, 389 F. Supp. 2d at 576. The task of the court was to balance the goals of the statute at large against the specific exemption, "not to defer to our worst fears, but to interpret and apply the law." *Id.* I held that "the core values that Exemption 7(F) was designed to protect are not implicated by the release of the Darby photographs, but that the core values of FOIA are very much implicated." *Id.* at 578. Accordingly, I held that the Darby photographs, the photographs then at issue, should be released.

On appeal, the Second Circuit affirmed, *see ACLU II*, 543 F.3d at 66-83, holding that Exemption 7(F) extends only to documents that could "reasonably be expected to endanger the life or physical safety of *any individual*." 5 U.S.C. § 552(b)(7)(F) (emphasis added). The Second Circuit reviewed the text of the exemption, its legislative history, and its prior application. In light of the presumption that FOIA exemptions be "narrowly construed," the Second Circuit concluded that the term "any individual" does not include "individuals identified solely as members of a group so large that risks which are clearly speculative for any particular individuals become reasonably foreseeable for the group." *ACLU II*, 543 F.3d at 67. Rather, "an agency must identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual." *Id.* at 71. As a result, Exemption 7(F) did not extend to a group "so vast as to encompass all United States troops, coalition forces, and civilians in Iraq and Afghanistan." *Id.*

The Government, arguing for a change of view, cites *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.* ("*EPIC*"), 777 F.3d 518 (D.C. Cir. 2015), a distinguishable case. In that case, the D.C. Circuit held that the term "any individual" in Exemption 7(F) should be given a "broad interpretation," not limited to the Government's ability to "specifically identify the individuals who would be endangered." *Id.* at 520. The Government was concerned in *EPIC*

that release of a protocol for shutting down wireless networks in critical emergencies, such as a terrorist bombing, would enable terrorists to disable the protocol and "freely use wireless networks to activate … improvised explosive devices," thereby endangering individuals in the vicinity of the bomb threat. *Id.* at 521-22. The danger was sufficiently specific, and the zone of endangerment was sufficiently concrete, to justify application of Exemption 7(F). By contrast, the Carter certification is vague and unlimited as to who is endangered: "citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." This vast and amorphous group clearly does not satisfy the standard described by the Second Circuit, nor would it likely satisfy the standard adopted by the D.C. Circuit in *EPIC*.

Thus, I decline to reverse my prior holding, affirmed by the Second Circuit, that the photographs at issue are not exempt under Exemption 7(F).

Conclusion

For the foregoing reasons, plaintiffs' motion is granted and the Government's motion is denied.

SO ORDERED.

Dated: January 18, 2017
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiffs,

-against-

DEPARTMENT OF DEFENSE, et al.,
Defendants.

----------X

04 **CIVIL** 4151 (AKH)

JUDGMENT

Whereas this action having come before the Court, and both Plaintiffs and the Government move for summary judgment, and the matter having come before the Honorable Alvin K. Hellerstein, United States District Judge, and the Court, on January 18, 2017, having rendered its Order and Opinion granting Plaintiffs' motion and denying the Government's motion, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order and Opinion dated January 18, 2017, Plaintiffs' motion is granted and the Government's motion is denied.

Dated: New York, New York

January 19, 2017

RUBY J. KRAJICK

Clerk of Court

BY:

K Mango

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

American Civil Liberties Union, et al., Plaintiffs, v. Department of Defense, et al., Defendants.	04 Civ. 4151 (AKH) **Notice of Appeal**

Notice is hereby given that the United States Department of Defense and United States Department of the Army, defendants in the above-named case, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on January 19, 2017.

Dated: New York, New York
March 17, 2017

Respectfully submitted,

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