17-779

To Be Argued By:
BENJAMIN H. TORRANCE

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

BRIEF FOR DEFENDANTS-APPELLANTS

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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.

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BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

In 2009, Congress enacted a statute that specifically precludes applying the Freedom of Information Act to compel disclosure of the photographs at issue in this litigation. The statute, known as the Protected National Security Documents Act ("PNSDA"), provides

that if the Secretary of Defense issues a certification stating that release of certain photographs would endanger U.S. citizens, military personnel, or employees abroad, then those photographs are not subject to disclosure or proceedings under FOIA. Shortly after the passage of the statute, the Secretary of Defense issued just such a certification, and the district court correctly held, without reviewing the underlying basis of that certification, that the covered photographs could not be ordered released in this FOIA action.

Yet when the Secretary of Defense renewed the certification in 2012 and 2015, the district court changed course. The district court conducted a *de novo* review, based on its own assessment of the military and political situation in Iraq and Afghanistan, and concluded that it could not verify whether the Secretary's predictive judgment about the possibility of harm—which was based on extensive review by his staff and military officers, and the recommendations of some of the highest-ranking officers in the Armed Forces—was, in fact, correct. The district court further held that in order to maximize disclosure, the Secretary must provide detailed justifications for his conclusions regarding the photographs and the harms that would be caused by their disclosure.

Those holdings contradict the plain terms of the statute and should be reversed. The PNSDA provides that the Secretary's certification is alone sufficient to preclude disclosure of covered photographs. Judicial review of the underlying basis for the Secretary's determination is not warranted, nor is it appropriate in this matter of national security and military affairs,

where Congress specifically intended such a certification to preclude the disclosure of these photographs. The procedural requirements the district court created are entirely absent from the statute, and improperly constrain the Secretary's authority to choose for himself the method of carrying out his duties and to utilize the assistance of his subordinates in doing so.

Separately from the PNSDA, FOIA's exemption 7(F) also applies to bar disclosure of the photographs at issue, as their release could reasonably be expected to endanger the lives and safety of U.S. and other persons abroad.

For those reasons, the district court's judgment should be reversed.

Jurisdictional Statement

The district court had jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. The district court entered final judgment on January 19, 2017 (Joint Appendix ("JA") 413), and the government filed a timely notice of appeal on March 17, 2017 (JA 414). This Court accordingly has jurisdiction over this appeal under 28 U.S.C. § 1291.

Questions Presented

1. Whether the Secretary's certification under the PNSDA—that public disclosure of certain detainee photographs would endanger citizens of the United States, members of the U.S. Armed Forces, or U.S. government employees deployed abroad—conclusively precludes disclosure of those photographs.

2. Whether FOIA's exemption 7(F) applies to exempt the photographs from disclosure because their public release could reasonably be expected to endanger the life or physical safety of any individual, where the individual is unidentified except as a member of a larger threatened group.

Statement of the Case

A. Procedural History

This appeal arises out of a Freedom of Information Act ("FOIA") suit by the ACLU, seeking the release of records relating to the treatment of detainees held by the United States abroad. The Departments of Defense ("DoD") and the Army are the only remaining defendants, and the only remaining records at issue are certain DoD photographs.

The district court first ordered the release of DoD photographs responsive to the ACLU's FOIA request over a decade ago, on September 29, 2005. (JA 120). This Court affirmed the district court's holdings with respect to those photographs. *ACLU v. DoD*, 543 F.3d 59 (2d Cir. 2008), *vacated*, 558 U.S. 1042 (2009). To prevent the release of these same photographs, Congress then enacted the PNSDA, and then-Secretary of Defense Robert Gates signed a certification under the terms of that statute to support withholding of the photographs. The Supreme Court granted the government's petition for certiorari, vacated this Court's judgment, and remanded for further consideration in light of the PNSDA and the Secretary's certification. 558 U.S. 1042 (2009).

On remand, in an oral ruling in July 2011, the district court granted summary judgment for the government, concluding that the Secretary's certification was valid and exempted the DoD photographs from FOIA's disclosure requirements. (JA 202).

Shortly before the Secretary of Defense's initial certification expired, the Secretary issued another PNSDA certification in November 2012, supporting the continued withholding of the photographs. (JA 246). The district court, while recognizing that the new certification was "virtually identical" to the original certification, nevertheless concluded that the 2012 certification was insufficient under the PNSDA, and ordered disclosure of the photographs with redactions. (JA 246, 330). The government appealed, and this Court vacated the district court's judgment after the 2012 certification expired and was renewed by a materially different 2015 certification. On remand, the district court concluded the 2015 certification was insufficient, and again ordered disclosure. Final judgment was entered on January 19, 2017 (JA 413), and this appeal followed (JA 414).

B. The FOIA Request and the Initial Litigation

On June 2, 2004, the ACLU filed a complaint challenging the government's responses to its FOIA request, which sought records related to the treatment of individuals apprehended after September 11, 2001, and held by the United States at military bases or detention facilities outside the United States. The responsive records identified by DoD included a set of photographs depicting detainees held at Abu Ghraib

prison in Iraq, which the government withheld pursuant to FOIA exemptions 6, 7(C), and 7(F).

In September 2005, the district court ordered the release of the withheld photographs. In rejecting the government's exemption 7(F) claim, the district court recognized "[t]here is a risk that the enemy will seize upon the publicity of the photographs and seek to use such publicity as a pretext for enlistments and violent acts," but discounted the possibility of additional violence because "[t]he terrorists in Iraq and Afghanistan do not need pretexts for their barbarism." 389 F. Supp. 2d 547, 576, 578 (S.D.N.Y. 2005). Instead, the district court held that any risk to the lives or safety of U.S. military personnel and civilians must be balanced against the perceived benefits of disclosure, and held that disclosure was justified despite the risk of violence. *Id*. The government appealed, but withdrew that appeal after those photos were published by a third-party source.

While that appeal was pending, however, the government identified other photographs potentially responsive to plaintiffs' FOIA request, and withheld them under FOIA exemptions 6, 7(C), and 7(F). The district court rejected the government's exemption claims, and ordered the majority of those photographs released. The district court did not issue a written opinion, but instead adopted the same reasoning used with respect to the Abu Ghraib photographs. The government appealed again, and in September 2008, this Court affirmed the district court's decision, holding that the potential harm to unspecified members of large groups of people (such as U.S. troops or civilians

in Afghanistan and Iraq) does not meet exemption 7(F)'s requirement to identify harm to "any individual." *ACLU v. DoD*, 543 F.3d 59 (2d Cir. 2008), *vacated*, 558 U.S. 1042 (2009). The Court denied the government's request for rehearing en banc, and the government filed a petition for a writ of certiorari.

C. The Protected National Security Documents Act

While the government's petition for certiorari was pending, Congress passed the PNSDA. *See* Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142, § 565 (2009). The Act was intended to "[c]odif[y] the President's decision to allow the Secretary of Defense to bar the release of detainee photos." (JA 201 (Conference Summary by U.S. Senate and U.S. House of Representatives Committees on Appropriations on the Department of Homeland Security Appropriations Act, FY2010, dated October 7, 2009)).

As further described below, the PNSDA provides that "no protected document . . . shall be subject to disclosure under [FOIA] or any proceeding under [FOIA]." PNSDA, § 565(b). To be a "protected document," a record 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 between "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). A PNSDA certification expires after three years, but may be renewed by the Secretary. *Id.* § 565(d)(2), (d)(3). Finally, the PNSDA provides for direct congressional oversight of any certification by requiring the Secretary to provide "timely notice" to Congress when he issues a certification or renewal certification. *Id.* § 565(d)(4).

D. The 2009 Certification by the Secretary of Defense

In November 2009, shortly after the passage of the PNSDA, then-Secretary of Defense Robert Gates signed a certification with respect to the photographs at issue in this case. The 2009 certification specified that it pertained to "a collection of photographs . . . assembled by the Department of Defense . . . [that] are contained in, or derived from, records of investigations of allegations of detainee abuse, including the records of investigation processed and released in" the district court proceedings in this case, which include the "photographs referred to in the decision of the United States Court of Appeals for the Second Circuit in [*ACLU v. DoD*], 543 F.3d 59, 65 & n.2 (2d Cir. 2008)." (JA 196). The certification also states that the photographs "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" and "were taken in the period between September 11, 2001 and January 22, 2009." (JA 196).

The 2009 certification explains that before it was issued, Secretary Gates sought and received the recommendations of "the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, and the Commander of the Multi-National Forces—Iraq," and then 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." (JA 196). As contemplated by the PNSDA, the certification directs that notice of the Secretary's certification be provided to Congress. (JA 196).

E. The Supreme Court's Remand and the District Court's 2011 Opinion

The Supreme Court then granted the government's petition for certiorari, vacated this Court's judgment upholding the district court's disclosure order, and remanded the action for further consideration in light of the PNSDA and the 2009 certification. *DoD v. ACLU*, 558 U.S. 1042 (2009).

On remand, the district court granted summary judgment for DoD, concluding that Secretary Gates's certification supported the withholding of the photographs under the PNSDA. (JA 202). In an oral ruling, the district court rejected ACLU's suggestion that the

court should conduct a *de novo* review of the Secretary's determination of harm, noting that "these kinds of certifications need to be given conclusive respect," and that the legislative history of the PNSDA did not "suggest[] any further *de novo* review or any kind of review by the court." (JA 216, 238).

F. The 2012 Certification

In November 2012, then-Secretary of Defense Leon Panetta signed a renewal certification. The 2012 certification, as the district court recognized, was "virtually identical" to the 2009 certification. (JA 246).

In advance of the certification, an attorney in DoD's Office of the General Counsel ("OGC") reviewed each photograph individually on the Secretary's behalf. (JA 280, 282). The attorney sorted the photographs into three categories based on their content, including the extent of any injury suffered by the detainee pictured, whether U.S. servicemembers were also in the photograph, and the location of the detainee in the photograph. (JA 283). Working with OGC leadership, the attorney then selected five to ten representative photographs from each category. This sample was then provided to the Commander of U.S. Forces in Afghanistan, the Commander of U.S. Central Command, and the Chairman of the Joint Chiefs of Staff, who reviewed the sample and recommended to the Secretary that all of the photographs be recertified under the PNSDA. (JA 283-84, 286-92).

The 2012 certification refers explicitly to the photographs at issue in this case, and explains that "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" each recommended that the Secretary certify 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 of the United States.'" (JA 240).

For instance, General John R. Allen, then the Commander of the International Security Assistance Force/U.S. Forces—Afghanistan, concluded that release of the photographs would endanger the lives of U.S. and allied servicemembers in Afghanistan. (JA 286). "The photographs will likely cause a very public and emotional response in Afghanistan and the larger Muslim world," with "devastating" consequences. (JA 286). General Allen also concluded, based on past events, that release "will almost certainly exacerbate the conditions that foster 'insider threat' attacks," and extremist groups "would undoubtedly use the release of these photographs to further justify and encourage" attacks and for recruitment and fundraising. (JA 286-87). General James Mattis, then Commander of U.S. Central Command, agreed that release of the photographs would "fuel[] civil unrest, causing increased targeting of U.S. and Coalition forces, and providing a recruiting tool for insurgent and violent extremist groups." (JA 289). General Mattis also noted that the "insider threat" had increased since the 2009 certification, such that the release of the photographs in 2012 posed a "far greater threat" than before. (JA 290). That conclusion was bolstered by General Mattis's first-hand experience with the results of prior

publications of controversial images that had incited violence. (JA 290). Finally, General Martin E. Dempsey, then Chairman of the Joint Chiefs of Staff, "strongly concur[red]" in the generals' recommendations, concluding 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." (JA 291).

G. The District Court's 2014 Ruling

On the parties' cross motions for summary judgment, in August 2014, the district court ruled that the 2012 certification was insufficient. (JA 260).

The district court first rejected the argument that its prior ruling, upholding the 2009 certification, governed its decision with respect to the 2012 certification, even though the certifications were "virtually identical." (JA 246). Despite the contrary statements in its earlier ruling, the district court now stated that it had previously "effectively conducted a *de novo* review" of Secretary Gates's 2009 certification. (JA 250). The district court found that Secretary Panetta's 2012 certification "was issued under different circumstances," reasoning that "the United States' combat mission in Iraq had ended (in December 2011), and all (or mostly all) American troops had been withdrawn from Iraq." (JA 250). The court concluded that there was "no basis" for concluding that disclosure of the photographs "would affect United States military operations at this time, or that it would not." (JA 251).

The district court further ruled that it should review the 2012 certification *de novo*, to include review of whether the Secretary had a sufficient factual basis for his conclusions. (JA 256). Because the court determined that the record did not include adequate information to support Secretary Panetta's determination of harm, the court provided the government with an opportunity to support its assertion that the photographs should be withheld. (JA 256).

The district court also held that the PNSDA requires the Secretary to "consider each photograph individually, not collectively," as such a process "may allow for more photographs to be released, furthering FOIA's 'policy of full disclosure.'" (JA 258-59). The court held that the 2012 certification suggested that the Secretary reviewed the photographs as a collection, and thus was insufficient. (JA 259). The court provided the government with an opportunity to demonstrate that the Secretary of Defense considered each photograph individually. (JA 260).

The government then submitted a declaration explaining the process behind the 2012 certification, described *supra* Point F. The government maintained that, while not required under the PNSDA, DoD had individually reviewed the photographs, and that the three generals' recommendations Secretary Panetta relied upon in making his recertification provided ample basis for his conclusion that disclosure of the photographs would endanger U.S. citizens, servicemembers, or employees abroad.

In February 2015, the district court found the additional materials submitted by the government insufficient to satisfy the PNSDA. (JA 327). The district court ruled that the "Secretary must demonstrate knowledge of the contents of the individual photographs rather than mere knowledge of his commanders' conclusions" in order to certify the photographs. (JA 328). "He may obtain such knowledge either by reviewing the photographs personally or having others describe their contents to him," the district court continued, "but he may not rely on general descriptions of the 'set' of 'representative samples,' as such aggregation is antithetical to individualized review without precise criteria for sampling." (JA 328-29). The court also stated the certification must make clear "the Secretary's factual basis for concluding that disclosure would endanger U.S. citizens, Armed Forces, or government employees." (JA 329). "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." (JA 329).

The district court provided the government with another opportunity to make further submissions (JA 329), which the government declined (Dist. Ct. ECF No. 547). The district court then ordered disclosure of the photographs with redactions. (JA 331).

H. The 2015 Certification

The government appealed. (JA 335). While the appeal was pending, Secretary Panetta's 2012 certification expired. In November 2015, then-Secretary Ashton Carter determined that 198 photographs could be released, and issued a renewal certification regarding the remaining photographs. (JA 343).

1. DoD's Initial Reviews

The 2015 certification was based on a new review of the photographs, which began about six months before the certification was issued. (JA 337). First, an attorney from DoD's OGC individually examined each photograph, categorized each one based on its content, and then further sorted them within each category based on the likelihood that public release of the photograph would result in endangerment of U.S. citizens, members of the Armed Forces, or employees deployed outside the United States. (JA 337-38).

Second, each one of the photographs was independently reviewed by commissioned officers assigned to the office of the Joint Staff, Deputy Director for Special Operations, Counterterrorism and Detainee Operations (Joint Staff J37), who possess extensive knowledge of the Armed Forces and U.S. adversaries in Afghanistan, Iraq, and other regions of the Middle East and Africa. (JA 338). They conducted this independent review of each photograph for the same purpose as counsel: to categorize the photographs based on their content and the likelihood that public disclosure of the photographs would lead to the harm that the PNSDA was designed to prevent. (JA 338). The

photographs were categorized in this manner to ensure a truly representative sample reflecting the full spectrum of what the entire group of photographs depicted for the Secretary's review. (JA 338).

Next, three new OGC attorneys and one uniformed attorney with the Department of the Army reviewed the combined work product of the initial OGC attorney and the commissioned officers assigned to Joint Staff J37. (JA 338). The officials examined each photograph to assess the likelihood of harm it would cause to U.S. citizens, troops, and employees operating abroad if publicly disclosed. (JA 338). After completing the third review, these attorneys coordinated with the Joint Staff J37 officers and uniformed attorneys from the Office of Legal Counsel for the Chairman of the Joint Chiefs of Staff to reach a final consensus. (JA 338).

As a result of this multi-tiered process, 198 photographs were determined to be least likely to cause harm and proposed for public disclosure. (JA 338). OGC developed a representative sample of the remaining photographs—including photographs from each of the categories created, to ensure the sample reflected the full scope of the photographs' imagery and the full range of the gravity of the content—for review by the Commander of U.S. Central Command, the Commander of U.S. Africa Command, the Acting Commander of U.S. Forces, Afghanistan, and the Chairman of the Joint Chiefs of Staff. (JA 338).

2. Recommendations of the Commanders and the Chairman of the Joint Chiefs

The commanders and the Chairman of the Joint Chiefs each reviewed the representative sample of the remaining photographs, and each assessed that public disclosure would endanger the lives of U.S. personnel operating abroad.

General Lloyd J. Austin, the Commander of U.S. Central Command, affirmed that "'multiple groups seek to destabilize'" the Central Command region to "'promote their own interests, degrade our military posture, and put our core national interests at greater risk.'" (JA 339). In his expert opinion, 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.'" (JA 339). General Austin confirmed that violent extremist organizations in the region "'successfully use social media to inspire and recruit individuals in support of their causes, plan and launch attacks within'" the Central Command region, and encourage attacks on U.S. soil. (JA 339). He opined that extremist organizations "'will undoubtedly use the photographs in their propaganda efforts to encourage threats to U.S. service members and U.S. Government personnel.'" (JA 339). Overall, public disclosure of the photographs "'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 violent groups. (JA 339).

General David M. Rodriguez, the Commander of U.S. Africa Command (who previously commanded the International Security Assistance Force—Joint Command in Afghanistan) described how Africa faces threats from a wide variety of sources, including "'transnational terrorist and criminal networks [and] regional armed conflict.'" (JA 339-40). In particular, in "'North and West Africa, Libyan and Nigerian insecurity increasingly threatens U.S. interests.'" (JA 340). A number of violent organizations, including Al-Qaida in the Lands of the Islamic Maghreb, Ansar al-Sharia, Boko Haram, al-Murabitun, and ISIL are operating "'to train and move fighters and distribute resources.'" (JA 340). Citing the potential that these groups would exploit the photographs and present them as evidence of U.S. noncompliance with international and humanitarian law, and the potential for increased efforts to attack personnel at Camp Lemonier, Djibouti, General Rodriguez also concluded that public disclosure of the photographs "'would endanger the lives of U.S. servicemen, U.S. citizens, and government personnel serving overseas'" in Africa. (JA 340).

General Jeffrey S. Buchanan, the Acting Commander of U.S. Forces, Afghanistan, stated that "'release of these photographs will significantly and adversely impact'" the mission to build a stable and secure Afghanistan. (JA 340). Significantly, the fact that the mission is not designated a combat mission "'does not eliminate the fact that U.S. and Coalition Forces and Civilians operate in a hostile environment.'" (JA 340). Like General Austin, General Buchanan assessed that release of the photographs could "'exacerbate the conditions that foster insurgent "insider

threat" attacks,'" citing the August 2014 killing of Major General Harold Greene by an Afghan military police officer as an example highlighting the concern. (JA 340-41). He also agreed that the photographs would be used by adversaries to inspire violence, among other things. (JA 340-41).

Based on the expert assessments of these high-ranking military commanders, the Chairman of the Joint Chiefs of Staff, General Joseph F. Dunford, "'strongly concurred'" with the commanders' recommendations to certify all the remaining photographs. (JA 341). He concluded 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.'" (JA 341).

3. Secretary Carter's 2015 Certification

Secretary Carter was provided the recommendations of the Commanders and the Chairman of the Joint Chiefs, the 198 photographs recommended for public disclosure, and the representative sample of the remaining photographs. (JA 341-42). Secretary Carter declined to certify any of the 198 photographs, which were released on February 5, 2016. (JA 336, 341-42). On November 7, 2015, Secretary Carter certified each of the remaining photographs pursuant to the PNSDA. (JA 341-43).

Carter's certification differs from those of Secretaries Gates and Panetta. It expressly states that it pertains to "each photograph" that is "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." (JA 343).

Further, Carter's certification explains that based on the recommendations of the commanders and the Chairman of the Joint Chiefs of Staff, "and after a review of each photograph by my staff on my behalf," the Secretary 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." (JA 343). Accordingly, Secretary Carter certified "each" photograph "continues to meet the standard for protected documents" as defined in the PNSDA. (JA 343). The certification also directs that notice of its issuance be provided to Congress. (JA 343).

I. The District Court's 2017 Ruling

In light of the supersession of the 2012 certification by the 2015 certification, this Court vacated the district court's order and remanded for consideration of the new certification. (JA 59-60). On remand, the district court again held that all of the photographs must be released. (JA 382-412).

The district court reiterated its holding that the PNSDA is an exemption statute under FOIA, rather than an independent basis for nondisclosure. (JA 396-99). The court reasoned that Congress may not supersede or modify FOIA's requirements unless it does so expressly, but the PNSDA did not do so; instead, it merely created an exception to FOIA. (JA 397-98). FOIA, the court held, creates a "background norm" of disclosure, which Congress did not change. (JA 398). Thus, FOIA's usual requirement of *de novo* review of a claim of exemption applies. (JA 398-99).

Under that standard, the district court held the government had not met its burden. The court observed that it owed "a certain degree of deference to the executive branch" in reviewing matters of national security, but stated that deference is not owed "unless the executive provides the Court with enough information" to permit judicial review. (JA 400). The government therefore must, the court held, account for how it reached its conclusion. (JA 401).

The district court held that the government had not provided a sufficient explanation to justify withholding the photographs, because, in the court's view, it had failed to submit evidence supporting the Secretary's determination of the risk of harm, and failed to show the Secretary considered each photograph. (JA 403-04). The court had previously asked the government to indicate the criteria it used to categorize photographs and select samples, describe the categories of objectionable content and how many photographs fit into each category, and specify the harm resulting from disclosing that content. (JA 403-04). The

government's decision not to do so, the court ruled, made summary judgment for the FOIA requesters appropriate. (JA 403-04). Moreover, the court held that the government had not adequately detailed the various levels of review, whether each reviewer used the same criteria or reached the same conclusions, or what distinguishes the 198 released photographs from others. (JA 404-05).

The district court suggested that the government should compare previously released photographs to those now certified and consider any episodes of violence caused by the released photographs. (JA 406). In doing so, the court stated, the government should consider the decline in U.S. troop levels over the years, the President's prior but no longer applicable desire to bolster the Iraqi prime minister, and ISIL's demonstrated propensity for violence without pretext. (JA 406-08).

The district court then noted that the Carter certification referred to "each photograph" in the singular, rather than a "collection of photographs" as prior certifications had, and that the record showed that each photograph was individually reviewed at some point in DoD's process. (JA 408-09). The district court nevertheless reiterated its previous holdings that the Secretary must consider each photograph individually; while he need not personally review each one and may delegate the individual reviews, he must be personally responsible for the certification as to each photograph by explaining the terms of his delegation to subordinates. (JA 409-10). Because he failed, in the district court's view, to do so, and because the generals to whom authority had been delegated reviewed only

samples, the certification did not comply with the PNSDA. (JA 409-10).

Finally, the district court held that FOIA exemption 7(F) did not apply, as this Court held (in a now-vacated decision) it only extends to documents whose release could be expected to endanger a specified individual, rather than members of large groups. (JA 410-12).

This appeal followed.

Summary of Argument

The PNSDA provides that photographs defined as "protected documents" are not subject to FOIA at all. Its text and history demonstrate that Congress intended that neither FOIA's disclosure requirement nor judicial proceedings under FOIA will apply to the photographs at issue in this case. At the very least, the PNSDA is a withholding statute under FOIA exemption 3 that specifically exempts the photographs from disclosure. Either way, under the plain terms of the PNSDA, the photographs may not be ordered released. *See infra* Point I.A.

As the PNSDA requires, the Secretary of Defense has issued a certification stating that the release of the photographs could endanger U.S. citizens, military personnel, or employees abroad. The issuance of that certification alone means that the PNSDA forecloses disclosure, and judicial review is limited to whether the Secretary issued such a certification (and to whether the photographs otherwise meet the statute's terms, which is not contested). That limitation is apparent from the statute itself, which requires only that

the Secretary issue a "certification" "stating" his prediction of danger, but does not require any statement or elaboration of the Secretary's basis for that determination. Congress's intent was clear: the decision regarding danger and disclosure belongs to the Secretary, and there is no judicial review of the basis for that decision.

Additionally, in the context of national security matters, courts should not lightly presume their authority to second-guess the predictive judgments of those in the executive branch with the necessary expertise. Moreover, Congress required the Secretary to notify Congress of any certifications under the PNDSA, thus indicating that the legislative branch, rather than the judicial branch, would serve as a check on the Secretary's power. That Congress intended no judicial review of the Secretary's certification is confirmed by the PNSDA's legislative history, which manifests a clear intent to halt the prior court-ordered disclosure of the very photographs at issue here, and to do so without further litigation. Finally, even if the Secretary's determination is reviewable, it should be upheld under the deferential standards courts apply in reviewing administrative action, particularly in sensitive areas of national security. The Secretary's judgment is well rooted in the carefully considered judgment of senior military leaders and DoD officials, and cannot be overcome by the district court's own assessment of the risks currently presented in Iraq and Afghanistan. *See infra* Point I.B.

The district court further erred in prescribing the methods by which the Secretary must make his prediction of harm. Because the PNSDA does not specify the means by which the Secretary must conduct his duty, he may choose how to do so, and the courts may not delve into the Secretary's personal knowledge or the degree to which he relied on subordinates. The method the Secretary chose here to certify the photographs, based on multi-tiered review by DoD staff and the recommendations of top military officers, was entirely appropriate. *See infra* Point I.C.

Finally, apart from the PNSDA, FOIA exemption 7(F) protects the relevant photographs from disclosure. While this Court previously held in this case that exemption 7(F) does not apply when the individuals at risk from disclosure are identified solely as members of a large group, that decision was vacated by the Supreme Court and is therefore no longer binding. Moreover, in the intervening time, the D.C. Circuit has held to the contrary, concluding that when the government shows that disclosure poses a concrete danger to a group of unspecified individuals, exemption 7(F) is satisfied. Accordingly, exemption 7(F) applies to shield the photographs at issue from disclosure. *See infra* Point II.

Therefore, the district court's judgment should be reversed.

ARGUMENT

Standard of Review

This Court reviews *de novo* a grant of summary judgment, including in FOIA cases or cases involving a question of statutory interpretation. *Peterson v. Islamic Republic of Iran*, 758 F.3d 185, 189 (2d Cir. 2014); *National Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir. 2005).

POINT I

Disclosure of the Protected Photographs Is Foreclosed by the PNSDA

The Protected National Security Documents Act was enacted specifically to prevent the release of the very photographs at issue in this case, so long as the Secretary of Defense issues a certification that makes them "protected documents." The Secretary did just that. His 2015 certification complies with the terms of the PNSDA, and that is the end of the matter: the photographs are therefore not subject to FOIA. The district court erred in questioning the Secretary's determination that disclosure of the photographs would endanger Americans serving abroad, and in imposing procedural requirements that are nowhere in the statute. Its judgment should therefore be reversed.

A. The PNSDA Forecloses Disclosure of Protected Photographs

1. PNSDA-Protected Documents Are Not Subject to FOIA

The plain language of the PNSDA forecloses disclosure of the photographs at issue.

The PNSDA provides, "Notwithstanding any other provision of the law to the contrary, no protected document . . . shall be subject to disclosure under section 552 of title 5, United States Code [i.e., FOIA] or any proceeding under that section." PNSDA § 565(b). A protected document, in turn, is "any record" that meets three criteria: (1) it must be "a photograph" taken between September 11, 2001, and January 22, 2009; (2) it must "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 of the United States"; and (3) it must 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). Subsection (d) then provides that "the Secretary of Defense shall issue a certification if the Secretary of Defense determines that disclosure of that photograph would endanger" U.S. citizens, servicemembers, or employees abroad.

The statute does not provide any procedures the Secretary must follow in making the required certification. It does not require the Secretary to disclose particular information about his decisionmaking, other than the result: that he has concluded that release of the photographs would lead to the specified danger. And it forecloses any FOIA proceedings, including application of FOIA's exemption 3 or its standards of judicial review. In short, once the Secretary certifies a photograph as "protected," FOIA is inapplicable.

That follows directly from the PNSDA's text. The statute's operative provision begins with the phrase, "Notwithstanding any other provision of law to the contrary." PNSDA § 565(b). "[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). The PNSDA then goes on to say that "no protected document" is subject to FOIA disclosure—expressly superseding FOIA. *See Lockhart v. United States*, 546 U.S. 142, 145-46 (2005) (later statute's citation of earlier provision is "exactly the sort of express reference . . . necessary to supersede" the earlier provision); (*contra* JA 397-98). Thus, while FOIA "calls for broad disclosure of Government records," *CIA v. Sims*, 471 U.S. 159, 166 (1985), the PNSDA calls for no disclosure at all of certified photographs—notwithstanding FOIA.

Moreover, the PNSDA makes clear that protected documents are not subject to "any proceeding under

[FOIA]." PNSDA § 565(b). That language means that any FOIA proceeding, including application of exemption 3, should not occur regarding a certified document. It also means that the district court could not order disclosure in a FOIA lawsuit, nor does the government need to justify withholding under FOIA's standards in litigation, 5 U.S.C. § 552(a)(4)(B). In short, by its plain terms, the PNSDA makes photographs certified by the Secretary immune from FOIA disclosure or from FOIA litigation.

2. Even If FOIA Applies, the PNSDA Is an Exemption 3 Statute That Authorizes Withholding of the Photographs.

Even if FOIA governs, FOIA "does not apply" to matters that are "specifically exempted from disclosure by statute," if that statute "refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Exemption 3 applies when "(1) the statute invoked qualifies as an exemption 3 withholding statute, and (2) the materials withheld fall within that statute's scope." *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994).[1] The agency's burden, therefore, is

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[1] The OPEN FOIA Act of 2009 added a further requirement for a statute to qualify as an exemption 3 withholding statute: "if enacted after the date of enactment of the OPEN FOIA Act of 2009 [Oct. 28, 2009]," the statute must "specifically cite[ ] to this paragraph [i.e., 5 U.S.C. § 552(b)(3)]." 5 U.S.C. § 552(b)(3)(B). Because the OPEN FOIA Act and the PNSDA were sections 564 and 565, respectively, of the same act, Public

simply to "prov[e] that the documents withheld pursuant to Exemption 3 fell within the scope" of a withholding statute. *Id.* at 144.

"[E]xemption 3 . . . incorporates the policies of other statutes," and should be applied in accord with those statutes' meaning. *Id.* at 143-44. This Court construes withholding statutes by "looking to the plain language of the statute and its legislative history, in order to determine legislative purpose." *Id.* While other courts of appeals have held that withholding statutes should be given a narrow construction due to FOIA's disclosure principles, this Court has rejected that approach, noting that "the Supreme Court has never applied a rule of narrow or deferential construction to withholding statutes." *Id.* at 144.

Under these principles, the PNSDA precludes disclosure of the DoD photographs even if FOIA applies. The PNSDA plainly (and uncontestedly) qualifies as an exemption 3 withholding statute, as it refers to particular "protected document[s]" that, once certified by the Secretary of Defense, are not "subject to disclosure." And the photographs at issue here equally plainly fall within the PNSDA's scope. The Secretary's certification established that the photographs are protected documents because (1) the Secretary stated that disclosure would endanger United States citizens, servicemembers, or government employees abroad, (2)

Law No. 111-83, the PNSDA was not "enacted after" the OPEN FOIA Act.

the photographs were taken in the specified date range and relate to the specified subject matters.

Indeed, whether considered under exemption 3 or as a statute that on its own provides that FOIA does not apply, the "'plain meaning' of the [PNSDA] is sufficient to resolve the question" of whether the statute protects the covered photographs from disclosure. *Sims*, 471 U.S. at 167-68. The plain meaning provides that the Secretary's certification—and nothing else—is required to protect the documents from disclosure. Just as in *Sims*, which also considered whether FOIA mandated disclosure of national security-related information, here an agency head was given "very broad authority to protect [such information] from disclosure." *Id.* at 168-69. And just as in *Sims*, the PNSDA "does not state" that an agency must make a showing of need to justify protection from disclosure. *Id.* at 169-70. Instead, Congress through the PNSDA "simply and pointedly protected" all qualified documents whose disclosure the Secretary predicted would result in danger. *Id.* at 169-70.

Thus, the only issue in this case is whether the Secretary of Defense has "issued a certification," "stating" that disclosure of the photographs would endanger U.S. citizens, servicemembers, or employees abroad. He has. (JA 196, 240, 343). Accordingly, under the PNSDA the photographs are "protected document[s]" that are not "subject to disclosure" under FOIA or "any proceeding under" FOIA.

B. Judicial Review Is Limited to Whether the Secretary Issued a Certification and the Documents Otherwise Satisfy the PNSDA

When the withholding of photographs under the PNSDA is challenged, a court may review whether the statute's clear terms have been satisfied. But here, the district court went much further, undertaking a skeptical reassessment of the Secretary's determination that release of the photographs would cause harm and imposing requirements on the Secretary's process for making that determination. Such requirements are either not found in the PNSDA or directly contrary to its text. They are also contradicted by legal principles allowing the Secretary to choose how to perform his statutory mandate, and according deference to his predictive judgments in the fields of military and national security affairs.

The PNSDA itself provides clear and easily reviewable guidelines for determining if a photograph is properly withheld: it must have been taken during a specified period; it must relate to the treatment of certain persons by the U.S. armed forces; and the Secretary must have issued a certification stating his determination that disclosure would endanger U.S. citizens, servicemembers, or employees abroad. Judicial review should go no further than determining if those criteria were satisfied. *See EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600-01 (2014) ("[A] reviewing court's task is to apply the text of the statute, not to improve upon it." (quotation marks omitted)); *see also Virgin Atlantic Airways, Ltd. v. National Mediation Board*, 956 F.2d 1245, 1250 (2d Cir. 1992). The

PNSDA's protection of photographs from disclosure does not turn on the "correctness" of the Secretary's determination, much less on a district court's assessment of that "correctness." Instead, protection from disclosure is triggered merely by the fact that the Secretary concluded that disclosure would result in danger to the specified people, and stated as much in a certification. PNSDA § 565(c)(1)(A), (d)(1).

In its 2011 decision, the district court correctly recognized the scope of its review of the 2009 certification: it acknowledged that "these kinds of certifications need to be given conclusive respect" (JA 216), and the statute "requires [the court] to accept the point of danger" certified by the Secretary (JA 222). The court thus properly eschewed "any further *de novo* review." (JA 238).

Yet the court erroneously reversed course in reviewing the Secretary's 2012 and 2015 certifications. While conceding that the 2012 certification was "virtually identical" to the 2009 certification it had upheld, the court ruled that the 2012 certification was insufficient because it was "conclusory as to all" of those photographs, instead of focusing on each photograph individually. (JA 242, 389-91). Then, in 2017, the district court shifted ground again—concluding that the 2015 certification showed that "each photograph was reviewed individually," but rejecting the certification because the Secretary "failed to sufficiently explain the terms of his delegation" of authority to his subordinates. (JA 409-10).

In both instances, the district court exceeded the scope of judicial review permitted under the PNSDA.

The district court's "narrowing of [the Secretary's] authority . . . contravenes the express intention of Congress." *Sims*, 471 U.S. at 168-69.

1. The PNSDA Demonstrates That Judicial Review Is Limited to the Fact of the Certification

The PNSDA on its face makes the protection of a document turn solely on whether the Secretary has "issued a certification . . . stating" that danger to U.S. citizens, servicemembers, or employees deployed abroad will result from disclosure.

First, the statute requires the Secretary's certification to merely "stat[e]" that the danger will occur, and expressly allows the Secretary to "determine[]" that risk, showing that Congress intended to leave the assessment of risk to the Secretary. In *Webster v. Doe*, the statute allowed agency action when its director "shall deem [it] necessary or advisable," which the Supreme Court construed to mean the courts should not inquire into whether it "*is* necessary or advisable." 486 U.S. 592, 600 (1988). Similarly, here, a statute that simply requires the Secretary to "issue[] a certification" "stating" his determination of danger "fairly exudes deference" to the Secretary, and "forecloses the application of any meaningful judicial standard of review." *Id.*

Also significant is Congress's use of the word "certification," indicating its choice to put the disclosure decision in the hands of the Secretary. By requiring a "certification," Congress gave the Secretary the authority to "attest[]" that the "specified standard has

been satisfied." Black's Law Dictionary (10th ed. 2014); *accord* American Heritage Dictionary of the English Language (5th ed. 2016) ("certify" means to "confirm formally as true, accurate, or genuine," or to "guarantee as meeting a standard"). Thus Congress left the decision to the Secretary's judgment that the standard had been met, and did not require the Secretary to do more than issue a formal determination in the form of his "certification."

Nothing in the PNSDA requires the Secretary to justify that determination, provide factual support, or explain the process used to reach it. In contrast, Congress has many times expressly required the Secretary to explain or support a determination. *See, e.g.*, National Defense Authorization Act 2015, Pub. L. No. 113-291, § 1063, 128 Stat. 3292, 3503-04 ("certification shall include a discussion of the basis for such determination"); National Defense Authorization Act 2011, Pub. L. No. 111-383, § 832, 124 Stat. 4137, 4275-76 (Secretary's "determination" to include "an explanation of the basis for such determination"); National Defense Authorization Act 2008, Pub. L. No. 110-181, § 1074, 122 Stat. 3, 331 (Secretary to make a "determination . . . in writing . . . based on a threat assessment by an appropriate law enforcement, security, or intelligence organization" and must "include . . . the reason for such determination."). That Congress omitted such a mandate here demonstrates its intent that the certification alone suffices. *See Jama v. ICE*, 543 U.S. 335, 341 (2005) (courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply").

Moreover, this Court and the Supreme Court have long been reluctant to undertake judicial review of executive determinations regarding military affairs and national security. "'Recognizing the relative competencies of the executive and judiciary, we believe 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." *ACLU v. DOJ*, 681 F.3d 61, 70-71 (2d Cir. 2012) (quoting *Wilner v. NSA*, 592 F.3d 60, 76 (2d Cir. 2009)); *accord Center for National Security Studies v. DOJ*, 331 F.3d 918, 922 (D.C. Cir. 2003). Thus, where the "language and structure" of a statute indicate that Congress meant to commit national security judgments to an executive-branch agency, judicial review of those judgments is precluded. *Webster*, 486 U.S. at 601.

The district court relied on the general presumption that judicial review is available. (JA 255-56, 399). But that presumption is satisfied by a properly limited review of whether the terms of the PNSDA have been met. What is impermissible is the task the district court undertook: going beyond the four corners of the statute to delve into matters of national security, second-guess the predictive judgments of seasoned military officials, and dictate the way the Secretary reaches the conclusions Congress has authorized him to make.

In any event, the general presumption of judicial review is limited in national security cases. "One perhaps may accept" the proposition that in the "absence of any statutory provision precluding" judicial review,

such review is presumed—but that "proposition is not without limit, and it runs aground when it encounters concerns of national security." *Department of the Navy v. Egan*, 484 U.S. 518, 526-27 (1988) (quotation marks omitted). "The authority to protect" national security information rests with the executive branch, resulting from the "constitutional investment of power in the President." *Id.* And where, as here, "'the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.'" *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring)). The "[p]redictive judgment" required for national security determinations "must be made by those with the necessary expertise," and "it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence." *Egan*, 484 U.S. at 529.

Therefore, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530. Nor is there a "meaningful judicial standard of review" of the Secretary's underlying decisions. "Short of permitting cross-examination of the [Secretary] concerning his views of the Nation's security," there is "no basis on which a reviewing court could properly assess" the Secretary's predictive judgment of harm. *Webster*, 486 U.S. at 600.

Disregarding these principles, the district court imposed its own nonexpert national security judgment, apparently relying exclusively on its own impressions regarding the military and political situation in Iraq and elsewhere. For instance, the district court asserted that the President and Congress were accommodating the needs of the Iraqi prime minister in 2009 by withholding the photographs, needs the court believed were no longer present; relied on its evaluation of the military's personnel levels and changing mission in Iraq; and rested on its opinions regarding the motivations of terrorist adversaries. (JA 249-51, 382-83, 385-87, 389, 406-08).

That contradicts the Supreme Court's instruction that courts should not "rely exclusively on [their] own inferences drawn from the record evidence" when "litigation implicates sensitive and weighty interests of national security and foreign affairs." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010). "[W]hen it comes to collecting evidence and drawing factual inferences in this area [of national security], the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate"—particularly where, as here, they involve "efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess." *Id.* (quotation marks and citation omitted). Demanding "detail, specific facts, and specific evidence" to support the

government's assessment of harm would be a "dangerous requirement." *Id.*[2]

Congress also showed its intent to preclude judicial review of the Secretary's predictive judgment of harm by monitoring the certification process itself. The PNSDA requires the Secretary to notify Congress when he issues a certification or a certification renewal. PNSDA § 565(d)(4). Thus, the statute not only requires the Secretary to reassess the danger that disclosure may cause every three years, but gives Congress the opportunity to do so too. *Id.* § 565(d)(2), (3). Monitoring of the Secretary's decisions by Congress—which, of course, could repeal or modify the statute at any time—provides a powerful check on the Secretary's actions. The presence of that check further indicates that Congress saw no need for judicial review of PNSDA certifications. "The lack of any authorization for petitions by the public or review at the behest of members of the public, when viewed in the context of the limits on review built into the statute and the ex-

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[2] The danger of judicial speculation in military affairs is illustrated by the district court's reliance on its own extra-record perception that U.S. forces are "serving in an advisory rather than combat capacity." (JA 383; *accord* JA 250). As General Buchanan explained, the designation of the military mission "as a non-combat mission does not eliminate the fact that U.S. and Coalition Forces and Civilians operate in a hostile environment" and are "exposed to many risks." (JA 340).

plicit provision of congressional oversight as a mechanism to keep the [Secretary] to his statutory duty, strongly suggests that Congress intended no review at the behest of the public." *Banzhaf v. Smith*, 737 F.2d 1167, 1169 (D.C. Cir. 1984); *accord Dellums v. Smith*, 797 F.2d 817, 823 (9th Cir. 1986) ("Central to our analysis is the Ethics Act's provision for oversight of the Attorney General's compliance with the Ethics Act by members of the congressional judiciary committees, not the public.").

2. The PNSDA's Legislative History Shows That Congress Did Not Intend Judicial Review of the Secretary's Determination

The legislative history of the PNSDA confirms that Congress intended the Secretary's certification to be dispositive of whether the photographs at issue in this case can be withheld.

On May 13, 2009, President Obama publicly stated his concern that the release of the photos in this litigation would pose an unacceptable risk of danger to U.S. military personnel in Afghanistan and Iraq. (JA 235). The President explained that based on his review of the DoD photographs, their release "would not add any additional benefit" to the public's "understanding of what was carried out in the past by a small number of individuals." (JA 235). Rather, the President recognized that "the most direct consequence of releasing the photographs . . . would be to further inflame anti-American opinion and to put our troops in greater danger." (JA 235).

A week later, Congress responded by introducing the first version of legislation to protect the DoD photographs from disclosure. 155 Cong. Rec. S5671-74 (daily ed. May 20, 2009) (Amendment 1157). As the bill's sponsors stated, the legislation was introduced to endorse the President's statements the previous week regarding the DoD photographs and this litigation. *See id.* S5672 (statement by Sen. Graham) (legislation "addresses the lawsuit before our judicial system about the photos"); *id.* (statement by Sen. Lieberman) ("Those photographs are the subject of a Freedom of Information Act lawsuit filed by the American Civil Liberties Union.").[3] Indeed, legislators made clear that their intent was to "establish a procedure to prevent the detainee photographs from being released." *Id.* (statement by Sen. Lieberman); *accord id.* at S5673 (statement by Sen. Lieberman) ("[T]he language in the bill is clear that it would apply to the current ACLU lawsuit that gave rise to the President's decision last week."); *see* 155 Cong. Rec. at S5987 (daily ed. June 3, 2009) (statement by Sen. Lieberman) (bill is "clear" that it would "apply to the current ACLU lawsuit and block the release of these photographs, preventing the damage to American lives that would occur from that

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[3] Although several of the comments quoted in this discussion concerned versions of the bill that differed slightly from what was enacted, all of the proposals sought to prevent the release of post-September 11, 2001, detainee photographs that the Secretary of Defense certified would cause harm to U.S. citizens, servicemembers, or employees.

release"); *id.* at S5988 (statement of Sen. Graham) (bill meant "to make sure that the photos subject to the pending litigation were never released"); *id.* (statement of Sen. Graham) (Congress's intent "to give legislative backing to the idea that these particular photographs, and those like these photographs, should not be released for a period of 3 years, and that is in our national security interests to do so"). In conference, the relevant committees of the House and Senate confirmed that the PNSDA was intended to "[c]odif[y] the President's decision to allow the Secretary of Defense to bar the release of detainee photos." (JA 201).

The discussion also reflected the Senate's concern, as a result of conversations with U.S. military leaders, over the danger to American citizens, members of the armed forces overseas, and employees of the U.S. government deployed outside the United States that would result from the release of the DoD photographs. *See id.* at S5672 (statement by Sen. Graham) ("The President is rightfully concerned that to release more photos would add nothing to the overall knowledge base we have regarding detainee abuse, and it is simply going to put American lives in jeopardy."); *id.* (statement by Sen. Lieberman) (describing question posed to General Petraeus, General Odierno, and others regarding whether "the public release of these pictures [will] endanger America, American military personnel, and American Government personnel serving overseas?," and describing the answer received as "loud and clear: Yes, it will."); *id.* at S5673 (statement by Sen. Graham) ("If you release these photos, Americans are going to get killed for no good reason."); 155 Cong. Rec. at S5987 (statement by Sen. Lieberman)

("nothing less than the safety and security and lives of our military service men and women is at stake—not to mention our non-military personnel deployed abroad, not to mention Americans here at home and throughout the world"); *id.* (statement by Sen. Lieberman) ("We know that photographs such as the ones at issue in the ACLU lawsuit are, in fact, used by Islamic terrorists around the world to recruit followers and inspire attacks against American service men and women.").

This history makes clear that Congress intended the PNSDA to allow withholding of the photographs at issue in this very action, and to do so without further litigation. Congress's goal was to "bar the release" of the photographs, to "apply to the current ACLU lawsuit" upon the issuance of the Secretary of Defense's certification. Congress thus acted to "establish a procedure to prevent the detainee photographs [at issue in this lawsuit] from being released," 155 Cong. Rec. S5672 (statement by Sen. Lieberman)—not only not mentioning, in the history or text of the statute, that such a procedure would be subject to review in the courts, but strongly suggesting that the intent of the statute was to bring litigation to a halt. Nor, contrary to the district court's view (JA 245-46, 249-50, 368, 387, 389), did Congress indicate that the need to withhold disclosure depended on the needs of the Iraqi prime minister. Congress's intent of establishing a definitive mechanism for preventing the release of these photographs is inconsistent with the district court's holding that judicial review of the Secretary's underlying harm determination is available.

3. Even If the Secretary's Determination Is Reviewable, It Should Be Upheld

Even if the Secretary's determination were reviewable, it should be upheld. The Secretary's certification was well supported by a robust process leading to the recommendations of senior military officials and an informed determination by the Secretary himself, whose predictive judgments of harm should not be disturbed by the courts.

When judicial review of agency action is available, it is typically governed by the deferential standards of the Administrative Procedure Act. As provided in 5 U.S.C. § 706, a reviewing court must uphold agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Bechtel v. Administrative Review Board*, 710 F.3d 443, 446 (2d Cir. 2013). Courts applying this "'deferential standard'" "'may not substitute [their] judgment for that of the agency,'" instead ensuring that the agency has "'examined the relevant data and articulated a satisfactory explanation for its action.'" *Guertin v. United States*, 743 F.3d 382, 385-86 (2d Cir. 2014) (quoting *Bechtel*, 710 F.3d at 446, and *NRDC v. EPA*, 658 F.3d 200, 215 (2d Cir. 2011)). A court accordingly may set aside agency action "only if [the agency] 'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Bechtel*, 710 F.3d at 446 (quoting *National*

Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007)). Deference is particularly warranted where, as here, matters of national security are implicated. *ACLU v. DOJ*, 681 F.3d at 70-71; *Wilner*, 592 F.3d at 76; *Center for National Security Studies*, 331 F.3d at 922.

The certification here easily passes the APA test. The 2015 review began (*see supra* Statement Point H) with an individual examination of each photograph by a DoD attorney, who categorized and sorted them based on content and likelihood of danger; the photographs were then individually and independently reviewed again by uniformed officers on the Armed Forces' counterterrorism and detainee-operations staff, and similarly categorized and sorted. (JA 338). The combined work product of these two groups was then reviewed by four new civilian and uniformed attorneys, who again examined each photograph. (JA 338). After these three reviews determined that 198 photographs could be recommended for release, a sample of the remainder, selected to ensure they depicted the full range of imagery and severity of the photographs' content, were reviewed by four four-star generals, including three field commanders and the Chairman of the Joint Chiefs of Staff, the nation's highest-ranking military officer. (JA 338). Those generals unanimously concluded, based on their military and command expertise, that the photographs, if released, would be used to incite attacks and inspire distrust against U.S. personnel, putting them at risk of harm. (JA 339-41).

The generals' recommendations, as well as the 198 photographs proposed for release and the representative sample of the remainder, were then provided to the Secretary. (JA 341-42). Secretary Carter certified that, based on the recommendations of the commanding generals and the Chairman of the Joint Chiefs, as well as review of the photographs by DoD staff on the Secretary's behalf, he had determined that release of "any" photograph in the collection would endanger U.S. citizens, servicemembers, or employees abroad; therefore, "each" photograph is "protected." (JA 343).

That careful consideration at the highest levels of the U.S. military and Department of Defense of the potential danger that would result from disclosure of the photographs was thorough and reasonable, and plainly survives the deferential review courts apply to agency action. *See Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008) ("where an agency's analysis of a controversial application is detailed and thorough," decision will not be found arbitrary and capricious even where agency might have done more). Nothing in the record—nor in the district judge's own impressions of the political situation and state of armed conflict in Iraq and Afghanistan (JA 382-83, 385-87, 389, 406-08)—is sufficient to overcome the Defense Department's considered and expert assessment. Thus, even if this Court decides that judicial review of the Secretary's predictive judgment is available, it should uphold that determination and the certification that embodies it.

C. The PNSDA Does Not Prescribe the Process by Which the Secretary Must Certify Harm

The district court further erred in imposing procedural requirements on the Secretary's PNSDA certification, requiring the Secretary to consider each photograph individually, and restricting the flexibility accorded the Secretary in determining how to perform the task allowed under the PNSDA.

In its 2014 ruling, the district court held that the "plain language [of the PNSDA] . . . requires that the Secretary of Defense consider each photograph individually, not collectively." (JA 258). The court reasoned that that conclusion would also further FOIA's purpose of broad disclosure, as some of the photographs that the district judge considered "relatively innocuous" could possibly be disclosed without danger. (JA 258-59). Accordingly, the district court held that the government "must prove that the Secretary of Defense considered each photograph individually." (JA 259).

In 2017, however, the district court recognized that the 2015 certification referred to individual photographs, and that "each photograph was reviewed individually" in the DoD process. (JA 408-09). The court clarified that in its view, the "Secretary need not *personally* review each photograph," but instead "may delegate the individual reviews." (JA 409). However, the court continued, the Secretary must remain "personally responsible for the certification as to each photograph," and thus he must "establish the criteria" for categorizing and assessing the photographs, and "'ex-

plain the terms of his delegation.'" (JA 409-10 (quoting JA 328)). Those requirements, the district court ruled, had not been met.

But those requirements do not appear in the PNSDA. The Secretary shows he is "personally responsible" for the certification by "issu[ing]" it. PNSDA § 565(d)(1). Nothing in the statute requires the Secretary to do anything more to establish his personal responsibility. Indeed, as nothing in the PNSDA prescribes any particular means by which the Secretary is to make his determination, he has discretion to choose how to do so. *See JTEKT Corp. v. United States*, 642 F.3d 1378, 1383 (Fed. Cir. 2011) (agency acts "within its discretion" to choose means of performing task when "statute is silent as to any . . . methodology"); *Kennedy for President Comm. v. FEC*, 734 F.2d 1558, 1563 (D.C. Cir. 1984) ("statute's silence . . . manifests a discernible congressional intent to accord to the [agency] discretion in the formulation of a method"); *see Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (under "'very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure,'" court may not "'impose upon an agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good'" (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978) (alterations omitted))). More generally, the Secretary has specific statutory authority, "[u]nless specifically prohibited by law," to "exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate." 10 U.S.C. § 113(d).

Neither the PNSDA nor any other law authorizes a court to look behind the Secretary's decision regarding his degree of personal participation or the process by which he reached his determination. "'[W]hen a decision has been made by the Secretary . . . , courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination.'" *National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974) (Friendly, J.) (quoting *De Cambra v. Rogers*, 189 U.S. 119, 122 (1903)); *see United States v. Morgan*, 313 U.S. 409, 422 (1941) (improper to take cabinet officer's testimony regarding the "manner and extent of his study of the record and his consultation with subordinates" before making decision); *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (same); *Goetz v. Crosson*, 41 F.3d 800, 805 (2d Cir. 1994) ("The inner workings of administrative decision making processes are almost never subject to discovery."). Indeed, "government would become impossible if courts were to insist" that an agency head "personally familiarize himself" with all the evidence supporting a decision committed to him by statute. *Nutritional Foods*, 491 F.2d at 1146. Courts instead adhere to a "presumption of regularity with respect to the participation of the officer authorized to sign administrative orders," and therefore eschew further inquiry into the processes the

agency followed, or "the relative participation of the Secretary and his subordinates." *Id* at 1145.[4]

The district court's insistence that the Secretary of Defense himself must "establish the criteria" for categorizing and assessing the photographs, and "explain the terms of his delegation" (JA 409-10), contradicts those principles. Indeed, the district court apparently sought to micromanage the precise level of the Secretary's assignment of tasks to subordinates, acknowledging that uniformed and civilian staff had reviewed every photograph, but suggesting that the generals must do so as well. (JA 410). And the district court specified procedures—entirely foreign to the statute and outside the district court's expertise—that it thought DoD should follow: it should "compare" publicly available photographs to those being withheld and attempt to trace any instances of harm to prior disclosure; it should consider the evolution of the U.S. troop presence and scope of military operations in Iraq,

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[4] One reason for this rule is the "enormous volume of administrative decisions which must be made each year." *Yaretsky v. Blum*, 629 F.2d 817, 824 (2d Cir. 1980), *rev'd on other grounds*, 457 U.S. 991 (1982). There are literally hundreds of statutory and regulatory requirements that the Secretary of Defense make certifications, render determinations, or issue reports. In the National Defense Authorization Acts for fiscal years 2011 to 2015 alone, there are over seventy certification requirements, many of which require detailed and complicated analyses. Those would become impossible under the district court's rationale.

and it should consider the supposed fact that President Obama was "animated" by the no-longer-present need to bolster the Iraqi prime minister. (JA 406-07). In short, the district court demanded precisely the inquiry into the Secretary's "knowledge," "methods," and "relative participation" vis-à-vis subordinates that the law of this Court and the Supreme Court forbid.

While the district court cited *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998), for the proposition that the government "must provide an accounting of *how* it reached its conclusion" (JA 401), that case does not say that—it merely rejected an agency FOIA declaration as insufficiently detailed and specific. And the district court also cited *Gardels v. CIA*, a FOIA case where the court held that once it is "satisfied that proper procedures have been followed and that the [withheld] information logically falls into the exemption claimed, the courts need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith." 689 F.2d 1100, 1104 (D.C. Cir. 1982) (quotation marks omitted). Although undefined, the "proper procedures" required by the D.C. Circuit appear to mean procedures for asserting FOIA exemptions in the district court, not internal agency procedures.[5] In any event, that passing and

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[5] *Gardels* cited *Weissman v. CIA*, 565 F.2d 692, 697 (D.C. Cir. 1977), which, although also unclear, may have used the same phrase to refer to adherence to the procedures specified by executive order for classifying national security information. But because those procedures were incorporated into FOIA by 5

unelaborated reference cannot overcome the clear law of this Court, holding that the presumption of regularity requires that the judiciary may not inquire into agency processes or delegations.

And even if such an inquiry were permissible, the Secretary's delegation of the review of the photographs to subordinates was plainly reasonable. As explained above (*supra* Statement Point H, Argument Point I.B.3), DoD engaged in a thorough and robust review, involving assessments by numerous civilian and military attorneys, uniformed officers in the counterterrorism and detainee-operation unit, three four-star field commanders, the Chairman of the Joint Chiefs of Staff, and the Secretary of Defense. The Secretary's determination therefore easily exceeds the standards of this Court, which has held it will "suffice" if the agency head "considered [staff] summaries" of the underlying matters "and conferred with his staff about them." *Nutritional Foods*, 491 F.2d at 1146.

POINT II

FOIA Exemption 7(F) Applies to the Photographs

Separately from the PNSDA, FOIA's exemption 7(F) applies to the photographs at issue here.

U.S.C. § 552(b)(1), they provide no basis for concluding that a court can, contrary to *Nutritional Foods* and other case law, inquire into internal agency procedures beyond statutory requirements.

Exemption 7(F) 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). Here, it is undisputed that the photographs were compiled for law enforcement purposes. *ACLU v. DoD*, 543 F.3d at 67. Accordingly, the only question is whether release of the photos "could reasonably be expected to endanger the life or physical safety of any individual." The district court followed this Court's now-vacated 2008 decision in holding that to assert exemption 7(F), the government must identify a specific endangered individual or small group of individuals, rather than a member of a large at-risk group. (JA 410-12). That approach reads the exemption too narrowly.[6]

"The scope of [exemption 7(F)] is broadly stated." *Electronic Privacy Information Center v. Department of Homeland Security* ("*EPIC*"), 777 F.3d 518, 523 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 876 (2016). Exemption 7(F) protects documents whose disclosure

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[6] As this Court's prior decision was vacated by the Supreme Court, it is no longer binding. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (vacatur by Supreme Court "clears the path for future relitigation of the issues between the parties"); *Brown v. Kelly*, 609 F.3d 467, 476-77 (2d Cir. 2010). The conflict with the more recent decision of the D.C. Circuit described below should counsel caution in following the vacated opinion.

could be expected to endanger "*any* individual." That text is plain: "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quotation marks omitted); *accord Boyle v. United States*, 556 U.S. 938, 944 (2009) ("any" "has a wide reach"); *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007) ("any" underscores intent to have broad scope); *Salinas v. United States*, 522 U.S. 52, 56-57 (1997) ("any" suggests "expansive" and "unqualified" scope).

Those definitions apply here. "[I]n the context of Exemption 7(F) the word 'any' demands a broad interpretation." *EPIC*, 777 F.3d at 525. "Congress could have, but did not, enact a limitation on Exemption 7(F), such as 'any specifically identified individual.'" *Id.* (citing *Sims,* 471 U.S. at 169 n.13). Indeed, Congress did so in the Privacy Act, affording "special treatment to certain law enforcement records associated with an 'identifiable individual.'" *Id.* (quoting 5 U.S.C. § 552a(a)(6), (j)(2)(B), (*l*)(2).

By employing the broader language of "any individual" in FOIA, "Congress contemplated protection beyond a particular individual who could be identified before the fact." *Id.*; *see United States v. Gonzales*, 520 U.S. 1, 5 (1997) (absent "language limiting the breadth of that word," term "any" should be given normal, expansive meaning). There is "no textual basis" in exemption 7(F) for requiring the government to "identify the specific individuals at risk from disclosure, and to do so would be to take a red pen to the words chosen by Congress that are to be understood to have their

ordinary meaning." *EPIC*, 777 F.3d at 525 (quotation marks and alteration omitted). When the government shows that disclosure "poses a concrete and non-speculative danger to numerous albeit unspecified individuals, and . . . thereby assert[s] a direct nexus between disclosure and a reasonable possibility of personal harm," exemption 7(F) applies. *Id.*

And the national security context again requires deference to the government's predictive judgments. In matters of national security, "before-the-fact individual identification is unlikely to be practical." *Id.* "'The confluence of Exemption 7(F)'s expansive text and the court's generally deferential posture when it must assess national security harms'" means that the government may satisfy exemption 7(F)'s "risk threshold" by showing unspecified individuals may be expected to be harmed. *Id.* (quoting *Public Employees for Environmental Responsibility v. U.S. Section, International Boundary & Water Comm'n*, 740 F.3d 195, 205 (D.C. Cir. 2014)). More generally, in FOIA cases, courts "have expressly recognized the propriety of deference to the executive" with respect to "claims which implicate national security." *Center for National Security Studies*, 331 F.3d at 926-27; *accord Gardels*, 689 F.2d at 1104-05.

Nor does "adhering to the plain text of Exemption 7(F) eviscerate Exemption 1," which protects records properly classified in the interests of national security. *EPIC*, 777 F.3d at 526; *contra ACLU v. DoD*, 543 F.3d at 72-74. That exemption is broader, as it "applies even to records *not* compiled for law enforcement purposes." *EPIC*, 777 F.3d at 526. Exemptions often overlap with

respect to a particular record, even while the exemptions have different thresholds for protection from disclosure, but there is no reason to read them as mutually exclusive.

The statutory history of exemption 7(F) confirms the D.C. Circuit's understanding. In its original form, exemption 7(F) applied only to documents whose disclosure would "endanger the life or physical safety of any law enforcement officer." 5 U.S.C. § 552(b)(7) (1982). In 1986, however, Congress expanded the exemption to encompass the life and physical safety "of any individual." The Court must give meaningful effect to that significant expansion of the exemption's coverage. *Stone v. INS*, 514 U.S. 386, 397 (1995).

"[U]nderstood in context, the phrase 'any individual' makes clear that Exemption 7(F) now shields the life or physical safety of *any* person, not only the law enforcement personnel protected under the pre-1986 version of the statute." *EPIC*, 777 F.3d at 525. This Court's prior opinion suggested that Congress intended to extend exemption 7(F) only to non-law enforcement officers who were "involved in [law enforcement] investigations . . . [and] faced similarly specific threats of violence," relying on statements of members of Congress and a Deputy Assistant Attorney General. *ACLU v. DoD*, 543 F.3d at 77-80. But as the D.C. Circuit pointed out, other legislators' comments "viewed the amendment to Exemption 7(F) as relatively

broad,"[7] and the same Deputy Assistant Attorney General also expressed concerns that the prior version of the exemption did not protect "'the life of any other person.'" *EPIC*, 777 F.3d at 527. In any event, none of these pieces of legislative history are sufficient to overcome the clear meaning of the broad statutory text that was actually enacted. *Id.*

For all those reasons, this Court's now-vacated holding that exemption 7(F) requires an agency to "identify at least one individual with reasonable specificity" who "could reasonably be expected" to be endangered by a document's disclosure, 543 F.3d at 71, was erroneous. Under that rule, the document in *EPIC*—a Department of Homeland Security protocol for preventing the use of wireless networks to detonate explosive devices, as they were used to bomb the London subway in 2005—would not have been protected from disclosure by exemption 7(F). In that case, the government similarly was unable to identify a specific individual, as the population at risk was "anyone in the United States," 777 F.3d at 524: there was no way to know in advance which Americans might fall victim to an improvised explosive. The need to prevent disclosure—and the resulting circumvention—of such a life-

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[7] In particular, the "principal author" and sponsor of the exemption 7 amendments emphasized that "[t]here should be no misunderstanding" that the relevant amendments "are intended to broaden the reach of this exemption" and "ease considerably [the government's] burden in invoking it." 132 Cong. Rec. 31,423-31,424 (1986).

saving protocol is obvious, and the D.C. Circuit correctly held that exemption 7(F) applies. Yet under the *ACLU v. DoD* rule, such "risks that are speculative with respect to any individual" but are "certain" if a large population is implicated—the situation here and in *EPIC*—would not trigger that exemption's protection. That makes little sense: as the government stated to the D.C. Circuit, "it would be anomalous if it could withhold [a record] if disclosure poses a danger to a small group of specifically identifiable people but not where many or most people would be endangered by production." 777 F.3d at 524.

This Court should therefore follow the D.C. Circuit's holding that the government need not identify specific individuals at risk to invoke exemption 7(F). If the Court declines to adopt the government's view regarding the PNSDA, it should remand to the district court to allow the government to make the requisite factual submissions to support nondisclosure under exemption 7(F).

CONCLUSION

The judgment of the district court should be reversed.

Dated: New York, New York
June 30, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 13,440 words in this brief.

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ADDENDUM

Protected National Security Documents Act of 2009 (Department of Homeland Security Appropriations Act 2010, 111 Pub. L. 83, 123 Stat. 2142, § 565)

(a) Short Title.—This section may be cited as the "Protected National Security Documents Act of 2009".

(b) 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.

(c) Definitions.—In this section:

(1) Protected document.—The term "protected document" means any record—

(A) 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; and

(B) that is a photograph that—

(i) was taken during the period beginning on September 11, 2001, through January 22, 2009; and

(ii) 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.

(2) Photograph.—The term "photograph" encompasses all photographic images, whether originals or

copies, including still photographs, negatives, digital images, films, video tapes, and motion pictures.

(d) Certification.—

(1) In general.—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 [*2185] 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.

(2) Certification expiration.—A certification and a renewal of a certification issued pursuant to subsection (d)(3) shall expire 3 years after the date on which the certification or renewal, is issued by the Secretary of Defense.

(3) Certification renewal.—The Secretary of Defense may issue—

(A) a renewal of a certification at any time; and

(B) more than 1 renewal of a certification.

(4) Notice to congress.—The Secretary of Defense shall provide Congress a timely notice of the Secretary's issuance of a certification and of a renewal of a certification.

(e) Rule of Construction.—Nothing in this section shall be construed to preclude the voluntary disclosure of a protected document.

(f) Effective Date.—This section shall take effect on the date of enactment of this Act and apply to any protected document.

Freedom of Information Act, 5 U.S.C. § 552: Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

. . . .

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

. . . .

(4)

. . . .

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters

to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

. . . .

(b) This section does not apply to matters that are—

. . . .

(3) 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.

. . . .

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reason-

ably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual; . . . .