UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, et al.,

Defendants.

No. 04 Civ. 4151 (AKH)

DEFENDANT DEPARTMENT OF DEFENSE'S MEMORANDUM OF LAW IN SUPPORT OF ITS EIGHTH MOTION FOR SUMMARY JUDGMENT

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Defendant Department of Defense, including its components Department of Army, Department of Navy, Department of Air Force, and Defense Intelligence Agency (collectively, "DoD" or "the Government"), by and through its attorney, Preet Bharara, the United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in in support of DoD's eighth motion for summary judgment regarding its withholding of certain photographs pursuant to the Protected National Security Documents Act of 2009 (the "PNSDA")[1] and, separately, the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(3) & 7(F).

PRELIMINARY STATEMENT

As the Court is aware, in 2009, in direct response to a judicial order compelling disclosure of DoD photographs at issue in this litigation, Congress passed the PNSDA, a statute that, by its terms, specifically precludes application of the Freedom of Information Act to compel disclosure of those photographs. The PNSDA provides that if the Secretary of Defense issues a certification stating that the release of certain photographs would endanger U.S. citizens, military personnel, or employees abroad, then those photographs are not subject to disclosure under FOIA. Shortly after passage of the statute, Secretary of Defense Robert Gates issued just such a certification, and this Court correctly held that the photographs covered by the certification could not be ordered released in this FOIA action. (Dkt. Nos. 469, 474). Yet when Secretary of Defense Leon Panetta issued an essentially identical renewal certification three years later to justify the continued withholding of these photographs, as permitted by the PNSDA, this Court reversed course, holding that the Panetta Certification and the supporting record proffered by DoD were not sufficient to show that the requirements of the PNSDA were met, and ordering the photographs disclosed. (Order & Op. dated Aug. 27, 2014 (Dkt. No. 513); Order dated Feb. 18,

[1] Section 565 of the Department of Homeland Security Appropriations Act, 2010 Pub. L. No. 111-83, 123 Stat 2184.

2015 (Dkt. No. 543)).

The Government appealed the Court's judgment compelling disclosure of the DoD photographs. However, during the pendency of the Government's appeal, the Panetta Certification expired, Secretary of Defense Ashton Carter issued a PNSDA certification covering a smaller set of the DoD photographs, and DoD publicly released 198 photographs. Because the Carter Certification "has the potential to obviate many of the issues cited by the district court in granting relief," the Second Circuit vacated this Court's judgment and remanded the case so that this Court could consider the Carter Certification. (Dkt. No. 558).

DoD now moves for summary judgment on the basis of the Carter Certification. As an initial matter, the Government continues to maintain that pursuant to the plain language of the PNSDA, Secretary Carter's issuance of a certification is alone sufficient to preclude disclosure of the covered photographs. Judicial review of the underlying basis for the Secretary's certification 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 be conclusive. While we recognize that the Court previously held that judicial review of the factual basis for the Secretary's determination is proper, we respectfully request that the Court revisit this ruling, and grant summary judgment to the Government on the basis of Secretary Carter's issuance of a PNSDA certification.

If the Court adheres to its prior ruling that judicial review of the basis underlying the Secretary's certification decision is appropriate, the Court should nevertheless grant the Government summary judgment based upon the record underlying issuance of the Carter Certification. To the extent judicial review extends beyond the fact of Secretary Carter's

certification, such review should be governed by the deferential standards of the Administrative Procedure Act. Secretary Carter's certification easily passes muster, especially under this deferential standard. While the PNSDA does not prescribe the process by which the Secretary must certify harm, in fact the record supporting issuance of the Carter Certification (which is materially different from that supporting issuance of the Panetta Certification) establishes that several individualized reviews of each photograph were conducted at Secretary Carter's direction by both civilian and military attorneys and officers, and that Secretary Carter properly concluded that public disclosure of any of the certified photographs would endanger U.S. citizens, military personnel, or employees abroad.

Finally, separately from the PNSDA, FOIA's Exemption 7(F) also precludes disclosure of the photographs at issue, as their public release could reasonably be expected to endanger the lives and safety of U.S. and other persons abroad.

For any these reasons, the Court should grant the Government's eighth motion for summary judgment.

BACKGROUND

A. Procedural History Preceding Issuance of the Carter Certification

1. Procedural History Through Passage of the PNSDA

The procedural history of this litigation concerning the DoD photographs through passage of the PNSDA is fully described in DoD's Memorandum of Law in Support of Its Sixth Motion for Summary Judgment, along with a detailed account of the legislative history of the PNSDA. (*See* Exhibit A to the Declaration of Tara M. La Morte dated February 26, 2016 ("La Morte Decl.") at 2-13 (Dkt. No. 457)). To briefly recount, in response to a complaint filed by the

ACLU on June 2, 2004, seeking public disclosure of 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, DoD identified, among other things, a number of photographs of detainees contained in, or derived from, records of investigations of allegations of detainee abuse. The Government sought to withhold these photographs pursuant to FOIA Exemptions 6, 7(C), and 7(F). This Court rejected the Government's exemption claims, and its decision was affirmed by the Second Circuit in September 2008. *See ACLU v. DoD*, 543 F.3d 59 (2d Cir. 2008), *vacated*, 558 U.S. 1042 (2009). The Government filed a petition for certiorari.

2. Passage of the PNSDA

While the Government's petition for certiorari was pending, Congress passed the PNSDA. The PNSDA was specifically intended to "[c]odif[y] the President's decision to allow the Secretary of Defense to bar the release of detainee photos."[2] It provides that:

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

PNSDA § 565(b). To fall within subsection (c)'s definition of 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 "on September 11, 2001 through January 22, 2009," *id.* § 565(c)(1)(B)(i); and

(c) be a record "for which the Secretary of Defense has issued a certification, as

[2] Conference Summary by the United States Senate and U.S. House of Representatives Committees on Appropriations on the Department of Homeland Security Appropriations Act, FY 2010, dated October 7, 2009.

> 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).

The "term 'photograph' encompasses all photographic images, whether originals or copies, including still photographs, negatives, digital images, films, video tapes, and motion pictures." *Id*. § 565(c)(2).

The PNSDA does not specify the procedures by which the Secretary should make the certification. It simply states that the Secretary "shall issue [such] a certification" if he "determines that disclosure of that photograph would endanger" U.S. citizens, servicemembers, or employees abroad. *Id.* § 565(d)(1).

The PNSDA further provides that any such certification "shall expire 3 years after the date on which the certification . . . is issued by the Secretary of Defense." *Id.* § 565(d)(2). The PNSDA also allows for the Secretary to issue "a renewal of a certification at any time," and may issue "more than 1 renewal of a certification," although, like the original certification, a renewal certification will expire 3 years after the Secretary issues it. *Id.* § 565(d)(2) & (3).

Finally, the PNSDA provides for direct Congressional oversight of any certification issued under the PNSDA, by requiring the Secretary to provide "timely notice" to Congress when he issues a certification or a renewal certification pursuant to the PNSDA. *Id.* § 565(d)(4).

3. Issuance of the Gates Certification and this Court's Ruling Upholding the Gates Certification

In November 2009, shortly after passage of the PNSDA, then-Secretary of Defense Robert Gates signed a certification covering the DoD photographs at issue in this case. (*See* La Morte Decl. Ex. B).

Following issuance of the Gates Certification, the Supreme Court granted the Government's petition for certiorari, vacated the Second Circuit's judgment upholding the this Court's disclosure order, and remanded the action for further consideration in light of the PNSDA and the Gates Certification. *DoD v. ACLU*, 558 U.S. 1042 (2009). On remand, this Court granted summary judgment for DoD. (Dkt. Nos. 469, 474). In an oral ruling, based solely on the face of the Gates Certification, this Court rejected the ACLU's suggestion that the court 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." (Dkt. No. 474).

4. Issuance of the Panetta Certification and this Court's Ruling Rejecting the Panetta Certification

In November 2012, then-Secretary of Defense Leon Panetta signed a renewal certification which, as this Court recognized, was "virtually identical" to the Gates Certification. (Aug. 27, 2014 Order at 6; *see* La Morte Decl. Ex. C). In advance of the certification, an attorney in DoD's Office of the General Counsel was designated by the General Counsel to review each photograph individually on the Secretary's behalf. (*See* La Morte Decl. Ex. D). During her review, the attorney sorted the photographs into three categories based on their content, and then, working with the leadership of the Office of General Counsel, selected between five and ten photographs from each category that were representative of all of the photographs in each category. (*See id.*). This representative 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 each reviewed the sample and recommended to the

Secretary that all of the photographs be recertified pursuant to the PNSDA. (*See id*.).

The parties filed cross-motions for summary judgment regarding the sufficiency of the Panetta Certification to justify withholding the DoD photographs. In August 2014, this Court entered an order concluding that the Panetta Certification was insufficient. (Dkt. No. 513). Although the Court previously acknowledged that *de novo* review of the Gates Certification was not proper, it now stated that in 2009 it had "effectively conducted a *de novo* review" of the Gates Certification. (*Id.* at 5, 10). With respect to the Panetta Certification, the Court *sua sponte* observed that at the time of its issuance, "the United States' combat mission in Iraq had ended (in December 2011), and all (or mostly all) American troops had been withdrawn from Iraq." (*Id.* at 10). "Given the passage of time," the Court continued, "I have no basis for concluding either that the disclosure of photographs depicting the abuse or mistreatment of prisoners would affect United States military operations at this time, or that it would not." (*Id.* at 11).

The Court further determined that it should conduct a *de novo* review of the Panetta Certification to assess whether the Secretary had a sufficient factual basis to conclude that release of the photographs at issue would endanger U.S. citizens, military personnel, or employees abroad. (*Id.* at 16-17). Because the Court determined that the record did not include adequate information to support Secretary Panetta's determination of harm, it provided the Government with an opportunity to create a record to "support[ ] the factual basis" for its assertion that the photographs should be withheld. (*Id*.).

The Court also determined that the PNSDA requires the Secretary to consider each photograph individually, rather than collectively, and held that the Panetta Certification suggested that the Secretary reviewed the photographs as a collection, and thus was insufficient.

(*Id*. at 18-19). The Court provided the government with an opportunity to submit additional evidence to demonstrate that the Secretary of Defense considered each photograph individually. (*Id*. at 20).

The Government then submitted a declaration explaining the process behind the Panetta Certification, as briefly described briefly above. (*See* La Morte Decl. Ex. D). In February 2015, the Court found the additional materials submitted by the Government insufficient to satisfy the PNSDA. (Dkt. No. 543). The Court entered an order stating 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 such photographs. (*Id.* at 2). "He may obtain such knowledge either by reviewing the photographs personally or having others describe their contents to him," "but he may not rely on general descriptions of the 'set' of 'representative samples,' as such aggregation is antithetical to individualized review without precise criteria for sampling." (*Id.* at 2-3). The Court also stated that the certification must make clear "the Secretary's factual basis for concluding that disclosure would endanger U.S. citizens, Armed Forces, or government employees." (*Id.* at 3). "At minimum, the Court concluded, "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." (*Id*.). The Court provided the Government with another opportunity to make further submissions (*id.*), which the Government declined (Dkt. No. 547). The Court then ordered disclosure of the photographs, and on April 1, 2015, entered final judgment.

5. Appeal of the District Court's Judgment and Subsequent Remand

The Government appealed. Following briefing of the appeal, however, Secretary Paentta's Certification of November 9, 2012, expired, and Secretary of Defense Ashton Carter issued a new certification on November 7, 2015. The Government thus moved to vacate this Court's judgment and remand the matter for further proceedings in light of these changed circumstances. By order dated January 6, 2016, the Circuit granted the Government's motion, explaining that while the Carter Certification does not affect every issue raised on appeal, it "has the potential to obviate many of the issues cited by the district court in granting relief," and thus the district court should consider the Carter Certification in the first instance. (Dkt. No. 558).

B. The Carter Certification

1. Multi-Phase Individualized Review of the Photographs

Approximately six months prior to expiration of the Panetta Certification, DoD began to implement a multi-phase process of reviewing the certified photographs to assist Secretary Carter in determining whether to recertify some or all of the photographs. (Declaration of Liam M. Apostol dated February 26, 2016 ("Apostol Decl.") ¶ 2). As described below, this process involved a review of each and every photograph undertaken by both counsel and military officers at the behest of the Secretary (*see id.* Ex. 1), and resulted in the decision to publicly release approximately 198 previously-certified photographs (*id*. ¶ 8). At the direction of the Secretary, DoD counsel and military officials devised the review by considering the process undertaken for prior PNSDA certifications and the views expressed by this Court. (*Id*. ¶ 4).

In the first phase of the review process, an attorney from DoD's Office of General Counsel ("OGC") individually examined each photograph, and initially categorized them based

on the content of the photograph and then further sorted them within each category based on the likelihood that public release of the photograph would result in the harm the PNSDA was designed to prevent, *i.e.*, endangerment of U.S. citizens, members of the Armed Forces, or employees deployed outside the United States. (*Id.* ¶ 5).

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). (*Id.* ¶ 6). These commissioned officers collectively have extensive knowledge of the Armed Forces and of our adversaries in Afghanistan, Iraq, and other regions of the Middle East and Africa. (*Id.*). They conducted this independent review of each photograph for the same purpose as counsel – to categorize the photographs based upon their content and the likelihood that public disclosure of the photographs would lead to the harm that the PNSDA was designed to prevent. (*Id.* ¶ 6). The photographs were categorized in this manner to ensure creation of a truly representative sample that reflected the full spectrum of what the entire group of photographs depicted for the Secretary's review. (*Id.*; *see also id.* ¶ 5).

Next, three attorneys in OGC and one uniformed attorney with the Department of the Army conducted a third review of the combined work product of the initial OGC attorney and the commissioned officers assigned to Joint Staff J37. (*Id.* ¶ 7). Neither the attorney who conducted the first phase of review nor the commissioned officers who conducted the second phase of review took part in this third review. (*Id.*). The officials conducting this review examined each photograph to assess the likelihood of harm it would cause to U.S. citizens, troops, and employees operating abroad if publicly disclosed. (*Id.*). After completing the third

review, these attorneys coordinated with the Joint Staff 37 officers and uniformed attorneys from the Office of Legal Counsel for the Chairman of the Joint Chiefs of Staff to reach a final consensus. (*Id.*).

As a result of this multi-tiered process, 198 photographs were determined to be least likely to cause harm and proposed for non-certification. (*Id.* ¶ 8). DoD's OGC developed a representative sample of the remaining photographs 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, so that they could provide informed recommendations to the Secretary regarding the likelihood that public disclosure of any of the photographs could result in harm. (*Id.*). Photographs were compiled from all of the categories created to ensure that the sample reflected the full scope of the imagery depicted in the photographs as well as the full range of the gravity of the content. (*Id.*).

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 photographs and each assessed that public disclosure would endanger the lives of U.S. personnel operating abroad. General Lloyd J. Austin, who has been the Commander of U.S. Central Command since March 22, 2013, 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 stake.'" (*Id.* ¶¶ 9-10). The "'tremendous challenges'" posed by these groups have required "'U.S. and Coalition-led operations in Afghanistan, Iraq, Syria, Yemen, and Egypt.'" (*Id.* ¶ 10). 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.'" (*Id.* (emphasis added)). With respect to the aggressive Violent Extremist Organizations ("VEOs") operating in the region, General Austin confirmed that they "'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, and opined, as a result, that they "'will undoubtedly use the photographs in their propaganda efforts to encourage threats of U.S. service members and U.S. Government personnel.'" (*Id.* (emphasis added)). Overall, public disclosure of the photographs "'could reasonably be expected to . . . fuel[] unrest, increase targeting of U.S. military and civilian personnel, and provid[e] a recruiting tool for insurgent[s] and VEOs.'" (*Id.* ¶ 10).

General David M. Rodriguez, the Commander of U.S. Africa Command since April 5, 2013, has commanded at every level, including the United States Army Forces Command and the International Security Assistance Force – Joint Command in Afghanistan. (*Id.* ¶ 11). In his recommendation to Secretary Carter, General Rodriguez described how Africa faces threats from a wide variety of sources, including "'transnational terrorist and criminal networks [and] regional armed conflict.'" (*Id.* ¶ 12). In particular, in "'North and West Africa, Libyan and Nigerian insecurity increasingly threatens U.S. interests. . . . Armed groups control large areas of territory in Libya and operate with impunity.'" (*Id.*). A number of VEOs, 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.'" (*Id.*). 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. (*Id.* ¶ 13).

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. (*Id.* ¶ 15 (emphasis added)). 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.'" (*Id.*). 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. (*Id.* ¶ 16). He also agreed that the photographs would be used by VEOs to inspire violence, among other things. (*Id.*).

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. (*Id.* ¶ 18). He concluded that "'[d]isclosure of <u>any</u> of the photographs recommended for recertification <u>would result in a substantially increased level of danger</u> 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.'" (*Id.* ¶ 18 (emphasis added)).

3. Secretary Carter's PNSDA Certification

Secretary Carter was presented with 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. (*Id.* ¶ 19). Secretary Carter declined to certify any of the 198 photographs, which were released on February 5, 2016. (*Id.*). On November 7, 2015, Secretary Carter certified each of the remaining photographs pursuant to the PNSDA. (*Id.* ¶ 19 & Ex. 1).

The Carter Certification is not identical to the certifications issued by Secretaries Gates or 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." (*Id.* Ex. 1).

Further, the Carter Certification explains that on the basis of the recommendations of his 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." (*Id.* Ex. 1). Accordingly, "each" photograph "continues to meet the standard for protected documents" as defined in the PNSDA. (*Id.* Ex. 1). The certification also directs that notice of its issuance be provided to Congress. (*Id.* Ex. 1).

ARGUMENT

A. The PNSDA, in Conjunction with the Carter Certification, Precludes Disclosure of the Certified Photographs

1. The PNSDA Forecloses Disclosure of Protected Photographs Under FOIA

The PNSDA 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 making them "protected documents" under the PNSDA. Secretary Carter did just that. The Carter certification complies with the express terms of the PNSDA, and that is the end of the inquiry: the photographs certified are therefore not subject to FOIA disclosure.

The plain language of the PNSDA provides that "[n]otwithstanding any other provision of 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). The statute specifically defines a protected document as "any record" that (1) is "a photograph" taken between "September 11, 2001, through January 22, 2009"; (2) "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"; and (3) is 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) (emphasis added).

Each of the photographs certified by Secretary Carter falls within the definition of a "protected document." There is no dispute that each the photographs at issue here (which constitute a subset of the photographs previously certified by Secretaries Panetta and Gates) was taken during the specified period and relate to the treatment of the specific persons. (Dkt. No. 444); PNSDA § 565(c)(1). And there can be no question that they are photographs for which Secretary Carter has issued a certification stating that disclosure of each would endanger United States citizens, members of the U.S. Armed Forces, or U.S. government employees abroad.

PNSDA § 565(c)(1). Indeed, as described more fully below, the Carter Certification (unlike the preceding certifications) expressly addresses each certified photograph in the singular, making abundantly clear that disclosure of "any" one of the certified photographs would endanger U.S. citizens, servicemembers, and employees deployed abroad, and therefore concludes that "each" photograph separately qualifies as a "protected document." (Apostol Decl. Ex. 1; *compare* La Morte Decl. Exs. B & C).

As noted above, the text of the PNSDA dictates that such "protected document[s]" are not subject to disclosure under FOIA. The statute's operative provision begins with a "notwithstanding" clause, which "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). Thus, while FOIA calls for "broad disclosure," as this Court observed in its previous decision (Aug. 27, 2014 Order at 7), this mandate simply does not apply to the PNSDA, which expressly *forbids* disclosure of any "protected document" under FOIA or in any FOIA proceeding. Nor does FOIA's imposition of the burden of proof on the Government to justify withholding in litigation apply here, 5 U.S.C. § 552(a)(4)(B), as made clear by the PNSDA's explicit reference to "any proceeding under [FOIA]." PNSDA § 565(b). Simply put, the PNSDA unequivocally prohibits disclosure of protected documents, including under FOIA or in any proceeding under FOIA.

Even if FOIA governed, however, the result would be the same. FOIA itself provides that it "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). This Court previously determined (and Plaintiffs do not contest) that the PNSDA qualifies as such a

statute. (Aug. 27, 2014 Order at 7). Accordingly, the agency's burden to justify invocation of Exemption 3 in conjunction with the PNSDA is simply to "prov[e] that the documents withheld pursuant to Exemption 3 fell within the scope" of the PNSDA. *See A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 144 (2d Cir. 1994) (discussed in Aug. 27, 2014 Order at 11-13).

In construing withholding statutes such as the PNSDA, the Second Circuit has instructed courts to look "to the plain language of the statute and its legislative history, in order to determine legislative purpose." *Id.* at 143-44. The Circuit adopted that approach after considering, and rejecting, the views of other courts of appeals, which had held that withholding statutes should be given a narrow construction due to FOIA's disclosure principles. *Id.* at 144.

Under these principles, the PNSDA precludes disclosure of the DoD photographs even if FOIA applies. The photographs certified by Secretary Carter plainly fall within the PNSDA's scope; as described herein, Secretary Carter expressly determined that each constitutes a "protected document." That is the end of the matter. While this Court previously ruled that it may review the factual basis underpinning a PNSDA certification (*see* Aug. 27, 2014 Order at 17), in fact the PNSDA nowhere states that protection from disclosure turns on a showing by the agency that protection is needed. *See CIA v. Sims*, 471 U.S. 159, 169-170 (1985) (noting that nothing in the National Security Act, an Exemption 3 statute, states that protection from disclosure must be justified by a showing by the agency that such protection is "needed").

2. 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's review extends to whether the clear terms of the statute have been satisfied. As described above, the PNSDA imposes only three specific requirements before a photograph becomes "protected": it

must have been taken during a specified timeframe; 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 of the photograph would endanger U.S. citizens, servicemembers or employees abroad. PNSDA § 565(c)(1). Judicial review should go no further than determining if those criteria were met. "[A] reviewing court's 'task is to apply the text of the statute, not to improve upon it.'" *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600-01 (2014) (quoting *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989)).

The text, subject matter, and legislative history of the PNSDA all confirm that judicial review is limited to whether the Secretary issued a PNSDA certification and whether the records at issue meet the three easily reviewable criteria set forth in the statute. 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. That the statute requires the Secretary's certification to merely "stat[e]" that the danger will occur is telling—nothing in the PNSDA requires the Secretary to justify or explain his determination, or even provide any factual basis for it, in the certification or elsewhere. In contrast, Congress has in numerous enactments expressly required the Secretary to explain or provide a basis for a determination.[3] That Congress omitted such a mandate here demonstrates its intent that the certification alone suffices for withholding, and that

[3] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1063, 128 Stat. 3292, 3503-04 ("The certification shall include a discussion of the basis for such determination"); National Defense Authorization Act for Fiscal Year 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 for Fiscal Year 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 that the Secretary "include . . . the reason for such determination").

judicial review of the underlying basis for the certification is not appropriate. *See Jama v. Immigration & Customs Enforcement*, 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").

The lack of judicial review of the Secretary's underlying determination (as opposed to the fact of certification) is underscored by the subject matter of that determination: matters of military affairs and national security. The Second Circuit and the Supreme Court have long been reluctant to undertake judicial review in the sphere of 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)). 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 v. Doe*, 486 U.S. 592, 601 (1988). While this Court noted that a presumption of judicial review should apply given the statute's silence on that point (Aug. 27, 2014 Order at 15), the fact that judicial review is available affords no basis for going beyond the four corners of the statute in conducting that review.

Moreover, as discussed at length in the Government's memorandum in support of its sixth motion for summary judgment, the legislative history of the PNSDA strongly confirms that Congress intended the Secretary's certification to be determinative of whether the photographs at issue in this case could be withheld. (*See* La Morte Decl. Ex. A). The Government expressly

incorporates that discussion herein.

Finally, Congress's intent to preclude judicial review of the Secretary's predictive judgment of harm is also reflected in Congress's decision to itself monitor the certification process. The PNSDA requires the Secretary to notify Congress when he issues a certification or a certification renewal. PNSDA § 565(d)(4). By further limiting the life of a certification to three years, the statute requires the Secretary to periodically reassess the danger that disclosure may cause to U.S. citizens, servicemembers, or employees abroad, and thus to ensure that that danger is still current and to provide Congress with regular updates on his determinations. *Id.* § 565(d)(2), (3). By providing that Congress—which, of course, could repeal or modify the statute at any time—would itself monitor the Secretary's certifications, the PNSDA 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. *See Banzhaf v. Smith*, 737 F.2d 1167, 1169 (D.C. Cir. 1984); *accord Dellums v. Smith*, 797 F.2d 817, 823 (9th Cir. 1986).

Accordingly, as Secretary Carter's certification is alone sufficient to withhold the DoD photographs pursuant to the PNSDA, the Government's summary judgment motion should be granted solely on the basis of the certification.

B. Even if Secretary Carter's Determination Were 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 the recommendations of senior military officials, 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." *See Bechtel v. Administrative Review Bd.*, 710 F.3d 443, 446 (2d Cir. 2013). Courts applying this "'deferential standard'" "'may not substitute [their] judgment for that of the agency,'" but simply ensure 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. *Dep't of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988); *ACLU v. DOJ*, 681 F.3d at 70-71; *Wilner*, 592 F.3d at 76.

The certification here easily passes the APA test. Secretary Carter stated in the certification itself that he based his decision on the "recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, the Commander of U.S. Africa Command, and the Commander, U.S. Forces – Afghanistan. (Apostol Decl. Ex. 1). Based on the recommendations of those officers—the nation's highest-ranking military officer, along with three other four-star generals who serve as field commanders—and multiple reviews of "each photograph" by the Secretary's staff on his behalf, the Secretary agreed 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.'" (*Id.*). The four generals based their recommendations on representative samples of the photographs, which were created by attorneys and commissioned officers of DoD—who themselves have extensive knowledge of the Armed Forces and of our enemies in the Middle East and Africa—in a multi-layered, thorough, and robust process involving several independent reviews of every photograph, to reflect the full range of what the photographs depicted and the gravity of their content. (Apostol Decl. ¶¶ 5-7; *see also* Background Pt. B.2 (describing harms)). The representative sample of photographs, the generals' written recommendations, and 198 photographs recommended for public release were then presented to the Secretary of Defense for review. (*Id.* ¶ 19).

That careful consideration at the highest levels of the U.S. military and DoD 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, especially in the national security realm. *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); *Islamic American Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007) ("[W]e reiterate that our review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential.").

The Government acknowledges that the Court's Order of February 18, 2015, which clarified the Court's view of what must be shown to demonstrate a factual basis for the

Secretary's determination, did not rely on the framework discussed above. Rather, the Court instructed the Government that its submission must, "[a]t minimum, describe the categories of objectionable content contained in the photographs, identify how many photographs fit into each category, and specify the type of harm that would result from disclosing that content." (Feb. 15, 2015 Order at 3). The Government concedes that its submission here does not satisfy the first two elements set forth by the Court. However, the Court acknowledged that "there may be other ways" for the Government to satisfy its burden (*id*.), and the Court's analysis occurred in the context of reviewing a PNSDA certification that did not reveal whether the certified photographs were individually considered, and a record showing that an individualized review was conducted by a single attorney from the Office of General Counsel at the direction of DoD General Counsel. Here, in contrast the record shows that Secretary Carter certified each photograph individually and in good faith pursuant to a process entailing several individualized reviews of each photograph by multiple attorneys and military officers with extensive knowledge and experience in military affairs, as well as recommendations by senior military commanders based upon a representative sample of the photographs. (*See supra* Background Pt. B.1, B.2). As Secretary Carter expressly points out in his certification, the multiple reviews of each individual photograph were done on his behalf. (Apostol Decl. Ex. 1). Accordingly, even if this Court adheres to its previous ruling that judicial review of the Secretary's predictive judgment of harm is available (*see* Aug. 27, 2014 Order at 16-17), it should apply the APA principles described in this section and defer to that judgment.

C. While the PNSDA Does Not Prescribe the Process by Which the Secretary Must Certify Harm, the Process Employed Was Reasonable

1. Although the PNSDA Does Not Require Individualized Consideration of the Photographs, the Carter Certification Clearly Establishes That Each Photograph Was Individually Considered

This Court previously held that the "plain language" of the PNSDA "refers to the photographs individually—'*that* photograph'—and therefore requires that the Secretary of Defense consider each photograph individually, not collectively." (Aug. 27, 2014 Order at 18; *see also* Feb. 18, 2015 Order at 1). The Court reasoned that this interpretation would further FOIA's goal of broad disclosure, as "it may be the case that innocuous documents could be disclosed" without causing harm. (Aug. 27, 2014 Order at 18-19). Thus, the Court held that DoD "must prove that the Secretary of Defense considered each photograph individually." (*Id.* at 19). Moreover, the Court held that while "[n]othing in the statute prevents the Secretary of Defense from issuing one certification to cover more than one photograph[]," the face of Panetta Certification suggested that Secretary Panetta reviewed the photographs collectively and thus, standing alone, did not suffice to satisfy the Government's burden to show that the Secretary considered the photographs individually. (*Id.* (quoting Panetta Certification's reference to "a collection of photographs" and "these photographs"); *see* La Morte Decl. Ex. C (Panetta Certification)).

While the Government expressly preserves its argument that the text and purpose of the PNSDA, and underlying principles of statutory interpretation, all suggest that the PNSDA does not require the Secretary to consider each photograph individually, this is no longer an issue with respect to the Carter Certification, which in fact clearly establishes that Secretary Carter and his designees individually considered each photograph. In contrast to the Panetta Certification, the

Carter Certification states that it "pertains to each photograph" contained in a specified collection of photographs, and that the Secretary's certification determination was reached upon the recommendations of high-ranking military officials "after a review of each photograph by my staff on my behalf." (Apostol Decl. Ex. 1 (emphasis added)). As a result, Secretary Carter's certification states that he "determined that disclosure of any of the photographs would endanger" U.S. citizens, members of the Armed Forces, or U.S. employees deployed abroad, and, accordingly "each of these photographs" qualifies as a "protected document[]" as defined by the PNSDA. (*Id.* Ex. 1 (emphasis added)).

Per this Court's previous order, the Carter Certification is alone sufficient to establish that the Secretary, with the aid of his subordinates, considered each photograph individually. (*See* Aug. 27, 2014 Order at 19-20).

2. The Secretary Properly Relied on His Subordinates for Multiple Individualized Reviews and Sampling

This Court previously ruled that to issue a certification, the Secretary of Defense must demonstrate knowledge of the contents of the photographs at issue, and may not rely on "representative samples" or "general descriptions" to do so, unless "precise criteria" for sampling were employed. (Feb. 18, 2015 Order at 3). The Court also acknowledged, however, that the Secretary may delegate responsibilities so long as he "explain[s] the terms of his delegation so it is the Secretary, and not any subordinate, who takes responsibility for his knowing and good faith Certification that release of a particular photograph will result in the harm envisioned." (*Id*. at 2). For the reasons described below, the Government respectfully maintains that the PNSDA permits the Secretary to employ *any* reasonable method of his choosing to reach his certification decision. The Government further submits that Secretary

Carter employed a reasonable, good faith certification process and has demonstrated, consistent with the Court's ruling, that his certification was done knowingly and in good faith. Indeed, Secretary Carter's process resulted in the public release of 198 previously-certified photographs. (Apostol Decl. ¶ 8).

As an initial matter, as noted, nothing in the PNSDA prescribes any particular means by which the Secretary is to determine whether public disclosure of a record would endanger U.S. citizens, servicemembers, or U.S. employees deployed abroad; the Secretary therefore may choose any reasonable method of doing 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"). 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).[4]

In this case, Secretary Carter directed attorneys from the Office of General Counsel and commissioned officers from Joint Staff J37 to devise a review process by considering the views of this Court as well as the processes undertaken previously. (Apostol Decl. ¶ 4). Pursuant to this review process, three different groups of officials independently examined and categorized (and sub-categorized) all of the photographs.

In the first phase of review, on behalf of the Secretary, an attorney from the Office of

[4] There are a few instances where Congress has prohibited delegation of the Secretary's authorities, *e.g.*, 10 U.S.C. § 2466(c), but Congress did not do so in the PNSDA.

General Counsel reviewed all of the photographs and initially categorized them based on what was depicted in the photograph. (*Id*. ¶ 5). Within each category, the attorney then further sorted the photographs based on how likely it was that the release of the photograph would result in the harm the PNSDA was designed to prevent. (*Id.*).

Second, again on behalf of the Secretary, all of the photographs were independently reviewed by commissioned officers assigned to Joint Staff J37, to assess both the initial categorization of the photographs based on what they depicted and their sub-categorization based on the likelihood that public disclosure would cause harm. (*Id.* ¶ 6). As noted above, these officers collectively have extensive knowledge of the Armed Forces and of our enemies operating in the Middle East and Afghanistan. (*Id*.). The entire purpose of sorting the photographs in this fashion was to "ensure that a true representative sample that contained the full spectrum of what the full group of photographs depicted would be created for the Secretary's review." (*Id*. ¶ 5; *see also id.* ¶ 6).

Third, three different attorneys from the Office of the General Counsel and one uniformed attorney assigned to the Department of the Army independently reviewed the combined work product of the first two phases of review. (*Id.* ¶ 7). Again, on the Secretary's behalf, each photograph was reviewed to assess the likelihood that harm would result from public disclosure. (*Id.*).

Upon completion of the third review, the attorneys coordinated with the commissioned officers and uniformed attorneys from the Office of Legal Counsel for the Chairman of the Joint Chiefs of Staff to reach final consensus. (*Id*.). After removing 198 photographs that the group proposed for release, the Office of General Counsel created a representative sample of the

remaining photographs for review by the four Commanders, the Chairman of the Joint Chiefs of Staff, and the Secretary. (*Id.* ¶ 8). Photographs were compiled from all the categories created to include the full scope of what the imagery in the photographs depicted as well as the full range of the gravity of the content. (*Id.*).

The representative sample was provided to the three Commanders and the Chairman, who provided written recommendations regarding whether a renewal PNSDA certification should issue. (*Id.*). All three generals and the Chairman agreed that certification was appropriate as to all of the photographs, and explained the basis for their recommendations. (*See id.* ¶¶ 9-18; *supra* Background Pt. B.2). The recommendations, representative sample, and 198 photographs recommended for non-certification were then provided to Secretary Carter for his personal review. (*Id.* ¶ 19). Secretary Carter declined to certify the 198 photographs (which were released on February 5, 2016), and on November 7, 2015, issued a certification covering each of the remaining photographs. (*Id.*).

The Secretary's method of making the required determination was reasonable under the terms of the PNSDA and significantly, demonstrates that Secretary Carter's certification was made knowingly and in good faith. Although the Secretary did not personally review every photograph at issue, 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), *cert. denied*, 134 S. Ct. 1510 (2014). 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.

Instead, as the Second Circuit has held, it will "suffice" if the agency head "considered summaries" of the underlying matters "and conferred with his staff about them." *Id.* That is precisely what the Secretary of Defense did here. Requiring that the Secretary undertake a particular procedure—as the Court did when it said that the Secretary must "demonstrate knowledge of the contents of the individual photographs," "review[ ] the photographs personally or hav[e] others describe their contents to him," and specify the "factual basis" for his conclusions and the harm that would occur in the certification itself (Feb. 18, 2015 Order at 2-3)—improperly constricts the Secretary's authority. None of these steps appear in the PNSDA. A court may not "lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply," *Jama*, 543 U.S. at 341, and may not "impose upon the agency its own notion of which procedures are 'best,'" *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978). The Department of Defense read the statute to mean that the determination of harm was the Secretary's to make, and he may make it by enlisting the assistance of his generals, his counsel, and his military officers to sample the photographs. *See* 10 U.S.C. § 113(d). That interpretation of the statute was reasonable and consistent with the

PNSDA's text and purpose, and deserves the deference of this Court. *See United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001) (according deference to agency interpretation of statute pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)).

D. The Photographs Are Exempt From Public Disclosure Pursuant to FOIA Exemption 7(F), as Their Release Could Endanger the Lives or Physical Safety of Individuals

1. Exemption 7(F) Protects from Disclosure a Record That Could Endanger the Life or Safety of an Unspecified Individual

Even apart from the PNSDA, the photographs are exempt from FOIA disclosure. 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 presented is whether release of the photos "could reasonably be expected to endanger the life or physical safety of any individual."

As explained below, the release of the photographs at issue in this case "could reasonably be expected to endanger the life or physical safety" of U.S. servicemembers and other personnel abroad, due to the increased risk of anti-American violence.[5] By its terms, "[t]he 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), *rhg. en banc denied* (May 13,

[5] This Court rejected that view in *ACLU v. DoD*, holding that exemption 7(F) does not apply because the phrase "any individual" should not, in the Court's view, be read "to include individuals identified solely as members of a group so large that risks which are clearly speculative for any particular individuals become reasonably foreseeable for the group." 543 F.3d at 67. As discussed below, that holding is not binding on the Court now, as it was vacated by the Supreme Court, and should not be followed as it was in error.

2015), *cert. denied,* 136 S. Ct. 876 (Jan. 11, 2016). While it is true, as the Second Circuit noted in this case, that FOIA's exemptions "'are to be narrowly construed,'" *ACLU v. DoD*, 543 F.3d at 69-70 (quoting *FBI v. Abramson*, 456 U.S. 615, 630 (1982)), the Court is also obliged to give effect to the plain meaning of the exemption, which is "intended to have meaningful reach and application," *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). The exemption protects documents whose disclosure could be expected to endanger "*any* individual." The plain text resolves the matter: as the D.C. Circuit has held, "Congress' use in Exemption 7(F) of the word 'any' is instructive. Generally, 'the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."' *EPIC*, 777 F.3d at 525 (quoting *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008); quotation marks omitted); *accord Boyle v. United States*, 556 U.S. 938, 944 (2009) ("The term 'any' [in a definitional provision] ensures that the definition has a wide reach."); *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007); *Salinas v. United States*, 522 U.S. 52, 56-57 (1997); *United States v. Ballistrea*, 101 F.3d 827, 836 (2d Cir. 1996). While in some contexts, "any" may have a narrower meaning, "in the context of Exemption 7(F) the word 'any' demands a broad interpretation." *EPIC*, 777 F.3d at 525. As the D.C. Circuit explained,

> Congress could have, but did not, enact a limitation on Exemption 7(F), such as "any specifically identified individual." *See Sims,* 471 U.S. at 169 n.13[]. By contrast, in the Privacy Act Congress afforded special treatment to certain law enforcement records associated with an "identifiable individual." *See* 5 U.S.C. §§ 552a(a)(6), (j)(2)(B), (*l*)(2); *cf. Sims,* 471 U.S. at 169 n. 13[.] The language of Exemption 7(F), which concerns danger to the life or physical safety of any individual, suggests 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).

Thus, as the D.C. Circuit has held, "FOIA provides no textual basis for requiring the [government], for purposes of Exemption 7(F), 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, absent indication to the contrary." *EPIC*, 777 F.3d at 525 (quoting *Milner v. Dep't of the Navy*, 562 U.S. 562, 573 (2011); alterations 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) is satisfied. *Id.*

And the national security context again requires deference to the government's predictive judgments in this regard. 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 an expectation of harm to unspecified individuals. *Id.* (quoting *Public Employees for Environmental Responsibility v. U.S. Section, International Boundary and 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 v. U.S. Dep't of Justice*, 331 F.3d 918, 926-27 (D.C. Cir. 2003) ("CNSS"); *see also ACLU v. DOJ*, 681 F.3d at 70-71; *Wilner*, 592 F.3d at 76. Thus, a court "may rely on government affidavits to support the withholding of documents under FOIA exemptions," and it is "equally well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive

purview." *CNSS*, 331 F.3d at 926-27 (citation omitted); *accord Gardels v. CIA*, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982).

Nor does FOIA's Exemption 1—which exempts from disclosure records properly classified in the interests of national security—mean that Exemption 7(F) cannot cover records whose disclosure would endanger unspecified members of large populations. "[A]dhering to the plain text of Exemption 7(F) [does not] eviscerate Exemption 1, which applies even to records *not* compiled for law enforcement purposes." *EPIC*, 777 F.3d at 526. Exemptions may, and often do, overlap with respect to a particular record, and there is no reason to read them as mutually exclusive.

The statutory history of Exemption 7(F) confirms the D.C. Circuit's reading of the statute. 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.

In affirming this Court's ruling, the Second Circuit previously rejected the view that Exemption 7(F) applies here, holding that the phrase "any individual" should not be read "to include individuals identified solely as members of a group so large that risks which are clearly speculative for any particular individuals become reasonably foreseeable for the group." 543

F.3d at 67. That holding was vacated by the Supreme Court, however, and therefore is not binding on this Court now. *O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect . . . ."); *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"). In addition, as discussed above, the Court of Appeals for the District of Columbia Circuit has recently disagreed with the Second Circuit's analysis.

In any event, for the reasons explained above, the Second Circuit's now-vacated holding that "in order to justify withholding documents under exemption 7(F), an agency must identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual," 543 F.3d at 71, was erroneous. Under such an interpretation, the document in *EPIC*—a Department of Homeland Security protocol for preventing the use of wireless networks to detonate explosive devices in the manner such networks 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. Moreover, 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).

2. The Government Established That Release of the Photographs Could Endanger the Lives or Physical Safety of U.S. Servicemembers and Civilians

The standards of Exemption 7(F) are satisfied here. The declarations and certifications submitted by the government establish the dangers posed by release of the photographs, a determination to which this Court should defer.

The Department of Defense has repeatedly affirmed its predictive judgment regarding the risks to the lives and safety of individuals that is reasonably likely to be caused by public disclosure of the photographs at issue. The Secretary of Defense certified that release of the photographs would cause such a risk in 2009, 2012, and 2015. And as explained above, all of those certifications were based on the expert opinions of high-ranking generals. (*See supra* at Background Pt. B.2 (describing harms)).

Under settled FOIA and national security law, these expert opinions are entitled to considerable deference. Exemption 7(F) turns on whether disclosure "could reasonably be expected" to endanger the life or physical safety of any individual, 5 U.S.C. § 552(b)(7)(F), thus necessitating a predictive judgment. Here, that judgment involves both military and national security expertise—areas in which deference is particularly appropriate. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001); *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988); *CNSS*, 331 F.3d at 926-27; *Gardels*, 689 F.2d at 1104-05.

Accordingly, Exemption 7(F) applies, and protects the photographs at issue here from disclosure.

CONCLUSION

For the forgoing reasons, the Court should enter summary judgment in favor of the Government on its eighth motion for summary judgment.

Date: New York, New York
February 26, 2016

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