UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE, and VETERANS FOR PEACE, Plaintiffs, v. DEPARTMENT OF DEFENSE, Defendant.	No. 1:04-CV-4151 (AKH)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S EIGHT MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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

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

Counsel for Plaintiffs

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I. BACKGROUND

Over the last year and half, this Court has set forth and clarified the standard required by the Protected National Security Documents Act ("PNSDA") no less than four times. Yet, the defendant Department of Defense ("DOD"), by its own admission, still chooses to ignore this Court's orders. *See* Gov't Br. at 22-23. The Court should once again deny DOD's motion for summary judgment, grant summary judgment to Plaintiffs, and order the photographs here at issue released.

A. Pocedural History

This Court has overseen this case for over a decade and is intimately familiar with its procedural history: For twelve years, DOD has relied upon a series of FOIA exemptions to withhold an undisclosed number of photographs of detainee mistreatment and abuse abroad. Initially, in 2005, DOD argued that exemptions 6 and 7(c) protected the photos from disclosure; after oral argument before this Court, it belatedly claimed that exemption 7(F) also provided grounds for withholding. *Am. Civil Liberties Union v. Dep't of Def*, 389 F. Supp. 2d 547, 569, 574 (S.D.N.Y. 2005) ("*ACLU I*"). This Court rejected all three arguments, noting that that the withheld photographs were "the best evidence of what happened, better than words, which might fail to describe, or summaries, which might err in their attempt to generalize and abbreviate." *Id.* at 578. The Second Circuit upheld this Court's decision in full. *Am. Civil Liberties Union v. Dep't of Def.*, 543 F.3d 59 (2d Cir. 2008) (*"ACLU II"*). Left with no substantive ground to resist disclosure, DOD sought a new basis for its secrecy. Thus, in 2009, Congress passed and the President signed the Protected National Security Documents Act, which authorizes the Secretary of Defense to certify a document for withholding when "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." *See* PNSDA § 565(c)-(d)

Shortly after Congress passed the PNSDA, then-Secretary of Defense Robert Gates certified all the withheld photographs for withholding. *Am. Civil Liberties Union v. Dep't of Def.,* 40 F. Supp. 3d 377, 381 (S.D.N.Y. 2014) (*"ACLU III")*. This Court upheld that certification "[w]ithout specifically ruling on the standard of review" given that the certification followed so closely on the heels of the statute's passage. *Id.* It was not until August 24, 2014, that this Court had occasion to explain exactly how DOD must meet its burden to prove that it complied with the PNSDA's criteria. *Id*. at 385. First, the Court rejected the DOD's contention that the PNSDA should be read to strip courts of the power to review the basis for the Secretary's suppression of documents. Specifically holding the PNSDA to be an exemption 3 statute, *id.* at 385, the Court noted that "FOIA litigation, by requiring the government to identify responsive documents, serves to call the government to account," *id.* at 388; in enacting the PNSDA, then, Congress must have been "aware that [c]ourt[s] had construed FOIA as creating a background norm of broad disclosure of Government records, and [had] provided *de novo* judicial review of agency invocations of FOIA exceptions," *id.* at 389 (citations and quotation marks omitted). Thus, held this Court, "the PNSDA should be read as providing for judicial review of the basis for the Secretary of Defense's certification." *Id.* at 388. For that substantive review to be meaningful, DOD was required to provide some showing that "support[ed] the factual basis for its assertion that these photographs should be withheld." *Id.*

Second, the Court held that the statute required the Secretary of Defense to follow a prescribed process: the Secretary must assess the risk of release of each individual photograph, rather than treat the images "as a collection" to be reviewed together. *Id.* at 390 (quotation

marks omitted). The Court reasoned that the plain text of the PNSDA "refers to the photographs individually — '*that* photograph' — and therefore requires that the Secretary of Defense consider each photograph individually, not collectively." *Id.* at 389 (emphasis in original). The Court further explained that this textual interpretation made practical sense in light of the Court's own experience in this litigation: "Even if some of the photographs could prompt a backlash that would harm Americans, it may be the case that the innocuous documents could be disclosed without endangering the citizens, armed forces or employees of the United States. Considering the photographs individually, rather than collectively, may allow for more photographs to be released, furthering FOIA's 'policy of full disclosure.'" *Id.* (quoting *Halpern v. FBI*, 181 F.3d 279, 284-85 (2d Cir. 1999). DOD's burden, then, was to "show[] that the photographs were individually considered by the Secretary of Defense." *Id.* at 390.

At a status conference on October 21, 2014 the Court again made clear what such a showing, at a minimum, required. "[W]hat is necessary, is that the submission to me show an accountability, by the Secretary of Defense, of having considered and having [made] a finding with regard to each and every photograph, individually and in relation to the others." Oct. 21 Tr. at 11:13-16 (dkt no. 526) (Nov. 04, 2014). "[The DOD's] burden," the Court elaborated, "is to be specific, photograph by photograph." *Id.* at 13:4-5. Thus, the Court provided the DOD with clear instructions: It must demonstrate that the Secretary had assessed the risk posed by disclosure of each photograph, and must provide a factual basis for its assertion that disclosure would trigger harm.

In December of 2014, the DOD submitted a declaration and accompanying affidavits outlining the steps it took to certify photographs for withholding in 2012. Plaintiffs explained the deficiencies in that process in their response to the DOD's submission, and expressly

incorporate those arguments herein. *See* Plaintiffs' Br. in Opposition to Def. Renewed Seventh Motion for Summary Judgment (dkt no. 533) (Jan. 9, 2015). To summarize:

> (1) The DOD did not follow the process mandated by the PNSDA when certifying photographs. Neither the Secretary nor anyone else at the Department of Defense assessed the risk of release of each individual photograph — the military experts charged with assessing that risk reviewed only a subset of the images;
>
> (2) The DOD failed to provide the Court with a sufficient factual basis to justify its withholding of each photograph. The DOD rested its argument to the Court on vague descriptions of a sample of photographs. But those descriptions said little about the criteria used to categorize the photos, or how those criteria related to the risk of potential harm. Thus, the Court could not assess whether sampling was appropriate let alone whether the Secretary correctly concluded that release would trigger harm.
>
> (3) The DOD also failed to provide the Court with a sufficient basis to justify its withholding because it failed to show why release of images might trigger an attack.

This Court agreed with Plaintiffs on all three counts. At a February 4, 2015 Hearing, the Court reiterated that "the certification has to be individual," Feb. 4. Tr. at 7:18 (dkt no. 544) (Feb. 25, 2015), and found that "an item-by-item review was not performed," *id.* at 8:23-24. The Court concluded that it was "highly suspicious of something that is certified en gros [because] [i]t's too easy to do." *Id.* at 19:22-23. Turning to substance, the Court stressed that DOD had not justified its use of sampling, noting, for example, that "[w]e don't know the magnitude — we don't know the denominator, and we don't know the numerator." *Id.* at 18:4-5. The Court also expressed skepticism as to the substantive reasons provided, noting that it "ha[d] to make the ultimate decision: Will release of the items in this sample or some of them endanger US personnel? And it [was] hard to understand the relationship" between the photographs and the danger or release given the vague descriptions provided. *Id.* at 20:2-4.

DOD requested further clarification, and on February 18, 2015, this Court reaffirmed its analysis. Regarding process, the Court again explained that the PNSDA required a risk

assessment with regard to each individual photograph: The Secretary could "obtain such knowledge either by reviewing the photographs personally or having others describe their contents to him, but he may not rely on general descriptions of the 'set' or 'representative samples,' as such aggregation is antithetical to individualized review without precise criteria for sampling." Order Clarifying Instructions for Defendants' Submission at 2-3 (dkt no. 543) (Feb. 18, 2015). Regarding substance, the Court yet again stated that DOD's "declaration did not indicate the criteria used to categorize the pictures or to select the samples from each category[or] . . . how many pictures fell into each category." *Id.*at 2. For the Court to assess descriptions of only a sample of photos, "[a]t a minimum, the submission [should have] describe[d] the categories of objectionable content contained in the photographs, identif[ied] how many photographs fit into each category, and specif[ied] the type of harm that would result from disclosing such content." *Id.* at 3. Finally, the Court repeated that "the Certification must make the Secretary's factual basis for concluding that disclosure would endanger U.S. citizens, Armed Forces, or government employees clear to the Court [because] [w]ithout such a record, judicial review is impossible." *Id*.

A month later, the DOD informed the Court that it did not intend to amend the record it had submitted. *See* Letter Addressed to Judge Alvin K. Hellerstein from Sarah S. Normand (dkt no. 547) (March 17, 2015). Thus, the DOD had achieved the "very substantial delay" this Court predicted. Feb. 4 Tr. at 23:4. The Court accordingly entered judgment stating that DOD's "Certification remained deficient because it was not sufficiently individualized and it did not establish the Secretary's own basis for concluding that disclosure would endanger Americans." Order Granting Judgment for Plaintiff (dkt no. 549) (March 20, 2015). DOD appealed. However, during the pendency of the appeal, the 2012 certification at issue expired and Secretary

of Defense Ashton Carter was required to issue a new certification, which he did on November 7, 2015. *See* Secretary Ashton Carter's 2015 Certification, Def. Ex. 1. Accordingly, DOD moved the Court of Appeals for a remand because "the process leading to the Carter Certification differed in material ways from the process leading to the [2012] certification." Defendants-Appellants Motion to Remand at 1, *ACLU v. Dep't of Def.*, No. 15-1606 (dkt no. 119) (Dec. 22, 2015). The Second Circuit granted DOD's motion and remanded this case to this Court for further proceedings.

B. The Carter Certification

Following remand, pursuant to a schedule agreed upon by the parties and so ordered by the Court, the DOD submitted a declaration outlining the process used to arrive at the certification and an accompanying memorandum of law. *See* Defendant Department of Defense's Eighth Motion for Summary Judgment (dkt no. 564) (Feb. 26, 2016). If the "process leading to the Carter Certification differed in material ways" from the prior certification, those "material" differences are entirely unclear from the record submitted to this Court, *see* Defendants-Appellants Motion to Remand at 1: The military experts tasked with assessing the risk of disclosure were again provided with only a subset of photographs. Once again, the contours of the sample with which they were provided are entirely unclear. And, perhaps most significantly, the experts' substantive reasons for withholding photographs are both vague and so attenuated from any concrete risk as to preclude this Court from conducting any meaningful review.

Specifically, DOD prepared to recertify photographs for withholding in the late spring of 2015, well after this Court had explained, multiple times, what the PNSDA required. Dec. of Liam Apostol ¶ 3 ("Apostol Dec."), Def. Ex. 1. DOD describes the 2015 certification as a "robust, multi-phase process" that "enhanced the thoroughness of the review process previously

undertaken." *Id.* ¶ 3, 4. In reality, however, it mirrored the simple, two-step process employed three years before, which was rejected by this Court as inadequate.

First, a staff member grouped individual photographs into categories. Just as before, a lawyer from the Office of the General Counsel conducted this review — though DOD has not disclosed how many categories resulted. *Id.* ¶ 5. The criteria used to create each category are also unclear: The lawyer separated images based on "what [they] depicted," and the photos were then "further/additionally sorted based on how likely it was that the public release of photographs would result in the harm" *Id.* But DOD has not explained anything more: it does not give any sense of the subject matter of the photographs or the differences between them. It does not disclose what factors staff relied upon to determine which photographs might pose a greater danger than the others. And, importantly, the purpose of this exercise was not for the lawyer to recommend withholding based on a risk assessment. Rather, the "purpose of this sorting was to ensure that a true representative sample" could be provided to *others* to evaluate the requisite danger. *Id.*

Next, another set of staff — officers assigned to Joint Staff 37 — reviewed all of the photographs, as well as the groups and the sample prepared by the lawyer. This "second phase of review [had] the same purpose" — to refine a representative sample, not assess risk in order to recommend withholding. *Id.* at ¶ 6. A third review of the photos and the sample by a third set of staff followed. *Id.* ¶ 7. All told, then, three different sets of staff consolidated the individual photographs sought in this litigation into groups, and, from those groups, created a sample of images to be evaluated at a later date for danger to Americans abroad at a later date. This, of course, is exactly what Attorney Megan Weis did in 2012 when she sorted photographs into

categories and created a representative sample to provide to military experts for review. Dec. of Megan Weis ¶ 8, Def. Ex. D ("Weis Dec.").

Staff then sent the sample of images on to four generals: General Lloyd J. Austin, Commander of U.S. Central Command; General David M. Rodriguez, Commander of the U.S. Africa Command; Major General Jeffrey S. Buchanan, Acting Commander of U.S. Forces, Afghanistan; and General Joseph F. Dunford, Chairman of the Joint Chiefs of Staff. Apostol Dec. at ¶ 8. Before doing so, staff removed 198 photographs from the collection that were so nonthreatening as to not even merit review for the risk of their disclosure. *Id.* The generals reviewed the sample and recommended that all of the remaining photographs — both those provided to the generals and others that they never saw — should be certified for withholding. *Id.* at ¶¶ 9-18.

The generals' excerpted recommendations make clear that they viewed the photographs "*en gros*" rather than individually. *See* Feb. 4 Tr. at 19:23. Each general's recommendation spoke of "the photographs" in the plural, as an undifferentiated collection. Apostol Dec. at ¶¶ 9-18. None of the general refers to an individual photograph, let alone provides any insight into why that photograph was deemed to pose the danger required by the PNSDA.

Indeed, none of the recommendations provide a concrete basis that would allow the Court, Plaintiffs or the public to understand why release of any particular photograph would "endanger the lives of citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States," as required by statute. PNSDA § 565 (d)(1). Thus, for example, General Austin's recommendation opened with his broad observation that he operated in a dangerous area of the world. "Violent Extremist Organizations," for example, threatened American national security. Apostol Dec. ¶ 10. He

referred to "trends" in which "[m]ultiple groups seek to destabilize the region to promote their own interests, degrade our military posture, and put our core national interests at greater risk." He indicated that "there are a number of tremendous challenges present in [his area] that require U.S. military engagement and strategic partnerships." He worried that release would "inspire extremist behavior" in organizations he had previously described as already aligned against, and actively "destabiliz[ing]," American interests. He then noted that "Al Qaeda, ISIL, and Iranian" forces exert a "malign influence" in the Middle East. *Id.*

After reciting these general concerns, General Austin jumped to specific conclusions — that "public release of these photographs, even if redacted . . ., could reasonably be expected to adversely impact U.S.' civil and military efforts," that "[t]he photographs would be used to fuel distrust, encourage insider attacks against U.S. military forces, and incite anti-U.S. sentiment across the region," and that "the release of the photographs could be used by these groups to have a major strategic impact to USCENTCOM's mission and priorities." At no point, however, did he provide any facts drawing a causal connection between his observations that his forces operated in a risky environment and his opinion that release of any given image would increase that already present danger. *Id.*

The other generals' recommendations followed a similar pattern. General Rodriguez observed that "Africa continues to present a broad spectrum of dynamic and uncertain global security challenges to the United States," including "[t]errorist and criminal networks" and "armed groups." *Id.* at ¶ 12. From this, he concluded that "public release of the Detainee Photographs designated for recertification . . . would endanger the lives of [Americans]." *Id.* ¶ 13. But he provided no basis for his logical leap between the assertion that Africa is dangerous and his conclusion that release of the photos would make it more so, let alone that each photo

would do so. Likewise, General Buchanan stated that Afghanistan is still a volatile area, one in which there is "some evidence of recruiting efforts [by the Islamic State]." *Id.* ¶17. The "budding presence of ISIL in the Afghanistan-Pakistan border areas," he continued, "offers an opportunity for both countries to work together in trust." From these impressions, he concluded that "the release of the photographs could erode the Afghanistan-Pakistan military-to-military relationship," without suggesting how or why this was so or how a weaker relationship between these two states would endanger Americans. *Id.* And General Dunford's recommendation is even more conclusory. Without any reference to any specific conditions which might indicate the risk that would result release of the photographs (let alone each photograph), he simply stated his opinion that "public disclosure of the photographs contained in the collection of photographs would endanger citizens of the United States." *Id.* ¶ 18.

Secretary Carter received these recommendations, the sample of photographs recommended for certification, and the 198 images that staff had deemed too innocuous to justify further review. *Id.* at ¶ 19. After review of this subset of images, he certified all but the 198 photos that were not considered for withholding. *See* Secretary Ashton Carter's 2015 Certification. In his certification, he cites to the generals' "recommendations" as the basis for his decision. *Id.* at ¶ 2. Though his staff, unlike the generals, performed a "review of each photograph," his certification makes clear that staff never reached the issue of whether to "recommend" that any be withheld. *Id.* In other words, though some staff examined each photograph, the DOD personnel who actually recommended withholding did not. Nonetheless, Carter signed the certification on November 7, 2015, well over a year after this Court's published decision in this case making clear the individual review that was required, and many months after its multiple explanations of that decision.

II. ARGUMENT

A. The Secretary did not comply with the clear standards set forth in this Court's prior orders.

At the time the Secretary certified the withheld photographs for disclosure, he knew what this Court had ordered the DOD to do to sustain its burden: The Secretary knew that the PNSDA required him to make an individualized determination with regard to the risk posed by release of each photograph. He also knew that he would have to provide this Court with a showing that "support[ed] the factual basis for [his] assertion that these photographs should be withheld." *ACLU III*, 40 F. Supp. 3d at 388. Yet, the 2015 certification process did not comply with either command: rather, the Secretary has once again issued a blanket certification based upon recommendations made with regard to but a subset of images that treated the withheld photographs "as a collection." *Id.* at 390 (quotation marks omitted). And the reasons for withholding—or even any description of the contents of any photograph, their number, the number of categories created, or the criteria for those categories—offered to this court are again entirely insufficient to allow for any meaningful judicial review. As a result, the current certification suffers from precisely the same deficiencies as this Court identified with respect to the 2012 certification, which the Court held inadequate to support withholding.

First, neither the Secretary nor his staff "considered" nor "ma[d]e a finding with regard to each and every photograph." Oct. 21 Tr. at 11:15-16. Instead, the Secretary's certification makes clear that he relied on the "recommendations" of only four people in making his determination: "the Chairman of the Joint Chiefs of Staff [General Joseph F. Dunford], the Commander of the U.S. Central Command [General Lloyd J. Austin], the Commander of the U.S. Africa Command [General David M. Rodriguez], and the Commander U.S. Forces - Afghanistan [General Jeffrey S. Buchanan]." Secretary Ashton Carter's 2015 Certification at ¶

2. But it is undisputed — indeed, conceded — that those generals did not receive copies of every photograph, only a sample of them. Apostol Dec. ¶ 8. Thus, the generals could not evaluate each photograph. Unsurprisingly, that the generals address the photos as a collection rather than individually. All four consistently referred to "the photographs" in the plural, never once describing a subset of those images, let alone an individual picture. *Id.* at ¶ 9-18. Thus, the generals' blanket recommendation that release of any photographs would endanger American lives could not and did not follow upon an evaluation of the risks posed by "each separate photograph," as this Court so clearly, and repeatedly demanded. *ACLU III*, 40 F. Supp. at 380. In particular, the Court could not have been more explicit that the Secretary "may not rely on general descriptions of [a] 'set' or 'representative samples,' as such aggregation is antithetical to individualized review." Order Clarifying Instructions for Defendants' Submission at 3.

That staff "review[ed]" "each photograph" does not cure this deficiency. Secretary Ashton Carter's 2015 Certification at ¶ 2. The "robust, multi-phase process" described in DOD's declaration was in essence no different than the one performed in 2012. Apostol Dec. ¶ 3. Then, Attorney Megan Weis reviewed every photograph, but did so only for the purposes of creating "a representative sample," not to perform the risk analysis required by the PNSDA. Weis Dec. at ¶ 8. The same is true now. All three sets of reviewers sorted photos into groups "for the purpose [of] . . . ensur[ing] . . . a true representative sample." Apostol Dec. ¶ 5. To the extent staff considered risk of harm at all, it was only in order to group the photographs into categories, not to recommend withholding. Recommendations were left to the Generals to whom Staff passed on the sample of photographs to perform a risk assessment and decide whether to

counsel withholding, leaving aside only the 198 photographs that presented no possible grounds for resisting disclosure.[1]

Second, DOD's submission to this Court does not adequately describe the basis for its withholding. This Court has held, in no uncertain terms, that if DOD wished to support its certification on the basis of a sample of the photographs, "[a]t a minimum the submission [should have] describe[d] the categories of objectionable content contained in the photographs, identif[ied] how many photographs fit into each category, and specif[ied] the type of harm that would result from disclosing such content." Order Clarifying Instructions for Defendants' Submission at 3. Of course, the record contains no such descriptions: We do not know the number of categories, the number of total photos examined, or the number of images in each category. And, more substantively, DOD contends that the photographs were grouped based on "what the photographs depicted," it does not provide any information on their subject matter — for example, the type of conduct, the locations thereof, etc. Apostol Dec. at ¶ 5. And although the DOD states that the photos were "further/additionally sorted based on how likely it was that the public release of the photographs would result in the harm the PNSDA was intended to prevent," it does not explain what factors the staff relied upon to make that determination. *Id.*

[1] The Staff decision not to propose those photographs for certification does not, as DOD argues, Gov't Br. at 25-29, satisfy the PNSDA's requirement that each individual photograph be evaluated by the Secretary or his designee for purposes of determining whether it should actually be certified for non-disclosure. The PNSDA provides a means for the Secretary to resist disclosure for those documents encompassed by his certification; here, he did so based upon recommendations by the Generals as to whether release of the image provided to them would trigger harm (not based upon the Staff determination merely to include them from the process). That other images were excluded from this process is, of course, irrelevant; those documents could, and a review of them shows, should have been excluded. This says nothing about the validity of the process by which those documents certified were, in fact, evaluated (though it does make one wonder why they were previously certified, perhaps casting doubt upon the validity of the decisionmaking this time as well). *See infra* at II.E.

The criteria used for sampling, then, were as vague as those which this Court has previously deemed unacceptable.

Third, DOD has also failed to "support[] the factual basis for its assertion that these photographs should be withheld." *ACLU III*, 40 F. Supp. 3d at 388. Under the PNSDA, the Secretary may withhold images only if he "determines that disclosure of [a] photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." PNSDA § 565 (d)(1). In other words, there is only one reason to withhold: an increased risk of harm triggered by release. The generals' recommendations do not provide any basis from which this Court, or anyone else, could draw this conclusion. All pitch their factual assertions at a high level of generality; they speak of broad threats to their entire region like "tremendous challenges . . . that require U.S. military engagement and strategic partnerships," Apostol Dec. at ¶ 10, or "a broad spectrum of dynamic and uncertain global security challenges to the United States," *id.* at ¶ 12. Without any mention of how a photo could alter or heighten these conditions, all conclude that release of images would result in harm to Americans. Thus, all omit the critical causal connection that the PNSDA, as explained by this Court, demands, *i.e.*, "why . . . the release of pictures taken years earlier" would create a new risk in an already risky region. *ACLU III*, 40 F. Supp. 3d at 388.

In this regard, the justifications offered here are even less helpful in describing DOD's concern than were the statements underlying the 2012 certification, which this Court, of course, rejected as inadequate: then, the military experts attributed the risk posed by release of the photographs to violence that followed release of other images, albeit images that displayed extreme disrespect to Muslims. *See* Plaintiffs' Br. in Opposition to Def. Renewed Seventh

Motion for Summary Judgment at 17-18. Here, DOD does not seek to draw even those comparisons. There is no mention of any specific episode of unrest that followed release of any image. Nor, obviously, is there any comparison (as there was none last time) drawn between the release of that image and the photographs now withheld. Indeed, this time around, there is literally no basis provided to justify the contention that the release of any photograph will pose any risk whatsoever. In submissions that do not hide their disregard of the requirements set by the Court, the generals have provided opinions that are less detailed and more attenuated from any risk of harm than even the previous statements that this Court previously deemed insufficient to allow for meaningful judicial review. *See* Order Clarifying Instructions for Defendants' Submission at 3.

In sum, DOD had ample opportunity to comply with the orders of this Court, after many months of consideration and reconsideration. Instead, DOD has now certified photos in a manner that, for all intents and purposes, tracks the same process already rejected by this Court. And, although called upon to provide a justification for withholding, DOD has provided a vague factual showing that is even less concrete than the insufficient one that preceded it. For these reasons, this Court should deny the DOD's motion for summary judgment and, instead, enter judgment for Plaintiffs.

B. <u>This Court has already held that PNSDA is an Exemption 3 statute and the DOD's arguments to the contrary are unavailing.</u>

In *ACLU III*, this Court held that the PNSDA is a withholding statute, within the meaning of FOIA Exemption 3, 5 U.S.C. § 552(b)(3), subject to FOIA's *de novo* review provision. 40 F. Supp. 3d at 385 (citing 5 U.S.C. § 552(a)(4)(B)). Nevertheless, DOD now argues that FOIA does not apply to this action in any respect, including with regard to the existence and scope of judicial review. This Court should reject this sweeping argument, once again, for three reasons.

First, courts have long held that Congress may not supersede any provision of FOIA unless it does so expressly, and the PNSDA certainly does not expressly eliminate judicial review, DOD's argument to the contrary notwithstanding. *See* Gov't Br. at 16 (arguing that PNSDA stripped courts of the power to review withholding under the FOIA). As then-Judge Scalia explained in *Church of Scientology v. IRS*, 792 F.2d 146 (D.C. Cir. 1986):

> FOIA is a structural statute, designed to apply across-the-board to many substantive programs . . . it is subject to the provision, governing all of the Administrative Procedure Act of which it is a part, that a 'subsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly.'

Id. at 149 (quoting 5 U.S.C. § 559). In that case, the court rejected the government's claim that a statute allowing the IRS commissioner to withhold certain return information precluded judicial review. *Id.* Then-Judge Scalia wrote, "We find it impossible to conclude that such a statute"—a provision of FOIA—"was *sub silentio* repealed by [the tax statute]." *Id.* Rather, "[t]he two statutes seem to us entirely harmonious; indeed, they seem to be quite literally made for each other": the tax statute provided a substantive prohibition on disclosure, and through FOIA, courts would ensure that an agency correctly invoked it.[2] *Id.* That, of course, is the case here as well: the PNSDA is a classic withholding statute under Exemption 3, about which, as a part of FOIA, Congress is deemed to be "knowledgeable." *ACLU III*, 40 F. Supp. 3d at 387 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988)). Thus, as this Court has held, "Congress was aware that [courts] had construed FOIA as creating a background norm of 'broad

[2] Five other circuits have agreed. *See e.g. Long v. U.S. Internal Revenue Service*, 742 F.2d 1173, 1182 (9th Cir. 1984); *Currie v. Internal Revenue Serv.*, 704 F.2d 523, 527 (11th Cir. 1983); *Linsteadt v. Internal Revenue Serv.*, 729 F.2d 998, 999 (5th Cir. 1984); *Grasso v. Internal Revenue Serv.*, 785 F.2d 70, 74-75 (3rd Cir. 1986); *DeSalvo v. Internal Revenue Serv.*, 861 F.2d 1217, 1221 (10th Cir. 1988).

disclosure of Government records,'" and provided for *de novo* judicial review of agency invocations of FOIA exceptions when it enacted the PNSDA. *ACLU III*, 40 F. Supp. 3d at 387 (citations omitted). And, the Court correctly concluded, "[t]here is no evidence that Congress intended to depart from" the presumption in favor of judicial review, both as it is embodied in FOIA and more generally. *Id.* at 388. DOD's argument ignores this holding.

Second, contrary to the DOD's assertion, the phrase "Notwithstanding any other provision of law" does not, without more, override FOIA's judicial review provision. Gov't Br. at 16. Rather, the phrase creates a means to resist disclosure. This is evident from the many other Exemption 3 statutes that open with the exact same clause. For example, in *Newport Aeronautical Sales v. Dep't of the Air Force*, 684 F.3d 160 (D.C. Cir. 2012), the court analyzed a statute that began with the same phrase, concluding that the language created a statutory exemption to FOIA, and scrutinized the attempt to withhold *de novo*. *Id.* at 165 (explaining that the provision beginning with the word "notwithstanding" "readily qualifies as an Exemption 3 statute"). And in *Public Citizen, Inc. v. FAA*, 988 F.2d 186 (D.C. Cir. 1993), the court likewise concluded that Congress's insertion of the words "notwithstanding [the FOIA]" into a law made clear, even when it otherwise was not, that the statute created grounds for witholding under Exemption 3. *Id.* at 195. *See also O'Keefe v. United States Department of Defense*, 463 F. Supp. 2d 317, 325 (E.D.N.Y. 2006) (treating statute that began "notwithstanding section 552 of title 5" as an exemption 3 statute subject to judicial review under the FOIA). Thus, DOD is simply incorrect that the phrase "notwithstanding any other provision of law to the contrary" sweeps away all of FOIA. Far from it—as other courts have reasoned, the words signal that

Congress intended to create a ground for withholding subject to FOIA's usual provision for judicial review.[3]

Third, the legislative history and context of the PNDSA speak to Congress's concern with substance rather than judicial process. Congress passed the PNSDA in the wake of the Second Circuit's decision that left DOD without any grounds to resist disclosure. *ACLU II*, 543 F.3d 59. In response, Congress enacted the PNSDA in order to open a new avenue for the DOD to withhold certain documents. Yet, although a Court had prevented DOD from withholding the photos in question, Congress chose to say nothing about judicial review. To the contrary, Congress disavowed any intent to "change FOIA, in its basic construct." 155 Cong Rec S5650, 5672 (statement of Sen. Graham). This Court should, then, interpret the PNSDA as Congress intended it — as adding substantive grounds upon which the Secretary could withhold photographs, but subject to the same *de novo* judicial review mandated in any Exemption 3 case.

DOD may wish that this case arose under a different statutory scheme, one less "vital to the functioning of a democratic society," one that does not serve to "hold the governors accountable to the governed," one in which the DOD may keep information secret without reason or justification. *Nat'l Labor Relations Bd. v. Robbins Tire and Rubber Co.,* 437 U.S. 214, 242 (1978). But this is a FOIA action. And under FOIA, federal courts must conduct a *de novo*

[3] The rest of the opening clauses of the PNSDA make clear that FOIA remains the governing framework. After the "notwithstanding" clause, the statute instructs that a protected document will not be subject to "disclosure." It then makes clear that this applies whether the disclosure would be by way of a FOIA request to an agency (thus the reference to section 552 of title 5), or, if the agency refuses a request, in the kind of court "proceeding" like this one, that follows. Significantly, then, the statute expressly acknowledges that such actions will inevitably occur, and when they do so, a properly "protected document" need not be disclosed. What the statute conspicuously does not say is that such proceedings will be fundamentally changed, for example, by eviscerating the judicial review provision that is such a fundamental part of precisely the "proceeding" to which the statute refers. DOD's argument to the contrary, Gov't Br. at 16, elides this obvious reasoning.

review of the agency's refusal to release documents integral to a public debate. *See* 5 U.S.C. § 552(a)(4)(B). That is the case under the PNSDA, just as it is with any other Exemption 3 withholding statutes. DOD's argument to the contrary should be rejected and the Court should again enter judgment for Plaintiffs.

C. Judicial review extends to more than merely the fact of certification.

In *ACLU III*, this Court held that judicial review extends beyond the fact of certification alone. 40 F. Supp. 3d at 385. The Court should reject the DOD's attempt to relitigate this settled issue, which was decided correctly the last time around.

As the DOD correctly notes, when a party challenges a withholding decision, courts must verify that the DOD's decision complied with any criteria in the statute that authorizes withholding. Govt Br. at 17-18. Here, the PNSDA contains two operative sections, one of which the DOD ignores: Section (c) of the statute defines the universe of potential "protected documents": A document may be "protected" if the Secretary of Defense "issue[s] a certification . . . stating" that it covers a "photograph" taken during a defined "period," and that it "relates" to detainee treatment. PNSDA § 565(c). DOD acknowledges those requirements, and Plaintiffs concede that they are met. *Id.*

But the PNSDA does not end at subsection (c); it goes on to prescribe a process for "certification" in subsection (d). As the text of subsection (c) makes clear, a "certification" is only valid if it was "issued" "*as described in section d*." (emphasis added). And as this Court has held, section (d) requires the Secretary to review each photograph, and decide on some justifiable basis that release of that photograph would endanger Americans. *ACLU III*, 40 F. Supp. 3d at 390. DOD's cramped reading of the statute would render subsection (d) a nullity.

Indeed, if DOD were correct, and its only burden was to produce a "certification" that "stated" that the photos were "protected documents," then courts would be powerless to verify

that the Secretary had complied in any regard with § (d) of the statute. A court could not intervene even if the Secretary did not in fact examine the photographs or "determine" anything regarding the effect of disclosure; courts would be powerless even if the Secretary chose to withhold the photograph based on some irrelevant, or completely impermissible concern. Had Congress intended to grant the Secretary such unfettered discretion (and so radically limit the power of the courts), it would not have included §(d) at all.[4]

DOD's arguments to the contrary are unavailing. *First*, it argues that Congress would have explicitly required the Secretary to explain his decision in writing if it had intended for courts to review his determination. Gov't Brief at 18. It points to three funding provisions that contain such a requirement. *Id.* But those statutes, none of which requires judicial review, have no relationship to FOIA, which clearly does. Accordingly, these statutes — concerning decisions to close Air Force bases, *see* 128 Stat. 3292, 3504-04, cost assessments of an air defense system, *see* 124 Stat. 4137, and personal protection for low ranking military officers and civilians, *see* 122 Stat. 3 — shed no light whatsoever on Congress's intent in passing an Exemption 3 statute like the PNSDA. Indeed, the DOD's reliance on cases far afield from FOIA only serves to highlight that, unlike the statutes upon which DOD relies, FOIA already requires the Secretary to explain himself to a court.

[4] In addition, as Plaintiffs have previously argued to this Court, in a nearly identical context, courts have held that judicial review under Exemption 3 requires more than establishing that an agency made a finding of some kind with regard to disclosure. *See Long v. U.S. Internal Revenue Service*, 742 F.2d 1173, 1182 (9th Cir. 1984) (rejecting argument that review was limited to the fact of a decision to withhold where a statute allowing Tax Commissioner to resist disclosure turned on a risk assessment). Plaintiffs expressly incorporate those arguments as if fully set forth herein. *See* Memorandum of Law in Support of Plaintiffs Sixth Motion for Partial Summary Judgment (dkt no. 544) (Dec. 17, 2010); Reply Memorandum of Law in Support of Plaintiffs' Sixth Motion for Summary Judgment (dkt no. 462) (April 29, 2011).

Second, DOD argues that the Court cannot review the Secretary's certification because it relates to national security. Gov't Br. at 19. Of course, this Court has previously acknowledged, both in this context and in others, that courts can and should accord some measure of deference to the Executive's comparative expertise in national security and foreign relation matters. *ACLU III*, 40 F. Supp. 3d at 389; *see also ACLU v. Dep't of Def.*, 723 F. Supp. 2d 621, 627 (S.D.N.Y. 2010) ("The Director's affirmation is subject to judicial review, albeit, a review that is limited and deferential."), *ACLU I*, 389 F. Supp. 2d at 564 ("Clearly, the need for such deference is particularly acute in the area of national security"). But the fact that a court should accord appropriate deference to an Executive branch decision does not negate the fact of judicial review; to the contrary, it assumes it by defining its scope. Indeed, courts, including this one, frequently grapple with national security issues in the FOIA context, debating the extent of the deference that will be accorded, and the application of that deference to the issue before them, but not whether review is appropriate at all. *See, e.g., Cent. Intelligence Agency v. Sims*, 471 U.S. 159, 165, 179 (1985) (acknowledging that FOIA calls for "broad disclosure of Government records," but explaining that reviewing courts must respect Executive Branch's judgments "given the magnitude of the national security interests and potential risks at stake"); *Wolf v. Cent. Intelligence Agency*, 473 F.3d 370, 374 (D.C. Cir. 2007) (noting FOIA's mandate of public access to information, and balancing that interest against "expertise of agencies engaged in national security and foreign policy").

Here, DOD asks for far more than deference: it seeks complete relief from FOIA. Yet, even the cases it cites do not support its argument. In *ACLU v. Dep't Of Justice*, 681 F.3d 61, 70 (2d Cir. 2012), the Second Circuit accepted the Government's reasons for withholding a classified memo only after its own "*ex parte* and *in camera* review of the unredacted [document]

and the Government's classified explanations," and after verifying that the redacted information indeed related to the relevant classification criteria. Likewise, in *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009), the Court of Appeals accepted a Glomar response only after it reviewed affidavits that explained in a "detailed, nonconclusory" fashion why withholding was appropriate. *See also Sims*, 471 U.S. at 174, 177 (holding that Director of the Central Intelligence Agency had power to withhold records only after the Court examined the "record developed" below and concluded that it "establishes that . . . researchers did in fact provide the Agency with information related to the Agency's intelligence function"). Deference, then, may be appropriate, to a greater or lesser degree, depending upon the issue presented, but it defines — and therefore assumes the existence of — the judicial review at the core of FOIA. As the D.C. Circuit explained in *Gardels v. Cent. Intelligence Agency*, 689 F.2d 1100 (D.C. Cir. 2003), deference is appropriate, but only once a court is "satisfied that the proper procedures have been followed and that the information logically falls into the exemption claimed." *Id.*at 1104. Judicial review is necessary for courts to perform this function.

Third, DOD argues that the legislative history of the PNSDA establishes that Congress intended for the courts to do no more than verify the fact of a certification. Gov't Br. at 19-20. But nothing in the legislative record supports this argument; indeed, to the extent that the sponsors addressed the question of judicial review at all, they assured their colleagues that FOIA's well-established rules would remain in place: Senator Graham explained that the PNSDA "establish[ed] a procedure to prevent the detainee photographs from being released," but that it would not "change FOIA, in its basic construct." 155 Cong Rec S5650, 5672 (statement of Sen. Graham). Other than that promise, the record is entirely silent regarding the role of courts in reviewing a certification; nor does DOD point to any.

Fourth, DOD makes the sweeping claim that the PNSDA's inclusion of congressional oversight and monitoring signals an intent to make withholding under the PNSDA unreviewable. Govt Br. at 20. But FOIA itself demonstrates that congressional oversight and judicial review may go hand in hand. Indeed, FOIA itself provides not only for judicial review, 5 U.S.C. § 552(a)(4)(B), but also for executive and congressional oversight of improper withholdings, *id*. § 552(a)(4)(F). Given that Congress must clearly express its intent to preclude review, *see supra* II.B, it simply cannot be that the availability of congressional oversight alone can displace judicial review. Were that so, then any number of statutory rights to judicial review would be nullified by overlapping congressional oversight. *See, e.g.,* 50 U.S.C. §§ 1807–1808 (imposing congressional reporting requirements on the executive for surveillance under the Foreign Intelligence Surveillance Act); *id.* § 1810 (providing for judicial review of allegedly unlawful surveillance).

In sum, this Court should adhere to its prior decision and require DOD to establish that the Secretary reviewed each photo and rendered an individualized determination of risk, and that he had a sufficient basis to do so. Further, because DOD has conceded that this has not occurred, not only must DOD's motion for summary judgment be denied, but Plaintiffs must be granted and the documents ordered disclosed forthwith.

D. Even if the Secretary's decision were not subject to *de novo* review under the FOIA, it was arbitrary and capricious.

As the DOD concedes, it has not met the requirements set forth by this Court in its previous orders. Gov't Br. at 23 ("The Government concedes that its submission here does not satisfy the first two elements set forth by the Court."). Rather, it argues that the Secretary's decision complies with an entirely different standard, one prescribed by the Administrative Procedures Act ("APA"). *Id.* at 20-21. But even if the APA's general judicial review provision

governed this proceeding (which it does not), the DOD has still failed to establish that it acted reasonably, for the same reasons that it failed to meet the rule enunciated by this Court: it has not followed the process mandated by statute, and has not provided any factual basis to support its certification decision.[5]

Under the APA, a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this standard, a court will overturn an agency decision where an 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 v. Administrative Review Board*, 710 F.3d 443, 446 (2d Cir. 2012) (quoting *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 664, 658 (2007)). As the Second Circuit has cautioned, "[t]his is not to suggest that judicial review of agency action is merely perfunctory;" rather, it is "searching and careful." *Islander East Pipeline Co. v. McCarthy*, 525 F.3d 141, 151 (2d Cir. 2008). A "court must be satisfied from the record that 'the agency . . . examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Id.* (quoting *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983)) (alterations in original). In addition, "the agency must reveal a 'rational connection between the facts found and the choice made.'" *Id.* A reviewing court "should not attempt itself

[5] Even utilizing the more deferential standard upon which DOD insists (because this case involves national security), a decision which both ignores the process dictated by statute and fails to provide a factual basis to which deference might be given, must be deemed unreasonable, whether under the APA or otherwise.

to make up for . . . deficiencies in the record; [it] may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43.

Here, as set forth above, the Secretary's certification entirely fails to comport with the statutory criteria of the PNSDA. The record provided to this Court shows that neither the Secretary nor anyone else charged with determining whether release of the photographs at issue would endanger Americans abroad in fact assessed each image for the risk of release of "that photograph," as the statute requires. PNSDA § 565 (d). The record also fails to establish the required rational connection between the facts found and the choice made. Instead, the Secretary's certification resulted from the review of only a sample of photographs. And the recommendations upon which the Secretary based the certification failed to draw any factual connection between the broad observation that the American military operates in dangerous areas, and the very specific conclusion that release of any photograph, let alone each and every one of them, would endanger American lives.

The violation of the APA is patent. First and foremost, the Secretary ignored the process prescribed by PNSDA § 565(d). This failure to follow the process prescribed by statute was itself arbitrary and capricious. Thus, in *NRDC v. EPA*, 658 F.3d 200 (2d Cir. 2011), for example, the Second Circuit vacated an agency order because the agency had failed to conduct the risk assessment dictated by statute. There, the Food Quality Protect Act, *see* 21 U.S.C. § 346a(b)(2), required the Environmental Protection Agency to assess the risk of pesticide residue in foods to infants and children. If it could establish a safe level of consumption, the agency was then required to apply a "tenfold margin of safety" to protect infants and children. 21 U.S.C. § 346a(b)(2)(C)(ii). But the agency set a consumption level for a chemical without following these statutorily mandated steps. Faced with a decision that ignored the appropriate process, the

Second Circuit vacated the order. A similar failure doomed an agency's decision in *Bellevue Hosp. Ctr. v. Leavitt*, 443 F.3d 163, 179 (2d Cir. 2006), where the agency failed to collect data on the schedule and in the manner dictated by statute. As a result, the Second Circuit held that "[n]ot only are the agency's actions violative of the statute, but they are arbitrary and capricious." *Id. See also Green Island Power Auth. v. F.E.R.C.*, 577 F.3d 148, 164-65 (2d Cir. 2009) (holding that agency acted arbitrarily and capriciously where it failed to "conduct[] the proper analysis determine whether it was required to solicit . . . motions [to intervene]).

Nor were the Secretary's findings sufficient to support a rational connection between the facts in the record and the conclusions drawn. In *Islander East Pipeline Co. v. State of Connecticut Department of Environmental Protection*, 482 F. 3d 79 (2006), the Second Circuit held that an agency's denial of a certificate was arbitrary and capricious in part because the agency had failed to cite any concrete evidence of a predicted harm. There, a natural gas company had applied for a permit to build a pipeline across the Long Island Sound. The agency denied the permit for a host of reasons, including on the ground that a pipeline would impact the "entire 3,700 acre [pipeline] corridor," and, in the process, harm shellfish and other organisms that lived on the ocean floor. *Id.* at 101 (alteration in original). Upon review, the Second Circuit held that the agency had cited "no evidence supporting its claim" because it had failed to provide specific facts to justify its sweeping conclusion. *Id.* The agency could not simply assume that harm would befall such a large swath of land; "[t]o explain clearly how the pipeline would degrade a particular area," the Court reasoned, "the agency must first define the area in question" and then explain why it would all be affected. *Id.* Nor could the agency "assert in general terms" that the pipeline would harm all shellfish in the region, without pointing to any specific evidence, such as "even one specific [farming] lease that would be impacted." In sum, the

agency had inferred a specific harm from vague facts pitched at too high a level of generality. This, the Court, held was not enough.[6] *See also Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 86 (2d Cir. 2006) (holding that agency use of per se rule eliminating coverage without explanation or rationale was arbitrary and capricious).

In addition, the history of this case suggests that the Secretary may have ignored conflicting evidence in the record before him. *See Bechtel*, 710 F.3d at 446 (agency acts arbitrarily and capriciously where it "offer[s] an explanation for its decision that runs counter to the evidence before the agency"). That is, as this Court long ago pointed out, "many of these photographs are relatively innocuous." *ACLU III*, 40 F. Supp. 3d at 389. We now know that this was true for at least 198 of those photographs, ones that for more than a decade DOD considered too dangerous to release: Most show contusions and bruises on unidentified prisoners – exactly what one might expect to see on prisoners that the world knows were subject to inhumane conditions.[7] Nor has the release of these photos, more than a month ago, sparked the dire consequences so long predicted by DOD. The sudden change in his subordinates' view of those photos should have raised the Secretary's skepticism about the rest of the photos before him. Yet, the record reflects no such skepticism or considered review; rather, it appears that the Secretary simply rubberstamped the blanket recommendations of generals whose position with

[6] In its brief, the government cites to a later Second Circuit decision in this same pipeline saga, one that upheld the agency's second denial. *See* Gov't Br. at 22. The differences in these cases are instructive: After remand, the agency conducted further analysis and submitted an amended record in favor of denial. At that time, the agency pointed to specific evidence that four shellfish beds lay directly above the proposed path for the pipeline, and that five other adjacent beds would suffer from related dredging and plowing activities. *Islander East Pipeline Co. v. McCarthy*, 525 F.3d 141, 153 (2d Cir. 2008). Now presented with concrete evidence — that is, facts that drew a connection between the specific harm posited and the general existence of shellfish — the Second Circuit upheld the agency's decision. The differences are obvious.

[7] A small number of the photos are full body or head shots of detainees with their faces redacted — also a predictable set of images given that these were taken in prisons.

regards to the photographs has not changed for more than 12 years, even when demonstrably wrong.

E. The PNSDA prescribes a process for certification, and the Secretary may not deviate from that mandated process.

Contrary to the Government's view, *see* Gov't Br. at 24-30, the DOD is not free to invent a process for certifying and withholding photographs. As this Court has explained many times, the PNSDA requires the Secretary to follow a simple, but critical process: at the time the Secretary considers whether to certify images for withholding, he must either review each photograph himself in order to determine whether that photograph will pose the risk contemplated by the statute, or he must rely upon the recommendations of someone who has done so.[8] Order Clarifying Instructions for Defendants' Submission at 2. By the terms of the statute, he must make a judgment with regard to each photograph; it follows that he may not certify every photograph for withholding based upon an assessment of only a sample. And, he must provide a reviewing court with an explanation of his decision not to disclose each withheld photograph. *ACLU III*, 40 F. Supp. 3d at 389 (holding that Secretary's decision is subject to judicial review under the FOIA). To do so, the Secretary may rely on descriptions of categories of documents, but only if he explains why it was necessary to sort individual photos into groups, as well as what criteria he used to construct each category. Order Clarifying Instructions for Defendants' Submission at 3.

[8] Plaintiffs have never contended that the Secretary may not enlist his staff in completing the certification process. Rather, as this Court has held, the Secretary may delegate responsibility but "is required, at a minimum, to explain the terms of his delegation so it is the Secretary, and not any subordinate, who takes responsibility for his knowing and good faith Certification that release of a particular photograph would result in the harm envisioned." Order Clarifying Instructions for Defendants' Submission at 2.

DOD does not attempt to argue that it has met the standard set forth by this Court. Instead, it argues that this Court should not scrutinize the process underlying the Secretary's review. But this argument is flawed for three reasons.

First, it does not matter that the Secretary's certification speaks of "each photograph," Gov't Br. at 24-25, because the certification's language does not control a Court's review of the process underlying it. Neither this Court nor plaintiffs have ever contended that the Secretary's certification must follow a specific formula or incant any particular "magic words." Rather, the inquiry is a practical one: this Court must have some basis to hold that the Secretary, or his delegee, actually reviewed each photograph for the danger it might pose. A detailed certification could in theory accomplish this. Or a more barebones document could later be supported by declarations and other record evidence submitted to this Court. *See* Order Clarifying Instructions for Defendants' Submission at 3 (noting that a "Vaughn index would satisfy this requirement but there are may be other ways for the Government to meet its burden as well."). Again, the inquiry remains a practical, not a formalistic, one — the Court must assure itself that individualized review in fact occurred.

Second, however much deference should be accorded the Secretary's substantive decisionmaking, he does not have discretion to invent a new process for certifying photographs because, quite simply, the statute already prescribes one. Eschewing that process violates the statute. For this reason, DOD's reliance on cases that address a different issue — the method for complying with a mandated process — is inapposite. Gov't Br. at 26. In *JKET Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011), for example, the Federal Circuit held that an agency could rely on a new methodology to perform a statistical calculation. In particular, the statute there required that the agency calculate an antidumping margin. *See* 19 U.S.C. § 1677(16). It

then dictated a process for doing so, namely, that the agency compare similar merchandise. *See* 19 U.S.C. § 1677(16). It did not, however, prescribe a particular method for performing the mandated comparison. The Court upheld the agency's choice to use a newer, more sophisticated model to conduct the required assessment because nothing in the statute prevented it from doing so.

Like the statute in *JKET*, the PNSDA dictates a process — it requires the Secretary to review each photograph and determine that "that photograph" might endanger Americans if released. PNSDA §(d). To the extent the PNSDA is silent as to method, it leaves to the Secretary's discretion how the DOD may go about reviewing each individual photograph. So, for example, the agency is free to review either a hard copy or a digital replica of each photograph. Or it could categorize the photos into similar groups and then review each photograph by group rather than chronologically. The point remains the same – just as in *JKET* the agency had to achieve the mandated comparison, here, the Secretary must assess the risk of release of each individual photograph.

For this reason too, the DOD's citation to *United States v. Morgan*, 313 U.S. 409 (1941), and its progeny misses the mark. Gov't Br. at 28-29. In *Morgan*, and other early administrative law cases,[9] petitioners argued that courts should look past an administrative record and question the subjective motives of administrators. After a series of remands, the Supreme Court held that courts should look only to the objective record evidence and findings submitted in support of a determination, and not delve deeper into an administrative official's thought process absent some showing of bad faith. *Morgan*, 313 U.S. at 1004 ("[I]t was not the function of the court to probe

[9] *National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141 (2d Cir. 1974), is one such case. *See* Gov't Br. at 28. There, the petitioners argued that the court should infer arbitrary and capricious action from the swift timing of an administrative decision, even though the record before the court was complete and suggested a thorough and reasoned process.

the mental processes of the Secretary"); *see also* Jerry L. Mashaw, *Reasoned Administration*, 76 GEO. WASH. L. REV. 99, 109 (2007) (explaining that courts must require agencies to provide evidence that they have complied with a statutory process, and that *Morgan* stands only for the proposition that "reviewing courts should make no further inquiry into the mental processes of administrative decisionmakers"). Here, plaintiffs make no claim about the Secretary's hidden motives; his errors are clear from the record that he has provided, which shows that he relied upon the recommendations of officials who examined only a subset of the withheld photographs.

Third, as this Court has repeatedly held, under FOIA, DOD — like any other respondent — must provide a reasoned basis for each document that it withholds. *See ACLU III*, 40 F. Supp. 3d at 389. Otherwise, judicial review would be impossible. As discussed above, this requires review of each document: sampling is not permitted. But even if it were, as courts have long held, agencies may justify withholding of a group of documents based upon a subset of them only if it proves that such sampling was necessary and only if the agency explains the criteria used to construct the sample. In *Meeropol v. Meese*, 790 F.2d 942, 958 (D.C. Cir. 1986), for example, the D.C. Circuit upheld an agency's request to produce only a sample of withheld documents for *in camera* review because the universe of responsive documents was so vast as to occupy the time of "sixty-five full-time and twenty-one part-time FBI employees." *Id*. at 951. Of course, DOD has made no similar claim here. And in *Bonner v. United States Dep't of State*, 928 F.2d 1148, 1151 (D.C. Cir. 1991), then-Judge Ginsburg held that even where sampling is warranted, an agency must explain how it constructed a sample so that a court may ensure that

"the sample employed is sufficiently representative." *Id.* Again, DOD has not even attempted to make such a showing, which would be susceptible of review, here.[10]

In sum, this case boils down to a straightforward command grounded in a statute's text: the PNSDA requires an individualized determination of the risk posed by release of each photograph withheld, in a manner that will allow for appropriate judicial review. Unless and until DOD performs that analysis, its certification cannot be sustained. But if sampling is to be utilized, that process too must be set forth in sufficient detail to allow the Court to determine whether it was proper.

F. <u>This Court need not revisit its prior decision, affirmed by the Second Circuit, that exemption 7(f) does not apply in this case.</u>

In the alternative, DOD recycles its already dismissed argument that Exemption 7(F) protects the photos from disclosure. But this Court has already rejected this argument. *ACLU I*, 389 F. Supp. 2d at 576. And the Second Circuit affirmed that decision in a lengthy, unanimous decision. *See ACLU II*, 543 F.3d at 71. Indeed, DOD sought *en banc* review in an effort to overturn that judgment, but the motion was denied. *See ACLU v. Dep't of Def.*, No. 06-3140-cv (March 11, 2009). Just as the Second Circuit, sitting *en banc*, chose not to revisit the panel's

[10] DOD seeks to avoid these principles by casting this matter as something other than a FOIA Exemption 3 case but that, of course, is exactly what it is, as is discussed *supra*, at 15-19. Indeed, there can be little question but that DOD has here certified documents for withholding specifically in order to avoid its obligation under FOIA. At the very least, it is thus required to proceed as FOIA requires in all Exemption 3 cases, including with regard to such matters as sampling, or as to the manner in which the justification of documents will take place. *See* Order Clarifying Instructions for Defendants' Submission at 3 (noting that DOD must justify its burden with a showing akin to a Vaughn index). Of course, here, this Court has made clear that the PNSDA requires each and every withheld document to be considered individually. But even if, somehow, sampling can be justified at all, it should be done consistent with the rules governing FOIA cases. As set forth above, that has not occurred here: the Court has not approved any sampling process and Plaintiffs did not had the opportunity to be heard with regard to the propriety of the sampling process employed for FOIA purposes.

decision then, so should this Court not question its prior ruling and the persuasive and thorough logic of the Second Court's affirmance of it.

Exemption 7(F) allows agencies to withhold "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). DOD claimed in 2008 that "the plain meaning of the term 'any individual' is unlimited, and thus includes individuals identified solely as military and civilian personnel in Iraq and Afghanistan." *See ACLU II*, 543 F.3d at 67. But the Second Circuit rejected that position, holding that the phrase "any individual" cannot be construed to cover a limitless group. The phrase "may be flexible but it is not vacuous," wrote the Court, *id.* at 67; it "connotes a degree of specificity above and beyond that conveyed by alternative phrases such as 'endanger life or physical safety.'" *Id.* Indeed, "[t]he legislature's choice to condition the exemption's availability on danger to an individual, rather than danger in general, indicates a requirement that the subject of the danger be identified with at least reasonable specificity." *Id.* at 68 (emphasis in original).

Given this plain meaning, the Court of Appeals held 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." *Id.* at 71. But DOD had only made the speculative claim that release would endanger some American soldier somewhere in the world, and thus, this was "not a case where the defendants have shown exemption 7(F)'s required reasonable expectation of endangerment with respect to one or more individuals, but one where the defendants attempt to

cobble together that required reasonable expectation of endangerment by aggregating miniscule and speculative individual risks over a vast group of individuals." *Id*.

The Second Circuit supported its textual interpretation with an exhaustive explanation of Exemption 7's structure and statutory history, noting specifically that FOIA Exemption 1 already provided an avenue for DOD to protect sensitive national security information. Under DOD's theory, Exemption 7 would be transformed into an "ersatz classification system," one that would allow "an agency that could not meet the requirements for classification of national security material, by characterizing the material as having been compiled for law enforcement purposes, evade the strictures and safeguards of classification and find shelter in exemption 7(F) simply by asserting that disclosure could reasonably be expected to endanger someone unidentified somewhere in the world." *Id.* at 73, 83. This would "reinvent exemption 7(F) as an all-purpose damper on global controversy," *id.* at 80, a result not intended by Congress.

Of course, as a formal matter, this Court may certainly revisit its own decision and that of the Second Circuit, given that the Supreme Court vacated the Second Circuit judgment, albeit on very different grounds. But there is no reason for the Court to do so. In fact, DOD's position today is identical to the one it took in 2008; its theory of harm is equally diffuse and speculative. Indeed, the categories at issue are far broader than those identified in 2008, including "citizens of the United States," "members of the U.S. Armed Forces," and "employees of the U.S. Government deployed outside the United States" —the list delineated by the PNSDA. If the groups identified in 2008 were too broad to merit protection under 7(F), then the groups identified today are certainly not the sort of "individual" that Congress had in mind.

Nor has any recent decision of this or any other Court unsettled the foundations of this Court's and the Second Circuit's prior decisions. To be sure, in *Electronic Privacy Information*

Center v. United States Dep't of Homeland Sec., 777 F.3d 518 (D.C. Cir. 2015) ("*EPIC*"), upon which DOD relies, Gov't. Br. at 30-34, the D.C. Circuit sustained an agency's refusal to release an emergency wireless protocol that codified the "process for the orderly shut-down and restoration of wireless services during critical emergencies." *Id*. at 520. But the D.C. Circuit took pains to explain that it was not disagreeing with the Second Circuit's opinion: the *EPIC* Court noted that the "context addressed by the Second Circuit involved vast populations," rather than a "discrete population." *Id*. at 524. The protocol, in contrast, limited its reach to a targeted population of people, those vulnerable to the "critical emergency" created by a terrorist attack conducted via a wireless system. As the Court explained, "[e]xactly who will be passing near an unexploded bomb when it is triggered somewhere in the United States may often be unknowable beyond a general group or method of approach (on foot, by car, etc.) but the critical emergency itself provides a limit (e.g., a situs on the London transportation system)." *Id*. at 525.

In sum, exemption 7(F) protects people and interests not present in this case. Years ago, this Court correctly held, and the Second Circuit affirmed, that the provision targeted identifiable harms to discrete individuals. The risk of release in this case is as speculative today as it was then. As this Court noted in 2005, "[o]ur nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command." This Court should follow that statutory command and order the photographs released.

III. CONCLUSION

For the reasons set forth above, this Court should deny the DOD's motion for summary judgment, grant Plaintiffs' cross-motion for summary judgment, and order the long sought photographs released.

Respectfully submitted,

/s/ Lawrence S. Lustberg

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

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

Counsel for Plaintiffs

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 17, 2016, I caused the foregoing Notice of Motion and accompanying Memorandum of Law to be electronically filed with the Clerk of the United States District Court for the Southern District of New York through the Court's CM/ECF system, and will have paper copies delivered by sending two copies of the filing to chambers via FedEx.

I hereby certify that on March 17, 2016, I caused the foregoing Notice of Motion and accompanying Memorandum of Law to be served upon the following counsel of record for Defendants through the Notice of Docketing Activity issued by this Court's CM/ECF system:

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

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg
Dated: March 17, 2016