

15-1606

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 15-1606

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

—v.— *Plaintiffs-Appellees,*

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

Defendants-Appellants.

(Caption continued on inside cover)

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

**JOINT APPENDIX
VOLUME II OF II
(Pages JA-170 to JA-335)**

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

Defendants.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

ECF CASE

Plaintiffs,

No. 04 Civ. 4151 (AKH)

v.

DEPARTMENT OF DEFENSE, AND ITS
COMPONENTS DEPARTMENT OF ARMY,
DEPARTMENT OF NAVY, DEPARTMENT
OF AIR FORCE, DEFENSE INTELLIGENCE
AGENCY; DEPARTMENT OF HOMELAND
SECURITY; DEPARTMENT OF JUSTICE,
AND ITS COMPONENTS CIVIL RIGHTS
DIVISION, CRIMINAL DIVISION, OFFICE
OF INFORMATION AND PRIVACY, OFFICE
OF INTELLIGENCE POLICY AND REVIEW,
FEDERAL BUREAU OF INVESTIGATION;
DEPARTMENT OF STATE; AND CENTRAL
INTELLIGENCE AGENCY,

Defendants.

.....x

DECLARATION OF CARTER F. HAM

Carter F. Ham, pursuant to 28 U.S.C. sec. 1746, declares as follows:

1. I am a Brigadier General in the United States Army. I am currently the Deputy Director for Regional Operations (DDRO) of the Operations Directorate on the Joint Staff at the Pentagon. The DDRO is the principal advisor to the Director for Operations, J-3, of the Joint Staff for operational matters outside of the continental United States. As such, the DDRO coordinates and communicates frequently with the staffs of US Central Command, US European Command, US Pacific Command and US Southern Command to ensure combatant command concerns are addressed by the Joint Staff. The DDRO

develops and coordinates operational orders and, once the Secretary of Defense approves such orders, communicates operational orders to the combatant commands. Additionally, the DDRO manages the Global Force Management system, which, in close coordination with US Joint Forces Command, US Transportation Command and US Strategic Command, ensures the highest priority combatant command requirements are met most effectively and efficiently. The DDRO maintains oversight of the National Military Command Center. In performing my duties as DDRO, I routinely confer with and obtain advice from combatant commanders' staffs regarding the operational requirements of their commands; I evaluate and synthesize this information; and I advise and make recommendations to the Chairman of the Joint Chiefs of Staff through the Director of Operations and other members of the Joint Staff.

2. Through the exercise of my official duties and as a result of my personal knowledge, I am familiar with this civil action and with Plaintiffs' requests for information under the Freedom of Information Act. Further, I have reviewed the 29 photographic images that are identified in Exhibit B of the Fourth Declaration of Philip J. McGuire (collectively referred to as the "Responsive Army Photos"). For the reasons set forth in this declaration, I have concluded that the official release of the images further identified below, even if redacted to obscure identifying information, could reasonably be expected to:

- a. Endanger the lives and physical safety of the Soldiers, Sailors, Airmen, and Marines in the United States Armed Forces presently serving in Iraq and Afghanistan, as well as other U.S. officials, Coalition Forces allied with the United States, and contractors serving with these forces;

- b. Endanger the lives and physical safety of Iraqi civilians at large, and police and military personnel of the democratic Iraqi Transitional Government working in coordination with the United States and Coalition Forces in support of Operation IRAQI FREEDOM;
- c. Endanger the lives and physical safety of Afghan civilians at large, and police and military personnel of the Government of Afghanistan working in coordination with the United States and Coalition Forces operating in support of Operation ENDURING FREEDOM, NATO-led operations, and contractors serving with these forces;
- d. Aid the recruitment efforts and other activities of insurgent elements, weaken the new democratic governments of Iraq and Afghanistan, and add radical pressures on several of our regional allies and friends; and
- e. Increase the likelihood of violence against United States interests, personnel, and citizens worldwide.

THE BASES FOR MY CONCLUSIONS

3. My conclusions are based upon my years of service and experience in the United States military, the assessments and evaluations of the battlefield commanders responsible for Iraq and Afghanistan, and intelligence reports and assessments of Department of Defense subject-matter experts on the Middle-Eastern region. In performing my duties, I routinely rely on the views of our combat command operations staffs, intelligence synthesis and reports, and the assessments of subject matter experts. In formulating my conclusions concerning the Responsive Army Photos, I have used the same approach, types of resources, information, and experts. In particular:

a. I have served in the United States Armed Forces for more than 30 years at various levels of command and staff. I have served in my current position as Deputy Director of Regional Operations on the Joint Staff at the Pentagon since April 2005. From August 2003 through February 2005, I was Deputy Commanding General for Training and Readiness for the US Army's I Corps, which included duty as Commander, Multi-National Brigade Northwest, Operation IRAQI FREEDOM. In the period of January 2004 to February 2005, I also was the senior U.S. commander in Mosul, Iraq, responsible for all U.S. and Coalition operations in the northern provinces of Iraq. From August 2001 to July 2003, I served in Central Command, including deployment to Qatar with the Central Command Headquarters, for the initial phases of Operation IRAQI FREEDOM. As a result of my experiences, I have intimate, extensive knowledge of our military forces and their capabilities, as well as of the conventional and unconventional forces and capabilities of the enemies arrayed against us.

b. As Deputy Director for Regional Operations, I receive and review daily operations briefings, reports and intelligence analyses from Central Command, the Joint Staff, the Defense Intelligence Agency, the Central Intelligence Agency and the National Security Agency. I oversee the Current Operations cell in the National Military Command Center, which is responsible for reporting real-time, worldwide events affecting national security and US interests. Given my familiarity with current Operation IRAQI FREEDOM / Operation ENDURING FREEDOM events, I frequently provide briefings to the Senate and House Armed Services Committees and Congressional Delegations traveling to Iraq and

Afghanistan. In short, my job requires me to be an expert in worldwide current operations.

c. In reaching my conclusions, I have reviewed and relied upon the Second Amended Declaration of former Chairman of the Joint Chiefs of Staff, General Richard B. Myers, dated August 25, 2005, that was submitted to this Court regarding the so-called Darby photos. See Second Amended Declaration of Richard B. Myers, dated August 25, 2005, ¶¶ 2, 24-26.

d. With respect to this matter, I also have solicited and relied upon the assessments and recommendations of the following three individuals regarding their views of the military implications of release of the Responsive Army Photos:

1) General John P. Abizaid, Commander, U.S. Central Command, who is the ultimate military commander responsible for the geographical area that includes both Iraq and Afghanistan; 2) General George Casey, the commander of the Multi-National Forces-Iraq (the ultimate military commander in Iraq of the coalition armed forces); and 3) Lieutenant General Karl W. Eikenberry, Combined Forces Command Afghanistan (the ultimate military commander in Afghanistan of the coalition armed forces). Each of these three commanders, by virtue of their positions and responsibilities and their immediate visibility of the battlefield environment, have highly informed opinions that I have considered in this matter. Each of these three commanders agree with and support my conclusions about release of the Responsive Army Photos.

e. As I indicated above, I have also considered and relied upon the analysis and assessments of DOD resident subject-matter experts on the Middle-Eastern region.

**OPERATION ENDURING FREEDOM
AND OPERATION IRAQI FREEDOM**

4. Following the attacks on the United States of September 11, 2001, the United States military, with the support of a worldwide coalition, launched Operation ENDURING FREEDOM to drive the oppressive Taliban regime – which provided comfort and support to al-Qaeda terrorists – from Afghanistan. As a result of that successful effort, the Taliban was removed from power, and on October 9, 2004, the Afghan people for the first time ever selected their head of state, the president of Afghanistan, by democratic vote. Operation IRAQI FREEDOM was launched, again with the support of a worldwide coalition, to remove the dictatorial regime of Saddam Hussein from power, with the aim of ending an active threat to the safety of the U.S. and fostering the establishment of a democratic form of government in Iraq. Following a brief period when Iraq was led by a Coalition Provisional Authority, sovereignty of Iraq was transferred to an interim government, and democratically elected representatives of the Iraqi people are in the process of completing work on a national constitution. There is, however, more work to do. Insurgent elements in both Afghanistan and Iraq continue to attack the process of democratic transition in those countries by mounting violent and deadly assaults against the multinational forces that remain posted in the region in order to protect and defend those countries as they take their steps toward freedom. As part of the multinational commitment to strengthening and defending these emerging

democracies, more than 23,000 U.S. troops remain on the ground in Afghanistan and over 132,000 U.S. troops are part of the ongoing mission in Iraq.

5. As General Myers' declaration sets forth in more detail, perceived mistreatment or humiliation of detainees in the custody of the United States Armed Forces has been exploited or misrepresented for violent ends in Iraq, Afghanistan and elsewhere in the Middle East. See General Myers' Decl. ¶¶ 8, 14-19, 24-29. A prime example of such violence was the rioting that occurred as a result of a *Newsweek* report – later retracted – of alleged abuse of the Koran by United States' personnel. Id. ¶¶ 14-19.

A. Current Situation in Iraq

6. The situation on the ground in Iraq remains dynamic and dangerous in Baghdad and several other parts of the country. It changes from day to day, and it varies from region to region. Insurgent attacks against Coalition Forces in Iraq average about 1,700 attacks per month. However, significant events can cause those levels to spike to approximately 2,500 insurgent attacks per month.

7. As General Myers' declaration makes clear, one of the goals of the insurgency is to use violence against innocent civilians to undercut the mission of the U.S. and Coalition forces, as well as the Iraqi Transitional Government, and to stop the transition to democracy in that country. Thus, the insurgents will use any means necessary to incite violence and, specifically, have and will focus on perceived U.S. or Coalition mistreatment of Iraqi civilians and detainees as a propaganda and recruiting tool to aid their cause.

8. For example, two British soldiers were killed and another was injured in Amarah, Iraq, by way of an Improvised Explosive Device in February 2006. Open sources linked

these killings to recent use of a 2004 video of British soldiers beating Iraqi youths in the Amarah area. Amarah, which is located north of Basra in the British-controlled Maysan province, is dubbed the “Wild West” by British troops and has been the focus of heavy attacks by insurgents. There had been warnings in the Arab media that there could be reprisals against British forces in the area as a result of the video. The warnings proved true. More than 1,000 protestors, many of them supporters of Shia cleric Muqtada al-Sadr, gather and shouted slogans against the alleged abuse of the youths in Amarah. The release of the tape inflamed tensions and led to the ruling council of Maysan province making a public declaration that they would suspend cooperation with all British forces and officials. Members of Shiite political groups opposed to the U.S.-led coalition appeared to have engineered that move, apparently seeking to exploit public sensitivities after attempts by the British to be more aggressive with Shiite militias.

B. Current Situation in Afghanistan

9. The situation on the ground in Afghanistan also remains volatile. In addition to the details set forth in General Myers’ declaration, the most recent estimates indicate that there are about 250 insurgent attacks per month against the Coalition Forces, which forces operate in support of the Government of Afghanistan. The insurgency in Afghanistan relies heavily on aggressive information operations to turn perceived insult or deprecation towards Islam into causes for violent uprisings.

10. As noted in General Myers’ declaration, when *Newsweek* incorrectly reported that U.S. military personnel at Guantanamo Bay, Cuba had desecrated the Koran, at least eleven people died and many were hurt during several anti-U.S. protests in Afghanistan. Open sources reported that two United Nations guest-houses were attacked, as were

shops and government buildings. Two offices of international aid groups were destroyed. And uprising of Muslims was not limited to Afghanistan. Open sources reported that about 12,000 people gathered in Egypt, many of them supporters of the outlawed Muslim Brotherhood. About 30 people were injured during that protest. A similar number gathered in Beirut, Lebanon, where the crowd carried black banners and burned American and Israeli flags. In Bangladesh's capital of Dhaka, about 5,000 people rallied after Friday prayers, spitting on U.S. flags and burning them. While doing so, they shouted "Death to America!" and "Destroy America!"

11. The recent reaction to re-publication of the Danish cartoon of the Prophet Muhammad is another example of images being used in information operations to stir violent reactions in Afghanistan. In January 2006, a Norwegian publication reprinted a Danish cartoon depiction of the Prophet Muhammad. As a direct result, open sources reported that at least eleven people were killed in Afghanistan, including two people who died when protesters turned on the U.S. airbase at Bagram. As a result of the cartoon, violence erupted elsewhere as well. Again, open sources reported that the cartoon sparked violence between Nigeria's Muslim and Christian communities, leaving nearly 150 people dead and thousands displaced after five days of violence. Five protestors were killed in Pakistan during demonstrations. One teenage boy died in Somalia after protestors attacked police. In Turkey – where U.S. forces are also stationed – a Catholic priest was killed, allegedly by a teenage shooter who was influenced by the cartoon. Protestors also attacked the Danish embassies in Iran, Syria and Lebanon. In addition to these violent reactions, open sources reported protests at many locations in reaction to the Muhammad cartoon.

THE RESPONSIVE ARMY PHOTOS

12. I have personally reviewed the 29 responsive photographic images that are identified in Exhibit B of the Fourth Declaration of Philip J. McGuire.

13. REDACTED-- FILED UNDER SEAL

14. REDACTED-- FILED UNDER SEAL

15. REDACTED-- FILED UNDER SEAL

16. REDACTED-- FILED UNDER SEAL

17. REDACTED-- FILED UNDER SEAL

CONCLUSIONS AFTER REVIEWING THE RESPONSIVE ARMY PHOTOS

18. Based on my review, I believe that official release of the 22 Responsive Army Photographs described in paragraphs 13-16 above will pose a clear and grave risk of inciting violence and riots against American troops and coalition forces. I also believe that release of the Responsive Army Photos will expose innocent Iraqi, Afghan, and American civilians to harm as a result of the insurgency's reaction, which will likely

¹ These thirteen photographs are identified as numbers 11, 13-18, 20-27 in Exhibit B to the Fourth McGuire Declaration.

involve violence and rioting. It is probable that the insurgents and other groups will seize upon these images as grist for their propaganda mill, which will result in, besides violent attacks, increased terrorist recruitment, continued financial support, and exacerbation of tensions between the Iraqi and Afghan populaces and U.S. and Coalition Forces.

19. My opinion is based upon the information set forth in General Myers' declaration, including but not limited to the vitriolic and violent reaction to *Newsweek's* Koran report, as well as the updated assessment of the conditions in Iraq and Afghanistan, which is informed by the violence arising out the publication of cartoons depicting the Prophet Muhammed and release of a British video depicting the mistreatment of Iraqi nationals. Release of these Responsive Army Photos will be portrayed as part of an alleged, continuing effort of the United States to humiliate Muslims and, given the patterns of violence observed there, will be used by the insurgents as propaganda to increase calls for violence against U.S. and Coalition personnel. I believe that if the Responsive Army Photos are released, riots, violence, and attacks by insurgents will result.

20. I am also concerned that, while the photographs are illustrative of isolated activity, their graphic and offensive nature will make it easy to falsely generalize from those images and impugn the United States Armed Forces as a whole, thereby generating a more vehement – and violent – reaction. The offensiveness of these images will make it more difficult to counteract calls for violence against U.S. and Coalition Forces.

Redaction of the Responsive Army Photos Does Not Alter These Conclusions

21. Redaction of the Responsive Army Photos to obscure individuals' faces and identifying information does not change my opinion. Release of the photographs, even in redacted form, will very likely lead to riots and violence in Iraq, Afghanistan and elsewhere in the Middle East, posing grave risk to both military forces and civilians. This is because the privacy concerns of the detainees are separate and distinct from the inflammatory nature of the images depicted in the Responsive Army Photos – and thus the risk of harm to our personnel – which remains apparent despite redaction.

Sealing Portions of This Declaration

22. In some of the paragraphs of this Declaration, I provide descriptions of the records that are the subject of this litigation, and I respectfully request that the Court seal the paragraphs 13-17.

CONCLUSION

In light of the knowledge and information described herein, and given the inflammatory nature of the Responsive Army Photos, I believe that the Responsive Army Photos that I have identified in this declaration must be withheld in order to protect the lives of: members of the United States Armed Forces, forces operating in cooperation with the United States, and contractors operating with those forces; U.S. officials; Iraqi and Afghan police and military personnel working in coordination with our government and military forces; as well as to protect against the increased likelihood of violence against U.S. interests, personnel, and citizens world-wide.

I declare under penalty of perjury that the foregoing is true and correct.


CARTER F. HAM

Date: Washington, D.C.
April 26, 2006

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, AND ITS COMPONENTS
DEPARTMENT OF ARMY, DEPARTMENT OF NAVY,
DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE
AGENCY; DEPARTMENT OF HOMELAND SECURITY;
DEPARTMENT OF JUSTICE, AND ITS COMPONENTS
CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE
OF INFORMATION AND PRIVACY, OFFICE OF
INTELLIGENCE, POLICY AND REVIEW, FEDERAL
BUREAU OF INVESTIGATION; DEPARTMENT OF STATE;
AND CENTRAL INTELLIGENCE AGENCY,

Defendants.

CIVIL ACTION
DOCKET NO. 04-CV-4151 (AKH)

DECLARATION OF
MICHAEL E. PHENEGER

Michael E. Pheneger, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a retired U.S. Army Colonel who served 30 years on active duty as a Military Intelligence Officer. While on active duty from 1963 to 1993, I held a wide variety of assignments including: Commander, U.S. Army Intelligence School (Fort Devens); Director of Intelligence (J2), U.S. Special Operations Command; Deputy Director of Intelligence (D/J2), U.S. Central Command; Commander, 470th MI Group (Panama); Director of Operations, 66th MI Brigade (Germany); and G2, Second Infantry Division (Korea). During assignments with USSOCOM and USCENTCOM, I routinely provided intelligence support to those combatant commanders. During my tenure with Central Command, I made frequent trips to the Middle East as part of a team conducting bi-lateral military planning with counterparts in Bahrain, Kuwait, and (less frequently) Saudi Arabia. For three years, I taught intelligence subjects at the

U. S. Army Intelligence School, Fort Huachuca, AZ and participated in the development of Army intelligence doctrine.

2. While I do not have current access to classified information, I routinely consult a wide variety of published sources about the status of ongoing military and nation building activities in Iraq and Afghanistan. These include reporting in major newspapers and studies prepared by the Center for Strategic and International Studies (CSIS), the Brookings Institution, and GlobalSecurity.org. Of particular interest is the working draft of Anthony H. Cordesman's CSIS study: Iraq's Evolving Insurgency and the Risk of Civil War dated April 26, 2006. I comment on military affairs for local media outlets in Tampa, Florida. I have great professional respect for Brigadier General Carter F. Ham and Generals Richard Myers, John Abizaid, George Casey and Karl W. Eikenberry who contributed their insights to Brigadier General Ham's declaration; however, I disagree with several of their conclusions.

3. I am an active member of the American Civil Liberties Union (ACLU), a plaintiff in this case. I represent Florida on the ACLU's national board of directors and serve on the national Executive Committee, but the analysis and conclusions in this declaration are based on my military judgment.

4. At the request of the plaintiffs, I made an earlier declaration (dated August 2, 2005) addressing the redacted versions of the Declarations of Richard B. Myers, Chairman of the Joint Chiefs of Staff, and Ronald Schlicher, former Deputy Assistant Secretary of State and Coordinator for Iraq in the Bureau of Near Eastern Affairs, pertaining to the official release to the plaintiffs of 87 photos and four tapes of Abu Ghraib prisoners under the Freedom of Information Act. This declaration addresses redacted versions of the Declarations of BG Ham, Richard B. Jackson, and Phillip J. McGuire ("Ham Decl.," "Jackson Decl." and "McGuire Decl." respectively) that address the effects of the release of 29 additional photos relating to the government's abuse of detainees held in U.S. custody abroad.

5. Insurgent groups in Iraq and Afghanistan have specific military and political objectives. Iraqi insurgents mount from 55 to 80 attacks a day; in Afghanistan the level of violence is much lower. In Iraq, attacks on U.S. and coalition forces are designed to foment

sectarian violence between Sunnis and the Shiites who control the nascent government. Sunni and foreign insurgents have stepped up attacks on Iraqi police, military and government sites to undermine the effectiveness and legitimacy of the government. Insurgent attacks on Shiite religious sites are designed to provoke retaliatory attacks on Sunnis and exacerbate religious and tribal differences. Attacks on the Iraqi oil infrastructure and reconstruction efforts have reduced oil production and exports to prewar levels and have slowed efforts to rebuild critical infrastructure. Attacks on these projects have forced contractors to devote about 25% of reconstruction funds to secure the projects. It is not clear that insurgents will be successful in their effort to provoke civil war, divide the country along religious and ethnic lines and force coalition forces to leave the country; however, their intent is clear. Their actions are designed to achieve these objectives.

6. BG Ham is correct in stating that the "situation on the ground in Iraq remains dynamic and dangerous in Baghdad and several other parts of the country," Ham Decl. at ¶ 6, but I believe he is incorrect in asserting that publication of the photos would endanger the lives and physical safety of U.S., coalition, Iraqi and Afghan forces and that of Iraqi and Afghan civilians. Insurgents attack U.S., coalition Iraqi, Afghan and Iraqi forces dozens of times every day. They seek to achieve their objectives and deny us the ability to achieve ours. They will continue to attack us as long as they have the will and the resources.

7. Insurgents may use torture photos and anti-Muslim cartoons as the pretext for their attacks, but they are not the real motivation. Attacks will continue whether these photos are released or not.

8. Images and information that may damage the image and reputation of U.S. and coalition forces are published frequently with no adverse result. Images of Abu Ghraib detainee abuse recently published on Australian television and Salon.com as well as other images published on Palmbeachpost.com do not appear to have been used as a pretext for insurgent action. Some of these images depict a detainee who is presumed deceased. Another depicts simulated homosexual acts. The material is readily available. It can be viewed and copied by anyone with access to the Internet. Newspapers in Jordan, Iraq, Egypt, Lebanon and other Mid-East countries and regional electronic media including Al Jazeera and Al Arabia covered the

release and published some photos. On February 16, 2006, CNN reported that a spokesman for then Iraqi Prime Minister al-Jaafari stated that the conduct depicted in the photos “completely conflicted with the human rights charter and their repetition should be prevented.” The Iraqi Council of Ministers welcomed “the firm denunciation (of the conduct) by the U.S. State Department and American officials.” CNN reported that a U.S. officer (from the context - Major General Rick Lynch) said the release of the photos had not resulted in “increased hostility” in Iraq. See *Iraqi Government Denounces Abu Ghraib Abuse*, Feb 16, 2006, *available at* <http://www.cnn.com/2006/WORLD/meast/02/16/abughraib.photos/index.html>. There was no apparent reaction on April 10th and 27th, 2006, when the U.S. government authenticated, in this litigation, the material posted by Salon.com and the Palm Beach Post respectively.

9. In addition, in recent months, a number of reports containing vivid descriptions of torture and mistreatment of detainees in U.S. custody were published with no indication that our insurgent enemies attempted to use them as a pretext for attack. Though these reports do not contain shocking photos, the content of some reports is, in some respects, more shocking to the conscience than many of the Abu Ghraib photos already released. On March 19, 2006, Eric Schmitt and Carolyn Marshall of the New York Times published “*Task Force 6-26: Inside Camp Nama; In Secret Unit’s ‘Black Room,’ A Grim Portrait of U.S. Abuse*,” describing prisoner abuse by Task Force 6-26, a Special Operations unit that created its own interrogation facility in one of the former Iraqi government’s torture chambers. The facility had signs proclaiming, “No blood no foul.” CIA, FBI, and Defense Intelligence Agency (DIA) officials who either observed or were made aware of the interrogation techniques used in the Black Room dissociated themselves and reported violations through their chains of command. In February 2006, the non-governmental organization Human Rights First published *Command’s Responsibility: Detainee Deaths in U. S. Custody in Iraq and Afghanistan*; the report examines the cases of 98 individuals who died while in U.S. custody overseas. Thirty-four were suspected or confirmed homicides; at least eight and as many as twelve were tortured to death. The report contains vivid profiles of the abuses suffered by many of the victims including Iraqi Major General Abed Hamed Mowhoush whose torture is portrayed in graphic detail. General Mowhoush surrendered after U.S. forces arrested his sons and used them for leverage to compel his surrender. He was interrogated on numerous occasions with a pattern of escalating violence and severe beatings. At

one point, his interrogators simulated the execution one of his sons to make Mowhoush cooperate. When he still refused to answer questions, he was placed head first in a sleeping bag and bound with electrical cord. His interrogator sat on his chest impairing his ability to breathe; he died of asphyxiation. An autopsy revealed that Mowhoush's body was covered with bruises; he had five broken ribs. In April 2006, the Detainee Accountability Project published "*By the Numbers*," a documentation of 330 cases involving more than 600 U.S. personnel who are "alleged to have abused detainees, ranging from beatings and assaults, to torture, sexual abuse, and homicide." This study reports that many cases of alleged abuse are not investigated, and that almost all of the perpetrators punished were low-ranking enlisted personnel, who largely received minimal punishments. Public sources do not indicate that insurgent groups in Iraq and Afghanistan have used these or similar reports as a pretext for attacking coalition forces.

10. The Al Amarah incident on February 28, 2006, described in BG Ham's declaration is more complex than his declaration indicates. BG Ham acknowledges that Al Amarah is a dangerous place. Ham Decl. at ¶ 9. It is the administrative center of the Maysan Governorate; the population is predominately Shia. The Mhadi Army, a militia loyal to Muqtada al-Sadr, reportedly dominates the Maysan Governorate. The Badr Corps, a militia aligned with the Supreme Council for Islamic Revolution in Iraq (SCIRI), also has a presence in the city. Press reports indicate that many Badr Corps leaders spent time in exile in Iran. In the April 24, 2004, Michael Rubin in the New Republic Online quoted Sheik Muhammed Al Abadi, a Badr Corps member in Al Amarah, as stating: "The Americans may think they will have peace in eight months. But even if they stay eighteen years, we will never give them peace." Other press accounts indicate that Al Amarah is a center for the infiltration of weapons from Iran into Iraq. Al Amarah has been the scene of many incidents between Iraqis and British forces.

11. In January 2004, British soldiers in Al Amarah were videotaped apparently beating young Iraqis who were demonstrating for better employment opportunities. On or about February 15, 2006, the video was broadcast on British television and was reported in Al Amarah newspapers. Published sources indicated that Iraqis responded with demonstrations. On February 17th, local officials organized protest demonstrations in Al Amarah and Basra. They demanded that British forces apologize to the families of the victims of abuse, compensate them,

and investigate and punish the soldiers involved. The officials stated their intention not to cooperate with British forces and said they intended to pursue legal action "until those responsible are indicted and held accountable."

12. On February 22, 2006, insurgents bombed an important Shiite mosque in Samarra. The bombing was followed by an unprecedented wave of sectarian violence that affected most areas of the country. In the week that followed the Mosque bombing, reprisal attacks resulted in 379 deaths and 458 wounded. As a result of the outbreak of violence, curfews were imposed in many areas of the country, including Al Amarah. The curfew was lifted on February 27th. On February 28th, two British soldiers were killed in Al Amarah and a third was injured by an Improvised Explosive Device ("IED") that had been placed in an abandoned vehicle adjacent to a local playground. Responding British forces were stoned by a crowd but sustained no injuries.

13. Though British press reports linked the British soldiers' deaths to the video of abuse and earlier demonstrations, I have not been able to identify any insurgent claim linking the attack to the broadcast of the video. It is doubtful that there was a cause and effect relationship. The IED attack occurred almost two weeks after the video was broadcast and the demonstrations that immediately followed. Media reports of the incidents did not mention any attacks against British forces in Al Amarah in the days between the demonstrations and the imposition of the curfew. The British soldiers were killed by an Improvised Explosive Device of the type used in Iraq on an almost daily basis. On May 6, 2006, the BBC reported that "the distance between bases, and more importantly because of the dangers of bombs at the sides of roads" forced the British to make increased use of helicopters to move troops. The article specifically mentions a helicopter troop lift from Basra to Al Amarah.

14. On the day the British soldiers were killed, Iraq was still experiencing widespread violence stemming from the February 22nd attack on the Samarra Mosque; this included five attacks in Baghdad that killed 41 people. The lapse of time between the release of the video, the demonstrations and the IED attack combined with the violence that permeated the country during that period make it impossible to establish a cause and effect relationship between the video and the IED attack.

15. There is also a significant difference of context between the Al Amarah video and the photos plaintiffs seek to obtain. The Al Amarah incident was local. It occurred against a backdrop of long-standing interactions and complaints between local residents and British forces. Press accounts describing the video featured interviews with local individuals who claimed to have been among those beaten by British forces during the January 2004 incident. This is a situation that is unlikely to occur when the contested photos are released. The 29 photos are from different locations in Iraq and Afghanistan; the identifying features of Iraqi and Afghani detainees will be redacted.

16. Evaluating BG Ham's declaration in light of information contained in the McGuire and Jackson declarations is disconcerting. There is a marked discrepancy between the scale of harm that BG Ham predicts could result from release of these images, and the apparent leniency of punishments for what Richard B. Jackson describes as "threats, imminent assault, or humiliation of detainees" depicted in photos at Tabs C, D, E, and F. Jackson Decl. at ¶ 6.

17. BG Ham asserts that the release of the 29 photos at issue will endanger American, coalition Iraqi and Afghani lives. Ham Decl. at ¶ 2. In contrast, Mr. McGuire states that "the content of the 29 ROI Photos does not necessarily depict criminal behavior," and Exhibit C of this declaration indicates that no punishments were assessed with respect to 14 of the photos (Tabs A, B, F, and G). McGuire Decl. at ¶ 7, Ex. C. With regard to the remaining 15 photos (Tabs C, D, and E), investigations found probable cause to believe that criminal activity had occurred. McGuire Decl. at Ex. C. According to the McGuire declaration, however, all cases involving probable cause of criminal activity were resolved through Article 15 (Non-Judicial Punishment), Uniform Code of Military Justice ("U.C.M.J"). *Id.* One soldier was found not guilty in an Article 15 (U.C.M.J.) proceeding. *Id.* Eleven soldiers received unspecified punishment under Article 15 for a variety of charges, and one soldier received a reprimand. The level of the commander imposing the Article 15s and the punishments imposed under Article 15 were not specified. *Id.* However, it is, frankly, difficult to logically reconcile the magnitude of the potential harms alleged by BG Ham with the reality of the minor punishments that could be imposed on perpetrators under Article 15 of the U.C.M.J.

18. Prior to the "War on Terror," there was a bright line between acceptable and unacceptable treatment of prisoners of war and other protected persons. That line has been blurred. The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment was ratified by the United States and implemented in Section 2340 of the Criminal Code. The Geneva Conventions III and IV prohibited torture and cruel, inhuman and degrading treatment. The Army's Interrogation Field Manual FM 34-52, states that: "The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the U.S. Government."

19. Richard B. Jackson's declaration argues that the photos should not be released because the Geneva conventions bind us to treat detainees humanely and protect them from exposure to insults or public curiosity. Jackson Decl. at ¶ 6. It is unfortunate that our failure to ensure humane treatment has resulted in behavior like that depicted in the Abu Ghraib photos and those at issue here. I believe the identity of the detainees in these images can be obscured to satisfy the Geneva requirement to protect detainees from becoming objects of public curiosity. It is necessary to release these images in redacted form to ensure complete public accountability for the widespread use of torture and cruel, inhuman and degrading interrogation techniques in the "War on Terror." It is necessary to restore the bright line between legal and illegal interrogation techniques.

20. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.


MICHAEL E. PHENEGGER, Colonel, U.S. Army
(Retired)

Date: May 18, 2006

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, AND ITS COMPONENTS
DEPARTMENT OF ARMY, DEPARTMENT OF NAVY,
DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE
AGENCY; DEPARTMENT OF HOMELAND SECURITY;
DEPARTMENT OF JUSTICE, AND ITS COMPONENTS
CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE
OF INFORMATION AND PRIVACY, OFFICE OF
INTELLIGENCE, POLICY AND REVIEW, FEDERAL
BUREAU OF INVESTIGATION; DEPARTMENT OF STATE;
AND CENTRAL INTELLIGENCE AGENCY,

Defendants.

CIVIL ACTION
DOCKET NO. 04-CV-4151 (AKH)

**DECLARATION OF
KHALED FAHMY**

Khaled Fahmy, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am an Associate Professor of Middle Eastern Studies at New York University. My research to date has focused on the social history of the modern Middle East, with a particular focus on the relationship between modernity and religion. In addition, my extensive experience in the Egyptian National Archives has enabled me to engage with the new scholarship within Middle Eastern studies on nationalism and state building, social history and gender studies, as well as medical and legal history. Among my articles on these subjects are: "The military and politics in Egypt: An historical overview," "Towards a social history of modern Alexandria," "Prostitution in Nineteenth-Century Egypt," "The Police and the People in Nineteenth-Century Egypt," "The Anatomy of Justice: Forensic Medicine and Criminal law in Nineteenth-Century Egypt," and "Women, Medicine and Power in Nineteenth-Century Egypt."

During my twelve years of teaching first at Princeton University and then at NYU, I offered courses on the modern history of the Middle East, including: “Emergence of the Modern Middle East,” “Modern Egypt,” “Colonialism, Imperialism and Nationalism in the Middle East,” “Women in Islam,” “History of the Middle East from 1750 to the present,” and “Problems and Methods in Middle Eastern Studies.”

2. I am a native speaker of Arabic. I spend nearly five months each year living in Cairo conducting research in the Egyptian National Archives. I am also intimately familiar with the Egyptian cultural and intellectual community. Furthermore, I have traveled extensively in the Middle East, and am familiar with the various societies and cultures of the region.

3. As a result of my scholarship I have received the following honors and fellowships: Fulbright Scholar-in-Residence (1993-94), Malcolm Kerr Awards of the Middle East Studies Association for best humanities dissertation: honorable mention (1993), and Faculty Fellow in the Project on Cities and Urban Knowledges, International Center for Advanced Studies, New York University (2000-2001). I am affiliated with the Middle East Studies Association, the Egyptian Historical Association, and the American Historical Association.

4. I previously submitted a declaration dated August 4, 2005 relating to the government’s withholding of images of detainee abuse at Abu Ghraib turned over by Joseph Darby to the Army Criminal Investigations Command (the “Darby images”). See Decl. of Khaled Fahmy, Aug. 4, 2005 (“Aug 2005 Fahmy Decl.”). At the request of the plaintiffs, I have reviewed the Declaration of Carter F. Ham (“Ham Decl.”) pertaining to the 29 photographic images that are identified in Exhibit B of the Fourth Declaration of Phillip J. McGuire (collectively referred to as the “Responsive Army Photos”).

5. In his Declaration, Brigadier General Ham expresses his view that the release of the material in question could reasonably be expected to endanger the lives and physical safety of U.S. soldiers in the armed forces, as well as Iraqi and Afghani civilians. Ham Decl. at ¶ 2. In addition, he argues that the release of this material will also aid in the recruitment efforts of insurgent elements in Iraq and will increase the likelihood of violence against U.S. interests and

citizens worldwide. *Id.* For reasons set forth in my previous declaration, it is my view that the assertions of Brigadier General Ham are based on generalizations and assumptions about Muslim and Arab culture that are unfounded. I therefore reiterate here what I stated in my August 4, 2005 declaration relating to the government's withholding of the Darby images. *See* Aug. 2005 Fahmy Decl.

6. In his declaration, Brigadier General Ham repeats a point made earlier in General Myers's declaration, comparing the hypothetical results of the release of the Responsive Army Photos of prisoner abuse to the publication by *Newsweek* of a disputed case of desecrating the Koran in Guantanamo Bay, Cuba. *See* Ham Decl. at ¶ 10. As set forth in my August 2005 declaration, however, these two events are not analogous. There is nothing that approaches the holiness of the Koran in Islam. The Koran is believed by Muslims to be the literal word of God. They believe that it contains the eternal and unchanging message from God to humanity. There is nothing in Islam that approaches the Koran's sanctity. To compare Muslims' feelings about reports of alleged desecration of the Koran to their feelings about abuse of Iraqi prisoners by U.S. troops is to misunderstand a fundamental tenet of Islam, namely, the sanctity of the Word of God. This comparison also confuses feelings of anger, frustration and/or hostility that some Iraqis may have towards what they consider a foreign occupation of their country with a basic religious feeling that millions of Muslims around the world have regarding what they consider their Holy Book. *See* Aug. 2005 Fahmy Decl. at ¶ 7.

7. It is my opinion that there is nothing peculiar about Muslim culture in Iraq or elsewhere that would make people react to the Responsive Army Photos in a way different from other people's reactions elsewhere in the world. In other words, there is nothing specifically "Islamic" about the feelings conjured in people's minds when these pictures became available in the region. The perpetrators who abused the prisoners in Abu Ghraib might have conjured this link between what they assumed the religion of their captors to have been and the humiliation that they wanted to subject their captives to. However, there is no evidence whatsoever to support the allegation that Iraqi Christians, for example, would have felt any less insulted by this treatment than their fellow Muslim countrymen. In fact, one need not be Iraqi at all to be offended by these pictures.


8. Similarly, Brigadier General Ham compares the hypothetical result of the release of the Responsive Army Photos to the worldwide violence that occurred following the publication in Denmark (and then in Norway) of cartoons depicting the Prophet Muhammad. Ham Decl. at ¶ 11. Again, the two events are not analagous. While Muslims deny any divine attributes to Muhammad and insist that he was 100% human, they still think of him as an infallible, Perfect Man. His words and deeds are revered and emulated, as Muslims take them to be the best guide to how to lead an upright life and implement God's will as expressed in the Koran. As such, the Prophet Muhammad is treated with the utmost respect and veneration and his position in Islam is second only to the Koran. It follows that pictures depicting him in an irreverent manner (which is the conclusion reached by many Muslims across the globe about the Danish cartoons) is seen as literally blasphemous. By contrast, and as said above, there is nothing religious about how Iraqis (or anyone for that matter) think and react to the pictures depicting abuse of prisoners.

9. The insurgents in Afghanistan and Iraq defend their actions on multiple and sometimes shifting grounds. At various times, they have stated that they are fighting American occupation, that they oppose the stationing of United States troops in the Middle East, and that they are fighting for the overthrow of corrupt governments backed by the United States. While it is possible that insurgents may point to the abuse of prisoners by United States personnel as further justification for their actions, it is highly unlikely that such abuse would be the real justification. Photographs of detainee abuse might conceivably be used as pretexts for violence, but violence is likely to persist whether or not the photographs are released.

10. Even as pretexts, the photographs are likely to be of marginal value, as the insurgents have the ability to produce and disseminate fabricated images of U.S. troops abusing prisoners. The insurgents do not need accurate photographs in order to generate pretexts. The insurgents will have pretexts whether or not the true photographs are released. I do not know of any incident in which a photograph – real or doctored – was the actual cause of violence.

11. Moreover, the official release of the Responsive Army Photos will also win the support of those Muslims who seek some measure of public accountability. Indeed, in the Muslim world, much of the anger surrounding the photographs stems from the perception that the U.S. endorses torture, and that it has failed to hold officials accountable for abuses that took place on their watch and that they may even have authorized. The government's concealment of evidence that torture has occurred only feeds that anger. Refusing to release these photographs may be viewed as a further effort to cover up the scandal, which in my opinion would be just as harmful, if not more so, as releasing the photographs. An official release of the photographs, and official action to hold perpetrators accountable, will be seen by many Muslims, as by many Americans, as significant progress.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.


Khaled Fahmy, Professor, New York University

Date: May 19 2006

JA-196

**CERTIFICATION OF THE
SECRETARY OF DEFENSE**

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

Upon the recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of U.S. Central Command, and the Commander of Multi-National Forces-Iraq, and by the authority vested in me under Section 565(d)(1) of the DHS Appropriations Act, I have determined that public disclosure of these photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.

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

Date: 11-13-09


Secretary of Defense



COMMITTEES ON APPROPRIATIONS

Daniel K. Inouye (D-HI), Chairman
United States Senate

David R. Obey (D-WI), Chairman
U.S. House of Representatives

Wednesday, October 7, 2009

Contact: Rob Blumenthal / John Bray, w/Inouye (202) 224-7363
Ellis Brachman / Jenilee Keefe Singer, w/Obey (202) 225-2771

FY2010 CONFERENCE SUMMARY: HOMELAND SECURITY APPROPRIATIONS

The Homeland Security Appropriations Bill is focused on securing our nation's borders and preparing for any potential disaster. The conference agreement totals \$42.776 billion of discretionary budget authority for fiscal year 2010, \$2.648 billion, or 6.6 percent, above fiscal year 2009.

Priorities in the bill are focused on five major goals:

- 1) Securing our borders and enforcing our immigration laws;
- 2) Protecting the American people from terrorist threats and other vulnerabilities, and ensuring the Department is nimble enough to address future threats;
- 3) Preparing for, responding to, and recovering from all-hazards;
- 4) Supporting our State, local, Tribal, and private sector partners in homeland security with resources and information; and
- 5) Giving the Department resources to strengthen financial, procurement, IT systems, and other management tools that it needs to succeed; eliminating or reducing programs that are ineffective or duplicative.

Bill Total

2009 Enacted:	\$40.128 billion
2010 President's Request:	\$43.071 billion (includes Coast Guard Overseas Contingencies)
House Passed:	\$42.617 billion
Senate Passed:	\$42.927 billion
Conference Agreement:	\$42.776 billion

KEY INVESTMENTS

Customs and Border Protection (CBP): \$10.1 billion, \$306 million above 2009, excluding stimulus funding. Funding within CBP for border security includes:

- **Border Security Fencing, Infrastructure, and Technology (BSFIT):** \$800 million for Southwest Border investments, \$25 million above 2009, and \$22 million above the budget request. Through a mix of fencing, technology, and Border Patrol agents on the ground CBP now has nearly 700 miles of Southwest border under effective control, compared to 241 miles in FY 2005.
 - BSFIT funding includes \$40 million, the same as 2009, for additional investments in Northern Border security technology.
- **Border Patrol:** \$3.587 billion, \$86 million above 2009, to fully support 20,163 Border Patrol agents – an increase of 6,000 (or more than 50 percent) since 2006.
- **Southwest Border Counterdrug Initiatives:** \$72.6 million, including \$20 million for additional scanning systems for southbound lanes and checkpoints, and \$26 million above the request for 50 additional CBP officers, 100 Border Patrol agents, and 33 support personnel and equipment to stop

the outbound flow of weapons and currency used in the drug trade. All inspection equipment is to be competitively procured.

- **Western Hemisphere Travel Initiative:** \$145 million, as requested, to continue deploying technology and infrastructure at the 46 busiest border ports of entry and to facilitate travel and security for all travelers.

Immigration and Customs Enforcement (ICE): \$5.437 billion, \$447.7 million above 2009, including:

- **Dangerous Criminal Aliens:** \$1.5 billion for identifying and removing from the United States criminal aliens who are either at-large or already incarcerated in prisons or jails once an immigration judge has ordered them deported.
 - **Secure Communities:** Included in the \$1.5 billion is \$200 million, \$50 million above 2009, for a program that allows local law enforcement to check fingerprints of people booked on criminal charges for immigration and criminal records.
- **Southwest Border Violence:** \$100 million to combat international trade in illicit drugs, weapons smuggling and crimes associated with violence along the Southwest Border. This is part of an overall \$99 million increase over 2009 for ICE investigations. Funding includes:
 - \$70 million, as requested, to expand operations related to Southwest border violence by initiating more ICE investigations, intelligence activities, and international programs;
 - \$10 million above the request for investigations of transnational gangs;
 - \$10 million above the request for expansion of Border Enforcement Security Task Forces (BESTs); and
 - \$10 million above the request for counter-proliferation investigation, including bulk cash and weapons smuggling investigations.
- **Detention Capacity:** Funding for 33,400 detention beds and statutory language requiring that this number of beds be maintained throughout the fiscal year.
- **Worksite Enforcement:** \$135 million, \$6 million above the request, to hire special agents to perform audits of employers.
- **Alternatives to Detention:** \$70 million, \$6 million above the request, to expand this program nationwide

United States Visitor and Immigrant Status Indicator Technology (US-VISIT): \$373.7 million, \$73.7 million above 2009, for the US-VISIT program which uses biometrics to track the entry of visitors to the United States. The bill directs that a total of \$50 million be used to implement a biometric air exit capability so that we can determine if individuals have overstayed their visas.

United States Citizenship and Immigration Services: \$224 million, \$122 million above 2009, including \$5 million to cover naturalization of immigrants serving in the U.S. armed services, \$50 million for processing asylum and refugee applications, and \$11 million to expand immigrant integration and outreach efforts that promote legal paths to US citizenship.

- **E-Verify:** Includes a 3-year extension of E-Verify, as requested, and \$137 million to operate the system and further improve its accuracy and compliance rates.

Transportation Security Administration (TSA): \$7.7 billion, \$678.7 million above 2009, excluding stimulus funding. Funding includes:

- **Explosive Detection Systems:** \$778.3 million in discretionary funding to purchase and install explosives detection systems at airports. An additional \$250 million will be provided for this activity through mandatory fees.
- **Air Cargo Security:** \$122.8 million, including \$3.5 million above the budget request for 50 additional inspectors to ensure compliance with the 100% screening mandate set for August 2010 in the 9/11 Act; \$2.2 million above the budget request for inspectors and canine teams to convert 35 legacy teams to proprietary teams; and \$9 million above the budget request for testing and deployment of screening technologies.

- **Surface Transportation Security:** \$110.5 million, including funds for 15 new Visible Intermodal Protective Response security teams and 100 new surface transportation security inspectors to defend against potential attacks against our subways, trains, and buses.

Coast Guard: \$8.8 billion (excluding mandatory funding), \$415 million above 2009, including:

- **Deepwater:** \$1.154 billion, \$120 million above 2009, including \$389 million to complete production of the fourth National Security Cutter (NSC #4) and for long lead time materials for NSC #5.
- **Maritime patrol aircraft:** \$138.5 million for adding two patrol aircraft to the service rotation.
- **Fast Response Cutters:** \$243 million for four patrol boats.
- **Response Boat Mediums:** \$121 million to replace 41 foot Utility Boats in use since the early 1970's.
- **Interagency Operation Centers:** \$10 million for centers authorized by the SAFE Port Act.

Federal Law Enforcement Training Center: \$282.8 million for personnel and construction. The bill includes a general provision expanding the definition of “rural” to help the Rural Policing Institute reach jurisdictions in more rural areas of the United States.

Chemical Security: \$103.4 million for risk-based chemical facility security including \$25 million above 2009 to support the coordination and management of regulating high-risk chemical facilities. The increase, combined with the conversion of contract employees to federal employees, will bring the total DHS chemical facility regulatory staffing to 246, which is 168 above 2009. The bill also includes a one year extension of DHS’s regulatory authority to secure chemical facilities.

FEMA: \$903 million for FEMA Management and Administration. Together with amounts made available for management and administration from other FEMA accounts, these activities are funded at \$9 million above fiscal year 2009.

Science and Technology: \$1.006 billion, \$73.9 million above 2009, for research on homeland security priorities, such as counter-improvised explosives devices, cyber security, air cargo security, and first responder technologies.

Cyber Security: \$397 million, \$84 million above 2009, to expedite the continuing effort to combat the cyber security threat by reducing the points of access to the federal computer network to prevent hacking; by coordinating with the private sector who owns 85 percent of the Nation’s critical infrastructure; and by increasing security training and management of telecommunications, networks, computer systems, and the Internet.

Homeland Security Grants: \$4.17 billion, nearly \$300 million above the request, for grants to first responders and partners in homeland security, including:

- **State Grants:** \$950 million, matching the request and 2009, for grants used to plan, equip and train local first responders to respond to terrorist attacks and catastrophic incidents, including \$60 million for Operation Stonegarden.
- **Urban Area Security Grants:** \$887 million, matching the request and \$50 million above 2009, to help high-risk urban communities prevent, respond to, and recover from terrorist attacks.
- **Rail/Transit Security Grants:** \$300 million, \$50 million above the request, to protect critical transit infrastructure, including freight rail, Amtrak and ferry systems in high-threat areas.
- **Port Security Grants:** \$300 million, \$50 million above the request, to assist ports in enhancing maritime domain awareness and enhancing risk management capabilities to prevent, detect, and respond to terrorist attacks.
- **Emergency Management Performance Grants:** \$340 million, \$25 million above the request and 2009, for all-hazard grants for state and local emergency managers.
- **Fire Grants (including SAFER):** \$810 million, \$220 million above the request and \$35 million above 2009, to help local fire departments address communication, equipment and staffing problems. Of this total, \$420 million is for SAFER, as requested, and \$390 million is for fire grants.

- **Metropolitan Medical Response System:** \$41 million, \$1 million above the request, to help high-threat communities respond to mass casualty incidents.
- **Interoperable Communications:** \$50 million, matching the request and 2009, for help firefighters and emergency responders talk to each other during a crisis.
- **Emergency Operations Centers:** \$60 million, \$25 million above 2009, to equip and upgrade central command facilities used by emergency personnel during disasters.

REAL ID: \$60 million, \$40 million below 2009, to help states comply with REAL ID, which requires state driver's licenses to meet new standards in order to be used for federal identification purposes. Of this total, \$50 million is for the driver's license security grant program, the same as 2009, and \$10 million is for REAL ID hub development.

Emergency Food and Shelter: \$200 million, matching 2009 and \$100 million above the request, to address the increasing needs for food and shelter of our citizens in this time of economic downturn.

Strengthening DHS Financial, Procurement, IT Systems, and other Management tools:

- **Data Center Migration:** \$150 million above 2009 to continue the migration of 24 DHS data centers located across the country and develop the two secure locations they will be housed in. This funding will enable DHS to effectively monitor all IT systems for compliance while reducing the risk of vulnerabilities in information systems. Migration to two centers will also allow the Department to mitigate disaster recovery deficiencies.
- **Office of Security:** \$90.2 million, \$29.3 million above 2009, including: \$20 million for secure identification cards for DHS employees pursuant to Homeland Security Presidential Directive 12; and \$3 million to create a Personnel Security Adjudication Team to reduce the backlog in background investigations for security clearances, which has delayed hiring of critical positions at DHS.
- **Office of the Chief Procurement Officer:** \$68.5 million, \$29.5 million above 2009, including: \$7.5 million to create a new contracting component for classified programs; \$8 million to increase capacity in the acquisition program management division (this increase will bolster the Department's efforts to oversee major Departmental procurements); and \$7 million for 100 additional acquisition professionals across the Department to fill a shortage of qualified contracting professionals.

Domestic Nuclear Detection Office (DNDO): \$383 million, \$131.2 million below 2009. The reduction reflects the Department's delay in developing next-generation radiation portal monitors. DNDO is encouraged to focus on deterrence to alternative pathways for bringing nuclear devices or radiological materials into the country, such as general aviation or small maritime vessels. A total of \$20 million is provided for the Securing the Cities program.

United States Secret Service: \$1.5 billion, \$70 million above 2009. Additional funds are for Secret Service personnel costs, a new overseas field office in Tallinn, Estonia, and to secure the Service's mission-critical computer applications.

SIGNIFICANT CUTS:

Advanced Spectroscopic Portal Monitors: Language is included prohibiting the Department from full-scale procurement of Advanced Spectroscopic Portal Monitors (ASP) monitors until the Secretary submits a report to the Committees on Appropriations certifying that a significant increase in operational effectiveness will be achieved.

Program Eliminations: Cuts \$319 million by eliminating funding for programs such as: advanced spectroscopic portal monitors, trucking industry security grants, and commercial equipment direct assistance program.

OTHER IMPORTANT POLICY ITEMS:

Guantanamo Bay Detention Facility: 1) Prohibits current detainees from being released into the continental United States, Alaska, Hawaii, DC, or any U.S. territory. 2) Prohibits current detainees from being transferred to the continental United States, Alaska, Hawaii, DC, or any U.S. territory, except to be prosecuted and only after Congress receives a plan detailing: risks involved and a plan for mitigating such risk; cost of the transfer; legal rationale and court demands; and a copy of the notification provided to the Governor of the receiving state 14 days before a transfer with a certification by the Attorney General that the individual poses little or no security risk. 3) Current detainees cannot be transferred or released to another country (including freely associated states) unless the President submits to Congress 15 days prior to such transfer: the name of the individual and the country the individual will be transferred to; an assessment of risks posed and actions taken to mitigate such risks; and the terms of the transfer agreement with the other country, including any financial assistance. 4) Requires the President to submit a report to Congress describing the disposition of each current detainee before the facility can be closed. 5) Bars the use of funds to provide any immigration benefits to GTMO detainees other than to allow them to be brought to the U.S. for prosecution. 6) Mandates the inclusion of all GTMO detainees on the TSA No Fly List.

Detainee Photos: Codifies the President's decision to allow the Secretary of Defense to bar the release of detainee photos.

National Bio and Agro-defense Facility (NBAF): Prohibits the obligation of construction funds until DHS undertakes a bio-safety and bio-security mitigation risk assessment to determine requirements for the safe operation of NBAF in Manhattan, Kansas. Once DHS completes the risk assessment, the National Academy of Sciences shall provide an independent evaluation of the DHS study to ensure that risk has been adequately identified and mitigated for in planning for NBAF. In addition, the Secretary of DHS, in coordination with the Secretary of Agriculture, shall report to the Committees on the procedures used to issue a permit for foot-and-mouth disease live virus research and an emergency response plan in the event of an accidental release of a hazardous pathogen originating from NBAF.

Federal Protective Service (FPS): Transfers FPS from ICE to the National Protection and Programs Directorate and requires DHS to maintain a FPS in-service field staff of at least 900 FPS officers to protect Federal buildings.

LORAN-C: Allows for termination of the LORAN-C signal on January 4, 2010, after certification from the Commandant of the Coast Guard that it is not needed for navigation and from the Secretary of DHS that it is not needed as a backup for GPS.

Oversight: Expenditure plans, important to ensure that DHS is appropriately planning, are required for many programs, including: Deepwater; the Secure Border Initiative; the Automated Commercial Environment; US-VISIT; National Cyber Security Initiative; BioWatch; Office of Policy; CIO IT acquisition projects; TSA air cargo security, checkpoint support, and explosive detection systems; USCIS REAL-ID Hub; DNDO portal radiation monitors; ICE Alternatives to Detention; and Next Generation Networks.

Visa Extensions: Provides three year authorization extensions for the religious worker (R visa), rural-serving doctors (Conrad 30-J visa), and investor (EB-5 visa) programs.

Humanitarian Treatment for Surviving Spouses and Other Relatives of Deceased Immigrant Sponsors: Provides statutory authority for USCIS to complete processing of permanent residence applications for surviving spouses and other relatives of immigration sponsors who die during the adjudication process.

Program Extensions: Extends the authorization for PreDisaster Mitigation and Chemical Facility Anti-Terrorism Standards for a year.

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 AMERICAN CIVIL LIBERTIES
4 UNION, et al.,

Plaintiffs,

v.

04-CV-4151 (AKH)

6 DEPARTMENT OF DEFENSE, et al.,

Defendants.

Oral Argument

8 -----x

New York, N.Y.

July 20, 2011

3:24 p.m.

11 Before:

12 HON. ALVIN K. HELLERSTEIN,

District Judge

14 APPEARANCES

15 AMERICAN CIVIL LIBERTIES UNION
For Plaintiffs

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1 (In open court)

2 (Case called)

3 THE CLERK: Counsel, please state your name for the
4 record.

5 MR. ABDO: Alexander Abdo for the plaintiffs, your
6 Honor.

7 MR. JAFFER: Jameel Jaffer for plaintiffs, your Honor.

8 MR. LUSTBERG: Lawrence S. Lustberg, Gibbons, P.C., on
9 behalf of plaintiffs.

10 MS. BANNON: Alicia Bannon, Gibbons, P.C., on behalf
11 of plaintiffs.

12 MS. BARCELO: Amy Barcelo, assistant United States
13 attorney, on behalf of the government.

14 MS. LA MORTE: Tara La Morte, assistant United States
15 attorney, on behalf of the government.

16 MR. MILLS: Charles G. Mills on behalf of the amicus
17 curiae, the American Legion.

18 THE COURT: All right. Who's going to argue for the
19 plaintiff?

20 MR. ABDO: I will, your Honor. Alexander Abdo.

21 THE COURT: Go ahead, Mr. Abdo.

22 MR. ABDO: Your Honor, at issue today is the
23 government's withholding of approximately 2,000 photographs
24 depicting the abuse of detainees in US custody throughout
25 detention facilities in Iraq and Afghanistan. The vast

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1 majority of the photographs have never been publicly described.
2 This court and the Second Circuit ordered their release, as you
3 will recall. Now, however, the government --

4 THE COURT: Vividly.

5 MR. ABDO: Well, now, as I'm sure your Honor recalls,
6 the government is withholding the photographs under new
7 statutory authority provided by Congress. That statute
8 authorizes the government to withhold certain photographs if
9 the Secretary of Defense determines that release of the
10 photographs would endanger US citizens, civilians, or
11 employees, and the Secretary has made such a determination.

12 The question today for the court is a very simple one:
13 whether there is any judicial review whatsoever of the
14 Secretary's determination that release of the photographs would
15 endanger those individuals. We think there are -- there is,
16 for three simple reasons.

17 The first is that the photo statute is an Exemption 3
18 withholding statute because it establishes particular criteria
19 for the withholding of agency records.

20 Second, one of those criteria -- indeed, the most
21 important -- is that the Secretary determines that release of
22 the requested records would endanger US individuals.

23 And finally, FOIA requires additional review of that
24 determination, as it does of all criteria established under
25 Exemption 3 statutes.

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1 As the briefing to this court shows, the majority of
2 the caselaw supports that simple analysis. The Ninth Circuit,
3 in a case known as *Long*, and a number of circuits following
4 that decision, encountered a very similar situation that this
5 court is in now. The Ninth Circuit had ordered the release of
6 certain tax-related information, and Congress responded by
7 passing a statute that provided new statutory authority for the
8 withholding of that information if the Secretary of the
9 Treasury determined that release would cause a particular harm.
10 The district court in that case found that the statute,
11 invocation of the statute was sufficient to discharge the
12 government's obligations to withhold the tax-related
13 information, but the Ninth Circuit reversed, holding that FOIA
14 provides --

15 THE COURT: Tell me, Mr. Abdo, the nature of the
16 information that was sought in that case.

17 MR. ABDO: The information was return information
18 submitted by taxpayers that was withheld by the Secretary of
19 the Treasury on the claim that disclosure would adversely
20 impact the administration of the tax laws.

21 THE COURT: You mean the Freedom of Information Act
22 requests were for the precise returns filed by taxpayers?

23 MR. ABDO: I don't recall whether it was for
24 particular information within returns, but it was for
25 information covered by the portion of the tax act that

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1 protected return information.

2 THE COURT: I think I need to know more about that to
3 consider if *Long* is a good precedent for you. Some areas, by
4 the very nature of those areas, the court naturally has a great
5 deal of information and is in possession of a better ability to
6 evaluate the nature of the withholding than perhaps in other
7 areas, and I'd like to compare what a court might well
8 appreciate in *Long* to the very difficult job a judge sitting in
9 New York City, insulated in a courtroom from a battlefield,
10 might be able to evaluate in the case applied.

11 MR. ABDO: There's no doubt, your Honor, that the
12 context of the two cases are distinct. What we are asking the
13 court to do, however, is engage in the very type of analysis
14 that courts examining FOIA requests engage in all the time, to
15 determine --

16 THE COURT: No, they don't. They don't. Once the
17 head of an agency has a deliberate consideration and
18 determination, courts tend to respect that.

19 MR. ABDO: Respectfully, your Honor, there is some
20 deference given to heads of agencies in making those
21 determinations, but all we're requesting at this point is that
22 the government provide a justification for the invocation of
23 the statute, which it has yet to do.

24 For example, in the context of Exemption 1, courts are
25 called upon routinely to determine whether the government's

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1 determination of national security harm satisfies its
2 obligation to withhold records that would allegedly endanger
3 the national security. There may be some measure of deference
4 in that context, but that deference on the question of the
5 substance has never been held to negate the availability of
6 judicial review in the first instance for the government
7 withholdings.

8 THE COURT: I've done a lot of those reviews in this
9 case. Mr. Lustberg has been involved in any number of them.
10 And I looked at the particular statement that is subject to the
11 withholding request. And I looked for a reasonable
12 relationship by the nature of the subject matter to the general
13 classification -- for example, in the CIA papers -- that a
14 method of investigation or inquiry would be disclosed. And
15 it's not a very detailed evaluation; it is rather superficial,
16 by its very nature.

17 And here, as I understand what happened, the United
18 States was all set to make the publication ordered by me and
19 affirmed by the Second Circuit when the Prime Minister of Iraq
20 importuned President Obama not to allow it for fear that a
21 great deal of civil unrest and insurrection would occur in
22 Iraq, endangering the Iraqi government, the officials of the
23 Iraqi government, the United States military, and civilian
24 forces supporting that government. And it went up through the
25 chain of command, and Secretary of Defense Gates made the

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1 determination, based on recommendations made at every step
2 along the way.

3 When I initially made the determination to release the
4 photographs, I considered an affidavit from the then commander
5 in chief Richard Myers, who wrote as to his concern that the
6 release of the photographs would endanger American military and
7 civilian forces in Iraq and lead to insurrection and the like.
8 And I ruled that these were really speculative, that the
9 terrorists in Iraq needed no pretext to attack American forces,
10 and the core values of the Freedom of Information Act were more
11 cogent and more dear than the speculation of even the commander
12 in chief of the United States military. And the Second Circuit
13 affirmed.

14 And then we have this presidential order, and an act
15 of Congress. What more could I do?

16 MR. ABDO: Respectfully, your Honor, the determination
17 or the public statements you're referring to are from several
18 years ago, and we're simply not in a position to know now
19 whether those are the same types of concerns that are animating
20 the government's withholdings. A year and a half ago, when the
21 government -- when the President determined not to release the
22 photographs as he had initially determined to do, he made a
23 very time-sensitive statement about the nature of the facts on
24 the ground at the time. We are now two years removed from that
25 determination and yet we have no record from the Secretary of

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1 Defense explaining the entirely conclusory explanation in his
2 certification that disclosure of these records now would cause
3 harm. Moreover, we don't have any connection drawn --

4 THE COURT: It's evident. It's evident. It's the
5 same concern about harm that's been expressed throughout the
6 case, which I did not follow but which Congress commands me to
7 follow. I'm just a judge.

8 MR. ABDO: We understand that, your Honor. But
9 there's a crucial role for judges to play in the FOIA process.
10 The process of FOIA is not simply for the government to come
11 into court, invoke an exemption, and for courts then to simply
12 ratify that invocation of an exemption.

13 THE COURT: I don't think the government did that. If
14 Secretary of Gates had done what you said, I might be tempted
15 to require more. But in the context of the history of this
16 case, I think the concerns are real, and they've been
17 expressed. It was a very interesting statement that was made,
18 when the United States was ready, willing, and able to produce
19 the redacted photographs, an amazing statement, and it, in
20 effect, could not be ignored by the President or the Congress.
21 The history makes it quite clear, I think.

22 MR. ABDO: Your Honor, we respect that the court is
23 inclined to defer to determinations of the agency, but there
24 has to be something to defer to. Currently before the court,
25 the only document provided by the government attempting to

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1 justify the withholding of these records on this motion is a
2 Secretary certification, which does no more than essentially
3 copy and paste the language of the statute relating to the
4 required harm that must be demonstrated. The Secretary has not
5 attempted, nor has any declarant on behalf of the government,
6 to explain how any one of the photographs would lead to that
7 harm. Given the sheer volume of the photographs, 2,000, we
8 think it unlikely that the release of even one of them, much
9 less the least inflammatory of them, would cause the type of
10 harm that the Secretary predicts. But we're also --

11 THE COURT: You want me to go through all 2,000 and
12 rank them? This one is benign, we'll let that go through, but
13 this one shows something more dramatic? What would I be
14 looking for? What kind of criteria would I use to go through
15 this?

16 MR. ABDO: We would invite *in camera* review, your
17 Honor, but the initial posture of most FOIA cases is to require
18 the government, through a Vaughn declaration and a Vaughn
19 index, to make that showing, because the government bears the
20 burden under FOIA in the first instance of attempting to
21 justify its withholdings. It has yet to produce a Vaughn index
22 or declaration with respect to these 2,000 photographs. So we
23 think the first step for the court would be simply to order the
24 government to produce a Vaughn declaration explaining how
25 release of each of the photographs would result in the harm it

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1 claims and an index that provides sufficient textual detail,
2 describing each photograph, to allow the court to connect the
3 alleged harm with the actual records.

4 And it's notable that the statute at issue says not a
5 word about textual descriptions of these photographs. It
6 protects simply the photographs themselves. And so the court
7 wouldn't be in any way endangering the asserted interests of
8 the government if it merely required a textual description to
9 be provided by the government to the plaintiffs. All it would
10 be doing would be vindicating FOIA's core purposes by allowing
11 adversarial testing of the government's claim of harm by
12 providing a sufficient record for the court to conduct the *de*
13 *novo* review mandated and, importantly in this case, by creating
14 a full record of the government's reasons for withholding and
15 the contents of the records it seeks to withhold.

16 THE COURT: Mr. Abdo, I'm looking at your brief, and I
17 take it that you want me, as stated at the bottom of page 9, to
18 conduct a *de novo* review, finding if the release of the
19 photographs actually would cause the harm specified by the act.

20 MR. ABDO: The phrase --

21 THE COURT: How am I equipped to do that?

22 MR. ABDO: We respectfully disagree, your Honor. FOIA
23 mandates that courts engage in that type of *de novo* review --

24 THE COURT: Actually would cause the harm.

25 MR. ABDO: We perhaps misquoted the statute, but

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1 whatever --

2 THE COURT: This is argument. You didn't quote
3 anything. You just asked. This is argument. That's what you
4 want me to do. You want me to conduct a *de novo* review to find
5 whether the photographs actually would cause the harm. What is
6 the harm specified by the law?

7 MR. ABDO: Subsection (d), your Honor, of the statute
8 authorizes withholding if the Secretary of Defense determines
9 that disclosure of that photograph would endanger citizens of
10 the United States, members of the United States armed forces,
11 or employees of the United States government deployed outside
12 the United States. That is the very type of determination,
13 albeit with some deference in these contexts, that courts
14 engage in when, for example, they ask whether release of a
15 document would compromise national security under Exemption 1.
16 It is the same type of question that this court asked when the
17 CIA sought to neither confirm nor deny the existence of a
18 particular legal memorandum, an explanation that this court,
19 after conducting *de novo* review, rejected, notwithstanding the
20 context of that withholding, and the same type of determination
21 that this court more recently --

22 THE COURT: I recall that the government volunteered
23 that information.

24 MR. ABDO: Ultimately, your Honor, I don't recall
25 whether that's true, but --

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1 THE COURT: I don't remember well enough, but I don't
2 remember having made that determination. Maybe Mr. Lustberg
3 remembers that.

4 MR. ABDO: It was in the September 2005 order, your
5 Honor.

6 In any event, your Honor --

7 THE COURT: I called on Mr. Lustberg because I think
8 only he has memory long enough to the beginning of the case.

9 MR. LUSTBERG: And I had hair when this case started,
10 Judge.

11 THE COURT: What shall I say, Mr. Lustberg?

12 MR. LUSTBERG: I don't have a specific word.

13 I think the issue in that case was that some of those
14 memoranda had already been disclosed in the public record, so
15 there was a different determination that your Honor had to
16 make.

17 THE COURT: I think that's right.

18 MR. ABDO: Then I'll point your Honor to a more recent
19 determination that the alleged source and method withheld by
20 the CIA in one of those memoranda was not in fact a source or
21 method but was in fact a source of authority and would not
22 cause the harm claimed by the CIA.

23 In any event, the point is a larger one, your Honor,
24 that FOIA requires that courts conduct that type of review.
25 Although styled *de novo* by FOIA, it varies, of course,

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1 according to the circumstances, but the review in any of those
2 circumstances fulfills an important role of the court in
3 ensuring that it is the rule of law respected when records are
4 withheld and not simply a mere ratification of withholding
5 decisions.

6 THE COURT: I wrestled with that consideration at some
7 earlier time, because the statute seems to be saying two
8 things. It does call upon a *de novo* review of sorts, but that
9 review seems to be satisfied by looking at the procedure used
10 by the particular head of an agency in claiming an exemption,
11 and the court did not seem -- particularly in matters of
12 defense and intelligence, the courts give a great deal of
13 respect for the decision made.

14 And I remember very well the *Glomar* case, where
15 President Carter ordered the release of information that showed
16 that what the United States had been calling an exploration and
17 scientific research ship actually was used for spying purposes
18 in the Pacific, and notwithstanding the disclosure by the
19 United States, a subsequent claim to withhold disclosure under
20 an exemption was upheld by the District of Columbia circuit
21 because even the provenance of a particular disclosure could
22 embarrass our foreign relations. I was very struck by that
23 decision, which I thought was something that the Second Circuit
24 would follow, and which I would follow, that matters of defense
25 and intelligence are of such a sensitive nature, it's very

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1 difficult for a judge, and maybe impossible, to make the kinds
2 of calculations and evaluations that are necessary for the
3 normal kind of *de novo* review. And I applied it here.

4 Going back to what happened, here is the certification
5 by Secretary Gates that you quote on page 5 of your brief.

6 "After hearing recommendations of the Chairman of the Joint
7 Chiefs of Staff, the Commander of US Central Command, and the
8 Commander of Multinational Forces, Iraq, that public disclosure
9 of these photographs would endanger citizens of the United
10 States, members of the United States armed forces, or employees
11 of the United States government deployed outside the United
12 States." I've seen photographs similar to this in an *in camera*
13 review, and it's clear from all the public information as well
14 that what is depicted in these photographs are scenes of
15 inappropriate corrections officers behavior towards detainees.
16 There are scenes where dogs are used, there are scenes where
17 there's public nakedness, there are scenes of compromising
18 behavior. All of this is on the public record in word
19 descriptions. Photographs have not been depicted. And I felt,
20 after seeing these pictures, that the dimension of visual
21 knowledge of what was going on is different in kind and quality
22 from the intellectual knowledge that comes from reading words
23 on a page, and it was for that reason that I held that it was
24 appropriate to publish these photographs. And I had before me
25 certifications by the military that the publication would

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1 endanger lives. We were in a wartime situation there, and we
2 were being attacked regularly. And I believed from everything
3 known to me that the danger of our forces and civilians were at
4 such a high level that there need be no pretext for additional
5 terrorist activity against us, and so the photographs would do
6 nothing, and I felt that the speculation of the commander in
7 chief, although entitled to great deference, did not outweigh
8 the core values of FOIA. But there's now a specific statute
9 that says that these kinds of certifications need to be given
10 conclusive respect.

11 Then, as now, there are still the same issues of the
12 visual image of American troops committing improper and
13 inappropriate acts towards Iraqis which fuel insurrection and
14 terrorist activity, endangering our forces. We've drawn down
15 our forces. There are more civilians, many more civilians than
16 military, and we're in the process of continuing to draw down
17 our forces. The dangers that are certified by Secretary Gates
18 become much more vivid in this kind of an environment. And
19 although one can argue that the conditions existing now are of
20 a more benign nature than existed when Congress enacted the
21 statute, one could argue the contrary as well. We continue to
22 hear and read of terrorist activities in Iraq, one Iraqi
23 against another and one Iraqi against the forces of the United
24 States. We're not out of danger. And for the same rationale
25 that animated the passage by Congress of the act -- what is the

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1 name, the Protected National Defense --

2 MR. ABDO: The Protected National Security Documents
3 Act.

4 THE COURT: Yes. That should be applied. I cannot
5 conduct the evaluation that you want. The certifications are
6 there. I just read that particular certification. The other
7 criteria of the law is that the photographs were taken during
8 the period beginning on September 11th, 2001 through
9 January 22, 2009, and relate to the treatment of individuals
10 engaged, captured, or detained after September 11, 2001, by the
11 armed forces of the United States and operations outside of the
12 United States. There's no serious question that the
13 photographs, each of the 2,000, qualify, is there?

14 MR. ABDO: We have the Secretary's representation but
15 that's it, your Honor.

16 THE COURT: You do not --

17 MR. ABDO: We're not contesting that, your Honor.

18 THE COURT: You're not. I think it's enough.

19 Mr. Abdo, I'm sympathetic to your argument, but I
20 think I have to follow this.

21 MR. ABDO: Your Honor, if I could make just one point.

22 THE COURT: Yes.

23 MR. ABDO: It seems that the primary motivation is the
24 court's belief that Congress has conclusively acted, and I'd
25 just like to push back up against that a little bit.

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1 THE COURT: You may.

2 MR. ABDO: Congress could easily have written a
3 statute that would have prohibited the disclosure of these
4 photographs without the availability of any judicial review of
5 a determination of harm. It could, for example, have drafted a
6 statute like the CIA Act, which protects the operational files
7 of the CIA without any intervention of a court; it could have
8 protected these photographs in the same way it protects
9 information provided by census takers, which is protected in
10 the Census Act, or to visa applicants, protected by the U.S.
11 Code. Instead it seeks to hinge its holding on the
12 determination of harm, and that determination of harm, under
13 hornbook law of FOIA, is an Exemption 3 criterion that is
14 subject to judicial review. And at this point there's simply
15 no record before the court to allow that type of review. The
16 Secretary's certification, with all due respect to the
17 Secretary, is nothing more than a recitation of the statutory
18 language. It provides no explanation for its determination of
19 harm; it doesn't explain anything about the contents of the
20 2,000 photographs. It may very well be that some of them are
21 withholdable for the reasons that the court provided, but we
22 simply don't know whether all 2,000 of them are or whether all
23 2,000 have the same type of content that would, you know,
24 self-evidently cause the type of harm that the court has
25 discussed. And that's because we simply have no record of what

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1 the photographs are. We don't know even how many there are
2 conclusively from the government. We don't know where they
3 were taken, and we don't know what they show. Without that
4 type of record, the Secretary's conclusory statement that
5 disclosing them would cause a harm is entirely unreviewable.
6 It would simply be wholesale deference without any other type
7 of review that FOIA calls for to ratify that withholding
8 without, at the very least, satisfying the procedural
9 requirements of FOIA.

10 And to be frank, it's a very modest request, your
11 Honor. We're simply asking that the government provide what it
12 does, even in all of the national security cases that your
13 Honor was talking about. Even in the *Glomar* context, even in
14 the Exemption 1 and national security Exemption 3 context.
15 Even in those contexts, the government provides a Vaughn
16 declaration and it provides an index that describes the
17 withheld records in as much detail as possible without
18 compromising the interests that it is trying to protect. It
19 has yet to do that here, and the only basis we can discern for
20 that judgment is that the government thinks the statute has
21 legislated the withholding of these photographs, but that is
22 emphatically not the case. Congress did not enact the type of
23 categorical ban that it has done in so many contexts. It
24 hinged withholding on specific criteria -- criteria that are
25 reviewable by courts' determinations of harm, that, albeit

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1 often reviewed in the context where deference is appropriate,
2 are reviewed nonetheless on the basis of a record provided by
3 the government. And here all we have is a declaration that
4 recites the photographs, and upon that record, we think it
5 would be improper for the court to uphold the withholding of
6 the photographs without more.

7 THE COURT: Thank you.

8 Ms. La Morte?

9 MS. BARCELO: Actually, Ms. Barcelo.

10 THE COURT: Ms. Barcelo. Sorry.

11 MS. BARCELO: No problem, your Honor.

12 THE COURT: Whenever I become familiar with the
13 assistants, you switch on me.

14 MS. BARCELO: Yes. I understand. The court --

15 THE COURT: Should the government have issued a Vaughn
16 declaration?

17 MS. BARCELO: There is no requirement for a Vaughn
18 index -- declarations or index here, your Honor. The basis --
19 as your Honor noted, this case has a unique history, or this --
20 the coming about of this statute.

21 THE COURT: I'm not sure it's unique, but it sure is
22 extensive.

23 MS. BARCELO: Yes. Well, I do think -- I mean, I
24 think the issue of these specific photos has a unique history,
25 and it resulted in an enactment of a unique statute. As a

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1 result of the enactment of the Protected National Security
2 Documents Act, we're now operating under FOIA Exemption 3.
3 That's the basis under which the government is withholding
4 these documents. And FOIA Exemption 3 is different from the
5 other FOIA exemptions under which this court has previously
6 considered the documents -- these photographs. Excuse me.

7 FOIA Exemption 3 requires only that a statute be a
8 FOIA Exemption 3 statute. Here plaintiffs argue that it is,
9 and that the document -- secondly, that the documents fall
10 within the scope of that statute. Here the government's
11 argument, the basis for the withholding -- the basis for the
12 documents -- the photographs falling within the scope of the
13 statute is the existence of the Secretary's certification which
14 fulfills all of the requirements of the statute, because each
15 and every one of the photographs falls within the scope of this
16 certification --

17 THE COURT: How do we know that?

18 MS. BARCELO: We know that because the certification
19 says so, your Honor. The certification refers specifically to
20 the photographs that are, I quote, "contained in or derived
21 from records of investigations of allegations of detainee
22 abuse," including the records -- including the records of
23 investigation, process and release in this very case, citing
24 the index number for this very case.

25 THE COURT: Well, the statute seems to make a

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1 distinction between the certificate, which is that disclosure
2 would endanger citizens of the United States, etc., and that
3 the photograph qualifies objectively. They're two different
4 criteria, and I don't think we can accept the certificate to
5 cover each and all of the photographs.

6 MS. BARCELO: I'm sorry. I'm not sure that I
7 understand the question.

8 THE COURT: The certificate has to do with danger to
9 persons.

10 MS. BARCELO: That's correct.

11 THE COURT: The photographs are qualified documents
12 under the act if they were taken during a certain period and if
13 they related to treatments engaged, captured, or detained by
14 the United States armed forces. So I can't accept the
15 certificate as conclusively saying that each of these 2,000
16 photographs qualifies under subsection (b) of the act.

17 MS. BARCELO: The certificate does also address both
18 of those points.

19 THE COURT: But I can't accept that. The law does not
20 require me to accept that. It requires me to accept the point
21 of danger. It doesn't require me to accept that these
22 photographs were taken during a certain period and related to
23 certain individuals.

24 MS. BARCELO: As an initial matter, plaintiffs are not
25 disputing that either one of those criteria are met here, and I

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1 do think the Secretary's certification, which is issued by the
2 Secretary of Defense himself, does speak precisely to both of
3 those issues, the time period during which the photographs were
4 taken.

5 THE COURT: I don't think that's relevant. That's not
6 what the statute says. I do think it would be an idle act to
7 go over each of these 2,000 photographs to see if they qualify
8 under this period. We won't know from the photograph
9 necessarily exactly when it was taken, although they may be
10 time stamped. We will be able to see from each of the
11 photographs what they relay. And I think for the purposes of
12 this motion, we don't have to go into that exercise, but I do
13 not hold that the government's certificate is conclusive on the
14 aspect of subsection (b).

15 MS. BARCELO: Thank you, your Honor.

16 THE COURT: Let's talk a little bit about *Long* and
17 *A. Michael's Piano*, two cases that are cited by the plaintiffs.
18 In *Long*, what was sought are standards used or to be used for
19 the selection of income tax returns for examination or that
20 they used for determining such standards. In other words, what
21 the applicant wanted to know was what criteria did the IRS use
22 in deciding which returns were audited; a valuable piece of
23 information for taxpayers.

24 The government argued that disclosure would qualify
25 under the act, that it authorized these kinds of criteria and

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1 data, to establish those criteria, to be exempted from
2 disclosure.

3 The Court of Appeals in the Ninth Circuit held that
4 the court had to make that determination. The case is not
5 binding on me, since we sit in the Second Circuit, and I don't
6 think I would agree with the Court of Appeals in the Ninth
7 Circuit. I think this kind of information is inconsistent with
8 the effective tax administration. But that would be on the
9 substance. I could understand a rule that says a district
10 judge has to delve into it because these are the kinds of
11 things that judges are aware of. You have to understand.

12 For the reasons I expressed before, I don't think we
13 have a very good understanding of what may or may not be
14 dangerous on the battlefield in the crazy conditions that exist
15 in Iraq at this point in time. And even there, the history of
16 what's involved, with which I've become as familiar as almost
17 any person outside the CIA or the Department of Defense, shows
18 to me that the Secretary of Defense has a rational basis for
19 how he wishes to conclude. I might disagree with him. I might
20 agree that the core values of FOIA are more important and more
21 cogent. In fact, I expressed those views. But I cannot say
22 that there is a lack of a rational basis for what Secretary
23 Gates has certified, and if you want me to do a *de novo* review,
24 I've done it, by reason of my familiarity with the case, and
25 that's as far as I'll go. I will not opine that there is or is

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1 not a danger in the battlefield because of the disclosure of
2 pictures of this sort. And I should say that issuing the
3 rulings I did was probably the most difficult judicial decision
4 that I've had to do in 12 years. We put people in the line of
5 fire every day. Regardless of whether we agree or disagree
6 with one or more aspects of national policy, we cannot gainsay
7 the fact that these are very brave soldiers and sailors and
8 airmen who carry out very dangerous missions every day to
9 protect the United States and advance its policies. And it's a
10 very difficult act on the part of a district judge to arrogate
11 the function of deciding what measure of danger is permissible
12 and what not.

13 So I will not do the *de novo* review except to the
14 extent of looking for the rational basis of what the Secretary
15 of Defense has done, and I've done that.

16 Before leaving, there's just one other case I wanted
17 to discuss with you, and that's *A. Michael's Piano v. FTC*. Can
18 you tell me a little bit about that case. That's a Second
19 Circuit decision.

20 MS. BARCELO: Certainly, your Honor.

21 In that case, that was an Exemption 3 FOIA case,
22 similar to this -- the issues that we are now discussing. *A.*
23 *Michael's Piano*, of course, dealt with a different Exemption 3
24 withholding statute than what we're talking about here. But
25 the fundamental issue that the Second Circuit was addressing

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1 here was, how do we determine whether or not a record is
2 protected under Exemption 3? Do we interpret the statute
3 using, you know, different principles of statutory
4 interpretation when considering it as a FOIA Exemption 3
5 statute than we would for any other sort of -- any other
6 statute that has been enacted by Congress?

7 It looks at, in considering -- excuse me. In
8 considering the different ways that a FOIA Exemption 3 statute
9 could be interpreted, the Second Circuit looks at the ways
10 other -- other circuits -- excuse me -- had interpreted 6103 of
11 the Internal Revenue Code, which is the statute the plaintiffs
12 argue we should interpret the PNSDA in a manner similar. What
13 the Second Circuit held was that in those cases, where other
14 circuits had argued or had held that principles of FOIA *de novo*
15 review should be imposed upon the interpretation of the scope
16 of the FOIA Exemption 3 statute and other circuits had argued
17 or had held that APA principles of arbitrating capricious
18 review should be imposed upon the interpretations of the scope
19 of the Exemption 3 statutes, the Second Circuit considered both
20 of those options and rejected them. Instead, the Second
21 Circuit held, in light of the Supreme Court precedent in the
22 *CIA v. Sims* case -- which I know the court is very familiar
23 with, as it's come up a number of times in the previous case --
24 it held that a FOIA Exemption 3 statute could only be
25 interpreted according to its plain language, its plain meaning,

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1 taking into account its structure, its purpose, and the
2 legislative history of the statute, with the ultimate goal of
3 determining Congressional purpose in enacting the statute and
4 determining what Congress intended. Did Congress intend for
5 the types of documents that we're talking about here to be
6 protected under this statute. Here, there is no question that
7 that is what Congress is intending with respect to the
8 photographs at issue here. That I think is what we can -- the
9 sense in which *A. Michael's Piano* was instructive, that a FOIA
10 Exemption 3 statute should be interpreted in the same manner as
11 any other Congressional enactment, on its own terms, its own
12 plain language, and Congressional intent on enacting the
13 statute.

14 THE COURT: The Second Circuit held -- this is a 1994
15 case -- that the burden of proof on *de novo* judicial review
16 rests with the agency asserting the exemption. What did
17 Secretary Gates have to do? Was his certificate sufficient?

18 MS. BARCELO: His certificate -- certification
19 absolutely was sufficient.

20 THE COURT: Because that's what the statute says.

21 MS. BARCELO: Because that's what the statute
22 requires; exactly, your Honor. The statute requires --

23 THE COURT: And clearly the materials withheld fall
24 within the scope of the statute.

25 MS. BARCELO: That's exactly right, your Honor.

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1 THE COURT: And that's the end of the inquiry.

2 MS. BARCELO: That is also exactly right.

3 THE COURT: Anything else?

4 MS. BARCELO: Unless the court has any further
5 questions.

6 THE COURT: No. Thank you.

7 MS. BARCELO: Thank you.

8 THE COURT: Do we have any legislative history that
9 commands judicial review to a greater extent than I've
10 expressed?

11 MS. BARCELO: There is none, your Honor.

12 THE COURT: Last word, Mr. Abdo?

13 MR. ABDO: Yes, your Honor. Respectfully, the inquiry
14 about judicial review isn't whether Congress has expressed an
15 intent to maintain the default rule of judicial review under
16 FOIA. The inquiry under *Long* and all of the other -- the vast
17 majority of the circuits to consider a question similar to this
18 is whether Congress has tried to negate judicial review or get
19 rid of it. In this context it hasn't. It has left FOIA as it
20 stands --

21 THE COURT: It says nothing about judicial review.

22 MR. ABDO: That's exactly right. That's --

23 THE COURT: It says nothing about what standards of
24 inquiry the court should look to.

25 MR. ABDO: That's the case with all Exemption 3

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1 statutes, your Honor. Not a single one expresses a view on
2 whether the traditional FOIA review should apply, and the only
3 context in which Congress does express a view in those cases is
4 when it does try to extract a withholding statute from the
5 purview of FOIA, which Congress has not done here. And even
6 today the government concedes for the first time that the
7 proper framework is Exemption 3. And so it seems to us that
8 the only real question is whether a criterion under the statute
9 for withholding is that the Secretary determined harm or, as
10 your Honor has said a couple times, whether the Secretary
11 merely needs to certify that harm would exist. We think that's
12 a distinction without a difference. The statute requires both.
13 The only reason for the existence of a certification process
14 was to allow Congress to impose a temporal limit on the
15 certification, not to allow a single certification or a single
16 determination of harm to preclude release of these photographs
17 for all time. And the reason for that should be
18 straightforward. These are records that obviously cut to the
19 core of governmental transparency and to the core of the
20 purposes of FOIA. And so Congress was careful not to enact a
21 statute that allowed the withholding of these photographs on
22 the basis of one determination, no matter how long ago made.

23 THE COURT: What's the time period I look to in
24 deciding whether your request for FOIA disclosure were
25 appropriate or not? As of today or as of the time you made the

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1 request?

2 MR. ABDO: I believe it's the government's burden to
3 justify its withholding as of this moment. And that's
4 consistent with how the court has, for example, treated
5 withholdings under Exemption 7, where there are temporal
6 considerations. So for example, when Special Prosecutor Durham
7 withheld certain records under Exemption 7(a), the court asked
8 for periodic updates that might affect the relevance of his
9 withholding analysis at any given moment. And so I think the
10 question is whether the Secretary's simple statement that the
11 records should be withheld suffices to discharge the
12 government's burden to demonstrate that there would be harm if
13 the photographs were released today with respect to 2,000
14 photographs which we know nothing about.

15 THE COURT: Okay. Thank you very much, Mr. Abdo.

16 I deny the plaintiff's motion for disclosure of these
17 documents and hold that the government properly showed the
18 applicability of Exemption 3 of the Freedom of Information Act,
19 5 U.S.C. § 552(b)(3), and Section 565 of the Department of
20 Homeland Security Appropriations Act 2010, Public Law No.
21 111-83, 123, Statute 2142 and 2184-85 of 2009, better known as
22 the Protected National Security Documents Act of 2009.

23 So I deny plaintiff's motion for disclosure and I
24 grant the government's cross-motion for partial summary
25 judgment.

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1 This controversy has a rather long history.
2 Plaintiffs started the matter in October 2003 when they
3 submitted a FOIA request to a number of federal government
4 agencies, including the Department of Defense, and several
5 components, seeking the release of all records concerning the
6 treatment of detainees taken into United States custody after
7 September 11, 2001, and held at military bases or detention
8 facilities abroad.

9 This lawsuit, seeking to implement the FOIA request,
10 was filed in June of 2004.

11 I examined *in camera* each of the photographs that were
12 then in issue and I ordered that there be a redaction on most
13 of these photographs to mask the identity of the detainee and,
14 subject to such redaction, that most of these had to be
15 disclosed.

16 My opinion in writing is *American Civil Liberties*
17 *Union v. Department of Defense*, 389 F.Supp.2d 547 at 568-79,
18 issued in 2005 and affirmed by the Court of Appeals at
19 543 F.3d 59, decided in 2008, and then vacated after subsequent
20 proceedings by the United States Supreme Court at
21 130 U.S. 777 (2009).

22 These photographs, known as the Darby photographs,
23 from the person who took them, further claim exemption under
24 Exemption 6 and 7(c) of FOIA, 5 U.S.C. § 552(b)(6) and
25 (b)(7)(C). It was argued by the government that release of the

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1 photographs would constitute an unwarranted invasion of
2 personal property or privacy. It's very interesting to note
3 that the government at that time did not argue any aspect of
4 national security or endangerment of any military persons. I
5 denied the government's motion because I reasoned the
6 photographs had been redacted to eliminate all identifying
7 characteristics of the persons shown.

8 The government added its Exemption 7(f) argument,
9 arguing that publication of the Darby photographs would likely
10 incite violence against our troops and Iraqi and Afghan
11 personnel and civilians and that redactions would not avert the
12 danger. I overruled that objection. That is reflected at
13 389 F.Supp.2d at 574-79. After thorough review of all the
14 precedents and all the photographs, I concluded that the core
15 values that Exemption 7(f) was designed to protect are not
16 implicated by the release of the Darby photographs but that the
17 core values under which FOIA commands the disclosure were very
18 much implicated. Accordingly, I ordered the government to
19 release the Darby photographs.

20 Following that, a third party published the Darby
21 photographs online, and that resulted in a withdrawal by the
22 government of its appeal, at least as to the aspect of the
23 Darby photographs.

24 However, more and more photographs came into being, or
25 at least came out of hiding. It appears that there were an

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1 additional 29 photographs and two videos taken by individuals
2 serving in Iraq and Afghanistan that the government believes
3 were responsive to the FOIA requests. Again, the government
4 claimed exemption under Section 6, 7(c), and 7(f).

5 On June 8th, 2006, I reviewed the 29 photographs
6 *ex parte* and *in camera*, and that's reflected in an order,
7 04-CV-4151, Document 193, June 9, 2006.

8 I just want to interject that at all times during this
9 case I've been concerned to balance as properly as I could the
10 commands of secrecy and national defense and the commands of
11 publicity for a court record. I'm very much concerned that as
12 a United States district judge, I should be accountable for all
13 that I do, and at every step along the way I've tried to put on
14 the public record as much as I could about the subject matter
15 of my ruling and my rulings themselves. And some of this
16 required a good deal of intensive negotiations and stubbornness
17 with various government officials.

18 But in any event, I rejected the government's claimed
19 exemptions for the same reasons I expressed earlier and I
20 ordered the release of 21 of the 29 photographs, subject to
21 redaction to eliminate all identifying facial features. And as
22 to the other eight photographs, I ruled they were not
23 responsive to the request. That order was issued, June 9,
24 2006. It's Document 193. And it's also reflected in 2006 US
25 District LEXIS 40894 at *3-4.

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1 That was not the last of the photographs. By letter
2 of June 29, 2006, the government advised that the Department of
3 Defense had an additional 23 images of detainees and claimed
4 exemptions on the same bases as before. However, it was
5 clearly unnecessary to have further argument and further
6 opinion writing on the subject because what I said earlier on
7 several occasions the parties expected and I believe to be
8 consistently applied so there was a stipulation that these 23
9 would be governed by the rulings on the 21 for the purposes of
10 the appeal that followed.

11 So the government appealed my orders for the 21 and
12 the 29 photographs. On September 22, 2008, a unanimous panel
13 of the United States Court of Appeals for the Second Circuit
14 affirmed my order, directing the release of the photographs.
15 *American Civil Liberties Union v. Department of Defense*,
16 543 F.3d 59 (2d Cir. 2008), and that was vacated subsequently,
17 and a hearing *en banc* was denied.

18 The government advised on April 23, 2009, that it
19 would not seek certiorari review and that it was prepared to
20 release the 21 and the 23 photographs. There may be somewhat
21 different numbers, but there were two tranches of photographs
22 that were involved. And the government added that it was
23 processing for release a substantial number of other images
24 contained in the CIC (Criminal Investigation Command) report
25 that it disclosed during the pendency of the case. The

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1 government represented that it would process these other images
2 in a manner consistent with the court's previous rulings on
3 responsive images. Again, the government did not petition for
4 certiorari.

5 The Second Circuit issued a mandate on April 27, 2009.

6 However, just a few weeks later, matters turned
7 around. On May 13th, 2009, President Barack Obama stated
8 publicly that he would oppose the release of additional
9 detainee photographs. That followed -- and I'm not sure this
10 is in the record or from my recollection of the news reports,
11 but that followed an urgent request by the Prime Minister of
12 Iraq to the United States government not to publish the
13 photographs. The Prime Minister of Iraq, which had a more
14 fragile governmental structure at the time than it is today,
15 was concerned that the publication of these photos would fuel
16 insurrection and make it impossible to have a functioning
17 government. In reaction to that, President Obama expressed his
18 belief that the publication of these photos would not add any
19 additional benefit to the public's understanding of what was
20 carried out in the past by a small number of individuals;
21 rather, the most direct consequence of releasing the
22 photographs, the President added, would be to further inflame
23 antiAmerican opinion and to put our troops in greater danger.

24 Pursuant to the President's statements, on the
25 application of the government, the Second Circuit granted the

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1 government's motion to recall the mandate and to stay the
2 effect of the mandate pending disposition of a new petition for
3 certiorari. The government filed a petition, and it was three
4 months later that the Protected National Security Documents Act
5 of 2009 was signed into law. The PNSDA specifically exempts
6 from disclosure under FOIA any protected documents, defined as
7 a photograph taken between September 11, 2001, and January 2,
8 2009, relating to the treatment of individuals engaged,
9 captured, or detained, after September 11, 2001, by the United
10 States armed forces in their operations overseas, and for which
11 the Secretary of Defense issued a certification stating that
12 disclosure would endanger United States citizens, military
13 personnel, or federal government employees. Subsequently, the
14 Secretary of Defense, Robert M. Gates, issued a certification
15 of November 13, 2009, addressing a collection of photographs
16 between the indicated dates and relating to the subject matter
17 of the law. The collection includes the 23 and 21, or 44,
18 photographs that were involved in these proceedings. They do
19 not affect the photographs that were, I think -- I'd like to
20 confirm.

21 The first tranche of photographs that I ruled on are
22 out in the public domain, are they not, Mr. Abdo?

23 MR. ABDO: I believe so, your Honor.

24 THE COURT: So we're talking about the second tranche,
25 third tranche, and the fourth tranche documents?

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1 MR. ABDO: Yes.

2 THE COURT: Do you agree, Ms. Barcelo?

3 MS. BARCELO: I do, your Honor.

4 THE COURT: And I mentioned before on the record the
5 basis that was cited by Secretary Gates and my ruling that,
6 given the history of how this came about, it was clear to me
7 that Secretary Gates had a rational basis for his
8 certifications and that I could not second-guess it, and
9 notwithstanding the statement made this week by the ACLU, no
10 one really wants me to conduct a second review of that which is
11 in the purview of the Secretary of Defense, beyond looking for
12 a rational basis the way it did. I find that rational basis.

13 On November 30, 2009, continuing with the history of
14 the case, the United States Supreme Court granted the
15 government's petition for certiorari, vacated the Second
16 Circuit's judgment, and remanded for further consideration, in
17 light of the enactment of the Protected National Security
18 Documents Act and the certification of the Secretary of
19 Defense. 130 U.S. 777 (2009).

20 In turn, the Second Circuit vacated my orders and
21 remanded for further proceedings. And thus I'm blessed with
22 another appearance by everyone in this courtroom.

23 So I've expressed my holdings in the discussions we've
24 had. I hold that Exemption 3 makes clear that an agency need
25 not disclose records that are, by separate qualifying statute,

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1 specifically exempted from disclosure, and that separate
2 qualifying statute is the Protected National Security Documents
3 Act. I hold that the government has satisfied its burden to
4 support the claimed Exemption 3 from disclosure, and that was
5 the holding of *A. Michael's Piano, Inc. v. FTC*, which we
6 discussed earlier today, 18 F.3d 138, 143 (2d Cir. 1994),
7 implementing 5 U.S.C. § 552(a)(4)(D).

8 I've expressed my disagreement, as applied to the
9 proceedings before me, of *Long v. United States Internal*
10 *Revenue Service*, 742 F.2d 1173 (9th Cir. 1984), and I don't
11 need to elaborate further.

12 And the Second Circuit held, in *A. Michael's Piano*,
13 which I previously cited, following the Supreme Court decision
14 in *CIA v. Sims*, 471 U.S. 159, that we look in all statutes to
15 the plain language of the statute and its legislative history
16 in order to determine its legislative purpose. The legislative
17 purpose here was to provide authorizing legislation to support
18 the President's determination that these images should not be
19 disclosed, should be exempt from FOIA.

20 We saw before the statements in the Congressional
21 record of Senator Lieberman and Senator Graham, who sponsored
22 the bill. There is no legislative history suggesting any
23 further *de novo* review or any kind of review by the court. The
24 legislative history is not helpful. The language of the
25 statute makes clear what has to be done in terms of qualifying

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1 for exemption, that is, the certificate of which we spoke
2 before by the Secretary of Defense and the objective criteria
3 of the photographs, 2,000 photographs qualifying by date and by
4 relation to the criteria of the statute. So therefore I hold
5 that the photographs now in question are not subject to
6 disclosure under FOIA.

7 It seems to me that as a judge, my obligation is to
8 follow the law. We're not involved with the constitutional
9 determination; we're involved with the application of statutory
10 law, where, as here, the Executive branches and the Legislative
11 branches have spoken clearly as to the appropriateness of
12 exempting these photographs. My job as a judge is to follow
13 and not arrogate my own thinking and policy considerations and
14 derogations of the Legislative and Executive branches, which,
15 after all, have the job of making laws that I have to implement
16 and that pertain to the national defense.

17 Accordingly, the government's sixth motion for partial
18 summary judgment is granted.

19 Plaintiff's sixth motion for partial summary judgment
20 is denied.

21 The clerk shall mark the motions, Documents Number 443
22 and 456, terminated. These are my findings and conclusions.

23 Thank you very much.

24 ALL COUNSEL: Thank you, your Honor.

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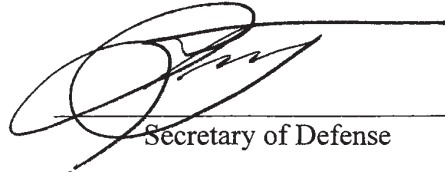
CERTIFICATION RENEWAL OF THE
SECRETARY OF DEFENSE

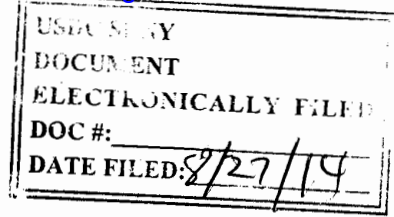
This Certification Renewal pertains to a collection of photographs (as that term is defined in Section 565(c)(2) of the Department of Homeland Security Appropriations Act, 2010 (Pub. L. 111-83) (“DHS Appropriations Act”)) assembled by the Department of Defense that were taken in the period between September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

Upon the recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, and the Commander, International Security Assistance Force/United States Forces-Afghanistan and by the authority vested in me under Section 565(d)(1), (3) of the DHS Appropriations Act, I have determined that public disclosure of these photographs would “endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.”

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

Date: NOV 09 2012


Secretary of Defense



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
 AMERICAN CIVIL LIBERTIES UNION et al, :
 :
 Plaintiffs, :
 :
 -against- :
 :
 DEPARTMENT OF DEFENSE et al, :
 :
 Defendants. :
 :
 ----- X

**ORDER AND OPINION
 GRANTING, IN PART,
 PLAINTIFFS' MOTION FOR
 PARTIAL SUMMARY
 JUDGMENT AND DENYING
 DEFENDANTS' MOTION FOR
 PARTIAL SUMMARY
 JUDGMENT**

04 Civ. 4151 (AKH)

ALVIN K. HELLERSTEIN, UNITED STATES DISTRICT JUDGE:

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

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

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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

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

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

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

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

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

The PNSDA provides that:

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

Subsection (c) defines protected documents as photographs, taken between September 11, 2001 and January 22, 2009, relating to the treatment of individuals by the United States military abroad “for which the Secretary of Defense has issued a certification, as described in subsection (d), stating that disclosure of that record would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.” Subsection (d) provides that

[T]he Secretary of Defense shall issue a certification if the Secretary of Defense determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.

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

“The agency asserting the exemption [from FOIA] bears the burden of proof, and all doubts as to the applicability of the exemption must be resolved in favor of disclosure.”

Wilner v. Nat’l Sec. Agency, 592 F.3d 60, 69 (2d Cir. 2009). To meet its burden of proof, the agency can submit “[a]ffidavits or declarations giving reasonably detailed explanations why any withheld documents fall within an exemption.” *Am. Civil Liberties Union v. Dep’t of Justice*, 681 F.3d 61, 69 (2d Cir. 2012) (internal quotation marks omitted).

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

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

⁴ Copies of the certifications are appended to this order.

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

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

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

The PNSDA was enacted in the context of the ongoing war in Iraq, in which the United States military was involved in active military operations. As I noted on July 20, 2011, the statute was passed in response to a request from the Prime Minister of Iraq that the United States government not publish the photographs for fear that their publication would fuel insurrection and make it impossible to have a functioning government. *See* Tr. at 34:7-23. The legislative history of the statute—especially statements by Senators Lieberman and Graham who sponsored the bill—made clear that the PNSDA was passed in order “to provide authorizing legislation to support the President's determination that these images should not be disclosed.” Tr. at 37:16-19.⁵

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

Given that history, I concluded that “it was clear to me that Secretary Gates had a rational basis for his certifications and that I could not second guess-it.” Tr. at 36:6-8. I also commented that, “by reason of my familiarity with the case,” I had effectively conducted a *de novo* review of Secretary Gates’s decision, had found that there was a rational basis for it, and would not “opine” on whether there is or is not a danger in the battlefield because of the disclosure of pictures of this sort.” Tr. at 23:21-24:2.⁶

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

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

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

Certification was based on the recommendation of the U.S. Commander responsible for the deployment of our troops in Afghanistan. Given the passage of time, I have no basis for concluding either that the disclosure of photographs depicting the abuse or mistreatment of prisoners would affect United States military operations at this time, or that it would not.

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

B. The Adequacy of the Certification:

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

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

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

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

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

To resolve this issue, I must interpret the PNSDA. Because the PNSDA is an exemption (3) withholding statute, I follow the Second Circuit's decision in *A. Michael's Piano* and construe the PNSDA by "looking to the plain language of the statute and its legislative history, in order to determine legislative purpose." 18 F.3d at 144.⁷ This is in accord with the

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

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

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

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

For any photograph described under subsection (c)(1), the Secretary of Defense shall issue a certification if the Secretary of Defense determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.

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

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

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

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

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

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

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

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

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

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

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

181 F.3d at 288.

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

These background rules of construction favor judicial review, both in light of the specific policies underlying FOIA and the general presumption of judicial review. There is no evidence that Congress intended to depart from those principles when it enacted the PNSDA. Accordingly, the PNSDA should be read as providing for judicial review of the basis for the Secretary of Defense's certification that disclosure of the photographs "would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." PNSDA § (d)(1).⁹

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

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

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

As applied to this case, the government must show why, on November 9, 2012, the release of pictures taken years earlier would continue to "endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." PNSDA § (d)(1).

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

II. Individual or collective review of the photographs:

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

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

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

course of this litigation, I have reviewed some of these photographs and I know that many of these photographs are relatively innocuous while others need more serious consideration. Even if some of the photographs could prompt a backlash that would harm Americans, it may be the case that the innocuous documents could be disclosed without endangering the citizens, armed forces or employees of the United States. Considering the photographs individually, rather than collectively, may allow for more photographs to be released, furthering FOIA's "policy of full disclosure." *Halpern*, 181 F.3d at 284-85.

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

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

or with others “would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.” PNSDA § (d)(1).

C. Next Steps

As set forth above, the 2012 Recertification, standing alone, is insufficient to meet the government’s burden to justify its withholding the photographs from disclosure. The government has failed to submit to this Court evidence supporting the Secretary of Defense’s determination that there is a risk of harm, and evidence that the Secretary of Defense considered whether each photograph could be safely released.

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

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


CONCLUSION

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

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

SO ORDERED.

Dated: New York, New York
August 27, 2014


ALVIN K. HELLERSTEIN
United States District Judge

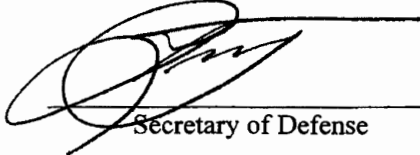
CERTIFICATION RENEWAL OF THE
SECRETARY OF DEFENSE

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

Upon the recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, and the Commander, International Security Assistance Force/United States Forces-Afghanistan and by the authority vested in me under Section 565(d)(1), (3) of the DHS Appropriations Act, I have determined that public disclosure of these photographs would “endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.”

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

Date: NOV 09 2012



Secretary of Defense

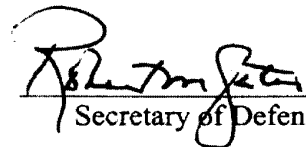
**CERTIFICATION OF THE
SECRETARY OF DEFENSE**

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

Upon the recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of U.S. Central Command, and the Commander of Multi-National Forces-Iraq, and by the authority vested in me under Section 565(d)(1) of the DHS Appropriations Act, I have determined that public disclosure of these photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.

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

Date: 11-13-09


Secretary of Defense

1 eal0aclc Conference

2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

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4 AMERICAN CIVIL LIBERTIES
5 UNION, et al,

6 Plaintiff,

7 v. 04 CV 4151

8 DEPARTMENT OF DEFENSE, et al,

9 Defendant.

-----x

10 New York, N.Y.
11 October 21, 2014
12 2:31 p.m.

13 Before:

14 HON. ALVIN K. HELLERSTEIN,

15 District Judge

16 APPEARANCES

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

20 AMERICAN CIVIL LIBERTIES UNION, WOMEN'S RIGHTS PROJECT
21 BY: ALEXANDER ABRAHAM ABDO
22 Attorneys for Plaintiff

23 AMERICAN CIVIL LIBERTIES UNION FOUNDATION
24 BY: MARCELLENE ELIZABETH HEARN
25 Attorneys for Plaintiff

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

1 (In open court, case called)

2 THE COURT: Hello, everybody. Be seated.

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

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

9 ALL: Good afternoon.

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

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

14 MR. TSITSUASHVILI: *Tsitsuashvili*.

15 THE COURT: Thank you.

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

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

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

20 MS. HEARNE: Good afternoon.

21 THE COURT: Please stand.

22 MR. LUSTBERG: Oh, stand. Good afternoon.

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

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

1 otherwise you block Ms. Lamorte.

2 MR. LUSTBERG: Okay.

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

6 THE COURT: Sorry?

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

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

13 On August --

14 THE COURT: Any what?

15 MS. HEARNE: Attorneys fees.

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

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

20 THE COURT: What about the appeal?

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

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

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

1 withholding of the photographs.

2 THE COURT: Okay.

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

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

14 THE COURT: And so you have two things for me today.
15 One is something having to do with the photographs that you say
16 should be subject to the same orders and rulings of August 27,
17 2014 as with the others, and the second is attorneys fees.

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

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

23 MS. HEARNE: Okay.

24 THE COURT: I had this case for 10 years.

25 MS. HEARNE: That's correct, yes.

1 THE COURT: Time to finish.

2 Ms. Lamorte.

3 MS. LAMORTE: Good afternoon, your Honor.

4 THE COURT: Good afternoon.

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

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

19 THE COURT: Give me some more background.

20 MS. LAMORTE: In what respect, your Honor.

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

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

25 THE COURT: What were the conditions I put down with

1 regard to those photos.

2 MS. LAMORTE: The conditions?

3 THE COURT: Yeah.

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

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

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

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

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

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

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

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

12 THE COURT: I think that's technically correct. But
13 part of what you are doing is making estimates. And estimates,
14 as of whatever date, I forget, in 2012, either would be more
15 likely to be true or less likely to be true, according to the
16 conditions that have occurred since that time. Since that
17 time, we're out of Iraq all together. Now we seem to be partly
18 coming back. So I think it would be useful to me, and maybe to
19 the government, to present a snapshot as of the critical day in
20 2012 but, as it were, a moving image going forward to current
21 times. I don't think it is difficult for you, Ms. Lamorte.
22 Naturally, you will be citing events that occurred after 2012,
23 to show that you're correct. And I think you might also bear
24 that period in mind in case you feel that your concerns were
25 not substantial, or showed not to be substantial. I would like

1 you to update it, as well.

2 MS. LAMORTE: Yes, your Honor.

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

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

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

18 THE COURT: How about if I give you to December 12th.
19 Is there an objection, Ms. Hearn?

20 MS. HEARNE: That's fine.

21 THE COURT: So all justifications --

22 MS. HEARNE: I have --

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

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

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

13 THE COURT: Ms. Lamorte.

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

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

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

10 And I called for a conference as to whether the
11 government intended to submit additional evidence into the
12 record, or to produce redacted versions of the photographs. I
13 ruled that because the recertification by Secretary of Defense
14 Panetta suggested that he review the photographs as a
15 collection, not individually, that standing alone, that
16 certification was insufficient to meet the government's burden
17 of showing that the photographs were individually considered by
18 the Secretary of Defense. I held that the condition of the
19 statute would allow withholding of the disclosures, that each
20 individual photograph be disclosed, alone or with others, would
21 endanger citizens of the United States, members of the United
22 States armed forces, or employees of the United States
23 government deployed outside the United States.

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

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

4 MS. LAMORTE: Your Honor.

5 THE COURT: Just a minute, Ms. Lamorte.

6 MS. LAMORTE: I just wanted --

7 THE COURT: Just a minute.

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

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

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

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

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

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

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

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

7 Questions? Comments?

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

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

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

17 THE COURT: Before we do that --

18 MR. LUSTBERG: Pardon me?

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

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

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

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

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

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

10 MR. LUSTBERG: That's right.

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

14 THE COURT: How about January 9?

15 MR. LUSTBERG: That's fine, Judge.

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

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

23 MR. LUSTBERG: Agreed, Judge.

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

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

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

8 Both agree?

9 MR. LUSTBERG: Yes, Judge.

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

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

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

16 THE COURT: Yeah.

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

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

23 THE COURT: You prevailed on everything except this
24 issue.

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

1 to, again, abide the results of these proceedings.

2 THE COURT: Right.

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

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

7 Okay, thanks again.

8 ALL: Thank you, your Honor.

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

10 THE COURT: We have another.

11 (Adjourned)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

DECLARATION OF MEGAN M. WEIS

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

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

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

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

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

5. On November 13, 2009, Secretary of Defense Robert Gates certified that disclosure of the photographs would “endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.” Upon remand in light of the certification, on July 11, 2011, this Court noted the Secretary’s certification and granted the government’s motion for summary judgment, ruling that the photographs were not subject to disclosure under FOIA Exemption 3.

6. Under the PNSDA, the Secretary of Defense’s certification expires after three years, and the Secretary may renew the certification at any time. On November 9, 2012, Secretary of Defense Leon Panetta issued a renewed certification regarding the photographs. In his certification renewal, Secretary Panetta determined, upon the recommendations of the Chairman of the Joint Chiefs of Staff, Commander, United States Central Command, and Commander, International Security Assistance Force/United States Forces-Afghanistan, that public disclosure of the photographs would “endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.”

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

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

exercise any of his powers through . . . such persons in, or organizations of, the Department of Defense as he may designate.”). I gathered all of the photographs subject to the 2009 certification and reviewed all of them. During this review, I placed the photographs into three categories, and created a representative sample of five to ten photographs in each category to provide to senior military commanders for their review and judgment of the risk from public disclosure of each category. In creating these three categories, I considered the content of each photograph, to include the extent of any injury suffered by the detainee, whether U.S. service members were depicted, and the location of the detainee in the photograph (e.g., at point of capture, at a medical facility). Although the photographs had previously been reviewed and categorized in 2009, I conducted a full review of all of the photographs and recategorized them where appropriate before creating the representative sample. I worked with leadership in the DoD Office of the General Counsel to ensure the representative sample accurately characterized all of the photographs.

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

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

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

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

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

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

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

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


Megan M. Weis

JA-286



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

USFOR-A-CDR

28 October 2012

MEMORANDUM THRU
COMMANDER, USCENTCOM
CHAIRMAN, JOINT CHIEFS OF STAFF

FOR SECRETARY OF DEFENSE

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

1. [REDACTED] This memorandum provides my current assessment of the impact of publicly releasing the photographs referenced in the *United States Department of Defense v. American Civil Liberties Union*, 543 F.3d 59 (2d Cir. 2008), *vacated & remanded*, 130 S. Ct. 777 (2009), as well as other photographs of similar character taken in the period between 11 September 2011 and 22 January 2009, that are also related to the treatment of individuals engaged, captured or detained after 11 September 2001 by U.S. Armed Forces in operations outside of the United States (hereinafter, the "photographs").
2. [REDACTED] Under the Protected National Security Documents Act of 2009, certain photographs, as defined in the statute, are exempt from disclosure under the Freedom of Information Act when the Secretary of Defense certifies that disclosure would "endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." Having served in the U.S. Central Command Area of Operations for most of the past six years, and as current Commander, United States Forces – Afghanistan (USFOR-A) and Commander, International Security Assistance Forces (ISAF), it is my opinion that the public release of these photographs, even if redacted to obscure identifying information, would result in the harm the statute is intended to prevent.
3. [REDACTED] I strongly believe the release of these photographs will endanger the lives of U.S. Soldiers, Airmen, Marines, Sailors and civilians presently serving in Afghanistan, as well as the lives of our Coalition partners. The release of these photographs will significantly and adversely impact the USFOR-A/ISAF mission to develop a strategic partnership with a stable, secure, prosperous, and democratic Afghanistan, that stands as an ally in the war on terror, and contributes to peace and stability in the region. The photographs will likely cause a very public and emotional response in Afghanistan and the larger Muslim world. These responses can be devastating, like that caused by a release of the film "Innocence of Muslims," which generated 38 protests in a number of cities across Afghanistan, including three that turned violent. The mishandling of religious materials at Bagram in February 2012 also caused a similar outcry, and led to at least 74 demonstrations and 30 Coalition and Afghans deaths. Finally, in January 2012 an internet release of videos showing U.S. Marines urinating on corpses in Helmand province led to violence and Coalition deaths. The release of these photographs will only intensify existing resentment and emotional fervor harbored by the Afghan public.
4. [REDACTED] The release of these photographs will almost certainly exacerbate the conditions that foster "insider threat" attacks. Since January 2012, 38 insider threat attacks have caused [REDACTED]

[REDACTED]

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

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

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

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

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

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

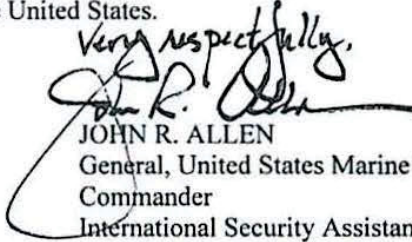
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[REDACTED]

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

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

Very respectfully,



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

JA-289



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

29 October 2012

FOR: SECRETARY OF DEFENSE
CHAIRMAN, JOINT CHIEFS OF STAFF

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

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

Mr. Secretary, Chairman,

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

BACKGROUND

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

DISCUSSION

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

- This request should also be considered in light of the increased insider threat activity which is much more prevalent in Afghanistan than when the original certification was made in 2009. It is my opinion that the release of images which could be construed as showing detainee mistreatment, especially in this context, would pose a far greater threat to U.S. forces than at the time of the original certification.
- I have seen first-hand the tremendous violence that the publication of certain images has incited within the CENTCOM AOR. The Koran burnings in early 2012, the images of Marines urinating on corpses and the “Innocence of Muslims” video release, have all sparked violence that have resulted in death and endangerment to members of our Armed Forces. Given the recent violence sparked by release of inflammatory imagery, I believe that the potential adverse impact from release of these photographs is even higher now than it was in 2009.
- This is an extraordinarily sensitive time in Afghanistan. Specifically, the negotiations for the Bilateral Security Agreement will soon begin. Additionally, U.S. and Coalition forces are drawing down as we continue the process of transferring the responsibility of overall security to the Government of the Islamic Republic of Afghanistan (GIROA). Detention operations in Afghanistan have become a contentious issue, especially regarding the transfer of detention responsibility to the GIROA. The release of these photographs along with the potential violence incited would have a major strategic impact that must be considered alongside the serious risks to U.S. forces.
- For the reasons described above, I conclude that release of the photographs at this time would endanger citizens of the United States, members of the U.S. Armed Forces and employees of the U.S. Government deployed outside the United States.

RECOMMENDATION

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

Copy to:
OSD
DEPSECDEF
USD-P
CCJ2
CCJ3

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████████████████████
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

WASHINGTON, D.C. 20318-9999

ACTION MEMO

FOR: SECRETARY OF DEFENSE

DepSec Action _____

FROM: General Martin E. Dempsey, CJCS

Martin E. Dempsey 18

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

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

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

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

████████████████████

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

Approve _____ Disapprove _____ Other _____

COORDINATION: TAB C

Attachments:
As stated

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

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

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

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

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

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

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

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

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

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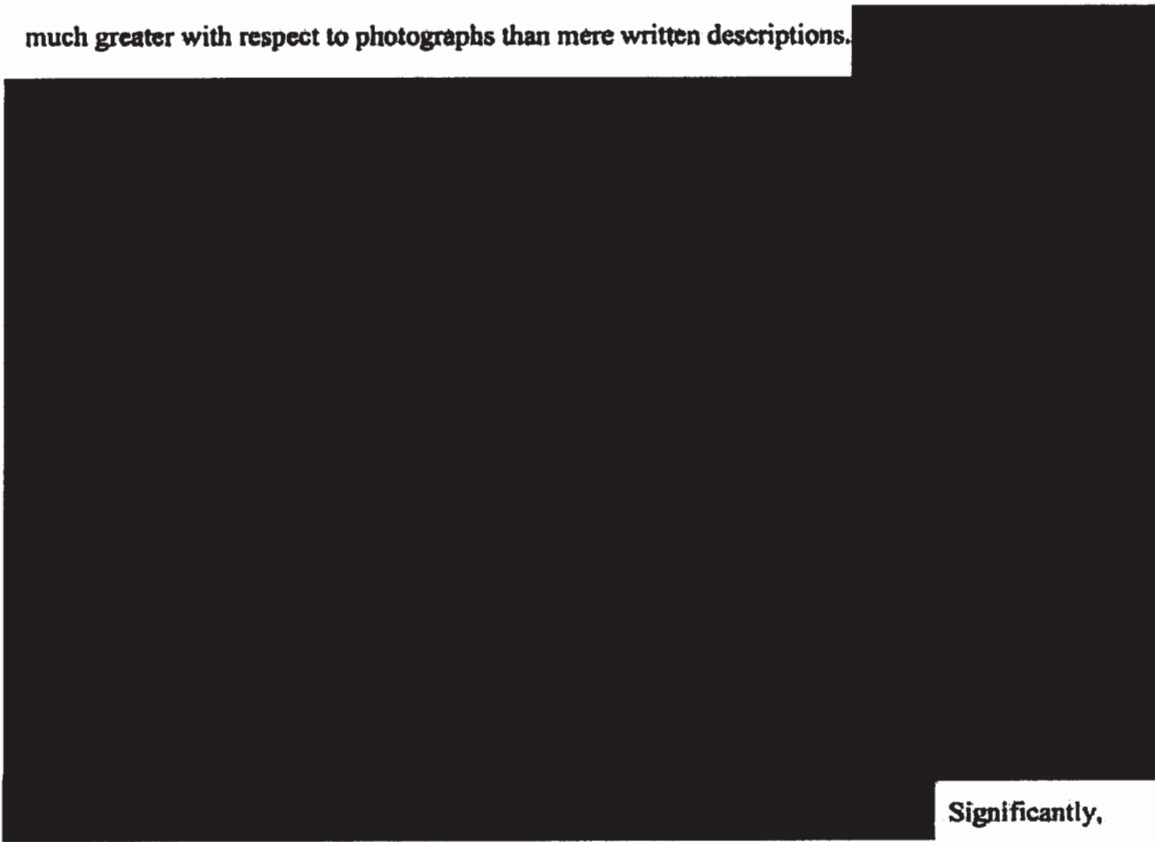
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events further the concern that calls to violence by ISIL and its supporters are being answered and could motivate attacks on U.S. personnel.

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

10. ~~(S//NF)~~ The photographs are susceptible to use as propaganda to incite a public reaction and could be used as recruiting material to attract new members to join enemy forces. This risk is much greater with respect to photographs than mere written descriptions.



Significantly,

ISIL has a particular interest in using imagery associated with U.S. detention practices as part of its propaganda and recruitment efforts. For example, in early September 2014, when ISIL released a video showing the beheading of journalist Steven Sotloff, Mr. Sotloff was forced to make

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

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

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

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

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

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

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

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

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

Executed this 10 day of December 2014 in Arlington, VA.



Rear Admiral Sinclair M. Harris, USN

Vice Director of Operations, J-3, Joint Staff

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

3 AMERICAN CIVIL LIBERTIES
4 UNION, et al.,

5 Plaintiffs,

6 v.

04 CV 4151 (AKH)

7 DEPARTMENT OF DEFENSE,

8 Defendant.
-----x

9
10 February 4, 2015

11 4:57 p.m.

12 Before:

13 HON. ALVIN K. HELLERSTEIN,

14 District Judge

15 APPEARANCES

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

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

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

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1 (In open court)

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

4 MR. LUSTBERG: Good afternoon, your Honor.

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

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

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

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

12 THE COURT: Congratulations. And?

13 MR. ABDO: Alex Abdo with the ACLU.

14 THE COURT: Ms. LaMorte and Ms. Normand?

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

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

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

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

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

2 THE COURT: Would you like to sit down?

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

6 THE COURT: Okay.

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

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

18 MS. LAMORTE: Yes.

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

21 MS. LAMORTE: That is correct.

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

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

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

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

12 MS. LAMORTE: You reviewed --

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

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

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

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

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

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

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

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

14 THE COURT: It wasn't --

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

17 THE COURT: You're correct.

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

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

24 MS. LAMORTE: Yes.

25 THE COURT: We thought when we did this exercise in

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

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

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

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

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

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

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

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

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

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

14 MR. LUSTBERG: Not --

15 THE COURT: -- this process.

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

19 THE COURT: Now, this time.

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

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

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

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

8 MS. LAMORTE: Because the --

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

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

23 THE COURT: That's because I required it.

24 MS. LAMORTE: Huh?

25 THE COURT: That's because I required it.

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

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

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

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

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

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

20 THE COURT: Well --

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

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

25 MS. LAMORTE: Sure, okay.

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

2 MS. LAMORTE: But the --

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

4 MS. LAMORTE: Sure.

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

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

10 THE COURT: Can we state the name?

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

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

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

24 THE COURT: How could she know all that?

25 MS. LAMORTE: She looked at every photograph.

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

3 MS. LAMORTE: Right.

4 THE COURT: -- subjected to treatment.

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

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

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

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

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

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

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

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

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

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

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

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

3 THE COURT: Mr. Lustberg?

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

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

13 What you said is, in discussing next steps, the
14 government has failed to submit to this Court evidence
15 supporting the Secretary of Defense's determination that there
16 is a risk of harm and evidence that the Secretary of Defense
17 considered whether each photograph could be safely released.
18 Each photograph.

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

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

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

4 THE COURT: Am I right, Ms. LaMorte?

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

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

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

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

14 MS. LAMORTE: Yes.

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

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

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

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

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

6 THE COURT: Well, I ruled that.

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

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

12 MR. LUSTBERG: In any event --

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

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

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

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

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

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

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

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

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

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

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

3 MR. LUSTBERG: And most significantly --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 Mr. Lustberg, that's satisfactory?

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

22 THE COURT: Okay. Thank you very much.

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

25 THE COURT: So I need to issue an order.

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

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

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

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

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

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

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1 will consult with DOD.

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

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

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

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

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

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1 motivating our position here.

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

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

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

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

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

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

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

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1 not to endanger American lives and why.

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

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

5 THE COURT: Thank you all.

6 MR. LUSTBERG: Thank you, Judge.

7 (Adjourned)

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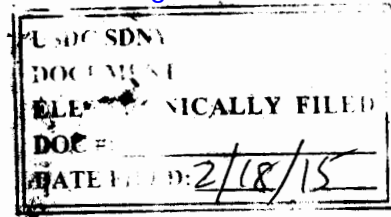
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JA-327

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- X
 AMERICAN CIVIL LIBERTIES UNION et al, :
 :
 Plaintiffs, :
 :
 -against- :
 :
 DEPARTMENT OF DEFENSE et al, :
 :
 Defendants. :
 :
 ----- X

**ORDER CLARIFYING
INSTRUCTIONS FOR
DEFENDANTS'
SUBMISSIONS**

04 Civ. 4151 (AKH)

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

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

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

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

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

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

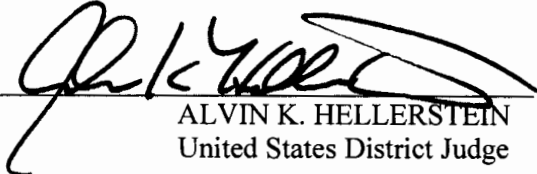
reviewing the photographs personally or having others describe their contents to him, but he may not rely on general descriptions of the “set” or “representative samples,” as such aggregation is antithetical to individualized review without precise criteria for sampling.

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

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

SO ORDERED.

Dated: New York, New York
February 12, 2015

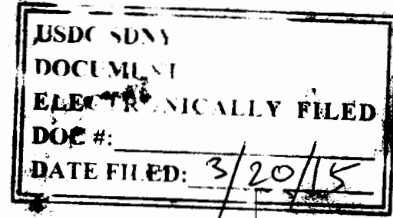

ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
 AMERICAN CIVIL LIBERTIES UNION et al, :
 Plaintiffs, :
 -against- :
 DEPARTMENT OF DEFENSE et al, :
 Defendants. :
 ----- X

**ORDER GRANTING
JUDGMENT FOR PLAINTIFF**

04 Civ. 4151 (AKH)



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

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

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

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

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

JA-332

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

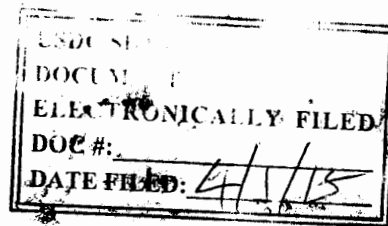
SO ORDERED.

Dated: New York, New York
March 10, 2015



ALVIN K. HELLERSTEIN
United States District Judge

JA-333



**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

<p>AMERICAN CIVIL LIBERTIES UNION, et al.,</p> <p>Plaintiffs,</p> <p style="text-align: center;">-against-</p> <p>DEPARTMENT OF DEFENSE, et al.,</p> <p>Defendants.</p>

No. 04 Civ. 4151 (AKH)

ORDER OF FINAL JUDGMENT

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

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

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

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

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

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

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

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

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

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

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

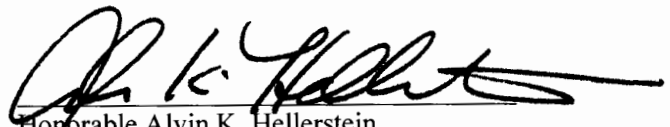
1. The Court enters final judgment in favor of plaintiffs with regard to all responsive photographs.

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

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

4. The Clerk shall enter judgment accordingly.

SO ORDERED this 21st day of March, 2015, as follows:


Honorable Alvin K. Hellerstein
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
AMERICAN CIVIL LIBERTIES UNION et al.,

Plaintiffs,

04 Civ. 4151 (AKH)

v.

Notice of Appeal

UNITED STATES DEPARTMENT OF DEFENSE
et al.,

Defendants.

----- X

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

Dated: New York, New York
May 15, 2015

Respectfully submitted,

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

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New York, New York 10007
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TO: Clerk of Court
United States Court of Appeals for the Second Circuit
United States Courthouse
500 Pearl Street
New York, New York 10007

Lawrence Lustberg, Esq.
Counsel for Plaintiffs