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May 18, 2015

Honorable Catherine O'Hagan Wolfe, Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall Courthouse
40 Foley Square
New York, New York 10007

Re: *American Civil Liberties Union, et al. v. Department of Defense, et al.*
Docket No. 15-1606

Dear Clerk of Court:

Please accept this letter in response to the Government's motion of May 15, 2015 requesting a stay of the execution of the District Court's judgment. As described below, this Court should deny the Government's request for expedited relief because any "emergency" here is entirely of the Government's own making, and the Court should deny its application for a stay because the Government has failed to make a strong showing of the likelihood of success on the merits and where the public interest favors the Plaintiffs.

First and foremost, plaintiffs urge this Court to reject defendant's request for review of this motion on an expedited basis. Local Rule of Appellate Procedure 27.1 instructs that an emergency motion "must be preceded by as much advance notice as possible to the clerk and to opposing counsel of the intent to file an emergency motion." Here, however, Plaintiff's counsel effectively received no advance notice that the Government intended to seek an emergency stay. Indeed, counsel learned of the Government's motion approximately two hours before the motion was filed with the Court, which occurred at approximately 7:30 pm on Friday, May 15. Time was not thereby afforded for counsel to consult with his client, let alone to respond to a fairly lengthy (16-page) brief.

More to the point, the current emergency is one entirely of the Government's own making. Indeed, this appeal is, as the Government's motion makes clear, a challenge to a District Court decision of almost nine months ago. That is, in August of last year, the District Court held that the Protected National Securities Document Act ("PNSDA") allowed for judicial review of the Secretary of Defense's decision to certify withholding of the photographs at issue

in this case, *ACLU v. DOD*, 40 F. Supp. 3d 377, 388 (S.D.N.Y. 2014), and in particular, that the statute "required that the Secretary of Defense consider each [withheld] photograph individually, not collectively." *Id.* at 389. It reiterated that position at an on-the-record status conference on October 21, 2014, explaining that "what is necessary, is that the submission to me show an accountability, by the Secretary of Defense, of having considered and having made a finding with regard to each and every photograph." ECF Dkt # 526 (October 21 Transcript) at 11:13 - 16. And the Court again explained on February 4, "it's the obligation of the Secretary of Defense to certify each picture in terms of its likelihood or not to endanger American lives." ECF Dkt # 544 (February 4 Transcript) at 25:24 - 26:1. After a further request for clarification from the Government, the Court again explained in a written order that an "*en grosse* certification was not sufficient and . . . that the certification has to be individual." The Court allowed the Government "one more opportunity" to comply with this mandate, and made clear that if it did not do so, judgment would be entered against it. ECF Dkt # 543 (February 18 District Court Order) at 3. Moreover, and significantly, as the Government itself notes, the District Court previously considered a request for a stay and in fact stayed its judgment for sixty days. But in granting the Government's request, the District Court stated almost two months ago, on March 20, 2015, that it was doing so

> 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 February 4, 2015 Hearing at 23:2-4. Accordingly, any subsequent stays must be issued by the Court of Appeals.

ECF Dkt # 549 (March 20 District Court Order) at 2.

In sum, the Government's burden according to the District Court has been clear for almost a year: it must review each photograph and assess whether "that photograph" would endanger American lives. PNSDA § d(1). It now seeks to challenge the District Court's ruling. But, with all due respect to the significant matters upon which the Solicitor General must pass, the Government simply does not explain why it could not have made its decision long before the eve of the expiration of the stay granted by the District Court. Its last minute decision to do so is abusive of both the Court and counsel and should not be rewarded by the routine grant of this kind of motion which the Government expressly seeks. *See* Gov't Br. at 9. Certainly, there is no reason why the Government could not have provided opposing counsel with more than two hours notice, late on a Friday, of a motion that, quite clearly, had been in the works for some time.

Second, a stay is unwarranted in this case because, contrary to the Government's position, it is far from likely that defendant will succeed on the merits of its appeal. To warrant a stay, the Government must, as it concedes, make a "strong showing" of its future success. *In Re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2007). Here, the District Court correctly held that the PNSDA did not strip courts of the power to review the basis for the Secretary's suppression of otherwise public documents. As the District Court cogently explained, "[t]here is a 'strong presumption that Congress intends judicial review.'" *ACLU*, 40 F. Supp. 3d. at 387 (quoting *Bowen v. Mich. Acad of Family Physicians*, 476 U.S. 667, 670 (1986)). That presumption is at its peak where Government transparency is at stake, because "executive determinations generally are subject to judicial review [and] . . . mechanical judgments are not the kind federal courts are set up to render." *Id.* at 387-88 (citing same). Nothing in the PNSDA militates against this "strong presumption." Indeed, the statute enunciates specific criteria for certification, "suggesting that certification is a mandatory act, not a discretionary one, and is therefore particularly apt for judicial review." *Id.* at 387.

Moreover, the District Court also correctly held that the Secretary must provide some basis to believe that he reviewed each photograph and evaluated its individual risk in advance of certification. Indeed, the plain text of the PNSDA requires that the Secretary of Defense conduct such a review. For example, the statute refers to "that photograph," indicating that "the Secretary of Defense [should] consider each photograph individually, not collectively." *Id.* at 389. The District Court further explained that this textual interpretation made practical sense in light of the Court's own experience reviewing a subset of withheld photos —a number of which proved "innocuous" — as well as the policy of open government underlying the Freedom of Information Act: "Even if some of the photographs could prompt a backlash that would harm Americans, it may be the case that the innocuous documents could be disclosed without endangering the citizens, armed forces or employees of the United States. Considering the photographs individually, rather than collectively, may allow for more photographs to be released, furthering FOIA's 'policy of full disclosure.'" *Id.* at 389 (quoting *Halpern v. F.B.I*, 181 F.3d 279, 284-85 (2d Cir. 1999)).

Given that the statute is subject to judicial review, and that it requires that the Secretary individually review each photo, the District Court correctly concluded that the Government had a modest but critical burden — to establish that the Secretary evaluated each photograph before he certified them for withholding. In response to this request, the Government provided declarations that plainly indicated that this did not occur; rather, the officials charged with evaluating the risk of disclosure had only been provided with a sample of photographs, a fact that the Government does not dispute, instead arguing that the PNSDA allows the Secretary to review photographs "collectively" as a "group," *Gov't Motion* at 14, and that an individual officer had reviewed all of the photographs even though that officer did so only to organize them into groups and not to evaluate the risk of each individual photograph's disclosure, *id.* at 15. The District

Court correctly held that this meager showing, which on its face provides no basis to hold that the Secretary conducted an individualized determination of each photograph's risk, was insufficient to meet the Government's burden. Respectfully, this Court can and likely will reach the same conclusion. The Government has failed to make the "strong showing" required. *In Re World Trade Ctr. Disaster Site Litig.*, 503 F.3d at 170.

Third, while Plaintiffs certainly recognize that, without a stay, the Government would be forced to release information it would like to withhold prior to appellate review, continued suppression will also cause substantial injury to Plaintiffs and adversely affect the public interest; indeed, the Government is simply wrong to argue that further delays in this long running litigation "would cause no appreciable harm." *Gov't Motion* at 10. As the District Court noted in an opinion in this case almost a decade ago, FOIA was designed to "promote honest and open government and to assure the existence of an informed citizenry." *ACLU v. DOD*, 389 F. Supp. 2d 547, 551 (quoting *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir. 2005)). For this reason, FOIA "strongly favors a policy of disclosure" in order "to ensure public access to information created by the government in order to hold the governors accountable to the governed." *Long v. OPM*, 692 F.3d 185, 190 (2d Cir. 2012) (citations omitted).

This case concerns records, including photographs, that document our Government's treatment of detainees abroad. Since 2004, Plaintiffs have diligently sought release of this information so that the public could have the information necessary to understand the nature of these actions, confront the reality of the conditions endured by detainees, and grapple with the public policy ramifications of this brutality. *See* Mark Mazzetti, *Panel Faults C.I.A. Over Brutality and Deceit in Terrorism Interrogations*, N.Y. TIMES, December 10, 2014 at A1 (describing findings of Senate Intelligence Committee's investigation of the Government's detention and interrogation program). As the District Court noted at the February 4, 2015 hearing in this case, such a public reckoning is obviously impossible without the transparency that FOIA fosters. *See* ECF Dkt # 544 (February 4 Transcript) at 24:24 - 25:1 (highlighting the virtues of "[o]penness, free debate, free discussion, information available to the citizenry, even to the extent that it might be embarrassing to government officials"). And, as Judge Hellerstein warned, the Government in this case has done everything in its power to avoid this democratic debate, employing what the Court deemed a "sophisticated ability to obtain a very substantial delay." *Id.* at 23:2-4. Thus, the Government is correct that a stay will preserve the "status quo," *Gov't Motion* at 9, but it does not follow that a stay should, therefore, automatically be granted, particularly where it will do more than allow the Government to continue to evade its statutory responsibility of openness to its citizens, thereby causing serious harm to both the Plaintiffs, who are engaged in educating the public with regard to these issues, and that public itself, which will be kept in the dark.

In sum, plaintiffs urge this Court to deny the Government's request for a stay, and certainly its request for an emergency stay. In the alternative, should the Court grant the

Government's motion, Plaintiffs would respectfully request that it expedite this appeal, so that any further delay in the disclosure of documents which should have been made available to the public so long ago is no longer than absolutely necessary. Certainly, the imperative of public disclosure constitutes "good cause," within the meaning of Local Rule of Appellate Procedure 2 to warrant expedited briefing and decision, and is particularly justified where, as here, the Government has repeatedly delayed its compliance with the District Court's Orders, and where it now seeks a stay on an emergent basis simply because it could not, even after months, decide whether to appeal, and did not make that decision until the stay granted by the District Court was about to expire.

Thank you for your kind consideration of this submission.

Respectfully submitted,

/s/ Lawrence S. Lustberg

Lawrence S. Lustberg

cc: Emily Daughtry, Assistant U.S. Attorney (via email)
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