

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

AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, et al.,

Defendants.

No. 04 Civ. 4151 (AKH)

**DEFENDANT DEPARTMENT OF DEFENSE'S MEMORANDUM OF LAW IN  
SUPPORT OF ITS RENEWED SEVENTH MOTION FOR SUMMARY JUDGMENT**

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**TABLE OF CONTENTS**

PRELIMINARY STATEMENT ..... 1

BACKGROUND ..... 2

    A.    Procedural History ..... 2

    B.    The Court’s August 27, 2014 Opinion and Order..... 3

DISCUSSION ..... 5

    A.    Although an Individualized Review of Each of the DoD Photos Is Not Required  
          by the PNSDA, DoD in Fact Conducted an Individualized Review ..... 5

    B.    Secretary Panetta’s Determination that Public Disclosure of the DoD Photos  
          Would Endanger United States Citizens, Armed Forces, and Employees  
          Deployed Overseas Is Rational and Entitled to Substantial Deference ..... 7

    C.    Although Legally Irrelevant to Whether the Government Is Entitled to Summary  
          Judgment, Public Disclosure of the DoD Photos Would Continue to Endanger  
          United States Citizens, Armed Forces, and Employees Deployed Overseas ..... 11

CONCLUSION..... 14

Defendant Department of Defense, including its components Department of Army, Department of Navy, Department of Air Force, Defense Intelligence Agency (collectively, “DoD” or the “Government”), by and through its attorney, Preet Bharara, the United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in support of the Government’s renewed seventh motion for summary judgment regarding its withholding of certain photographs pursuant to the Protected National Security Documents Act of 2009.

### PRELIMINARY STATEMENT

On August 27, 2014, this Court issued an Opinion and Order granting, in part, plaintiffs’ seventh motion for summary judgment and denying the Government’s cross-motion. (Dkt. No. 513). Those motions addressed DoD’s continued withholding of photographs contained in or derived from records of investigations into allegations of detainee abuse (the “DoD Photos”) pursuant to the Protected National Security Documents Act of 2009 (the “PNSDA”),<sup>1</sup> a statute that Congress enacted in response to this very litigation for the express purpose of precluding disclosure of these very photographs upon issuance of a certification by the Secretary of Defense. Notwithstanding Secretary of Defense Leon Panetta’s issuance of such a certification on November 9, 2012 (the “Panetta Certification”) – which mirrored the previous certification that was issued by former Secretary of Defense Robert Gates and upheld by the Court as sufficient to satisfy the Government’s burden (*see* Dkt Nos. 469, 474) – the Court ruled that the Panetta Certification was insufficient to prevent disclosure of the DoD Photos. In the Court’s view, the Panetta Certification was deficient because it did not disclose whether an individualized review of each of the DoD Photos had been conducted, and because the

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<sup>1</sup> Section 565 of the Department of Homeland Security Appropriations Act, 2010 Pub. L. No. 111-83, 123 Stat 2184.

Government failed to show an adequate basis for Secretary Panetta's determination that public disclosure of the DoD Photos would endanger United States citizens, Armed Forces, or employees deployed outside the United States.

The Court, however, provided the Government with an opportunity to supplement the record to address the Panetta Certification's purported deficiencies. While the Government maintains that the Panetta Certification is sufficient to justify its withholding of the DoD Photos pursuant to the PNSDA, and incorporates herein its previous arguments (*see* Dkt. Nos. 456-458, 466, 495-497, 502), the Government has supplemented the record to show that DoD appropriately conducted an individualized review of each of the DoD Photos, that an adequate basis existed for the issuance of the Panetta Certification, and, as directed by the Court during the October 21, 2014, status conference, that United States citizens, Armed Forces, and employees deployed outside the United States would continue to be in danger if the DoD Photos were publicly released today. (*See* Oct. 21 Tr. at 6-8). Accordingly, the Court should grant the Government's renewed seventh motion for summary judgment.

## **BACKGROUND**

### **A. Procedural History**

The procedural history of the DoD Photos prior to the Court's order of August 27, 2014, which granted in part plaintiffs' seventh motion for summary judgment and denied the Government's cross-motion, is set forth in DoD's memoranda of law in support of its sixth and seventh motions for summary judgment, along with a detailed account of the legislative history of the PNSDA. (*See* Dkt. Nos. 457, 494). As those memoranda reflect, the PNSDA was enacted in late 2009 after President Obama made public statements describing the harm that would result

from the release of the group of DoD Photos at issue here. Congress responded with support for the President's position by enacting the PNSDA.

**B. The Court's August 27, 2014 Opinion and Order<sup>2</sup>**

As the Court explained, to justify withholding the DoD Photos from public disclosure, the Government must show that the photographs fall within the scope of the PNSDA. (Slip Op. at 11). The PNSDA, a FOIA Exemption 3 statute (*see id.* at 7), precludes compelled disclosure of certain photographs ““for which the Secretary of Defense has issued a certification . . . stating that disclosure of that record would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States”” (*id.* (quoting PNSDA § (c)). The statute obligates the Secretary to issue a certification if he determines that this standard is met. (*Id.* at 8). Each certification expires after three years, but is renewable at any time. (*Id.*).

In analyzing whether the Panetta Certification was sufficient to sustain the Government's withholding of the DoD Photos pursuant to the PNSDA, in conjunction with FOIA Exemption 3, the Court noted that the certification “must be judged as of its date, November 9, 2012.” (Slip Op. at 6). Construing the text, structure, and legislative history of the PNSDA, along with canons of statutory construction concerning the availability of judicial review, the Court concluded that “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.’” (*Id.* at 16 (quoting PNSDA § (d)(1))).

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<sup>2</sup> This section does not outline the entirety of the Court's Opinion and Order, but focuses on those aspects which provide context for the Government's supplementation of the record.

Accordingly, to properly invoke the PNSDA, the Government must show “why, on November 9, 2012,” the release of the DoD Photos would meet this standard. (*Id.* at 17). In reviewing the Government’s showing, the Court acknowledged its legal obligation to “largely defer[.]” to the judgments of the Government’s military and intelligence officers. (*Id.*).

Turning to whether the PNSDA requires the Secretary of Defense to issue an individual certification for each of the DoD Photos, the Court held that the statute’s plain language “requires that the Secretary of Defense consider each photograph individually, not collectively.” (*Id.* at 18 (emphasis added)). As the Court explained, the statute does not prescribe what form the certification must take, and thus the Secretary may issue one certification to cover multiple photographs. (*Id.* at 19). However, the Court held that the Panetta Certification, standing alone, was insufficient to meet the Government’s burden of showing that each of the DoD Photos was individually reviewed, as nothing on the face of the certification indicated that an individualized consideration had been conducted. (*Id.*).

In light of these rulings, the Court provided the Government with an opportunity to supplement the record to provide evidence that the Secretary considered each of the DoD Photos in support of his determination that public disclosure would endanger United States citizens, Armed Forces, and employees deployed overseas. (*Id.* at 20). In addition, during the October 21, 2014, status conference, the Court further directed the Government to provide evidence of the harms that would likely occur if the DoD Photos were released now. (*See* Oct. 21 Tr. at 6-8).

## DISCUSSION

### **A. Although an Individualized Review of Each of the DoD Photos Is Not Required by the PNSDA, DoD in Fact Conducted an Individualized Review**

The Declaration of Megan M. Weis, Associate Deputy General Counsel in the Department of the Army, Office of General Counsel, recounts the process leading to Secretary Panetta's decision to issue a renewal certification concerning the DoD Photos, and demonstrates that an individualized review of each photograph was undertaken in connection with that process.

As Ms. Weis explains, several months prior to expiration of Secretary Gates's 2009 certification, she was designated to review each of the DoD Photos on Secretary Panetta's behalf. (*See* Declaration of Megan M. Weis dated December 19, 2014 ("Weis Decl.") ¶ 8 (quoting 10 U.S.C. § 113(d))).<sup>3</sup> She began this process by gathering and reviewing all of the photographs that were subject to Secretary Gates's 2009 certification. (*Id.*). During this review, she placed the photographs into three categories based upon the content of each photograph. (*Id.*). Specifically, Ms. Weis considered the extent of injury suffered, if any, by the detainee depicted in the photograph; whether the photograph depicted United States service members; and the location of the detainee in the photograph (*e.g.*, at point of capture, at a medical facility, etc.). (*Id.*). Five to ten photographs from each of these three categories were then selected to comprise

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<sup>3</sup> Section 113(d) permits the Secretary to "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," so long as not otherwise "specifically prohibited by law." *See also* DoD Directive 5145.01 (authorizing DoD General Counsel to "[a]dvice the Secretary of Defense . . . regarding all legal matters . . ."). Nothing in the PNSDA "specifically prohibit[s]" the Secretary's delegation of review and in any event, as described *infra*, the Secretary himself was provided with all of the DoD Photos and a representative sample of them. At the time Ms. Weis was designated to review each photograph, she was serving as an Associate Deputy General Counsel in the Department of Defense, Office of General Counsel. (*See* Weis Decl. ¶ 1).

a representative sample of the DoD Photos. (*Id.*) Ms. Weis worked directly with leadership in the Department of Defense, Office of General Counsel to ensure that this representative sample accurately characterized all of the photographs. (*Id.*)

Next, Ms. Weis solicited the recommendations of the senior military leadership and field commanders as to whether public disclosure of the DoD Photos would endanger United States citizens and other government personnel serving overseas. (*Id.* ¶ 9). To accomplish this, she provided the representative sample of DoD Photos to senior attorneys for the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, and the Commander of the U.S. Forces in Afghanistan. (*Id.*) These attorneys were requested to provide the representative sample to their respective commanders and obtain written recommendations as to whether Secretary Panetta should renew the PNSDA certification. (*Id.*) Each of the three then-commanders – General John R. Allen, Commander of U.S. Forces in Afghanistan, General James N. Mattis, Commander of U.S. Central Command, and General Martin Dempsey, Chairman of the Joint Chiefs of Staff – recommended that Secretary Panetta certify all of the photographs. (*Id.* ¶¶ 10-12).<sup>4</sup>

Finally, Ms. Weis provided the representative sample of DoD Photos and the Generals' recommendations to the General Counsel of DoD, and met with him to review and discuss the representative sample and recommendations. (*Id.* ¶ 13). In addition, Ms. Weis provided the DoD General Counsel with a compact disk containing all of the DoD Photos, along with a draft certification memorandum. (*Id.*) DoD General Counsel then met with Secretary Panetta to discuss whether a certification should issue; as a result of that meeting, Ms. Weis received the

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<sup>4</sup> Copies of those recommendations are attached to the Weis Declaration and described below. (*Id.* Exs. A-C).



Panetta Certification, which she promptly ensured was provided to staff for the appropriate committees of Congress as required by the PNSDA. (*Id.*).

Accordingly, consistent with the Court's interpretation of the PNSDA, the Secretary, at a minimum through his delegate, in fact conducted an individualized review of each photograph subject to the Panetta Certification.

**B. Secretary Panetta's Determination that Public Disclosure of the DoD Photos Would Endanger United States Citizens, Armed Forces, and Employees Deployed Overseas Is Rational and Entitled to Substantial Deference**

The three recommendations expressly relied upon by Secretary Panetta in connection with his decision to certify the DoD Photos pursuant to the PNSDA – provided to him in October 2012 by the military commanders in Afghanistan and the Chairman of the Joint Chiefs<sup>5</sup> – provide more than an ample basis for his conclusion 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.” (Slip Op. Attachment (Panetta Certification)). As the Court has repeatedly acknowledged throughout this litigation, it must substantially defer to the judgments of military commanders, as they have specialized expertise in assessing the harms that are reasonably likely to occur from the disclosure of non-public material, including the DoD Photos. (*See, e.g.*, Slip Op. at 17); *see also, e.g., ACLU v. DOJ*, 681 F.3d 61, 69, 70-71 (2d Cir. 2012); *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 76 (2d Cir. 2009).

First, General John R. Allen, the Commander of the U.S. Forces in Afghanistan who had

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<sup>5</sup> It is noteworthy that these recommendations were prepared in 2012 *not* for purposes of litigation, but to inform Secretary Panetta's decision regarding whether to issue a renewal certification.

been serving in the U.S Central Command (“CENTCOM”) region for the previous six years, provided the Secretary with multiple detailed explanations supporting his “strong[] belie[f]” that public disclosure of the DoD Photos “will endanger the lives of U.S. Soldiers, Airmen, Sailors and civilians presently serving in Afghanistan, as well as the lives of our Coalition partners.” (Weis Decl. Ex. A ¶ 3). As an initial matter, pointing to the “devastating” violent and deadly consequences of the then-recent release of inflammatory imagery, including videos of U.S. Marines urinating on corpses in Afghanistan and the “Innocence of Muslims” film, General Allen opined that release of the DoD Photos would only “intensify existing resentment and emotional fervor,” with similar violent and deadly results, and would also “significantly and adversely impact” the Government’s mission to develop a strategic partnership with a stable and secure Afghanistan. (*Id.*); *cf. Ctr. for Cons. Rights. v. CIA*, 765 F.3d 161, 168-69 (2d Cir. 2014) (affirming withholding of images of a prominent Guantanamo Bay detainee in part because “*images . . . alone and interacting with military personnel, particularly when released directly by the FBI and DoD, may prove more effective propaganda than previously released written records that disclose the same—or even more controversial—information about . . . detention*”). Second, General Allen explained that public release of images purporting to show detainee mistreatment would “almost certainly exacerbate” the conditions that foster “insider threat” attacks, which had already resulted in 53 deaths and 89 non-death casualties between January and October 2012. (*Id.* ¶ 4). General Allen noted that many of these attacks were inspired both by the release of the inflammatory imagery mentioned above, as well as the mishandling of religious materials. (*Id.*). As a result, “[e]xtremist groups, who already encourage this form of attack, would undoubtedly use the release of these photographs to further justify and encourage . . . these attacks as worthy

acts of religious retribution.” (*Id.*; *see also id.* ¶ 8). Third, General Allen assessed that anti-United States groups such as the Taliban would likely exploit the DoD Photos to recruit and raise funds, by relying on them as evidence of the United States’ “noncompliance with international law and basic standards of a humane and civilized society.” (*Id.* ¶ 5; *see also id.* ¶ 8). Fourth, General Allen expressed concern that release of the DoD Photos “would almost certainly exacerbate our current impasse with . . . Afghanistan over the issue of transferring detainees to Afghan Custody, and increase the pressure to fully release individuals” held by United States forces. (*Id.* ¶ 6). This, in turn, would undermine security in Afghanistan, as many of the detainees “continue to pose a serious risk to U.S. forces and U.S. domestic security.” (*Id.*). Finally, General Allen opined in 2012 that release of the DoD Photos could undermine support for the United States’ military presence in Afghanistan – a presence which General Allen deemed “essential” to “defending the homeland.” (*Id.* ¶ 7). In reaching this view, General Allen observed that public support for a continued United States military presence in Afghanistan after 2014 “remains fragile.” (*Id.*). For all of these reasons, and based on his years of military experience and judgment, General Allen concluded that public disclosure of the DoD Photos “could be expected to destabilize [Afghanistan] . . . and endanger the U.S., the Coalition, and Afghan lives.” (*Id.* ¶ 8). Accordingly, he recommended that Secretary Panetta issue a renewal certification. (*Id.* ¶ 9).

The Commander of U.S. Central Command, General James N. Mattis, also concluded that public release of the photographs could reasonably be expected to fuel civil unrest, provide a recruiting tool for insurgent and violent extremist groups, and increase targeting of U.S. forces – even if the photographs were “redacted to obscure identifying information.” (*See Weis Decl. Ex.*

B at 1, 2). Considering the DoD Photos in the context of his “intimate familiarity” with the situations in Afghanistan, Pakistan, and other locations within the CENTCOM region, which General Mattis characterized as “fragile” and “extraordinarily sensitive,” General Mattis advised that public release of the photographs “would pose a far greater threat to U.S. forces” than at the time of Secretary Gates’s certification in 2009, in light of the “increased insider threat activity” which was now “much more prevalent” in Afghanistan. (*Id.* at 1, 2). Like General Allen, General Mattis’s expert judgment was also informed by his “first-hand” experience with the “tremendous violence” sparked within the CENTCOM region by the then-recent publication of inflammatory imagery, including images of Marines urinating on corpses and the “Innocence of Muslims” videotape. (*Id.* at 2). Given that the DoD Photos “could be construed as showing detainee mistreatment,” General Mattis opined “that the potential adverse impact from release of these photographs is even higher now than it was in 2009.” (*Id.*). Finally, also pointing to sensitive negotiations that were ongoing between the United States and Afghanistan governments on matters of detention and security, General Mattis explained that public release of the photographs “along with the potential violence incited,” would have a “major strategic impact” in Afghanistan that “must be considered alongside the serious risks to U.S. forces.” (*Id.*). As a result, General Mattis also recommended that Secretary Panetta issue a renewal certification covering the DoD Photos.

Finally, General Martin E. Dempsey, the Chairman of the Joint Chiefs of Staff, “strongly concur[red]” with the recommendations supplied by General Allen and General Mattis. (Weis Decl. Ex. C at 1). Based on General Mattis’s and General Allen’s respective memoranda, along with his personal familiarity with the DoD Photos and the fragile situation in the CENTCOM

region, particularly in Afghanistan and Pakistan, General Dempsey recommended to Secretary Panetta that the DoD Photos be recertified pursuant to the PNSDA.

Accordingly, even assuming that judicial review of the basis for Secretary Panetta's renewal certification is appropriate – a ruling the Government continues to dispute – it is evident that a rational and plausible basis supported the Secretary's determination that public disclosure of the DoD Photos would endanger United States personnel deployed overseas, and that the Secretary's determination should not be disturbed by this Court.

**C. Although Legally Irrelevant to Whether the Government Is Entitled to Summary Judgment, Public Disclosure of the DoD Photos Would Continue to Endanger United States Citizens, Armed Forces, and Employees Deployed Overseas**

As the Court acknowledged, the Government's withholding of the DoD Photos must be considered as of the date of the Panetta Certification – November 9, 2012. (*See* Slip Op. at 6, 17; Oct. 21 Tr. at 7). However, the Court indicated that it would nonetheless be useful for the Government to provide an updated assessment of whether public disclosure of the DoD Photos would continue to endanger United States personnel overseas, and so directed the Government to do so. (Oct. 21 Tr. at 7-8). Accordingly, the Government has also submitted the classified Declaration of Sinclair M. Harris, Rear Admiral of the United States Navy.<sup>6</sup>

Rear Admiral Harris currently serves as the Vice Director of Operations for the Joint Staff at the Pentagon, and in that capacity, is responsible for advising the Chairman of the Joint Chiefs of Staff regarding the United States' worldwide military operations. (Declaration of Sinclair M. Harris dated December 10, 2014 (“Harris Decl.”) ¶ 1). As a result of over thirty-years of experience in the United States military at various levels of command, Rear Admiral

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<sup>6</sup> The Government is publicly filing a redacted, unclassified version of the Rear Admiral Harris's declaration with this motion.

Harris has “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.” (*Id.* ¶ 2). In connection with his assessment of present day harm that would occur if the DoD Photos were released, he reviewed the representative sample of photographs described in the Weis Declaration and previously provided to Generals Allen, Mattis, and Dempsey. (*Id.* ¶ 6).

As Rear Admiral Harris explains, the danger associated with release of the DoD Photos remains “heightened” (*id.* ¶ 7), as numerous groups are intent on attacking United States personnel and interests both abroad and within the United States, and are invoking imagery and the United States’ treatment of detainees in urging supporters to do so. (*See generally id.* ¶¶ 7, 10-12).

The Islamic State of Iraq and the Levant (“ISIL”), for example, has repeatedly called on members to commit attacks against United States and Western interests, specifically urging “lone-wolf” attacks targeting individual United States military, law enforcement, and government personnel. (*Id.* ¶ 7). Significantly, this extremist group has a particular interest in using imagery associated with United States detention practices as part of these efforts. (*Id.* ¶ 10). For example, in early September 2014, ISIL released a video showing the beheading of journalist Steven Sotloff. (*Id.*). The video depicted Mr. Sotloff in an orange jumpsuit – a symbol commonly associated with detainees housed at Guantanamo Bay – at the time of his execution. (*Id.*). Journalists James Foley, Alan Henning, and David Haines were also clothed in orange jumpsuits at the time of their executions. (*Id.*).

In Rear Admiral Harris’s expert judgment, ISIL would similarly exploit the DoD Photos in connection with its campaign to encourage supporters and followers to attack United States

military and government personnel. (*Id.* ¶ 9). Notably, ISIL’s propaganda has already been successful in spurring followers and supporters to plot and execute attacks on Western countries’ citizens and military personnel. (*Id.* ¶ 8 (describing examples)).

Al Qaeda also remains active in its efforts to incite members to attack the United States and its citizens, and often invokes the United States Government’s treatment of detainees in encouraging such attacks. (*Id.* ¶¶ 11-12). For example, the Spring 2014 issue of “Inspire” – an English propaganda magazine published by Al Qaeda for purposes of informing and persuading readers to commit attacks against non-Muslims – contains an article written by a former Guantanamo Bay detainee that highlights the United States Government’s treatment of detainees abroad, including detainees that were housed at Abu Ghraib, CIA black sites, and Guantanamo Bay. (*Id.* ¶ 12). The DoD Photos, “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.” (*Id.*). Armed with imagery allegedly depicting the abuses described by Al Qaeda, the risk that Al Qaeda’s supporters will respond to calls to launch attacks against United States citizens and other personnel is greater. (*Id.*).

Finally, while the subject of United States detainee operations remains “extremely sensitive” with countries located in the CENTCOM region, including Afghanistan and Iraq, the United States continues to have military and civilian personnel operating throughout the region and in those countries, with plans to increase the number of military personnel in Iraq. (*Id.* ¶ 13). Public disclosure of the DoD Photos – which represent photographs of United States detainees taken in connection with allegations of abuse – would facilitate these groups’ 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.” (*Id.*).

For these reasons, as further detailed in Rear Admiral Harris’s classified declaration, public disclosure of the DoD Photos 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.” (*Id.* ¶ 6).

### CONCLUSION

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

Date: New York, New York  
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