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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.,

5 Plaintiffs,

6 v.

04-CV-4151 (AKH)

7 DEPARTMENT OF DEFENSE, et al.,

8 Defendants.

Oral Argument

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9 New York, N.Y.
10 July 20, 2011
3:24 p.m.

11 Before:

12 HON. ALVIN K. HELLERSTEIN,

13 District Judge

14 APPEARANCES

15 AMERICAN CIVIL LIBERTIES UNION
For Plaintiffs

16 BY: ALEXANDER A. ABDO, ESQ.
JAMEEL JAFFER, ESQ.

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Attorneys for Plaintiffs

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20 UNITED STATES ATTORNEY'S OFFICE
21 SOUTHERN DISTRICT OF NEW YORK
For Defendants

22 BY: AMY A. BARCELO, AUSA
TARA LA MORTE, AUSA

23 CHARLES G. MILLS, ESQ.
24 Attorney for Amicus Curiae The American Legion

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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. ABD0: 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. ABD0: 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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