UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY IN SUPPORT OF PLAINTIFFS' SIXTH MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT DEPARTMENT OF DEFENSE'S SIXTH MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The parties' motions turn on a straightforward question about procedure: Is there *any* judicial review of the Secretary of Defense's determination that disclosing the photographs of abuse sought by Plaintiffs would endanger U.S. citizens, soldiers, or employees? The overwhelming weight of authority makes clear that there is.

Relying on that authority, Plaintiffs' opening brief established two propositions: first, that the Protected National Security Documents Act of 2009 ("PNSDA"), Pub. L. No. 111-83, § 565, 123 Stat. 2142, 2184–85, is an Exemption 3 statute that allows the withholding of a photograph if, among other things, the Secretary of Defense "determines that disclosure of that photograph would endanger" U.S. citizens, soldiers, or employees, PNSDA § 565(d)(1); and second, that judicial review of such a withholding is of the Secretary's determination of harm and not merely of whether the Secretary has in fact made such a determination.

Taken together, these propositions make clear that the government has yet to satisfy its burden under FOIA of justifying the Secretary's withholding of the photographs of abuse here at issue. The Secretary's certification that disclosure would cause harm is wholly conclusory. It provides neither a description of the photographs at issue nor an explanation for the determination of harm, preventing this Court from conducting the de novo review of that determination mandated by the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(B). For these reasons, the Court should order the government to submit a *Vaughn* index describing each photograph in adequate textual detail, and a *Vaughn* declaration explaining how "disclosure of [each] photograph would endanger" U.S. individuals.

In opposition, the government relies heavily upon a perplexing interpretation of the Second Circuit's decision in *A. Michael's Piano, Inc. v. Federal Trade Commission*, 18 F.3d 138

(2d Cir. 1994). The government claims that the court in that case rejected the line of cases relied upon by Plaintiffs, Def.'s Br. 16; *see* Pls.' Br. 9–11 & nn.4–5, but that is simply incorrect. *See A. Michael's Piano*, 18 F.3d at 144 ("We see no need to choose sides in the conflict between our sister circuits."). More importantly, however, *A. Michael's Piano* dealt with an issue wholly irrelevant here: whether withholding statutes should, like FOIA exemptions, be construed narrowly. *Id.* at 143–44. Nothing in this case turns on that question. Rather, the determinative question is a procedural one: whether the Secretary's determination of harm is subject to the judicial review mandated by FOIA. On that question, *A. Michael's Piano* is silent. If anything, it tends to support Plaintiffs' position, as discussed below.

The government also contends that judicial review of its withholding of the photographs is limited to merely confirming that the Secretary has certified their withholding. This argument has been rejected in the context of a provision of the Internal Revenue Code, 26 U.S.C. § 6103, by six of the eight circuit courts to have considered the question. Pls.' Br. 9–11. The government cannot persuasively distinguish that precedent, and it offers little to question the majority view's reasoning. While the Second Circuit has not directly confronted the question raised here and in that precedent, it recently embraced the foundation of the majority view, that § 6103 is an Exemption 3 withholding statute and not a statute that operates independently of FOIA. *Adamowicz v. Internal Revenue Serv.*, 402 F. App'x 648, 651–52 & n.5 (2d Cir. 2010). This Court should follow the majority view and hold that the Secretary's determination of harm under the PNSDA is subject to judicial review.

For these reasons and those that follow, the Court should direct the government to provide Plaintiffs with a *Vaughn* index and declaration describing each withheld photograph in

adequate textual detail and explaining how release of each photograph would endanger U.S. citizens, soldiers, or employees.

ARGUMENT

I. THE GOVERNMENT HAS FAILED TO JUSTIFY ITS WITHHOLDING OF THE PHOTOS.

There are two questions relevant to this Court's determination of the parties' motions for partial summary judgment: (1) whether the PNSDA is an Exemption 3 statute or, instead, operates independently of FOIA; and (2) whether judicial review of withholding under the PNSDA includes review of the Secretary's determination of harm or, instead, is limited to merely confirming that the Secretary has in fact made such a determination.

As Plaintiffs' opening brief explained, precisely these questions arose in the 1980s in the context of 26 U.S.C. § 6103(b)(2), a portion of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 701(a), 95 Stat. 172, which is a withholding statute virtually identical to the PNSDA. Pls.' Br. 9–11. Like the PNSDA, § 6103 was enacted by Congress in response to a specific court-ordered disclosure of governmental records under FOIA. And like the PNSDA, § 6103 allows the withholding of records notwithstanding any other provision of law if the relevant agency head determines that disclosure would cause a specified harm.[1] In the 1980s, the government resisted judicial review of its withholdings under § 6103 by arguing that § 6103 operated independently of FOIA and that, in any case, review of the agency head's determination of harm was limited to confirming that the determination had in fact been made. Pls.' Br. 9–11.

Six of the eight circuit courts to have addressed the government's arguments—identical to those before this Court—rejected them. The D.C., Third, Fifth, Ninth, Tenth, and Eleventh

[1] Section 6103(b)(2) authorizes the Internal Revenue Service to withhold certain tax-related information "if the Secretary [of the Treasury] determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws."

Circuits all held: (1) that § 6103(b)(2) is an Exemption 3 withholding statute that does not operate independently of FOIA, Pls.' Br. 9–10 & n.4; and (2) that review of withholdings under § 6103 includes review of the agency head's determination of harm, Pls.' Br. 9–10 & n.5. Indeed, just last year, the Second Circuit likewise treated § 6103 as an Exemption 3 withholding statute. *See Adamowicz*, 402 F. App'x at 651–52 & n.5.

This Court should follow the majority view, as well as the Second Circuit's precedent in *Adamowicz*, by answering the two questions posed above in the affirmative. Specifically, it should hold that the PNSDA, like § 6103, is an Exemption 3 withholding statute that conditions the withholding of records on the Secretary's determination of harm; and that review of withholdings under the PNSDA, as under § 6103, includes review of the actual determination of harm. The only immediate consequence of such a holding would be the government's obligation to justify its withholding of the photographs at issue here by submitting a *Vaughn* index and declaration describing each photograph and explaining how release of each would endanger U.S. individuals.

The government responds to Plaintiffs' opening brief primarily by relying on a perplexing and incorrect interpretation of the Second Circuit's decision in *A. Michael's Piano* and, alternatively, by attempting to distinguish § 6103 from the PNSDA. Neither argument has merit, as explained below. Before addressing the substance of the government's arguments, however, it bears emphasis that this is not, as the government intimates, an academic dispute. Def.'s Br. 29–30. Although some of the photographs at issue are described in investigative files released by the Army, many or most are not. For example, one investigative report describes the alleged abuse of a detainee held at a facility in Mosul, Iraq known as the "Disco."[2] The detainee

[2] CID Report of Investigation 0252-2004-CID259-80286-5C1C/5Y2E, *available at* http://www.aclu.org/files/projects/foiasearch/pdf/DODDOACID013960.pdf.

alleged that interrogators: (1) "would fill his jump suit with ice and then hose him down with cold water and make him stand for long periods of time," (2) would "force him to drink water until he gagged, vomited, or choke[d]," and (3) would "have his hooded head banged against a hot steel plate while being questioned."[3] Although the same Army report mentions the existence of a number of photographs, it provides no descriptions of any of them; thus, there may or may not be photographs that capture this conduct.[4]

More generally, the government's apparent hesitance in this litigation even to state publicly and officially how many photographs have been withheld confirms that it has not already publicly described all of the photographs.[5] Moreover, none of the publicly available descriptions explain the basis for the Secretary's determination that releasing the photographs—or even just one of them—would endanger U.S. individuals. Absent descriptions of the photographs and explanations of anticipated harm, the Court cannot meaningfully review the government's withholdings, and the public will be deprived of even the most basic descriptions of photographs depicting the abuse of captives in U.S. custody.

A. The government misinterprets *A. Michael's Piano*.

The government's primary response to Plaintiffs' motion is that the Second Circuit, in *A. Michael's Piano*, "rejected . . . the very cases on which Plaintiffs rely." Def.'s Br. 16; *see also id.* at 21–22. This is incorrect. Although *A. Michael's Piano* discussed several of the cases

[3] *Id.* at 8.

[4] *See, e.g., id.* at 43, 56, 59, 120. The report also mentions the existence of "mugshots."

[5] Although publicly available sources suggest that the government is withholding between 2,000 and 2,100 photographs, *see, e.g.*, 155 Cong. Rec. S5987 (daily ed. June 3, 2009) (statement of Sen. Joseph Lieberman) ("On May 13, President Obama announced that he would not release nearly 2,100 photographs depicting the alleged mistreatment of detainees in U.S. custody."), the Army's investigative files do not allow an accurate count, and the government has stated only that there are a "substantial number" of photographs, Decl. of Gen. David H. Petraeus ¶ 2, Mot. to Recall the Mandate, *Am. Civil Liberties Union v. Dep't of Def.*, No. 06-3140 (2d Cir. May 28, 2009).

relied upon by Plaintiffs, it did so without expressing approval or disapproval: "We see no need to choose sides in the conflict between our sister circuits." 18 F.3d at 144.

More importantly, the Second Circuit in that case dealt with a question that is not now before the Court. At issue here is whether a particular statute, the PNSDA, is an Exemption 3 withholding statute and whether the determination of harm under that statute is subject to judicial review. At issue in *A. Michael's Piano*, by contrast, was the question of whether an Exemption 3 withholding statute should be interpreted narrowly as are the FOIA exemptions themselves. *Id.* at 143–44 ("Michael's Piano urges that the withholding statute—here § 21(f)—should be construed narrowly as are the FOIA exemptions themselves. The FTC disagrees. Courts have differed on this issue."). Nothing in this case turns on whether an Exemption 3 statute should be interpreted narrowly, and *A. Michael's Piano* is therefore simply not relevant to the motions before the Court. The government's interpretation of *A. Michael's Piano* is all the more surprising because in *Adamowicz*, decided only months ago, the Second Circuit accepted the principal holding of the cases that the government claims the court rejected in *A. Michael's Piano*, namely that § 6103 is an Exemption 3 withholding statute. *Adamowicz*, 402 F. App'x at 652 & n.3.

Moreover, to the extent *A. Michael's Piano* provides any guidance, it only lends support to Plaintiffs' position. In construing the ambiguous language of the withholding statute before it, the Second Circuit considered not only the language and legislative purpose of the statute, but of FOIA as well. *A. Michael's Piano*, 18 F.3d at 144–45 (rejecting one possible construction of the statute because "the public would be denied access to information that FOIA envisions being disclosed"). After construing the terms of the ambiguous withholding statute before it, the Second Circuit remanded for de novo review of the government's withholdings. *Id.* at 146 ("we

must remand the exemption 3 portion of the case to the district court for it to apply the three factors just outlined in order to determine whether exemption from disclosure to any challenged documents is appropriate"); *id.* at 144 ("Conducting a *de novo* review we must determine whether the FTC met its burden of proving that the documents withheld pursuant to Exemption 3 fell within the scope of § 21(f) of the FTC Act."). Thus, to the extent it is relevant, *A. Michael's Piano* supports Plaintiffs' argument that the PNSDA was not intended to preempt the judicial review of Exemption 3 withholdings mandated by FOIA.

In sum, *A. Michael's Piano* does not support the government's position.[6]

B. FOIA requires judicial review of the Secretary's determination of harm.

Plaintiffs' opening brief explained that the PNSDA is an Exemption 3 statute that conditions withholding upon a determination of harm; and that the determination of harm is subject to judicial review. These conclusions flow directly from the language of the statute and Exemption 3 and are supported by the clear majority of circuits to have considered § 6103—a statute that, like the PNSDA, hinges withholding upon a determination of harm by an agency head. *See* Pls.' Br. 9–11 & nn.4–5. In response, the government attempts to distinguish § 6103 from the PNSDA. Those efforts fail.

1. The PNSDA is an Exemption 3 statute.

The PNSDA is an Exemption 3 withholding statute under FOIA because it "establishes particular criteria for withholding" records otherwise subject to disclosure under FOIA. Pls.' Br.

[6] The government also argues that the Second Circuit in *A. Michael's Piano* rejected *Long v. U.S. Internal Revenue Service*, 742 F.2d 1173 (9th Cir. 1984), in holding that "'exemption 3 . . . incorporates the policies of other statutes,' and is not 'defined by FOIA itself.'" Def.'s Br. 22 (quoting *A. Michael's Piano*, 18 F.3d at 143). This is incorrect. The Second Circuit merely restated hornbook law, to the effect that the scope of an Exemption 3 statute is generally governed by its plain meaning. The Second Circuit of course demonstrated the flexibility of even that rule by relying in the same opinion on FOIA's purposes in construing the withholding statute at issue. *A. Michael's Piano*, 18 F.3d at 144–45. But it did not cast any doubt on the Ninth Circuit's unrelated holding in *Long* about the judicial review available for withholding decisions under properly construed Exemption 3 statutes.

7; *see* 5 U.S.C. § 552(b)(3)(A)(ii). The government's only response is that the PNSDA must operate independently of FOIA because it allows the withholding of certain records "[n]otwithstanding any other provision of the law to the contrary." Def.'s Br. 31–32; *see* PNSDA § 565(b). This argument is insupportable because nothing in FOIA is in fact "contrary" to the provisions of the PNSDA. For this reason, six of the eight circuit courts that considered this argument in the context of virtually identical language in § 6103(b)(2) have rejected it, as this Court should do as well.

Section 6103 of the Internal Revenue Code, like the PNSDA, allows for the withholding of records otherwise subject to FOIA if the relevant agency head determines that release would cause a specified harm. *See Long v. U.S. Internal Revenue Serv.*, 742 F.2d 1173, 1177-78 (9th Cir. 1984). Like the PNSDA, § 6103 also allows withholding notwithstanding any other provision of law. 26 U.S.C. § 6103(b)(2) ("*Nothing in the preceding sentence, or in any other provision of law*, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws." (emphasis added)). In the context of § 6103, as here, the government argued that this language preempted FOIA altogether. In *Long*, for example, the government contended that the language "evidences a congressional intent to preempt" FOIA. 742 F.2d at 1178. The Ninth Circuit rejected that argument, reasoning that "the only real effect of placing section 6103 within FOIA is procedural." *Id.* In other words, interpreting § 6103 harmoniously with FOIA, as an Exemption 3 statute, would not alter the substantive withholding authority of the agency; it would merely subject withholdings under the

statute to the judicial review procedures of FOIA rather than the Administrative Procedure Act. *Id.* at 1178 n.12.

Then-Judge Scalia expanded upon this logic in *Church of Scientology of California v. Internal Revenue Service*, 792 F.2d 146 (D.C. Cir. 1986), in likewise rejecting the government's argument. He explained that § 6103 and FOIA, far from serving contradictory ends, are "entirely harmonious; indeed they seem quite literally made for each other: Section 6103 prohibits the disclosure of certain IRS information (with exceptions for many recipients); and FOIA, which requires all agencies, including the IRS, to provided nonexempt information to the public, establishes the procedures the IRS must follow in asserting the § 6103 (or any other) exemption." *Id.* at 149. Judge Scalia was also troubled by the silent repeal of FOIA that would result from the government's interpretation of § 6103:

> FOIA is a structural statute, designed to apply across-the-board to many substantive programs; it explicitly accommodates other laws by excluding from its disclosure requirement documents "specifically exempted from disclosure" by other statutes, 5 U.S.C. § 552(b)(3); and it is subject to the provision, governing all of the Administrative Procedure Act of which it is a part, that a "[s]ubsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly," 5 U.S.C. § 559. We find it impossible to conclude that such a statute was *sub silentio* repealed by § 6103.

Id. (alteration and omission in original) (footnote omitted).

Finally, the circuits that have rejected the government's contention that § 6103 operated independently of FOIA have noted the contrast between that statute and § 6110, a withholding statute that established comprehensive review procedures for the withholding of certain information, thus supplanting the review procedures of FOIA and allowing true independent operation of the statute. *See, e.g., id.* ("That is to be contrasted with § 6110, enacted at the same time as § 6103, which specifically requires that IRS written determinations be 'open to public inspection,' and establishes procedures to obtain and restrain disclosure, time limits, the level of

assessable fees, and an action to compel or restrain disclosure in the Claims Court. That scheme is a 'comprehensive' one in the relevant sense—that is, in the sense of duplicating and hence presumably replacing the dispositions of FOIA."); *Long*, 742 F.2d at 1178 ("Congress, wishing to exclude section 6110 from FOIA, specifically made known its intention by providing that section 6110 was to be the exclusive remedy where disclosure of written determinations were sought and that the rules and procedures of FOIA would not apply. 26 U.S.C. § 6110(1) (1982). To replace the procedures of FOIA, Congress created a new set of procedures to be applicable to requests under section 6110. Its failure to do likewise in amending section 6103 is highly persuasive of an intent not to preempt the procedural provisions of FOIA as to requests under section 6103." (footnote omitted)); *Grasso v. Internal Revenue Serv.*, 785 F.2d 70, 75 (3d Cir. 1986) ("Finally, section 6110 contains specific procedures for disclosure of IRS written determinations. In contrast, section 6103 provides only a substantive standard, and thus can more reasonably be viewed as subsumed into exemption 3 of FOIA." (footnote omitted)); *DeSalvo v. Internal Revenue Serv.*, 861 F.2d 1217, 1220 (10th Cir. 1988) ("Congress' simultaneous enactment of sections 6103 and 6110 subsequent to enacting the FOIA therefore implies that Congress was aware of the FOIA implications, was capable of making alternative provisions for review, and chose not to do so in the case of section 6103.").

These same considerations compel the holding that the PNSDA, which is identical to § 6103 in relevant part, is also an Exemption 3 statute. In particular, (1) it functions as a narrow exception to the disclosure requirements of FOIA; (2) neither its text nor its legislative history supports its independent operation, and interpreting it otherwise would silently repeal FOIA with respect to the records at issue; and (3) it provides only a substantive standard for withholding, but no procedures that would supplant FOIA's judicial-review provisions. For these reasons, the

Court should hold that the PNSDA is an Exemption 3 statute, subject to the judicial-review provision of FOIA.

2. The PNSDA conditions withholding on a determination of harm, and that determination is subject to judicial review.

Because the PNSDA is an Exemption 3 withholding statue, and because it conditions withholding on a determination by the Secretary that disclosure would result in harm, that determination is subject to judicial review under FOIA. In this respect, the PNSDA is similar to other FOIA exemptions and other Exemption 3 statutes, and it is virtually identical to § 6103, which also conditions withholding on a determination of harm. The majority of circuit courts have held that § 6103's determination of harm—like the determinations of harm in Exemptions 6, 7(C), and7(F), and in classification decisions under Exemption 1—is subject to judicial review.

Rather than grapple directly with the weight of precedent interpreting § 6103 as requiring judicial review of agency determinations of harm prior to withholding, the government devotes the majority of its brief to attempting to distinguish § 6103 from the PNSDA. Those efforts fail primarily because the government conflates substance and procedure. It is undoubtedly true that the substantive criteria of a withholding statute derive meaning primarily from the text, structure, and purpose of the enactment. But the substantive scope of the criteria has little to do with the *procedures* used to review whether the criteria have been satisfied. If the statute is an Exemption 3 statute, those procedures are provided by FOIA, and FOIA requires judicial review of withholding decisions. 5 U.S.C. § 552(a)(4)(B) ("the court shall determine the matter de novo"). Thus, in *Long*, even though the history of § 6103(b)(2) clearly demonstrated Congress's displeasure with the order of disclosure in that very case, 742 F.2d at 1176 ("It is clear from the legislative history of the amendment that Congress was targeting these two cases."), the Ninth

Circuit nonetheless subjected the government's withholdings and, specifically, its determination of harm to judicial review under FOIA. The same result should obtain here.

The government's arguments to the contrary are unavailing. The government first argues that the text of the PNSDA evidences congressional intent that the Secretary's determination of harm not be subject to judicial review. Def.'s Br. 17–19. But a nearly identical argument was considered and rejected in *Long* and its sister-circuit analogues. The government claims, however, that the certification process in the PNSDA, absent in § 6103, somehow shields the underlying determination of harm from judicial review. Def.'s Br. 18, 23. This argument is illogical. The PNSDA conditions withholding upon *both* a determination of harm (subsection (d)(1)) and a certification issued to that effect (subsection (c)(1)(A)). It is irrelevant that the conditions are specified in different portions of the statute. Were that fact determinative, the expiration provision of the certification requirement—also contained in subsection (d)—would likewise be unreviewable. Under that theory, the government could withhold documents based upon an expired certification simply because, under subsection (c)(1)(A), "the Secretary of Defense has issued a certification." Textually, both that result and the government's interpretation are foreclosed, however, by the next phrase in subsection (c)(1)(A), which requires that the certification be "as described in subsection (d)." In other words, the certification requirement does not stand alone, as the government's argument would have it; it is simply a placeholder for the determination of harm defined under subsection (d).

Moreover, the government's interpretation, if correct, would yield perverse results. Foreclosing review of the Secretary's determination of harm would allow the unreviewable withholding of records based on a certification of harm even if the Secretary: (1) did not in fact make any determination about the danger of disclosure; or (2) made a determination of harm for

patently deficient reasons or based upon entirely inappropriate or irrelevant considerations. For example, under the government's theory, this Court would be powerless to reject a withholding based on a certification of harm even if the Secretary publicly confirmed that disclosure would endanger no one and that he issued the certification solely to prevent embarrassment to the government. *Long* explains why such an "irrational construction" should be rejected: "It is totally inconceivable that Congress, on the one hand, would seek to limit discretion by requiring that it be exercised according to particular criteria spelled out in the statute and, on the other hand, would render its exercise completely unreviewable, even where it had been clearly abused." 742 F.2d at 1181.

It is no response to say that the PNSDA "eliminated the Secretary's discretion to decide whether to issue such a certification" and that the determination of harm therefore "is not subject to judicial review." Def.'s Br. 19. The PNSDA did not in fact eliminate the Secretary's discretion. Like § 6103, it affords discretion, circumscribed by statutory criteria, to make the initial determination of harm. *See Long*, 742 F.2d at 1179 ("Here, the statute permits the Secretary to disclose if he determines that the disclosure will not seriously impair assessment, collection or enforcement of the tax laws. The presence of such discretion prevents the statute from qualifying under Part A [of Exemption 3].").[7] Furthermore, the PNSDA does not eliminate discretion even once a determination of harm has been made and a certification issued: "Nothing in this section shall be construed to preclude the *voluntary* disclosure of a protected document." PNSDA § 565(e) (emphasis added).

Next, the government makes the sweeping claim that the PNSDA's inclusion of congressional oversight and monitoring signals an intent to make withholding under the PNSDA

[7] *Long*'s discussion of Part A of Exemption 3 refers to the newly re-numbered Part A(i), 5 U.S.C. § 552(b)(3)(A)(i), which describes withholding statutes that require non-disclosure, "leav[ing] no discretion on the issue."

unreviewable. Def.'s Br. 19–20. There is no support in the text or the legislative history of the PNSDA for this proposition. To the contrary, the text of the PNSDA expressly recognizes that the records it addresses will be subject to proceedings under FOIA. PNSDA § 565(b). And FOIA itself demonstrates that congressional oversight and judicial review may go hand in hand. FOIA provides not only for judicial review, 5 U.S.C. § 552(a)(4)(B), but also for executive and congressional oversight of improper withholdings, *id.* § 552(a)(4)(F). The government's logic, moreover, is simply too broad to be sustained. It cannot be that the availability of congressional oversight alone, absent any textual command, is sufficient to implicitly displace statutorily provided judicial review. Were that so, any number of statutory rights to judicial review would be nullified by overlapping congressional oversight. *See, e.g.*, 50 U.S.C. §§ 1807–1808 (imposing congressional reporting requirements on the executive for surveillance under the Foreign Intelligence Surveillance Act); *id.* § 1810 (providing for judicial review of allegedly unlawful surveillance). But that, of course, is not the law.

The government's assertion that the national-security character of the PNSDA also displaces judicial review is similarly sweeping and incorrect. Def.'s Br. 18, 20–21. While citing cases far afield from FOIA, the government forgets that FOIA routinely requires judicial review of the withholding of records that "implicate national security." Def.'s Br. 20; *see* 5 U.S.C. § 552(b)(1), (3). In this very litigation, the Court has frequently reviewed, under Exemptions 1 and 3, information that the government claimed could be withheld in part due to its national-security nature. *See, e.g.*, 5 U.S.C. § 552(b)(1) (allowing the withholding of only "*properly* classified" records (emphasis added)). Though styled "de novo" by FOIA, 5 U.S.C. § 552(a)(4)(B), that type of judicial review often entails some measure of deference to agency determinations. But the possibility that deference might be due does not affect the availability of

judicial review in the first instance. *See, e.g.*, *Long*, 742 F.2d at 1182 (requiring de novo review even though "the Commissioner's determination is [not] to count for nothing").[8] In implying that somehow the two are related—that deference immunizes the Secretary's determination of harm from *any* review—the government again conflates substance and procedure.[9]

The government's final attempt at distinguishing the PNSDA from § 6103 is its contention that the PNSDA applies to a narrow class of documents and may therefore "'provid[e] for limited unguided discretion' to an agency to withhold certain records." Def.'s Br. 24 (alteration in original) (quoting *Lessner v. U.S. Dep't of Commerce*, 827 F.2d 1333, 1336 (9th Cir. 1987)). In the case relied upon by the government, the Ninth Circuit commented that certain types of Exemption 3 statutes may, if their text and legislative history support the construction, provide "limited unguided discretion" to agencies to withhold narrow classes of information. *Lessner*, 827 F.2d at 1336. Whether or not the Ninth Circuit's comment in *Lessner* is consistent with Exemption 3, it does not apply here. The PNSDA does not delegate "unguided" discretion to the Secretary of Defense to withhold records; rather, it "establishes particular criteria for withholding," 5 U.S.C. § 552(b)(3)(A)(ii), that are reviewable under FOIA. The most important of those criteria—the Secretary's determination of harm—is indistinguishable from other criteria routinely reviewed by courts under FOIA. Exemption 1, for example, requires courts to determine whether information is properly classified, which turns principally upon an assessment of harm. *Id.* § 552(b)(1); Exec. Order No. 13,526, § 1.1(a)(4), 75 Fed. Reg. 707 (Dec. 29, 2009)

[8] Plaintiffs do not concede that the deference ordinarily due in the context of national security should be afforded here. Heightened deference is inappropriate where the records at issue are acknowledged to pertain to governmental misconduct.

[9] The government's citation of *Long* in support of its claim that no judicial review is available here is particularly misguided. Def.'s Br. 24. *Long* did state that deference might apply in reviewing certain FOIA withholdings. 742 F.2d at 1182. But that statement assumed *judicial review* of withholdings, based upon "detailed affidavits" that would be filed by the government justifying those withholdings. *Id.* ("In particularly sensitive areas such as national security cases and cases involving investigatory records of law enforcement agencies, courts have accorded special deference to an agency's detailed affidavits.").

("Information may be originally classified under the terms of this order only if . . . the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security . . . ."). Exemptions 6 and 7(C) require courts to review executive determinations that disclosure would invade personal privacy. 5 U.S.C. § 552(b)(6), (7)(C). And, perhaps most similarly to the PNSDA, Exemption 7(F) obligates courts to evaluate government claims that disclosure of law-enforcement records would "endanger the life or physical safety of any individual." *Id.* § 552(b)(7)(F). If these criteria are judicially reviewable under FOIA, and they surely are, so too is the PNSDA's harm criterion.

3. The PNSDA's legislative history is not to the contrary.

The legislative history of the PNSDA does not alter the conclusion, compelled by its plain language and by precedent interpreting § 6103, that the Secretary's determination of harm is subject to judicial review under FOIA. None of the statements from the two sponsors of the act—the only legislative history cited by the government—suggests an intent to strip courts of their traditional authority to review withholdings under FOIA. To the contrary, all of the quotations upon which the government relies are consistent with the existence of meaningful judicial review. It is true, as the sponsors of the PNSDA make clear, that the statute changed the *substantive* authority of the government to withhold records. *See, e.g.*, Def.'s Br. 26. And it is true that the bill was enacted specifically in response to this litigation. But those precise facts were likewise true in *Long*, and yet the court had no trouble concluding that the substantive change in withholding authority left undisturbed FOIA's traditional judicial-review procedures. *Long*, 742 F.2d at 1176 ("It is clear from the legislative history of the amendment that Congress was targeting these two cases."); *id.* at 1182 ("We therefore conclude that the . . . determination that disclosure . . . would seriously impair the assessment, collection, or enforcement of the tax laws is subject to de novo review by the district court.").

This conclusion is buttressed by the fact that Congress did not enact legislation simply prohibiting disclosure of these photographs, as it easily could have done if it intended to bypass judicial review. Instead, Congress conditioned withholding on the potential for disclosure to cause harm, a standard formulation for withholding criteria under FOIA. *See* 5 U.S.C. § 552(b)(1), (6), (7)(C), (7)(F). Even were the government correct, however, that the legislative history of the PNSDA contradicted its plain language, the text would control. *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1266 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.").

For these reasons, and those previously discussed, the Court must review the Secretary's determination of harm under the PNSDA.[10]

4. The government must justify its withholdings with Vaughn *indices.*

In order for the Court to be able to conduct its statutorily mandated review of the government's withholding of the photos pursuant to Exemption 3, and in order for Plaintiffs to be able to meaningfully participate in that review, the government must justify its withholdings under the PNSDA with an index and declaration. *See* Pls.' Br. 12–13. Conclusory justifications will not suffice. Thus far, the sole explanation provided by the government for the Secretary's determination that disclosure would cause harm is a single sentence from his certification, which

[10] Plaintiffs' opening brief correctly noted that the recent modifications to Exemption 3 in the OPEN FOIA Act of 2009, Pub. L. No. 111-83, § 564, 123 Stat. 2142, 2184, do not apply to the PNSDA. Pls.' Br. 7 n.3. Those changes apply only to withholding statutes "enacted after the date of enactment of the OPEN FOIA Act of 2009." *Id.* § 564(b)(3)(B). The PNSDA was enacted on the same date, and is therefore not subject to the Act's requirement that Exemption 3 statutes "specifically cite[] to [the relevant] paragraph" of FOIA. In any event, the PNSDA does explicitly state that it operates as an exemption to disclosure otherwise mandated by FOIA. PNSDA § 565(b). The government's apparent contention that the PNSDA is subject to and does not satisfy the OPEN FOIA Act is simply incorrect. Def.'s Br. 31 n.10. It also appears to contradict the Department of Justice's own interpretation of the statute. *See Congress Passes Amendment to Exemption 3 of the FOIA*, Dep't of Justice, Office of Info. Policy (Mar. 10, 2010), http://www.justice.gov/oip/foiapost/2010foiapost7.htm ("The OPEN FOIA Act was enacted on October 28, 2009, and so this amendment impacts statutes enacted after that date.").

merely recites the statutory language of the PNSDA: "I have determined that public disclosure of these photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." *See* Pls.' Br. 12. That statement fails to satisfy the government's burden under FOIA to justify its withholdings. *Id.* (citing cases). It does not describe the photos, state when they were taken, identify how many are at issue, or provide any explanation whatsoever of how the disclosure of each individually would endanger U.S. individuals. *See PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 250 (D.C. Cir. 1993) ("an affidavit that contains merely a 'categorical description of redacted materials coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate'" (quoting *King v. U.S. Dep't of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987))).

The Court should therefore order the government to provide Plaintiffs with a *Vaughn* index describing each photograph in adequate textual detail, as well as a *Vaughn* declaration explaining how release of each individual photograph would endanger U.S. citizens, soldiers, or employees. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *King*, 830 F.2d at 218 ("Affidavits submitted by a governmental agency in justification for its exemption claims must therefore strive to correct, however, imperfectly, the asymmetrical distribution of knowledge that characterizes FOIA litigation."); *Lykins v. U.S. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984) (The *Vaughn* procedure "serves at least three purposes: it forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court.").

The government's primary response—that it may justify its withholdings categorically without any index or declaration based on the categorical nature of the PNSDA, Def.'s Br. 27–28—is based on the mistaken premise that this Court's review of the Secretary's determination of harm is limited to simply confirming that the Secretary has in fact made such a determination. Because the Court must review the actual determination itself, the government must provide an index and declaration allowing such review with respect to each photograph. *See, e.g.*, *Long*, 742 F.2d at 1182 ("the district court should first attempt to resolve the issue [of withholding under § 6103] by means of detailed affidavits"). In other words, this is not a case, as described in the precedent cited by the government, where the shared characteristics of the withheld records categorically justify their withholding. *See, e.g.*, *Church of Scientology*, 792 F.2d at 152 (explaining the circumstances in which categorical justifications may be appropriate); *see also PHE, Inc.*, 983 F.2d at 250. To the contrary, judicial review of the withholdings requires a fact-specific inquiry into the contents of the withheld photographs and the potential for the release of each, individually, to cause the harm predicted by the Secretary.[11]

The government misconceives Plaintiffs' position in arguing that FOIA does not require it to "create new documents," and therefore that it need not describe the photographs in defending their withholding. Def.'s Br. 28–29. Plaintiffs' contention here is only that, consistent with well-established jurisprudence, FOIA requires the government to justify its withholdings by providing detailed affidavits that describe the documents in as much textual detail as is consistent with the claimed need for secrecy. *See, e.g.*, *Lykins*, 725 F.2d at 1463 ("we

[11] The government alternatively proposes the use of a sample *Vaughn* index. Def.'s Br. 28 n.8. Plaintiffs are not yet in a position to determine whether sampling is appropriate or even possible. The government has not confirmed the number of photographs being withheld, and it has yet to explain whether categories of photographs exist such that a representative sample of the images could be produced. If and when the Court orders the government to produce a *Vaughn* index and declaration of its withholdings, Plaintiffs request that the Court allow the parties an opportunity to explore the possibility of a sample index and to brief any disagreements to the Court at that time.

have required that as much information as possible be made public" in *Vaughn* indices); *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (the agency must provide "reasonably detailed explanations why any withheld documents fall within an exemption"). Here, the level of detail in the government's *Vaughn* index of the photographs should reflect Congress's limited concern in enacting the PNSDA: that *photographic* evidence of misconduct is uniquely powerful. Textual descriptions of that misconduct are not protected under any circumstances by the PNSDA, and the government accordingly has no legitimate justification in refusing to provide detailed textual descriptions in its *Vaughn* index of each withheld photograph.[12]

CONCLUSION

For these reasons, the Court should order the government to disclose the withheld images of prisoner abuse or, at a minimum, to provide Plaintiffs with a *Vaughn* index describing each photograph in adequate textual detail as well as a *Vaughn* declaration explaining how release of each individual photograph would endanger U.S. citizens, soldiers, or employees.

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Respectfully submitted,

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[12] The government preserves its argument that Exemption 7(F) justifies its withholding of the photographs of abuse. Def.'s Br. 30. The Court should adhere to its initial holding, affirmed by the Second Circuit, that Exemption 7(F) does not justify the withholding of the photographs in this case. *See Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005), *aff'd*, 543 F.3d 59 (2d Cir. 2008).

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