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)

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
SEVENTH MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

It has been nearly ten years since photographs of detainee abuse at the Abu Ghraib prison in Iraq shocked the world. It is past time for the remainder of the government's photographs of detainee abuse to be made available to the public. Meanwhile, the United States ended its combat mission in Iraq more than two years ago; its military mission in Afghanistan is also winding down. Whatever justification there may have been for concealing the abuse that took places in connection with these wars no longer exists.

The photographs here at issue are "the best evidence of what happened, better than words, which might fail to describe, or summaries, which might err in their attempt to generalize and abbreviate." *Am. Civil Liberties Union v. Dep't of Def.* ("*ACLU I*"), 389 F. Supp. 2d 547, 578 (S.D.N.Y. 2005), *aff'd*, 543 F.3d 59, 87 (2d. Cir. 2008). Indeed, they are manifestly important to the continuing national debate concerning government accountability for the abuse of prisoners and to current and future conversations about the United States' detention practices. To continue to conceal the full scope of these abuses ensures only that Americans will make decisions about government policy, including decisions about war, without the benefit of past experience.

The sole basis put forth by the government to justify withholding the photographs is a one-page certification issued by former Secretary of Defense Leon Panetta on November 9, 2012 ("Recertification"), which renewed an earlier certification by then-Secretary of Defense Robert Gates dated November 13, 2009. Both were issued pursuant to the Protected National Security Documents Act of 2009 ("PNSDA"), Pub. L. No. 111-83, § 565, 123 Stat. 2142, 2184–85, which was enacted in response to a unique constellation of factors that confronted the United States in 2009: the United States had more than 110,000 troops in Iraq; and the Prime Minister of that country had urged the United States not to release the photographs in order to prevent increased

violence that might delay the planned end of the combat mission. Michael E. O'Hanlon & Ian Livingston, *Iraq Index: Tracking Variable of Reconstruction & Security in Post-Saddam Iraq* 19, Brookings Institute, July 28, 2010, http://bit.ly/1d1Gt8s; *see also* Nancy A. Youssef, *Why'd Obama Switch on Detainee Photos? Maliki went Ballistic*, McClatchy DC, June 1, 2009, http://bit.ly/1iUdvwe. The PNSDA permits the government to withhold certain photographs from release under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for three years if the Secretary certifies that their release would "endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." PNSDA, § 565(c)(1)(A), (B).

The government has failed to justify withholding the photographs from release under the PNSDA for two reasons. First, the Recertification is deficient because the Secretary has certified an entire collection of photographs rather than making the individualized determination required by the PNSDA that release of *each* photograph would endanger U.S. citizens, service members, or employees. The Court should therefore order release of the photographs or, in the alternative, require the government to present a certification that complies with the statute's command for such an individualized determination.

Second, the Recertification is wholly conclusory and does not include information sufficient to allow this Court to determine whether the photographs are properly withheld under the PNSDA. Under FOIA, judicial review of the government's decision to withhold documents is always conducted *de novo*. In this case, that review must include an independent review of the Secretary's determination that release of each photograph would endanger U.S. citizens, service members, or employees. While this Court has previously expressed its view that cases in other circuits requiring such independent review are not applicable here, the Court should revisit the

matter in light of the fact that the circumstances, including the circumstances that served as a catalyst for the PNSDA, have changed so dramatically. Indeed, those changed circumstances make even clearer the need for judicial review of the Secretary's determination, particularly where, as here, the Recertification and the original certification, although issued three years apart, are essentially the same.

The Recertification upon which the government solely relies provides no information that would allow the Court to review the adequacy of the Secretary's determination. The government has refused to produce a *Vaughn* index and declaration further justifying its withholding. On that basis alone, the Court should order the government to produce the photographs but, in the alternative, the Court should order the government to provide Plaintiffs with a *Vaughn* index and declaration that describes each photograph in detail and sets out the government's reasons for concluding that release of each photograph would endanger U.S. citizens, service members, or employees. That is, even if the Court concludes that it need not conduct an independent assessment of the Secretary's certification, the government must still produce a *Vaughn* index and declaration that provides as much information about the photographs as can be provided without compromising the governmental interests protected by the FOIA. Such an index and declaration would not only allow for meaningful judicial review, but it would also contribute to the public record of the post-September 11 conflicts, vindicate the "right to know" that FOIA was meant to serve, and contribute to the ability of the public to hold current and former officials accountable for decisions that led to abuses.

STATEMENT OF FACTS

On October 7, 2003, more than a decade ago, Plaintiffs submitted a FOIA request to the Department of Defense for all records related to the treatment, death, or rendition of detainees held in U.S. custody abroad. This motion concerns an unspecified, but "substantial" number of

images in the possession of the Department of Defense that depict the abuse of detainees and that the government continues to withhold from the public to this day. As set forth below, the path to this day has been long and labyrinthine.

I. Background

A. The Darby Images

On July 2, 2004, Plaintiffs filed this lawsuit seeking compliance with their FOIA requests to the Department of Defense and others. *See Am. Civil Liberties Union v. Dep't of Def.*, 339 F. Supp. 2d 501, 503 (S.D.N.Y. 2004). On August 16, 2004, "in order to facilitate the government's processing of documents, plaintiffs created a priority list of enumerated documents" that included a set of photographs and videos that Army Specialist Joseph Darby had provided to the Department of the Army Criminal Investigative Command ("Darby Images"). *ACLU I*, 389 F. Supp. 2d at 550–51. The Darby Images were taken at Abu Ghraib and included images of unclothed detainees posed in "dehumanizing, sexually suggestive ways." *Am. Civil Liberties Union v. Dep't of Def.* ("*ACLU II*"), 543 F. 3d 59, 64 (2d Cir. 2008).

Initially, the government refused to release the Darby Images on the basis of FOIA Exemptions 6 and 7(C), 5 U.S.C. § 552(b)(6), (7)(C), arguing that disclosure of the photographs would infringe upon the privacy of the prisoners depicted even if the photographs were redacted to obscure identifying features. Defs.' Br. Opp'n to Pls.' Mot. Partial Summ. J. 57–74, Mar. 30, 2005, ECF No. 80.

Two months after oral argument on the issue, however, the government offered a new justification: that the Darby Images were exempt from disclosure under Exemption 7(F) because their release could reasonably be expected to endanger U.S. armed forces, other coalition forces, or civilians in Iraq and Afghanistan. Defs.' Supplemental Br. Defs.' Mot. for Summ. J. at 19–27, July 28, 2005, ECF No. 114.

On September 29, 2005, this Court rejected the government's Exemption 6 and 7(C) privacy arguments, finding that the prisoners' privacy could be protected by the redaction of identifying features and that any residual privacy interest would be outweighed by the public interest in disclosure. *ACLU I*, 389 F. Supp. 2d at 571–74. The Court also rejected the government's supplemental argument relating to Exemption 7(F). *Id.* at 574–79. The Court acknowledged the "risk that the enemy will seize upon the publicity of the photographs and seek to use such publicity as a pretext for enlistments and violent acts," *id.* at 578, but rejected that speculative harm as a basis for withholding the images: "The terrorists in Iraq and Afghanistan do not need pretexts for their barbarism; they have proven to be aggressive and pernicious in their choice of targets and tactics." *Id.* at 576. Accordingly, the Court ordered the images released. *Id.* at 579. The government appealed, Notice of Appeal, Nov. 29, 2005, ECF No. 166, but withdrew the appeal after a third party published the Darby Images on the internet. *ACLU II*, 543 F.3d at 65.

B. Three Sets of Additional Images

In or about early April 2006 the government acknowledged that it possessed twenty-nine additional photographs responsive to Plaintiffs' FOIA request. *See* Order 2, Apr. 10, 2006, ECF No. 184. According to the government, these photographs were taken in at least seven different locations throughout Afghanistan and Iraq. The government also withheld these photographs on the basis of FOIA Exemptions 6, 7(C), and 7(F). It was agreed in a stipulated order dated April 10, 2006 that any additional responsive documents withheld by the government on the same bases as the twenty-nine images would also "be governed by the final ruling on appeal as to" those images. *Id.* at 4.

On June 9 and 21, 2006, relying on the same reasoning in its September 2005 order, this Court ordered the government to disclose twenty-one of the photographs (twenty of which were

redacted), finding that eight of them were not responsive to Plaintiffs' FOIA request. *Am. Civil Liberties Union v. Dep't of Def.*, No. 1:04-CV-4151, 2006 WL 1722574, at *1 (S.D.N.Y. June 21, 2006); *Am. Civil Liberties Union v. Dep't of Def.*, No. 1:04-CV-4151, 2006 WL 1638025, at *1 (S.D.N.Y. June 9, 2006) (collectively the "June 2006 Orders").

Less than a week later, on June 26, 2006, the government informed Plaintiffs that it had twenty-three further images responsive to Plaintiffs' requests, which images were to be governed by the final ruling on the twenty-nine images. *See ACLU II*, 543 F.3d at 65 n.2. On June 30, 2006, the government appealed this Court's June 2006 Orders. Notice of Appeal, June 30, 2006, ECF No. 197.

On September 22, 2008, a panel of the United States Court of Appeals for the Second Circuit affirmed the June 2006 Orders. Without deciding whether disclosure of the photographs would risk inciting violence, the Second Circuit held that, under the plain language of Exemption 7(F), "[i]t is plainly insufficient to claim that releasing documents could reasonably be expected to endanger some unspecified member of a group so vast as to encompass all United States troops, coalition forces, and civilians in Iraq and Afghanistan." *ACLU II*, 543 F.3d at 71. The government's petition for rehearing was denied on March 11, 2009. Order, *Am. Civil Liberties Union v. Dep't of Def.*, No. 06-3140-cv. (2d. Cir. Mar. 11, 2009).

Seven weeks later, on April 23, 2009, the government informed this Court that it possessed an unspecified, "substantial number" of additional responsive images and represented that it would process them consistently with the Court's previous rulings. Barcelo Decl. Ex. B, Apr. 1, 2011, ECF No. 458-2. The executive has never officially confirmed the number of additional images in its possession, but a member of Congress has stated that there are over 2,000 such images. *See* 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.").

In the same letter in which it informed this Court of the existence of additional responsive images, the government stated it would not seek review of the Second Circuit's decision. The Second Circuit issued its mandate on April 27, 2009. Mandate, Apr. 28, 2009, ECF No. 340.

On May 13, however, the government reversed course, announcing that it was in fact considering petitioning the Supreme Court for review of the Second Circuit's decision. Letter from Lev L. Dassin, Acting U.S. Attorney, to Hon. Alvin K. Hellerstein (May 13, 2009). The government filed its petition for a writ of certiorari on August 7, 2009.

II. The PNSDA and the Sixth Cross-Motions for Partial Summary Judgment

A. Enactment of the PNSDA

On October 28, 2009, Congress enacted the Protected National Security Documents Act of 2009 ("PNSDA"), as part of the Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 1111-8, § 565, 123 Stat. 2142, 2184–86. The PNSDA authorizes the withholding of "any record" that is a photograph (i) "taken between September 11, 2001 through January 22, 2009" and that (ii) "relates to the treatment of individuals engaged, captured or detained after September 11, 2009, by the Armed Forces of the United States in operations outside of the United States" *provided that* the Secretary of Defense has certified that "disclosure of the record would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." PNSDA, § 565(b)(c), 123 Stat. at 2184–85. The Secretary of Defense may renew his certification "at any time" and any such certification, whether an initial one or a renewal, expires after 3 years. PNSDA, § 565(d)(2), (3), 123 Stat. at 2184–85.

B. 2009 Certification

On November 13, 2009, Secretary of Defense Robert M. Gates issued the Certification of the Secretary of Defense ("2009 Certification") in which he identified "a collection of photographs . . . assembled by the Department of Defense" that "include but are not limited to the 44 photographs referred to in the decision of the United States Court of Appeals for the Second Circuit in *American Civil Liberties Union v. Department of Defense*, 04 Civ. 4151 (AKH) (S.D.N.Y.)." The 2009 Certification further states that "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." Barcelo Decl. Ex. G, Apr. 1, 2011, ECF No. 458.

C. Sixth Cross-Motions for Partial Summary Judgment

On August 7, 2009 the government notified the United States Supreme Court of the 2009 Certification and petitioned the Court to grant its petition, vacate the decision below and remand for further proceedings in light of the enactment of the PNSDA and the Secretary's certification. Brief for Petitioner, *United States Dep't of Def. v. Am. Civil Liberties Union*, 130 S. Ct. 777 (2009) (No. 09-160).

On November 30, 2009, the Supreme Court agreed, remanding this case for further proceedings. 130 S. Ct. 777 (2009). The Second Circuit, in turn, remanded the case to this Court on July 7, 2010. *See* Mandate, July 7, 2010, ECF No. 419.

On December 17, 2010, Plaintiffs moved for partial summary judgment and for an order requiring the government to disclose the images it purported to withhold pursuant to the PNSDA or, in the alternative, to produce a *Vaughn* index describing each photograph in sufficient textual detail to explain how it would endanger U.S. citizens, service members, or employees. Pls.' Br. Sixth Mot. for Partial Summ. J. 2, Dec. 17, 2010, ECF No. 444. Plaintiffs argued that the Court

was required to conduct a review of the Secretary of Defense's determination that release of the photographs would endanger U.S. citizens, service members, or employees. *Id.* at 8–11. The government cross-moved for partial summary judgment, arguing that the Court's only role was to establish that the Secretary of Defense had issued a certification with respect to the photographs. Defs.' Br. Sixth Mot. for Partial Summ. J. 2, Apr. 1, 2011, ECF No. 457.

On July 20, 2011 this Court held oral argument and denied Plaintiffs' motion and granted the government's "for the reasons stated on the record of proceedings." *See* Summ. Order Granting Defs.' Sixth Mot. for Partial Summ. J., July 20, 2011, ECF No. 469. The Court recognized that FOIA required it to do something more than verify the fact of the certification of harm. Oral Arg. Tr. 23:21–25, 24:13–15, 37:8–11, Oct. 11, 2011, ECF No. 474 (limiting *de novo* review to "looking for the rational basis of what the Secretary of Defense has done"). Nevertheless, the Court concluded that "given the history of how this came about," the government had "satisfied its burden to support the claimed Exemption 3 from disclosure." *Id.* at 36:4–6, 23–25, 37:1–7.

III. Plaintiffs' Seventh Motion for Partial Summary Judgment

A. The Recertification

On November 9, 2012, several days before the 2009 Certification expired, Secretary of Defense Leon E. Panetta issued a renewal certification for the photographs at issue in this case ("Recertification").[1]

The Recertification is virtually identical to the original 2009 Certification. Like the original one, it states that it "pertains to a collection of photographs . . . assembled by the Department of Defense" that "include but are not limited to the 44 photographs referred to in the

[1] For the convenience of the Court a copy of the Certification Renewal of the Secretary of Defense is attached to this memorandum as Exhibit A.

decision of the United States Court of Appeals for the Second Circuit in *American Civil Liberties Union v. Department of Defense*, 04 Civ. 4151 (AKH) (S.D.N.Y.)." Also like original one, the Recertification states that "[u]pon the recommendations of [certain listed officials] and by the authority vested in me under [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.'" Indeed, the only differences between the two certifications are that the new one includes the word "continue" in the statement that the "photographs continue to meet the standard for protected documents" in the PNSDA; and that "the Commander, International Security Assistance Force/United States Forces-Afghanistan" is substituted for "the Commander Multi-National Forces Iraq" in the list of officials upon whose recommendations the Secretary based his determination. *Compare* Barcelo Decl. Ex. G, *with* Ex. A (attached).

Although the two certifications are essentially the same, between their issuance the situations in Iraq and Afghanistan had changed significantly. The U.S. military mission in Iraq had ended: by December 15, 2011, the U.S. had withdrawn "nearly 150,000 U.S. combat forces" from that country. Leon E. Panetta, Secretary of Defense, Speech, U.S. Forces-Iraq End of Mission Ceremony (Dec. 15, 2011), http://1.usa.gov/1g8srCP. The numbers of government and contract workers at the U.S. Embassy in Iraq had also been greatly reduced by late 2012. Karen DeYoung, *U.S. Reducing Plans for Large Civilian Force in Post-2014 Afghanistan*, Wash. Post, Dec. 5, 2012, http://wapo.st/1eQUeXr (noting reduction from 20,000 to 13,000 employees and civilians at the U.S. Embassy in Iraq and plans for further reductions to 8,000 persons).

With respect to Afghanistan, by November 2012 the United States had set the end of 2014 as the target date for the end of the combat mission, and troop reductions were already well

underway. *See, e.g.*, Army Sgt. 1st Class Tyrone C. Marshall, Jr., *Post-2014 Afghanistan Troop Levels Remain Undecided*, Am. Forces Press Svc., Nov. 26, 2012, http://1.usa.gov/KqvbAQ (noting completion of withdrawal of 33,000 surge troops from Afghanistan in September 2012); Craig Whitlock and Karen DeYoung, *Panetta: U.S., NATO will Seek to End Afghan Combat Mission Next Year*, Wash. Post, Feb. 1, 2012, http://wapo.st/1gGfC2G. The U.S. had already announced that it intended to scale back the number of civilians to be posted in Afghanistan after 2014. *U.S. Reducing Plans for Large Civilian Force in Post-2014 Afghanistan, supra*.

Moreover, since the issuance of the Recertification, the United States has reduced its troop levels in Afghanistan by more than 40%. *Compare How Many U.S. Troops are Still in Afghanistan*, CBS News, Jan. 9, 2014, http://cbsn.ws/1m1dKWk ("the drawdown process remains on track") *with Time to Pack Up and Leave*, N.Y. Times, Oct. 13, 2012, http://nyti.ms/L0YOZR. On May 23, 2013, President Barack Obama stressed that the "Afghan war is coming to an end" and that "[f]ewer of our troops are in harm's way, and over the next 19 months they will continue to come home . . . . In sum, we are safer because of our efforts." Remarks by the President at the National Defense University (May 23, 2013), http://1.usa.gov/1coxD1o. The United States has also indicated that it might withdraw all troops from Afghanistan at the end of 2014, as it did from Iraq, if a long-term security agreement is not reached with Afghanistan. *See* Matthew Rosenberg, *U.S. Softens Deadline for Deal to Keep Troops in Afghanistan*, N.Y. Times, Dec. 23, 2013, http://nyti.ms/1cgcHN2; Karen DeYoung, et. al, *Karzai is Unlikely to Meet Deadline on Signing Long-term Security Deal, U.S. Envoy Says*, Wash. Post. Jan. 9, 2014, http://wapo.st/1lYsjHb.

B. Plaintiffs' Seventh Motion for Partial Summary Judgment

At a status conference held on December 14, 2012, Plaintiffs requested that the Court enter an order applying its previous order to the Recertification so that Plaintiffs could appeal to

the Second Circuit. Status Conference Tr. 5:15–6:23, 9:14–17, Jan. 11, 2013, ECF No. 486. The Court responded that in light of the changed circumstances it wished to reexamine whether the withholding remained justified. *Id.* at 6:24–7:11. On December 6, 2013, the parties agreed to a briefing schedule with respect to this motion, which they submitted to the Court by way of a status report, Joint Letter, Dec. 6, 2013, ECF No. 489. On December 9, 2013, the Court accepted the parties' proposed schedule. Mem. Endorsement, Dec. 9, 2013, ECF No. 490.

Plaintiffs now move for partial summary judgment with respect to all images withheld by the government, including, but not limited to: (1) the twenty-one photographs that this Court ordered the government to release in its two June 2006 Orders; (2) the twenty-three additional photographs acknowledged by the government on June 26, 2006; and (3) the "substantial number" of additional responsive images referred to by the government in its April 23, 2009 letter to the Court.

STATUTORY FRAMEWORK

Congress enacted FOIA to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). To that end, FOIA "create[s] a 'strong presumption in favor of disclosure.'" *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir. 2008) (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). While FOIA includes nine exemptions pursuant to which an agency may withhold information, *see* 5 U.S.C. § 552(a)(4)(B), (b)(1)–(9), those exemptions "are narrowly construed with doubts resolved in favor of disclosure," *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999). The exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7–8 (2001).

In order to accomplish its goal of government transparency, FOIA places the burden on the government to demonstrate that an exemption applies to each piece of information it seeks to withhold. *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356 (2d Cir. 2005). To satisfy its burden, the government must submit a so-called *Vaughn* declaration and index setting forth the bases for any claimed exemptions. *See Halpern*, 181 F.3d at 290–93 (citing *Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C. Cir. 1973)). In recognition of the reality that federal agencies tend to "claim the broadest possible grounds for exemption for the greatest amount of information," agencies are required to produce "a relatively detailed analysis" of the withheld material "in manageable segments" without resort to "conclusory and generalized allegations of exemptions." *Id.*; *Vaughn*, 484 F.2d at 826–27. "Specificity is the defining requirement of the Vaughn index and affidavit." *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 560 (S.D.N.Y. 1989); *Reader's Digest Ass'n, Inc. v. FBI*, 524 F. Supp. 591, 594–95 (S.D.N.Y. 1981) (agency affidavits falling short of document-by-document review of the material are inadequate to support agency's summary judgment motion).

At summary judgment, courts review *de novo* an agency's claim of entitlement to an exemption. 5 U.S.C. § 552(a)(4)(B); *Halpern* 181 F.3d at 287. One of the main functions of the *Vaughn* index and declaration is to "enable the trial court to fulfill its duty of ruling on the applicability of the exemption." *Halpern*, 181 F.3d at 295 ("Absent a sufficiently specific explanation from an agency, a court's *de novo* review is not possible and the adversary process envisioned in FOIA litigation cannot function.").

The government's claim of exemption fails where: "(1) the *Vaughn* index does not establish that the documents were properly withheld; (2) the agency has improperly claimed an exemption as a matter of law; or (3) the agency has failed to segregate and disclose all non-

exempt material in the requested documents." *Elec. Privacy Info. Ctr. v. Transp. Sec. Admin*., 2006 U.S. Dist. LEXIS 12989, at *18 (D.D.C. Mar. 12, 2006).

Here, the government purports to withhold the photographs pursuant to the PNSDA. Both parties have conceded, and this Court has recognized, that the PNSDA is a FOIA Exemption 3 withholding statute. 5 U.S.C. § 522(b)(3); Oral Arg. Tr. 20:2, 29:16–22, ECF No. 474.[2] Thus, the PNSDA states that "no protected document" as defined in the statute "shall be subject to disclosure under [FOIA] or any proceeding under [FOIA]." PNSDA, § 565(b). The statute then proceeds to set out "particular criteria for withholding." The record in question must be a photograph:

> (i) taken from September 11, 2001 through January 22, 2009;[3]
>
> (ii) relates to the "treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States;"[4] and
>
> (iii) concerning which the Secretary of Defense has "issued a certification . . . stating that the disclosure of that record would endanger citizens of the United States, members of the United States Armed Forces or employees of the United States Government deployed outside the United States."[5]

Because the PNSDA is, accordingly, an Exemption 3 statute, the Court must determine whether the withheld records "satisf[y] the criteria of the exemption statute" for non-disclosure. *CIA v. Sims*, 471 U.S. 159, 167 (1985); *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 72 (2d Cir. 2009)

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[2] Exemption 3 to the FOIA provides that records that are "specifically exempted by disclosure from statute" need not be disclosed under FOIA if the withholding statute "(i) requires that the matters be withheld from the public in such manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular matters to be withheld. . . ." 5 U.S.C. § 522(b)(3)(A).

[3] PNSDA § 565(c)(1)(B)(i).

[4] PNSDA § 565(c)(1)(B)(ii).

[5] PNSDA § 565(c)(1)(A).

(internal citations and quotations omitted); *A. Michael's Piano Inc. v. F.T.C.*, 18 F. 3d 138, 143 (2d Cir. 1994).

ARGUMENT

I. The Recertification Fails to Satisfy the PNSDA's Withholding Criteria Because It Fails to Address the Photographs on an Individualized Basis.

The Recertification purports to address an entire collection of photographs *en masse*. But this is not what was intended by the PNSDA. Rather, the plain language of the PNSDA obligates the Secretary of Defense to consider the risk posed by disclosure of each photograph:

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

PNSDA § 565(d)(1) (emphasis added).

The Secretary does not appear to have conducted that individualized determination here. Rather, he has issued a blanket certification, stating only that "public disclosure of these photographs" would risk harm. *See* Barcelo Decl. Ex. G, ECF No. 458-7. He has not specified how many photographs are in the collection, much less that disclosure of each would—even if released in isolation—endanger Americans. This is clearly insufficient here.

The government continues to withhold at least 2,000 photographs, and it beggars belief to suggest that not a single one can be released without endangering U.S. citizens, service members, or employees. This is particularly so because the government has admitted that the photographs depict conduct of varying severity. In the Fourth Declaration of Phillip J. McGuire, which purported to provide a justification for the withholding of the twenty-nine photographs that were the subject of this Court's June 2006 Orders, Mr. McGuire stated that "[u]nlike the content of many of the Darby photos" some of the twenty-nine photographs "depict behavior that was

determined to be inappropriate, but not criminal" while others "depict the normal processing operations in Iraq and Afghanistan." Fourth McGuire Decl. at ¶ 7, Apr. 26, 2006, ECF No. 188. Indeed, even the President himself has stated that some of the photographs at issue "are not particularly sensational." Office of the Press Secretary, Statement by the President on the Situation in Sri Lanka and Detainee Photographs (May 13, 2009), http://1.usa.gov/JTwt7q ("And I want to emphasize that these photos that were requested in this case are not particularly sensational, especially when compared to the painful images that we remember from Abu Ghraib, but they do represent conduct that did not conform with the Army Manual").

In sum, the Recertification is deficient in that it certifies only that disclosing the entire collection of photographs would risk harm, rather than that disclosing each photograph would do so. Accordingly, the Court should order production of the photographs or, in the alternative, order the government to provide a certification that the release of each photograph would endanger U.S. citizens, service members, or employees deployed abroad.

II. The Recertification Does Not Provide Sufficient Information to Allow This Court to Determine Whether the Photographs Are Properly Withheld Under the PNSDA

As noted above, this Court recognized, and the government conceded during oral argument, that the PNSDA is an Exemption 3 statute that authorizes the withholding of certain photographs if their disclosure would endanger U.S. citizens, service members, or employees. Oral Arg. Tr. 20:2, 29:16–22, ECF No. 474. The principle dispute here is whether this Court's *de novo* review of the government's invocation of the PNSDA encompasses review of the basis for the Secretary of Defense's certification that the disclosure will endanger U.S. citizens, service members, or employees. Defendants' position throughout this litigation has been that the Court's review is limited to verifying the existence of the certification of harm. *See e.g.*, Defs.' Br. Sixth Mot. for Partial Summ. J., 17, ECF No. 457. This is incorrect. Under FOIA the Court must

conduct an independent review of the Secretary's harm determination or, in the words of the Ninth Circuit, "satisfy itself" that the Secretary of Defense "is correct in his belief that disclosure" of the photographs would endanger U.S. citizens, service members, or employees posted abroad. *Long v. U.S. Internal Revenue Serv.*, 742 F.2d 1173, 1183 (9th Cir. 1984).

The majority of circuit courts to have addressed this issue in clearly analogous circumstances have held that FOIA obligates review of the determination of harm. *See Long*, 742 F.2d at 1183; *Currie v. Internal Revenue Serv.*, 704 F.2d 523, 531–32 (11th Cir. 1983); *Linsteadt v. Internal Revenue Serv.*, 729 F.2d 998, 999 (5th Cir. 1984); *Grasso v. Internal Revenue Serv.*, 785 F.2d 70, 77 (3d Cir. 1986); *DeSalvo v. Internal Revenue Serv.*, 861 F.2d 1217, 1221–22 (10th Cir. 1988); *see also Seaco Inc. v. Internal Revenue Serv.*, No. 86 Civ. 4222, 1987 WL 14910, at *4 (S.D.N.Y. July 21, 1987) (citing *Long*, 742 F.2d at 1182).

This Court recognized during the oral argument concerning the original 2009 Certification that it is required to do something more than verify the fact of the Secretary of Defense's certification, but expressed its disagreement with *Long* "as applied to the proceedings before [the Court]." Oral Arg. Tr. 23:21–25, 24:13–15, 37:8–11, ECF No. 474. However, at the status hearing on December, 14 2012, the Court acknowledged that the circumstances that motivated Congress's enactment of the PNSDA in the first instance have changed dramatically since that time. Status Conference Tr. 6:24–25, 7:1–11, ECF No. 486.

Those changed circumstances make even clearer the need for meaningful judicial review of the Secretary's determination. For while the circumstances are different, the 2009 Certification and Recertification are essentially the same. In light of these changed circumstances, the Court should hold that the Recertification fails to justify withholding the photographs.

A. The Court Should Conduct an Independent Review of the Secretary's Determination of Harm

The core question in this case is whether the government may withhold thousands of photographs of detainee abuse upon the simple verification that the Secretary of Defense has issued a certification pursuant to the PNSDA. Judicial review of an agency determination to withhold records pursuant to any of the nine exemptions to FOIA[6] is always conducted *de novo.* 5 U.S.C. § 552(a)(4)(B); *Halpern*, 181 F.3d at 287. Review of the Secretary's determination of harm under the PNSDA is no different. Importantly, the Court is not called upon to decide this issue on a blank slate.

In the 1980s, in a similar context concerning an Exemption 3 withholding statute that also turned on an agency head's determination of harm, the Ninth Circuit was required to determine whether its review stopped once the court had verified the existence of the determination. The withholding statute at issue then was 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. The factual circumstances that led to the enactment of § 6103, and the statutory structure that resulted, are strikingly similar to that of the PNSDA. Like the PNSDA, § 6103 was enacted by Congress in response to a specific court-ordered disclosure of governmental records under FOIA that was under review at the Supreme Court. *See Long*, 742 F.2d at 1176–77 (detailing history of the case and the statute). 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.[7]

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[6] 5 U.S.C. § 552(b)(1)–(9).

[7] The harm in the case of § 6103(b)(2)(D) was whether the disclosure of certain tax-related information "will seriously impair assessment, collection, or enforcement under the internal revenue laws".

In *Long*, the Ninth Circuit addressed whether the district court was required to review the determination of harm. There, as here, the government resisted judicial review of its withholdings under § 6103 by arguing that judicial review of the agency's determination of harm was "limited merely to establishing the factual existence of the Commissioner's finding that disclosure would seriously impair tax collection" (the determination of harm for § 6103). *Long*, 742 F.2d at 1177. In *Long*, the government also argued that § 6103 operated independently of FOIA and that § 6103 withholdings were therefore not subject to the same standard of review as documents withheld pursuant to a FOIA exemption.[8] *Id.* at 1177–78. The Ninth Circuit disagreed, holding that § 6103 was a FOIA Exemption 3 withholding statute.[9] *Id.* at 1179.

The court then went on to hold that the determination by the agency head that disclosure of the requested records would cause harm was subject to *de novo* review by the district court and that the review encompassed a review of the underlying basis for the certification. In so concluding, the court looked to the legislative history of the 1976 amendments to Exemption 3 of FOIA, which, the court observed, were animated by Congressional concern over allowing the

[8] Although it has conceded that the PNSDA is an Exemption 3 withholding statute, the government has previously made similar arguments here. Def's. Reply Br. Sixth Mot. Partial Summ. J., 13–14, May 13, 2011, ECF No. 466.

[9] Six other Circuits including the Second Circuit have held that § 6103 is an Exemption 3 withholding statute. *See, e.g.*, *Adamowicz v. Internal Revenue Serv.*, Nos. 10-0263, 10-0265, 2010 WL 4978494, at *2 (2d Cir. Dec. 8, 2010) (unpublished decision) ("Because these withholdings were expressly mandated by statute, they clearly fall within FOIA Exemption 3."); *Church of Scientology of Cal. v. Internal Revenue Serv.*, 792 F.2d 146, 149–50 (D.C. Cir. 1986) (Scalia, J.) (holding that "Section 6103 does not supersede FOIA but rather gives rise to an exemption under Exemption 3"); *Maxwell v. Snow*, 409 F.3d 354, 355 (D.C. Cir. 2005) (same); *Currie v. Internal Revenue Serv.*, 704 F.2d 523, 526–27 (11th Cir. 1983) (same); *Linsteadt v. Internal Revenue Serv.*, 729 F.2d 998, 999 (5th Cir. 1984) (same); *Grasso v. Internal Revenue Serv.*, 785 F.2d 70, 74–75 (3d Cir. 1986) (same); *DeSalvo v. Internal Revenue Serv.*, 861 F.2d 1217, 1221 (10th Cir. 1988) (same); *see id.* at 1219 (collecting cases). In addition, two circuits have held that § 6103 operates independently of FOIA. *Aronson v. Internal Revenue Serv.*, 973 F.2d 962 (1st Cir. 1992); *King v. Internal Revenue Serv.*, 688 F.2d 488 (7th Cir. 1982); *see also White v. Internal Revenue Serv.*, 707 F.2d 897, 900 (6th Cir. 1983) ("We are disposed to affirm the district court on the basis of the *Zale* and *King* rationale expressed in its decision.").

executive too much discretion to withhold documents. *Id. at* 1179 n.14. Congress therefore limited Exemption 3 to statutes that either did not delegate any discretion at all to the agency or to statutes that "sufficiently inform the administrator's discretion [so] that he will know what to do about disclosure." *Id. at* 1181 (analyzing 5 U.S.C. § 552(3)(A)(i), (ii)). On the basis of that history, the court wrote:

> 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. We refuse to give the statute such an irrational construction.

Id. at 1181. The court concluded that an independent examination of the question of harm was the best way to ensure that Congress's intent would be fulfilled, though it stressed that it did "not mean to imply that the [agency's] determination is to count for nothing." *Id.* at 1182. Thus, in conducting its review, the district court is to accord deference to the agency head's determination but also to "satisfy itself, on the basis of detailed and nonconclusory affidavits, that the Commissioner is correct in his belief." *Id.* at 1182–83.

Four other circuit courts have held that review of withholdings under § 6103 includes review of the harm determination.[10] The Second Circuit has not addressed this particular issue, although at least one court in this District has followed *Long.*[11] In *Seaco*, the United States

[10] These cases involve § 6103(e)(7), where the withholding of tax related information also turns on a determination of harm by the agency head. Pursuant to § 6013(e)(7) tax return information should be disclosed "if the Secretary determines that such disclosure would not seriously impair Federal tax administration"). *See DeSalvo*, 861 F.2d at 1222 (requiring the district court to "require the IRS to provide sufficient information to allow the court to determine independently . . . whether the release of [the requested records] will 'seriously impair Federal tax administration'"); *Grasso*, 785 F.2d at 77 (reviewing and rejecting the agency head's determination of harm); *Linsteadt*, 729 F.2d at 1001–03 (higher FOIA standard of review applied to withholdings under § 6103); *Currie*, 704 F.2d at 528, 530 (same).

[11] In *Adamowicz* the United State Court of Appeals for the Second Circuit determined that § 6103 is an Exemption 3 withholding statute, but as the case did not turn on a part of that statute

District Court for the Southern District of New York held that the IRS's "determination that disclosure would seriously impair federal tax administration is subject to this court's *de novo* review." No. 86 Civ. 4222, 1987 WL 14910, at * 4 (S.D.N.Y. July 21, 1987) (citing *Long*, 742 F.2d at 1182).

The Second Circuit's decision in *A. Michael's Piano*, upon which the Court previously focused, is not to the contrary. In fact, that case did not concern the issue of judicial review of the propriety of an agency determination of harm at all. Rather, it stands for the non-controversial proposition that a court should look to the plain meaning of a statute and its legislative history for guidance on how to interpret a term or a phrase in a withholding statute. *A. Michael's Piano, Inc.*, 18 F.3d at 142. Plaintiffs, of course, do not disagree with this well-established principle. To the contrary, as set forth above, the plain language of the PNSDA supports their view that an individualized determination is required.

For the reasons above, the Court should reconsider its disagreement with the applicability of *Long* that it expressed during the oral argument. Oral Arg. Tr. 37:8–11, ECF No. 474. It is certainly not constrained from doing so by the law of the case doctrine, as the government contends, Joint Letter, Dec. 6, 2013, ECF No. 489, because unless an appellate court has ruled on a matter, the "law of the case doctrine is . . . discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992); *First Nat'l Bank of Hollywood v. Am. Foam Rubber Corp*., 530 F.2d 450, 453 n. 3 (2d Cir. 1976), *cert. denied*, 429 U.S. 858 (1976) ("In this Circuit, the law of the case is a discretionary doctrine that need not be applied when no prejudice

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that conditions withholding on a harm determination, the Court of Appeals did not comment on the issue of whether a district court is required to review the determination of harm. *Adamowicz*, 2010 WL 4978494, at *2.

results from its omission") (citation omitted); *In re N. Telecom Ltd. Sec. Litig.*, 42 F. Supp. 2d 234, 239–40 (S.D.N.Y. 1998). Moreover, even under the law of the case doctrine, changed circumstances are grounds for reconsideration. *Id.* at 239–40 ("principal grounds justifying a court's reconsideration of its own prior decision include the discovery of new evidence, an intervening change of controlling law or the need to correct a clear error or prevent manifest injustice") (internal citations omitted). As set forth below, that is the case here.

B. Changed Circumstances Command a Different Result in this Motion

The importance of this Court engaging in judicial review of the Secretary's determination of harm is underscored by the fact that even though the circumstances—particularly in Iraq—that served as a catalyst for the enactment of PNSDA no longer exist, the Recertification is essentially the same as the 2009 Certification. It is in precisely situations like these that FOIA's command of judicial review is most important: to ensure that information critical to the public's understanding of what happened is not suppressed on the basis of stale facts or by now inapplicable considerations.

During the oral argument concerning the original certification, the government acknowledged that the PNSDA was prompted by a particular, unique situation. Oral Arg. Tr. 19:23–25, ECF No. 474 ("I think the issue of these specific photos has a unique history, and it resulted in an enactment of a unique statute"). As this Court observed, a key factor, or perhaps the primary factor, that led President Obama to renew the government's challenge to the release of the photographs was an urgent plea by Prime Minister Nuri al-Maliki of Iraq to withhold the photographs in order to prevent increased violence in Iraq that might delay the planned withdrawal of U.S. combat forces from Iraq. *See id.* at 34:5–24; *see also* Youssef, *supra*. Indeed, both sponsors of the bill that would later become the PNSDA specifically mentioned Prime Minister Maliki's request during their floor statements on June 3, 2009, suggesting that a concern

that release of the photographs would lead to violence in Iraq and delay the withdrawal of U.S. troops from Iraq was foremost on Congress's mind in 2009. *See* 155 Cong. Rec. S5987–88.

Moreover, the structure of the law makes clear that Congress did not intend for the photographs to be withheld forever, based upon the perceived danger of release in 2009. The PNSDA includes a three-year sunset provision for each certification. PNSDA, § 565(d)(2). The Secretary of Defense is free to issue a renewal at any time, but each renewal expires after three years. PNSDA, § 565(d)(3), (4). This structure reflects Congress's concern that certifications and renewals be based upon current levels of risk rather than dangers that were perceived in the past. PNSDA, § 565(d)(3). Indeed, Congress actually shortened the sunset provision from five to three years during the drafting process, further indicating its intent to constrict the government's authority to withhold the photographs from the public for any longer than truly necessary. *Compare* 155 Cong. Rec. S5673 (daily ed. May 20, 2009) *with* 155 Cong. Rec. S5799 (daily ed. May 21, 2009). Moreover, floor statements by the sponsors also support the view that any continued withholding must be based upon current circumstances. 155 Cong. Rec. S5673 (daily ed. May 20, 2009) (Statement of Sen. Joseph Lieberman) (stressing that the certification "could be renewed by the Secretary of Defense if the threat to American personnel continues.")

In reality, circumstances in Iraq did change radically by the time the Recertification was issued in November 2012. For example, the U.S. military mission in Iraq had been complete for nearly a year, and the United States has recently indicated that it will not send U.S. troops to support the government of Iraq. *See Kerry: 'No Boots On The Ground' in Iraq*, Voice of America News, Jan. 5, 2014, http://www.voanews.com/content/kerry-no-boots-on-the-ground-in-iraq/1823659.html. In addition while the United States was still engaged in Afghanistan in

2012, the plan was and still is for the United States to end its military mission there by the end of this year. *See Time to Pack Up and Leave*, *supra*; Rosenberg, *supra.*

It is striking, then, that the Recertification is the same as the original 2009 Certification. There will always be U.S. citizens, service members and employees working outside the United States but Congress did not intend to deprive the public of the photographs forever. But the government's interpretation of the statute would insulate the Secretary's findings of harm from review even where, as here, there has been an obvious change in circumstances. This is contrary to the Congressional intent underlying the PNSDA, in opposition to longstanding principles governing FOIA and in defiance of common sense. Accordingly, Plaintiffs respectfully request the Court to engage in a *de novo* review of the correctness of the Secretary of Defense's determination of harm.

C. The Government Must Produce a Vaughn Index and Declaration to Enable the Court to Conduct Its Review

To be sufficient under *Vaughn*, an index and declaration must "describe *each* document or portion thereof withheld, and for *each* withholding . . . discuss the consequences of disclosing the sought-after information." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987); *Citizens Comm'n on Human Rights v. Food & Drug Admin.*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995) ("A *Vaughn* Index must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption"). On the other hand, a conclusory declaration or one that simple recites the statutory language or standard is insufficient and does not allow the trial court to fulfill its "obligation under the FOIA to conduct a *de novo* review." *King*, 830 F.2d at 223–24 ("affidavits cannot support summary judgment if they are conclusory, merely reciting statutory standards, or

if they are too vague or sweeping") (internal citations and quotations omitted); *accord Halpern*, 181 F.3d at 295.

Here, the government has refused to produce a *Vaughn* affidavit. It has refused even to say even how many photographs are being withheld, let alone to justify each photograph's withholding. To the contrary, the sole explanation provided in the Recertification for the Secretary's determination that disclosure would cause harm is a conclusory recitation of the statutory standard. The Secretary simply echoes the language of PNSDA § 565(c)(1)(A), and concludes that "upon the recommendation" of certain listed officials,[12] "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." Barcelo Decl. Ex. G, ECF No. 458-7.

Thus, the Recertification provides no information that would allow the Court to review the adequacy of the Secretary's determination. For example, the Recertification does not specify in which of the more than 190 countries in the world U.S. citizens, service members, or employees would be endangered, let alone how they would be endangered or whether the danger is to a particular citizen, service member, or employee; a group of citizens, service members, or employees; or to every single U.S. citizen, service member, or employee outside of the United States. This is patently insufficient, as a matter of law, and precludes the Court from performing the function required of it under FOIA.

Again, litigation regarding § 6103 of the Internal Revenue Code is instructive. For example, in *Shannahan v. Internal Revenue Service*, the United States District Court for the Western District of Washington ordered the IRS to provide a *Vaughn* index in a case involving

[12] Only their titles are provided; names are not included making it difficult to determine when the recommendations were made.

§ 6103, in order to allow the court "to engage in its own *de novo* review of the soundness of the IRS's decision to withhold the documents under Exemption 3." 637 F. Supp. 2d 902, 916 (W.D. Wash. 2009). The IRS sought summary judgment based upon generic, boilerplate declarations that "clearly identif[ied] the general categories of documents at issue" but did not "identify particular documents." *Id.* at 916. The court denied the motion, holding that these declarations were not an "adequate alternative" for a *Vaughn* index and ordering the IRS to produce one. *Id.* The IRS subsequently did produce the index, and in its decision affirming the district court's subsequent decision that the IRS had demonstrated the requisite harm through the produced indices, the Ninth Circuit lauded the district court for being "meticulous" and having "insisted on evidence about, and explanation of, the harm that would be caused by the release of two kinds of documents." *Shannahan v. Internal Revenue Serv.*, 672 F.3d 1142, 1150–51 (9th Cir. 2012). Similarly, in *Seaco*, after observing that the agency's determination of harm "is subject to this court's *de novo* review", the court ordered the IRS to supplement its *Vaughn* index and declaration in order to allow the court to determine "whether the alleged [harm] . . . is entirely speculative or a real possibility." *Seaco*, 1987 WL 14910, at * 4–5.[13]

In sum, the government should be ordered to produce a *Vaughn* index and supporting declaration that lists each photograph withheld and provides a sufficient basis for the Court to determine whether that photograph may be properly withheld under the PNSDA.

III. The Court Should Order the Government to Produce a *Vaughn* Index and Declaration Even If It Does Not Review the Secretary's Certification of Harm.

Even if the Court concludes that it need not review the Secretary's certification of harm, the government must still produce a *Vaughn* index and a declaration that provides as much

[13] *Seaco* involved a withholding under § 6103(e)(7). 1987 WL 14910, at *4. *See also Batton v. Evers*, 598 F.3d 169, 179 (5th Cir. 2010) (holding that district court abused its discretion by failing to order the production of a *Vaughn* index).

information as possible about the photographs as can be provided without compromising governmental interests protected by the FOIA. Such an index and declaration would contribute to the public record of the post-September 11 conflicts, vindicate the "right to know" that FOIA was meant to serve, and contribute to the ability of the public to hold current and former officials accountable for the decisions that led to the abuses. Requiring the government to produce such an index and declaration here would be consistent with the rule that courts have applied in other FOIA cases. *See, e.g.*, *Lykins v. U.S. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984) ("we have required that as much information as possible be made public" in *Vaughn* indices); *Citizens Comm'n on Human Rights*, 45 F.3d at 1328 ("The agency must disclose as much information as possible without thwarting the purpose of the exemption claimed").

Indeed, the public is entitled to as detailed an explanation as possible of the government's claim that photographs depicting serious misconduct should remain shrouded in secrecy. Because FOIA litigation is, by its very nature, minimally adversarial, the courts have insisted on thorough public justifications for the government's withholding decisions. By requiring *Vaughn* indices and declarations, the courts enable more informed adversarial testing and ensure that the public understands the nature of the information that its government is attempting to keep secret and its basis for doing so.

Further, enforcing the *Vaughn* requirement in this case would not harm any legitimate governmental interest. The purpose of the PNSDA was to permit the government to delay the release of photographs that satisfy its criteria, not to suppress textual descriptions of those photographs. PNSDA § 565(b). This is not a case, in other words, where a detailed public description of the withheld documents would, itself, be subject to a FOIA exemption.

Indeed, the government has already described at least some of the incidents depicted in the photographs in this very case. For example, the government has released versions of many "Reports of Investigation," which describe investigations of detainee abuse, but redacting photographs of detainees. Fourth McGuire Decl. at ¶ 3, ECF No. 188. Although one can read the text of those reports, it is not always clear when and from where photographs were removed or what they actually show. A Vaughn index that includes information tying the withheld photographs to particular reports and which describes what is depicted in the photographs and where they were taken would serve to fill in the historical record here and fulfill the goal of FOIA to "provide a means of accountability, to allow Americans to know what their government is doing." *Am. Civil Liberties Union*, 339 F. Supp. 2d at 504 (citing *Halpern*, 181 F.3d at 284–85). Such an index should be required.

CONCLUSION

For these reasons, the Court should order the government to disclose the photographs it purports to withhold under the PNSDA as an exception to FOIA. In the alternative, the Court should order the government to provide Plaintiffs with a *Vaughn* index and declarations describing each photograph withheld in adequate textual detail and explaining how release of that photograph withheld would endanger U.S. citizens, service members, or employees.

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Respectfully submitted,

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