UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, et al.,	
Plaintiffs,	ELECTRONICALLY FILED
v.	04 Civ. 4151 (AKH)
DEPARTMENT OF DEFENSE, et al.,	
Defendants.	

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

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Defendant Department of Defense and its components Department of Army, Department of Navy, Department of Air Force, Defense Intelligence Agency (collectively, "DoD" or the "Government") by their attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in opposition to Plaintiffs' sixth motion for partial summary judgment dated December 17, 2010 seeking the release of certain photographs pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and in support of the Government's sixth motion for partial summary judgment as to those same photographs.

PRELIMINARY STATEMENT

Section 565 of the Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142, entitled the "Protected National Security Documents Act of 2009" (the "PNSDA"), was enacted in October 2009 as a legislative overruling of the holdings of this Court and the Second Circuit, which had previously ordered the release to Plaintiffs in this action of photographs contained in or derived from records of investigations into allegations of detainee abuse (the "DoD Photos"). The PNSDA expressly provides that no "protected document" as defined in the Act shall be subject to disclosure under FOIA. The DoD Photos clearly fall within the PNSDA's definition of "protected documents" and therefore are properly withheld from disclosure in this action. The plain language and structure of the PNSDA, as well as its legislative history, all reflect Congress's intent to grant to the Secretary of Defense (the "Secretary") the ability to exempt from disclosure under FOIA the DoD Photos, provided the Secretary certifies, as he did here, that the release of the photos would endanger the lives of U.S. citizens, members of the Armed forces, or government employees deployed outside the United States.

Plaintiffs are wrong to argue that the Secretary's determination of harm is subject to judicial review when the PNSDA is interpreted as a FOIA Exemption 3 withholding statute. The DoD Photos are properly withheld based on the existence of a certification from the Secretary stating that the harms enumerated in the Act are present. To make their argument Plaintiffs rely on the decisions and analysis from other Circuits that the Second Circuit has rejected. The Second Circuit has held that an Exemption 3 statute (like the PNSDA) must be interpreted pursuant to its own plain language and Congressional purpose in its enactment, and that, contrary to Plaintiffs' arguments, "FOIA disclosure and review requirements" do not apply to the interpretation of the scope of a FOIA withholding statute.

Plaintiffs' analogy to section 6103 of the Internal Revenue Code, which Plaintiffs characterize as "nearly indistinguishable" from the PNSDA, is also unavailing. Substantial differences exist between the PNSDA and section 6013 of the Internal Revenue Code, which further serve to illuminate Congress's intent to ensure that the DoD Photos are withheld without review of the Secretary's determination of harm.

The Government's withholding of the DoD Photos is also proper under FOIA Exemption 7(F). Although this Court previously rejected the Government's withholding pursuant to Exemption 7(F), the Supreme Court has not yet considered the Government's argument and the Government preserves it here.

Finally, the plain language of the PNSDA requires that the DoD Photos not be released even if this Court were to hold that FOIA Exemptions 3 and 7(F) do not provide a basis to withhold the photographs. The language of the statute is clear that because the photographs are "protected documents" under the PNSDA, this Court should not order their release in this

proceeding, "[n]otwithstanding any other provision of the law to the contrary." PNSDA § (b).

STATEMENT OF FACTS

A. Factual Background

In the spring of 2005, the parties filed their first set of partial cross motions for summary judgment as to certain documents withheld by DoD and the Central Intelligence Agency ("CIA"), including photographs and videos that were contained on a CD provided by Joseph Darby to the Department of Army Criminal Investigative Command ("CID") and depicted the treatment of detainees at Abu Ghraib prison (collectively, the "Darby Photos"). After originally withholding the Darby Photos pursuant to Exemptions 6 and 7(C), 5 U.S.C. §§ 552(b)(6), (7)(C), in July 2005, the Government supplemented the basis for its withholding by additionally invoking Exemption 7(F). (Dkt. Nos. 114-17). In September 2005, this Court issued a decision denying the Government's motion as to the Darby photos. See ACLU v. Dep't of Def., 389 F. Supp. 2d 547 (S.D.N.Y. 2005). (Dkt. No. 150). The Government originally appealed that ruling (Dkt. No. 166), but then withdrew its appeal after the Darby Photos were publicly published through a third-party source. See Order dated April 10, 2006 ("April 10, 2006 Order") (Dkt. No. 184) at 2.

While the appeal of this Court's order regarding the Darby Photos was pending, the Government had completed processing 29 additional photographs of detainees that were potentially responsive to Plaintiffs' FOIA requests in this action (the "29 Photos"). April 10, 2006 Order at 2. Each of the 29 Photos are contained within files relating to seven investigations conducted by the Army's CID into allegations of abuse or mistreatment of detainees in Iraq and Afghanistan. Fourth Declaration of Phillip J. McGuire dated April 25, 2006 ("Fourth McGuire Decl.") (Dkt. No. 188) ¶¶ 3-5. Like the Darby Photos, the Government withheld the 29 Photos

pursuant to FOIA Exemptions 6, 7(C), and 7(F). See April 10, 2006 Order at 2.

In April 2006, the Court entered a stipulated order endorsing the parties' agreement that any responsive images in addition to the DoD Photos would "be governed by the final ruling on appeal as to the [29 Photos]," to the extent that the Government withheld such records on the basis of FOIA Exemptions 6, 7(C), and/or 7(F). April 10, 2006 Order ¶ 6.

Following the entry of that stipulated order, the Government submitted declarations and Vaughn indexes supporting its withholding of the DoD Photos pursuant to Exemption 7(F). See Fourth McGuire Decl. The Government submitted a declaration by Brigadier General Carter F. Ham, who concluded that release of the 29 Photos would, among other things, "endanger the lives and physical safety" of members of the U.S. Armed Forces and increase the likelihood of violence against the United States. Declaration of Carter F. Ham dated April 26, 2006 ("Ham Decl.") (Dkt. No. 186) ¶ 2(a). To reach those conclusions, General Ham relied in part on the Declaration of former Chairman of the Joint Chiefs of Staff, General Richard B. Myers, dated August 25, 2005, which the Government submitted in support of its invocation of Exemption 7(F) with respect to the Darby Photos, and also consulted with the military commanders responsible for Iraq and Afghanistan, each of whom agreed with his risk assessment and with the need to "withh[o]ld [the images] in order to protect the lives of" Americans and others. Ham Decl. ¶ 3(c), p. 13.

By orders dated June 9, 2006 and June 21, 2006, this Court applied the same reasoning it had used to analyze the Darby photos, and ordered the release of 21 of the 29 Photos. ACLU v. Dep't of Def., 04 Civ. 4151 (AKH), 2006 WL 1638025, at *1 (S.D.N.Y. Jun. 9, 2006), 2006 WL 1722574, at *1 (S.D.N.Y. Jun. 21, 2006) (collectively, the "June 2006 Orders"). The Court held

that 8 of the 29 Photos were not responsive to Plaintiffs' FOIA requests and therefore did not have to be released. ACLU v. Dep't of Def., 2006 WL 1638025, at *1. A week after the issuance of the second of those two orders, the Government informed Plaintiffs in a letter dated June 29, 2006, that it was withholding 23 additional images based upon FOIA Exemptions 6, 7(C), and 7(F), and that "the releasability of these 23 other photos will be governed by any final order as to the releasability" of the 21 of the 29 Photos that this Court had ordered released (collectively, the "44 Photos"). Exhibit A to the Declaration of Amy A. Barcelo dated April 1, 2011 ("Barcelo Decl.").

The Government appealed this Court's June 2006 Orders. (Dkt. No. 197). On November 20, 2008, the Second Circuit issued a decision affirming this Court's holdings with respect to the 44 Photos, ACLU v. Dep't of Def., 543 F.3d 59 (2d Cir. 2008), and, on March 11, 2009, denied the Government's request for rehearing en banc. On April 23, 2009, the Government notified both this Court and the Plaintiffs that in light of the Second Circuit's decision, in addition to the 44 Photos, the Government was "processing for release a substantial number of other images contained in Army CID reports" that were responsive to Plaintiffs' FOIA requests in this action, and that those images would "be processed consistent with the Court's previous rulings on responsive images in this case."[1] Barcelo Decl. Ex. B (together with the 44 Photos, the "DoD Photos"). The Second Circuit then issued its mandate on April 27, 2009.

A couple of weeks later, on May 13, 2009, President Obama made a public statement

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[1] The Government has released the CID reports themselves to Plaintiffs. As postings on the American Civil Liberties Union's website reflect, the CID reports themselves often include "discuss[ion] at length" of the photographs associated with the reports. See http://www.aclu.org/torturefoia/released/021109.html (discussion of report identified as DODDOACID14080).

expressing his concern that the release of the DoD Photos would pose an unacceptable risk of danger to U.S. troops in Afghanistan and Iraq. See Statement by the President on the Situation in Sri Lanka and Detainee Photographs (May 13, 2009). Barcelo Decl. Ex. C. Specifically, the President explained that based on his review of the DoD Photos, their release "would not add any additional benefit" to the public's "understanding of what was carried out in the past by a small number of individuals." Id. Rather, the President recognized that "the most direct consequence of releasing [the DoD Photos]. . . would be to further inflame anti-American opinion and to put our troops in greater danger." Id. The President elaborated: "Now let me be clear: I am concerned about how the release of these photos would be – would impact the safety of our troops." Id.

Following that statement, the Solicitor General decided to file a petition for writ of certiorari seeking review of the Second Circuit's November 2008 order, and the Government moved the Second Circuit to withdraw its Mandate. In support of that motion, the Government submitted the declarations of General David H. Petraeus, the Commander of the United States Central Command dated May 27, 2009 ("Petraeus Decl."), and General Raymond T. Odierno, the Commander of the Multi-National Force - Iraq dated May 27, 2009 ("Odierno Decl."). Barcelo Decl. Exs. D, E. In his declaration, General Petraeus explained his conclusion that the release of the DoD Photos would "caus[e] increased targeting of U.S. and Coalition forces" abroad. Petraeus Decl. ¶ 2. General Odierno's declaration likewise explained the basis for his conclusion that the release of the DoD Photos would, among other things, "[e]ndanger the lives of U.S. and coalition Soliders, Airmen, Marines, Sailors, civilians, and contractors presently serving in Iraq." Odierno Decl. ¶ 2(a); id. at ¶ 4 (same).

B. The Protected National Security Documents Act of 2009

A week after President Obama's May 13, 2009 statement describing the harm that would result from the release of the DoD Photos, Congress responded with support for the President's position. Specifically, on May 20, 2009, Senators Lieberman, Graham, and McCain introduced in the Senate the Detainee Photographic Records Protection Act of 2009 (the "Photograph Protection Act") as a proposed amendment to the Supplemental Appropriations Act, 2009 (H.R. 2346). 155 Cong. Rec. S5671-74 (daily ed.) (Amendment 1157). The Photograph Protection Act provided that a "photograph relating to the treatment of individuals engaged, captured, or detained after September 11, 2001" would not be subject to public disclosure under FOIA if the Secretary had issued a certification, based on his determination, that release of such photos would "endanger" either United States citizens or "members of Armed Forces or employees of the United States government deployed outside the United States" and shared that certification with the President. See id. at S5673-5674 (text of the Photograph Protection Act as of May 20, 2009).

Comments made on the Senate floor on May 20, 2009, demonstrate that the Photograph Protection Act was introduced as an endorsement of the President's statements the previous week regarding the DoD Photos and the instant litigation. See id. S5672 (statement by Sen. Graham) ("The President of the United States has decided to stand for the proposition that releasing these photos would jeopardize the safety of our men and women serving overseas and Americans abroad, as well as civilians serving in the war zones."); id. (statement by Sen. Graham) ("[W]e came up with an amendment that addresses the lawsuit before our judicial system about the photos."); id. (statement by Sen. Graham) ("Those photographs are the subject of a Freedom of

Information Act lawsuit filed by the American Civil Liberties Union.").

Other statements made that day clearly evidence that the aim of the proposed legislation was to ensure that the DoD Photos would not be released in this action. Id. (statement by Sen. Graham) (the goal of the proposed amendment was "[to] establish a procedure to prevent the detainee photographs from being released"); id. at S5673 (statement by Sen. Graham) ("[T]he language in the bill is clear that it would apply to the current ACLU lawsuit that gave rise to the President's decision last week."); id. at S5674 (statement by Sen. Graham) (the proposed law "will help the President win a lawsuit that is moving through our legal system regarding the release of photos of past detainee abuse").

The discussion also reflected the Senate's concern, as a result of conversations with U.S. military leaders, over the issue the President identified a week earlier—i.e., the danger to American citizens, members of the U.S. Armed Forces overseas, and employees of the U.S. Government deployed outside the U.S. that would result from the release of the DoD Photos. See id. at S5672 (statement by Sen. Graham) ("The President is rightfully concerned that to release more photos would add nothing to the overall knowledge base we have regarding detainee abuse, and it is simply going to put American lives in jeopardy"); id. (statement by Sen. Graham) (describing question posed to General Petraeus, General Odierno, and others regarding whether "the public release of these pictures [will] endanger America, American military personnel, and American Government personnel serving overseas?," and describing the answer received as a "loud and clear: Yes, it will."); id. S5673 (statement by Sen. Graham) ("If you release these photos, Americans are going to get killed for no good reason."). On May 21, 2009 the Senate passed by unanimous consent the Photograph Protection Act as an amendment to the

Supplemental Appropriations Act, 2009 (H.R. 2346), 155 Cong. Rec. at S5798-99 (Amendment 1157).[2]

Following the Memorial Day recess, on June 3, 2009, discussion on the floor of the Senate again described the aim of the proposed Photograph Protection Act as to protect the DoD Photos at issue in the instant lawsuit. Senator Lieberman introduced the discussion of the Photograph Protection Act by referring to the Second Circuit's September 2008 opinion ordering release of the 44 Photos. 155 Cong. Rec. at S5987 (daily ed.) (statement by Sen. Lieberman) ("Last fall, as part of th[e ACLU] lawsuit, the Second Circuit Court of Appeals in New York ordered the release of many of these photographs.").

Senator Lieberman reiterated the concerns that Senator Graham had stated a few weeks before, specifically, that "nothing less than the safety and security and lives of our military service men and women is at stake—not to mention our non-military personnel deployed abroad, not to mention Americans here at home and throughout the world . . . ." Id.; see also id. (statement by Sen. Lieberman) ("We know that photographs such as the ones at issue in the ACLU lawsuit are, in fact, used by Islamic terrorists around the world to recruit followers and inspire attacks against American service men and women."); id. at S5987-S5988 (statement by Sen. Lieberman) (explaining that the Photograph Protection Act was aimed at "protect[ing] the

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[2] The version of the Photograph Protection Act that passed on May 21, 2009 was slightly different than the version introduced the previous day. It included a specific date range in which a photo must have been taken for it to fall within the protection of the Photograph Protection Act, and provided that the Secretary's certification would expire 3 years after the date on which it was executed. See 155 Cong. Rec. at S5799 (daily ed.) (May 21, 2009) (text of the Photograph Protection Act as of May 21, 2009). The subsequent conference report on H.R. 2346, however, did not include the Photograph Protection Act as an amendment, H.R. Rep. No. 111-151 (2009) (Conf. Rep.), reprinted in 2009 U.S.C.C.A.N. 524, and the Photograph Protection Act was therefore not enacted at that time.

safety and security of the United States").

Senator Lieberman then went on to explain his understanding of what the Act would accomplish: "the language in the bill . . . is clear . . . in that it would apply to the current ACLU lawsuit and block the release of these photographs, preventing the damage to American lives that would occur from that release." Id. at S5987. Senator Graham then made statements directed to any court that would later be in a position to interpret the scope of the Photograph Protection Act. Specifically, he stated that it was the intention of the drafters of the Act "to make sure that the photos subject to the pending litigation were never released and Congress weighed in and agreed with the President's decision not to release those photos." Id. at S5988. Senator Graham explained his hope that "the courts will understand" that Congress's intent was to "change[] the law, directly on point, to give legislative backing to the idea that these particular photographs, and those like these photographs, should not be released for a period of 3 years, and that is in our national security interests to do so." Id.

The Senate then passed the Photograph Protection Act, twice, without substantive change. First, on June 17, 2009, the Senate passed the Act by unanimous consent as a freestanding bill (S. 1285). 155 Cong. Rec. at S6742 (daily ed.). Then, on July 9, 2009, the Senate passed the Act by unanimous consent as an amendment to the Department of Homeland Security Appropriations Act, 2010 (H.R. 2892), id. at S7303-S7304, S7370 (H.R. 2892 § 567(a)), and requested a conference with the House. Id. at S7311-12 (July 9, 2009); see id. at H8012 (July 13, 2009).

That conference resulted in an October 13, 2009 Conference Report that included a slightly modified version of the Photograph Protection Act, now entitled the "Protected National Security Documents Act of 2009," as section 565 of the Department of Homeland Security

Appropriations Act, 2010. 155 Cong. Rec. at H11195-H111209, H111231; H.R. Rep. No. 111-298, at 44-45 (2009) (Conf. Rep.), reprinted in 2009 U.S.C.C.A.N. 670. A few days prior to that Conference Report, the Senate and House of Representatives Committees on Appropriations confirmed that the PNSDA was intended to "[c]odif[y] the President's decision to allow the Secretary of Defense to bar the release of detainee photos." Conference Summary by the United States Senate and the U.S. House of Representatives Committees on Appropriations on the Department of Homeland Security Appropriations Act, 2010 FY2010, dated October 7, 2009, Barcelo Decl. Ex. F.

The Conference Report was agreed to in the House on October 15, 2009 (Roll no. 784), and the Senate on October 20, 2009 (Record Vote Number 323). On October 28, the President signed the Homeland Security Appropriations Act, 2010 into law. Pub. L. No. 111-83, 123 Stat. 2142. The PNSDA was section 565 of that Act. Although the language and structure of the PNSDA is not identical to the Photograph Protection Act originally introduced in May 2009 (compare 155 Cong. Reg. at S5799 (Photograph Protection Act) with H.R. Rep. No 111-298 at 44 (the PNSDA)), their provisions are quite similar and clearly aimed at the same documents.

Specifically, as enacted, the law provides:

> Notwithstanding any other provision of the law to the contrary, no protected document, as defined in subsection (c), shall be subject to disclosure under Section 552 of title 5, United States Code or any other proceeding under that section.

PNSDA § (b). To fall within subsection (c)'s definition of a "protected document," a record must be a "photograph," which the PNSDA defines as "all photographic images, whether originals or copies, including still photographs, negatives, digital images, films, video tapes, and motion pictures," id. § (c)(2), and must have been created during the period beginning "on

September 11, 2001 through January 22, 2009," id. § (c)(1)(B)(i). The photograph must also "relate[] 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." Id. § (c)(1)(B)(ii). And finally, a photograph constitutes a protected document where the Secretary of Defense has issued a certification "stating that disclosure of [the 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." Id. § (c)(1)(A).

The PNSDA does not grant any discretion to the Secretary regarding whether to issue a certification pursuant to the PNSDA after he has determined that disclosure of that photograph would result in one or more of the enumerated dangers. PNSDA § (d)(1). Rather, the PNSDA mandates that the Secretary "shall issue [such] a certification" any time that he makes such a determination. Id. The PNSDA further provides that any such certification "shall expire 3 years after the date on which the certification" or a renewed certification if the original certification has expired "is issued by the Secretary of Defense." Id. § (d)(2).

Finally, the PNSDA provides for direct Congressional oversight of any certification issued under the PNSDA, by requiring the Secretary to provide "timely notice" to Congress when he issues a certification or a renewal certification pursuant to the PNSDA. Id. § (d)(4).

C. The Secretary Issues a Certification Pursuant to the PNSDA

A couple of weeks after the PNSDA was signed into law, on November 13, 2009, Robert Gates, the Secretary, signed a certification provided for under the PNSDA (the "Certification"). See Barcelo Decl. Ex. G. The Certification refers to this lawsuit and the DoD Photos. Id. Specifically, the Certification states that it pertains to "photographs [that] are contained in, or

derived from, records of investigations of allegations of detainee abuse, including the records of investigation processed and released in American Civil Liberties Union v. Department of Defense, 04 Civ. 4151 (AKH) (S.D.N.Y.)," and "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, 543 F.3d 59, 65 & n.2 (2d Cir. 2008), petition for cert. filed, 78 U.S.L.W. 3083 (Aug. 7, 2009) (No 09-160)." Barcelo Decl. Ex. G. The Certification also states that the photographs "relate to the treatment of individuals engaged, captured or detained after September 11, 2001 by the Armed Forces of the United States in operations outside the United States" and "were taken in the period between September 11, 2001 and January 22, 2009." Id.

The Certification explains that before its issuance, the Secretary consulted with "the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, and the Commander of Multi-National Forces-Iraq," id., each of whom agreed with the Secretary's determination 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." Id. Finally, and as contemplated by the PNSDA, the Certification directs that notice of the Secretary's Certification be provided to Congress. Id.

D. The Supreme Court Grants Certiorari and the Issue of the DoD Photos Is Remanded

While Congress was considering the PNSDA, the Government filed a petition for writ of certiorari seeking review of the Second Circuit's September 2008 judgment rejecting the

Government's invocation of FOIA Exemption 7(F) as a basis to withhold the DoD Photos. After the PNSDA was signed into law and the Secretary had issued the Certification, the Supreme Court granted certiorari, vacated the Second Circuit's judgment, and remanded this action to the Second Circuit "for further consideration in light of Section 565 of the Department of Homeland Security Appropriations Act, 2010, and the certification by the Secretary of Defense pursuant to that provision." 130 S. Ct. 777 (2009). The Second Circuit, in turn, remanded this action to this Court on July 7, 2010. (Dkt. No. 419).

ARGUMENT

I. THE DOD PHOTOS ARE EXEMPT FROM DISCLOSURE UNDER FOIA

FOIA was enacted to "ensure an informed citizenry, . . . needed to check against corruption and hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). FOIA requires each federal agency to make available to the public a wide array of information, and sets forth procedures by which requesters may obtain such information. See 5 U.S.C. § 552(a). At the same time, FOIA exempts nine categories of information from disclosure. At issue here are FOIA Exemptions 3 and 7(F).

A. The DoD Photos Are Exempt from Disclosure Pursuant to FOIA Exemption 3

1. The Determination of Whether a Record Is Exempt from Disclosure Under a FOIA Exemption 3 Statute Is Based on the Statute's Plain Language, Structure, and Legislative History

FOIA Exemption 3 permits the withholding of records where that withholding is authorized by a separate statute. See 5 U.S.C. § 552(b)(3). Exemption 3 is unique among

the FOIA exemptions, because its applicability is not "defined by FOIA itself," but rather by the statute that forms the basis for the withholding. A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 143 (2d Cir. 1994); see also id. (FOIA Exemption 3 "incorporates the policies of other statutes"). As the D.C. Circuit has explained, Exemption 3 is also "'differ[ent] from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage.'" Fitzgibbon v. CIA, 911 F.2d 755, 761-62 (D.C. Cir. 1990) (quoting Ass'n of Ret. R.R. Workers v. U.S. R.R. Ret. Bd., 830 F.2d 331, 336 (D.C. Cir. 1987) and Goland v. CIA, 607 F.2d 339, 350 (D.C. Cir. 1978)).

The Second Circuit therefore applies a straightforward test to determine whether records are properly excluded from release under FOIA pursuant to Exemption 3. Under that test, records are properly withheld pursuant to an Exemption 3 statute if: "(1) the statute invoked qualifies as an Exemption 3 withholding statute, and (2) the materials withheld fall within the statute's scope." A. Michael's Piano, 18 F.3d at 143 (citing CIA v. Sims, 471 U.S. 159, 167 (1985) and Baldridge v. Shapiro, 455 U.S. 345, 352-53 (1982)); see also Fitzgibbon, 911 F.2d at 761-62. Thus, where an agency withholds records pursuant to an Exemption 3 statute, FOIA principles of de novo review are limited to determining "whether the [agency] met its burden of proving that the documents withheld pursuant to Exemption 3 fell within the scope" of the withholding statute. A. Michael's Piano, 18 F.3d at 144.

To answer that question and determine the scope of an Exemption 3 statute, the

Second Circuit has followed the "approach taken by the Supreme Court" and will "look to the plain language . . and . . . legislative history" of the Exemption 3 statute, with the aim of "determin[ing] legislative purpose." Id. at 144 (citing Sims, 471 U.S. at 168-73); id. at 145 (in construing an Exemption 3 statute courts should be "guided by Congress' aim"); id. at 145-46 (examining legislative history to determine scope of the Exemption 3 withholding statute); see also Baldridge, 455 U.S. at 355-59 (interpreting the scope of a FOIA Exemption 3 statute based on the statute's legislative history even after determining that the language of the withholding statute was "unambiguous").

The Second Circuit adopted that approach after considering and rejecting the holdings and analysis of other Circuits, that impose "FOIA disclosure and review requirements" on the interpretation of the scope of an Exemption 3 withholding statute. See A. Michael's Piano, 18 F.3d at 144. Indeed, four of the cases that the Second Circuit rejected in A. Michael's Piano—i.e., Church of Scientology v. IRS, 792 F.2d 146, 148-50 (D.C. Cir. 1986); Grasso v. IRS, 785 F.2d 70, 74-75 (3d Cir. 1986); Lindsteadt v. IRS, 729 F.2d 998, 1003 (5th Cir. 1984); and Currie v. IRS, 704 F.2d 523, 526-27 (11th Cir. 1983)—are the very cases on which Plaintiffs rely to argue that this Court should interpret the scope of the PNSDA by looking to the policies underlying FOIA, rather than looking to the plain language of the statute and its legislative history. Memorandum in Support of Plaintiffs' Sixth Motion for Partial Summary Judgment ("Plfs' Br.") at 10 & n. 4 & 5.

2. The DoD Photos Are Properly Withheld Under FOIA Exemption 3

Plaintiffs argue that the PNSDA is a FOIA Exemption 3 statute. Plfs' Br. at 7.

Assuming that Plaintiffs are correct,[3] the only issue before this Court is whether the DoD Photos are "protected documents" within the meaning of the PNSDA, and therefore "fall within the [PNSDA]'s scope." A. Michael's Piano, 18 F.3d at 143; see PNSDA § (b). That question must be answered in the affirmative.

a. The DoD Photos Are "Protected Documents" Pursuant to the Plain Language of the PNSDA

The DoD Photos fall squarely within the plain meaning of "protected documents" as defined in the PNSDA. PNSDA § (c). As the Secretary's Certification sets forth, and as Plaintiffs do not dispute, the DoD Photos: (1) are "photographs" within the meaning of the PNSDA taken during the period from "September 11, 2001 through January 22, 2009" (PNSDA § (c)(1)(B)(i), (c)(2); Certification, Barcelo Decl. Ex. G); (2) they "relate[] 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 (PNSDA § (c)(1)(B)(ii); Certification, Barcelo Decl. Ex. G); and, (3) the Secretary has "issued a certification," based on his own determination "stating that disclosure of [the DoD Photos] 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." (Certification, Barcelo Decl. Ex. G; PNSDA §§ (c)(1)(A), (d)(1)). Because the DoD Photos qualify as "protected documents" as defined in subpart (c) of the PNSDA, they are therefore properly withheld under the PNSDA. Sims, 471 U.S. at 190

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[3] As explained in more detail infra Point II, the DoD Photos are properly withheld regardless of whether the PNSDA is a FOIA Exemption 3 statute or instead operates independently of FOIA.

(In determining whether a document falls within the scope of an Exemption 3 statute, "[t]he plain statutory language is not to be ignored.") (citing United States v. Weber Aircraft Corp., 465 U.S. 792, 798 (1984)). That should end the Court's analysis of the exempt nature of these records.

Indeed, the language and structure of the PNSDA confirms Congress's intent that the Secretary's determination that releasing the DoD Photos "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 § (d)(1), which served as the basis for the Certification, is not subject to judicial review. This is clear first because under the plain meaning of the PNSDA, a record's status as a "protected document" does not depend on whether the Secretary was accurate in his determination of harm, but rather on the existence of a certification containing certain Congressionally-mandated language. See PNSDA § (c)(1)(A). Requiring a certification with specific content provides a clear guideline on which a court should rely to determine whether records constitute "protected documents" as defined by the statute, rather than attempting to perform a review of the Secretary's judgment in military matters regarding the safety of U.S. troops and U.S. citizens. Cf. A. Michael's Piano, 18 F.3d at 144 ("[T]he FOIA exemptions [are] intended to set up 'concrete, workable standards for determining whether particular material may be withheld' from public scrutiny.") (quoting EPA v. Mink, 410 U.S. 73, 79 (1973)).

Moreover, the PNSDA provides that the Secretary "shall" issue a certification if he "determines" that the harms specified by the PNSDA are present. PNSDA § (d)(1);

see also Lopez v. Davis, 531 U.S. 230, 231 (2001) (noting Congress's "use of a mandatory 'shall' . . . to "impose discretionless obligations"). Having eliminated the Secretary's discretion to decide whether to issue such a certification after determining the existence of such harm, the Secretary's decision to issue a certification pursuant to the PNSDA is not subject to judicial review. Cf. Lexecon v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (use of the "the mandatory 'shall'" in a statute "normally creates an obligation impervious to judicial discretion"); Carte Banche (Singapore) PTE, Ltd. v. Carte Blanche Int'l, Ltd, 888 F.2d 260, 269 (2d Cir. 1989) (statute's use of the word "shall" imposed a "mandatory" obligation that does not permit "the exercise of judicial discretion in its application").

Congress's intent to preclude judicial review of the Secretary's determination of harm is also reflected in Congress's decision to itself monitor the certification process under the PNSDA. Indeed, the PNSDA requires the Secretary to provide "timely notice" to Congress any time a certification or recertification is issued. PNSDA § (d)(4). By further limiting the life of a certification to three years, the PNSDA requires the Secretary to reassess whether the same danger and harms are present in order to issue a recertification, id. § (d)(2), (3), and provide Congress with regular updates regarding the Secretary's findings.[4] Congress's own involvement in the review of the certification

[4] Plaintiffs' argument that Congress could have achieved the same result if it had passed a law "requir[ing] the Department of Defense to withhold the photographs at issue leaving no discretion to the Secretary and providing no criteria for this Court to review," Plfs' Br. 13 n.7, does not undermine Congress's determination to structure the PNSDA as it is written and achieve that same result. Rather than provide a blanket and everlasting prohibition on the release of the DoD Photos, the structure and plain language of the PNSDA reflects the balance Congress struck between the public interest in release of the documents if the situation underlying the finding of

process under the PNSDA reflects its intent that judicial review of the certification process is not required.

The lack of judicial review of the Secretary's determination of the existence of the enumerated harms is consistent with case law interpreting statutes that, like the PNSDA, implicate national security. Indeed, the Supreme Court has consistently declined to review exercises of discretion by national security officials, where the "language and structure" of the statute pursuant to which the official exercised his discretion "indicate that Congress meant to commit [the decision] to the [official]'s discretion" in matters of national security.[5] Webster v. Doe, 486 U.S. 592, 601 (1988) (relying on the plain language of the statute and the subject matter at issue of the "Nation's security" to hold that Congress granted unreviewable deference to the Director of the CIA to "deem . . . termination [of CIA employee] necessary or advisable in the interests of the United States"); Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988) (decision of the Director of the Naval Civilian Personnel Command to deny security clearance to civilian Naval employee unreviewable because the decision involved a "sensitive and inherently discretionary judgment call" involving "concerns of national security"); Lincoln v. Vigil, 508 U.S. 182, 192 (1993) ("[T]he interests of national security" are "an area of executive action 'in which courts have long been hesitant to intrude.'") (citation omitted); see also

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harm were to become stale, and the unacceptable risk to certain individuals that Congress determined would result from the release of the DoD Photos.

[5] Notably, before the Secretary issued the Certification, he consulted with various other military leaders, including the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Commands, and the Commander of Multi-National Forces-Iraq, each of whom agreed with the Secretary's determination of harm. See Certification, Barcelo Decl. Ex. G.

Conyers v. Rossides, 558 F.3d 137, 147 (2d Cir. 2009) (Aviation and Transportation Security Act grants unreviewable discretion to Administrator of Transportation Security Administration on certain matters of "safety and security of civil air transportation system").

The Supreme Court has relied on these same principles to decline judicial review of decisions that are statutorily mandated as within the military judgment of officers of the DoD. E.g., Orloff v. Willoughby, 345 U.S. 83, 88 (1953) (no judicial review of the Secretary of the Army's personnel decision under statute "provid[ing] that medical officers of the Army may be assigned by the Secretary of the Army to such duties as the interests of the service demand"); see also Byrne v. Resor, 412 F.2d 774, 775 (3d Cir. 1969) (it is not the "function [of the courts] to review the discretionary judgment of a military officer made within the scope of his authority," even on a matter that may seem "trifling" to a civilian). These same principles apply here.

b. Plaintiffs' Arguments to the Contrary are Without Merit

Plaintiffs' assertion that this Court should review de novo the Secretary's determination of the harm that would flow from release of the DoD Photos is mistaken. See Plfs' Br. at 9-11. Plaintiffs are therefore wrong to argue that this Court should employ the same reasoning and analysis as the Ninth Circuit did in Long v. IRS, 742 F.2d 1173 (9th Cir. 1984), where the court concluded that FOIA principles of de novo review applied to the exercise of discretion by a governmental official underlying a withholding under Exemption 3. The Ninth Circuit's ruling was not based on its analysis of the plain meaning or legislative history of section 6103, but rather on the legislative history of

FOIA Exemption 3 and FOIA's overarching policy of disclosure. 742 F.2d at 1180-81. The Second Circuit, however, has rejected that approach and instructed that "exemption 3 . . . incorporates the policies of other statutes," and is not "defined by FOIA itself." A. Michael's Piano, 18 F.3d at 143; see also King v. IRS, 688 F.2d 488, 493 (7th Cir. 1982) (rejecting Ninth Circuit's analysis in Long because "that court erred by importing the policies of the FOIA into the interpretation of § 6103."); cf. Ass'n of Retired R.R. Workers, 830 F.2d at 336 (declining to apply Ninth Circuit's holding in Long to impose de novo review of agency's exercise of discretion in withholding documents pursuant to Exemption 3).

Moreover, contrary to Plaintiffs' contention (Plfs' Br. at 9-11), the Second Circuit's opinion in A. Michael's Piano does not suggest that the Second Circuit would either disregard the plain meaning of an Exemption 3 statute or decline to examine Congress's purpose in enacting an Exemption 3 statute merely because the Exemption 3 Statute contemplates an exercise of discretion by a governmental official, as Plaintiffs argue that this Court should, Plfs' Br. at 9-11. Rather, in such a case, the Second Circuit would look to the Exemption 3 statute itself to determine the amount of deference to afford the agency's determination, as other Circuits and the Supreme Court have done.[6] A. Michael's Piano, 18 F.3d at 144 (interpreting Exemption 3 statute based on its "plain

[6] Plaintiffs are therefore wrong to argue that the dispositive issue in the instant cross-motions for partial summary judgment is whether the PNSDA operates "independently" of FOIA or is instead an Exemption 3 statute. Plfs' Br. at 9-11. The Second Circuit interprets the scope of an Exemption 3 statute the same way it interprets any other statute, i.e., based on the statute's plain meaning with the goal of determining "Congressional purpose." A. Michael's Piano, 18 F.3d at 144.

language . . and . . . legislative history," with the aim of "determin[ing] legislative purpose"); see also Sims, 471 U.S. at 168-69 (construing FOIA Exemption 3 statute according to the "plain meaning of its statutory language, as well as the legislative history of the National Security Act," to determine "that Congress intended to give the Director of [the CIA] broad power to protect the secrecy and integrity of the intelligence process"); Aronson v. IRS, 973 F.2d 962, 966 (1st Cir. 1992) ("[H]ow an exemption 3 statute applies to data that arguably fall within its reach, and whether specific circumstances counsel disclosure to further the statute's aim, are legal questions normally governed by that Exemption 3 statute, not by the FOIA itself."); Ass'n of Retired R.R. Workers, 830 F.2d at 335 (rejecting plaintiff's argument that "the court must decide de novo whether [the U.S. Railroad Retirement Board] appropriately balanced the benefit and cost of disclosure" when deciding not to release documents pursuant to Exemption 3 statute). Here, the PNSDA makes clear that the Secretary's certification is not subject to review.

Likewise, Plaintiffs are wrong to argue that the PNSDA and section 6103(b)(2) of the Internal Revenue Code are "nearly indistinguishable." Plfs' Br. at 9. As an initial matter, section 6103 does not have a Congressionally-mandated certification process, which indicates Congress's intent that the existence of a certification would be the basis for the withholding. See supra pp. 18-19. Because section 6103 does not have such a certification procedure it also does not have the checks on that procedure as contained in the PNSDA, such as the 3-year time limit for each certification and Congressional oversight of the certification process. Supra pp. 19-20.

Moreover, the two laws also address very different subject matters. While section

6103 concerns the administration of tax laws, the PNSDA deals with matters of national security and the lives of the U.S. Armed Forces as well as U.S. citizens. See supra pp. 20-21. Indeed, even the Ninth Circuit's opinion in Long, on which Plaintiffs base their entire argument, Plfs' Br. at 9-11, recognized that "special deference" is afforded to agencies in "particularly sensitive areas such as national security" that is not due in the administration of tax laws. 742 F.2d at 1182.

Finally, while section 6103 generally applies to all "return information" (as defined in section 6103) and subsection 6103(b)(2) specifically applies to any "standards used or to be used for the selection of returns for examination, or date used or to be used for determining such standards," the documents potentially covered by a certification under the PNSDA, in contrast, are finite in scope and limited in nature. As the Ninth Circuit has explained, where, as under the PNSDA, "the identified class of nondisclosable matters is narrow" an Exemption 3 statute may "provid[e] for limited unguided discretion" to an agency to withhold certain records. Lessner v. U.S. Dep't of Commerce, 827 F.2d 1333, 1336 (9th Cir. 1987). Here, the entire universe of photographs that are subject to the PNSDA was in existence by the time the statute was passed in October 2009. See PNSDA § (c)(1)(B)(i) (last possible date that a photograph subject to the PNSDA could have been created was January 22, 2009). And the PNSDA only covers photographs that "relate[] 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." Id. § (C)(1)(B)(ii).[7] Thus, the narrow class of documents that can possibly constitute "protected documents" under the PNSDA further distinguishes the PNSDA and section 6103(b)(2).

c. The PNSDA's Legislative History Further Evidences Congressional Intent That the DoD Photos Be Withheld Without Judicial Review of the Secretary's Determination of Harm

Any remaining questions regarding Congress's purpose with respect to the scope of the PNSDA and the amount of deference that Congress intended be granted to the Secretary is resolved by reference to the PNSDA's legislative history. The legislative history confirms that Congress intended for the DoD Photos to be withheld in this very action, and that to do so it granted unreviewable discretion to the Secretary's determination of harm.

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[7] In passing, Plaintiffs state that "Congress is presumed also to be aware of prior judicial interpretations of similar statutory provisions," Plfs' Br. at 11 (quoting Strom v. Goldman Sachs & Co., 202 F.3d 138, 147 (2d Cir. 1999)), to suggest that other courts' interpretation of section 6103(b)(2) of the Internal Revenue Code should inform this Court's interpretation of the PNSDA. However, and as Plaintiffs' concede, the interpretation of section 6103(b)(2) for which Plaintiffs advocate, i.e., that the Secretary of the Treasury's determination of harm pursuant to section 6103(b)(2) is subject to de novo review, has been explicitly rejected by the First, Sixth, and Seventh Circuits. Plfs' Br. at 11 n. 8 (citing Aronson, 973 F.2d 962 (1st Cir. 1992), King v. IRS, 688 F.2d 488 (7th Cir. 1982), and White v. IRS, 707 F.2d 897, 900 (6th Cir. 1983)). As Plaintiffs also concede, not all of the Circuits that have held that section 6103 is an Exemption 3 statute have also held that the Treasury Secretary's determination of harm under section 6103(b)(2) is subject to de novo review in a FOIA action. See Plfs' Br. at 10 n. 4 & n.5. Indeed, although the D.C. Circuit has held that section 6103 is an Exemption 3 statute, it has not held that the Treasury Secretary's determination of harm under any of section 6103's subsections is subject to de novo review, and has even questioned the viability of the Ninth Circuit's holding in Long on which Plaintiffs rely so heavily. See Ass'n of Retired R.R. Workers, 830 F.2d at 335-37 (discussing, but ultimately not ruling, on whether Long was wrongly decided). Thus, even if section 6013(b)(2) and the PNSDA were "similar statutory provisions" (which, as explained herein they are not), Plaintiffs' observation that Congress is presumed to know of prior judicial interpretation is unavailing.

The PNSDA's legislative history reveals that both the Photograph Protection Act and the PNSDA were introduced to provide legislative support for the President's determination that the release of the DoD Photos would endanger the lives of U.S. citizens, members of the Armed Forces, and employees of the U.S. government deployed abroad, but would "add nothing to the overall knowledge base we have regarding detainee abuse." 155 Cong. Rec. S5672 (daily ed. May 20, 2009) (statement by Sen. Graham); Conference Summary of the House Committee on Appropriations (explaining understanding that the PNSDA would "[c]odif[y] the President's decision to allow the Secretary of Defense to bar the release of detainee photos."); see supra Background pp. 7-11.

Because of those harms, Congress enacted legislation that, in its own words, would "establish a procedure to prevent the detainee photographs [at issue in this lawsuit] from being released." 155 Cong. Rec. S5672 (statement by Sen. Graham). Indeed, recognizing that the PNSDA would be subject to future litigation (in this very case), Congress spoke directly to this Court, expressing Congressional intent to "change[] the law, directly on point, to give legislative backing to the idea that these particular photographs, and those like these photographs, should not be released for a period of 3 years, and that it is in our national security interests to do so." Id. at S5988 (statement of Sen. Graham); see also supra Background pp. 7-11.

Thus, the PNSDA's legislative history plainly supports the Government's withholding of the DoD Photos.

B. No Detailed Vaughn Indices Are Necessary to Support the Government's Exemption 3 Withholding

Plaintiffs' alternative argument that the Government is required to provide them with a Vaughn index "describing each photograph in . . . detail" or a Vaughn declaration "explaining how release of each individual photograph would endanger U.S. citizens," Plfs' Br. at 14, is without merit. As the D.C. Circuit has explained, in a FOIA Exemption 3 case where, as here, "a claimed FOIA exemption consists of generic exclusion, dependent upon the category of records rather than the subject matter with which each individual record contains, resort to a Vaughn index is futile." Church of Scientology of California v. IRS, 792 F.2d 146, 152 (D.C. Cir. 1986) (no Vaughn index required in a FOIA Exemption 3 case if the agency has otherwise sufficiently established "that the document or group of documents in question actually falls into an exempted category"); accord Brown v. FBI, 658 F.2d 71, 74 (2d Cir. 1981) ("[W]hen the facts in plaintiff's possession are sufficient to allow an effective presentation of its case, an itemized and indexed justification of the specificity contemplated by Vaughn may be unnecessary."); see also Krikorian v. Dep't of State, 984 F.2d 461, 465 (D.C. Cir. 1993) ("In reviewing an exemption 3 claim," a court should "not closely scrutinize the contents of a withheld document; instead, [it should] determine only whether there is a relevant statute and whether the document falls within that statute.").

This general rule has also consistently been applied to FOIA exemptions other than Exemption 3 where, as here, a categorical or generic description of the records provides a sufficient basis to justify their withholding. See, e.g., Church of Scientology,

792 F.2d at 152 (listing cases); Maydak v. DOJ, 218 F.3d 760, 766 (D.C. Cir. 2000) ("generic, categorical showings" by the agency can justify withholding under Exemption 7(A)); Gallant v. NLRB, 26 F.3d 168, 173 (D.C. Cir. 1994) ("'[T]he government need not justify its withholdings document-by-document; it may instead do so category-of-document by category-of-document,' so long as its definitions of relevant categories . . . 'allow a court to determine . . . whether the specific claimed exemptions are properly applied.'") (quoting Vaughn v. United States, 936 F.2d 862, 868 (6th Cir. 1991)); Brown, 658 F.2d at 73-74 (rejecting plaintiff's request for a "detailed justification for withholding the requested information, including an itemization and index which would correlate specific statements in the justification with actual portions of the requested documents" in FOIA action challenging withholdings under Exemptions 6 and 7).

Here, all of the DoD Photos are categorically withheld pursuant to Exemption 3 because they fall within the PNSDA's definition of a "protected document," and are all covered by the Secretary's Certification. See supra Point I(A)(2)(a). Accordingly, no Vaughn index is required beyond the Vaughn indexes DoD already prepared in connection with its invocation of Exemption 7(F). Church of Scientology, 792 F.2d at 152.[8]

Plaintiffs are similarly incorrect to argue that FOIA requires the Government to

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[8] Even if an individualized Vaughn index were necessary or appropriate in this case beyond the indexes the Government already prepared and provided to Plaintiffs, there would be no basis for this Court to order the Government to provide a Vaughn index describing the contents of each of the DoD Photos. Not only is no such description required because the photographs are subject to the categorical exclusion provided by the PNSDA, see supra Point I(A)(2)(a). , but a sampling method is appropriate because as Plaintiffs recognize, there are a substantial number of photographs at issue in this action. Plfs' Br. at 5 n.1.

create a detailed written explanation of the protected documents simply because the PNSDA only applies to photographs. Plfs' Br. at 13. Plaintiffs do not (and cannot) cite to any legal requirement that the Government create new documents containing detailed descriptions of the DoD Photos. Indeed, the law is well-settled that "FOIA does not require an agency to create a document in response to a request." Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 499 (S.D.N.Y. 2010) (citations and internal quotations omitted); see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975) (overturning as "baseless" court order in FOIA case "requir[ing] the agency to create explanatory material").

Plaintiffs' suggestion that Vaughn indexes or other documents created by the Government in connection with this litigation are the only way that the public will learn of the nature of the documents at issue here, Plfs' Br. at 13, fails to acknowledge the substantial amount of publicly available information regarding the contents of the DoD Photos. As the Certification explains, the DoD Photos are all "contained in, or derived from, records of investigations of allegations of detainee abuse" that were "processed and released" in this case. Certification, (Barcelo Decl. Ex. G); see also Fourth McGuire Decl. ¶ 5 (each of the CID reports associated with the 29 Photos were "processed and released to Plaintiffs" in this action). Thus, substantial amounts of information regarding the subject matter of the DoD Photos has been released to the public. And as a posting on the ACLU's website reflects, the CID reports often "discuss at length" the photographs associated with the CID reports. See http://www.aclu.org/torturefoia/released/021109.html (discussion of report identified as

DODDOACID14080). Accordingly, the Court should reject Plaintiffs' request that the Government be required to create additional Vaughn indexes (or, for that matter, any other documents) describing the contents of the DoD Photos.

C. The DoD Photos Are Properly Withheld Pursuant to Exemption 7(F)

The DoD Photos are also properly withheld under Exemption 7(F). That exemption provides that documents may be exempt from disclosure under FOIA if they are "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). The Government maintains its argument that Exemption 7(F) justified its withholding of the DoD Photos. See Defendants' Supplemental Memorandum of Law in Further Support of Defendants' Motion for Partial Summary Judgment dated July 22, 2005.[9] (Dkt. No. 114).

Although this Court previously rejected the Government's argument with respect to the 29 Photos in the June 2006 Orders, the Supreme Court vacated and remanded this action without consideration of the Government's withholding under Exemption 7(F), 130 S. Ct. 777, and the Government preserves that argument herein should this issue once again reach an appeal. See also Milner v. Dep't of Navy, 131 S. Ct. 1259, 1271-73 (Mar. 7, 2011) (concurrence by Justice Alito discussing broad scope of Exemption 7(F)).

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[9] The Government's July 22, 2005 memo of law related specifically to the Darby photos, but after the Government withdrew its objection to the withholding of the Darby photos the parties stipulated that they could choose not to "submit additional legal memoranda on Exemptions 6, 7(C), and 7(F)," and the Court endorsed that stipulation. Order dated April 10, 2006 at ¶ 3.

The Government also is not required to provide Plaintiffs with any additional Vaughn declarations or indexes to describe the basis for the Government's withholding of the DoD Photos pursuant to Exemption 7(F). The Government provided Plaintiffs with Vaughn indexes for the 29 Photos. See Fourth McGuire Decl. On April 10, 2006, the Court approved the parties' agreement to litigate the Government's invocation of Exemption 7(F) on the basis of the sample of the 29 Photos, and agreed that the final rulings with respect to the 29 Photos would govern the question of whether any other photographic images responsive to Plaintiffs' FOIA requests, such as the DoD Photos, should be released under Exemption 7(F). April 10 Order ¶ 6. Therefore, no further Vaughn declarations or indices should be required.

II. IN THE ALTERNATIVE, THE PNSDA OPERATES INDEPENDENTLY OF FOIA

Finally, because of the PNSDA's unequivocal language prohibiting release of the DoD Photos, this Court should uphold the Government's withholding even if it finds that the DoD Photos are not properly withheld pursuant to the PNSDA when it is construed as a FOIA Exemption 3 statute.[10] The PNSDA expressly states that "[n]otwithstanding any other provision of law to the contrary," no "protected document" as defined in the PNSDA "shall be subject to disclosure under [FOIA] or any proceeding under that section." PNSDA § (b) (emphasis added). Thus, Congress clearly prohibited disclosure

[10] As Plaintiffs concede, the PNSDA does not explicitly state that it operates as an exemption to disclosure otherwise mandated by FOIA, Plfs' Br. at 7 n.3, despite the fact that the OPEN FOIA Act of 2009, which was passed simultaneously with the PNSDA as part of the Department of Homeland Security Appropriations Act, 2010, requires that all Exemption 3 statutes specifically cite to the OPEN FOIA Act of 2009.

of a "protected document" under FOIA and "any proceeding under [FOIA]."[11]

The Supreme Court has recognized that it "is difficult to imagine" a "clearer statement" of legislative intent than the phrase "[n]otwithstanding any other provision of the law to the contrary," which "clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." Cisceros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993); see also Conyers, 558 F.3d at 145 (same). Accordingly, even if this Court were to conclude that the DoD Photos were not properly withheld under Exemption 3, the Court still should not order their release because under the plain terms of the PNSDA, they fall within the PNSDA's definition of a "protected document." Indeed, a "notwithstanding" clause such as that contained in the PNSDA preempts any prior statutes, including FOIA itself, which the PNSDA specifically references. See Lockhart v. United States, 546 U.S. 142, 144-46 (2005) (provision in Higher Education Technical Amendments, 20 U.S.C. § 1091a(a)(2), stating: "Notwithstanding any other provision of statute . . . no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or any offset, garnishment, or other action initiated or taken," eliminated ten-year limitations period in Debt Collection Act for claims based on failure to repay federally reinsured student loans). Accordingly, the DoD Photos are properly withheld under the PNDSA.

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[11] The PNSDA's reference to both "section 552 of title 5," i.e., FOIA, and "any proceeding under that section," as separate examples of the circumstances in which "protected documents" are not subject to release should be read separately to refer to both administrative proceedings under FOIA and any action brought pursuant to FOIA.

CONCLUSION

For the foregoing reasons, the Court should grant the Government's sixth motion for partial summary judgment and deny Plaintiffs' sixth motion for partial summary judgment.

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April 1, 2011

Respectfully submitted,

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