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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 AMERICAN CIVIL LIBERTIES  
4 UNION, et al.,

Plaintiffs,

v.

04-CV-4151 (AKH)

6 DEPARTMENT OF DEFENSE, et al.,

7 Defendants.

Oral Argument

8 -----x

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

11 Before:

12 HON. ALVIN K. HELLERSTEIN,

13 District Judge

14 APPEARANCES

15 AMERICAN CIVIL LIBERTIES UNION  
For Plaintiffs

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

17 GIBBONS P.C.  
Attorneys for Plaintiffs

18 BY: ALICIA L. BANNON, ESQ.  
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20 UNITED STATES ATTORNEY'S OFFICE  
21 SOUTHERN DISTRICT OF NEW YORK  
For Defendants

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

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

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1 (In open court)

2 (Case called)

3 THE CLERK: Counsel, please state your name for the  
4 record.

5 MR. ABDO: Alexander Abdo for the plaintiffs, your  
6 Honor.

7 MR. JAFFER: Jameel Jaffer for plaintiffs, your Honor.

8 MR. LUSTBERG: Lawrence S. Lustberg, Gibbons, P.C., on  
9 behalf of plaintiffs.

10 MS. BANNON: Alicia Bannon, Gibbons, P.C., on behalf  
11 of plaintiffs.

12 MS. BARCELO: Amy Barcelo, assistant United States  
13 attorney, on behalf of the government.

14 MS. LA MORTE: Tara La Morte, assistant United States  
15 attorney, on behalf of the government.

16 MR. MILLS: Charles G. Mills on behalf of the amicus  
17 curiae, the American Legion.

18 THE COURT: All right. Who's going to argue for the  
19 plaintiff?

20 MR. ABDO: I will, your Honor. Alexander Abdo.

21 THE COURT: Go ahead, Mr. Abdo.

22 MR. ABDO: Your Honor, at issue today is the  
23 government's withholding of approximately 2,000 photographs  
24 depicting the abuse of detainees in US custody throughout  
25 detention facilities in Iraq and Afghanistan. The vast

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1 majority of the photographs have never been publicly described.  
2 This court and the Second Circuit ordered their release, as you  
3 will recall. Now, however, the government --

4 THE COURT: Vividly.

5 MR. ABDO: Well, now, as I'm sure your Honor recalls,  
6 the government is withholding the photographs under new  
7 statutory authority provided by Congress. That statute  
8 authorizes the government to withhold certain photographs if  
9 the Secretary of Defense determines that release of the  
10 photographs would endanger US citizens, civilians, or  
11 employees, and the Secretary has made such a determination.

12 The question today for the court is a very simple one:  
13 whether there is any judicial review whatsoever of the  
14 Secretary's determination that release of the photographs would  
15 endanger those individuals. We think there are -- there is,  
16 for three simple reasons.

17 The first is that the photo statute is an Exemption 3  
18 withholding statute because it establishes particular criteria  
19 for the withholding of agency records.

20 Second, one of those criteria -- indeed, the most  
21 important -- is that the Secretary determines that release of  
22 the requested records would endanger US individuals.

23 And finally, FOIA requires additional review of that  
24 determination, as it does of all criteria established under  
25 Exemption 3 statutes.

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1           As the briefing to this court shows, the majority of  
2 the caselaw supports that simple analysis. The Ninth Circuit,  
3 in a case known as *Long*, and a number of circuits following  
4 that decision, encountered a very similar situation that this  
5 court is in now. The Ninth Circuit had ordered the release of  
6 certain tax-related information, and Congress responded by  
7 passing a statute that provided new statutory authority for the  
8 withholding of that information if the Secretary of the  
9 Treasury determined that release would cause a particular harm.  
10 The district court in that case found that the statute,  
11 invocation of the statute was sufficient to discharge the  
12 government's obligations to withhold the tax-related  
13 information, but the Ninth Circuit reversed, holding that FOIA  
14 provides --

15           THE COURT: Tell me, Mr. Abdo, the nature of the  
16 information that was sought in that case.

17           MR. ABD0: The information was return information  
18 submitted by taxpayers that was withheld by the Secretary of  
19 the Treasury on the claim that disclosure would adversely  
20 impact the administration of the tax laws.

21           THE COURT: You mean the Freedom of Information Act  
22 requests were for the precise returns filed by taxpayers?

23           MR. ABD0: I don't recall whether it was for  
24 particular information within returns, but it was for  
25 information covered by the portion of the tax act that

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1 protected return information.

2 THE COURT: I think I need to know more about that to  
3 consider if *Long* is a good precedent for you. Some areas, by  
4 the very nature of those areas, the court naturally has a great  
5 deal of information and is in possession of a better ability to  
6 evaluate the nature of the withholding than perhaps in other  
7 areas, and I'd like to compare what a court might well  
8 appreciate in *Long* to the very difficult job a judge sitting in  
9 New York City, insulated in a courtroom from a battlefield,  
10 might be able to evaluate in the case applied.

11 MR. ABDO: There's no doubt, your Honor, that the  
12 context of the two cases are distinct. What we are asking the  
13 court to do, however, is engage in the very type of analysis  
14 that courts examining FOIA requests engage in all the time, to  
15 determine --

16 THE COURT: No, they don't. They don't. Once the  
17 head of an agency has a deliberate consideration and  
18 determination, courts tend to respect that.

19 MR. ABDO: Respectfully, your Honor, there is some  
20 deference given to heads of agencies in making those  
21 determinations, but all we're requesting at this point is that  
22 the government provide a justification for the invocation of  
23 the statute, which it has yet to do.

24 For example, in the context of Exemption 1, courts are  
25 called upon routinely to determine whether the government's

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1 determination of national security harm satisfies its  
2 obligation to withhold records that would allegedly endanger  
3 the national security. There may be some measure of deference  
4 in that context, but that deference on the question of the  
5 substance has never been held to negate the availability of  
6 judicial review in the first instance for the government  
7 withholdings.

8 THE COURT: I've done a lot of those reviews in this  
9 case. Mr. Lustberg has been involved in any number of them.  
10 And I looked at the particular statement that is subject to the  
11 withholding request. And I looked for a reasonable  
12 relationship by the nature of the subject matter to the general  
13 classification -- for example, in the CIA papers -- that a  
14 method of investigation or inquiry would be disclosed. And  
15 it's not a very detailed evaluation; it is rather superficial,  
16 by its very nature.

17 And here, as I understand what happened, the United  
18 States was all set to make the publication ordered by me and  
19 affirmed by the Second Circuit when the Prime Minister of Iraq  
20 importuned President Obama not to allow it for fear that a  
21 great deal of civil unrest and insurrection would occur in  
22 Iraq, endangering the Iraqi government, the officials of the  
23 Iraqi government, the United States military, and civilian  
24 forces supporting that government. And it went up through the  
25 chain of command, and Secretary of Defense Gates made the

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1 determination, based on recommendations made at every step  
2 along the way.

3           When I initially made the determination to release the  
4 photographs, I considered an affidavit from the then commander  
5 in chief Richard Myers, who wrote as to his concern that the  
6 release of the photographs would endanger American military and  
7 civilian forces in Iraq and lead to insurrection and the like.  
8 And I ruled that these were really speculative, that the  
9 terrorists in Iraq needed no pretext to attack American forces,  
10 and the core values of the Freedom of Information Act were more  
11 cogent and more dear than the speculation of even the commander  
12 in chief of the United States military. And the Second Circuit  
13 affirmed.

14           And then we have this presidential order, and an act  
15 of Congress. What more could I do?

16           MR. ABDO: Respectfully, your Honor, the determination  
17 or the public statements you're referring to are from several  
18 years ago, and we're simply not in a position to know now  
19 whether those are the same types of concerns that are animating  
20 the government's withholdings. A year and a half ago, when the  
21 government -- when the President determined not to release the  
22 photographs as he had initially determined to do, he made a  
23 very time-sensitive statement about the nature of the facts on  
24 the ground at the time. We are now two years removed from that  
25 determination and yet we have no record from the Secretary of



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1 Defense explaining the entirely conclusory explanation in his  
2 certification that disclosure of these records now would cause  
3 harm. Moreover, we don't have any connection drawn --

4 THE COURT: It's evident. It's evident. It's the  
5 same concern about harm that's been expressed throughout the  
6 case, which I did not follow but which Congress commands me to  
7 follow. I'm just a judge.

8 MR. ABDO: We understand that, your Honor. But  
9 there's a crucial role for judges to play in the FOIA process.  
10 The process of FOIA is not simply for the government to come  
11 into court, invoke an exemption, and for courts then to simply  
12 ratify that invocation of an exemption.

13 THE COURT: I don't think the government did that. If  
14 Secretary of Gates had done what you said, I might be tempted  
15 to require more. But in the context of the history of this  
16 case, I think the concerns are real, and they've been  
17 expressed. It was a very interesting statement that was made,  
18 when the United States was ready, willing, and able to produce  
19 the redacted photographs, an amazing statement, and it, in  
20 effect, could not be ignored by the President or the Congress.  
21 The history makes it quite clear, I think.

22 MR. ABDO: Your Honor, we respect that the court is  
23 inclined to defer to determinations of the agency, but there  
24 has to be something to defer to. Currently before the court,  
25 the only document provided by the government attempting to



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1 justify the withholding of these records on this motion is a  
2 Secretary certification, which does no more than essentially  
3 copy and paste the language of the statute relating to the  
4 required harm that must be demonstrated. The Secretary has not  
5 attempted, nor has any declarant on behalf of the government,  
6 to explain how any one of the photographs would lead to that  
7 harm. Given the sheer volume of the photographs, 2,000, we  
8 think it unlikely that the release of even one of them, much  
9 less the least inflammatory of them, would cause the type of  
10 harm that the Secretary predicts. But we're also --

11 THE COURT: You want me to go through all 2,000 and  
12 rank them? This one is benign, we'll let that go through, but  
13 this one shows something more dramatic? What would I be  
14 looking for? What kind of criteria would I use to go through  
15 this?

16 MR. ABDO: We would invite *in camera* review, your  
17 Honor, but the initial posture of most FOIA cases is to require  
18 the government, through a Vaughn declaration and a Vaughn  
19 index, to make that showing, because the government bears the  
20 burden under FOIA in the first instance of attempting to  
21 justify its withholdings. It has yet to produce a Vaughn index  
22 or declaration with respect to these 2,000 photographs. So we  
23 think the first step for the court would be simply to order the  
24 government to produce a Vaughn declaration explaining how  
25 release of each of the photographs would result in the harm it

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1 claims and an index that provides sufficient textual detail,  
2 describing each photograph, to allow the court to connect the  
3 alleged harm with the actual records.

4 And it's notable that the statute at issue says not a  
5 word about textual descriptions of these photographs. It  
6 protects simply the photographs themselves. And so the court  
7 wouldn't be in any way endangering the asserted interests of  
8 the government if it merely required a textual description to  
9 be provided by the government to the plaintiffs. All it would  
10 be doing would be vindicating FOIA's core purposes by allowing  
11 adversarial testing of the government's claim of harm by  
12 providing a sufficient record for the court to conduct the *de*  
13 *novo* review mandated and, importantly in this case, by creating  
14 a full record of the government's reasons for withholding and  
15 the contents of the records it seeks to withhold.

16 THE COURT: Mr. Abdo, I'm looking at your brief, and I  
17 take it that you want me, as stated at the bottom of page 9, to  
18 conduct a *de novo* review, finding if the release of the  
19 photographs actually would cause the harm specified by the act.

20 MR. ABDO: The phrase --

21 THE COURT: How am I equipped to do that?

22 MR. ABDO: We respectfully disagree, your Honor. FOIA  
23 mandates that courts engage in that type of *de novo* review --

24 THE COURT: Actually would cause the harm.

25 MR. ABDO: We perhaps misquoted the statute, but

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1 whatever --

2 THE COURT: This is argument. You didn't quote  
3 anything. You just asked. This is argument. That's what you  
4 want me to do. You want me to conduct a *de novo* review to find  
5 whether the photographs actually would cause the harm. What is  
6 the harm specified by the law?

7 MR. ABDO: Subsection (d), your Honor, of the statute  
8 authorizes withholding if the Secretary of Defense determines  
9 that disclosure of that photograph would endanger citizens of  
10 the United States, members of the United States armed forces,  
11 or employees of the United States government deployed outside  
12 the United States. That is the very type of determination,  
13 albeit with some deference in these contexts, that courts  
14 engage in when, for example, they ask whether release of a  
15 document would compromise national security under Exemption 1.  
16 It is the same type of question that this court asked when the  
17 CIA sought to neither confirm nor deny the existence of a  
18 particular legal memorandum, an explanation that this court,  
19 after conducting *de novo* review, rejected, notwithstanding the  
20 context of that withholding, and the same type of determination  
21 that this court more recently --

22 THE COURT: I recall that the government volunteered  
23 that information.

24 MR. ABDO: Ultimately, your Honor, I don't recall  
25 whether that's true, but --

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1 THE COURT: I don't remember well enough, but I don't  
2 remember having made that determination. Maybe Mr. Lustberg  
3 remembers that.

4 MR. ABDO: It was in the September 2005 order, your  
5 Honor.

6 In any event, your Honor --

7 THE COURT: I called on Mr. Lustberg because I think  
8 only he has memory long enough to the beginning of the case.

9 MR. LUSTBERG: And I had hair when this case started,  
10 Judge.

11 THE COURT: What shall I say, Mr. Lustberg?

12 MR. LUSTBERG: I don't have a specific word.

13 I think the issue in that case was that some of those  
14 memoranda had already been disclosed in the public record, so  
15 there was a different determination that your Honor had to  
16 make.

17 THE COURT: I think that's right.

18 MR. ABDO: Then I'll point your Honor to a more recent  
19 determination that the alleged source and method withheld by  
20 the CIA in one of those memoranda was not in fact a source or  
21 method but was in fact a source of authority and would not  
22 cause the harm claimed by the CIA.

23 In any event, the point is a larger one, your Honor,  
24 that FOIA requires that courts conduct that type of review.  
25 Although styled *de novo* by FOIA, it varies, of course,

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1 according to the circumstances, but the review in any of those  
2 circumstances fulfills an important role of the court in  
3 ensuring that it is the rule of law respected when records are  
4 withheld and not simply a mere ratification of withholding  
5 decisions.

6 THE COURT: I wrestled with that consideration at some  
7 earlier time, because the statute seems to be saying two  
8 things. It does call upon a *de novo* review of sorts, but that  
9 review seems to be satisfied by looking at the procedure used  
10 by the particular head of an agency in claiming an exemption,  
11 and the court did not seem -- particularly in matters of  
12 defense and intelligence, the courts give a great deal of  
13 respect for the decision made.

14 And I remember very well the *Glomar* case, where  
15 President Carter ordered the release of information that showed  
16 that what the United States had been calling an exploration and  
17 scientific research ship actually was used for spying purposes  
18 in the Pacific, and notwithstanding the disclosure by the  
19 United States, a subsequent claim to withhold disclosure under  
20 an exemption was upheld by the District of Columbia circuit  
21 because even the provenance of a particular disclosure could  
22 embarrass our foreign relations. I was very struck by that  
23 decision, which I thought was something that the Second Circuit  
24 would follow, and which I would follow, that matters of defense  
25 and intelligence are of such a sensitive nature, it's very

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1 difficult for a judge, and maybe impossible, to make the kinds  
2 of calculations and evaluations that are necessary for the  
3 normal kind of *de novo* review. And I applied it here.

4           Going back to what happened, here is the certification  
5 by Secretary Gates that you quote on page 5 of your brief.

6 "After hearing recommendations of the Chairman of the Joint  
7 Chiefs of Staff, the Commander of US Central Command, and the  
8 Commander of Multinational Forces, Iraq, that public disclosure  
9 of these photographs would endanger citizens of the United  
10 States, members of the United States armed forces, or employees  
11 of the United States government deployed outside the United  
12 States." I've seen photographs similar to this in an *in camera*  
13 review, and it's clear from all the public information as well  
14 that what is depicted in these photographs are scenes of  
15 inappropriate corrections officers behavior towards detainees.  
16 There are scenes where dogs are used, there are scenes where  
17 there's public nakedness, there are scenes of compromising  
18 behavior. All of this is on the public record in word  
19 descriptions. Photographs have not been depicted. And I felt,  
20 after seeing these pictures, that the dimension of visual  
21 knowledge of what was going on is different in kind and quality  
22 from the intellectual knowledge that comes from reading words  
23 on a page, and it was for that reason that I held that it was  
24 appropriate to publish these photographs. And I had before me  
25 certifications by the military that the publication would



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1 endanger lives. We were in a wartime situation there, and we  
2 were being attacked regularly. And I believed from everything  
3 known to me that the danger of our forces and civilians were at  
4 such a high level that there need be no pretext for additional  
5 terrorist activity against us, and so the photographs would do  
6 nothing, and I felt that the speculation of the commander in  
7 chief, although entitled to great deference, did not outweigh  
8 the core values of FOIA. But there's now a specific statute  
9 that says that these kinds of certifications need to be given  
10 conclusive respect.

11 Then, as now, there are still the same issues of the  
12 visual image of American troops committing improper and  
13 inappropriate acts towards Iraqis which fuel insurrection and  
14 terrorist activity, endangering our forces. We've drawn down  
15 our forces. There are more civilians, many more civilians than  
16 military, and we're in the process of continuing to draw down  
17 our forces. The dangers that are certified by Secretary Gates  
18 become much more vivid in this kind of an environment. And  
19 although one can argue that the conditions existing now are of  
20 a more benign nature than existed when Congress enacted the  
21 statute, one could argue the contrary as well. We continue to  
22 hear and read of terrorist activities in Iraq, one Iraqi  
23 against another and one Iraqi against the forces of the United  
24 States. We're not out of danger. And for the same rationale  
25 that animated the passage by Congress of the act -- what is the



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1 name, the Protected National Defense --

2 MR. ABDO: The Protected National Security Documents  
3 Act.

4 THE COURT: Yes. That should be applied. I cannot  
5 conduct the evaluation that you want. The certifications are  
6 there. I just read that particular certification. The other  
7 criteria of the law is that the photographs were taken during  
8 the period beginning on September 11<sup>th</sup>, 2001 through  
9 January 22, 2009, and relate to the treatment of individuals  
10 engaged, captured, or detained after September 11, 2001, by the  
11 armed forces of the United States and operations outside of the  
12 United States. There's no serious question that the  
13 photographs, each of the 2,000, qualify, is there?

14 MR. ABDO: We have the Secretary's representation but  
15 that's it, your Honor.

16 THE COURT: You do not --

17 MR. ABDO: We're not contesting that, your Honor.

18 THE COURT: You're not. I think it's enough.

19 Mr. Abdo, I'm sympathetic to your argument, but I  
20 think I have to follow this.

21 MR. ABDO: Your Honor, if I could make just one point.

22 THE COURT: Yes.

23 MR. ABDO: It seems that the primary motivation is the  
24 court's belief that Congress has conclusively acted, and I'd  
25 just like to push back up against that a little bit.

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1 THE COURT: You may.

2 MR. ABDO: Congress could easily have written a  
3 statute that would have prohibited the disclosure of these  
4 photographs without the availability of any judicial review of  
5 a determination of harm. It could, for example, have drafted a  
6 statute like the CIA Act, which protects the operational files  
7 of the CIA without any intervention of a court; it could have  
8 protected these photographs in the same way it protects  
9 information provided by census takers, which is protected in  
10 the Census Act, or to visa applicants, protected by the U.S.  
11 Code. Instead it seeks to hinge its holding on the  
12 determination of harm, and that determination of harm, under  
13 hornbook law of FOIA, is an Exemption 3 criterion that is  
14 subject to judicial review. And at this point there's simply  
15 no record before the court to allow that type of review. The  
16 Secretary's certification, with all due respect to the  
17 Secretary, is nothing more than a recitation of the statutory  
18 language. It provides no explanation for its determination of  
19 harm; it doesn't explain anything about the contents of the  
20 2,000 photographs. It may very well be that some of them are  
21 withholdable for the reasons that the court provided, but we  
22 simply don't know whether all 2,000 of them are or whether all  
23 2,000 have the same type of content that would, you know,  
24 self-evidently cause the type of harm that the court has  
25 discussed. And that's because we simply have no record of what

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1 the photographs are. We don't know even how many there are  
2 conclusively from the government. We don't know where they  
3 were taken, and we don't know what they show. Without that  
4 type of record, the Secretary's conclusory statement that  
5 disclosing them would cause a harm is entirely unreviewable.  
6 It would simply be wholesale deference without any other type  
7 of review that FOIA calls for to ratify that withholding  
8 without, at the very least, satisfying the procedural  
9 requirements of FOIA.

10 And to be frank, it's a very modest request, your  
11 Honor. We're simply asking that the government provide what it  
12 does, even in all of the national security cases that your  
13 Honor was talking about. Even in the *Glomar* context, even in  
14 the Exemption 1 and national security Exemption 3 context.  
15 Even in those contexts, the government provides a Vaughn  
16 declaration and it provides an index that describes the  
17 withheld records in as much detail as possible without  
18 compromising the interests that it is trying to protect. It  
19 has yet to do that here, and the only basis we can discern for  
20 that judgment is that the government thinks the statute has  
21 legislated the withholding of these photographs, but that is  
22 emphatically not the case. Congress did not enact the type of  
23 categorical ban that it has done in so many contexts. It  
24 hinged withholding on specific criteria -- criteria that are  
25 reviewable by courts' determinations of harm, that, albeit

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1 often reviewed in the context where deference is appropriate,  
2 are reviewed nonetheless on the basis of a record provided by  
3 the government. And here all we have is a declaration that  
4 recites the photographs, and upon that record, we think it  
5 would be improper for the court to uphold the withholding of  
6 the photographs without more.

7 THE COURT: Thank you.

8 Ms. La Morte?

9 MS. BARCELO: Actually, Ms. Barcelo.

10 THE COURT: Ms. Barcelo. Sorry.

11 MS. BARCELO: No problem, your Honor.

12 THE COURT: Whenever I become familiar with the  
13 assistants, you switch on me.

14 MS. BARCELO: Yes. I understand. The court --

15 THE COURT: Should the government have issued a Vaughn  
16 declaration?

17 MS. BARCELO: There is no requirement for a Vaughn  
18 index -- declarations or index here, your Honor. The basis --  
19 as your Honor noted, this case has a unique history, or this --  
20 the coming about of this statute.

21 THE COURT: I'm not sure it's unique, but it sure is  
22 extensive.

23 MS. BARCELO: Yes. Well, I do think -- I mean, I  
24 think the issue of these specific photos has a unique history,  
25 and it resulted in an enactment of a unique statute. As a

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1 result of the enactment of the Protected National Security  
2 Documents Act, we're now operating under FOIA Exemption 3.  
3 That's the basis under which the government is withholding  
4 these documents. And FOIA Exemption 3 is different from the  
5 other FOIA exemptions under which this court has previously  
6 considered the documents -- these photographs. Excuse me.

7 FOIA Exemption 3 requires only that a statute be a  
8 FOIA Exemption 3 statute. Here plaintiffs argue that it is,  
9 and that the document -- secondly, that the documents fall  
10 within the scope of that statute. Here the government's  
11 argument, the basis for the withholding -- the basis for the  
12 documents -- the photographs falling within the scope of the  
13 statute is the existence of the Secretary's certification which  
14 fulfills all of the requirements of the statute, because each  
15 and every one of the photographs falls within the scope of this  
16 certification --

17 THE COURT: How do we know that?

18 MS. BARCELO: We know that because the certification  
19 says so, your Honor. The certification refers specifically to  
20 the photographs that are, I quote, "contained in or derived  
21 from records of investigations of allegations of detainee  
22 abuse," including the records -- including the records of  
23 investigation, process and release in this very case, citing  
24 the index number for this very case.

25 THE COURT: Well, the statute seems to make a

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1 distinction between the certificate, which is that disclosure  
2 would endanger citizens of the United States, etc., and that  
3 the photograph qualifies objectively. They're two different  
4 criteria, and I don't think we can accept the certificate to  
5 cover each and all of the photographs.

6 MS. BARCELO: I'm sorry. I'm not sure that I  
7 understand the question.

8 THE COURT: The certificate has to do with danger to  
9 persons.

10 MS. BARCELO: That's correct.

11 THE COURT: The photographs are qualified documents  
12 under the act if they were taken during a certain period and if  
13 they related to treatments engaged, captured, or detained by  
14 the United States armed forces. So I can't accept the  
15 certificate as conclusively saying that each of these 2,000  
16 photographs qualifies under subsection (b) of the act.

17 MS. BARCELO: The certificate does also address both  
18 of those points.

19 THE COURT: But I can't accept that. The law does not  
20 require me to accept that. It requires me to accept the point  
21 of danger. It doesn't require me to accept that these  
22 photographs were taken during a certain period and related to  
23 certain individuals.

24 MS. BARCELO: As an initial matter, plaintiffs are not  
25 disputing that either one of those criteria are met here, and I

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1 do think the Secretary's certification, which is issued by the  
2 Secretary of Defense himself, does speak precisely to both of  
3 those issues, the time period during which the photographs were  
4 taken.

5 THE COURT: I don't think that's relevant. That's not  
6 what the statute says. I do think it would be an idle act to  
7 go over each of these 2,000 photographs to see if they qualify  
8 under this period. We won't know from the photograph  
9 necessarily exactly when it was taken, although they may be  
10 time stamped. We will be able to see from each of the  
11 photographs what they relay. And I think for the purposes of  
12 this motion, we don't have to go into that exercise, but I do  
13 not hold that the government's certificate is conclusive on the  
14 aspect of subsection (b).

15 MS. BARCELO: Thank you, your Honor.

16 THE COURT: Let's talk a little bit about *Long* and  
17 *A. Michael's Piano*, two cases that are cited by the plaintiffs.  
18 In *Long*, what was sought are standards used or to be used for  
19 the selection of income tax returns for examination or that  
20 they used for determining such standards. In other words, what  
21 the applicant wanted to know was what criteria did the IRS use  
22 in deciding which returns were audited; a valuable piece of  
23 information for taxpayers.

24 The government argued that disclosure would qualify  
25 under the act, that it authorized these kinds of criteria and



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1 data, to establish those criteria, to be exempted from  
2 disclosure.

3 The Court of Appeals in the Ninth Circuit held that  
4 the court had to make that determination. The case is not  
5 binding on me, since we sit in the Second Circuit, and I don't  
6 think I would agree with the Court of Appeals in the Ninth  
7 Circuit. I think this kind of information is inconsistent with  
8 the effective tax administration. But that would be on the  
9 substance. I could understand a rule that says a district  
10 judge has to delve into it because these are the kinds of  
11 things that judges are aware of. You have to understand.

12 For the reasons I expressed before, I don't think we  
13 have a very good understanding of what may or may not be  
14 dangerous on the battlefield in the crazy conditions that exist  
15 in Iraq at this point in time. And even there, the history of  
16 what's involved, with which I've become as familiar as almost  
17 any person outside the CIA or the Department of Defense, shows  
18 to me that the Secretary of Defense has a rational basis for  
19 how he wishes to conclude. I might disagree with him. I might  
20 agree that the core values of FOIA are more important and more  
21 cogent. In fact, I expressed those views. But I cannot say  
22 that there is a lack of a rational basis for what Secretary  
23 Gates has certified, and if you want me to do a *de novo* review,  
24 I've done it, by reason of my familiarity with the case, and  
25 that's as far as I'll go. I will not opine that there is or is

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1 not a danger in the battlefield because of the disclosure of  
2 pictures of this sort. And I should say that issuing the  
3 rulings I did was probably the most difficult judicial decision  
4 that I've had to do in 12 years. We put people in the line of  
5 fire every day. Regardless of whether we agree or disagree  
6 with one or more aspects of national policy, we cannot gainsay  
7 the fact that these are very brave soldiers and sailors and  
8 airmen who carry out very dangerous missions every day to  
9 protect the United States and advance its policies. And it's a  
10 very difficult act on the part of a district judge to arrogate  
11 the function of deciding what measure of danger is permissible  
12 and what not.

13 So I will not do the *de novo* review except to the  
14 extent of looking for the rational basis of what the Secretary  
15 of Defense has done, and I've done that.

16 Before leaving, there's just one other case I wanted  
17 to discuss with you, and that's *A. Michael's Piano v. FTC*. Can  
18 you tell me a little bit about that case. That's a Second  
19 Circuit decision.

20 MS. BARCELO: Certainly, your Honor.

21 In that case, that was an Exemption 3 FOIA case,  
22 similar to this -- the issues that we are now discussing. *A.*  
23 *Michael's Piano*, of course, dealt with a different Exemption 3  
24 withholding statute than what we're talking about here. But  
25 the fundamental issue that the Second Circuit was addressing

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1 here was, how do we determine whether or not a record is  
2 protected under Exemption 3? Do we interpret the statute  
3 using, you know, different principles of statutory  
4 interpretation when considering it as a FOIA Exemption 3  
5 statute than we would for any other sort of -- any other  
6 statute that has been enacted by Congress?

7           It looks at, in considering -- excuse me. In  
8 considering the different ways that a FOIA Exemption 3 statute  
9 could be interpreted, the Second Circuit looks at the ways  
10 other -- other circuits -- excuse me -- had interpreted 6103 of  
11 the Internal Revenue Code, which is the statute the plaintiffs  
12 argue we should interpret the PNSDA in a manner similar. What  
13 the Second Circuit held was that in those cases, where other  
14 circuits had argued or had held that principles of FOIA *de novo*  
15 review should be imposed upon the interpretation of the scope  
16 of the FOIA Exemption 3 statute and other circuits had argued  
17 or had held that APA principles of arbitrating capricious  
18 review should be imposed upon the interpretations of the scope  
19 of the Exemption 3 statutes, the Second Circuit considered both  
20 of those options and rejected them. Instead, the Second  
21 Circuit held, in light of the Supreme Court precedent in the  
22 *CIA v. Sims* case -- which I know the court is very familiar  
23 with, as it's come up a number of times in the previous case --  
24 it held that a FOIA Exemption 3 statute could only be  
25 interpreted according to its plain language, its plain meaning,

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1 taking into account its structure, its purpose, and the  
2 legislative history of the statute, with the ultimate goal of  
3 determining Congressional purpose in enacting the statute and  
4 determining what Congress intended. Did Congress intend for  
5 the types of documents that we're talking about here to be  
6 protected under this statute. Here, there is no question that  
7 that is what Congress is intending with respect to the  
8 photographs at issue here. That I think is what we can -- the  
9 sense in which *A. Michael's Piano* was instructive, that a FOIA  
10 Exemption 3 statute should be interpreted in the same manner as  
11 any other Congressional enactment, on its own terms, its own  
12 plain language, and Congressional intent on enacting the  
13 statute.

14 THE COURT: The Second Circuit held -- this is a 1994  
15 case -- that the burden of proof on *de novo* judicial review  
16 rests with the agency asserting the exemption. What did  
17 Secretary Gates have to do? Was his certificate sufficient?

18 MS. BARCELO: His certificate -- certification  
19 absolutely was sufficient.

20 THE COURT: Because that's what the statute says.

21 MS. BARCELO: Because that's what the statute  
22 requires; exactly, your Honor. The statute requires --

23 THE COURT: And clearly the materials withheld fall  
24 within the scope of the statute.

25 MS. BARCELO: That's exactly right, your Honor.

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1 THE COURT: And that's the end of the inquiry.

2 MS. BARCELO: That is also exactly right.

3 THE COURT: Anything else?

4 MS. BARCELO: Unless the court has any further  
5 questions.

6 THE COURT: No. Thank you.

7 MS. BARCELO: Thank you.

8 THE COURT: Do we have any legislative history that  
9 commands judicial review to a greater extent than I've  
10 expressed?

11 MS. BARCELO: There is none, your Honor.

12 THE COURT: Last word, Mr. Abdo?

13 MR. ABDO: Yes, your Honor. Respectfully, the inquiry  
14 about judicial review isn't whether Congress has expressed an  
15 intent to maintain the default rule of judicial review under  
16 FOIA. The inquiry under *Long* and all of the other -- the vast  
17 majority of the circuits to consider a question similar to this  
18 is whether Congress has tried to negate judicial review or get  
19 rid of it. In this context it hasn't. It has left FOIA as it  
20 stands --

21 THE COURT: It says nothing about judicial review.

22 MR. ABDO: That's exactly right. That's --

23 THE COURT: It says nothing about what standards of  
24 inquiry the court should look to.

25 MR. ABDO: That's the case with all Exemption 3

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1 statutes, your Honor. Not a single one expresses a view on  
2 whether the traditional FOIA review should apply, and the only  
3 context in which Congress does express a view in those cases is  
4 when it does try to extract a withholding statute from the  
5 purview of FOIA, which Congress has not done here. And even  
6 today the government concedes for the first time that the  
7 proper framework is Exemption 3. And so it seems to us that  
8 the only real question is whether a criterion under the statute  
9 for withholding is that the Secretary determined harm or, as  
10 your Honor has said a couple times, whether the Secretary  
11 merely needs to certify that harm would exist. We think that's  
12 a distinction without a difference. The statute requires both.  
13 The only reason for the existence of a certification process  
14 was to allow Congress to impose a temporal limit on the  
15 certification, not to allow a single certification or a single  
16 determination of harm to preclude release of these photographs  
17 for all time. And the reason for that should be  
18 straightforward. These are records that obviously cut to the  
19 core of governmental transparency and to the core of the  
20 purposes of FOIA. And so Congress was careful not to enact a  
21 statute that allowed the withholding of these photographs on  
22 the basis of one determination, no matter how long ago made.

23 THE COURT: What's the time period I look to in  
24 deciding whether your request for FOIA disclosure were  
25 appropriate or not? As of today or as of the time you made the



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1 request?

2 MR. ABDO: I believe it's the government's burden to  
3 justify its withholding as of this moment. And that's  
4 consistent with how the court has, for example, treated  
5 withholdings under Exemption 7, where there are temporal  
6 considerations. So for example, when Special Prosecutor Durham  
7 withheld certain records under Exemption 7(a), the court asked  
8 for periodic updates that might affect the relevance of his  
9 withholding analysis at any given moment. And so I think the  
10 question is whether the Secretary's simple statement that the  
11 records should be withheld suffices to discharge the  
12 government's burden to demonstrate that there would be harm if  
13 the photographs were released today with respect to 2,000  
14 photographs which we know nothing about.

15 THE COURT: Okay. Thank you very much, Mr. Abdo.

16 I deny the plaintiff's motion for disclosure of these  
17 documents and hold that the government properly showed the  
18 applicability of Exemption 3 of the Freedom of Information Act,  
19 5 U.S.C. § 552(b)(3), and Section 565 of the Department of  
20 Homeland Security Appropriations Act 2010, Public Law No.  
21 111-83, 123, Statute 2142 and 2184-85 of 2009, better known as  
22 the Protected National Security Documents Act of 2009.

23 So I deny plaintiff's motion for disclosure and I  
24 grant the government's cross-motion for partial summary  
25 judgment.



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1           This controversy has a rather long history.  
2 Plaintiffs started the matter in October 2003 when they  
3 submitted a FOIA request to a number of federal government  
4 agencies, including the Department of Defense, and several  
5 components, seeking the release of all records concerning the  
6 treatment of detainees taken into United States custody after  
7 September 11, 2001, and held at military bases or detention  
8 facilities abroad.

9           This lawsuit, seeking to implement the FOIA request,  
10 was filed in June of 2004.

11           I examined *in camera* each of the photographs that were  
12 then in issue and I ordered that there be a redaction on most  
13 of these photographs to mask the identity of the detainee and,  
14 subject to such redaction, that most of these had to be  
15 disclosed.

16           My opinion in writing is *American Civil Liberties*  
17 *Union v. Department of Defense*, 389 F.Supp.2d 547 at 568-79,  
18 issued in 2005 and affirmed by the Court of Appeals at  
19 543 F.3d 59, decided in 2008, and then vacated after subsequent  
20 proceedings by the United States Supreme Court at  
21 130 U.S. 777 (2009).

22           These photographs, known as the Darby photographs,  
23 from the person who took them, further claim exemption under  
24 Exemption 6 and 7(c) of FOIA, 5 U.S.C. § 552(b)(6) and  
25 (b)(7)(C). It was argued by the government that release of the

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1 photographs would constitute an unwarranted invasion of  
2 personal property or privacy. It's very interesting to note  
3 that the government at that time did not argue any aspect of  
4 national security or endangerment of any military persons. I  
5 denied the government's motion because I reasoned the  
6 photographs had been redacted to eliminate all identifying  
7 characteristics of the persons shown.

8 The government added its Exemption 7(f) argument,  
9 arguing that publication of the Darby photographs would likely  
10 incite violence against our troops and Iraqi and Afghan  
11 personnel and civilians and that redactions would not avert the  
12 danger. I overruled that objection. That is reflected at  
13 389 F.Supp.2d at 574-79. After thorough review of all the  
14 precedents and all the photographs, I concluded that the core  
15 values that Exemption 7(f) was designed to protect are not  
16 implicated by the release of the Darby photographs but that the  
17 core values under which FOIA commands the disclosure were very  
18 much implicated. Accordingly, I ordered the government to  
19 release the Darby photographs.

20 Following that, a third party published the Darby  
21 photographs online, and that resulted in a withdrawal by the  
22 government of its appeal, at least as to the aspect of the  
23 Darby photographs.

24 However, more and more photographs came into being, or  
25 at least came out of hiding. It appears that there were an

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1 additional 29 photographs and two videos taken by individuals  
2 serving in Iraq and Afghanistan that the government believes  
3 were responsive to the FOIA requests. Again, the government  
4 claimed exemption under Section 6, 7(c), and 7(f).

5 On June 8<sup>th</sup>, 2006, I reviewed the 29 photographs  
6 *ex parte* and *in camera*, and that's reflected in an order,  
7 04-CV-4151, Document 193, June 9, 2006.

8 I just want to interject that at all times during this  
9 case I've been concerned to balance as properly as I could the  
10 commands of secrecy and national defense and the commands of  
11 publicity for a court record. I'm very much concerned that as  
12 a United States district judge, I should be accountable for all  
13 that I do, and at every step along the way I've tried to put on  
14 the public record as much as I could about the subject matter  
15 of my ruling and my rulings themselves. And some of this  
16 required a good deal of intensive negotiations and stubbornness  
17 with various government officials.

18 But in any event, I rejected the government's claimed  
19 exemptions for the same reasons I expressed earlier and I  
20 ordered the release of 21 of the 29 photographs, subject to  
21 redaction to eliminate all identifying facial features. And as  
22 to the other eight photographs, I ruled they were not  
23 responsive to the request. That order was issued, June 9,  
24 2006. It's Document 193. And it's also reflected in 2006 US  
25 District LEXIS 40894 at \*3-4.

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1           That was not the last of the photographs. By letter  
2 of June 29, 2006, the government advised that the Department of  
3 Defense had an additional 23 images of detainees and claimed  
4 exemptions on the same bases as before. However, it was  
5 clearly unnecessary to have further argument and further  
6 opinion writing on the subject because what I said earlier on  
7 several occasions the parties expected and I believe to be  
8 consistently applied so there was a stipulation that these 23  
9 would be governed by the rulings on the 21 for the purposes of  
10 the appeal that followed.

11           So the government appealed my orders for the 21 and  
12 the 29 photographs. On September 22, 2008, a unanimous panel  
13 of the United States Court of Appeals for the Second Circuit  
14 affirmed my order, directing the release of the photographs.  
15 *American Civil Liberties Union v. Department of Defense*,  
16 543 F.3d 59 (2d Cir. 2008), and that was vacated subsequently,  
17 and a hearing *en banc* was denied.

18           The government advised on April 23, 2009, that it  
19 would not seek certiorari review and that it was prepared to  
20 release the 21 and the 23 photographs. There may be somewhat  
21 different numbers, but there were two tranches of photographs  
22 that were involved. And the government added that it was  
23 processing for release a substantial number of other images  
24 contained in the CIC (Criminal Investigation Command) report  
25 that it disclosed during the pendency of the case. The

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1 government represented that it would process these other images  
2 in a manner consistent with the court's previous rulings on  
3 responsive images. Again, the government did not petition for  
4 certiorari.

5 The Second Circuit issued a mandate on April 27, 2009.

6 However, just a few weeks later, matters turned  
7 around. On May 13<sup>th</sup>, 2009, President Barack Obama stated  
8 publicly that he would oppose the release of additional  
9 detainee photographs. That followed -- and I'm not sure this  
10 is in the record or from my recollection of the news reports,  
11 but that followed an urgent request by the Prime Minister of  
12 Iraq to the United States government not to publish the  
13 photographs. The Prime Minister of Iraq, which had a more  
14 fragile governmental structure at the time than it is today,  
15 was concerned that the publication of these photos would fuel  
16 insurrection and make it impossible to have a functioning  
17 government. In reaction to that, President Obama expressed his  
18 belief that the publication of these photos would not add any  
19 additional benefit to the public's understanding of what was  
20 carried out in the past by a small number of individuals;  
21 rather, the most direct consequence of releasing the  
22 photographs, the President added, would be to further inflame  
23 antiAmerican opinion and to put our troops in greater danger.

24 Pursuant to the President's statements, on the  
25 application of the government, the Second Circuit granted the

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1 government's motion to recall the mandate and to stay the  
2 effect of the mandate pending disposition of a new petition for  
3 certiorari. The government filed a petition, and it was three  
4 months later that the Protected National Security Documents Act  
5 of 2009 was signed into law. The PNSDA specifically exempts  
6 from disclosure under FOIA any protected documents, defined as  
7 a photograph taken between September 11, 2001, and January 2,  
8 2009, relating to the treatment of individuals engaged,  
9 captured, or detained, after September 11, 2001, by the United  
10 States armed forces in their operations overseas, and for which  
11 the Secretary of Defense issued a certification stating that  
12 disclosure would endanger United States citizens, military  
13 personnel, or federal government employees. Subsequently, the  
14 Secretary of Defense, Robert M. Gates, issued a certification  
15 of November 13, 2009, addressing a collection of photographs  
16 between the indicated dates and relating to the subject matter  
17 of the law. The collection includes the 23 and 21, or 44,  
18 photographs that were involved in these proceedings. They do  
19 not affect the photographs that were, I think -- I'd like to  
20 confirm.

21 The first tranche of photographs that I ruled on are  
22 out in the public domain, are they not, Mr. Abdo?

23 MR. ABDO: I believe so, your Honor.

24 THE COURT: So we're talking about the second tranche,  
25 third tranche, and the fourth tranche documents?



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1 MR. ABDO: Yes.

2 THE COURT: Do you agree, Ms. Barcelo?

3 MS. BARCELO: I do, your Honor.

4 THE COURT: And I mentioned before on the record the  
5 basis that was cited by Secretary Gates and my ruling that,  
6 given the history of how this came about, it was clear to me  
7 that Secretary Gates had a rational basis for his  
8 certifications and that I could not second-guess it, and  
9 notwithstanding the statement made this week by the ACLU, no  
10 one really wants me to conduct a second review of that which is  
11 in the purview of the Secretary of Defense, beyond looking for  
12 a rational basis the way it did. I find that rational basis.

13 On November 30, 2009, continuing with the history of  
14 the case, the United States Supreme Court granted the  
15 government's petition for certiorari, vacated the Second  
16 Circuit's judgment, and remanded for further consideration, in  
17 light of the enactment of the Protected National Security  
18 Documents Act and the certification of the Secretary of  
19 Defense. 130 U.S. 777 (2009).

20 In turn, the Second Circuit vacated my orders and  
21 remanded for further proceedings. And thus I'm blessed with  
22 another appearance by everyone in this courtroom.

23 So I've expressed my holdings in the discussions we've  
24 had. I hold that Exemption 3 makes clear that an agency need  
25 not disclose records that are, by separate qualifying statute,



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1 specifically exempted from disclosure, and that separate  
2 qualifying statute is the Protected National Security Documents  
3 Act. I hold that the government has satisfied its burden to  
4 support the claimed Exemption 3 from disclosure, and that was  
5 the holding of *A. Michael's Piano, Inc. v. FTC*, which we  
6 discussed earlier today, 18 F.3d 138, 143 (2d Cir. 1994),  
7 implementing 5 U.S.C. § 552(a)(4)(D).

8 I've expressed my disagreement, as applied to the  
9 proceedings before me, of *Long v. United States Internal*  
10 *Revenue Service*, 742 F.2d 1173 (9th Cir. 1984), and I don't  
11 need to elaborate further.

12 And the Second Circuit held, in *A. Michael's Piano*,  
13 which I previously cited, following the Supreme Court decision  
14 in *CIA v. Sims*, 471 U.S. 159, that we look in all statutes to  
15 the plain language of the statute and its legislative history  
16 in order to determine its legislative purpose. The legislative  
17 purpose here was to provide authorizing legislation to support  
18 the President's determination that these images should not be  
19 disclosed, should be exempt from FOIA.

20 We saw before the statements in the Congressional  
21 record of Senator Lieberman and Senator Graham, who sponsored  
22 the bill. There is no legislative history suggesting any  
23 further *de novo* review or any kind of review by the court. The  
24 legislative history is not helpful. The language of the  
25 statute makes clear what has to be done in terms of qualifying

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1 for exemption, that is, the certificate of which we spoke  
2 before by the Secretary of Defense and the objective criteria  
3 of the photographs, 2,000 photographs qualifying by date and by  
4 relation to the criteria of the statute. So therefore I hold  
5 that the photographs now in question are not subject to  
6 disclosure under FOIA.

7 It seems to me that as a judge, my obligation is to  
8 follow the law. We're not involved with the constitutional  
9 determination; we're involved with the application of statutory  
10 law, where, as here, the Executive branches and the Legislative  
11 branches have spoken clearly as to the appropriateness of  
12 exempting these photographs. My job as a judge is to follow  
13 and not arrogate my own thinking and policy considerations and  
14 derogations of the Legislative and Executive branches, which,  
15 after all, have the job of making laws that I have to implement  
16 and that pertain to the national defense.

17 Accordingly, the government's sixth motion for partial  
18 summary judgment is granted.

19 Plaintiff's sixth motion for partial summary judgment  
20 is denied.

21 The clerk shall mark the motions, Documents Number 443  
22 and 456, terminated. These are my findings and conclusions.

23 Thank you very much.

24 ALL COUNSEL: Thank you, your Honor.

25 o0o