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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 AMERICAN CIVIL LIBERTIES UNION,
4 UNION, et al.,

5 Plaintiffs,

6 v. 04 CV 4151 (AKH)

7 DEPARTMENT OF DEFENSE,

8 Defendant.

9 -----x
10 New York, N.Y.
11 September 30, 2009
12 4:30 p.m.

11 Before:

12 HON. ALVIN K. HELLERSTEIN
13 District Judge

14 APPEARANCES

15 AMERICAN CIVIL LIBERTIES UNION FOUNDATION

16 Attorneys for Plaintiffs

17 BY: JAMEEL JAFFER
18 ALEXANDER ABDO

19 -and-

20 GIBBONS P.C.
21 BY: LAWRENCE S. LUSTBERG
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24 United States Attorney for the
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1 (Case called)

2 THE COURT: When confronted with the chores of today,
3 I'm thinking of how to proceed. It seemed to me that I would
4 be called upon to review a large number of documents, and it
5 was not enough to rule from the abstract, but that I also would
6 have to rule in a specific, and that meant seeing the
7 documents.

8 Since the documents involved were classified
9 documents, classified according to various degrees of secrecy
10 and sensitivity and compartmentalization, it would have to be
11 done in camera. And some of the documents that I read were
12 documents that were above the classification clearance of my
13 law clerk so I read them alone. I read the entire two
14 memoranda of the Office of Legal Counsel, both the redacted and
15 the unredacted part, and I am prepared to make rulings on
16 those.

17 With regard to the fifth summary judgment, that having
18 to do with documents describing the contents of the destroyed
19 videotapes, a 65-document sample was prepared and Mr. Lane and
20 Ms. McShain will describe the methodology of the sampling.

21 I sampled the sample, first reading entirely the
22 documents suggested by Mr. Lane and Ms. McShain and then at
23 random picking out other documents, just wherever my fingers
24 went and reading those as well. And I was prepared on the
25 basis of that to make rulings with -- I think they were 53 of

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1 the 65 documents -- and then I read additional documents that
2 will be described to you.

3 A transcript was prepared. Because of the logistics,
4 I could not say in the course of making my rulings and making
5 my observations that part would be public and part would be
6 non-public and sealed. So what was possible and practical was
7 to treat the entire transcript as classified, with the idea
8 that the government would review the transcript, subject to my
9 review as well, and unclassify the transcript to the greatest
10 extent possible or with a view of making the record as public
11 as was possible. So that was the methodology used.

12 And what I propose to do now is ask the government to
13 describe my rulings with regard to the two memoranda of the
14 four released memoranda prepared by the Office of Legal
15 Counsel, page by page, so that they can be followed. You will
16 see that, in one respect, repeated a number of times throughout
17 the memoranda, I ruled in favor of disclosure but gave the
18 government two weeks to take up my rulings which I described as
19 tentative with effectiveness delay. So after two weeks I would
20 get a submission from the government, either agreeing to the
21 production that I ordered or giving me stronger arguments for
22 maintenance of classification.

23 Mr. Lane, Ms. McShain, have I given an accurate
24 summary of that which we did in camera?

25 MR. LANE: That's correct.

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1 THE COURT: It is now 4 o'clock. We took a 10-minute
2 break. We started at 2 o'clock, so this was a session of an
3 hour and 15 minutes.

4 Before we begin, Mr. Jaffer, any comments?

5 MR. JAFFER: Your Honor, Alex Abdo, my colleague will
6 be handling the fifth summary judgment motion today, and
7 Jennifer Brooke Condon is going to handle the issues relating
8 to the memos, so I would respectfully defer to them on these
9 questions.

10 THE COURT: I am generally asking for a comment as to
11 procedures thus far, whether you understand them.

12 MR. JAFFER: I think we understand them, your Honor.
13 We appreciate your willingness to look at the documents in
14 camera and, obviously, if we have concerns we will raise them
15 as we go through the process today.

16 THE COURT: I will call on the government, I guess,
17 Mr. Lane to describe the procedures that we used and the
18 rulings that I made and with regard to the two memoranda.

19 MR. LANE: Your Honor, Ms. McShain is going to handle
20 the two OLC memoranda, and I will get up and walk through the
21 Court's ruling on the sample of 16.

22 MS. McSHAIN: Your Honor, with respect to the two OLC
23 memos that are at issue in the support motion for summary
24 judgment, what we have referred to in the briefing as the
25 second OLC memo which is the 46-page May 10, 2005 memo, your

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1 Honor has upheld the CIA's redaction of the names and dates of
2 capture of certain detainees that appear on pages 15 through 16
3 and page 41.

4 Your Honor has already upheld the CIA's withholding of
5 the names, titles and other identifying information of the
6 individuals consulted by the CIA that appear on page 29 of the
7 second OLC memo in footnote 33.

8 Also, within the second memo is an intelligence method
9 that appears on pages 5 and 29, and it is this intelligence
10 method that your Honor has given us a two-week period to
11 respond to his preliminary ruling.

12 THE COURT: I don't think that I characterized it that
13 way.

14 MS. McSHAIN: Your Honor, we characterized it as the
15 CIA withheld it as an intelligence method.

16 THE COURT: Yes, but I withheld it as to the source of
17 the document. I made my ruling because, in my opinion, it was
18 not a descriptive of the method but rather of the source of
19 authority.

20 MS. McSHAIN: So your Honor's preliminary ruling then
21 with respect to the source of authority that appears on pages 5
22 and 29 of the second memo.

23 THE COURT: Yes.

24 MS. McSHAIN: With respect to the May 30, 2005 OLC
25 memo which the government refers to as the fourth OLC memo in

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1 its briefing --

2 THE COURT: Before we go on, are there questions?

3 MR. JAFFER: No, your Honor.

4 MS. McSHAIN: With respect to the fourth OLC memo, the
5 Court has upheld the CIA's withholding of names and dates of
6 capture of certain detainees that appear on pages 5 through 8,
7 11 and 29.

8 The Court has also upheld the CIA's withholding of the
9 standard interrogation policy that appears in footnote 29 of
10 the fourth memo.

11 THE COURT: What page?

12 MS. McSHAIN: Your Honor, I'm sorry. I just need to
13 look for the page.

14 THE COURT: 32.

15 MS. McSHAIN: 32. So it is footnote 29, page 32 of
16 the fourth memo.

17 The Court has also upheld the CIA's withholding of the
18 intelligence method that appears on page 11 of the fourth OLC
19 memo.

20 And then, finally, the Court has made a preliminary
21 ruling with regard to the source of authority that appeared on
22 pages 4 through 5 and page 7 of the fourth OLC memo ordering
23 the CIA to disclose that source of authority, but has granted
24 the government two weeks in which to respond to that
25 preliminary ruling.

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1 THE COURT: Thank you, Ms. McShain.

2 Before we get to the fifth summary judgment -- is that
3 what you are rising for, Mr. Lane?

4 MR. LANE: Yes, your Honor.

5 THE COURT: Let's stop here.

6 How does the plaintiff wish to proceed?

7 MS. CONDON: Your Honor, if the Court will consider
8 it, plaintiff would like to be heard with respect to the two
9 categories of information that the Court has withheld, detainee
10 names and the names of contractors consulted by the CIA. I
11 understand that your Honor has already made these rulings, but
12 to the extent they may be preliminary in any way --

13 THE COURT: I should have said that you have a
14 position, and I made my ruling without your involvement or
15 presence and so I would like you to argue your point if you
16 wish to.

17 MS. CONDON: Yes, your Honor.

18 With respect to detainee names, your Honor, the issue
19 raises a question of exceptional public importance which this
20 Court nor any other court has addressed before. And that is
21 whether the CIA may conceal a detainee's name under Exemptions
22 1 and 3 of FOIA as an intelligence source or method where the
23 identity of the detainee and the fact of his detention have not
24 been previously disclosed.

25 This Court should reject the government's

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1 justification for withholding because to do so would sanction
2 the government's ongoing violation of the law in allowing the
3 secrecy that is fundamental to the unlawful practices of secret
4 detention and forced disappearance to continue.

5 THE COURT: Secret detention and --

6 MS. CONDON: -- forced disappearance to continue.

7 Your Honor, the inference here is governed by the U.S.
8 Supreme Court's decision in CIA v. Sims. Contrary to the
9 government's arguments in their brief that plaintiffs are
10 asking the Court to engage in far-ranging inquiry into the
11 legality of the CIA's program, that is not the case.

12 The Supreme Court in Sims stated that, when the
13 government withholds information from disclosure under
14 Exemption 3 as an intelligence source or method, the Court must
15 engage in a two-step analysis. The first part of that analysis
16 is simply whether a withholding statute has been properly
17 invoked. That is not a disputed issue here. Plaintiffs agree
18 that the withholding statutes are appropriate. But the second
19 step of that step is critical, and that is whether or not the
20 intelligence source or method is within the CIA's mandate,
21 essentially, whether or not the information that is being
22 withheld fits within the withholding statute, and that is the
23 critical point here.

24 Because Congress could never have intended to
25 authorize unlawful conduct, such fundamentally unlawful conduct

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1 as secret detention and enforced disappearance, it cannot be
2 the case that these practices are within the CIA's mandate and
3 therefore protectable as intelligence sources and methods under
4 Exemption 103.

5 To be clear, your Honor, this is not an unprecedented
6 analysis. It is simply the analysis that the court followed
7 and set forth in Sims, and other District Courts have followed
8 this analysis and have made determinations that specific
9 information was not within the CIA's mandate. This is a
10 standard analysis of Congressional intent under the withholding
11 statute, the National Security Act and the CIA Act of 1949
12 which courts have recognized are not simply withholding
13 statutes, but they are essentially the CIA's mandate. They set
14 forth the purpose of the CIA. They set forth its functions,
15 and nowhere within that statute is the CIA authorized to engage
16 in unlawful conduct of this nature.

17 Those District Court cases I mentioned, your Honor,
18 one of them is from this court, the Southern District of New
19 York, although in Navasky v. CIA, the court held or suggested
20 that illegality of a program in general would not defeat a
21 withholding of an otherwise lawful intelligence source.
22 Nevertheless, the court still went on to that second step that
23 we are urging the Court to engage in here, and that is whether
24 or not the intelligence sources or methods in that case were
25 within the CIA's mandate.

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1 Significantly, the court found that they were not.
2 And in that case the information or the techniques that were
3 sought to be protected were innocuous techniques -- some view
4 as innocuous techniques -- such as the publishing of books or
5 propaganda. Looking at the statute, the court found that there
6 was no source of authority for the CIA to engage in those
7 activities. Actually, it was a circuit court case, and the
8 D.C. Circuit similarly held that the CIA had no authority
9 within its mandate to engage in domestic intelligence
10 activities. The court engaged in a Sims-like analysis, looked
11 at the withholding statute and said, this is simply not conduct
12 that is within the CIA's power. That is simply what plaintiffs
13 suggest that the Court do here.

14 But it is significant, it would be extraordinary for
15 this Court to find that Congress had authorized the CIA to keep
16 detainees' names secret. And that is because the act of
17 separating a detainee from all legal process and leaving them,
18 basically, in the status of being a disappeared could not be
19 countenanced by Congress because it is unquestionably unlawful.
20 It is violative of the Geneva Convention. It is violative of
21 several special international law statutes, and it is violative
22 of the Detainee Treatment Act of 2005 and, specifically, the
23 McCain amendment in which Congress specifically held that the
24 CIA was not exempt from certain basic guarantees of humane
25 treatment, of which subjecting somebody to secret detention and

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1 enforced disappearance, clearly, would not comply with that
2 guarantee.

3 And for all of these reasons, your Honor, the act of
4 secret detention which the continued secrecy of these names
5 continues could not be countenanced by Congress, and this Court
6 should hesitate before it concludes that the sources and
7 methods that the CIA seeks to protect here are within the CIA's
8 mandate --

9 THE COURT: Should that inquiry be made within a FOIA
10 application?

11 MS. CONDON: Yes, your Honor. It must be made within
12 a FOIA application.

13 THE COURT: What is your source for that?

14 MS. CONDON: That is Sims.

15 THE COURT: What is the language in Sims on which you
16 rely?

17 MS. CONDON: Your Honor, this is at page 169 in Sims:
18 "After the court finds that the withholding statutes are in
19 fact legitimate withholding statutes, the court then goes on to
20 say, the plain meaning of 102(d)(3)" --

21 THE COURT: Let me catch up with you. I am at 169.
22 Go ahead.

23 MS. CONDON: "The plain meaning of Section 102(d)(3)
24 may not be squared with any limiting definition that goes
25 beyond the requirement that the information fall within the

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1 agency's mandate to conduct foreign intelligence."

2 Your Honor, it is true here. The Court did not find
3 that the agency exceeded its mandate. It states that there is
4 a requirement that the information fall within the CIA's
5 mandate. And based on this language and the way other District
6 Courts have interpreted Exemption 3 withholdings, plaintiffs
7 submit that the Court must evaluate whether or not the CIA has
8 authority to engage in this activity.

9 THE COURT: Tell me what in the statute says I should
10 be doing that? Let's start with what is the CIA mandate. What
11 is the mandate of the CIA?

12 MS. CONDON: Your Honor, this mandate of the CIA comes
13 from two sources. Both of them are the withholding statute
14 here. That is Section 6 of the CIA Act and Section 403-1(I)(1)
15 of the National Security Act. These are the provisions that
16 are the withholding provision. But within the larger context
17 of those two statute it --

18 THE COURT: Let's start with the narrative. What in
19 the language of either authority tells me that I should be
20 examining the legality or illegality of the intelligence
21 gathering?

22 MS. CONDON: Your Honor, it sets forth the obligations
23 of the director of national intelligence, and this is Section
24 403, to be responsible for protecting intelligence sources and
25 methods from unauthorized disclosure.

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1 Then, if you continue on to Section 403-3, it sets
2 forth the duties of the director of national intelligence and
3 it states that the function of the director of national
4 intelligence is to assist in carrying out the duties and
5 responsibilities of the director.

6 In another provision, your Honor, it states that the
7 CIA may engage in the collection of intelligence through human
8 sources and by other appropriate means.

9 It states that the CIA can correlate and evaluate
10 intelligence related to the national security and provide
11 overall direction for and coordination for the collection of
12 national intelligence.

13 It goes on in a similar way to set forth what it is
14 that the CIA can do.

15 Your Honor asked where does it state that the Court
16 must evaluate the legality, well, it doesn't state that the CIA
17 can only engage in legal methods, but plaintiffs submit, your
18 Honor, that is implicit in the Congressional enactment.
19 Congress would never have authorized the CIA to break
20 preexisting law without being specific that it was intending to
21 do so.

22 THE COURT: I don't think I can speculate.

23 MS. CONDON: Your Honor, while other courts have noted
24 that the legislative history informing these withholding
25 statutes is not necessarily clear what intelligence sources or

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1 methods mean, even in cases which the government relies on in
2 their briefs where the courts recognize that general claims of
3 illegality with respect to a specific program would not defeat
4 an otherwise lawful exception, those courts have still
5 expressed reservation about the government's argument here that
6 the method would be subject to withholding if it is unlawful,
7 in and of itself.

8 Plaintiffs have been unable to identify a single case
9 in which a court upheld the withholding of a method that was
10 clearly or unquestionably unlawful. And I don't believe that
11 the government has identified any as well. Rather, the line of
12 cases the government relies on are very different in kind.
13 Those cases suggest that whether or not a program of
14 intelligence gathering is unlawful would not prohibit the
15 government from withholding an otherwise legitimate and needed
16 and lawful method. And those cases, many of them arising in
17 the context of a terrorist surveillance program, the courts
18 recognize that though the implementation of the techniques may
19 have been done in an unlawful way because the government didn't
20 obtain a warrant and didn't seek the approval of the FISA
21 court, even though that may or may not have been illegal, the
22 government was still seeking to withhold legitimate methods,
23 the ability to intercept communications electronically, signals
24 intelligence. But there was a distinction, none of the cases
25 that the government has cited to the Court is a matter where

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1 the intelligence method itself would be clearly prohibited by
2 law, and that is the case here.

3 THE COURT: It is hard to argue on the basis that
4 there are no cases because there are no cases dealing with
5 either. I have a reluctance in the context of a FOIA
6 application to base my ruling on whether something should be
7 disclosed or not disclosed or having to define "legality" or
8 "illegality."

9 MS. CONDON: If I could respond to your last comment,
10 both Sims and Navasky were cases that arose in the FOIA
11 context, and the court looked at whether or not the conduct was
12 within the mandate.

13 THE COURT: The mandate is to gather intelligence.
14 The Supreme Court pretty well -- the extension of the quotation
15 to which you refer discusses the mandate historically. It
16 comments that it was enacted shortly after World War II. It
17 discusses that it was enacted because it was considered that
18 the tragedy in Pearl Harbor was based, in large part, on
19 deficiencies in American intelligence then and even during the
20 course of the war. And Congress authorized the executive to
21 gather and analyze intelligence, in peacetime as well as in
22 war, and noted that it had to be improved.

23 And the court goes on to note that intelligence had to
24 be gathered from almost an infinite variety of diverse sources,
25 that there was a need to shepherd and analyze massive

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1 information in order to safeguard national security in a
2 postwar world. The practical realities of intelligence were
3 noted by the committee. They quoted Admiral Nimitz, who was in
4 charge of our naval forces during World War II, and he had a
5 five-star ranking. This affected intelligence as a composite
6 of authenticated and evaluative information covering not only
7 the armed forces' establishment of a possible enemy, but also
8 industrial capacity, racial traits, religious beliefs and other
9 related aspects. Again, Allen Dulles was quoted about the
10 diverse nature of intelligence sources, etc.

11 I am not able to comment, particularly in the context
12 of FOIA, on the nature of legality or illegality in the
13 development of intelligence. That has been a subject of
14 intense comment and discussion for sometime in our nation. And
15 I have very strong personal views on the subject as well. But
16 those personal views, I think, have to be cabined in and put
17 into the context of my thoughts and thinking and activities as
18 a private citizen, not as a judge. There is nothing that I
19 read in the Act that compromises the mandate of intelligence
20 gathering. The post-9/11 world was a very harsh world. Our
21 fears were great that another attack on our nation was
22 imminent, and there was a strong effort to gather intelligence
23 from the kind of diverse set of sources that the Sims court
24 notes.

25 I decline to rule on the question of legality or

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1 illegality in the context of a FOIA request. The need to keep
2 confidential just how the CIA and other government agencies
3 obtained their information is manifest, and that has to do with
4 the identities of the people who gave information and who were
5 questioned to obtain information.

6 So I will overrule your argument.

7 MS. CONDON: Your Honor, just for the record,
8 plaintiffs' argument with respect to the CIA contractors is
9 also based on the Sims analysis.

10 THE COURT: Yes, I read Sims also. Contractors were
11 part of what the CIA did, and their identities are part of the
12 CIA organization and need to be protected as well.

13 MS. CONDON: Thank you, your Honor.

14 THE COURT: Mr. Lane, please go on to deal with the
15 issues arising from the fifth summary judgment.

16 MR. LANE: Thank you, your Honor.

17 Let me summarize as best I can what the Court did in
18 camera in looking at the 65 documents that are a sample of a
19 larger number of 580 documents that memorialize the contents of
20 CIA videotapes.

21 The Court had before it the binder of 65 documents
22 that had been chosen. 1 through 53 of these documents were
23 cables that were from a CIA field to the CIA headquarters. And
24 in connection with those, your Honor reviewed several documents
25 identified by the government as documents 17, 40, 26 and 28 as

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1 well as documents that the Court chose on its own, which are
2 documents 33, 39, 13 and 44. And after reviewing the contents
3 of the documents, the Court made a ruling to defer to the
4 government's decision to withhold those documents in full.

5 The Court then went on to look at the remainder of the
6 documents in the sample, that is, documents 54 through 65, by
7 reviewing a sample of those documents, some of which the
8 government identified and some of which the Court looked at.

9 THE COURT: By making my own choice of documents.

10 MR. LANE: Correct, your Honor.

11 As to one document, that is document 59, the Court
12 concluded that the document could not be properly withheld in
13 full by the government but asked the government to do a
14 line-by-line justification of that document within two weeks,
15 and with the expectation that information from that document
16 would be releasable. And the government will do that.

17 As to the other documents reviewed by the Court, they
18 are the following numbers: 57, 58, 61, 62, 63, 64 and 65.

19 And after reviewing the content of those documents and
20 discussion with the government about any classified
21 justifications for the withholding, the Court deferred to the
22 government as to the withholding of that information.

23 THE COURT: Are there any questions, Mr. Abdo?

24 MR. ABDO: Your Honor, preliminarily, it was unclear,
25 based on the government's description of the documents

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1 initially, whether the sample reviewed by your Honor were
2 documents that described the use of enhanced interrogation
3 techniques or standard techniques of the CIA.

4 THE COURT: Both.

5 MR. ABDO: To the extent your Honor's rulings were
6 preliminary, we request to present argument about it.

7 THE COURT: You may.

8 MR. ABDO: Your Honor, the heart of the dispute --

9 THE COURT: The purpose of this exercise was to give
10 me concrete information so I could deal with your arguments.
11 It was not to preclude you from arguing. I respect your
12 arguments. I have ruled sometimes in your favor during these
13 cases and sometimes against you, so I don't mean to preclude
14 your ability to persuade me in any way you think I might be
15 persuaded.

16 MR. ABDO: Certainly, your Honor, and we appreciate
17 that and we appreciate your having taken the time to review
18 these documents in camera.

19 With respect to the descriptions of enhanced
20 interrogation techniques that are contained within the
21 documents at issue, the heart of the dispute is the CIA's
22 contention that it may continue to withhold descriptions of
23 enhanced interrogation techniques, notwithstanding three major
24 events.

25 The first, on April 16, 2009, the President himself

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1 declassified the enhanced interrogation techniques and publicly
2 disclosed and officially acknowledged substantial and
3 excruciating detail about the techniques.

4 The second event is that on August 24 of 2009, the
5 government released additional documents describing enhanced
6 interrogation techniques, both in their intended and actual
7 application on actual detainees.

8 And the third event is that on January 22 of 2009, the
9 President banned the use of these techniques and banned the
10 enhanced interrogation program.

11 Notwithstanding those events, the CIA maintains that
12 it may continue to withhold those descriptions on the basis of
13 a distinction that Mr. Panetta draws between abstract
14 descriptions of the enhanced interrogation techniques and their
15 actual descriptions and use. We think that distinction is
16 simply false.

17 The OLC memos that were released in April as well as
18 additional documents that have been released since provide
19 substantially more than abstract detail about the enhanced
20 interrogation techniques and even go on to provide details
21 about the actual use of the enhanced interrogation techniques
22 and actual interrogations of actual detainees.

23 Having not been present at your Honor's review of the
24 documents just now, I would like to implore your Honor to
25 review these documents with an eye towards what was contained

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1 in the OLC memos --

2 THE COURT: I have done that. I first read the four
3 memoranda in redacted form, and then I read the memoranda again
4 with the material redacted uncovered. So I've done the
5 discipline that you want me to do. And I make my rulings with
6 regard to the knowledge I obtained reading those memoranda as
7 well as the general knowledge that all of us have had in
8 reading the press about these events, so I did what you urged
9 me to do.

10 MR. ABDO: If I might make two further requests, your
11 Honor, and these relate to an event that took place after we
12 filed our last brief. Two additional documents we feel are
13 very relevant to your Honor's review of the documents are the
14 CIA's background paper which was released on August 24th of
15 2009. The background paper is a December 30, 2004 document
16 provided by the CIA to the Office of Legal Counsel to assist
17 the Office of Legal Counsel in reviewing the enhanced
18 interrogation techniques. That document not only provides a
19 description of each of the techniques in isolation, but
20 provides an exemplar interrogation from beginning to end of the
21 combined use of all the enhanced interrogation techniques, a
22 description that the background paper itself notes is "a fair
23 representation" of how the enhanced interrogation techniques
24 were "actually employed." We feel that description goes
25 substantially beyond an abstract description of the enhanced

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1 interrogation techniques and provides what the CIA actual did,
2 this document having been drafted in 2004 long after the
3 enhanced interrogations at issue in these records took place.

4 THE COURT: But as a composite of a lot of different
5 activities with a lot of different people, correct?

6 MR. ABDO: That is true, your Honor, but the document
7 however, provides, in essence, all the parameters of the
8 enhanced interrogations that the CIA might use. For example,
9 they would specify the angle of incline of the waterboard that
10 the CIA could use, the number of inches away from the face of
11 the detainee that the water may be poured from, the number of
12 seconds for application of water, the number of applications
13 per session, the number of sessions per day, even discussing
14 the counter measures the CIA may use if the detainee resists
15 application of the waterboard, and going on to discuss the
16 intelligence situation within which the CIA would use certain
17 of the techniques, including waterboarding. We feel that those
18 are the very same types of details that would be contained in
19 these documents. Of course, we don't have your Honor's
20 knowledge of those documents, not having reviewed them, but it
21 seems unlikely that there are any additional details that could
22 be --

23 THE COURT: It is not the subtraction or addition of
24 details. It is the use in actual cases that makes a dramatic
25 difference with the type of information that is presented in an

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1 exemplar. Just the way you ask me to exercise the discipline
2 of actually reading the OLC memoranda before I make rulings
3 with regard to the concrete examples of particular uses with
4 particular people is the same reason that there is a
5 distinction between the two.

6 You get a certain quality of information from a
7 composite or an abstract or an exemplar or a summary, but you
8 get a different quality of information in seeing how different
9 things are used in different ways with different people at
10 different times, what sequences are used, what order is used,
11 what evaluations are made and so on. That's the very essence
12 of intelligence gathering. It is not as if a generalized
13 format is imposed by computers or on a particular subject
14 because all are the same.

15 It takes particular training, particular efforts,
16 particular adaptations to do an effective job of intelligence
17 gathering. That's why there are specialists involved. That is
18 why they are trained. That is why they are supervised. That
19 is why they report. That's why the reports are reviewed. And
20 all of that is a very difficult and very important process.

21 I did what you asked me to do, and I have come to the
22 conclusion that a district judge in this context has to defer
23 to the director of the CIA in assessing the information.

24 I went through this again, also, when I wrote the long
25 decision mostly dealing with the Abu Ghraib photographs, but

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1 also dealing with some CIA memoranda. And at that time, if
2 memory serves, the OLC memos first came up and I ruled one way
3 with some and a different way with others.

4 The attitude of the courts with regard to that Global
5 Explorer, I think called Glomar, was quite instructive because
6 even after President Carter's administration disclosed the
7 information, the case came up again and the courts held that
8 the repetition of the information by the CIA, if required,
9 would be damaging to foreign intelligence sources and they
10 upheld the Glomar response, that is, neither admitting nor
11 denying if it did something like that.

12 One would think that after publication by the
13 government itself of what we were doing, it would be a snap for
14 a court to require disclosure when, again, there was a Glomar
15 response. But the reluctance of the courts to interfere was
16 instructive to me, and I commented on that in the decision.
17 Personally, I think that the courts ought to have a more active
18 role, but that's not what the law is.

19 MR. ABDO: If I might make one point, your Honor?

20 THE COURT: I just want to sum up and end it by
21 saying, the director of the CIA has made a strong
22 representation about the needs of the CIA in relationship to
23 its job to gather information sources, and unless I am
24 convinced that it is wrong, I have to give deference. And here
25 in particular where we are dealing with a very difficult task

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1 of extracting information from someone unwilling to give
2 information, deference is owed. We all know how hard it is to
3 conduct a cross-examination. It is an art in getting people to
4 give information that the person may not want to give. How
5 much greater is the task of intelligence gathering?

6 I don't think that I can do what you ask me to do, Mr.
7 Abdo.

8 MR. ABDO: If I may make one point with respect to the
9 details of the enhanced interrogation techniques and deference,
10 we think deference in this case is particularly unwarranted.
11 And we think your Honor should have a greater role in this case
12 in reviewing the declarations and the submissions of the
13 director of the CIA.

14 The reason we are here today is not because of these
15 documents being an original part of our FOIA request. We are
16 here today because the CIA destroyed the original responsive
17 documents in contempt of this Court's orders. We think in that
18 situation, deference is particularly unwarranted, and we think
19 that the record of this case and the disclosures made in this
20 case make painfully clear that the CIA had often used the
21 rubric of national security and the language of intelligence
22 sources method as a pretext to withhold information that was,
23 in several instances, later disclosed in one instance by the
24 President himself without the sky falling, although the CIA had
25 made that prediction to this Court in submissions prior to

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1 those disclosures.

2 THE COURT: I am not going to comment on what you say
3 about the sky falling or not falling. I make my ruling in the
4 context of where we are now.

5 MR. ABDO: If I may just refer to one further
6 document, document number 65 which your Honor upheld the
7 withholding of, the government in its briefing never offered
8 any justification for the withholding of the one-page
9 photograph of Abu Zubaydah, so we are left with little to
10 respond to in terms of the government's justification for
11 withholding. We would either ask the government to elaborate
12 on the rationale for the withholding insofar as it is distinct
13 from the withholding of the other documents that your Honor has
14 upheld.

15 THE COURT: I think that the image of a person in a
16 photograph is another aspect of information that is important
17 in intelligence gathering, and I defer in that respect as well.

18 I just want to make another comment about what you
19 said before. You said something to the effect that deference
20 is not owed when the government has admitted that what it did
21 was wrong and where there is a tendency to sometimes use
22 classification as a way of avoiding embarrassment. It is a
23 strong argument. But the fact that something was wrong, that
24 it was admitted as wrong does not change the bar, in my
25 opinion, of deference.

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1 Gathering intelligence has a long history. We have to
2 square what we do in the gathering of intelligence with who we
3 are as a people, and I have written about that as well. For
4 the first opinion I wrote in this area commented that we are a
5 government of laws and all of us have to obey the laws, and the
6 CIA as well has to obey the law. But in this kind of a
7 separation of powers government, a judge has to be very
8 concerned that the carrying on of the judicial function
9 interferes in a very substantial way with the carrying on of
10 the protective and defense function that our intelligence
11 gathering agencies have to perform. Where the balance lies is
12 very difficult to determine and a very painful job of
13 decision-making.

14 I come to the views I expressed not easily. The agony
15 of decision-making in this area has been greater than any other
16 area I have faced, and I have faced very difficult problems,
17 also particularly in the 9/11 cases that I have to administer.
18 But I think reading the cases, reading the tendency of the
19 courts, there has been a reluctance on the part of the courts
20 to interfere with the discretion conferred by the mandate of
21 the statutes on the CIA.

22 The fact that the CIA has erred in destroying tapes is
23 the subject of a contempt proceeding that is before me in
24 relationship to other judicial investigations being carried on,
25 and how that will work out is not the subject before me today.

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1 If the tapes had been produced, the rationale that I
2 used to defer for classification probably would have been
3 operative with regard to those tapes as well. Should I apply a
4 different standard to verbal descriptions of what went on
5 because the tapes were destroyed when I probably would have
6 upheld the classification of those tapes? I don't think so. I
7 look upon the verbal descriptions as I would look upon my
8 entire task here. Is this a fit subject for intelligence
9 gathering and, if so, my job is to defer, to the extent
10 appropriate -- and that is substantial -- to the decision of
11 the director of the CIA.

12 MR. ABDO: Thank you, your Honor.

13 THE COURT: Is there anything else?

14 MR. JAFFER: There is one other point that we missed,
15 and that is the argument or waiver with respect to a particular
16 individual.

17 MS. McSHAIN: Your Honor, that was my mistake.

18 THE COURT: No mistake. Don't apologize so quickly.

19 MS. McSHAIN: Thank you, your Honor.

20 As we had discussed in the in camera session, with
21 respect to any waiver argument that has been made with respect
22 to names of detainees, your Honor ruled --

23 THE COURT: I ruled that there was no waiver, that the
24 reference to a name, if it is a name -- apparently, it is a
25 name -- and what page is that on? Is that page 7 of memo

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1 number 4, on the bottom?

2 MS. McSHAIN: That's correct, your Honor.

3 THE COURT: I am given to understand that the name is
4 a common name, and whether that name refers to a number of
5 individuals, several individuals, one individual or no
6 individual is not something that I am going to pass on. I hold
7 that there was no waiver, and it does not affect my rulings one
8 way or another.

9 Unless there is more --

10 MR. ABDO: One question. We request the opportunity
11 to confer with the government with respect to how your ruling
12 on a sample of a sample should apply to the balance of the
13 documents.

14 THE COURT: Let me comment on that. We can identify
15 the documents that were proffered to me, and the ones that I
16 looked at. If you want me to look at a number today while the
17 public session is going on, I am glad to do it. I want you to
18 feel satisfied that I have looked at enough so that the ruling
19 is fairly reflective of the whole.

20 MR. ABDO: Your Honor, we are satisfied with your
21 review of the documents, and we appreciate that. We would
22 simply like the opportunity to confer with the government with
23 respect to how your ruling would apply to the broader universe
24 of documents that have been referred to as the paragraph 3
25 documents.

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1 MR. LANE: Your Honor, we are happy to confer with the
2 plaintiffs about the Court's ruling and how it might apply if
3 at all as to the -- I think there are four documents that the
4 Court did not actually review of those, from 54 through 65.

5 THE COURT: The only thing left, I think, is that the
6 government will review the transcript produced in the in camera
7 session with an eye to making public as much as can be made
8 public. I will review it after the government, and whatever
9 can be released into the open files will be released and the
10 balance will be sealed.

11 MR. LANE: Thank you, your Honor.

12 We will do that as quickly as possible.

13 THE COURT: If it can be done within the same two-week
14 span, that would be good closure for this entire proceeding.

15 MR. LANE: Thank you, your Honor.

16 THE COURT: Thank you all. I appreciate very much the
17 intelligence, the application and zeal of all parties here.
18 And although I cannot say that I enjoy making the decisions
19 because they are very difficult, I do respect all of your
20 efforts.

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