

Exhibit B

2008.01.17 MSJ and contempt argument.txt

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81HVACLC Argument
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----X
2

3 AMERICAN CIVIL LIBERTIES
3 UNION, ET AL,

4 Plaintiffs,

5 v.

04 CV 04151 (AKH)

6 DEPARTMENT OF DEFENSE, ET AL,

7 Defendants.
7
8 -----X
8

New York, N.Y.
January 17, 2008
10:50 a.m.

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11 Before:

11
12 HON. ALVIN K. HELLERSTEIN,

District Judge

13
13
14 APPEARANCES

14
15 AMERICAN CIVIL LIBERTIES UNION
15 Attorneys for Plaintiffs

16 BY: AMRIT SINGH
16 ALEXA KOLBI-MOLINAS
17 -AND-

17 GIBBONS, P.C.
18 BY: MELANCA D. CLARK
18

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20 Southern District of New York
20 SEAN H. LANE
21 PETER M. SKINNER
21 Assistant United States Attorneys
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(In open court)

1 THE COURT: So this is the motion for contempt, right?

2 MS. SINGH: Yes, your Honor.

3 THE COURT: Okay. Please proceed.

4 MS. SINGH: Good morning, your Honor.

5 THE COURT: Good morning.

6 MS. SINGH: Amrit Singh on behalf of plaintiffs. Your
7 Honor has previously recorded in this litigation the CIA's
8 reluctance to comply with the Freedom of Information Act. But
9 never before in this litigation has an issue of such
10

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11 fundamental importance been raised as the issue that is raised
12 by plaintiffs' contempt motion. This issue is central to the
13 survival of the Freedom of Information Act as we know it. And
14 it is also central to the survival of the system of checks and
15 balances that is the hallmark of the United States system of
16 government.

17 The central question raised by our motion, your Honor,
18 is whether or not the CIA violated this Court's September 15th,
19 2004 order and the Freedom of Information Act by destroying
20 videotapes depicting prisoners being interrogated in CIA
21 custody abroad.

22 THE COURT: Ms. Singh, I'd like you to take one step
23 back. Before there was an alleged violation of production,
24 there may have been an alleged violation of identification, and
25 I'd like to focus on that first.

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1 My previous decision in this case dealing with this
2 issue drew a distinction based on the statute between
3 operational documents and documents gathered pursuant to an
4 investigation. I held, interpreting the statute, that
5 operational documents were not subject to an obligation to
6 identify; but that once the documents came to be collected
7 pursuant to an investigation, that there was an obligation to
8 identify and then either to produce or to prove an exemption.

9 So in the first stage we need to know were these
10 videotapes items that were gathered in an investigation. And
11 having heard the submissions on this issue, I'm not clear on
12 the point.

13 MS. SINGH: Certainly, your Honor. I'd be happy to
14 explain.

15 The videotapes were the subject of an investigation
16 for two sets of reasons. But I'd just like to be clear that
17 plaintiffs are also saying that even if the videotapes were not
18 the subject of an investigation, your Honor has the authority
19 to impose certain remedies in this case. But let me start with
20 the first question.

21 THE COURT: I'm not sure I agree. If these documents
22 were not subject to search, they couldn't be subject to
23 identification, at least not under a FOIA request.

24 MS. SINGH: Your Honor, I can explain a little bit
25 more once I explain to you why the tapes were viewed within the

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context of an investigation.

1 The CIA Information Act has an exception for what I'm
2 going to refer to as the investigations exception to
3 operational files. As your Honor observed, operational files
4 are not generally subject to FOIA search and review. But 50
5 U.S.C. 431(c)(3) states, and I quote, "Operational files shall
6 continue to be subject to search and review for information
7 concerning the specific subject matter of an investigation by
8 the Office of Inspector General of the CIA for any impropriety
9 or violation of law."

10 THE COURT: where are you reading?

11 MS. SINGH: Your Honor, it's 50 U.S.C. 431(c). That's
12 the statute. And it's cited on page 1 of our response brief as
13 a footnote, as the first footnote.

14 THE COURT: I interpreted that in my decision of
15 Page 2

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16 February 2, 2005.
17 MS. SINGH: That's correct, your Honor. You went into
18 considerable detail on what that exception means.
19 THE COURT: And ultimately I held that the documents
20 collected by the Inspector General were subject to requirement
21 of identification. That was the key point.
22 MS. SINGH: Your Honor, just to be clear, I agree with
23 the gist of what you just said. But the February 2nd, 2005
24 order was not specifically addressing the question that is
25 before this Court today, which is what is the scope of -- what
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1 does the word "concerning" mean.
2 The issue that was before this Court on February 2nd
3 was whether or not the CIA was entitled to delay its search and
4 review of exempt operation of OIG files that were not exempt
5 from FOIA search and review. That was the question for your
6 Honor. And it was that context that your Honor looked at the
7 statute that I just cited to you.
8 You are correct that there was language in that
9 February 2nd, 2005 decision that suggested that these files
10 that were subject to FOIA search and review had to be the
11 subject of an OIG investigation. Your Honor also noted in the
12 February 2nd, 2005 decision that looking at the legislative
13 history, there was some language that suggested that Congress
14 did not intend for the files to actually be viewed by the OIG
15 or relied on by OIG for these files to fall within the
16 investigations exception.
17 THE COURT: They were collected. Collected was the
18 big point.
19 MS. SINGH: Your Honor, perhaps you're thinking of the
20 April 18th, 2005 order, because that order does say, and the
21 operative language, I think, is that the files have to be
22 produced and identified or otherwise collected for the OIG, for
23 the OIG investigation.
24 THE COURT: I think you're more of an expert on my
25 prior decision than I am.

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1 MS. SINGH: I wouldn't claim to be that, your Honor.
2 THE COURT: What decision?
3 MS. SINGH: The April 18th, 2005 order is attached
4 as --
5 THE COURT: That was following this decision.
6 MS. SINGH: Yes. That's correct, your Honor.
7 THE COURT: Right.
8 MS. SINGH: That was that order that your Honor issued
9 after receiving an in camera submission from the government
10 about the appropriate designation of the operational files as
11 exempt.
12 But, your Honor, to go back to your question as to why
13 plaintiffs are arguing that the files were viewed within the
14 context of an investigation as an investigation is defined
15 under 50 U.S.C. 431(c)(3), we have two arguments. And the
16 first argument is that the videotapes were viewed in May of
17 2003 in the context of an OIG investigation. And the second
18 argument is even if a videotapes were not viewed as -- even if
19 you were to hold that the 2003 so-called special review is not
20 an investigation, there are other investigation subject matter

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 21 which overlaps with the videotapes. So there are two
 22 arguments, and I will start with the first argument.
 23 Your Honor, the government argues that -- the
 24 government concedes that the OIG viewed the videotapes in May
 25 of 2003. That is there in the Rea declaration attached to the
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 1 plaintiffs' opposition brief. What the government is saying,
 2 however, is that the special review is not an investigation
 3 within the meaning of the CIA Information Act. Your Honor,
 4 there are six reasons for why this special review is an
 5 investigation within the meaning of the CIA Information Act,
 6 and I would like to take you through each of those six reasons
 7 while referring you to the appropriate exhibit, because I think
 8 this is really, in sum, the crux of the matter.
 9 First of all, the government itself has included a
 10 draft special review and labeled it as a closed OIG
 11 investigation document. If I could refer you to our revised
 12 Exhibit O, page 1. I have a copy of the exhibit.
 13 The first page of revised Exhibit O has at the top
 14 "Vaughn of Closed OIG Investigations Documents." That's the
 15 title of the documents that are subsequently described.
 16 On page 5 and 8 of that exhibit, revised Exhibit O, is
 17 a description of the so-called closed OIG investigation
 18 documents. And the description reveals that two documents in
 19 particular were thought of by the government as closed OIG
 20 investigation documents. The first was a draft special review
 21 dated February 2004, and the second was comments on a draft
 22 special review dated January 2004. Again, the dates are
 23 significant because the government has said that the special
 24 review within which the tapes were viewed was finalized by May
 25 of 2004.

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 1 So the facts that are presented in the Dorn
 2 declaration before you as Exhibit O would appear to fit with
 3 the facts that are set out in the CIA's declarant's affidavit.
 4 The May 2004 special review was presumably being drafted in
 5 January and February of 2004 and being commented at that point
 6 in time. So that's the first factor, your Honor, that goes to
 7 show that the special review was, in fact, an investigation
 8 within the meaning of the CIA Information Act.
 9 And just to give you some more background, your Honor,
 10 just to refresh your recollection of what that seventh Dorn
 11 declaration really is, that seventh Dorn declaration gives
 12 plaintiffs an account of why the government is entitled, under
 13 various exemptions, to withhold responsive documents. And so
 14 in that declaration, the government is conceding that the
 15 special review is a responsive document; and moreover, that it
 16 is a closed OIG investigation document.
 17 The second factor I'd like to draw --
 18 THE COURT: It seems both parties are drawing a
 19 significance from the fact that the investigation is closed.
 20 Didn't I, in one of my decisions, hold that there's no
 21 difference for the purposes of production?
 22 MS. SINGH: That's correct, your Honor. That's the
 23 February 2nd, 2005 decision. There were two holdings in that
 24 decision, the February 2nd, 2005 decision. The first holding
 25 of that decision was that the CIA had not properly designated

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1 certain operational files as exempt. And the second part of
2 that holding was that the CIA was not entitled to delay FOIA
3 search and review of its OIG documents until such time as the
4 investigation is closed.
5 THE COURT: And held that they couldn't wait.
6 MS. SINGH: That's correct, your Honor.
7 THE COURT: They are under obligation immediately to
8 identify.
9 MS. SINGH: That's correct, your Honor. You
10 specifically observed that the CIA's reluctance to comply with
11 FOIA was not an excuse.
12 THE COURT: Yet it seems from my reading of the Vaughn
13 declarations that distinctions are drawn between continuing and
14 closed investigations.
15 MS. SINGH: Your Honor, that may be -- and perhaps the
16 government is in a better position to explain that position,
17 but that may be because the government is withholding open
18 investigations under FOIA exemptions, exemption seven.
19 THE COURT: I didn't see a Vaughn declaration in
20 respect to an investigation that's continuing. I only saw them
21 in connection with closed investigations.
22 MS. SINGH: Your Honor, I can come back to you on that
23 particular fact. But the entire seventh Dorn declaration is
24 docketed in this case. I believe the number of -- it might be
25 No. 223, it's in the cover letter.

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1 THE COURT: Yeah, that's the basis of my comment.
2 MS. SINGH: Right. But the point is, your Honor --
3 THE COURT: It's document 225-3. But it all refers to
4 closed OIG investigations. And I took the impression that both
5 sides agreed that Vaughn declarations had to be produced only
6 with respect to closed investigations, even though I held to
7 the contrary.
8 MS. SINGH: No, your Honor. And again, I would ask
9 that the burden of explaining the Vaughn declaration should be
10 on the government.
11 THE COURT: It's not a matter of burden, it's a matter
12 of fact. I'm looking at the titles and the captions, and I
13 didn't see any Vaughn --
14 MS. SINGH: Your Honor, I think that there are two
15 issues here. I think that the government's position is it
16 would accept, or at least it would in theory have to accept,
17 your order requiring it to process documents that were the
18 subject that were concerning even an open OIG investigation.
19 But the documents that were concerning the OIG investigation
20 themselves could relate to pending investigations in which case
21 they would, I think, argue that those documents could be
22 withheld under exemption 7A. They would still have to search
23 and review those documents, but they would then have to give
24 you an exemption for which they're withholding that particular
25 document.

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1 THE COURT: They would have to identify the document.
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 2 MS. SINGH: They would have to identify the document.
 3 THE COURT: It would be listed on a Vaughn
 4 declaration, and the particular justification for exemption
 5 would have to be shown.
 6 MS. SINGH: That's correct, your Honor.
 7 THE COURT: And I did not see a Vaughn declaration
 8 dealing with documents in ongoing investigations. Maybe my
 9 failure; I just didn't see it.
 10 MS. SINGH: Your Honor, I would have to go back to the
 11 record and check, but I'm pretty sure that the CIA was invoking
 12 exemption 7A as the basis for withholding ongoing
 13 investigations.
 14 THE COURT: Isn't the CIA required to identify the
 15 document --
 16 MS. SINGH: Yes, your Honor.
 17 THE COURT: -- and justify the exemption? That's the
 18 point of a Vaughn declaration.
 19 MS. SINGH: Yes, your Honor. And we have certainly
 20 argued that in our briefs.
 21 THE COURT: I don't understand why I wasn't informed
 22 earlier that there were no Vaughn declarations with regard to
 23 documents in a continuing investigation. Am I wrong?
 24 MR. SKINNER: Yeah. Your Honor, there is a Vaughn
 25 declaration with regard to documents and continuing
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 1 declarations. There is a big packet of declarations that were
 2 submitted in support of motion for summary judgment. The
 3 declaration on top is called the Declaration of Marilyn A.
 4 Dorn; we commonly call it the OLC declaration.
 5 THE COURT: Which number? Which Dorn declaration?
 6 MR. SKINNER: This is the OLC Dorn. But the one you
 7 want to look at is the one at the very bottom, is the
 8 declaration of Thomas V. Jansen. It deals with open OIG
 9 investigations. And in support of our motion, it says these
 10 files should be declared exempt under exemption 7A, which is
 11 part of our cross-motion for summary judgment.
 12 THE COURT: But there's no Vaughn declaration
 13 attached.
 14 MR. SKINNER: Your Honor, we didn't do a Vaughn
 15 declaration for all of the documents in the open OIG
 16 investigation; we just argued that all of those investigations,
 17 as they're still open, that we should be able to withhold those
 18 documents in their entirety under exemption 7A.
 19 We also noted that those investigations were similar
 20 to the investigations that were closed. So based upon our
 21 initial review at that point in time, we would expect that the
 22 other exemptions that apply to the closed declarations --
 23 excuse me, the closed investigations, would also apply to the
 24 open investigations. But we didn't identify the documents
 25 because we were just claiming a blanket 7A with regard to those
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 1 open investigations.
 2 THE COURT: I think that's contrary to what I held.
 3 MR. SKINNER: Your Honor, you --
 4 THE COURT: We can get into it.
 5 MR. SKINNER: We can get into it.
 6 MS. SINGH: Your Honor, just to sort of separate out
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the issues a little bit. I think that there are two issues here. The subject of your Honor's February 2nd, 2005 decision essentially was looking at whether or not the CIA could delay its processing of documents, could delay the production and identification of documents. That decision did not specifically address the invocations of exemptions.

But, in any event, I agree with you that the government was under an obligation to specifically identify documents that it was withholding under particular exemptions.

If I may resume, your Honor, the six reasons why the so-called special review is, in fact, an investigation within the meaning of the CIA Information Act.

As I mentioned, the first reason was that the CIA itself classified a special review as a closed OIG investigation.

The second reason, your Honor, is that the CIA declarant's own affidavit states that the team that conducted this so-called special review had a large number of investigators in it. And I would refer your Honor to the Rea

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declaration on page 6 that is attached to the government's opposition brief.

THE COURT: I noticed that. I noticed that. Go on to the next one.

MS. SINGH: The third fact, your Honor, the Office of Inspector General report attached to plaintiffs' reply brief is Exhibit K, states that, and I would refer you to page 69 of Exhibit K. Page 69 of Exhibit K states that, and I quote, "Special reviews are undertaken by ad hoc teams under the leadership of a senior OIG officer to address issues of special concern identified by the Congress, senior CIA leaders, or the inspector general."

Now, nowhere does the Rea declaration, which is the principal CIA affidavit relied on by the government, nowhere does that declaration actually affirmatively state what a special review is prompted by or, indeed, what the 2003 special review was prompted by.

THE COURT: Do you know of any regulation that defines special reviews, investigations, audits?

MS. SINGH: No, your Honor. The statute that I would refer your Honor to is the Office of Inspector General statute that specifically states that the office was established in order to conduct three sets of functions: Audits, inspections, and investigations. There's no mention of special reviews in that.

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THE COURT: What is that statute?

MS. SINGH: It is 50 U.S.C., Section 403(q).

THE COURT: That's another reason.

MS. SINGH: That's another reason, your Honor. The government has introduced as Exhibit 1 to the Rea declaration what appears -- what they describe as an internal guideline, I believe. But that, if you take a look at that exhibit, it says nothing about special reviews. It refers to something called a special assessment report, which is not -- there's nothing in the guideline to suggest that's the same thing as a special review, although the Rea declaration states that the two are

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12 the same.

13 THE COURT: A special assessment report.

14 MS. SINGH: That's correct.

15 THE COURT: Is there any definition in the statute or

16 regulations?

17 MS. SINGH: No, your Honor.

18 THE COURT: So we have now audits, inspections,

19 investigations, defined in the statute or mentioned.

20 MS. SINGH: Referenced, yes.

21 THE COURT: Just referenced.

22 MS. SINGH: Well, mentioned. Mentioned.

23 THE COURT: It's not defined?

24 MS. SINGH: It's not defined.

25 THE COURT: And then we have special reviews, and we

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1 have special assessments.

2 MS. SINGH: Right. And I would also point out to your

3 Honor that that exhibit that is attached to the Rea declaration

4 only talks about certain reports; it does not talk about the

5 overall functioning of an audit or an inspection or --

6 THE COURT: In my mind, the characterization is less

7 important in the function. I went to some lengths to describe

8 the exception in the statute, and I ruled that Congress

9 considered that where documents were collected by the Inspector

10 General or a like office, there was no need to avoid the

11 obligation to search and prove exemption, unlike the massive

12 operational files where Congress agreed with the CIA that it

13 was a waste of time to do a search.

14 So it's the collection of documents that are

15 important. That, to me, is a functional distinction between

16 the obligation to search and the lack of an obligation to

17 search. And it doesn't make any difference in my mind, though

18 government counsel can argue this, whether it's an inspection

19 or an audit or an investigation or a special assessment or a

20 special review or a look-see, or an active read or whatever you

21 wish to call it, if a document is fingered and collected, then

22 there is an obligation to identify and prove or produce.

23 That's the spirit of what I held, and I think that's literally

24 what I held.

25 MS. SINGH: Your Honor also noted in your February

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1 2nd, 2005 decision that legislative history of the CIA

2 Information Act specifically was concerned that the agency

3 would try to circumvent its obligations to conduct FOIA search

4 and review by placing files among operational files and not

5 physically placing them with the OIG.

6 THE COURT: We talked about dummy copies.

7 MS. SINGH: That's correct, your Honor. Exactly.

8 THE COURT: And markers. And at page 273 of my

9 decision, 351 F. Supp. 2d, the February 2, 2005 decision,

10 there's a description of that practice.

11 MS. SINGH: That's correct, your Honor. And in that

12 context, your Honor also specifically noted that the

13 legislative history of the CIA Information Act demonstrates

14 that relevance, not storage site, is the touchstone of public

15 access. And I'm quoting directly from your opinion. So it

16 doesn't matter where the documents are actually physically

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 17 collected or stored.
 18 THE COURT: It's the fact of collection.
 19 MS. SINGH: It's the fact that it was viewed, your
 20 Honor.
 21 THE COURT: I would make a further observation. I've
 22 never been in that aspect of government service. My government
 23 service is confined for the three years as an officer in the
 24 Judge Advocate General's Corpse between 1957 and 1960. So I
 25 have no experience in this.

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1 But in any large organization where there are large
 2 numbers of documents, an obligation from the person who looks
 3 and inspects a document, to others on the team, given the
 4 obligation to evaluate and report, notes are created, markers
 5 are set out, inventories are maintained, so there is a record
 6 of that which is done. And it's rare that even an intention to
 7 delete a document or disappear a document is without a trace.
 8 More often than not, there's some note left behind or some
 9 marker of one kind or another left behind or even copies left
 10 behind.

11 So firstly, the concept of an absolute destruction is
 12 rare; happens, but it's rare. And secondly, it's very hard for
 13 any single individual to cause a destruction that's complete
 14 without a trace left behind. And in working with this
 15 functional problem as a judge and before that as a lawyer, one
 16 is trained to look for the different traces, if you come across
 17 something where there appears to have been a document and it
 18 appears the document was destroyed. And I suspect the same
 19 thing goes on in the government, including the CIA.

20 MS. SINGH: Yes, your Honor. I'm sure that that's the
 21 case. But just to be clear about what plaintiffs' position is,
 22 plaintiffs' position is that the mere fact of viewing these
 23 tapes was sufficient to put them within the reach of your
 24 orders.

25 THE COURT: Yes, I agree, till I hear what Mr. Skinner
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1 will say. If the particular videotape was encompassed within
 2 the FOIA request, as it was amended a number of times, then
 3 it's responsive.

4 MS. SINGH: That's correct, your Honor.

5 THE COURT: It was viewed and, I suspected, commented
 6 on.

7 MS. SINGH: That's correct, your Honor. Your Honor,
 8 may I proceed to the remaining two factors of my six-factor
 9 explanation for why a special review is, in fact, an
 10 investigation?

11 THE COURT: Yeah. And there's one thing more I wanted
 12 to comment on as part of those two. When there was a sampling
 13 technique that was agreed to --

14 MS. SINGH: Yes, your Honor.

15 THE COURT: -- there were several subjects that were
 16 to be sampled with different rates of frequency. And I wonder
 17 if any of those suggestions that were made by the government
 18 included some generic that would subsume videotapes.

19 MS. SINGH: Your Honor, I went through the Vaughn
 20 declarations of the government --

21 THE COURT: It would not be in the Vaughn

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 22 declarations. It would be in the discussions before that. And
 23 that's reflected in the various comments I've made in my
 24 decisions.

25 MS. SINGH: Your Honor, there was no reference to
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1 videotapes in any of the CIA's submission.
 2 THE COURT: The samplings were of what?
 3 MS. SINGH: The samplings were of all --
 4 THE COURT: E-mails?
 5 MS. SINGH: There were a number of different -- my
 6 colleague, Ms. Kolbi-Molinas, will go into this in greater
 7 detail in the context of CIA partial summary judgment motion.
 8 But there were e-mails, memoranda, but there was no mention of
 9 videotapes.

10 THE COURT: What were the categories, Ms. Clark?

11 MS. KOLBI-MOLINAS: Your Honor, they were other,
 12 e-mails, cables, and reports.

13 THE COURT: Other, e-mails, cables, and reports.

14 MS. KOLBI-MOLINAS: Yes.

15 THE COURT: And with respect to each of these four
 16 categories, there was a certain frequency of sampling that was
 17 agreed to?

18 MS. KOLBI-MOLINAS: Yes.

19 THE COURT: If there were videotapes included, I guess
 20 they would be included in "other."

21 MS. KOLBI-MOLINAS: "Other," yes. And "other" was
 22 every other, that's how it was sampled.

23 THE COURT: That was the catch.

24 MS. KOLBI-MOLINAS: Mm-hmm.

25 THE COURT: Thank you.

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1 MS. KOLBI-MOLINAS: You're welcome.

2 MS. SINGH: And, your Honor, just so you know, this is
 3 there in our submissions, but there were hundreds of hours of
 4 videotapes. That's according to news reports. So this is not
 5 just one or two videotapes.

6 THE COURT: Go ahead.

7 MS. SINGH: To continue with the six factors, the
 8 fourth factor -- your Honor, just sort of to recap, actually,
 9 on the third factor, I just drew your Honor's attention to the
 10 fact that special concerns sounds awfully like something that
 11 would generate an investigation. And in that context, the Rea
 12 declaration provides no affirmative explanation of what the
 13 2003 special review was prompted by or what, in fact, special
 14 reviews generally are prompted by. And, in fact, I think it's
 15 astounding at how little that declaration says; how little the
 16 CIA thinks it needs to tell you in order to be able to prevail
 17 on its position.

18 Moving to the fourth point, your Honor. The Rea
 19 declaration on page 3 specifically says that special reviews
 20 are not conducted on a regular schedule like audits and
 21 inspections. And the implication is that special reviews are,
 22 therefore, light investigations, and that both special reviews
 23 and investigations are not conducted on a regular schedule.
 24 That's page 3 of the Rea declaration.

25 THE COURT: Well, clearly they're not an audit and
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1 they're not an inspection. I'm familiar with the term as an
2 accounting term. A special review, unlike an audit, has a
3 lesser degree of formality to it. And it's done in connection
4 with an accountant's review of reports and of limited number of
5 documents ending up in an unaudited report as to which the
6 accountant will not deliver an opinion. So it's a lesser
7 category than audits and inspections.

8 But the way it's used in the descriptive material made
9 to the Court and in your comments and what I can see, it seems
10 to have a character that is of a higher degree than an audit or
11 inspection. It may be a lower character than investigation,
12 but it's hard to know because it's not defined.

13 MS. SINGH: Your Honor, the fifth point in my
14 six-factor test, the Rea declaration specifically notes at page
15 7 that after the special review was concluded in May of 2004,
16 it was reported to the Justice Department and oversight
17 authorities. That's page 7 of the Rea declaration.

18 And I would ask your Honor to compare that statement
19 of the Rea declaration with page 59 of plaintiffs' Exhibit K,
20 which relates to investigations.

21 THE COURT: And the inference you wish me to draw is
22 that they're the same?

23 MS. SINGH: Your Honor, I wish -- yes, that's correct.
24 Page 59 of the OIG investigation that is appended as Exhibit K
25 to plaintiffs' response states that, and I quote, "A majority

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1 of the staff's personnel continue to be devoted to
2 resource-intensive investigations concerning detention and
3 interrogation activities in Iraq, Afghanistan, and elsewhere.
4 These investigations focus on the circumstances surrounding the
5 detention, movement, confinement, and alleged abuse of
6 detainees." Then it goes on to say at the end that the
7 Inspector General regularly informed the congressional
8 oversight committees of progress in these investigations.

9 So I guess, your Honor, I'd just like to point out
10 that there may well be something called a special review that
11 the CIA does. We are not disputing that. What we are saying
12 is that the 2003 special review was, in fact, an investigation
13 within the meaning of the CIA Information Act.

14 THE COURT: You're already saying to me that it's very
15 hard to distinguish a special interview that is something other
16 than an investigation.

17 MS. SINGH: That's correct, your Honor.

18 THE COURT: The term "investigation" would seem to
19 encompass special reviews.

20 MS. SINGH: That's correct, your Honor.

21 THE COURT: Indeed, it's rather hard to think of where
22 one would be different from the other.

23 MS. SINGH: That's correct, your Honor.

24 THE COURT: Okay.

25 MS. SINGH: And then finally, your Honor, I think it's

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1 notable that this special review, which the government concedes
2 was a review of detention and interrogation operations, it's

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 3 significant that this special review was being conducted by the
 4 Inspector General and not by some operational site of the CIA
 5 or indeed by the general counsel. So the statute
 6 establishing --

7 THE COURT: Would it make any difference if the
 8 general counsel did the study, would be subject to the same
 9 obligations?

10 MS. SINGH: Your Honor, that's right, under the
 11 statute. But the fact that the OIG was investigating it, was
 12 looking at it, given that the statute specifically entrusts to
 13 the Inspector General the duty to conduct an independent
 14 investigation, the fact that the statute specifically mentions
 15 the word "objective" suggests that there was some assessment of
 16 the propriety or impropriety or legality or illegality of the
 17 detention and interrogation operations that were the subject of
 18 special review.

19 THE COURT: It could also be the efficacy or the lack
 20 of efficacy.

21 MS. SINGH: Certainly, your Honor.

22 THE COURT: Which you have nothing to do with
 23 propriety or impropriety or might have nothing to do with. We
 24 don't know what it is, do we? We have no idea what the purpose
 25 of one was and not the other. We have no idea what the

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1 boundaries were between the special reviews and the
 2 investigations or the several investigations. We have no
 3 definition of parameters or perimeters or subject matter; there
 4 are know orders that had been shown, there's no authorized
 5 descriptions of the scope of activity or appointment of
 6 personnel to activity. So it's really impossible to draw any
 7 distinctions.

8 MS. SINGH: Your Honor, we're certainly at a
 9 tremendous disadvantage here, because we don't have access to
 10 the CIA's information. And plaintiff is doubly disadvantaged
 11 here.

12 THE COURT: The Court labors under the same
 13 disadvantage, which causes me to ask you a question.

14 MS. SINGH: Yes, your Honor.

15 THE COURT: If the CIA maintains that its necessary
 16 secrecy would be compromised by this exercise we're engaged in
 17 today, is that a legitimate excuse?

18 MS. SINGH: No, your Honor.

19 THE COURT: Why is it not a legitimate excuse?

20 MS. SINGH: Because the issue before your Honor is a
 21 pure legal question. The only thing you need to look at is
 22 whether the CIA violated your order and whether the CIA
 23 violated the Freedom of Information Act.

24 THE COURT: I don't think it's that simple. And I
 25 would put the same question to you again, Ms. Singh, and

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1 perhaps steer you in the way of looking at the statutes. The
 2 CIA statute does not exempt it entirely from living under the
 3 FOIA. There's an exception in FOIA, one of the exemptions of
 4 FOIA, which incorporates 50 U.S.C.

5 But the CIA is not given an absolute excuse not to
 6 engage in the same kinds of activities as other agencies are
 7 required to engage in. Only where there is a specific charter,

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8 authorization, not to be subject to the obligation of search
 9 can the CIA avoid its obligation. In all other respects it
 10 must comply. And if it doesn't give us the information to
 11 enable us to evaluate whether it's complying or not, arguably
 12 it violates the law, just in the same way as any other person
 13 or agency can violate the law, leading to certain implications
 14 and consequences which we have yet to discuss.
 15 Is this a good point to ask Mr. Skinner to respond?
 16 MS. SINGH: Certainly, your Honor. I do have one more
 17 substantive point to make.
 18 THE COURT: Please, go ahead.
 19 MS. SINGH: The second point that I referred to at an
 20 earlier point was that even if your Honor finds that the
 21 special review that was conducted in 2003 does not amount to an
 22 investigation within the meaning of the CIA Information Act,
 23 there appear to be other investigations, the subject matter of
 24 which overlaps with the subject matter of the videotapes.
 25 THE COURT: Yes.
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1 MS. SINGH: And I would refer your Honor again to
 2 Exhibit K of plaintiffs' opposition -- sorry, plaintiffs' reply
 3 brief. Pages 1 and 59 specifically refer to investigations of
 4 detention and interrogation activities in Iraq, Afghanistan,
 5 and elsewhere. That's on page 59 of Exhibit K. And page 1 of
 6 Exhibit K specifically states that "OIG is investigating a
 7 number of incidents concerning the extra territorial transfers
 8 of individuals and alleged abuse during detentions outside
 9 Iraq."
 10 So I think that there's no dispute that these
 11 videotapes reflect activities outside Iraq. So at least as a
 12 prima facie matter there seems to be an overlap between
 13 investigations conducted by the OIG and the subject matter of
 14 the videotapes. And as such, pursuant to your Honor's February
 15 2nd, 2005 decision, that overlap would place the tapes within
 16 the reach of the investigations exception.
 17 THE COURT: There is no definition of "investigation"
 18 in the statute.
 19 MS. SINGH: No, your Honor. But, again, I would draw
 20 your attention to the plain language of the statute, your
 21 Honor, which states that the operational files shall continue
 22 to be subject to search and review for information
 23 concerning -- the word "concerning," your Honor, has already
 24 construed to be a broadly exclusive -- sorry, a broadly
 25 inclusive term.

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1 THE COURT: Yes, it was in my decision. Let me hear
 2 Mr. Skinner.
 3 MS. SINGH: Just one quick point. Your Honor, the use
 4 of the word "any" in 50 U.S.C. 431(c) I think is also
 5 significant. It says for any impropriety or violation of law.
 6 It does not make that impropriety or violation of law
 7 contingent on an allegation. Thank you, your Honor.
 8 MR. SKINNER: Good morning, your Honor.
 9 THE COURT: Good morning, Mr. Skinner.
 10 MR. SKINNER: I think I'd first like to just try and
 11 frame what I think is the issue before the Court.
 12 The first and most important issue is the request for

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 13 a contempt order which would involve an examination of whether
 14 or not the government has violated one of this Court's orders.
 15 THE COURT: Can you reduce your level, your rate of
 16 speech.
 17 MR. SKINNER: Sorry, your Honor. We maintain that we
 18 have not.
 19 The second issue would then be if --
 20 THE COURT: What's the first issue?
 21 MR. SKINNER: First issue is whether we are in
 22 contempt; whether we violated one of the Court's orders. We
 23 maintain that we did not, because the Court's orders required
 24 us to review what was collected by the Office of Inspector
 25 General. Videotapes were not collected by the Office of
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 1 Inspector General. If the Court were to disagree with our view
 2 of the orders and find that we were required to do something
 3 else in addition to reviewing what was collected by the OIG by
 4 the Court's orders.
 5 I think the second issue would be, as Ms. Singh spent
 6 the bulk of her time addressing, which is whether this special
 7 review in and of itself actually triggered any of our search
 8 obligations under 431(c)(3).
 9 THE COURT: Well, I think on the first issue if
 10 someone purposefully prevented the Office of the Inspector
 11 General from collecting, that you couldn't avoid the
 12 obligation.
 13 MR. SKINNER: But I'd first like to just talk about
 14 what our understanding of the Court's order is required. We
 15 understood the Court's orders to require us to search for
 16 documents or other evidence that were in the OIG files. Our
 17 reading of the Court's orders was informed by, first, in the
 18 February 2nd order, the Court said --
 19 THE COURT: I agree with you, Mr. Skinner. But I put
 20 to you the purposeful prevention of function of collection by
 21 destroying that which is supposed to be collected, particularly
 22 after it's been seen, would seem to me to not be an excuse.
 23 MR. SKINNER: The mere fact that the tapes were viewed
 24 by members of the Office of Inspector General during the course
 25 of a special review does not mean that the tapes were collected
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 1 by the OIG and included within its files. As Ms. Rea
 2 explained --
 3 THE COURT: I disagree. You'll have to say more about
 4 it. But that's what people do when they do a review or an
 5 investigation. I'm not going to at this point distinguish
 6 between the two.
 7 MR. SKINNER: When people conduct an investigation --
 8 THE COURT: And look, if there's a videotape, they run
 9 it and they watch it and they may take a note or two. But they
 10 watch it, they look at it. And that's what they do.
 11 MR. SKINNER: And then they make a determination about
 12 whether that videotape that they reviewed is relevant to the
 13 review that they are doing.
 14 THE COURT: No, they've already collected it.
 15 MR. SKINNER: If they view --
 16 THE COURT: They've already collected it. That's
 17 collection.

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 18 MR. SKINNER: So any document that an investigator
 19 reviews in any context becomes relevant to the investigation
 20 they have to be working on at that time?
 21 THE COURT: Yes, sir.
 22 MR. SKINNER: We argue that that's too broad.
 23 THE COURT: I don't think so at all. That's what
 24 happens. That's what happens. You have a scope of activity,
 25 and you take in the documents within that scope either within
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 1 your own office or at someone else's office. In proper
 2 practice, those documents are frozen, because you may need to
 3 look at them a second, third, or fourth time to assess it.
 4 No, I disagree with you. If it's properly within the
 5 scope of an investigation and it's seen, it's collected. It
 6 cannot be withheld from obligations flowing from collection by
 7 destroying them.
 8 MR. SKINNER: We thought that language in the Court's
 9 orders had made it clear that what the Court had intended us to
 10 be looking at --
 11 THE COURT: Mr. Skinner, I am sure, I am absolutely
 12 sure, to the extent of 100 percent, that you did not purposely
 13 instruct that the document that was destroyed and, therefore,
 14 not collected because of destruction, need not be produced.
 15 I'm sure of that.
 16 MR. SKINNER: Your Honor, then if the focus is going
 17 to be on whether or not this special reviewed triggered some
 18 kind of --
 19 THE COURT: The responsibility is not yours,
 20 Mr. Skinner.
 21 MR. SKINNER: Just one last point on what we were
 22 supposed to be looking at. I would note that requiring us to
 23 look at documents that an investigator, inspector, we don't
 24 know who actually looked at the tapes, but requiring us to
 25 determine that tapes that were viewed at an overseas facility
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 1 were actually part of the OIG files for purposes of FOIA, puts
 2 us in a difficult position because when the OIG -- when we told
 3 the OIG that we had to Vaughn the documents from the closed
 4 files, and I'll address the difference between the closed and
 5 the open files at the conclusion of my presentation to try and
 6 clear up any confusion on that, but when we told them what to
 7 do, we said we have to get all the documents from the closed
 8 files. They gave them to the OGC, and then FOIA processing
 9 folks went through those files to figure out what exemptions
 10 would apply to those documents and what would not. There were
 11 no markers in the files indicating that tapes had been reviewed
 12 and that they were considered part of the investigation.
 13 THE COURT: There's no declaration that goes into
 14 this.
 15 MR. SKINNER: Well, the Rea declaration says -- first
 16 of all, the Office of Inspector doesn't use markers. If they
 17 want a copy of a document for a file, they make arrangements to
 18 get a copy of the document for the file.
 19 The Rea declaration also says that in May of '03 the
 20 investigators went over to look at these tapes at the overseas
 21 facility; they reviewed the tapes; they didn't take custody of
 22 the tapes. The declaration further says that where OIG makes a

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 23 determination that a document is relevant to an investigation,
 24 they take a copy of the document. And in this instance -- I
 25 also would just note --

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1 THE COURT: I commented in my decision that I
 2 referenced before, February 2, 2005, to a practice of markers.
 3 I said, The legislative history explains that this paragraph,
 4 referring to a paragraph of the statute, concerns the CIA
 5 practice of using marker references referred to as dummy copies
 6 in the dissemination of particularly sensitive records from
 7 operational files. In these circumstances, the sensitive
 8 record is temporarily removed, shown to an attendant recipient,
 9 and returned to the operational file for exclusive storage.

10 In addition, a marker reference, typically a piece of
 11 paper with a brief description of the subject matter and
 12 storage site of the sensitive record, is put in the file of the
 13 of reader. The reader is the person on the staff conducting
 14 the investigation.

15 The legislative history explains that section
 16 431(d)(3) ensures that when CIA is searching a nonexempted file
 17 or records responsive to an FOIA request and locates a marker
 18 reference which substitutes for a record in an exempted
 19 operational file which may be responsive, the CIA must retrieve
 20 the record from the exempted operational file and process it
 21 and respond to the FOIA request.

22 Thus, even particularly sensitive records, by virtue
 23 of having been disseminated or identified beyond their
 24 originating operational files become subject to FOIA search and
 25 review, subject always to later proof of specifically available

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1 FOIA exemption.

2 That's pages 273 and 274 of my February 2, 2005
 3 decision, 351 F. Supp. 2d, 265.

4 MR. SKINNER: Your Honor, if the OIG investigators had
 5 gone over or inspectors or whomever reviewed these tapes had
 6 gone over and looked at the tapes and determined that they were
 7 relevant to the special review they were conducting, then maybe
 8 we could have expected to see some type of marker such as your
 9 Honor referenced in the files, at which point the FOIA folks,
 10 when reviewing those files for documents responsive to the
 11 request, would have known where to go and look for them. That
 12 wasn't the situation here.

13 In May of '03, five months before plaintiffs even
 14 served their FOIA request, a year before they filed the
 15 lawsuit, two years before this Court issued its order
 16 clarifying search obligations, a determination was made that
 17 these documents were not relevant to the investigation, were
 18 not going to be taken into the custody of the OIG.

19 THE COURT: Lead me through the Rea report that says
 20 this.

21 MR. SKINNER: In the Rea declaration --

22 THE COURT: She's deputy assistant -- this is
 23 Constance E. Rea, R-e-a, deputy assistant for the Inspector
 24 General for Investigations. She's a supervisor. She
 25 supervises the investigative staff. She has been on the job

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1 since March of 2004.

2 MR. SKINNER: That's correct, your Honor. In her
3 current position. I'm not sure how long she's been with the
4 agency.5 And in paragraph 8 and 9, Ms. Rea describes generally
6 how the review process works and how they review documents.
7 Specifically in paragraph 9 she notes, After OIG reviews
8 records, whether on-site or in OIG offices, it determines what
9 records are relevant to its review, and what copies of records
10 to retain in OIG offices.

11 THE COURT: What paragraph?

12 MR. SKINNER: That's paragraph 9. So there she's
13 talking about how they go out, they review records, they choose
14 to retain some records in their files, they choose to leave
15 some records where they found them. And she talks about how
16 relevance is an issue in determining what to put in their
17 files.18 And then in paragraph 13 she talks specifically about
19 what was done in the context of these videotapes. She explains
20 that she reviewed the videotapes -- or not she personally, but
21 that someone from OIG reviewed the videotapes in May of 2003.
22 She further explains that after reviewing the videotapes, OIG
23 did not take custody of the videotapes, and they remained in
24 the custody of the NCS, that being the National Clandestine
25 Service.SOUTHERN DISTRICT REPORTERS, P.C.
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1 She further notes that at the conclusion of the
2 special review, the results of the review were shared with main
3 justice. And I would just note that she also makes clear in
4 this declaration --5 THE COURT: I'm still looking at paragraph 9. The
6 practice that she describes varies from the practice that was
7 ascribed to the CIA in the legislative history.8 She writes, After OIG reviews records, whether on-site
9 or in OIG offices, it determines what records are relevant to
10 its review and what copies of records to retain in OIG offices
11 on a stop.12 If in point of fact there are hundreds of hours of
13 videotape, it's inconceivable to me that someone doing either a
14 special review or an investigation of what's going on would not
15 look at these videotapes and not make some summary or have some
16 equivalent summary and some documentation.17 MR. SKINNER: But, your Honor, they were doing a
18 top-to-down review of the entire CIA detention interrogation
19 program.

20 THE COURT: What does that mean, top-to-down?

21 MR. SKINNER: It means it was, I think, a special
22 review, and this is more part of the second part of the
23 discussion. But a special review is neither -- it's not an
24 investigation, it's not an inspection, it's not an audit; it's
25 a comprehensive review of an entire program bringing to bearSOUTHERN DISTRICT REPORTERS, P.C.
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1 that all of the tools that OIG has at its disposal to try and
2 assess what is going on in that program.3 THE COURT: Seems to me it's even more serious than an
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4 investigation.

5 MR. SKINNER: Excuse me?

6 THE COURT: It's more serious than an investigation.

7 MR. SKINNER: I would disagree. An investigation

8 arises as a result of an allegation of wrongdoing. A special

9 review can arise for any number of reasons. It could just be

10 that the agency wants ascertain the efficiency of an operation,

11 which I would not think would be as serious as an

12 investigation.

13 THE COURT: But the same functions are performed, it

14 seems to me. But, anyway, I'm just looking at this. It

15 determines what records are relevant to its review and what

16 copies of records to retain in OIG offices. And I've made my

17 observation about these videotapes. And it's inconceivable to

18 me that they weren't studied, especially what's going on in the

19 press about them.

20 MR. SKINNER: well, the videotapes were certainly

21 reviewed. And there very well may have been a mention of the

22 videotapes in the files themselves. But the videotapes were

23 not incorporated into the file as part of the investigative

24 file. And without some type of --

25 THE COURT: I find that very hard to believe, given

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1 this legislative history that I just recited. OIG does not use

2 markers, she writes, in its case files. Designate records

3 maintained in operational file, which there's a statement that

4 says that even if something is in an operational file that it

5 was reviewed, no reference is kept as to where it was and when

6 the review took place. I find that hard to believe.

7 MR. SKINNER: They go out, they conduct an

8 investigation. Investigations can go in any number of

9 different directions. And even though you have an

10 investigation as opposed to a special review, you start with an

11 allegation of wrongdoing, and then you go and see if it's true

12 or not and what it bears out.

13 And during the course of your investigation, you look

14 at a lot of different evidence; but what you choose to

15 determine as being relevant to what you are investigating, you

16 then put into your file. And these tapes --

17 THE COURT: I have to repeat. This whole study,

18 however you characterize it, this whole study has to do with

19 how the CIA treats prisoners for purposes of interrogation.

20 Everything that's been told to me says that in one word or

21 another. And now I'm asked to believe that actual motion

22 pictures, videographs, of the relationship between the

23 interrogators and the prisoners are of so little value that no

24 marker, no reference, no retention occurs.

25 And we know independently from that which is recorded

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1 in the press and commented on by officials of the CIA in

2 relationship to these articles, that these videotapes were the

3 subject of considerable discussion with Congress, with leaders

4 of the CIA, with others in the government, and yet they're not

5 in the OIG files? No markers in the OIG files, no references

6 in the OIG files. I just can't accept it.

7 If it came up in an ordinary case, it would not be

8 credible. And I am searching for some particular rule that

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 9 makes something incredible in the normal sphere of activities
 10 so they should become credible because of the CIA's lead. It
 11 boggles the mind in this case.
 12 MR. SKINNER: Your Honor, your order required us to
 13 search what was produced to or otherwise collected by the CIA.
 14 THE COURT: I'm not going to comment further. If it
 15 wasn't given in order to avoid this obligation, and that's what
 16 it seems, because there's nothing to disprove that, they can't
 17 escape the obligation to identify and then prove in a nutshell.
 18 MR. SKINNER: But when they made the determination in
 19 May of '03 of whether or not to include these videotapes as
 20 part of the actual OIG special review file, it was before a
 21 FOIA request was filed, it was before the Court's orders were
 22 in effect. How could they have made a determination to try and
 23 hide something from someone?
 24 THE COURT: That's true of all the records. And
 25 whether it was hidden or not came after the fact. I don't know
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 1 when it came. We're told by officials that they were destroyed
 2 in 2005, and they were created in 2003. And everybody knew
 3 about it. Everybody: OIG, Inspector General knew about it,
 4 the director of operations knew about it, the people in the
 5 field knew about it, various congressmen knew about it. But
 6 they don't exist.
 7 MR. SKINNER: Your Honor, the destruction of the
 8 videotapes is the subject of an ongoing criminal investigation
 9 by the Department of Justice. They are looking into all of
 10 what you just noted.
 11 They are also looking into whether anyone within OIG
 12 violated or within the CIA general violated the terms of this
 13 Court's order. And I have been authorized to tell the Court
 14 that if the prosecutors uncover any evidence of a violation of
 15 this Court's order, we will inform the Court of as much. But
 16 this case is about a FOIA request and what we needed to do to
 17 isolate and identify --
 18 THE COURT: I want to discuss that separately. I want
 19 first to understand whether or not there was an obligation to
 20 identify. And so far I feel that there was.
 21 MR. SKINNER: And we respectfully disagree.
 22 THE COURT: Why don't we go on to the discussion
 23 whether there's something in the character of a special review
 24 that would excuse the CIA from having to identify.
 25 MR. SKINNER: Just to put this in some context, in
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 1 September of '04, when your Honor required us to identify or
 2 produce or indicate why we were withholding all of the
 3 responsive documents to the plaintiffs, we soon thereafter came
 4 forward and told your Honor that due to the initiation of the
 5 investigations, special review investigations of alleged
 6 wrongdoing in Iraq, certain records that were in operational
 7 files that would ordinarily be exempt from search and review
 8 under the FOIA were subject to FOIA because Section 431(c)(3)
 9 had triggered. We asked your Honor to delay those search
 10 obligations until such time as the investigations were
 11 complete.
 12 THE COURT: I declined to do that. And I declined
 13 also to make a distinction between ongoing investigations and

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 14 completed investigations.
 15 MR. SKINNER: That's correct, your Honor. And you
 16 required us to search and review all documents produced to or
 17 otherwise collected by the CIA. The videotapes weren't part of
 18 the OIG investigative files; so we did not view them as being
 19 within the scope of your Court's order, and I hear from you
 20 today that you disagree with that view.
 21 I think the question then becomes --
 22 THE COURT: Well, that question was never put to me.
 23 It was never put to me.
 24 MR. SKINNER: But, your Honor, I think the timeline of
 25 how some of this happened is also important. The determination
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 1 by the people doing special review about whether or not to pull
 2 the videotapes into the investigative files was made in May of
 3 '03. The FOIA request was filed in October of '03. The
 4 investigation, which we concede triggers our obligations to
 5 search and review under FOIA, was initiated in May of '04. We
 6 then had the Court's order in September of '04.
 7 And then we came to the Court with a request for
 8 relief from the scope of that order with regard to the May '04
 9 investigations. We didn't consider the special review to have
 10 triggered our obligations. And the determination about what to
 11 include in those files was made long before anything had
 12 happened before this Court.
 13 THE COURT: You never put to me the question whether a
 14 special review is something different. I never heard of
 15 special review until this round of papers.
 16 MR. SKINNER: I didn't know of the special review
 17 until this round either, your Honor. So I assume you didn't
 18 know. We were just told an investigation, investigation has
 19 triggered our requirements and we need to go to the Court to
 20 find out when we have to do this because it's going to create
 21 some problems if we have to search these files now.
 22 THE COURT: Well, I was not told about a special
 23 review, and there was no suggestion that some different rule
 24 would apply to a special review and apply to an investigation.
 25 MR. SKINNER: We feel, for the reasons explained in
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 1 our brief --
 2 THE COURT: Your client knew that at the time. I
 3 understand what you feel, but I'm just repeating history.
 4 And secondly, if the videotapes were not put into the
 5 OIG files and no markers were put into the OIG files, both of
 6 which I find it very hard to understand, that's just that many
 7 other kinds of documents were looked at by inspectors general
 8 or the staffs and not referenced. It makes a sham out of this
 9 whole case.
 10 MR. SKINNER: Your Honor, I would disagree with that.
 11 We came to your Honor in November of 2004, and we said that we
 12 understood our search obligations to extend to the operational
 13 files themselves, because we understood the exception to relate
 14 to --
 15 THE COURT: And you complained about it, and I gave
 16 you relief.
 17 MR. SKINNER: And the relief you gave us was you don't
 18 have to search your operational files; why are you worried

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 19 about that? You only have to search what has been produced to
 20 or collected by the OIG. And we said, Okay, we'll go back and
 21 we'll do what the Court's told us. And when we searched and
 22 reviewed documents collected by the OIG, when the FOIA
 23 personnel did that, they didn't have any videotapes because the
 24 videotapes weren't there.

25 THE COURT: If your client was aware that that
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 1 representation to me masked information that was important to
 2 the OIG, it was not put into the OIG files, I hesitate to state
 3 the inference I would take from that, Mr. Skinner.

4 MR. SKINNER: Your Honor, I certainly don't --

5 THE COURT: It seems to me that you were gulled and
 6 the Court was gulled.

7 MR. SKINNER: I certainly don't think that any of us
 8 were gulled, because I think the determination was made by
 9 different people about a different time and for a different
 10 reason about whether or not to keep those tapes within the OIG
 11 files.

12 But moving on to whether or not --

13 THE COURT: There is no regulatory definition that
 14 would show a difference between a special report or a special
 15 investigation, I should say, and -- special review, excuse me,
 16 and investigation, right?

17 MR. SKINNER: The terms are not defined in the
 18 statute.

19 THE COURT: Or in regulations.

20 MR. SKINNER: Or in regulations.

21 THE COURT: Or in policy manuals?

22 MR. SKINNER: Well, I should say that we did provide
 23 your Honor with what -- we asked, is there anything that their
 24 regulation, internal or external, that explains the difference
 25 between a special review and an investigation. And what we

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 1 were given was the index or attachment appendix that we
 2 attached to the Rea declaration. And this is an internal OIG
 3 guideline for how --

4 THE COURT: This is a writing declaration of --

5 MR. SKINNER: This is the Rea declaration of --

6 THE COURT: -- 10 January 2008?

7 MR. SKINNER: That's correct. Attached is Exhibit 1,
 8 is a two-page document.

9 THE COURT: And it says it's unclassified, February
 10 24, 2003; title, "Appendix Audit, Inspection, and Special
 11 Assessment Report Handling Procedures."

12 MR. SKINNER: And in providing this document to the
 13 Court, what we are trying to establish is that special reviews
 14 are treated differently by the OIG than inspections. And we
 15 feel the special reviews do not trigger the exception, whereas
 16 investigations would. And within this guideline, they made
 17 clear that at the conclusion of an audit or an inspection for a
 18 special review, a report is generated; whereas at the
 19 conclusion of an investigation, it is up to the discretion of
 20 the investigator whether or not to create a report and what to
 21 do with it.

22 It also makes clear that when a report is generated at
 23 the end of an inspection, an audit, or a special review, the

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 24 subject of that audit, inspection, or special review is
 25 provided with a draft of the report, any recommendations made
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 1 in that report, is given an opportunity to comment on that
 2 report.
 3 The subject of an investigation which relates to
 4 allegations of wrongdoing, which is what 431(c)(3) had in mind,
 5 may not give the subject of the investigation that opportunity.
 6 The reason would be obvious. If there was a conclusion of
 7 illegality, then the OIG would need to refer that case to DOJ,
 8 and they might not want the target of the investigation to know
 9 about their conclusions ahead of time.
 10 So this does provide some indication in the form of an
 11 internal CIA guideline that was in effect at the time of the
 12 review of the videotapes as to how OIG treats special reviews
 13 differently from investigations.
 14 We would argue before the Court, we are arguing before
 15 the Court, that this special review did not trigger the
 16 exception to Section 431(c)(3). So any documents that were
 17 reviewed by the OIG in the context of the special review, if
 18 they didn't -- as we know, the exception provides that where
 19 the specific subject matter of an investigation overlaps with
 20 the subject matter of a FOIA request, then to the extent there
 21 is some overlap, the otherwise exempted operational files will
 22 come back within the scope of FOIA.
 23 THE COURT: Mr. Skinner, I'm trying to read this
 24 quickly as you speak, but where does it talk about special
 25 review?

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 1 MR. SKINNER: Well, it says special assessment report.
 2 But as Ms. Rea swears in her declaration, that OIG refers to
 3 special reviews, it's the same thing. It's the same report
 4 generated at the end of the special review. I think it's just
 5 a difference in nomenclature, terminology.
 6 THE COURT: Where do I find that?
 7 MR. SKINNER: It's, I think, in paragraph 6. But let
 8 me be sure. No, it's in paragraph 7. Excuse me, your Honor.
 9 She said this appendix describes the rules for handling special
 10 assessment reports, which are what OIG refers to as special
 11 reviews.
 12 (Pause)
 13 THE COURT: I find it hard to understand what this is
 14 all about. Let's read it together. Paragraph 6. In addition
 15 to audits, inspections, and investigations, OIG initiates and
 16 conducts special reviews.
 17 So a special review is different from an audit,
 18 different from an inspection, different from an investigation,
 19 and presumably different from a special assessment.
 20 MR. SKINNER: Well, I think a special review is the
 21 same as a special assessment. When they said special
 22 assessment report --
 23 THE COURT: No, we don't know.
 24 MR. SKINNER: Well, I think Ms. Rea's --
 25 THE COURT: We really don't know. A special review is
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1 distinguished from an audit inspection or investigation because
2 a special review typically, A, is not conducted on a regular
3 schedule such as some orders or inspections. It would suggest
4 that some audits and some inspections also are not regularly
5 scheduled.

6 MR. SKINNER: They certainly are not.

7 THE COURT: And investigations are not regularly
8 scheduled.

9 B. If not initiated in response to a specific
10 allegation of CIA impropriety, such as an investigation, yet,
11 as Ms. Singh has commented, within the subject matter of the
12 study that was said to be within the scope of the special
13 review improprieties were mentioned. So that makes it very
14 much likely.

15 MR. SKINNER: Within the subject matter, it said, of
16 special concern. There's a big difference between the
17 leadership of an agency having concern about the administration
18 of a program and whether or not there are actual improprieties.

19 THE COURT: But I held already it doesn't have to be
20 an actual impropriety; it could be a suspicion of impropriety
21 that sets off an investigation.

22 C. Requires a significant investment of personnel
23 resources in terms of either the number of personnel or the mix
24 of professional skills required such as auditors, inspectors,
25 or investigators. That can be characteristic of any activity.

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1 A special review, like an audit or inspection, may
2 give rise to a separate investigation -- that's also true, but
3 investigation can give rise to another investigation -- if the
4 review encompassed evidence of a violation of law, rules, or
5 regulations, mismanagement, gross waste of funds, etc.

6 As I commented, Ms. Singh, it seems to me, and I think
7 it's the correct rule, that the characterization doesn't
8 matter, it's the functional activity that matters for purposes
9 of requiring compliance with FOIA.

10 MR. SKINNER: If we focus on the function then of this
11 particular special review, this special review and in the CIA
12 Detention and Interrogation Program, as Ms. Rea explains, was
13 not initiated in response to allegations of wrongdoing. And I
14 can further represent to the Court today, although it's not in
15 the Rea declaration, but I can as a representative of the
16 Department of Justice, tell the Court that the special review
17 gave rise to no criminal referrals to the Department of
18 Justice.

19 Ms. Rea has further made clear that the videotapes
20 themselves were not the subject of a separate investigation.
21 And I think what we can take from all of this is that this
22 special review, the function of which did not trigger the
23 exception to 431(c). 431(c) is intended to bring
24 investigations for illegality or impropriety, the subject of
25 those investigations, back within the scope of FOIA. The two

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1 circuit cases interpreting it, Sullivan and Morley, both made
2 clear that we should be looking at what happened as a result of
3 that investigation in trying to ascertain whether it actually
4 triggered the exception.

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5 THE COURT: If this were a normal case, I would
6 require the people actually involved in the activities to
7 submit testimony or at least declarations. I would require
8 this of the person who reviewed the videotapes. I would
9 require some statement or some representation as to what
10 notations were made, what records were made, what markers were
11 left, or anything of that nature. I would want to know about
12 reports left with me with regard to what was seen; and with
13 regard to those who received the reports, what they did with
14 it, and how it fit within the activity that it was supposed to
15 further.

16 I would want a definition of what was going on,
17 including scope of activity. If it were a government agency, I
18 would want to see the authorization in the form of an order
19 that instituted the review or the investigation.

20 The question I want to put to you, Mr. Skinner, is
21 should I not do that, A, because it's the CIA; and, B, because
22 there is an ongoing investigation by the Department of Justice?

23 MR. SKINNER: I think the first one, your Honor.

24 THE COURT: Let's start with the first one. Should I
25 not do this because of the CIA?

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1 MR. SKINNER: I think an order like that might require
2 the production of information that would not be able to be
3 shared publicly because it's classified in nature.

4 THE COURT: I would think that's true. It could be
5 submitted in camera.

6 MR. SKINNER: Whether or not the CIA could gather that
7 information, I honestly don't know right now.

8 THE COURT: I would have to assume it could.

9 MR. SKINNER: If the individuals involved are still
10 with the agency, we could go and talk to them. If they are out
11 of the agency, then we couldn't compel them to talk to us.

12 THE COURT: No, but they could be subpoenaed.

13 MR. SKINNER: We could try to gather the information.
14 The nature of the information that your Honor is requesting, of
15 course, as you note, would be highly classified.

16 THE COURT: I understand. I understand it would be
17 classified. And I understand it would have to be in camera
18 treatment.

19 MR. SKINNER: In trying to gather the information
20 necessary to explain to the Court why we did not violate the
21 Court's orders and why, moreover, this special review didn't
22 trigger the exception to the Section 431, we ran into the
23 roadblock of the ongoing criminal investigation. We can't do
24 anything to interfere with that investigation, and we're not
25 sure if the people actually involved would even talk to us

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1 before the investigation is closed. So the investigation is
2 the real roadblock at this point in time to us taking further
3 action with regard to the type of information your Honor has
4 just described.

5 THE COURT: well, I think that's a serious issue, not
6 to say the other issues are not also serious. But if, as seems
7 to be the case, the order of the Court has not been observed,
8 and in some respects, and maybe major respects, has been
9 ignored and has become the subject of indifference, the Court

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 10 is required under Title 5 to look into various kinds of
 11 sanctions, among which is the need to find out exactly what
 12 happened.
 13 Frankly, I can't comprehend ordering the contempt of a
 14 government agency. It seems to me there are specific
 15 individuals that need to be the subjects of focus. And if
 16 those individuals acted in a way that shows a willful disregard
 17 of court orders, then I think we all understand what courts do
 18 in that kind of a situation.
 19 It's necessary to establish a record. How this fits
 20 or doesn't fit or is embraced by or not embraced by the ongoing
 21 Department of Justice investigation, I really don't know. And
 22 there's nothing in the papers that really relates to that.
 23 MR. SKINNER: Your Honor, we did inform the Court that
 24 the specific question of whether or not this Court's orders
 25 were complied with is one of the things that the criminal
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 1 investigators conducting the investigation are looking into.
 2 THE COURT: I think it's necessary for me first to
 3 define that myself. It is the obligation of the Court to do
 4 that. And I might be able to do that on the present record,
 5 but I think the next question is what's to be done if I find
 6 out and hold that there was a failure to abide by court orders.
 7 And that was perhaps willful.
 8 MR. SKINNER: I didn't understand from what your Honor
 9 was just saying whether you were saying that you would need
 10 this information in order to make that determination.
 11 THE COURT: I don't know. I think need to think more
 12 of it. And I don't want to pre-judge any issues now; these are
 13 all very serious and require some reflection and a written
 14 decision. And so what I hold is the subject of the discipline
 15 of considerable thought and examination of precedence and
 16 written form. So that if you feel aggrieved, you're able to
 17 appeal.
 18 I don't know where we stand, Mr. Skinner. I know that
 19 we all are disappointed. I include you in "all." I don't
 20 think this is the way we like to practice. What to do about it
 21 is another issue.
 22 I think we've gone about as far as we can now though.
 23 Unless either side has something more to comment on this, we
 24 can close this particular subject and go on to the next.
 25 MR. SKINNER: Your Honor, I had one other point I was
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 1 going to respond to.
 2 THE COURT: Right.
 3 MR. SKINNER: When you're reviewing whether or not
 4 there was a violation -- whether 431(c)(3) was triggered, one
 5 thing that Ms. Singh noted was that the draft of the special
 6 review was included in that seventh Dorn declaration. That
 7 Dorn declaration addressed closed OIG files. They considered
 8 the special review to be a closed file. And although they
 9 didn't think that it triggered the exception, it was an OIG
 10 file so it was searchable under FOIA, so that's why it was
 11 there. To the extent that title on one of the indexes said
 12 that it came from closed investigatory file, that was inartful.
 13 THE COURT: Tell me about this closed and continuing.
 14 why is that a relevant consideration, given my order?

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15 MR. SKINNER: Well, your order required us to search
16 and review. And the way everything has worked in this case,
17 given the broad scope of the plaintiffs' request, is that we've
18 searched and reviewed, and either produced what we could
19 produce, or give some idea of what we're not producing; then we
20 try to figure out amongst ourselves where there's some kind of
21 dispute.

22 After your Honor's orders in April of '05 requiring us
23 to search and review what was produced to or otherwise
24 collected by the OIG, we told the plaintiffs that we were going
25 to be claiming in a 7A exemption with regard to the open

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1 investigative files. And they agreed with us that that was
2 likely, and allowed Ms. Singh to recharacterize if I'm
3 mischaracterizing. But I believe they agreed that that was
4 likely a fairly strong exemption claim.

5 we said, why don't we give you what's been closed,
6 then those files are no longer subject to any kind of 7A
7 exemption, and we'll come up with a sampling system for how to
8 go through what the OIG has and we'll produce to you a Vaughn
9 on that. That's what the seventh Dorn declaration was.

10 THE COURT: And that's what we're going to do next.

11 MR. SKINNER: That's what we're going to do next.

12 And then as also part of this motion, we then said
13 there still are some investigations that are open. And at some
14 point in time this FOIA lawsuit needs to end. And we wanted a
15 ruling from the Court that with regard to the open OIG
16 investigations, they're properly withheld under exemption 7A,
17 which is why we provided the declaration for Mr. Jansen.

18 So we have provided declarations addressing both the
19 open and the closed. And the determination to provide the
20 seventh Dorn declaration only on the closed was one made
21 jointly between the plaintiffs and the defendants.

22 MR. LANE: Your Honor, if I may note a belated DOD
23 point. We follow basically the same procedure for open
24 investigations of the army. Once we explained the situation
25 with that, those were really no longer the subject of --

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1 THE COURT: I think there's a major distinction
2 between a CID investigation and the army and an investigation
3 in the CIA.

4 MR. LANE: Well, your Honor, they are the same for
5 this point that was just made, which is the relevant exemption
6 7A, which to be quite candid, when we invoke 7A, we very rarely
7 get challenges that are litigated in court because either an
8 investigation is open or closed. If it's open, whether it's
9 conducted by one agency or another, the concern is the same,
10 that processing and releasing information --

11 THE COURT: Look, if the parties are satisfied
12 functionally with regard to closed investigations, I'm not
13 going to interpose any objection.

14 MR. SKINNER: That was my final point, your Honor.
15 Move on to the rest of the subjects for this morning.

16 THE COURT: Okay. Good.

17 MS. SINGH: Your Honor, may I have just two minutes in
18 rebuttal?

19 THE COURT: Yes.

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20 MS. SINGH: Your Honor, there are two basic points
21 that I just want to clarify for the Court. The first is that a
22 finding of contempt by your Honor does not mean an inquiry into
23 the state of mind of the CIA. The law is very clear on that.
24 The government has not argued that you need to look into what
25 the intention was. Although that fact will be relevant.

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1 THE COURT: What's the function of a contempt?
2 MS. SINGH: Your Honor, civil contempt, the purpose of
3 civil contempt is either coercive or compensatory. It's
4 basically to make plaintiffs whole or to ensure that the remedy
5 appropriately tracks the infraction.

6 THE COURT: There's another section of FOIA that gives
7 you the right to recover fees.

8 MS. SINGH: That's correct, your Honor.

9 THE COURT: So there's no compensatory function that
10 follows on a contempt. And in terms of an order, there's
11 another section that deals with injunctions against
12 withholding. So nothing is accomplished by labeling it as a
13 contempt. It's just a pejorative term.

14 MS. SINGH: Your Honor, but the reconstruction of
15 documents, as well, is an important remedial measure that we
16 are seeking, as well as the identification of other documents
17 and the production of copies and transcripts, not just in the
18 CIA's possession, but also the possession of other defendant
19 agencies.

20 THE COURT: I'm glad you comment this way, because as
21 I look upon what role I should have in this, I think the role
22 is remedial, not punishment. I'm not about to punish the
23 government, whatever that would mean. But I am interested in
24 accomplishing the purposes of the statute of FOIA. And that
25 would entail looking into the possibility that there are

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1 summaries, that there's some way to recreate what was in the
2 videotape, to describe the number of them, the hours of
3 videotape, the subjects of the videotape, when they occurred,
4 were they continuous, were they sporadic, what caused them to
5 occur, and many other questions of this nature. And that's
6 what I had in mind in discussing with Mr. Skinner what kinds of
7 declarations I would be looking for in this case.

8 As I observed to you earlier, in modern day, it's very
9 hard to destroy. And it's quite possible that destruction was
10 not absolute, and if substantial, let us say, or even absolute,
11 that it couldn't be recreated in some form, maybe not as an
12 equivalent, but the best that could be done, that might be an
13 appropriate remedy. And that's what I had in mind when I made
14 reference to that mess. But I will be exploring in thinking
15 about how I should make a holding or express a holding.

16 MS. SINGH: Your Honor, that's correct. Just so I can
17 get plaintiffs' position to you, your Honor has identified two
18 separate issues. The first question is whether or not
19 plaintiffs are entitled to a remedy. That's a pure legal
20 question that your Honor can rule on without any further facts.

21 THE COURT: I agree.

22 MS. SINGH: The question of what the remedy should
23 be --

24 THE COURT: I agree with you.

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MS. SINGH: -- may involve --
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1 THE COURT: I agree with that.
2 MS. SINGH: Okay. And then, your Honor, my final
3 point is that --
4 THE COURT: And the remedy, as I'm trying to formulate
5 it, is not to punish, but to be remedial.
6 MS. SINGH: Certainly. And your Honor, we've asked
7 for a holding of civil contempt. And it does not require an
8 inquiry into the state of mind of the CIA.
9 THE COURT: Well, I question what value flows from
10 that. What flows from a holding of contempt? What can be
11 accomplished that way except to write a newspaper headline?
12 MS. SINGH: Your Honor, the remedial measures that
13 flow from a finding of contempt are certainly necessary to
14 ensure the integrity of the Freedom of Information Act and to
15 ensure that agencies like the CIA don't flout a court's order.
16 So I would submit that there is much to be gained from
17 the sanctions that flow from a finding of contempt. So it's
18 not just the symbolic fact that a court has publicly found the
19 CIA to have disobeyed its order, but also the sanctions that
20 flow from that finding that are important in holding the CIA
21 accountable.
22 THE COURT: Section 5524(g) provides, In the event of
23 noncompliance with the Order of the Court, the district court
24 may punish for contempt the responsible employee. And in the
25 case of uniformed service, the responsible member. Is there
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1 any other section I should look at?
2 MS. SINGH: Your Honor, we're prepared to brief that
3 issue for you, if you should so require.
4 THE COURT: Well, as you are now before me having
5 studied this extensively, is there any part of the statute here
6 that will describe what can be a consequence of a remedy for
7 noncompliance with the Order of the Court?
8 MS. SINGH: Your Honor, I will have to -- I will be
9 glad to brief that issue for you in a very short period of
10 time.
11 THE COURT: I am disinclined to use the label
12 "contempt." It appears to me there was noncompliance. And I
13 would like to examine very carefully if that is the case; and
14 if so, what should be the remedy.
15 MS. SINGH: Your Honor, on that point, Audrey says
16 very clearly that your Honor does not have to make a finding of
17 contempt in order to impose a remedy here. That is exactly
18 what happened in the judicial watch case that was -- it's a
19 FOIA case; it concerned the destruction of documents; and Judge
20 Lambert specifically supervised, on a case-by-case basis,
21 discovery relating to the destruction of documents. I think
22 that that would certainly meet what your Honor has in mind.
23 THE COURT: Now, what about the ongoing Department of
24 Justice investigation?
25 MS. SINGH: Your Honor, as a threshold matter, the
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1 relief that we are seeking does not -- most of the relief that
 2 we are seeking does not implicate the Justice Department
 3 investigation. We are asking for an order from this Court
 4 prohibiting the CIA and other defendant agencies from
 5 destroying any documents; we are asking for the identification
 6 of all destroyed documents; we are asking for the
 7 reconstruction of destroyed documents.

8 THE COURT: What does that mean?

9 MS. SINGH: Your Honor, to the extent that anybody has
 10 viewed the tapes, that they would have to come forward and give
 11 an account of what was in those tapes. And to the extent that
 12 there are copies of transcripts, they would have to provide --
 13 either turn those materials over or provide a Vaughn
 14 declaration for why they should be withheld.

15 THE COURT: Okay. Thanks.

16 MS. SINGH: Your Honor, just one very quick point.
 17 And that is that the government relies very heavily on the
 18 April 18th, 2005 order.

19 THE COURT: That's the collection form.

20 MS. SINGH: Yes. But I just want to make clear that
 21 the order is not contingent on collection. And I quote from
 22 that order. It's document No. 86 on the docket. And it says,
 23 The CIA's obligation to search and review shall extend not to
 24 operational files, but only to relevant documents that have
 25 already been identified and produced, or to otherwise collect

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1 it by -- or otherwise collect it by the CIA's Office of
 2 Inspector General. So "collection" is not the only term.
 3 There's also "produced" or "identified." That's completely
 4 what the CIA did, is a plain violation of produced and
 5 identified, as well as the collected portion of that word.

6 THE COURT: Thank you.

7 MS. SINGH: Thank you, your Honor.

8 THE COURT: Shall we go to the next subject?

9 MS. SINGH: Your Honor, we'd like to move to the CIA
 10 documents that are being withheld.

11 THE COURT: Yeah. Let's take a short break.
 12 (Recess)

13 THE COURT: Okay.

14 MS. KOLBI-MOLINAS: Good afternoon, your Honor.

15 THE COURT: Good afternoon.

16 MS. KOLBI-MOLINAS: Plaintiffs today are challenging
 17 the CIA's withholding of three categories of documents. And
 18 the first category are documents A and B on your chart. And
 19 those are items 29 and 61, which were originally Glomar
 20 documents. But item 29 has since been identified as an August
 21 1st, 2002 DOJ memorandum specifying interrogation techniques
 22 that may be used against top al Qaeda members. And item 61 has
 23 been identified as the September 17, 2001 presidential
 24 directive setting up the CIA's secret detention program abroad.
 25 The second category of documents are those documents

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1 that have been gathered by the CIA's OIG in connection with
 2 what are now closed criminal investigations into improprieties
 3 or illegal conduct by CIA personnel.

4 And the final category are classified documents that
 5 have been referred to the CIA by the OLC. And from what we can

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 6 tell -- the declaration is very minimal, but from what we can
 7 tell, all the documents relate to the CIA Detention
 8 Interrogation Program, and many specifically discuss
 9 interrogation methods. And I'm going to address these
 10 documents with respect to exemptions one and three, and my
 11 colleague Ms. Clark is going to address exemption five.

12 Your Honor, there is good reason to believe that at
 13 least some of the information contained within these documents
 14 concerns the torture and abuse of prisoners. And because
 15 torture and abuse do not constitute intelligence methods under
 16 either exemption, the FOIA does not permit the CIA to withhold
 17 information of this kind. And this is why plaintiffs
 18 respectfully request that the Court review these documents in
 19 camera and release any portions or documents that have been
 20 improperly withheld.

21 THE COURT: why would it be improper to withhold a
 22 document dealing with various descriptions of interrogation
 23 techniques if arguably some part of it mentions that torture
 24 was used?

25 MS. KOLBI-MOLINAS: Your Honor, as with any
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 1 intelligence method there are unlawful interrogation methods
 2 and there are lawful interrogation methods. And the CIA is
 3 only permitted to rely on exemptions one and three to withhold
 4 lawful interrogation methods or intelligence methods from
 5 disclosure. Therefore, to the extent that any of these
 6 documents discuss or describe torture or abuse of prisoners,
 7 those are not lawful intelligence methods within the meaning of
 8 the FOIA and, therefore, they cannot be withheld.

9 THE COURT: How do I decide what's a torture procedure
 10 and what's a nontorture procedure?

11 MS. KOLBI-MOLINAS: well, your Honor, I think that
 12 with respect to at least some of the documents, it will likely
 13 not be a difficult determination to make. There may be
 14 documents that themselves determine that the conduct is
 15 torture. We had received documents from the DOD, for example,
 16 and we can hypothesize that there would be, say, similar
 17 documents among the CIA's documents.

18 And we received autopsy reports that describe
 19 prisoners being shackled to the tops of door frames with gags
 20 in their mouths and being the victims of severe blunt force
 21 injuries. And those autopsy reports themselves conclude that
 22 the manner of death was homicide.

23 And to the extent that any cases like that are
 24 described within the CIA's documents, it will be easy for the
 25 Court to determine that they fall outside the scope of the

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 1 CIA's mandate. And on the other hand, there are likely going
 2 to be documents that are clearly withholdable. There are
 3 likely going to be documents that are very easy for the Court
 4 to decide in the other direction.

5 THE COURT: So you want me to examine the documents in
 6 camera.

7 MS. KOLBI-MOLINAS: Yes, your Honor. That's all we're
 8 asking.

9 THE COURT: And that applies to your A, B, and C
 10 categories?

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 11 MS. KOLBI-MOLINAS: Yes, your Honor. And D.
 12 THE COURT: Well, for the issue of exemption one.
 13 MS. KOLBI-MOLINAS: Mm-hmm.
 14 THE COURT: Okay. All right. Next point.
 15 MS. KOLBI-MOLINAS: Well, your Honor, we believe that
 16 because these documents concern torture and abuse or may
 17 concern torture and abuse of prisoners, they should be reviewed
 18 in camera. And if your Honor does not have any other questions
 19 about why they should be reviewed in camera...
 20 THE COURT: Well, maybe. But let's see what the
 21 government says and I'll come back to you.
 22 MS. KOLBI-MOLINAS: Okay.
 23 MR. SKINNER: Good morning again, your Honor.
 24 THE COURT: It's afternoon.
 25 MR. SKINNER: Good afternoon at this point.
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1 THE COURT: We've worked through the morning.
 2 MR. SKINNER: I stand corrected. It appears that the
 3 only dispute with regard to the holding of documents, I guess
 4 we use plaintiffs' categories A, B, C, and D under exemptions
 5 one and three, is plaintiffs' speculation that these documents
 6 contain evidence of illegality in the form of torture.
 7 If I could address the first two documents first.
 8 This would be the DOJ memorandum in the September 17th
 9 document.
 10 First, we've made clear in our submissions that the
 11 September 17th document does not say anything about what
 12 interrogation methods the CIA may or may not use. It's a
 13 document that authorizes the CIA to set up the interrogation
 14 and detention program; it doesn't provide any parameters for
 15 what CIA will do that. A document can't contain any evidence
 16 of what the CIA actually did.
 17 And we, therefore, don't feel that under even
 18 plaintiffs' characterization of what's properly classified,
 19 what's not, that there's any reason to believe that this
 20 document was improperly classified.
 21 And the same theory applies to --
 22 THE COURT: which Dorn declaration?
 23 MR. SKINNER: That document is addressed in the eighth
 24 Dorn declaration in detail; and then it's also addressed a
 25 little bit in the ninth Dorn declaration. And I can address,
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1 your Honor, the specific paragraphs in the Dorn declaration
 2 that discuss what that document actually is.
 3 If you turn to page --
 4 THE COURT: Well --
 5 MR. SKINNER: -- 34 is where the more detailed
 6 discussion is, the presidential directive begins. And in
 7 paragraph 66 on that page, Ms. Dorn says --
 8 THE COURT: Paragraph 66?
 9 MR. SKINNER: Yes. She says, The request the
 10 plaintiffs had served was for a directive signed that granted
 11 the CIA the authority to set up detention facilities outside
 12 the United States and/or outlined methods that may be used
 13 against detainees.
 14 She makes clear that the CIA did not locate a document
 15 signed by President Bush outlining interrogations that may be

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 16 used against detainees. But we did locate one document signed
 17 by President Bush that pertains to the CIA's authority to set
 18 up detention facilities outside the United States.
 19 So if plaintiffs are claiming that the document was
 20 improperly classified because it would contain evidence of
 21 illegal torture, this document, as it's described in the Dorn
 22 declaration, simply would not contain that type of evidence.
 23 THE COURT: The argument for exemption is B1, B3, and
 24 B5.
 25 MR. SKINNER: That's correct, your Honor. B5 only
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 1 applies to a portion of the document, very small portion.
 2 THE COURT: B1 is the key point. What is the
 3 argument?
 4 MR. SKINNER: Well, B1 and B3. The argument is that
 5 detention is an intelligence method. As an intelligence
 6 method, it is properly protected by the director of the Central
 7 Intelligence Agency under exemption three. And the NSA,
 8 National Security Act, and the CIA Act, as we lay it out in
 9 detail in our briefs.
 10 THE COURT: Should I be looking at these finding that
 11 there are segregable portions?
 12 MR. SKINNER: Your Honor, I don't believe there's any
 13 information in these documents that would be segregable or
 14 producible. They've been reviewed for that purpose. We,
 15 provided a declaration that establishes that we've reviewed
 16 them for that purpose and haven't found any segregable
 17 information. And in addition, if your Honor had any doubts
 18 about what was actually in those documents, the classified
 19 declaration that we've also put in goes into what is in that
 20 document paragraph by paragraph.
 21 THE COURT: That's General Hayden's --
 22 MR. SKINNER: That's General Hayden's declaration,
 23 which was filed at the beginning of the week.
 24 THE COURT: I want to say about that, that I did not
 25 look at it.

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 1 MR. SKINNER: I understand, your Honor.
 2 THE COURT: Because it was given to me with the
 3 limitation that only I could look at it, and I could not have
 4 the benefit of my law clerk looking at it.
 5 This issue came up two years earlier with respect to a
 6 previous law clerk, and I took the position at that time that I
 7 needed my law clerk to assist me in reviewing the document and
 8 understanding it and understanding how it should be evaluated
 9 in the context of this case and the precedence of other cases.
 10 And I did not want to be deprived of that judicial function,
 11 and so I refused to read what the CIA had tendered.
 12 The issue comes up again. These are numerous,
 13 numerous documents; many of them are very long, many of them
 14 say different things that need to be evaluated in different
 15 contexts. I cannot do it alone. I cannot function alone. And
 16 if there is information that the government wishes me to
 17 understand, I cannot do that and function properly and perform
 18 my judicial function without the benefit of my law clerk.
 19 I have arranged, with respect to law clerks now for
 20 three to four years, to be cleared at the highest level. And

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21 as I understand it, it's not the lack of clearance that is an
 22 issue, but, rather, the CIA's desire that information be
 23 compartmentalized so that it is not seen by any others than
 24 those having a need to know. They grant that I have a need to
 25 know; but they do not grant that I need to utilize my law clerk

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1 so that I can not only read, but understand. And without that
 2 capability, I will not read General Hayden's declaration. And
 3 if I can't read it, I cannot take it into consideration that
 4 which he says. And the result of that may be that I will have
 5 to undertake, at least on a separate basis, an in camera review
 6 of the documents themselves.

7 MR. SKINNER: I understand, your Honor. When we had
 8 submitted the declaration to you, we understood that your Honor
 9 was going to determine based upon the public record today
 10 whether he had sufficient information to rule with regard to
 11 whether or not we properly invoke the exemptions applicable to
 12 these documents.

13 All I was noting is that there is this other
 14 declaration which addresses these documents. If your Honor
 15 would find that the public declarations did not satisfy him
 16 that the entire document was withheld properly, then I think
 17 the next step would be to look at that declaration. And if
 18 your Honor is saying now that he's not going to look at that
 19 declaration unless and until his clerk is granted access to the
 20 declaration, as well, then we'll pass that on to the people who
 21 control --

22 THE COURT: I will state on the record that I decline
 23 to look at the document. The document is not to be kept in my
 24 chambers. I accept that limitation. I accept the limitation
 25 that a representative of the government will supervise my

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1 looking by remaining outside the door. I represent that I will
 2 not take any notes or review it.

3 But what I would like to do is the same kind of either
 4 review of the justification or review of the document that we
 5 did with Department of Defense documents in a previous
 6 exercise. We have a reporter that's been cleared. I look at
 7 the document, I make whatever observations I need to make on
 8 the record that also is sealed. There is in the room my law
 9 clerk, myself, the court reporter, a representative or several
 10 representatives of the government, and that is it.

11 And then at some point in time I state publicly my
 12 holdings, making sure that I do not disclose in my reasoning
 13 anything that would compromise the secrecy of the document.
 14 That is the procedure that we follow. And I think we followed
 15 it with a great deal of satisfaction to all involved in the
 16 process with regard to the Department of Defense documents.
 17 And I see no reason why I should not be able to follow it here.

18 with regard to documents of size and scope as these
 19 documents are, it's important to have some check, and it could
 20 be done on a sampling basis, to make sure that there are no
 21 segregable portions; and that the assertions of secrecy by the
 22 government are merited. That's not to say that I would take it
 23 upon myself to second-guess the classifying agency, I will not
 24 do that. But there are other functions that a court will do
 25 and can do and which I performed in the previous exercise of

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1 which I will propose to do again.

2 Those are the procedures that we follow. And if they
3 can't be worked out satisfactorily, then I decline to review
4 the Hayden declaration.

5 MR. SKINNER: We understand your Honor hasn't reviewed
6 it, and is not going to review it unless and until his clerk is
7 read into the program.

8 I think if we look at the actual documents at issue
9 here, we have a presidential directive, a legal memo, and then
10 a series of documents that were sampled by OIG. And we try and
11 figure out which, if any, of these documents are appropriate
12 for in camera review with regard to segregability. I would
13 argue that we made sufficient representations on the public
14 record to explain the applications of the first, third, and
15 fifth exemptions to FOIA with regard to presidential directive.

16 THE COURT: I don't think so. The argument is made in
17 paragraph 66 of the eighth Dorn declaration, because
18 substantial portions contain information relating to
19 intelligence sources and methods and foreign relations and
20 foreign activities of the United States, and that is classified
21 top secret and is withheld on the basis of FOIA exception B1
22 and B3. I think that's a large and conclusory statement with
23 regard to an extensive document.

24 MR. SKINNER: Your Honor, we go on to describe the
25 document in detail. In our argument here today, the plaintiffs

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1 are saying, your Honor, we want you to look at documents where
2 there may be some evidence of illegality and determine whether
3 or not those documents are properly withheld under exemptions
4 one and three. And the evidence that they claim that they
5 haven't provided any evidence, but they speculate that where
6 there is illegal activity, it comes in the form of improper
7 interrogation techniques.

8 And my point with regard to this document and this
9 document alone is that we had established that it does not
10 address interrogation techniques. So there is no reason to
11 suspect based upon plaintiffs' own arguments here in court that
12 it was improperly withheld under exemptions three or one.

13 THE COURT: Is it not within the scope of the FOIA
14 requests?

15 MR. SKINNER: It is, because it authorizes the CIA to
16 set up detention facilities. And plaintiffs have sought all
17 documents relating to the treatment of detainees. Their FOIA
18 requests with regard to the CIA is not limited in scope as it
19 was with DOD to instances where there was some kind of
20 allegation of abuse.

21 THE COURT: Now, previously it was a Glomar response
22 to this document.

23 MR. SKINNER: That's correct, your Honor.

24 THE COURT: The president then, during the appeal
25 period, went public to say that there were such facilities --

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1 MR. SKINNER: That's correct, your Honor.

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THE COURT: -- outside the United States and in other countries. So the world knows that. What is it that we're protecting, the precise location?

MR. SKINNER: Well, your Honor, first of all, within this document there's a lot of information that's actually nonresponsive to plaintiffs' FOIA request. It's there as part of the document.

THE COURT: I don't want to go into this in detail, because this is not the place to describe the document, but with an extensive document of this nature, with the president already having made public statements, it's almost impossible to believe that a blanket B1 or B3 exemption would cover everything.

MR. SKINNER: Well, it's not a blanket exemption. We argue that the document is significantly covered by B1 and B3, it's also covered by B5. Our position is that while the president has acknowledged the CIA has the authority to maintain detention facilities overseas, this directive contains additional information above and beyond that that is properly classified. And also, separate and apart from classification, which is an issue under 1295(a), the information concerns intelligence sources and methods as properly protected under exemption three, where our authority to withhold is even broader than under exemption one.

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THE COURT: Let's go on to the next document.

MR. SKINNER: The next document would be the legal opinion from OLC dated August 1, 2002. Plaintiffs again posited the basis of their argument is that they want this Court conducting an in camera review of documents that might contain evidence of illegality, a legal opinion which sets out OLC's opinions as to the scope of the law and what may be permissible and what may not be permissible.

THE COURT: This is in the form of legal advice.

MR. SKINNER: It's in the form of legal advice. And contrary to plaintiffs' description of the document --

THE COURT: I think it's encompassed by attorney-client privilege.

MR. SKINNER: It is. And it's also encompassed by the deliberative process privilege, and it's also properly classified to the extent it describes interrogation methods contemplated.

THE COURT: I'm not sure about deliberative process. Let's stick with attorney-client privilege. All you need is one exemption.

MR. SKINNER: Correct, your Honor.

THE COURT: Ms. Clark, why is this not attorney-client privilege?

MS. KOLBI-MOLINAS: Your Honor, I'm only addressing exemptions one and three. If you'd like to move to exemption

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five, then Ms. Clark may do so.

MS. CLARK: Sorry, your Honor. For item 29, I think our point there, first of all, is that based on the description of the document which talks about, and as Mr. Skinner described, lawful interrogation methods, our contention is that it does not necessarily mean that confidential information

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 7 about the client is disclosed in that document.
 8 And we believe that in camera review is warranted so
 9 that your Honor can look at the document and at least decide at
 10 least whether there is segregable information, for instance, if
 11 the OLC is simply setting forth the law as opposed to speaking
 12 specifically to something that is held confidentially by the
 13 client.
 14 THE COURT: I hold it that it's encompassed by
 15 attorney-client privilege.
 16 MS. CLARK: Thank you, your Honor.
 17 THE COURT: What's next?
 18 MR. SKINNER: The next documents, I guess, after the
 19 OLC memo, would be the closed OIG investigative files.
 20 We did a sampling of documents, as plaintiffs
 21 describe. There are four general categories: Other documents,
 22 those being documents that didn't fit within any particular
 23 category; interview reports; cables; and e-mails.
 24 Our main argument in our opening brief was that a lot
 25 of the very type of information that is included within these
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 1 documents the Court has previously ruled to be properly
 2 withheld with regard to our arguments in the first motion for
 3 summary judgment, because the same type of information was
 4 claimed exempt on rider 43. We're just trying to apply those
 5 very same rulings to these documents. We think we provided
 6 more than enough information to justify the one, three, and
 7 five exemptions on these documents.
 8 Plaintiffs' primary objection to the documents seems
 9 to be that they may hold evidence of illegality or impropriety.
 10 In the first instance, they haven't come forward with any
 11 evidence of what's in those documents; it's all speculation
 12 based upon press reports. In the second instance, even if the
 13 documents, which are investigative reports, did uncover some
 14 evidence of impropriety or illegality, that does not mean that
 15 the document itself was improperly classified.
 16 As Ms. Dorn explains in her seventh declaration at
 17 paragraph 11, there could be a lot of other information in that
 18 document that is properly classified. And we are entitled to
 19 classify all of the intelligent sources and methods, and then
 20 pass on whatever evidence of illegality or impropriety is
 21 uncovered to the Department of Justice. EO 12333, 12 with
 22 three 3's, in case you got that wrong, actually specifically
 23 contemplates that intelligent sources and methods will be
 24 protected even in referrals to main justice for further
 25 criminal investigation.
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 1 THE COURT: What document numbers are we talking
 2 about? This is category C?
 3 MR. SKINNER: It's category C. We did a sampling of
 4 documents. I don't know the total --
 5 THE COURT: Let me see if there's anything
 6 specifically that the plaintiffs want to --
 7 MR. SKINNER: That would make sense, your Honor.
 8 THE COURT: Pardon? Go ahead.
 9 MS. KOLBI-MOLINAS: Your Honor, there's no way for us
 10 to tell from the declarations that we've been given with
 11 respect to the OIG documents which specific ones that may cover

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 12 solely lawful intelligence methods and which ones may describe
 13 unlawful intelligence methods.
 14 THE COURT: Well, your argument has to be that the
 15 Vaughn declaration is inadequate.
 16 MS. KOLBI-MOLINAS: Your Honor, it is. That is our
 17 argument.
 18 THE COURT: So let's look at a few.
 19 MS. KOLBI-MOLINAS: Your Honor, these are all
 20 documents that were generated by investigations into
 21 improprieties and unlawful conduct. And we don't dispute that
 22 some of them may contain only lawful conduct. And the
 23 conclusion of the investigation may have been that no unlawful
 24 or improper conduct actually occurred.
 25 But based on this Vaughn declaration, there's no
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 1 way -- I mean not a single statement in this declaration says
 2 the intelligence methods described in these documents are all
 3 lawful. We don't have any indication.
 4 THE COURT: Give me a few that you think are
 5 particularly egregious.
 6 MS. KOLBI-MOLINAS: Well, your Honor, it's difficult
 7 to choose now. All we know is there are reports of interviews,
 8 we would also like -- the documents five and seven are the
 9 special review documents that were discussed earlier in the
 10 contempt motion. It's Exhibit O in the contempt motion, but
 11 that's only an excerpt from the Vaughn declaration.
 12 THE COURT: Let me look at one.
 13 MS. KOLBI-MOLINAS: Sure.
 14 THE COURT: Which one do you want me to look at?
 15 MS. KOLBI-MOLINAS: Okay. It's the seventh Dorn
 16 declaration, and then it's page -- I believe it's page 8. No,
 17 I'm sorry, page 5 is where document five is discussed. Page 8
 18 is where document seven is discussed.
 19 THE COURT: To find document five I look --
 20 MS. KOLBI-MOLINAS: Page 5 of the seventh Dorn.
 21 THE COURT: Yeah, but it's on the Vaughn declaration,
 22 on page 10 of the first Dorn declaration that's attached here?
 23 MS. KOLBI-MOLINAS: I'm sorry, your Honor. I don't
 24 know what declaration you're referring to.
 25 THE COURT: I'm looking at this big book.
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 1 MS. KOLBI-MOLINAS: Yes.
 2 MR. SKINNER: If you need some assistance, it's in the
 3 seventh Dorn declaration, Exhibit B, starts at Page 5.
 4 THE COURT: B. Okay.
 5 MS. KOLBI-MOLINAS: Sorry, your Honor.
 6 THE COURT: This 129-page document?
 7 MS. KOLBI-MOLINAS: Yes, your Honor.
 8 (Pause)
 9 THE COURT: I can't say looking at this lengthy
 10 description of the document that it's not presented in good
 11 faith.
 12 MS. KOLBI-MOLINAS: Your Honor, there's nothing in
 13 this document that --
 14 THE COURT: However, it is not paragraph-by-paragraph
 15 justification that one would normally require. It seems to me
 16 that in fairness to both sides, that I ought to be able to

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17 sample on a very restricted basis in terms of scope and numbers
18 a number of these documents. And if I conclude from them that
19 they are fairly covered by the exemptions and the government
20 has shown that, it seems to me that my inquiry will be
21 finished. But I do think I need to have some exposure to the
22 documents, Mr. Skinner.

23 MR. SKINNER: I understand, your Honor. And I know
24 your Honor has had a similar procedure with the Department of
25 Defense in reviewing documents in camera.

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1 THE COURT: Right.

2 MR. SKINNER: And I will pass on your Honor's request
3 to review a sampling of documents to the CIA. And I just hope
4 your Honor will understand that they are different agencies,
5 and they do treat documents differently. And as an
6 intelligence agency, the CIA just institutionally does not
7 provide records unless it's a matter of last resort.

8 THE COURT: There's attention. It is well-known in
9 the clandestine services that the more people that are privy to
10 an item of information, the more chance there is that the
11 confidentiality of that piece of information would be
12 compromised, even though all the people who may be privy are
13 within the zone of those who are pledged to maintain secrecy.

14 On the other hand, there's a judicial function to
15 perform. Congress has given to the courts the obligation to
16 interpret and implement the Freedom of Information Act and the
17 other acts that exempt various kinds of activities and
18 documents under exemption B3. The Court must interpret that.

19 In order to do that work, there's a deliberate
20 function that has to be performed which cannot be performed in
21 isolation. I think courts are well experienced, and law
22 clerks, as well, in the kinds of judgment that will maintain
23 secrecy and not compromise the information that is intended to
24 be secret.

25 And accordingly, I rule that there is a need of

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1 checking against the actual to be done on a sampling basis
2 under appropriate protections, and then I'll be in a position
3 to make rulings.

4 MR. SKINNER: I think I would say the next question
5 then, which is what are we to sample? Plaintiffs seem to say
6 that their fundamental argument is their concern that these
7 documents contain evidence of illegality, evidence of improper
8 interrogation methods. Now, we've argued that that in and of
9 itself is not a basis to require for a finding that a document
10 is improperly classified.

11 THE COURT: Let me ask you this, because I think I'm
12 inclined to agree with you, Mr. Skinner. Let me ask you this:
13 Let's suppose it is frankly stated within a document that a
14 technique is being used that is unlawful under the laws of the
15 United States. Would that characterization, and perhaps the
16 conduct leading to that characterization, be open to
17 inspection?

18 MR. SKINNER: Well, it certainly might be a criteria
19 for determining what the Court wants to inspect. We would
20 argue that --

21 THE COURT: No, I'm talking by opposing counsel.

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22 MR. SKINNER: No, not by opposing counsel, your Honor.
23 THE COURT: In other words, if there was a frank
24 concession of illegal conduct, not something that the Court has
25 to infer or find or conclude, but somebody involved in

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1 interrogation or authorizing interrogation said, Look, I know
2 it's legal, I know it's torture; do it. Something like that.
3 MR. SKINNER: Your Honor, even where there was some
4 kind of finding of illegality within a document, that would not
5 mean that the document itself was not otherwise properly
6 classified.

7 THE COURT: What about this piece of the document.
8 The segregable portion of the document.

9 MR. SKINNER: Even this piece of the document
10 identifying what was determined to be an improper technique
11 would itself be properly classified, would be referred to
12 proper authorities for investigation and action. But the
13 revelation of what has been determined to be improper would
14 itself be useful information for our adversaries in determining
15 what it is we do. So even that piece could be properly
16 withheld.

17 THE COURT: I understand. I feel -- and it would be
18 improper for me to make a ruling now. I'm going to do some in
19 camera inspections. But I would feel that you're correct that
20 torture and improper interrogation techniques are
21 fact-intensive and context-intensive. And as long as there is
22 a good-faith concern to maintain the secrecy of our
23 investigative techniques, and that is a concern that has been
24 reviewed by appropriate authorities within the CIA, with a
25 conclusion that secrecy should extend to very top secret bases,

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1 it's not for me to say it's wrong. I have to respect it and
2 follow it.

3 And, therefore, the argument that plaintiffs make that
4 there may be a core area which should be subject to production,
5 I can't say on a theoretical basis that I don't agree, but I
6 think the chances of my finding from that in such an
7 overpowering way that a portion of a document should be
8 produced is not a high probability. I think most probably I
9 will defer to the classified.

10 MR. SKINNER: So what your Honor has indicated, the
11 Court's desire to review a certain subset of documents in
12 camera.

13 THE COURT: Right.

14 MR. SKINNER: Pass that request on.

15 THE COURT: I think I should see 29; I think I should
16 see 61, because they've been before me before. I've made
17 rulings on that. The appeal was aborted because the president
18 disclosed that which he was not supposed to disclose or was not
19 supposed to be disclosed. The president can disclose anything
20 he wants to disclose. I think I should see 29, 61 and a small
21 sampling of the other stuff.

22 MR. SKINNER: So put 29, 61 to the side just for one
23 minute, focusing on the OIG documents, are we going to sample
24 documents that were already included within the CIA's Vaughn
25 declaration?

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1 THE COURT: That's my thought.
2 MR. SKINNER: Turning back to 29, 61. With regard to
3 29, your Honor had a moment ago, I thought, ruled that the
4 invocation of the attorney-client privilege with respect to
5 that document was proper. So wouldn't review for that document
6 only be for purposes of segregability?
7 THE COURT: Which one is that?
8 MR. SKINNER: That's the legal memo. That's the memo
9 from OLC to CIA.
10 THE COURT: That's 29.
11 MR. SKINNER: That's 29. It had said that B5,
12 attorney-client, at least, was proper; but then you indicated a
13 desire to see it in camera.
14 THE COURT: If this were attorney-client privilege
15 issue, I think there would be in camera review, unless there
16 were a very full description of the document itself paragraph
17 by paragraph. There isn't. So I do think that an in camera
18 review would be appropriate. You know my views. And anything
19 in the document is subsumed by those views; it will lead to a
20 conclusion that it need not be produced, but there may be other
21 things in the document, including how things are implemented
22 and the like.
23 If it's beyond the information imparted to the
24 Department of Justice for the purpose of obtaining an opinion,
25 and an opinion they want, if that's what it is, it's pertinent.
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1 MR. SKINNER: As we made clear in the declarations,
2 that's all there is.
3 THE COURT: Well, then if you --
4 MR. SKINNER: Proposed interrogation techniques in the
5 context in which they intended to be used were provided to the
6 Department of Justice.
7 THE COURT: If that's all it is, then I don't need to
8 see it. But someone's got to say that's all there is.
9 MR. SKINNER: We've said it in the declarations; we
10 said that's all there is.
11 THE COURT: I didn't read it that way. Where is it
12 again? Eighth Dorn?
13 MR. SKINNER: Eighth Dorn. 29 is described. The
14 description starts at paragraph 55 on page 29. Then the
15 description of what's in the document is in paragraph 56 on
16 page 30.
17 THE COURT: Have you seen this document?
18 MR. SKINNER: I have, your Honor.
19 THE COURT: Can you represent to me that there's
20 nothing beyond what is described?
21 MR. SKINNER: I can represent to your Honor that what
22 is in that document is a request for legal advice that does not
23 contain anything beyond what is described here. I know the
24 description is general.
25 THE COURT: I don't need to see 29.
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1 MS. CLARK: Your Honor, if I -- I'm sorry. Excuse me.
2 I feel like I was remiss just in my response to your
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3 point on item 29. And one argument that is in our briefs which
 4 I did not mention was the adoption argument. And, of course,
 5 in our briefs we've cited to news articles that describe the
 6 document as proving permissible interrogation techniques.

7 THE COURT: Proving what?

8 MS. CLARK: Permissible interrogation techniques. And
 9 the government --

10 THE COURT: That's a legal opinion.

11 MS. CLARK: Well, if, in fact, those -- the rationale
 12 is adopted by the decision-maker, then that would no longer --
 13 because just the way deliberative working law on adoption,
 14 adopted memos are not subject to the deliberative process
 15 privilege, they're similarly not subject to the attorney-client
 16 privilege. And I just want to point out --

17 THE COURT: Because of an exception in FOIA?

18 MS. CLARK: Yeah, that it is an exception to the
 19 attorney-client privilege.

20 THE COURT: What's the exception? What is the
 21 exception? Articulate the exception.

22 MS. CLARK: The exception is for -- well, there are
 23 two different ways to characterize it. First, for the adoption
 24 argument is that if the memorandum has a viewpoint that is
 25 adopted by an agency that was making a decision based on that

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1 viewpoint, the memorandum is no longer privileged.

2 THE COURT: I think we have, as represented to me, a
 3 request for advice and advice. And that's the whole document.
 4 I hold that it is privileged.

5 MS. CLARK: All right, your Honor. Just because it
 6 was something that has come up since we have briefed the
 7 papers, and part of our argument for adoption is that, you
 8 know, the Department of Justice says that the CIA does not --
 9 I'm sorry, that the Department of Justice does not specify or
 10 authorize activities in which clients can engage. And when we
 11 have an exhibit before your Honor, which is Exhibit H --

12 THE COURT: Does not specify activities what?

13 MS. CLARK: Specifically, they say -- they are talking
 14 with respect to item 29. DOJ does not -- this is the
 15 defendant's brief at page 21. DOJ does not specify activities
 16 in which clients may engage, but rather provides legal advice
 17 to clients.

18 Later, in the ninth Dorn declaration, paragraph 16, it
 19 states, DOJ does not authorize interrogation methods that the
 20 CIA may use.

21 Now, we have provided to the Court the public
 22 statement by CIA director Michael Hayden. And that is
 23 contained in Exhibit H to plaintiffs' contempt motion. It's a
 24 statement that he made in December, of course, after our
 25 briefing was completed. And I'll just quote from the paragraph

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1 that we think is relevant, it's the fourth paragraph, where he
 2 states, To meet that need, he's talking about the statements
 3 actually about the videotapes that were the subject of the
 4 first motion. But he says, The CIA designed specific
 5 appropriate interrogation procedures. Before they were used,
 6 they were reviewed and approved by the Department of Justice
 7 and by other elements of the executive branch, which, of

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8 course, cannot be squared with the representations that the
 9 government has made in their declaration.

10 THE COURT: I interpret that as a loose way of saying
 11 that the Department of Justice considered what was put to it as
 12 legal, and it's still legal opinion. And that doesn't change
 13 my mind.

14 MS. CLARK: Thank you, your Honor.

15 MR. SKINNER: Your Honor, I think the next question
 16 then would be -- it is my understanding right now that your
 17 Honor intends to review documents No. 61, and then some subset
 18 of the OIG documents in camera.

19 THE COURT: Right.

20 MR. SKINNER: What's the procedure that you want to
 21 follow for that?

22 MS. KOLBI-MOLINAS: Your Honor, if I may. The OIG
 23 documents that are before you right now are only a percent of
 24 the documents that they were supposed to search and identify
 25 and produce to us. So if your Honor is going to request a
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1 smaller sample of those OIG documents, we'd like to negotiate
 2 with --

3 THE COURT: I'll tell you what I want: Item 61, plus
 4 20 others. You choose the numbers.

5 MS. KOLBI-MOLINAS: Plaintiffs choose?

6 THE COURT: You choose the numbers. And the total
 7 should be 20.

8 MS. KOLBI-MOLINAS: Okay.

9 THE COURT: Don't pick all the big ones.

10 MR. SKINNER: Can we have some further detail on that,
 11 as far as don't pick -- I mean there are some very large
 12 documents in the record. Is there any kind of limitation --

13 THE COURT: Have some mercy on them.

14 MR. SKINNER: Yeah, all right.

15 THE COURT: The criteria should be mercy for the
 16 judge.

17 MS. KOLBI-MOLINAS: Okay, your Honor. So plaintiffs
 18 will choose 20 of the closed OIG files.

19 THE COURT: Right.

20 MS. KOLBI-MOLINAS: And then 61, as well.

21 THE COURT: And if it's a very large document, I may
 22 not read the whole thing; I may choose to sample what I read.
 23 I propose the following.

24 MS. KOLBI-MOLINAS: Your Honor, if I may, what about
 25 the OLC documents? We have not yet addressed whether or not
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1 those would be reviewed in camera.

2 THE COURT: We'll get to that in a moment.

3 MS. KOLBI-MOLINAS: Okay.

4 THE COURT: January 28, the government, if it's okay,
 5 will come to chambers at 3 o'clock. And I propose a two-hour
 6 review. I hope my time span is better there than it is today.

7 MR. SKINNER: Okay, your Honor. It's our legal
 8 position that we provided enough information for the
 9 determination to be made without in camera review. And it's
 10 your Honor's conclusion that it's necessary nonetheless.

11 THE COURT: Right.

12 MR. SKINNER: So on January 28, with regard to item 61

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 13 and the subset of 20 of the documents identified in Exhibit B
 14 to the seventh Dorn declaration to be chosen by the plaintiffs,
 15 we understand your Honor's order that they are to be brought in
 16 camera to the Court for review, 3 o'clock.
 17 THE COURT: Right. Plaintiffs will not be present.
 18 The government will be present.
 19 MR. LANE: Your Honor, if I can, just a larger point.
 20 Is that the same proceeding you want DOD to bring whatever
 21 documents that you talked about sampling yesterday?
 22 THE COURT: Yeah. We'll need more than -- we'll
 23 probably have to go into the next morning. We'll do our best.
 24 There will probably be representatives of the department that
 25 come, so it will be a hardship to make people wait around.

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 1 Let's do the CIA Monday at 3, and the Department of Defense
 2 Tuesday at 10. All right. Office of Legal Counsel. It seems
 3 to me that that would be also covered by attorney-client
 4 privilege.
 5 MS. CLARK: Your Honor, if we're speaking specifically
 6 about category D, which are the documents referred by the OLC
 7 to the CIA, I would just point out if you take a look at the
 8 Vaughn declaration describing those documents, it's absolutely
 9 vague and conclusory; and, in fact, they state in their
 10 declaration that they only have two paragraphs on this
 11 particular exemption, but they say on the OLC Dorn declaration,
 12 which is the first declaration, in the bound CIA
 13 declarations --
 14 THE COURT: Ms. Kolbi-Molinas -- off the record.
 15 (Off record)
 16 MS. CLARK: So I am referring you to the OLC Dorn
 17 declaration.
 18 THE COURT: Loud.
 19 MS. CLARK: The OLC Dorn declaration. And I just want
 20 to point out that in that declaration, the government states
 21 that many -- quote/unquote many documents contain confidential
 22 legal advice. But, in fact, when you look at the index
 23 attached to the declaration, they claim the attorney-client
 24 privilege with respect to each and every document that is
 25 appended.

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 1 THE COURT: I'm going to give you the reference
 2 criteria. It's the communication of factual information by the
 3 client to the lawyer or the legal office, and the delivery of
 4 advice with respect to that that is privileged.
 5 To the extent that privilege is claimed about
 6 information derived by the attorney from other sources, the
 7 definition of privilege becomes difficult to ascertain and
 8 judgment calls need to be made.
 9 With that, I want to leave it to you and Mr. Skinner
 10 to identify particular documents which are subject to question
 11 with me or further examination is a better way to put it,
 12 because privilege is claimed for sources of information
 13 obtained by the lawyer in order to give advice. But the advice
 14 itself is privileged. And I talked about it yesterday, citing
 15 Upjohn v. United States as the key case.
 16 MS. CLARK: Certainly, your Honor.
 17 MR. SKINNER: Your Honor, just perhaps one ruling from

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 18 your Honor may help us narrow this pool of documents
 19 considerably.
 20 In addition to the attorney-client privilege, we've
 21 also claimed deliberative process privilege with regard to most
 22 of these documents, not all, I think, but at least most. And
 23 in their chart that they gave to the Court yesterday, the
 24 plaintiffs indicate in a footnote with regard to these OLC
 25 documents that they do not challenge the CIA's withholding of
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 1 drafts pursuant to FOIA exemption five. To the extent that a
 2 finalized version of the draft document has been located by the
 3 CIA and identified in the Vaughn declaration, we maintain that
 4 that's just an incorrect legal position.
 5 THE COURT: I agree with you, Mr. Skinner. A draft is
 6 encompassed with the final product that is delivered. If I
 7 gave privilege status to the final and not to the draft, there
 8 would be no point to the privilege, because the draft would
 9 disclose information that would otherwise be privileged.
 10 MR. SKINNER: And also --
 11 THE COURT: It's the same problem with the
 12 deliberative privilege as it is with the attorney-client
 13 privilege. Clearly, the information given by the subordinate
 14 to the chief of department is encompassed by the deliberative
 15 privilege. Where the subordinate has done research to find
 16 information from other places, privilege is likely not to
 17 obtain, or if it does attain, it becomes subject to questioning
 18 and judgment. And so it's the same problem as with the
 19 attorney-client privilege.
 20 MR. SKINNER: I think what plaintiffs are saying is
 21 that there are some drafts where there's no final document
 22 identified, and they are objecting.
 23 THE COURT: That doesn't mean it's not part of the
 24 deliberation. It may be a deliberation that is concluded.
 25 We're not going to go that way.
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 1 MR. SKINNER: I think a determination not to have a
 2 final draft under the case law is especially true that drafts
 3 where you don't have a finalized determination are properly
 4 covered under B5, and I was hoping --
 5 THE COURT: Both the attorney-client privilege and the
 6 deliberative privilege give no special regard to a document
 7 because it's a document. It's the communication that's key.
 8 It's the communication of information to the chief of the
 9 department or the president. That's key for the deliberative
 10 privilege, and it's key if you substitute the word "client" for
 11 "chief of department" for the attorney-client privilege.
 12 The fact that a lawyer gathers together information
 13 and creates a draft, if not communicated, is not privileged, at
 14 least it's not an attorney-client privilege; it may be under
 15 work product, but then there are different standards.
 16 MR. SKINNER: Also may be under deliberative.
 17 MS. CLARK: Your Honor --
 18 THE COURT: Well --
 19 MR. SKINNER: I mean if I do some work in my office
 20 and don't pass it to my superior, but it's still part of what I
 21 might inform my ultimate recommendation, it's part of my
 22 deliberations.

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23 THE COURT: I think it depends, Mr. Skinner, on what
24 the agency head wants and what the subordinate wants to give.
25 work product in that sense is not privilege.

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1 MR. SKINNER: I brought it up because I thought we
2 might be able to knock drafts off and narrow the pool, but
3 apparently we're not going to be able to do that, so perhaps --

4 MS. CLARK: Your Honor, I'm sorry to interrupt you,
5 Mr. Skinner, but if I can just explain, it might help us to get
6 to the end that I think we both want to get to.

7 Your Honor, I think it's exactly -- you made the point
8 yesterday. Just because something is stamped "draft" doesn't
9 it's deliberative, it doesn't mean it's not. The reason we
10 dropped this footnote, is we, as Mr. Skinner, are interested in
11 narrowing these documents. And we would have liked to narrow
12 them in the same way that we did with the unclassified OLC --

13 THE COURT: Let me interrupt, because hour is late and
14 I'm losing capacity.

15 MS. CLARK: Okay.

16 THE COURT: To the extent I had capacity. Whatever I
17 had, I'm losing rapidly. So let me make this suggestion.

18 You've heard my take on both the attorney-client and
19 the deliberative privilege, mostly on the work product
20 privilege. I think it gives you room to work and try to
21 develop a core of documents that I can look at and then I can
22 make specific rulings. And in the context of those rulings, I
23 may be able to either enlarge or narrow the view that's
24 produced.

25 Now, if the documents that are to be sampled in this
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1 context don't have claims for other exemptions like one and
2 three, for example, it may be that this can best be done where
3 I see the document, but you're in the room.

4 MR. SKINNER: All of these documents have one and
5 three on them.

6 THE COURT: All right.

7 MR. SKINNER: That's why they were referred to the CIA
8 for processing.

9 THE COURT: So let's do the one and three first, let
10 me make my rulings on that, and then we'll have another session
11 which I'll schedule for five.

12 MR. SKINNER: Just so I understand, do you want us to
13 identify a subset of documents from the OLC documents referred
14 to the CIA?

15 THE COURT: I guess so.

16 MR. SKINNER: How many does your Honor want?

17 THE COURT: Look, I feel I can physically do 20 at a
18 session.

19 MR. SKINNER: All right.

20 MS. KOLBI-MOLINAS: Your Honor, should plaintiffs be
21 identifying, as we did with the OIG documents?

22 THE COURT: Do what? You want a number? You want to
23 identify the number you want?

24 MS. KOLBI-MOLINAS: Yes, same as we did with the OIG.

25 THE COURT: Right. Otherwise it wouldn't be a sample.

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1 MS. KOLBI-MOLINAS: Okay. So we'll choose 20 of the
2 OLC, as well. And we'll try to be merciful on the page length.

3 THE COURT: Please.

4 MR. SKINNER: If your Honor would like to get this all
5 completed on the 28th with regard to the CIA documents, and 20
6 is about how much you want to be looking at, should we be doing
7 20 total, so ten from each group, from the OIG group, from the
8 OLC group, or do you want to schedule a separate date for the
9 OLC documents?

10 THE COURT: That's a proposition that I find very hard
11 to say no to because it reduces my work. I want a sample that
12 the parties feel is a reliable sample. And if ten does it,
13 that's fine. I just pulled 20 out of a hat. It's an arbitrary
14 number.

15 MR. SKINNER: Ten would be sufficient for the
16 government.

17 THE COURT: It may be sufficient for me, as well. If
18 the plaintiffs are content, let's do that, but if they are not
19 content, I'll do more.

20 MR. SKINNER: Should we start with ten from each set?

21 MS. KOLBI-MOLINAS: Your Honor, plaintiffs would
22 respectfully request the 20 of each that you initially stated
23 you would review.

24 THE COURT: Whatever you want is okay. All right.
25 Just don't give me all the big ones.

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1 MS. KOLBI-MOLINAS: We won't.

2 THE COURT: Give me a fair sampling, and keep it to as
3 few as possible.

4 MR. SKINNER: Do you want to schedule a separate date
5 then for the review of the --

6 THE COURT: No, that's enough.

7 MR. SKINNER: Do it all on the 28th?

8 THE COURT: Yeah.

9 MR. SKINNER: Okay. I think that takes care of the
10 CIA documents, unless plaintiffs have something else to add.

11 MS. KOLBI-MOLINAS: Very minimal. Less than a minute,
12 your Honor. I would just like to add, first -- I think, your
13 Honor, you can hear me, yes, without the mike?

14 THE COURT: Louder.

15 MS. KOLBI-MOLINAS: Okay. Your Honor, with respect to
16 item 29, I just want to emphasize how important this document
17 is. It was a document that was produced on the same -- not
18 produced to us, but was on the same day as the infamous Bybee
19 organ failure memo. And as the eighth Dorn declaration states
20 at paragraph 56, it concerns potential interrogation methods.
21 And there's no reason to believe that this document doesn't
22 conclude that some interrogation methods shouldn't be used by
23 the CIA. And this is exactly what we are asking your Honor to
24 look for in terms of the other documents. And if there is
25 evidence in this DOJ memorandum that's specifying what

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1 interrogation techniques should be used against top al Qaeda
2 members, if there is any indication that some should not have
3 been used because they violated U.S. laws against torture or

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CID treatment, then we would ask that your Honor treat those sections of that document the same way that you're treating the other documents that you're reviewing.

THE COURT: I think not. I think the arguments for classification are probably the most sensitive level when it's the president that's concerned. I think there has to be judicial respect for the leader of the executive branch of government. The government has classified it on the basis of its concern for the safety and security of our nation, and I decline to inject myself into that calculus.

MS. KOLBI-MOLINAS: Your Honor, if I may, just one more moment. We're not asking for lawful intelligence techniques. And the government has cited no case where an unlawful intelligence method was the basis for the classification. And to the extent that any of these documents were classified to protect on the basis of protecting an unlawful intelligence method, then it doesn't fit within the definition of exemptions one and three.

THE COURT: Okay. I stick with my decision.

MS. KOLBI-MOLINAS: Thank you, your Honor.

MR. SKINNER: Your Honor, we're close to the finish line then. It's just the OLC documents remaining, and I'll see

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the podium to the plaintiffs, unless you want to take a break.

THE COURT: No. Off the record.
(Off record)

MS. CLARK: Your Honor, we have challenged the government's withholding of the 37 documents listed that's under category E. And I think the best way to approach the argument is for us to focus on two of those documents for which we have the most -- the government has provided the most information; that's document 1098 and document 1101.

THE COURT: Will that finish us for today?

MS. CLARK: And that will finish us for today.

THE COURT: 1098?

MS. CLARK: And 1101. The 1098 document is a March 13th, 2002 memorandum to William J. Haynes, general counsel at the DOD, and it's from J. Bybee, the assistant attorney general for the Office of Legal Counsel.

Our argument with respect to this document -- and let me just say the government withholds it on the basis of the deliberative process and the attorney-client privileges. We feel that we have enough information about this document in particular to warrant it to be reviewed by you in camera. We do not believe that the deliberative process or attorney-client privilege applies. It's been described in the news as a memorandum which outlines the president's purported authority to conduct renditions. It is not the type of document,

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therefore, that shows a back-and-forth in terms of coming to a decision, but it's actually a decision itself and considered inconclusive declaration from --

THE COURT: The fact that it comes from someone in justice to general counsel of the Defense Department suggests to me that if renditions is the subject, that it's concerned with the issue of its legality. And if it's concerned with the issue of legality, it constitutes a legal opinion, and also

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 9 input into the final decision what should be done with regard
 10 to renditions. It seems to me, therefore, that it is
 11 encompassed by privilege.
 12 MS. CLARK: But, your Honor, if I can just refer to
 13 some cases just so that we can have that language before us.
 14 If, in fact, the memorandum is -- you describe it as referring
 15 to legality. Well, legality, if it's talking in general terms
 16 of actions which are legal, but not disclosing anything that --
 17 it's sort of a hypothetical statement of what the law is, would
 18 not be covered by the privileges that we're discussing. And
 19 just looking at the Falcone case --
 20 THE COURT: Say that again. Because it's hypothetical
 21 it would not be?
 22 MS. CLARK: What I mean to say, your Honor, is that to
 23 the extent that a memorandum is stating the state of a law with
 24 respect to a particular issue, provided -- and, of course, you
 25 know, these documents can be segregated, as well -- provided
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 1 it's not disclosing a particular confidential fact, which it
 2 has to be, as we have discussed, it's, in fact, the final and
 3 declarative position of the agency on what the law is.
 4 THE COURT: Presumably, the general counsel of the
 5 Department of Defense is concerned with a particular treatment
 6 of a prisoner captured presumably from the battlefield. And he
 7 seeks input from the Office of Legal Counsel of the Department
 8 of Justice.
 9 The business of the Office of Legal Counsel of the
 10 Department of Justice is to give legal guidance to the other
 11 branches of the government. And the job of the general counsel
 12 of the department is to consider that legal advice and transmit
 13 it to the head of the department so that the particular
 14 policies of that department can be framed in an appropriate
 15 way. It seems to me that it's at the very heart of both
 16 attorney-client and deliberative privilege.
 17 MS. CLARK: But, your Honor, I think if you just look
 18 at the subject matter of the memo, the question, and it's
 19 disclosed in the title which we're talking about, the
 20 president's power to transfer captured terrorists to the
 21 control and custody of foreign nations. That's certainly a
 22 question that could be asked of a law student or of any lawyer
 23 who would set forth the law and here is the answer.
 24 Provided that memorandum does not disclose anything
 25 more confidential than what we already see in the title, that
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 1 is not a document that would be subject to withholding. And we
 2 would ask that your Honor --
 3 THE COURT: why?
 4 MS. CLARK: Because it sets forth the agency's
 5 interpretation, considered inconclusive interpretation, we
 6 propose.
 7 THE COURT: I don't think so. I think it's the input
 8 before policies are made. And I don't know what would flow
 9 from this and what the consequence would be, but I hold that
 10 this is privileged.
 11 MS. CLARK: But, your Honor, I would just make sure to
 12 draw your attention to all of the case law where these same
 13 arguments have been made about such documents.

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14 For instance, I'll cite another case, this is from the
15 Southern District, Hartford Life Insurance. A document
16 prepared by legal counsel containing generalized descriptions
17 of the law is not protected by attorney-client privilege where
18 that document does not reveal any of the client's confidential
19 communications with its counsel.

20 Now, if that memorandum is, as I described, a
21 memorandum that could be written by a lawyer who was presented
22 with that legal question, that, under this articulation, is
23 not, under FOIA, subject to that exemption.

24 THE COURT: This is not a hypothetical examination
25 question put to a lawyer. It's a question put -- presumably

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1 it's a question put because of serious concern to the officer
2 and the government charged with the development of legal advice
3 and given to the general counsel of an agency charged with
4 implementation of a certain policy. I've gone over this and I
5 stand by my ruling.

6 1102 is the other one?

7 MS. CLARK: 1101 is the other document. It's a
8 memorandum for Alberto Gonzalez, White House Counsel, regarding
9 protected persons in Iraq. And that document is being withheld
10 on the basis of the deliberative process, attorney-client, and
11 presidential communications privilege.

12 THE COURT: I think it goes to the same point.

13 MS. CLARK: So do you not want to hear argument on
14 that particular document?

15 THE COURT: Well, if you have something more to tell
16 me, but it seems to me it's encompassed by the principles we've
17 just discussed.

18 MS. CLARK: And your Honor, then, with respect to the
19 documents that we have not discussed, the remainder of the
20 documents under category E, do we have a ruling on those?
21 Because we believe similarly. And not all of them -- three of
22 them are not withheld on attorney-client privilege; although
23 they are all withheld on deliberative process privilege. And
24 again, I would just -- and there's another line of cases to
25 just point your Honor to. And that is the tax analyst cases

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1 and Evans; I did mention Falcone. But just to also just
2 articulate what those cases say, and again, it's the question
3 of whether the finalized legal conclusion is something that can
4 be protected.

5 THE COURT: I think we're talking about the same
6 principles. And unless there's something different, I think
7 it's covered by rulings before.

8 MS. CLARK: Your Honor, no, I understand what you're
9 saying. I guess I just wanted to make sure --

10 THE COURT: Lawyers don't make policy; they have input
11 into policy. This is not a directive for the policy statement
12 issued by the Secretary of Defense.

13 MS. CLARK: But, your Honor, I just respectfully, I
14 would say that there have been cases where legal opinions have
15 been disclosed after the government has tried to withhold them
16 under exemption five. So it cannot be the case that simply
17 because they're a legal opinion, and specifically these are the
18 cases that I was mentioning.

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20 THE COURT: I'll review your cases again.
21 MS. CLARK: Please, your Honor. Because those are
22 absolutely our cases where it was a legal conclusion, field
23 officers were given a legal memorandum, and that memorandum was
24 being withheld on the basis that it did not inform whatever --
25 that it wasn't the same thing as whatever policy the field
agent decided to take on the basis of that opinion.

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1 THE COURT: well, it may be that if these opinions
2 that were referenced in here were passed along to people
3 charged with implementing the policy, tell them here's the
4 policy, go implement it, you'd be right. We don't have that.
5 MS. CLARK: But, your Honor, I would just again refer
6 you to the briefs.
7 THE COURT: Okay. I'll read the cases again. Thanks
8 very much.
9 MR. SKINNER: Your Honor, I don't have anything to add
10 on that point.
11 THE COURT: Thank you very much.
12 MR. SKINNER: So are we finished?
13 THE COURT: We're finished.
14 MR. SKINNER: Thank you.

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