

85C3ACLC CONFERENCE  
1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x  
2

3 AMERICAN CIVIL LIBERTIES  
3 UNION, et al.,

4  
4 Plaintiffs,

5 v. 04 CV 4151 (AKH)

6 THE DEPARTMENT OF DEFENSE, et  
7 al.,

8 Defendants.

8  
9 -----x  
9 New York, N.Y.  
10 May 12, 2008  
10 11:30 a.m.

11 Before:  
12  
12 HON. ALVIN K. HELLERSTEIN,  
13  
13 District Judge

14 APPEARANCES

15 MICHAEL J. GARCIA  
15 United States Attorney for the  
16 Southern District of New York

16 SEAN LANE  
17 PETER SKINNER  
17 Assistant United States Attorneys

18 CENTRAL INTELLIGENCE AGENCY  
19 ANDREW PETERSON, ESQ.  
19 POLLY SMOTHERGILL, ESQ.  
20 WENDY HILTON, INFORMATION REVIEW OFFICER

20  
21 ALSO PRESENT: SHEILA NAGARAJ, LAW CLERK

22  
23  
24

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

2

85C3ACLC CONFERENCE

1 (In chambers)

2 MR. SKINNER: Let me introduce everybody, your Honor.  
3 We are joined by three folks from the Central Intelligence  
4 Agency, two attorneys, Andrew Peterson and Polly Smothergill,  
5 and Wendy Hilton. Ms. Hilton is an associate information  
6 review officer. Ms. Dorn, who is the individual you met a few  
7 years ago who had executed all of our declarations, she's moved  
8 on to another position in the agency. So Ms. Hilton is here in  
9 Ms. Dorn's stead, to basically explain to you if you have any  
10 questions about harm to national security that may result.

11 THE COURT: Wendy Hilton?

12 MS. HILTON: That's me.

13 THE COURT: And Andy Peterson.

14 MR. PETERSON: Yes.

15 THE COURT: Mr. Skinner has a way of speaking faster  
16 than I have a way of comprehending. You're --

17 MS. HILTON: Wendy Hilton.

18 MS. SMOTHERGILL: Polly Smothergill.

19 MR. LANE: I think you know me.

20 THE COURT: Yes. And this is Sheila Nagaraj, my law  
21 clerk. Under the protocol, you are going to show me documents.  
22 Only I will look at the documents. Ms. Forman is not cleared.

23 MR. SKINNER: She is cleared at the top secret  
24 program. She is not cleared for the program that covers the  
25 bulk of information in these documents.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

3

85C3ACLC CONFERENCE

1 THE COURT: The same is true of Ms. Nagaraj.

2 MR. SKINNER: That's correct.

3 THE COURT: Since I am not going to be putting on the  
4 record anything that I shouldn't be putting on the record, I  
5 think we can go ahead in this way.

6 MR. SKINNER: Let me tell you what we've brought.  
7 Originally back in January of 2008, the Court had said you  
8 wanted to review some documents in camera. And you'd asked

9 plaintiffs to identify 20 documents from the OIG files, 20  
10 documents that had been referred from the Office of Legal  
11 Counsel to the CIA because those documents had classified  
12 information in them. And then item 61, which is the  
13 presidential authorization for the CIA interrogation and  
14 detention program.

15 The plaintiffs ultimately identified 20 OIG documents,  
16 three OLC documents, so we have one binder here which is the  
17 first binder that we'll show you that has 24 documents in it.  
18 The three OLC, the 20 OIG, and the presidential authorization.

19 The way we've organized it is at the front we've  
20 tabbed the binder with numbers to correspond to the  
21 identification numbers that are in the public Vaughn  
22 declarations. At the front of each tab we've reproduced the  
23 description of the document from the public Vaughn declaration,  
24 so you can see initially how we described it publicly.

25 As you know, we have reviewed all of these documents

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

4

85C3ACLC CONFERENCE

1 to determine if there is any segregable information that could  
2 be produced to the plaintiffs in light of disclosures that were  
3 made after we claimed these exemptions. The acknowledgment  
4 that the CIA has used the waterboard against three detainees  
5 specifically, that's what we went back through to look at.

6 If a document has segregable information that could be  
7 released, what we've put at the front is the redacted version  
8 of that document. And that will show you in gray what is being  
9 withheld, if there is a gray box over it. But you should be  
10 able to read through it. Where there is no box, that would be  
11 the information that we intend to release. And then behind  
12 that redacted version of the document would be the complete  
13 unredacted version of the document. If there is no redacted  
14 version of a document, then it is our intention to withhold the  
15 document in full, and we as we explained in our letter.

16 THE COURT: Say that again, Mr. Skinner. If there is  
17 no --

18 MR. SKINNER: If there is no redacted version of a  
19 document, if there is no officially at the front a redacted  
20 version that would show what we intend to release, our  
21 intention would be to withhold it in full. We can remind your  
22 Honor as we go through. This is one where there is information  
23 that we found that is segregable and releasable. You'll see

24 what it is, and this one is not.

25 THE COURT: One copy here or do you have a copy?  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

5

85C3ACLC CONFERENCE

1 MR. SKINNER: We have two other copies here.

2 THE COURT: So I can look at this?

3 MR. SKINNER: You can look at that. That's yours. We  
4 have duplicates of that. What you also asked us to bring later  
5 on when we were discussing this protocol, you had said  
6 plaintiffs, why don't you identify another 20 documents in case  
7 there is more that I want to look at when I do this. We have  
8 those as well in separate binders organized the same way.

9 THE COURT: Let me proceed with these. I'll describe  
10 the binder. It is identified as Top Secret, and it is national  
11 security counsel information.

12 MR. SKINNER: That was there, but it just fell off.

13 THE COURT: The title is "In Camera Ex Parte Review of  
14 Classified CIA and OLC Documents." The first one is item 61.

15 MR. SKINNER: That's correct, your Honor. This is the  
16 presidential authorization.

17 THE COURT: The first page is what you said on the  
18 Vaughn declaration.

19 MR. SKINNER: Yes. This is the description from the  
20 eighth Vaughn declaration of the document, and as you'll see at  
21 the start, it is identified -- I guess earlier in that Vaughn  
22 it was identified by date only, and then with the number of  
23 pages that are in the document.

24 THE COURT: So privilege is claimed because there is  
25 no meaningful unclassified and unprivileged information that

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

6

85C3ACLC CONFERENCE

1 can be reasonably segregated.

2 MR. SKINNER: That would be our position, your Honor.  
3 It is our intention to withhold this document in full.

4 THE COURT: In full. Furthermore, that the document  
5 contains interagency predecisional deliberations between DOJ  
6 and the CIA.

7 MR. SKINNER: A portion of the document.

8 THE COURT: And intra-agency deliberations within the  
9 CIA. And that's basis of the classification.

10 MR. PETERSON: Paragraph 64 is about the previous  
11 document. The description of item number 61 begins halfway  
12 down the first page of the paragraph 66.

13 THE COURT: And goes on.

14 MR. PETERSON: Correct.

15 THE COURT: What I said is not pertinent. It goes on  
16 for several pages.

17 MR. SKINNER: Yes. That's the information that we've  
18 released publicly to identify this document and the exemptions  
19 that apply.

20 THE COURT: According to the Vaughn declaration, in  
21 response to the request for the presidential authorization to  
22 set up detention facilities outside the United States, and/or  
23 outlining interrogation methods that could be used against  
24 detainees, no document was found bearing a signature of  
25 President Bush. Except for, I'm sorry, one document showed

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

7

85C3ACLC CONFERENCE

1 authorization to set up detention facilities outside the United  
2 States, but no document was found that reflected a signature of  
3 President Bush and pertained to interrogation methods.

4 MR. SKINNER: That's correct, your Honor. This is the  
5 general authority for the CIA's program. No document was  
6 located from the president that actually outlined specific  
7 interrogation methods that would be used. The plaintiffs'  
8 request was for a document that addressed both subjects. So in  
9 the Vaughn, we tried to make clear while we found the document  
10 addressing the general authority, we didn't find anything more  
11 specific with regard to interrogation methods.

12 THE COURT: All right. The exemption that is claimed  
13 is that it relates to intelligence activities, intelligence  
14 sources, and intelligence methods and foreign relations and  
15 foreign activities of the United States, which has been  
16 classified top secret. There are other claims as well.

17 So I am going to look at this for purposes of  
18 segregability.

19 MR. SKINNER: That's fine, your Honor. That's the  
20 start of the document right there.

21 THE COURT: May I ask, Mr. Skinner, with the exception  
22 of the bottom paragraph which starts with the words "in light

23 of," why everything else in this document is not segregable and  
24 therefore producible?

25 MR. SKINNER: I think Mr. Peterson can probably -- let  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

8

85C3ACLC CONFERENCE

1 me try, he can fill in holes if I miss some of these things.

2 THE COURT: I'll direct it to him, but you can direct  
3 it to anyone else on your team.

4 MR. SKINNER: Okay. First of all, this communication  
5 we feel is covered by the presidential communications  
6 privilege, so all of this stuff, even if not classified in its  
7 own right, would be subject to the presidential communications  
8 privilege.

9 Also, although it might not be obvious by looking at  
10 it, there is quite a bit of sensitive information included in  
11 this document. For example, the name of the document, the  
12 title, the type of document that it is. That itself has never  
13 been acknowledged. That is actually significant.

14 THE COURT: All right.

15 MR. SKINNER: Also, just with the way the document  
16 looks.

17 THE COURT: That is significant?

18 MR. SKINNER: Yes, that's significant.

19 THE COURT: The subject matter?

20 MR. SKINNER: Not the -- the type of document that it  
21 is. That is significant. There are different types of  
22 presidential communications. The fact that this is this  
23 particular type is of significance. That would reveal what  
24 type of presidential authorization would be necessary for this  
25 type of program.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

9

85C3ACLC CONFERENCE

1 Also, just one thing that would seem somewhat  
2 innocuous but is actually very sensitive to the agency is  
3 actually what the document looks like. The fact it has these  
4 markings, that it is laid out in this form, that it is this  
5 font, that it contains this type of language. All of these  
6 things are relevant to concerns that if our adversaries knew

7 what these documents looked like, they would be able to produce  
8 forgeries of them.

9 THE COURT: Well, there could be a retyping using  
10 ordinary font. The page does not have to be a page that bears  
11 the identifying insignia. And in the reproduction that I  
12 contemplate, that aspect that's sensitive would be changed. As  
13 to the subject, let that be included in what is redacted.

14 MR. SKINNER: We have already -- I -- if we look back  
15 at how it's been publicly described --

16 THE COURT: May I say a word, Mr. Skinner?

17 MR. SKINNER: Sure.

18 THE COURT: I think what then comes out is  
19 substantially the same as that which is described in the Vaughn  
20 declaration.

21 MR. SKINNER: I think that was going to be my point,  
22 is we've tried to describe the general subject matter to the  
23 fullest extent we can on the public record of what's on this  
24 page already.

25 THE COURT: I agree.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

10

85C3ACLC CONFERENCE

1 MR. SKINNER: It is a covered notification.

2 THE COURT: I agree. But in the sense that this then  
3 becomes an original document, rather than a secondary document,  
4 there may be value.

5 MR. SKINNER: If we have to retype, it would be a  
6 secondary document.

7 THE COURT: That is true.

8 MR. LANE: Your Honor, I guess --

9 THE COURT: In the nature of a copy.

10 MR. LANE: One of the things under FOIA is that it is  
11 different than traditional discovery in the sense of what is at  
12 issue is the releasability of the particular document at issue.  
13 So, and that's one of the purposes that the Vaughn serves is to  
14 provide publicly as much information as we can about the  
15 document. So --

16 THE COURT: I understand that. I was suggesting what  
17 I did because it is very hard for me to understand looking at a  
18 caption, a date, an addressee, and a subject, that suggests  
19 that it should be protected in any way. It looks so normal.  
20 Ordinary.

21 MS. HILTON: Could I just point to this thing on the

22 page back -- just this down the page here, this indicates how  
23 few copies there are. This is something only appears when it  
24 is reproduced and it is a way of indicating --

25 THE COURT: I am saying we don't need this.  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

11

85C3ACLC CONFERENCE

1 MS. HILTON: I guess what I was trying to point out is  
2 that it indicates the level of sensitivity. Only the highest  
3 level documents are done in that fashion, to show how few  
4 copies there are and how strictly controlled the distribution  
5 of it is. It just indicates the level of sensitivity.

6 THE COURT: But that may arise from what it covers,  
7 rather than inherently in the document itself. I just fail to  
8 see anything in this document that is sensitive with the  
9 exception of the subject and that last paragraph.

10 MR. SKINNER: Just also just to --

11 THE COURT: And perhaps the classification information  
12 at the bottom.

13 MR. SKINNER: We've acknowledged that the CIA has the  
14 authority to engage in a detention program overseas. This is  
15 actually a little broader than what we've acknowledged just  
16 there in the first paragraph. Then in the second paragraph --

17 THE COURT: It is a general --

18 MR. SKINNER: -- for determinations --

19 THE COURT: It is a generalized description.

20 MR. SKINNER: Well, this.

21 THE COURT: Yes. I refer to that. It is a  
22 generalized description. I can't speak about the initials.

23 MR. SKINNER: The markings, certainly all of those  
24 would need to be withheld.

25 MR. PETERSON: This, your Honor, is not a generalized  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

12

85C3ACLC CONFERENCE

1 description in the sense that it has legal significance.

2 THE COURT: I really don't have a basis to contest you  
3 on this. I have to defer to you. So let's say we stop after  
4 the words "in a." And redact the balance of that paragraph.

5 MR. SKINNER: So if I understand your Honor

6 correctly --

7 THE COURT: The description at the top is redacted.  
8 The markings intrinsic to the page, redacted.

9 MR. SKINNER: I guess we would have to reproduce the  
10 page. I don't think we could redact these markings.

11 MS. HILTON: You wouldn't be able to read anything if  
12 you redacted these.

13 THE COURT: Ms. Hilton, what could we do that would  
14 produce information without disclosing the inherent quality of  
15 the page?

16 MS. HILTON: Well, I believe what you said, your  
17 Honor, about it would be like creating a copy. Although I  
18 think Sean probably knows the FOIA Act better, but my  
19 understanding was they had to be original documents, that we  
20 didn't use substitutions or summaries.

21 THE COURT: I would authorize the use of a substitute  
22 because it is inherently onerous and too difficult and perhaps  
23 impossible to produce the original. It is like a best evidence  
24 rule. If you can justify secondary evidence, instead of best  
25 evidence, that becomes an authorization.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

13

85C3ACLC CONFERENCE

1 MR. SKINNER: If we were talking about the first  
2 sentence, and trying to look for specific language that could  
3 be released, as I indicated this --

4 THE COURT: Second line.

5 MR. SKINNER: -- second line starting with this word.  
6 Going to here. That itself is particularly sensitive because  
7 it indicates the type of document. And then this is sensitive  
8 because it indicates the purpose of the document, and the fact  
9 and the scope of it. At the end of it all we'd end up with is  
10 that which is essentially meaningless and nothing in addition  
11 to what we've already acknowledged, which is it is a  
12 presidential authorization.

13 THE COURT: I'd like Ms. Forman and Ms. Nagaraj to  
14 leave the room for a few minutes and we'll have a discussion  
15 off the record and try to summarize it.

16 (Discussion off the record)

17 THE COURT: We've had a five minute off-the-record  
18 discussion. And the government has explained to me why the  
19 cover memorandum and the underlying memorandum -- was it 14  
20 pages?

21 MR. SKINNER: It is --  
22 THE COURT: Should be entirely classified and exempt  
23 from FOIA. So, Mr. Peterson or Mr. Skinner will please  
24 describe for the record what can be described about document  
25 number 61.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

14

85C3ACLC CONFERENCE

1 MR. SKINNER: Sure, your Honor. I'll endeavor to do  
2 that and I'll let Mr. Peterson correct me or expand as  
3 appropriate.

4 As we indicated, the document in its entirety is a  
5 14-page memorandum. There is a two-page cover memorandum.

6 THE COURT: Plus the 14 pages.

7 MR. SKINNER: Plus then a 12-page memorandum that  
8 follows, so it is 14 pages in entirety. Two-page cover  
9 followed by 12-page memorandum. The first page of the cover  
10 memorandum is what we were looking at before. It generally  
11 describes a type of document, and what is to follow. The  
12 second page of that is then a distribution list that indicates  
13 who received the document. Then the memorandum itself, as  
14 we've indicated there, I am not sure the total number of pages  
15 but I can count them. The memorandum itself then is comprised  
16 of this memo plus attachments.

17 And I think Mr. Peterson can correct me if I'm wrong,  
18 the only real detail we can offer about the memorandum itself  
19 is that it is 12 pages long. It goes into the various  
20 authorities that have been granted. A number of these  
21 authorities actually don't relate to plaintiffs' request for  
22 information considering the treatment of detainees. And then  
23 the final page would be the signature page from the president.

24 THE COURT: I uphold the position of the government,  
25 and find there are no segregable portions that can be produced.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

15

85C3ACLC CONFERENCE

1 MR. SKINNER: We would turn to the next three  
2 documents in the binder, the three documents that were referred  
3 from the Office of Legal Counsel of the Department of Justice  
4 to the Central Intelligence Agency. Generally speaking, all

5 three of these were documents that were created by the CIA and  
6 were provided to the Office of Legal Counsel in the course of  
7 requesting legal advice from the Office of Legal Counsel.

8 THE COURT: And the privilege is?

9 MR. SKINNER: The privileges are attorney/client  
10 communication, I believe deliberative process for all of them,  
11 and then they're also classified. But I think just generally  
12 speaking, if you look at these, these were facts that were  
13 being provided to OLC for OLC's consideration in the course of  
14 providing legal advice back to the CIA. I'll also just note  
15 for the record with regard to document number 12 --

16 THE COURT: Which one?

17 MR. SKINNER: That's the next one. Why don't I wait  
18 until you get there. I'll let you get through document number  
19 11 first.

20 THE COURT: Yes.

21 (Pause)

22 THE COURT: Is the heading classified?

23 MR. PETERSON: Your Honor, yes. It is simply because  
24 the CIA has never acknowledged that this exists.

25 MS. HILTON: A document that spells that out.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

16

85C3ACLC CONFERENCE

1 THE COURT: The first word?

2 MR. SKINNER: Yes, the first word is probably the most  
3 sensitive.

4 MS. HILTON: Your Honor, what we try to avoid in  
5 releasing this is giving Al Qaeda knowledge about what might  
6 happen should they be detained. Things are prescribed in a  
7 certain manner or in a certain way that may help them prepare a  
8 resistance strategy.

9 THE COURT: It is very hard for me to accept that as a  
10 matter of intuitive understanding. First, because it would  
11 normally be expected that such a document as this would exist,  
12 and second because given the number of people who have passed  
13 through the system that the United States has used, and have  
14 returned to their countries of origin, the information that  
15 they report must be widely known.

16 However, according to the law as I understand it, and  
17 lacking any basis on my own to assess these matters, I have to  
18 give deference to the CIA as the agency that is on the line.  
19 And giving such deference, I rule in your favor.

20 MS. HILTON: Is it okay --  
21 THE COURT: I just have to say that one would think  
22 that such a document as this would exist, entitled very much  
23 like this one is entitled.  
24 MR. SKINNER: Your Honor, we appreciate that. I think  
25 this ties into just generally speaking the fact that no details  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

17

85C3ACLC CONFERENCE

1 about the CIA detention and interrogation program have been  
2 released. And in an effort to preserve the confidentiality of  
3 the program, even things you might expect there to be, it would  
4 be significant for the government to be acknowledging that they  
5 do in fact exist.

6 THE COURT: That's exactly why I defer to you. But I  
7 have to remember the observation that Senator Moynahan  
8 expressed in a book that reported his service as chair of the  
9 Joint Committee on Intelligence, that his finding which then  
10 had applicability to the conditions of mutual spying as between  
11 the United States on Russia, the USSR, and the USSR on the  
12 United States, is that much of what we labeled as secret was  
13 known to our enemy, as is reflected in the papers that have  
14 come out since, and vice versa. So the only people that were  
15 not able to see what was classified were the people, the  
16 citizens of the United States.

17 I have no way to judge that. But I look at this  
18 memorandum and it just moved me to make the observation I did.  
19 However, I defer to the CIA and its claim of compromise or  
20 potential compromise of the security of the United States. And  
21 uphold the position of the CIA.

22 I am now on document number 12.

23 MR. SKINNER: Your Honor --

24 THE COURT: Again, this is the same claims for  
25 exemption, including national security?

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

18

85C3ACLC CONFERENCE

1 MR. SKINNER: That's correct, your Honor. I would  
2 note that in this document there actually is some segregable  
3 releasable information. It is included separately with the

4 final report of the Office of Inspector General special review.

5 THE COURT: Where do I see that?

6 MR. SKINNER: We've brought that with us. We can look  
7 at it now or we can wait and look at it later.

8 THE COURT: Let's look at it now. Is this document  
9 Mr. Peterson giving me being shown to the plaintiffs?

10 MR. SKINNER: Not yet. As we explained in our  
11 March 31 letter, it was our intent to show the redacted  
12 versions of the document to you first, and then turn them over  
13 to the plaintiffs within 10 days of this proceeding.

14 MS. HILTON: These were --

15 MR. SKINNER: So that document that you are looking at  
16 now was included as an attachment to -- is appendix E to the  
17 special review report which we have the entire redacted version  
18 right here.

19 THE COURT: That's clear enough for me to see. The  
20 document you've given me --

21 MS. HILTON: We do that in draft so you are able to  
22 read under it and see. Then when it is finalized, it will  
23 become opaque black.

24 MR. SKINNER: So you understand what this is, the  
25 redaction system is a computer that draws this box over the

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

19

85C3ACLC CONFERENCE

1 document. It would identify the agency that was claiming that  
2 this should be redacted, in this case CIA. So that's what  
3 those little letters mean.

4 MS. HILTON: Only in the draft form. Once it is  
5 finalized, the whole thing will be a solid black. That's for  
6 ease of use in interagency referrals.

7 THE COURT: Right. I can understand the reason that  
8 the top portion of the page is redacted, and approve it.

9 Could you explain the redaction in the paragraph which  
10 you propose to disclose?

11 MR. PETERSON: Your Honor, it would be difficult for  
12 us to do that in an unpublic or in a public way.

13 THE COURT: We'll do it off the record in a moment.

14 MR. PETERSON: Okay.

15 THE COURT: Given the proposed disclosure on page two,  
16 could you explain why paragraph number five is proposed to be  
17 redacted?

18 MR. SKINNER: Well, your Honor, I think generally

19 speaking, because that would actually give information about --  
20 it's operational information, if you will, about how the  
21 proposed technique will actually be used. I think we can  
22 probably talk in greater detail about that off the public  
23 record.

24 MS. HILTON: Yes.

25 THE COURT: We have two things then for off the public  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

20

85C3ACLC CONFERENCE

1 record and I'll ask Ms. Nagaraj and Ms. Forman to step outside.

2 (Discussion off the record)

3 THE COURT: We have had an off-the-record discussion  
4 and I've ruled supporting the redaction in the paragraph number  
5 one, which the CIA otherwise proposes to disclose, at least to  
6 the first paragraph of paragraph one, and requiring with regard  
7 to paragraph number five that the caption and the first four  
8 lines of the paragraph, with the exception of the last two  
9 words -- include the last two words.

10 The top four lines are to be disclosed. The next  
11 three lines may be redacted. The approval box including the  
12 signature and the date is to be disclosed.

13 What about so much of the last page, folks? That  
14 begins with the caption, in the center of the page, discloses  
15 that, it discloses the first line below that, and so much of  
16 the second line that omits the last two words. The third line,  
17 the fourth line, and the fifth line, can be redacted. And the  
18 information below that will be disclosed.

19 MR. SKINNER: Is that your ruling, your Honor?

20 THE COURT: Yes. I'm proposing to rule that way,  
21 consistent with my rulings on the page before.

22 MR. SKINNER: I think --

23 THE COURT: Is there further objection? I note you  
24 object to my ruling.

25 MR. PETERSON: The whole top is out?  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

21

85C3ACLC CONFERENCE

1 THE COURT: Exactly.

2 MR. PETERSON: Okay.

3 MR. SKINNER: I think the problem would be that this  
4 would reveal that this is actually done.

5 THE COURT: That's the point. Because it is part of  
6 what I propose to disclose. It is ancillary to the rulings I  
7 made on --

8 MR. SKINNER: On paragraph five?

9 THE COURT: That's my ruling. I note the objection  
10 from the CIA.

11 What's my next one, 70?

12 MR. SKINNER: That's correct, your Honor. Document  
13 number 70, this is the last of the three OLC documents that  
14 were selected. This is also B1, B3 and B5. I think the  
15 easiest way to understand this document --

16 THE COURT: Let me read it.

17 (Pause)

18 THE COURT: What is the government's proposal with  
19 regard to number 70?

20 MR. SKINNER: Well, your Honor, we intend to withhold  
21 this document in full. We can explain the classification  
22 issues with this document off the record in greater detail.

23 But the easiest -- at least for me the easiest way to  
24 understand this document as deliberative process. I think that  
25 those words indicate that this is or why it would be

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

22

85C3ACLC CONFERENCE

1 deliberative process.

2 (Discussion off the record)

3 THE COURT: We've been discussing off the record  
4 document number 70. Three objections have been raised. The  
5 attorney/client privilege, the deliberative privilege, and for  
6 certain aspects of the document, national security.

7 I overrule the objections with respect to  
8 attorney/client and deliberative privileges, on the basis of  
9 National Council of La Raza v. Department of Justice, 411 F.3d  
10 350, (2d Cir. 2005).

11 The document on its face gives proposals of what  
12 policy is to do, what people are to do in certain  
13 circumstances. And therefore, this is a document that is  
14 focused on action by the agency in relationship to what  
15 arguably might be said to be requests for advice. I do not  
16 know how this document related to other aspects of the advice  
17 activity and what came out of it and what may have been done or

18 may not have been done, may have been authorized, what may not  
19 have been authorized, what may have been the subject of  
20 opinions of permissibility, what may not. So I take the  
21 document at its own face value.

22 With respect to the issue of national security, the  
23 caption at the top of the page will be redacted. And  
24 Mr. Peterson, do you want to state what else is to be redacted?

25 MR. PETERSON: Certainly, your Honor. Under the  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

23

85C3ACLC CONFERENCE

1 national security privilege we would withhold for the first  
2 paragraph the last word of the second line and the entirety of  
3 lines three and four.

4 THE COURT: Approved.

5 MR. PETERSON: For the second paragraph, we would  
6 redact the fourth word of the first line.

7 THE COURT: Approved.

8 MR. PETERSON: For the first bullet under paragraph  
9 two, we would redact the last word of the first line, and the  
10 first two words of the second line.

11 THE COURT: Approved.

12 MR. LANE: I think you have to redact the caption at  
13 the bottom.

14 THE COURT: Yes, the caption at the bottom as well.  
15 Approved.

16 The next document is 303.

17 MR. SKINNER: Now, we are moving from the OLC  
18 documents to the documents that were retrieved from the OLC  
19 investigative files. We are looking at a document that was --

20 THE COURT: Have we then completed the subject of my  
21 order granting your consideration?

22 MR. SKINNER: No. That actually concerns item 29  
23 which is the legal memorandum.

24 THE COURT: Should we do that next?

25 MR. SKINNER: Which we can do. It is part of document  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

24

85C3ACLC CONFERENCE

1 number five. So we can skip to that now. Or we could --

2 THE COURT: Let's do that.  
3 MR. SKINNER: Okay.  
4 MR. PETERSON: It is not identical to what we just  
5 discussed, your Honor, but --  
6 MR. SKINNER: If you want to skip to that, we can.  
7 THE COURT: Let's do that.  
8 MR. SKINNER: We --  
9 THE COURT: Is that hard to do?  
10 MR. SKINNER: No. Just one moment. Your Honor, this  
11 is item 29 which is the classified August 1, 2002, legal  
12 memorandum. This was the subject of the motion for  
13 reconsideration. It is attached as an appendix to the special  
14 review. This, what you are holding right now, is the final  
15 special review report from the Inspector General of the Central  
16 Intelligence Agency.  
17 THE COURT: Which I should not bother with.  
18 MR. SKINNER: This is a draft document. All of number  
19 five you'll see there are line in and line out edits. This is  
20 the final. This is the final version of the memorandum that  
21 was the subject of the motion for reconsideration.  
22 THE COURT: I can put that away. Put away the large  
23 looseleaf binder and look at what Mr. Skinner has just given to  
24 me.  
25 (Pause)

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

25

85C3ACLC CONFERENCE

1 MR. SKINNER: Just to refresh --  
2 THE COURT: There is a name in the first paragraph.  
3 Is that --  
4 MR. SKINNER: This is how the document was described  
5 on the public record. That's from the eighth Dorn declaration,  
6 the description of item number 29.  
7 THE COURT: There is a name here. Do you want to  
8 redact the name?  
9 MR. PETERSON: Yes, your Honor. We've proposed we  
10 would withhold this document in full.  
11 THE COURT: I know. But I am just looking --  
12 MR. PETERSON: Sure.  
13 MS. HILTON: His title is on the second line. That's  
14 descriptive.  
15 THE COURT: Yes.  
16 MR. SKINNER: The position, your Honor, is that the

17 names and titles of CIA employees are withheld under exemption  
18 B3.

19 THE COURT: Yes. I accept it.

20 (Pause)

21 THE COURT: We've been exploring off the record  
22 document number --

23 MR. SKINNER: 29, item 29.

24 THE COURT: With respect to the argument for exemption  
25 based on national security. When we come back, I will make

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

26

85C3ACLC CONFERENCE

1 rulings on that issue. And then we will discuss the  
2 applicability of the other two arguments for exemption,  
3 attorney/client privilege, and deliberative exemption.

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

5 THE COURT: Then move on to other documents. So we'll  
6 recess now. It is a quarter of two. We'll recess until  
7 3 o'clock.

8 (Recess taken)

9 THE COURT: It is 3:05 and we'll reconvene. What  
10 we'll do now is summarize the discussions that we had and the  
11 rulings I made on the argument of national security with  
12 respect to the document identified as 29, the memorandum from  
13 Office of Legal Counsel.

14 So starting with page one, Mr. Peterson.

15 MR. PETERSON: Your Honor --

16 THE COURT: One question is the document itself in its  
17 pagination and appearance the same as the document that is part  
18 of this record?

19 MR. SKINNER: With regard to markings and things like  
20 that?

21 THE COURT: Not markings, but why don't we look at 29.

22 MR. SKINNER: You mean --

23 MR. PETERSON: 29 is not --

24 MR. SKINNER: It is not part of this binder. It is  
25 separate. We didn't get the order until --

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

27

85C3ACLC CONFERENCE

1 THE COURT: If we refer to the pagination of this  
2 final document that you gave to me, what kind of record will we  
3 make so the page references and paragraph references can be  
4 identified to something that is on the record?

5 MR. SKINNER: Well, I think we can identify it as  
6 appendix C to the final special review report. That's what  
7 this is. So we know where it appeared and what we were looking  
8 at. That is a signed final version of the August 1, 2002,  
9 memorandum, and there is not multiple versions of that, and it  
10 was printed out and signed and the pagination and paragraphs  
11 are the same on all of them.

12 THE COURT: Okay.

13 MR. PETERSON: On the first page of item 29, under B3,  
14 the CIA would redact the name which is in the first line of the  
15 title, and the position under the first line.

16 THE COURT: So in the caption you would disclose  
17 memorandum for, redact the name, and the second line which  
18 describes the title of that person.

19 MR. PETERSON: That's correct, your Honor.

20 THE COURT: Above that would you produce the date?

21 MR. PETERSON: We would release everything above that.  
22 Those things are not withheld on B1 grounds.

23 THE COURT: Okay. Then I think you are going to  
24 redact the subcaptions in italics.

25 MR. PETERSON: That's correct. The last three words  
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

28

85C3ACLC CONFERENCE

1 would be withheld on B1 grounds, your Honor.

2 THE COURT: All right.

3 MR. PETERSON: Then in the first paragraph, which is  
4 an introductory paragraph above a Roman numeral I, the first  
5 sentence is not withheld on B1 grounds, and would be released,  
6 and the first six words of the second sentence are not withheld  
7 on B1 grounds. After those six words, the remainder, which is  
8 all of lines four, five, six, seven and eight, and the last  
9 half of line three beginning with the word "in," would be  
10 redacted and are withheld on B1 grounds.

11 THE COURT: That's correct.

12 MR. PETERSON: Under Roman numeral I, your Honor,  
13 starting with the fourth line of that paragraph, the third  
14 word, from the third word to the end of the paragraph, would be  
15 withheld on B1 grounds, as well as the last paragraph in full.

16 THE COURT: The last paragraph on the page.  
17 MR. PETERSON: On the page, correct.  
18 THE COURT: Yes. Correct.  
19 MR. PETERSON: Then, your Honor, page two is withheld  
20 in full on B1 grounds.  
21 THE COURT: Correct.  
22 MR. PETERSON: Page three is withheld in full on B1  
23 grounds.  
24 THE COURT: Correct.  
25 MR. PETERSON: Page four is withheld in full on B1  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

29

85C3ACLC CONFERENCE

1 grounds.  
2 THE COURT: Would you produce the caption in number  
3 two?  
4 MR. SKINNER: The II.  
5 MR. PETERSON: We can produce just the II, your Honor.  
6 THE COURT: Do that.  
7 MR. PETERSON: Page five is withheld in full on B1  
8 grounds.  
9 THE COURT: Yes.  
10 MR. PETERSON: Page six is withheld in full on B1  
11 grounds.  
12 THE COURT: Yes.  
13 MR. PETERSON: Page seven is withheld in full on B1  
14 grounds.  
15 THE COURT: Yes.  
16 MR. PETERSON: Page eight is withheld in full on B1  
17 grounds. Page nine, near the top of the page, there is a III.  
18 Beneath that III we would release the first, second, third,  
19 fourth, fifth --  
20 THE COURT: You are not committing to release because  
21 we still have two other objections.  
22 MR. PETERSON: That's correct. These are the portions  
23 we would not withhold on B1 grounds.  
24 MR. SKINNER: We are memorializing the judge's rulings  
25 with regard to the B1 applicability with regard to this  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

30

1 document.  
2 THE COURT: Starting with caption III and the material  
3 following up to where?  
4 MR. PETERSON: The first 10 lines are not withheld on  
5 B1 grounds, and the first half of the 11th line.  
6 THE COURT: Where do you start numbering from?  
7 MR. PETERSON: Started at the word that -- first line  
8 under III which begins with the word "section."  
9 THE COURT: You start counting 10 lines from there?  
10 MR. PETERSON: Correct.  
11 MR. SKINNER: Everything up to III, up to the C  
12 citation in the following paragraph.  
13 THE COURT: That's 10 lines plus half the next line?  
14 MR. PETERSON: Correct.  
15 THE COURT: Then the citation is redacted.  
16 MR. PETERSON: The remainder of that first paragraph  
17 as well as the remainder of this page, which includes one full  
18 paragraph and half of an additional paragraph are withheld in  
19 full on B1 grounds.  
20 THE COURT: That's correct.  
21 MR. PETERSON: On page 10, your Honor, we are not  
22 withholding the first sentence, including the citation, on B1  
23 grounds, but we are withholding the remainder of that page on  
24 B1 grounds.  
25 THE COURT: Wait a minute, please.  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

1 MR. PETERSON: Certainly.  
2 (Discussion off the record)  
3 MR. PETERSON: So returning to page nine, your Honor  
4 has ruled that for the last portion of a paragraph on page  
5 nine, that that is not withholdable on B1 grounds.  
6 THE COURT: No. I don't think that is my ruling.  
7 MR. PETERSON: As to --  
8 THE COURT: Just a minute.  
9 MR. LANE: Talking about the last paragraph starting  
10 with section --  
11 THE COURT: Yes, the last three lines on page nine are  
12 not to be withheld on the grounds we've been discussing.  
13 MR. PETERSON: In addition, your Honor --  
14 THE COURT: And the top two lines except for the last

15 word on line two are not to be withheld on page 10.  
16 MR. PETERSON: That's correct.  
17 THE COURT: And the balance of the paragraph may be  
18 redacted.  
19 MR. PETERSON: As well as the remainder of the page.  
20 THE COURT: Correct.  
21 MR. PETERSON: With regards to page 11, your Honor has  
22 held that the partial paragraph that begins the page as well as  
23 the next three pages are withheld.  
24 THE COURT: Let's take it more slowly.  
25 MR. PETERSON: Paragraphs.  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

32

85C3ACLC CONFERENCE

1 THE COURT: The top paragraph coming off of page 10,  
2 we're on page 11, may be withheld. Now, wait a minute. The  
3 balance of page 11 may be redacted.  
4 MR. PETERSON: Your Honor, the last, actually the last  
5 partial paragraph we had discussed previously. The run-on that  
6 runs on to the next page.  
7 THE COURT: Yes.  
8 MR. LANE: Starting with "we."  
9 THE COURT: Thank you. Yes. That is not to be  
10 withheld.  
11 MR. LANE: Up to the --  
12 MR. PETERSON: On page 12.  
13 THE COURT: One at a time.  
14 MR. SKINNER: Do you want to switch places with me so  
15 the judge can see the marked-up copy?  
16 THE COURT: I don't need to see. I'm following quite  
17 well. We are on page 12. Mr. Peterson, start from the top.  
18 How many lines are not to be withheld?  
19 MR. PETERSON: There are nine lines that are not to be  
20 withheld in complete, and half of the 10th line.  
21 THE COURT: Line nine begins with the words "and of."  
22 MR. PETERSON: That's correct.  
23 THE COURT: Through that line, those nine lines are  
24 not to be withheld. Line 10, how much is to be allowed?  
25 MR. PETERSON: Until that line up until the "see id.,"  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

85C3ACLC CONFERENCE

1 your Honor.

2 THE COURT: Okay. Correct.

3 MR. PETERSON: Then, the next two sentences are  
4 withheld on B1 grounds.

5 THE COURT: Next two sentences starting with the  
6 middle paragraph?

7 MR. PETERSON: With -- in the same paragraph as we're  
8 continuing on. The next two sentences are withheld --

9 THE COURT: Off the record.

10 (Discussion off the record)

11 THE COURT: Mr. Peterson comments that, and I agree,  
12 the ruling of permissible redaction goes to the 15th line of  
13 the paragraph beginning with the words "as we previously  
14 explained," that sentence, and the citation that follows may  
15 not be redacted on the grounds we've been discussing. Correct?

16 MR. PETERSON: That's correct. That is what you  
17 ruled, your Honor.

18 THE COURT: Yes, okay. Then the next two paragraphs  
19 may be redacted.

20 MR. PETERSON: That's correct.

21 THE COURT: Now on page 13.

22 MR. PETERSON: This page, your Honor, we withheld in  
23 full under exemption B1.

24 THE COURT: Okay.

25 MR. PETERSON: The same for all of page 14, your  
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

85C3ACLC CONFERENCE

1 Honor.

2 THE COURT: Correct. With the exception of the two  
3 middle paragraphs on page 15 --

4 MR. PETERSON: The two partial paragraphs that begin  
5 the page and end the page are withheld in full on the grounds  
6 of exemption B1.

7 THE COURT: Wait a minute. Okay. We're now  
8 discussing the two middle paragraphs on the page. For the  
9 reasons I mentioned in our off-the-record discussion, I hold  
10 provisionally that these two paragraphs may not be covered by  
11 the same exemption. The government wishes to submit something  
12 to me on this issue, and it may. And you want to take it from  
13 there, Mr. Skinner?

14 MR. SKINNER: Yes. We would like the opportunity,  
15 your Honor, because this concerns a B1 B3 classification  
16 argument, to provide a supplemental declaration that explains  
17 on the record the reason why we feel the release of this  
18 information would reveal information about intelligence sources  
19 and methods that is protected under exemption B3 and would harm  
20 the national security of the United States, which is  
21 information protected under B1. I would envision submitting a  
22 classified declaration that provides the additional facts  
23 explaining those two exemptions.

24 THE COURT: I grant that. Let's discuss this. I'd  
25 like to put my reasons for my holding on the record. And I  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

35

85C3ACLC CONFERENCE

1 would do so at the time that you bring that material to me.

2 MR. SKINNER: Okay.

3 THE COURT: I'd like to read it in your presence and  
4 I'd like you to recommend to me at that time how we can have an  
5 argument and rulings that could be made part of the record of  
6 this case. So, when do you think you would be ready?

7 MR. SKINNER: We discussed this over lunch and  
8 actually didn't come up with a precise date for when we would  
9 be able to put in the supplemental declaration. Would it be  
10 possible -- we could write even as early as tomorrow with a  
11 proposed date for the supplemental declaration. We need to  
12 coordinate some of our own logistical issues.

13 THE COURT: You can come back tomorrow then and why  
14 don't you be in touch with Ms. Nagaraj on the precise dates and  
15 schedule. So it will be contemplated you would bring this  
16 document to me, I'll read it in your presence, and I'd make my  
17 rulings if I could, and you would make any arguments you want.

18 MR. SKINNER: Okay. I guess in the meantime we would  
19 also then have to propose a means of recording those rulings,  
20 if those rulings were to touch upon classified information.

21 THE COURT: Right. Right. My preference would be to  
22 use the court reporter staff. And since the reporter today is  
23 cleared top secret, maybe that will be adequate protection.

24 MR. SKINNER: That may be possible, your Honor. We'll  
25 look into it and get back to you as soon as we can on the

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

36

85C3ACLC CONFERENCE

1 logistics.

2 THE COURT: In any event, it would be a separate part  
3 of the record covered by such classification as we consider  
4 appropriate at the time.

5 MR. PETERSON: Can I raise one issue, your Honor?

6 THE COURT: Yes.

7 MR. PETERSON: There were two sentences -- well, there  
8 is one sentence in the first of those two middle paragraphs,  
9 there was one sentence that you had previously held properly  
10 withheld.

11 THE COURT: Sentence three.

12 MR. PETERSON: Correct. Sentence three in its  
13 entirety. So our filing will not address that sentence.

14 THE COURT: That's correct.

15 MR. PETERSON: Then as to the next paragraph,  
16 beginning in the sixth line after the words "based on," the  
17 remainder of that sentence down to the comma would be withheld  
18 on B1 grounds.

19 THE COURT: Well, after "based on," the balance of  
20 that line, which is the sixth line, all the seventh line, all  
21 of the eighth line, all of the ninth line, and so much of the  
22 10th line through the comma at the end of the line or almost at  
23 the end of the line could be redacted, and beginning with the  
24 word "no" on that line, and the next two lines, could not be  
25 withheld.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

37

85C3ACLC CONFERENCE

1 MR. PETERSON: Okay.

2 THE COURT: On the grounds we've been discussing.

3 MR. PETERSON: Thank you.

4 THE COURT: The balance of page 15, that is the bottom  
5 paragraph going on to page 16, may be redacted.

6 MR. PETERSON: On page 16, your Honor, the partial  
7 paragraph at the top of the page as well as the first full  
8 paragraph are withheld in full on B1 grounds.

9 THE COURT: Yes.

10 MR. PETERSON: You ruled previously that the entirety  
11 of the second full paragraph as well as the first two sentences  
12 of the third full paragraph may not be withheld on B1 grounds.

13 THE COURT: Give me that again, please?  
14 MR. PETERSON: The entirety of the second full  
15 paragraph.  
16 THE COURT: Beginning with the words --  
17 MR. PETERSON: Beginning with the words "specific."  
18 THE COURT: Okay.  
19 MR. PETERSON: And the first two lines of the third  
20 full paragraph, beginning, the first sentence begins with the  
21 words "based on," the second sentence begins with the word  
22 "the," that those two sentences may not be withheld on B1  
23 grounds. The balance --  
24 THE COURT: We're in the middle paragraph beginning  
25 with the word "specific."

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

38

85C3ACLC CONFERENCE

1 MR. PETERSON: That whole paragraph may not be  
2 withheld on B1 grounds.  
3 THE COURT: Below that.  
4 MR. PETERSON: Below that the first two sentences of  
5 the third full paragraph.  
6 THE COURT: May not be withheld.  
7 MR. PETERSON: On B1 grounds.  
8 THE COURT: And the balance may be.  
9 MR. PETERSON: The balance of the page may be.  
10 THE COURT: Correct.  
11 MR. PETERSON: On page 17, the partial paragraph at  
12 the top of the page may be withheld on B1 grounds.  
13 THE COURT: Yes.  
14 MR. PETERSON: The second paragraph in full may not be  
15 withheld on B1 grounds.  
16 THE COURT: Beginning with the word "furthermore."  
17 MR. PETERSON: Correct. Beginning with word  
18 "furthermore."  
19 THE COURT: Yes.  
20 MR. PETERSON: In terms of the next paragraph, the  
21 second full paragraph, the first eight words beginning with --  
22 the first eight words of that sentence may be withheld on B1  
23 grounds.  
24 THE COURT: So beginning with "have indicated."  
25 MR. PETERSON: It may not be. For the balance of that

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

39

85C3ACLC CONFERENCE

1 line, the second, third --

2 THE COURT: And just a minute. Redaction may cover  
3 all but the last two words of the line, and the balance of the  
4 line and the second line, the third line, the fourth line, and  
5 the first word of the fifth line may not be redacted.

6 MR. PETERSON: That's correct, your Honor. The  
7 remainder of that paragraph as well as the last paragraph on  
8 the page, which is a partial paragraph, are withheld on B1  
9 grounds.

10 THE COURT: Correct.

11 MR. PETERSON: Page 18, which is the last page of the  
12 memorandum partial paragraph at the top of the page is withheld  
13 in full on B1 grounds. In terms of the first full paragraph,  
14 the only portion of that paragraph which is not withheld on B1  
15 grounds begins with the second sentence starting with the word  
16 "you're." Through the balance of that sentence up to the word  
17 "exception of." That portion of the paragraph may not be  
18 withheld on B1 grounds.

19 THE COURT: Correct.

20 MR. PETERSON: The balance of the paragraph may be  
21 withheld.

22 THE COURT: Correct. That's correct.

23 MR. PETERSON: The remainder of the page, the  
24 remainder of the written page, other than the signature block,  
25 may be withheld in full on B1 grounds.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

40

85C3ACLC CONFERENCE

1 THE COURT: Correct. Now, let's go back to the same  
2 document and argue the attorney/client and the deliberative  
3 privilege.

4 It seems to me, Mr. Skinner, that the same arguments  
5 apply as were addressed with the previous documents. And for  
6 the same reasons as I expressed then and as I wrote in my order  
7 of May 8, 2008, relying on the Second Circuit decision in  
8 National Council of La Raza v. Department of Justice, the  
9 attorney/client privilege and the deliberative privilege should  
10 not be applicable. The government continues in its argument,  
11 and so I overrule your objection.

12 MR. SKINNER: Our Honor, our position I think is fully  
13 outlined in our opposition to plaintiffs' motion for  
14 reconsideration. We feel that the adoption reasoning under La  
15 Raza is not applicable to this particular document.

16 The broad brush highlights of our argument are that  
17 what has been acknowledged is that the Department of Justice  
18 has approved interrogation techniques that were used by the  
19 Central Intelligence Agency. The specific legal reasoning in  
20 this particular memorandum was never publicly acknowledged by  
21 any policy maker within the Central Intelligence Agency.  
22 Unlike La Raza, where the individuals had publicly stated  
23 repeatedly that they were making a policy change because of the  
24 legal reasons outlined in an OLC memorandum, here we merely  
25 have an acknowledgment that techniques were approved. It is

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

41

85C3ACLC CONFERENCE

1 much more general and vague. It is not linked to this specific  
2 memo. Indeed, this memo very well may address a number of  
3 techniques that the policy makers at the Central Intelligence  
4 Agency, when determining what techniques they were going to  
5 authorize people to use and what techniques they were not, this  
6 may have been broader than what the CIA ultimately did. Simply  
7 because the Department of Justice lays down the limits of what  
8 they believed to be lawful activity does not mean that their  
9 legal advice is therefore necessarily adopted by the ultimate  
10 policy maker who has to decide whether they want to go right up  
11 to that line or whether they might want to adopt policies that  
12 are more narrow.

13 We feel that this is not akin to what we had in La  
14 Raza, and that it was a predecisional deliberative piece of  
15 legal advice offered to a client as to the limits of the law.  
16 That it should be covered by the deliberative process and the  
17 attorney/client privileges, and should not be considered by the  
18 adoption reasoning that was outlined in the La Raza decision.

19 THE COURT: I think the issue is drawn in terms of the  
20 policy to do that which is allowed. Let's go on from here.  
21 I'll return this.

22 MR. SKINNER: Just so I am clear, so the record is  
23 clear then, have you overruled our invocation of exemption B5  
24 with regard to item 29?

25 THE COURT: Yes.

SOUTHERN DISTRICT REPORTERS, P.C.

\* \* \*

85C3ACLC CONFERENCE

1 MR. SKINNER: Under the theory it was adopted as --

2 THE COURT: Under the theory I just expressed.

3 MR. SKINNER: Okay.

4 THE COURT: The next thing we are going to do is  
5 document number what?

6 MR. SKINNER: We are now up to document number 303.  
7 We've done these first OIC documents. This is a cable. On the  
8 public record we have acknowledged the date of the cable, which  
9 is August 4, 2002. We've also acknowledged it is a six-page  
10 document. It is our intention to withhold this document in  
11 full. We believe the -- you can correct me if I am wrong, I  
12 believe we feel the entire document is protected under the B1  
13 and B3 exemptions. I think a perusal of it will reveal it is  
14 operational information.

15 (Pause)

16 THE COURT: I agree.

17 MR. SKINNER: The next document, your Honor, is  
18 document 541. This is an e-mail string between CIA officers.  
19 We dated it July 29, 2002. There is a two-page e-mail and then  
20 it attaches a cable from the field. And we withheld the  
21 document in its entirety under B1, B2, and B3.

22 (Pause)

23 MS. HILTON: This is akin to and includes operational  
24 cable and the same type of internal information.

25 THE COURT: Off the record.

SOUTHERN DISTRICT REPORTERS, P.C.

\* \* \*

85C3ACLC CONFERENCE

1 (Discussion off the record)

2 THE COURT: I approve.

3 MR. SKINNER: The next document, your Honor, is  
4 document number 23, which is an interview report, documenting  
5 the interview of a CIA officer. We've acknowledged publicly  
6 the date of the document, which is March 3, 2003, and that it  
7 is a six-page document. We feel the document is withheld in  
8 full under exemptions B1 and B3.

9 THE COURT: What have you acknowledged?

10 MR. SKINNER: We have acknowledged the date of the

11 document and the number of pages.  
12 THE COURT: Acknowledged in the Vaughn declaration?  
13 MR. SKINNER: That's correct, your Honor, in the  
14 Vaughn declaration.  
15 (Pause)  
16 THE COURT: Approved.  
17 MR. SKINNER: Your Honor, now we are moving into the  
18 final category of document which are what were described in the  
19 eighth -- in the seventh Vaughn declaration as the other  
20 documents. We are starting with document number one.  
21 THE COURT: First one I have is three.  
22 MS. HILTON: The tab says three.  
23 MR. SKINNER: This is number one.  
24 MS. HILTON: Yes.  
25 THE COURT: I have it. Thank you. Yes.  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

44

85C3ACLC CONFERENCE

1 MR. SKINNER: That's the description in the Vaughn  
2 declaration of that document.  
3 THE COURT: Right.  
4 MR. SKINNER: As the Vaughn indicates, it is a  
5 four-page document consisting of a one-page memorandum for the  
6 CIA's Inspector General from the director of Central  
7 Intelligence, being withheld in its entirety under exemptions  
8 B1, B2, B3 and B5. For B5 it is the deliberative process  
9 privilege.  
10 (Pause)  
11 THE COURT: What about the cover memo?  
12 MR. PETERSON: Your Honor, we generally withhold  
13 cover --  
14 MR. SKINNER: No, the cover memo.  
15 MR. PETERSON: This, your Honor, we're primarily  
16 withholding under B5. It explains that the attachments  
17 describe information that the director would like the Inspector  
18 General to consider when filing the report that's mentioned in  
19 the subject line. We know that this was sent prior to --  
20 actually after the issuance of that report, and it is unclear,  
21 there was no revised version of the report that was issued.  
22 So, it is unlikely that the Inspector General took any of the  
23 advice. The report itself is dated May 7, 2004.  
24 (Pause)  
25 MR. SKINNER: In essence he is recommending changes.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

45

85C3ACLC CONFERENCE

1 MR. PETERSON: That's correct, your Honor. Our  
2 position is it is predecisional, because it is requesting that  
3 the decisions or changes be made and reveals internal  
4 deliberations between the director and the Inspector General.

5 THE COURT: I don't know. I think there are  
6 generalized descriptions of contents.

7 MR. SKINNER: Your Honor, he's describing conclusions  
8 that were made in the memo. We are withholding those  
9 conclusions from the final version of the memo.

10 THE COURT: Let's do the final version and come back.

11 MR. SKINNER: Okay. We'll get there in a moment.

12 THE COURT: Is this the whole document?

13 MR. LANE: The final version is not that document. It  
14 is one of the documents to come shortly.

15 MR. SKINNER: The final version of the special review  
16 is this. So in essence, this is what -- this booklet, this is  
17 the final version.

18 THE COURT: A thick booklet, about an inch thick.

19 MR. SKINNER: Yes. What had happened was after  
20 receiving the final version of the document, the director of  
21 Central Intelligence recommended or requested that the  
22 Inspector General consider changes to language in the document,  
23 and then propose those changes in this document. He doesn't  
24 have the authority to mandate that those changes be made. He  
25 can only recommend them, so they reflect his thoughts and

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

46

85C3ACLC CONFERENCE

1 deliberations as to changes that should be made to the final.

2 THE COURT: I accept that they be withheld.

3 MR. SKINNER: The next document is document number  
4 three. Your Honor, document number three, the document itself  
5 is described initially in the Vaughn, and we propose releasing  
6 a redacted version of this document and the redactions follow.

7 (Pause)

8 THE COURT: On page two, production number 0000425.

9 MR. SKINNER: Excuse me, your Honor?

10 MR. PETERSON: 0000425.  
11 MS. HILTON: The Bates.  
12 MR. SKINNER: I'm sorry.  
13 THE COURT: There is an abbreviation in paragraph  
14 number three, line three.  
15 MR. SKINNER: In the language we propose?  
16 THE COURT: Is there any definition of that?  
17 MR. PETERSON: Within the parenthesis at the  
18 beginning, your Honor?  
19 MR. SKINNER: I think he means this.  
20 THE COURT: Yes.  
21 MR. SKINNER: I don't believe it is defined in the  
22 document. We can tell you what that typically stands for.  
23 THE COURT: Go ahead.  
24 MS. HILTON: "High value detainee." That's the phrase  
25 that is frequently used to distinguish the more senior  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

47

85C3ACLC CONFERENCE

1 detainees.  
2 THE COURT: Okay.  
3 (Pause)  
4 THE COURT: Page two, that same page, what is the  
5 justification for redacting paragraph four? Seems to me all  
6 information has been made public.  
7 MR. PETERSON: Your Honor, if you'll actually, I think  
8 the necessary context for that is on the last page. The last  
9 sentence of the last page of this document specifically shows  
10 that this is a forward-looking document that is actually a  
11 request for consideration by policy makers of a particular  
12 policy action. So paragraph four is primarily withheld on the  
13 basis of the deliberative process privilege. As you can see,  
14 the title of paragraph four, which is explained in the first  
15 sentence is --  
16 THE COURT: Yes.  
17 MR. PETERSON: This is the justification for the  
18 seeking of the review of a particular policy. So these outline  
19 the reasons of the memo's author for seeking policy  
20 consideration of a particular action. So it is our opinion  
21 that this is predecisional and deliberative information.  
22 THE COURT: I approve. Next?  
23 MR. SKINNER: The next document, your Honor, is a  
24 document number 5. It is a draft version of what eventually

25 became the special review report which is this bound document  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

48

85C3ACLC CONFERENCE

1 we have separately. I think if you look at that quickly, it  
2 will show that the document is literally a black line or red  
3 line showing proposed edits to what will become the final  
4 version.

5 THE COURT: Show me.

6 MR. SKINNER: Such as this. So this is an early  
7 version of this document.

8 THE COURT: So since we have the later version to  
9 consider, I don't need to consider the draft.

10 MR. SKINNER: That would be our position. That the  
11 draft is properly withheld in full.

12 THE COURT: I agree.

13 MR. SKINNER: We have the final version with us.

14 THE COURT: I agree. When would it be appropriate for  
15 us to look at the final version?

16 MR. SKINNER: If you want to right now. We propose  
17 releasing a redacted version of that document and we brought  
18 the redacted version with us.

19 THE COURT: Fine. Let me look at that.

20 MR. SKINNER: Let me show you -- so what you have  
21 here, your Honor, is this is a photocopy of this bound version.  
22 As with --

23 THE COURT: Identify what this is.

24 MR. SKINNER: This is the final report of the Office  
25 of Inspector General with regard to -- dated May 7 of 2004, and  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

49

85C3ACLC CONFERENCE

1 it is a report of a review of counter-terrorism detention and  
2 interrogation activities at the Office of the Inspector General  
3 of the Central Intelligence Agency, and it covers the period  
4 September 2001 to October 2003. As you'll see, we propose  
5 releasing that information from the cover. We propose  
6 releasing this information from the table of contents.

7 THE COURT: I can look.

8 MR. SKINNER: Then I think you'll see that generally

9 speaking, the released information later in the document is in  
10 the sections where we have released the header from the table  
11 of contents. And the reason for the release of that  
12 information is that it corresponds to information that has been  
13 already acknowledged in the public record.

14 THE COURT: What is the argument for not releasing the  
15 captions appearing in the redacted versions of the table of  
16 contents?

17 MR. SKINNER: Well, your Honor, I think this actually,  
18 initially at least, this would mirror the same arguments that  
19 we had with regard to some of the OLC documents before. There  
20 hasn't been acknowledgment publicly that this type of document  
21 exists. I mean, again we could discuss it more easily off the  
22 record.

23 THE COURT: I understand.

24 MS. HILTON: Normally --

25 MR. SKINNER: It is the same justifications as with  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

50

85C3ACLC CONFERENCE

1 regard to the earlier documents we've looked at.

2 MS. HILTON: The justification on the table of  
3 contents is that normally when we don't release any of the  
4 text, we don't release the headers as listed in the table of  
5 contents.

6 MR. SKINNER: Well, the headers themselves in this  
7 situation reveal substantive information --

8 MS. HILTON: It is classified.

9 THE COURT: I think we need more of a discussion on  
10 this.

11 MS. HILTON: You want may want to look at those actual  
12 sections.

13 THE COURT: I'm proposing to rule regardless of what I  
14 see in the sections themselves. The description of the  
15 sections in my opinion do not appear to merit --

16 MR. SKINNER: Your Honor, we could give you additional  
17 information with regard to the classification of these issues.

18 THE COURT: Let's have a discussion off the record.

19 MR. PETERSON: Because the justification for why we  
20 would withhold this sort of second section of these is  
21 different from the sort of first section, the section that  
22 begins with page three.

23 THE COURT: I can understand that. I can understand

24 that. For example, at the top of the page, following the word  
25 "specific," there are several subheadings. It seems to me,  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

51

85C3ACLC CONFERENCE

1 given our previous discussion, I should sustain an argument of  
2 exemption on national security grounds.

3 MR. PETERSON: That's correct, your Honor. That's our  
4 position.

5 THE COURT: And I hold that again.

6 MR. PETERSON: That's also, on page small Roman  
7 numeral i, at the bottom of that page, the subheadings if you  
8 look starting where they begin with page 33 --

9 THE COURT: Yes, I agree.

10 MR. PETERSON: Okay. On all of those redactions to  
11 the end of the page.

12 THE COURT: I agree.

13 MR. PETERSON: Thank you, your Honor.

14 MR. SKINNER: We could explain --

15 THE COURT: What I'm proposing now is the first six  
16 lines of the proposed redaction should be, in my opinion, not  
17 redacted. The balance of the redactions I approve.

18 MR. SKINNER: We can discuss those further off the  
19 record if you wish, your Honor, and explain our reasoning as to  
20 why that would threaten intelligence sources and methods as  
21 well as national security.

22 THE COURT: Right. And on page two, I approve all of  
23 that that is proposed to be redacted. At page iii.

24 MR. SKINNER: Yes, your Honor.

25 THE COURT: The indented top two lines may be  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

52

85C3ACLC CONFERENCE

1 redacted. The rest of that top redaction I think should not be  
2 redacted.

3 What is the argument on page iii, for the argument  
4 under the appendices?

5 MR. SKINNER: Your Honor, I think with regard to  
6 appendix C now that we've acknowledged today what that document  
7 is, so we can certainly unredact that.

8 THE COURT: Except for the name and title.  
9 MR. PETERSON: The portion of the title that we are  
10 redacting from --  
11 MR. SKINNER: As far as the fact it is a memorandum  
12 and we've acknowledged on the record it is the same memorandum  
13 that we previously identified as item 29.  
14 THE COURT: So item B will be released. Item number  
15 C, except with the name and title.  
16 MR. SKINNER: Item B we could not release that, and I  
17 think the reasoning actually would be that because it is this  
18 type of document, if you then went to the appendix itself, you  
19 might be able to glean information about CIA operations simply  
20 by looking at the length of the document.  
21 THE COURT: I don't accept that. Is that appendix  
22 here?  
23  
24 MR. SKINNER: Here it is in unredacted form. If you  
25 know what kind of document this is, and you know the length of  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

53

85C3ACLC CONFERENCE

1 the document, then you can glean information about the CIA's  
2 program.  
3 THE COURT: Well, first of all we are only talking  
4 about a chronology. We are not talking about any specific  
5 chronology.  
6 MR. SKINNER: That word was what we were trying to  
7 protect.  
8 THE COURT: I don't see it.  
9 MR. SKINNER: Is there additional information we could  
10 provide off the record?  
11 THE COURT: I think we need an off-the-record  
12 discussion.  
13 (Discussion off the record)  
14 THE COURT: We've had a discussion off the record.  
15 I'm convinced that the redactions on page i are correct on  
16 national security grounds. And the same is true with respect  
17 to ii. And on iii, the redactions should begin with category C  
18 in the appendices, not category B. Otherwise approved. And IV  
19 I approve.  
20 MR. SKINNER: Your Honor, within the sections where  
21 we've redacted the headers, you'll see there is information  
22 released in those sections as well. If we've redacted the

23 header and then we've withheld everything in that section also.  
24 MR. PETERSON: The first page, your Honor, where there  
25 is information we plan to release is page 15.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

54

85C3ACLC CONFERENCE

1 THE COURT: Okay.  
2 MR. SKINNER: If it is hard to read --  
3 THE COURT: I can read this fine.  
4 (Pause)  
5 (Discussion off the record)  
6 THE COURT: On paragraph 40, there is two proposed  
7 redactions. And I think the second redaction is inconsistent  
8 with my prior ruling of this morning.  
9 MR. SKINNER: We understand, your Honor. That does  
10 appear to be, that information appears to be consistent with  
11 the information you ordered disclosed earlier today, and we'll  
12 treat it as consistent with those orders.  
13 THE COURT: Thank you. On paragraph 77, the second  
14 proposed disclosure statement --  
15 MR. SKINNER: Yes, your Honor.  
16 THE COURT: -- is preceded by a previous sentence of  
17 factual information.  
18 MR. SKINNER: Yes, your Honor.  
19 THE COURT: Shouldn't that previous sentence be  
20 disclosed?  
21 MR. SKINNER: Your Honor, although we've acknowledged  
22 the existence of videotapes of interrogations, we've never  
23 acknowledged numbers which that information would disclose, and  
24 knowing the numbers of videotapes would reveal information  
25 about CIA operations.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

55

85C3ACLC CONFERENCE

1 MS. HILTON: I think if someone was looking at that,  
2 it would not provide a complete picture, either.  
3 THE COURT: That may or may not be true, but that's  
4 not the basis for an exemption.  
5 MR. SKINNER: The exemption argument would be that it  
6 is B1 and B3, national security and intelligence sources and

7 methods, and goes beyond the information that has been  
8 acknowledged on the public record.

9 THE COURT: I propose to rule that the previous  
10 sentence with the exception of the last two words should be  
11 disclosed. After your proposed disclosure, the next five words  
12 should be disclosed.

13 MR. SKINNER: Okay.

14 THE COURT: Incidentally, up through this paragraph  
15 number, I approve of the redactions.

16 (Pause)

17 (Discussion off the record)

18 THE COURT: I've completed the report up to appendix A  
19 and I approve the proposals.

20 I'm on appendix A. The first page, what about  
21 disclosing the first lines after the security initials?

22 MR. PETERSON: In paragraph --

23 MR. SKINNER: Three?

24 THE COURT: Yes. And in the second line redact only  
25 the first three words, and in the next sentence, through line

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

56

85C3ACLC CONFERENCE

1 three, redact the number and omit the fourth line.

2 MR. PETERSON: I think we would have an issue with the  
3 second, third and fourth line -- words in the third line.

4 THE COURT: Has that not been disclosed?

5 MR. PETERSON: It has not, your Honor.

6 THE COURT: Then delete those three words.

7 MR. PETERSON: Then I have one other question, your  
8 Honor. Which was you said that we could redact the number  
9 listed in line three.

10 THE COURT: Yes.

11 MR. PETERSON: Previously, I think in paragraph 77,  
12 you had ordered that number released.

13 THE COURT: Then you should release the number. I  
14 remember the issue, but I did not remember my ruling. I'd  
15 rather you release the number.

16 MR. SKINNER: Your Honor, just in the second sentence,  
17 there may be some information that you've noted with the  
18 exception of the number that we may be able to release. I  
19 think the first sentence is actually a fact that has never been  
20 acknowledged publicly, so that's likely going to pose more  
21 problems for us.

22 THE COURT: I think it is a fact that can't lead to  
23 any compromise of national security.  
24 MR. SKINNER: With the exception of those three words.  
25 THE COURT: I didn't require them.  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

57

85C3ACLC CONFERENCE

1 MR. SKINNER: I wanted to make sure I was clear.  
2 THE COURT: Let me repeat. The first line after the  
3 parenthesis would be produced. The second line, the first  
4 three words can be redacted. In the third line, the second,  
5 third and fourth word can be redacted. And the fourth line can  
6 be redacted.  
7 MR. SKINNER: This is what we spoke about off the  
8 record earlier.  
9 THE COURT: Yes, okay.  
10 MR. SKINNER: Appendix C we've already covered in some  
11 detail today.  
12 THE COURT: So that finishes the document. I'm giving  
13 it back.  
14 MR. SKINNER: With regard to our proposed redactions  
15 to the final special review report with the exception of what  
16 your Honor has just noted, otherwise the redactions are  
17 approved by the Court?  
18 THE COURT: They are.  
19 MR. SKINNER: Your Honor, turning back then to the  
20 looseleaf binder with the 24 documents in it, we're now at  
21 document number seven, which is the other document number  
22 seven. This is similar to -- this is the proposed redaction  
23 that we would release. Otherwise, our position is that these  
24 are comments, more comments from another component of the CIA  
25 on the OIG report. So with the exception of that information,  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

58

85C3ACLC CONFERENCE

1 we would be withholding the document in its entirety.  
2 THE COURT: I approve.  
3 MR. SKINNER: The next document, document number 21,  
4 this is as we have explained in the public Vaughn, it is a  
5 summary of various cables that were received from the field.

6 THE COURT: What is the basis of the claim?  
7 MR. SKINNER: B1 and B3, your Honor. This reveals --  
8 it is essentially raw intelligence.  
9 MS. HILTON: These are just summaries of cables like  
10 the operational cable.  
11 THE COURT: Agreed.  
12 MS. HILTON: Okay.  
13 MR. SKINNER: We are now on 25, your Honor.  
14 THE COURT: This is a preliminary document, you have a  
15 final document that incorporated whatever was appropriate to  
16 incorporate.  
17 MR. SKINNER: By --  
18 THE COURT: I uphold the privilege.  
19 MR. SKINNER: Okay.  
20 THE COURT: 27.  
21 MR. SKINNER: 27 is a three-page memorandum from the  
22 record that was drafted by the CIA Senior Deputy General  
23 Counsel on April 10, 2003. Some of the information in this  
24 document is classified. The document itself is withheld in its  
25 entirety. Primarily because it records the deliberative

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

59

85C3ACLC CONFERENCE

1 process of senior government officials. It is essentially a  
2 record of a meeting.  
3 THE COURT: Yes. I approve. Next document is 35?  
4 MR. PETERSON: 33, your Honor.  
5 MR. SKINNER: 33, your Honor. As we have explained in  
6 the Vaughn, this is an 18-page document. It is to the CIA's  
7 Inspector General from the Director of Technical Service. And  
8 it is essentially responding to an IG request for documents.  
9 Just so you know, the page you are looking at right  
10 now, those are not -- those were in the original document. The  
11 way it copies, you can't see what's underneath those blocks.  
12 MS. HILTON: We did not make those.  
13 MR. SKINNER: That's not information we pulled out.  
14 THE COURT: I approve.  
15 MR. SKINNER: The next document, document number 35,  
16 is another memorandum for the record prepared by the CIA's  
17 general counsel. It is fairly similar to the same type of  
18 document as the memorandum for the record that you reviewed a  
19 moment ago.  
20 MR. PETERSON: Your Honor, that page that's turned

21 sideways, it is a copy of the first page, but there was a  
22 Post-it note attached to that first page. That copy is simply  
23 to capture the information that was on the Post-it attached to  
24 the document as found.

25 THE COURT: Thank you.  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

60

85C3ACLC CONFERENCE

1 (Pause)

2 THE COURT: I approve.

3 MR. SKINNER: This, your Honor, number 51, is a  
4 16-page document from the chief of a CIA component to the  
5 director of another component. It is a proposal. It contains  
6 classified information, but as a proposal we are also  
7 withholding it under the deliberative process privilege.

8 THE COURT: I'm sorry. I moved away from the previous  
9 document.

10 MR. SKINNER: It is okay, your Honor. We are looking  
11 at document number 51 which is a proposal.

12 THE COURT: Just let me have a minute.

13 MR. SKINNER: Sure. We are proposing releasing a  
14 redacted portion of the document but otherwise withholding it.

15 (Pause)

16 THE COURT: Next document is 51?

17 MR. SKINNER: We're now on document 51. It is a  
18 redacted page that we proposed releasing. And the remainder of  
19 the document we intend to withhold.

20 THE COURT: Approved.

21 MR. SKINNER: We are now on document number 71.

22 THE COURT: There is something more on 51 that I  
23 hadn't seen before.

24 MR. PETERSON: That's the document in full.

25 THE COURT: Okay. So go to 71.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

61

85C3ACLC CONFERENCE

1 MR. SKINNER: This is a seven-page draft document of  
2 an assessment report. It has got a fax cover sheet then  
3 followed by the assessment report. All of which is being  
4 withheld under B1 and B3, as well as B5 because it is a draft,

5 but the information itself is national security and  
6 intelligence sources and methods.

7 THE COURT: I approve.

8 MR. SKINNER: We are now on document 111, your Honor.  
9 It is a four-page document. It is not dated.

10 THE COURT: I approve.

11 MR. SKINNER: Your Honor, 113 is a five-page document.  
12 It is -- I think if you look at it, the contents are fairly  
13 obvious.

14 THE COURT: Approve.

15 MR. SKINNER: We are now on 113 -- excuse me. 131.  
16 This is a report containing operational information. We are  
17 proposing redacting some information from this report. Excuse,  
18 me. Releasing some information from this report, but  
19 withholding the bulk of it.

20 THE COURT: Approved.

21 MR. SKINNER: Your Honor, we are now on document  
22 number 157. This is a three-page document. It is an  
23 operational document that is somewhat similar to the one you  
24 saw a moment ago.

25 THE COURT: Approved.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

62

85C3ACLC CONFERENCE

1 MR. SKINNER: 167 is the next document up. It is a  
2 four-page document, and it is similar in nature to the document  
3 you just viewed.

4 THE COURT: Approved.

5 MR. SKINNER: The last document then is document  
6 number 183. This is a 16-page document with a photocopy of  
7 handwritten notes, and it is all operational information.

8 THE COURT: Approved.

9 MR. SKINNER: Your Honor, that completes the first 24  
10 documents that you had asked us --

11 THE COURT: I don't believe I need to enlarge.

12 MR. SKINNER: Thank you, your Honor.

13 THE COURT: I think the scope -- where do we go from  
14 here?

15 MR. SKINNER: I think we'll get back to you tomorrow,  
16 we'll try, perhaps Wednesday at the latest, with a proposed  
17 schedule for us to submit a supplemental Vaughn declaration  
18 addressing some of these classified issues with view of your --

19 THE COURT: It seems to me Ms. Forman is free to

20 produce her transcript. It would be good if it could be done  
21 as quickly as possible.

22 MR. SKINNER: As we discussed previously, none of us  
23 think there are any problems with what was said. We would like  
24 to put this through classification review to make sure no  
25 information was inadvertently put through to the public.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

63

85C3ACLC CONFERENCE

1 THE COURT: Would you mind if I had a look at it  
2 first?

3 MR. SKINNER: Absolutely, your Honor. I guess after  
4 your Honor has reviewed it, we can get it through the review  
5 process as soon as possible.

6 We have the redactions we were going to release to the  
7 plaintiffs. Would you like us to hold the release of these  
8 documents until we've resolved whatever additional filings we  
9 are going to make or do you want us to release what we have?

10 THE COURT: Why don't you release what you have and  
11 your cover letter would say "subject to further rulings by the  
12 Court."

13 MR. SKINNER: Okay. We can take care of that, your  
14 Honor. The only other open issue, your Honor, is in a letter  
15 we had written to you in April we had noted that we did not  
16 find, as described in that letter, any videotapes or  
17 transcripts that you had asked us to look for.

18 THE COURT: Let me bring Sheila back in.

19 Let me do a summary of where I recall we are. Just  
20 help us remember what we need to do. Number one is I've  
21 completed my rulings on all the documents I was to sample, plus  
22 the additional document that I asked to be produced in my order  
23 of May 8. And I ruled that the sampling that I've reviewed in  
24 the context of my rulings persuade me that there is no need to  
25 have an enlarged sample. So, I rule that this phase of the

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

64

85C3ACLC CONFERENCE

1 proceedings has been completed.

2 Second, with respect to the rulings I made, there is  
3 one aspect mentioned in the transcript where I overruled the

4 government's objections to production, on national security  
5 grounds. The government asked for leave, and I gave it leave,  
6 to produce a supplemental justification for its actions, its  
7 proposed actions, in the form of a classified submission. The  
8 government will call my law clerk tomorrow and identify for her  
9 when it will propose to make this classified submission. When  
10 made, as was the case with this entire proceeding, the only  
11 person who will see the submission will be myself, and I was  
12 the only person other than the government itself who reviewed  
13 the text of all the documents that I reviewed today. At that  
14 time we will also have argument with regard to the two  
15 paragraphs in issue. And I hope I can make my rulings at that  
16 time.

17 When the government communicates tomorrow with my law  
18 clerk, if they're able to identify what kind of a record can be  
19 made of that argument and whatever proceedings there are, I  
20 would endeavor that the government do that. My preference  
21 would be using a cleared court reporter for the ease of  
22 recording the session and reviewing the session.

23 The government proposes to produce various documents  
24 today, subject to additional production in light of my rulings  
25 made today. The government will make its production soon,

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*

65

85C3ACLC CONFERENCE

1 perhaps tomorrow.

2 And lastly, the government wishes to report or make  
3 comment with regard to various matters left pending.

4 MR. SKINNER: Yes, your Honor. The only thing that I  
5 believe is then still open is that in a series of letters we  
6 had been sending, the last letter being April 11 of 2008, that  
7 we sent in response to the Court's order that we search for  
8 copies of videotapes and interrogation transcripts, we proposed  
9 in that letter that if the Court wanted, we could provide a  
10 Vaughn index of a sample of reports that we had identified that  
11 did describe some of the interrogations. We thought it might  
12 be akin to what you were looking for. If you want us to do  
13 that, we can do it. We just wanted to see if that was  
14 something that the Court wanted from us, and to try to  
15 determine the number --

16 THE COURT: It is highly likely that you will claim  
17 exemption for that information.

18 MR. SKINNER: Yes, your Honor.

19 THE COURT: I've already made rulings today, and I was  
20 given that particular subject, and upheld the claim of  
21 exemption. So I don't see the point.

22 I think what I was interested in was knowing more  
23 about the facts and circumstances of the destruction of  
24 documents. As I remember, and my memory is not completely  
25 clear on this, I was interested in knowing more about the

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

66

85C3ACLC CONFERENCE

1 destruction of information that supposedly should have been  
2 produced. I was told that the Attorney General had instituted  
3 an investigation into that very same subject.

4 (Discussion off the record)

5 THE COURT: I don't remember what happened next.  
6 Whether I ruled on the subject or made inquiry on the subject.  
7 Mr. Skinner or Mr. Lane, do you remember?

8 MR. SKINNER: Your Honor, I don't believe you ruled on  
9 the subject of the destruction of the videotapes, which is what  
10 we are talking about, or made, aside from asking whether there  
11 were other tapes or transcripts, made any inquiry. And our  
12 response was what we found are these reports.

13 Your Honor is correct, we would be holding national  
14 reports which summarize interrogations in their entirety.  
15 They're very similar to the cables that you reviewed today.  
16 But that's the extent of my understanding of what's happened  
17 since we were before your Honor in January.

18 MR. LANE: That's correct, your Honor. We had  
19 argument and we've had various letters trying to update the  
20 Court on exactly what information we have and just to keep the  
21 Court updated on that aspect.

22 MR. SKINNER: In the criminal investigation, which is  
23 being led by John Durham from the United States Attorney's  
24 Office in Connecticut is still ongoing.

25 THE COURT: Do you know if Mr. Durham has within the  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

67

85C3ACLC CONFERENCE

1 scope of his activities questions that I raised in my case?

2 MR. SKINNER: Your Honor, as we represented to the

3 Court in January, Mr. Durham is considering whether any orders  
4 issued in this case were violated by the destruction of the  
5 videotapes. As we told your Honor in January, if there is a  
6 determination made that any of your orders were violated, we  
7 will inform your Honor of that determination.

8 THE COURT: There is nothing official in his  
9 investigation?

10 MR. LANE: There is to the extent that we specifically  
11 spoke to the Department of Justice to make sure when we made  
12 that representation it was accurate. In other words, whether  
13 there were any violations of court orders in civil cases,  
14 including this case, that we could represent to the Court that  
15 that was part of what the Durham team was looking into.

16 THE COURT: What do you propose now, Mr. Skinner?

17 MR. SKINNER: Well, with regard to that issue, our  
18 position would be the same that it was in January.  
19 Preliminarily that we had complied with the letter of the  
20 Court's order. And that in any event, any further action in  
21 this case should be stayed pending resolution of the criminal  
22 proceeding. We would be happy to see what information, if any,  
23 we can get to your Honor about the status of the present  
24 criminal proceeding, if that might help the Court in  
25 determining what the next step would be.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

68

85C3ACLC CONFERENCE

1 THE COURT: I would like two things. One, that. And  
2 second, representing on the basis of information you learn from  
3 Mr. Durham or his staff, whether the non-compliance with my  
4 order is a matter that he is investigating. And will be able  
5 to report on to me.

6 MR. SKINNER: Your Honor, we will pass that on to  
7 Mr. Durham's team. If we can provide the information back, we  
8 will. He very well may want to respond himself directly, if he  
9 is able to provide this type of information. But we will pass  
10 that on and get back to your Honor as soon as possible.

11 THE COURT: If he would prefer not to have anything  
12 official on this, I would take unofficial comment as well.

13 MR. SKINNER: We'll take care of that, your Honor.

14 THE COURT: Thank you. I don't have anything more.

15 MR. SKINNER: The only thing we wanted to note for the  
16 record is the supplemental submission that we are going to put  
17 in will address the paragraphs that your Honor noted. And in

18 addition we had intended to address the number of videotapes  
19 which you've ordered us to disclose, which we feel is also  
20 protected by national security concerns as well as the  
21 intelligence sources and methods.

22 THE COURT: I can tell you that one of my points of  
23 interest was the proceedings that were in January.

24 Now, let's go through and say we've accomplished all  
25 this. Is there anything else that's open before me or can we

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

69

85C3ACLC CONFERENCE

1 close these cases?

2 MR. LANE: I think, your Honor, taking the big picture  
3 view, I think the Department of Defense is -- I shouldn't say  
4 this -- knock wood -- is complete. The only thing that is left  
5 for the Department of Defense is there is one matter sub judice  
6 with the circuit.

7 THE COURT: What is that?

8 MR. LANE: That's the issue of the 7F invocation as to  
9 photographs. I think that has been before the Second Circuit  
10 for more than a year, for about a year and a half. I don't  
11 think they are finding it any easier than your Honor did. And  
12 somebody who argued it took several exacerbated questions on  
13 subject.

14 The DOD is releasing some other reports, CID reports,  
15 which we've been doing on a regular basis for many years and we  
16 are going to keep doing that. We've never had an objection to  
17 what the Army has actually redacted in those reports, and we  
18 are going to keep doing that. So I think that's DOD.

19 The only other two agencies are CIA, which we just  
20 discussed, and then there was one pending motion that related  
21 to OLC that was filed in November. That was a motion for an  
22 order to show cause saying there were certain documents that  
23 should be included in this case, and we filed an opposition  
24 saying they were outside the scope of this case because they  
25 were much later in time. And that's still before the Court and

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

\* \* \*

70

85C3ACLC CONFERENCE

1 was argued in January I think just before the summary judgment

2 motions. So probably --

3 THE LAW CLERK: That was a motion for contempt?

4 MR. LANE: No, that was a motion for an order to show  
5 cause I believe.

6 MR. SKINNER: Yes. That was an argument that OLC  
7 memos, classified OLC memos from May of 2005 should be included  
8 within the scope of this litigation. We had argued that they  
9 were outside the scope of this litigation and were part of the  
10 litigation pending before Judge Preska. And I don't know if  
11 there was ever a final resolution of that motion.

12 THE COURT: No, there wasn't.

13 MR. LANE: I believe that's discussed in the first day  
14 of the hearings that is the January 16 transcripts.

15 THE COURT: Thanks very much. Have a good trip back.

16 MS. HILTON: Thank you, your Honor.

17 o0o

18

19

20

21

22

23

24

25

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

\* \* \*