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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 AMERICAN CIVIL LIBERTIES UNION,
3 et al.,

4 Plaintiffs,

5 v.

04CV4151(AKH)

6 DEPARTMENT OF DEFENSE, et al.,

7 Defendants.

8 -----x

9 New York, NY
10 August 12, 2004
10 3:15 p.m.

11 Before:

12 HON. ALVIN K. HELLERSTEIN

13 District Judge

14 APPEARANCES

15 GIBBONS DEL DEO DOLAN GRIFFINGER & VECCHIONE
16 Attorneys for Plaintiffs

16 LAWRENCE S. LUSTBERG

17 AMRIT SINGH

18 In-House Counsel ACLU

19 DAVID N. KELLEY

19 United States Attorney for the
20 Southern District of New York

20 SEAN LANE

21 PETER SKINNER

21 Assistant United States Attorneys

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1 (Case called)

2 THE COURT: Welcome.

3 I would like to hear the government first on the issue
4 of my jurisdiction. As I read the statute, it seems rather
5 clear that the district court is supposed to involve itself in
6 these issues and not leave it entirely to the discretion of an
7 executive order. That seems to be the purpose of the statute.

8 MR. LANE: Well, your Honor, we are not saying there
9 is never an occasion where the court should not weigh in. We
10 are saying this is not that case for several reasons, the first
11 of which, some defendants have responded to the requests, most
12 notably the Department of Homeland Security and Department of
13 Justice, Civil Rights Division.

14 THE COURT: Both those aspects of the motions are
15 withdrawn, not at issue.

16 MR. LANE: Certainly, your Honor. Secondly, the other
17 defendants are doing what the plaintiffs had requested. That
18 is, they are actively processing the request.

19 It's important to put this request in context, your
20 Honor. The amendment, that is, the amendment providing for
21 expedited processing, provides that things are done in other
22 than a first-in/first-out manner in a FOIA request. Here it's
23 undisputed --

24 THE COURT: Let me stop you. The first issue is my
25 jurisdiction. What you are talking about is the wisdom of the

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1 response. You have attacked my jurisdiction. You have told
2 me, judge, you have no business getting involved, you can't get
3 involved. I don't understand that position. The statute
4 specifically says I should.

5 MR. LANE: Where I was headed was on the question of
6 mootness. That's what the statute provides. A request that's
7 expedited should be handled as soon as practicable. What the
8 defendants here have done is expedite the requests. Either
9 explicitly or as a practical matter, that is out of the queue.
10 It's not being handled in the ordinary course of
11 first-in/first-out. The search is underway in all of the
12 agencies with processing occurring either now or to follow as
13 soon as the search is done.

14 THE COURT: The question is, if the government says
15 it's going to be handled in due course, is there any business
16 for the court. As I read the statute, there is. I have to
17 make my own findings. I may agree with you, but I have to come
18 to agreement. That is the process of jurisdiction. It seems
19 to me as I read the statute that it's my business to decide,
20 (A) are you right, (B) are you wrong.

21 MR. LANE: What we wanted to apprise the court of is
22 that what plaintiffs have asked for, that is, expedited
23 processing, that has already occurred; therefore, we believe of
24 the question is moot.

25 THE COURT: That's a question of fact.

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1 MR. LANE: We don't believe it is, your Honor. In a
2 sense, for the Department of Justice, the State Department,
3 certainly those agencies that have explicitly said here --

4 THE COURT: They are out of the case, out of the
5 motion; don't even bother me with that. Homeland Security and
6 Civil Rights are out of the motion.

7 MR. LANE: I wasn't referring to those; I was
8 referring to the agencies that have explicitly granted
9 expedited processing.

10 THE COURT: If an agency says I will get to it, is
11 that the end of it, do I have to accept it.

12 MR. LANE: Certainly there is case law where there are
13 facts and circumstances where courts have decided to intervene.
14 The issue has not been addressed in the Second Circuit or this
15 court. We are saying that the label of jurisdiction is too
16 strong if one of these agencies has granted the expedited
17 processing, they are processing this request even as we speak,
18 and, therefore, what they are entitled to under the statute has
19 been granted, and that, secondly, as an exercise of the court's
20 discretion, this is not the time to exercise the court's
21 discretion.

22 THE COURT: Discretion is a different issue. You have
23 attacked my jurisdiction. That's how I read your brief. Am I
24 wrong. Did I read it wrong.

25 MR. LANE: No, your Honor.

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1 THE COURT: Did you attack my jurisdiction.

2 MR. LANE: Yes, we did, your Honor.

3 THE COURT: Don't I have jurisdiction under the
4 statute to make my own independent finding that I should or
5 should not involve myself. That's the issue, not discretion.
6 You have attacked my jurisdiction. There is a difference. You
7 know the difference.

8 MR. LANE: Certainly, your Honor.

9 THE COURT: You don't pick concepts out of the air.
10 You know what you are doing. Why do I not have jurisdiction.

11 MR. LANE: We believe when a request, such as the May
12 25, 2004 request, has been made and plaintiffs have asked to
13 expedite that request, the agency where that request has been
14 made turns around and says, yes, we will expedite your request,
15 we have done so, then the court does not have jurisdiction to
16 expedite the request because that has already been done.

17 THE COURT: Do you mean, no matter how it's phrased,
18 if the Department of Justice or any other government agency
19 says, we are working on it, I have to leave it alone, I don't
20 get involved.

21 MR. LANE: No, your Honor; that's where it gets into
22 the discretionary issue.

23 THE COURT: Discretion is not jurisdiction. Let's
24 keep them separate. We are lawyers, right. There is a
25 difference between jurisdiction and discretion. Jurisdiction

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1 means I can't; discretion means I shouldn't act. Which is it.

2 MR. LANE: We believe that in this circumstance where
3 expedited processing has been granted by these agencies, that
4 question is moot; they have granted relief as to expedited
5 processing. I recognize, your Honor, that there is a second
6 request in the plaintiffs' motion, that is, to prepare Vaughn
7 indexes within 14 days to move the case forward. That is not
8 something jurisdictional, rather we think a matter of the
9 court's discretion and not appropriate here.

10 THE COURT: What's the position of the plaintiffs on
11 the issue of my jurisdiction.

12 MR. LUSTBERG: Your Honor clearly has jurisdiction.
13 There were two agencies as to which the court did not have
14 jurisdiction. The reason the court did not have jurisdiction
15 is because the statute says so. In 5 U.S.C. Section
16 552(a)(6)(E)(iv), that provision says: A district court of the
17 United States shall not have jurisdiction to review an agency
18 denial of expedited processing of a request for records after
19 the agency has provided a complete response to the request --
20 the request there of course referring to the underlying FOIA
21 request.

22 That has happened with respect to the Department of
23 Homeland Security and with respect to the Division of Civil
24 Rights. It's for that reason we withdrew our application with
25 respect to that. The remainder is covered by the prior

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1 paragraph which explicitly states that the court has
2 jurisdiction. I think the court has no choice but to exercise
3 jurisdiction. I think we should get on to discussing how the
4 court should go about doing that.

5 THE COURT: That's (a)(4)(B).

6 MR. LUSTBERG: Under 5, 552, I think, (a)(6)(E)(iii),
7 the provision reads: Agency action to deny or affirm denial of
8 a request for expedited processing pursuant to this
9 subparagraph --

10 THE COURT: Just a minute.

11 "An agency shall process as soon as practicable any
12 request for records to which the agency has granted expedited
13 processing under this subparagraph. Agency action to deny or
14 affirm denial of a request for expedited processing pursuant to
15 this subparagraph, and failure by an agency to respond in a
16 timely manner to such a request, shall be subject to judicial
17 review under paragraph (4), except that the judicial review
18 shall be based on the record before the agency at the time of
19 the determination."

20 That's what you are reading.

21 MR. LUSTBERG: Yes.

22 THE COURT: It goes back to (a)(4), which provides, in
23 relevant part, the agency is supposed to provide regulations,
24 proposed charges, referring to documents, and (B): On
25 complaint, the district court of the United States in the

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1 district in which the complainant resides, or has his principal
2 place of business, or in which the agency records are situated,
3 or in the District of Columbia, has jurisdiction -- that's my
4 court -- has jurisdiction to enjoin the agency from withholding
5 agency records and to order the production of any agency
6 records in improperly withheld from the complainant. In such a
7 case the court shall determine the matter de novo, and may
8 examine the contents of such agency records in camera to
9 determine whether such records or any part thereof shall be
10 withheld under any of the exemptions set forth in subsection
11 (b) of this section, and the burden is on the agency to sustain
12 its action.

13 That's the right section.

14 MR. LUSTBERG: Yes, your Honor.

15 THE COURT: Mr. Lane, is that right.

16 MR. LANE: Your Honor, if I may, yes, your Honor. For
17 that paragraph that the court just read, they are talking about
18 withholding records. That is where an agency has a FOIA
19 request and withheld records pursuant to that request. The
20 expedited processing provision in fact talks about agency
21 action to deny or affirmative denial of request to expedite
22 processing the court has jurisdiction over.

23 So the government's argument, my understanding is here
24 we have not reached the place where for the May requests we are
25 talking about the holding of records, because the search has

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1 not yet been complete for those records where an agency has not
2 denied a request for expedited processing but in fact granted
3 it. That's the circumstance we are under.

4 THE COURT: Suppose I find the agency has been much
5 too slow, indeed, the agency has been arbitrarily avoiding
6 making decision. What's the remedy under that hypothetical
7 which of course is not here.

8 MR. LANE: Your Honor, I think that the remedy there
9 would be to expedite processing saying that expedited
10 processing perhaps as a de facto matter has been denied, but in
11 this case --

12 THE COURT: That's my jurisdiction then.

13 MR. LANE: Yes, your Honor, but in this case it has
14 been granted.

15 THE COURT: Under the hypothetical, what relief would
16 I as district judge give.

17 MR. LANE: Your Honor, I believe that if the court
18 found that expedited processing was de facto denied by agencies
19 because they were not doing what they were supposed to be
20 doing, then the court could grant expedited processing.

21 THE COURT: Forget about expediting, just taking more
22 time than the judge thinks is reasonable in the circumstances,
23 what's the relief the statute provides.

24 MR. LANE: Your Honor, again I think referring back to
25 that Section B the court read, I think the court could perhaps

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1 under appropriate circumstances find that as a de facto matter
2 the agency has withheld records, it has taken so long the
3 agency has not processed in due diligence, it has become a de
4 facto withholding of records.

5 THE COURT: It's hard for me to resist that given the
6 record, absence of the record. We have ten months since the
7 issuance of the FOIA demand and the government has not come
8 forward with a single identification of a document.

9 MR. LANE: Your Honor, I don't believe that that
10 assertion in the plaintiffs' motion is correct. They received
11 some documents from the State Department and in addition they
12 did receive responses from agencies, not all of the agencies, I
13 will concede that, your Honor, but some of the agencies.

14 THE COURT: Take the Department of Defense which says
15 they have numerous documents, not one of which has been
16 identified. The suggestion that they may be covered in some
17 part in some fashion by an executive order that covers 30
18 pages. What should I do. It's hard to believe that not a
19 single document should be identified. Maybe there is an
20 exemption that applies. Presumably there will be very good
21 arguments for exemptions applying. But not a single document
22 has been identified. Same with the Department of Justice; they
23 talk about numerous documents which they have not identified.
24 Same with the CIA; they talk about numerous documents which
25 they say are operational. Maybe they are right. But what's my

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1 job. What am I supposed to do, a dispute like this is fairly
2 tendered to me for decision, how much deference to give to the
3 executive when there is not an administrative record.

4 MR. LANE: Your Honor, what we would propose in this
5 case is to, we think this case is many cases in one, given the
6 number of defendants involved here, each of which will have
7 exemption agency issues, and in each of the agencies when the
8 time for summary judgment comes, they will each have their
9 Vaughn indexes. We propose to move forward with the case with
10 all deliberate speed in a couple of ways.

11 THE COURT: You have been doing that since October.
12 If you responded as you were supposed to in 20 days,
13 realistically it required a longer time. What's the difference
14 now because the case is brought. That doesn't galvanize you
15 into action. You have been involved all along. There has been
16 no result.

17 MR. LANE: A couple of points. First, the plaintiffs
18 followed up with a May request which seeks additional documents
19 in additional time.

20 THE COURT: Since you were slow, you left yourself
21 open to it.

22 MR. LANE: Certainly they are entitled to do that
23 under the statute; no one begrudges them. It changes the
24 nature of the search. The first request is subsumed within the
25 second request. The Department of Defense has --

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1 THE COURT: The time period, you have a cut-off, if
2 you made production; since you didn't make production, they
3 overlap. If you wait long enough there will be a third
4 request. That's no answer. What realistic prospect is there
5 that you work any harder if I tell you than if I didn't tell
6 you to do it.

7 MR. LANE: I can represent to the court that since
8 getting this case, we have had numerous conversations with each
9 agency and each individual component, which are more than a
10 dozen, to impress upon them the need to process these requests,
11 to ask them how many pages of documents we are talking about,
12 to tell them that they have to move forward with this. We have
13 gotten some information. What we think is an appropriate way
14 to move forward with the case, because of the unique situation
15 for each one of these agencies in terms of filing, is to file a
16 motion for summary judgment to move forward with the case. We
17 would be happy to file a motion for summary judgment.

18 THE COURT: The first step is not a motion for summary
19 judgment. The first step is either to produce or furnish a
20 log. That is the first step. It's a Rule 34 issue. Either
21 you identify the document and produce it or you claim
22 privilege. But you have to claim privilege with specificity.
23 The cases require you to give enough specificity so the adverse
24 party has a basis to make an evaluation, decide whether to move
25 or not. That's the first step.

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1 MR. LANE: Certainly, your Honor, but one of the
2 things we want to apprise the court, we have been told by one
3 agency, the amount of documents that are potentially responsive
4 to this request in May that will need to be looked at to
5 determine if they are responsive is a total more than 67,000
6 pages of documents.

7 THE COURT: Take the first 1000, work with that, when
8 you finish the first 1000, go to the second 1000. A wise
9 person once said it's not for us to finish the job, that's not
10 an excuse for starting a job.

11 MR. LANE: I have mentioned to plaintiff on more than
12 one occasion we would be happy to do rolling production. We
13 have raised the issue with each one of the agencies. I have
14 gotten some assurance from some agencies they would be happy to
15 do that, they plan on doing that. We don't believe there is
16 any reason to wait until the very end to release documents that
17 can be released or identified to the plaintiffs.

18 THE COURT: Why has it not been done.

19 MR. LANE: Well, your Honor, again, what has been
20 going on in terms of this request, which is very broad, it
21 seeks any and all information about the treatment of overseas
22 detainees. There has been a search for documents. So, for
23 example, the State Department had to request of each one of its
24 overseas offices documents that are potentially responsive,
25 then documents come back to the office handling the request,

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1 then they are looked through to see if they in fact are
2 responsive. The agencies have been in the process of searching
3 for potentially responsive documents. The next step in the
4 process is to process what they have, determine whether they
5 are in fact responsive to the request. That's when production
6 can be made.

7 THE COURT: I think there is a faster way to do it. I
8 think, for example, using what you have, take five offices,
9 they respond, so you take all those documents, you put Bates
10 numbers on them, you either decide they should be produced, in
11 which case produce them, or should be exempted, in which case
12 you produce a log, then you move on to the next, or do it by
13 date, not allow a process to collect each document until some
14 future date, hopefully we will live as long as we collect all
15 the documents and produce them; that's not good.

16 MR. LANE: I will be happy to tell all the agencies to
17 proceed in that manner, not wait until the search is complete,
18 but to begin processing.

19 THE COURT: The ACLU doesn't need to bring a lawsuit
20 if that's going to happen, what's the necessity. We are all
21 functioning in good faith. The information may be unpleasant,
22 the information may be exempt or producible. To allow a
23 process of this nature to go on so long as to be part of a
24 lawsuit doesn't seem to be an exercise in good sense and
25 judgment. These are all busy people; they have operational

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1 things to do. So long as we have the Freedom of Information
2 Act, we have to follow the law, and what you are suggesting is
3 what should have been done long before this.

4 MR. LANE: Certainly, your Honor. Again, I have been
5 told by agencies that, for example, one other agency because of
6 other FOIA litigation requests has 11 other expedited
7 processing ahead of the line of this expedited processing, even
8 though they have expedited it.

9 THE COURT: So what.

10 MR. LANE: Your Honor, certainly --

11 THE COURT: If they are asking for the same things,
12 you produce the same things.

13 MR. LANE: Different requests for different kinds of
14 information involving different searches.

15 THE COURT: You get a pool of documents, you put them
16 in piles, make them copies, if they are exempt, they are exempt
17 for everything, if producible they are producible. I have gone
18 through every one of these techniques. I have been a lawyer
19 for many years, though I didn't function so much in the freedom
20 of information field, every production had the same kinds of
21 problems. I know all the gigs. But production has to begin.

22 The first step is for me to go off the record, allow
23 you and Mr. Lustberg to have a little conversation, come up
24 with a schedule. Because if I have to impose my values, it
25 will be arbitrary. You have to work out what's reasonable,

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1 what makes sense to both of you, a process that's fair. Don't
2 wait until the end of the day. Take a segment according to
3 chronology or according to office and set out a date to make
4 production or furnish a log. That's what I would like to see
5 happen. I think you are in agreement.

6 MR. LANE: Certainly, your Honor. As I said shortly
7 after receiving this motion that I was happy to work on a
8 rolling production basis where the process continued, whatever
9 could be turned over was turned over.

10 THE COURT: What should I do is recess for a half
11 hour.

12 MR. LANE: Certainly, your Honor.

13 MR. LUSTBERG: Fine.

14 THE COURT: We will recess for a half hour. It's now
15 25 minutes to 4:00; we will come back at 4:00.

16 (Recess)

17 THE COURT: Who wishes to tell me what's going on.

18 MR. LANE: I am happy to, and Mr. Lustberg, our
19 conversation zigged and zagged in many directions, if I say
20 anything not consistent, he should feel free to chime in. What
21 we would like to do is the following. There are many potential
22 avenues where we can impress upon our clients the need to do
23 this as a process moving forward where we are either producing
24 documents and identifying documents, saying you can't have them
25 because they are exempt. The plaintiffs have priorities what

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1 they are most interested in, some of which we may be able to
2 work on right away, some of which may be more difficult given
3 the way these searches are done.

4 We are going to try to iron this out in the next week
5 on ten days, come up with some sort of agreement along those
6 lines, while simultaneously working on some of the things
7 Mr. Lustberg has said they are most interested in, so we are
8 not waiting on the process, to come up with some sort of
9 framework. We are going to double track, that is, talk about
10 some documents they are interested in right away, as well as
11 talk about a framework for moving the document process forward.
12 I believe just talking to Mr. Lustberg, he was talking about
13 maybe setting a control date of the 23rd, is that right.

14 THE COURT: Could we speak off the record.

15 (Discussion off the record at the sidebar)

16 THE COURT: Any comment, Mr. Lustberg.

17 MR. LUSTBERG: Your Honor, if I can just further
18 explain this two-tracking idea that Mr. Lane was discussing.
19 What we thought as a reasonable starting point, a number of the
20 documents that we are most interested in we are aware have
21 already been produced to other entities, most notably to
22 Congress. That doesn't mean we get them. We think that we
23 will probably maintain that we do. Some they may claim
24 exemptions that don't apply to Congress. Some may be
25 producible. Those are documents that heretofore have already

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1 been identified by these agencies and produced pursuant to
2 requests. So those are documents that have already been
3 identified and which ought to be relatively easily reidentified
4 and produced to us.

5 It's our hope that within this ten-day period that we
6 will make progress with respect to that production or claims of
7 exemptions with respect to those documents. As well during
8 this ten-day period, we can negotiate a process going forward,
9 and we have begun to discuss outlines for the process. I can't
10 say we have come to agreement on it.

11 Let me be clear. We are not here to litigate. What
12 we want to do is to get the documents and not fight about it in
13 court if we can. We are going to push to try to have the
14 documents produced as expeditiously as they can, given the time
15 that's already elapsed. In the meantime we are content they
16 perhaps need some more time to figure out a timeframe. We
17 think in the initial stages some production of already
18 identified documents ought to be able to be made relatively
19 easily.

20 THE COURT: What kind of program would you recommend.
21 You are talking about a control date of August 23; what do you
22 expect should happen, both of you, on or before the 23rd.

23 MR. LUSTBERG: Our hope is on or before that date we
24 will have two things, number one, an agreement as to some
25 rolling production practice, thereafter, with respect to

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1 materials that we have requested, but in addition at that time
2 we will either have some claim of exemption with respect to
3 documents that have already been produced to Congress --

4 THE COURT: Either production or claim for exemption.

5 MR. LUSTBERG: Correct.

6 THE COURT: With regard to identified documents, those
7 documents you already identified in your papers.

8 MR. LUSTBERG: No, not the documents we have
9 identified in our papers, documents responsive to our request
10 that have already been produced to Congress.

11 THE COURT: You have identified which documents those
12 are.

13 MR. LUSTBERG: No. Obviously we are not members of
14 Congress, so we can't. We think there is a practicable
15 substantial overlap between those documents and the ones we
16 have identified with specificity in our request. In addition
17 to that, because time has elapsed since our request, it is our
18 intention within a couple of days, by Monday, to provide a
19 supplemental list of specific documents that we hope will
20 assist the government in their search. It may be that that
21 does not assist the government in their search, but we want to
22 be as specific as we can with the notion that that will be of
23 some assistance in their efforts.

24 MR. LANE: Your Honor, what I had said to Mr. Lustberg
25 is that I am happy to pursue all these avenues for documents.

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1 The dividing line will come to documents that people know exist
2 versus documents where there is identification and nobody knows
3 of those documents, it will only be found as part of a larger
4 search. Certainly that's a fact of the case. As Mr. Lustberg
5 discussed, there may be sort of a three-category thing; here's
6 the document, you can't have the document, it is exempt, in our
7 looking for these documents that are noteworthy, we have not
8 been able to find this one. That's how I contemplate that
9 working.

10 THE COURT: Let me suggest by Monday noon, August 16,
11 Mr. Lustberg will serve on Mr. Lane a list of documents which
12 in Mr. Lustberg's opinion have been identified in some place or
13 the other. By the following week, August 23, Mr. Lane will
14 either produce those documents or a log claiming specific
15 exemptions responding to the requirements of Vaughn with regard
16 to all those identified documents. By August 30, the parties
17 shall have agreed on a procedure that would govern reviews and
18 either production or claims of exemption with specificity. And
19 to the extent that there are disputes which require me to
20 involve myself, I will meet with you on September 9 at 4:00.

21 MR. LUSTBERG: Judge, I have a trial scheduled at that
22 time. I may ask the court for a little movement of that date.
23 For now, you never know what happens.

24 THE COURT: Where is the trial.

25 MR. LUSTBERG: Trenton, New Jersey, federal court
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1 before a judge who doesn't let us out early.

2 THE COURT: You will speak with my staff and work
3 something out. I want to give you these specific dates. Are
4 these satisfactory.

5 MR. LANE: Your Honor, yes. I have two points. One
6 is I can conceive a situation where Mr. Lustberg identifies a
7 document that's been recounted in the press that through a
8 quick search we have not been able to locate, that has been
9 leaked, it has not been leaked from any of the clients I can
10 find.

11 THE COURT: That would be your answer. I have
12 complete faith in your good faith.

13 MR. LANE: Thank you, your Honor. Second, I confess I
14 have undergone a great deal of education, I probably have some
15 more to go in this regard, I know that under various executive
16 orders there are certain processes for asserting exemptions
17 within agencies going through various committees, and this is
18 hypothetical, I just don't know if that will present a
19 timeframe difficulty in appropriately serving exemptions.

20 THE COURT: I am not an expert in this field. If you
21 come up with these problems, then what you need to do is adjust
22 the schedule. I won't give you any problem in that regard. I
23 am setting these specific targets. I think it will be easier
24 for you to work with them. I understand you are both dealing
25 with bureaucracies, you may need to adjust. Given the

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1 timeframe we are working on, the end of the summer, we will
2 work it out together. I want to demonstrate my continuing
3 readiness to be involved and my ambition to work out a schedule
4 that's practical and agreeable to both of you. I don't think
5 this should be a contested litigation. I think we are going to
6 be looking for the same solution.
7 MR. LANE: Thank you, your Honor, I appreciate that.
8 MR. LUSTBERG: Thank you, judge.
9 THE COURT: Thank you. As a fail date, September 9 at
10 4:00. If anyone is getting a transcript, you will each --
11 MR. LUSTBERG: Yes, your Honor.
12 THE COURT: -- let us have a copy.
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