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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 AMERICAN CIVIL LIBERTIES
UNION, et al.,
4
5 Plaintiffs,

6 v. 04 CV 4151(AKH)
7 DEPARTMENT OF DEFENSE,
8 Defendant.
9 -----x

10 February 4, 2015
11 4:57 p.m.

12 Before:

13 HON. ALVIN K. HELLERSTEIN,
14
15 District Judge

16 APPEARANCES

17 GIBBONS, PC
Attorneys for Plaintiffs
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ANA MUNOZ

19 AMERICAN CIVIL LIBERTIES UNION
Attorneys for Plaintiffs
20 BY: JAMEEL JAFFER
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22 United States Attorney for the
Southern District of New York
23 BY: TARA LAMORTE
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24 Assistant United States Attorneys

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1 (In open court)

2 THE COURT: So we have plaintiff represented by
3 Mr. Lustberg and colleagues.

4 MR. LUSTBERG: Good afternoon, your Honor.

5 THE COURT: Hello, Mr. Lustberg and your colleagues.

6 Mr. Jaffer, nice to see you again. You've been with
7 this case from the beginning.

8 And I don't think I have your two colleagues,
9 Mr. Jaffer.

10 MR. LUSTBERG: Well, one is one of my colleagues,
11 Judge. This is Anna Munoz, recently joined with us at Gibbons.

12 THE COURT: Congratulations. And?

13 MR. ABDO: Alex Abdo with the ACLU.

14 THE COURT: Ms. LaMorte and Ms. Normand?

15 MS. LAMORTE: Yes, your Honor. Good afternoon.

16 THE COURT: Let me ask Ms. LaMorte first. I've ruled
17 in my decision of August 27, 2014, that the certifications by
18 the Secretary of Defense had to be individual to each
19 photograph. That's not how it comes down, does it?

20 MS. LAMORTE: Well, your Honor, you actually ruled
21 that the Secretary of Defense had to undertake an
22 individualized consideration of each photograph. And we submit
23 that the record shows that that, in fact, has been done.

24 Your Honor, I would just go back for a moment to the
25 sixth motion for summary judgment, which your Honor granted in

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1 favor of the government. And there, as your Honor --

2 THE COURT: Would you like to sit down?

3 MS. LAMORTE: I'm actually okay. I'll let you know,
4 your Honor. Right now I'm okay, but I appreciate that. I'm
5 okay right now. I prefer to stand.

6 THE COURT: Okay.

7 MS. LAMORTE: So, your Honor, I'll just note that in
8 connection with the sixth motion for summary judgment covering
9 the same photographs but involving Secretary of Defense Gates'
10 certification, your Honor granted summary judgment in favor of
11 the government.

12 THE COURT: I did that. And I explained that in the
13 order, that it was close to the time that I had reviewed the
14 photographs. It was in the context of a raging war in Iraq.
15 It was very close in time to the representations made by the
16 Prime Minister of Iraq Nouri al-Maliki -- did I get his name
17 correct?

18 MS. LAMORTE: Yes.

19 THE COURT: -- to the President of the United States
20 urging him not to publicize the photographs --

21 MS. LAMORTE: That is correct.

22 THE COURT: -- and ensuing legislation protecting it.
23 And therefore, as a practical matter, I accepted the
24 certification. But I distinguished that from this current
25 certification.

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1 MS. LAMORTE: Yes, your Honor. There's a couple
2 things I will note, however.

3 First, as your Honor noted, you had previously not, in
4 connection specifically to the sixth motion for summary
5 judgment, but prior to that you had only reviewed a sample of
6 the photos. You had not yourself conducted a review of every
7 single photo, as you explain in your August 2014 opinion. And
8 now, based on that, and based on your knowledge of what --

9 THE COURT: Ms. LaMorte, my recollection is that in
10 the case of redactions, I reviewed if not every single
11 photograph, a large number, to cover every single photograph.

12 MS. LAMORTE: You reviewed --

13 THE COURT: The defendants came to my office in
14 chambers, and we went over as many photographs as were
15 necessary to cover every kind of example.

16 MS. LAMORTE: Your Honor, it is my understanding --
17 and we obviously can confirm this, because I was not there at
18 the time -- but it was my understanding that your Honor
19 reviewed 29 photographs, which were the photographs that the
20 Department of Defense had at the time. They were not at that
21 time a sample of any larger number of photographs. You had
22 ruled that I believe seven to nine of them were
23 nonresponsive -- I don't remember the exact number.

24 And then the Court also stated that your ruling on
25 appeal, or the ruling on appeal as to those 29 photographs,

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1 would cover, you know, all the remaining photographs that were
2 to be found by the Department of Defense.

3 THE COURT: Did I not do that on consent of both
4 sides?

5 MS. LAMORTE: Yes, your Honor, you did. But my point,
6 your Honor --

7 THE COURT: And was it the understanding that that
8 sample was adequate to understand the entire field of
9 photographs?

10 MS. LAMORTE: Your Honor, I'm not so sure about that,
11 because I don't believe that all of the photographs at that
12 time had been collected. So I can't say now that that was
13 representative of the full universe --

14 THE COURT: It wasn't --

15 MS. LAMORTE: -- of photographs that were ultimately
16 subject to the certification in 2009. Your process --

17 THE COURT: You're correct.

18 MS. LAMORTE: -- occurred earlier than that. I
19 believe your process -- I believe you must have reviewed the
20 photos in 2005 or 2006.

21 THE COURT: I don't remember now as I sit here when.
22 But I do remember clearly that as the case progressed, more and
23 more photographs came to light.

24 MS. LAMORTE: Yes.

25 THE COURT: We thought when we did this exercise in

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1 chambers ex parte that the source of the photographs was
2 limited to two or three soldiers and an investigation. It
3 turned out that there were many more photographs.

4 MS. LAMORTE: Yes. They were all derived in
5 connection with full criminal investigations into detainee
6 abuse.

7 THE COURT: And then the parties stipulated, and I
8 accepted, that whatever was the substance of the order in the
9 Court of Appeals dealing with the photographs that went up
10 would apply to all.

11 MS. LAMORTE: That's correct, your Honor.

12 THE COURT: Then it was affirmed, and it applied to
13 all. And then the President received the representations, and
14 there was not specified as to which photographs.

15 The problems come down now -- and it's only at this
16 time that it was posed to me whether the certification of the
17 Secretary of Defense en gros and covered each specific
18 photograph. I found the certification has to be individual; if
19 not on the type required by one index, something resembling it.
20 And that's the tension right now.

21 MS. LAMORTE: Your Honor, let me just review --

22 THE COURT: So let me see what -- I can state the
23 grounds, because I don't think that Mr. Lustberg has been privy
24 to as much of this, and I think needs to know. Or he may be.
25 I don't know.

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1 We have competent declarations from officials in the
2 Department of Defense to whom were delegated by the secretary
3 the job of reviewing all these photographs and subjecting them
4 to a classification, whether they could or could not be
5 produced. There's a satisfactory declaration that was shown to
6 me that that work was done. And it was the subject of
7 recommendations made to hire military and civilian officials in
8 the Department of Defense. I don't recall right now if
9 Secretary Panetta was included among them. But if he wasn't
10 included personally, the level of inclusion was at a very high
11 level.

12 So I'm not quarreling -- are you familiar with this,
13 Mr. Lustberg --

14 MR. LUSTBERG: Not --

15 THE COURT: -- this process.

16 MR. LUSTBERG: I'm generally familiar with the
17 process. Are we talking about the first time around, now or
18 this time?

19 THE COURT: Now, this time.

20 MR. LUSTBERG: I understand what happened this time,
21 yes, because it's set forth in Ms. Weiss's declaration.

22 THE COURT: So I thought when I read this that the
23 process of an item-by-item review was performed. But an item
24 by item certification was not performed. We have a
25 certification that deals with everything. And a certification

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1 that deals with everything is suspect, because the world
2 doesn't work that way. And I noticed when I did my own review
3 of photographs that some were irrelevant, some were harmless
4 and some were highly prejudicial. That's the way things tend.

5 So I ask of you: Why should I accept a certification
6 en gros when my reading of the law requires individualized
7 certifications?

8 MS. LAMORTE: Because the --

9 THE COURT: I may be wrong, Ms. LaMorte. I may be
10 wrong, but that is my view.

11 MS. LAMORTE: Because the process that DOD had
12 undertook in connection with issuing the Secretary Panetta's
13 certification was a process that included an individualized
14 review of each and every photograph that was subject to the
15 certification. So the general counsel of the Department of

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1 MS. LAMORTE: No, your Honor, because at the time this
2 process was undertaken, you had not issued your 2014 opinion.
3 This process with the Secretary Panetta certification occurred
4 in 2012, after we won summary judgment on the sixth motion for
5 summary judgment.

6 So this was not in response to litigation. There was
7 no litigation pending. There was no appeal from the sixth
8 summary judgment ruling. This was the process that DOD
9 undertook on its own in good faith. It was a deliberate and
10 thorough process, and they took it seriously.

11 THE COURT: So what happened is that lower-level
12 employees looked at every photograph?

13 MS. LAMORTE: A particular counsel, an associate
14 deputy general counsel, looked at each and every photograph.
15 She --

16 THE COURT: And we don't know the number?

17 MS. LAMORTE: No. The number has never been revealed.
18 And again, your Honor, never required the number to be
19 revealed.

20 THE COURT: Well --

21 MS. LAMORTE: Your Honor ruled that the statute never
22 required the number to be revealed.

23 THE COURT: Yes, but a certification of individual
24 photographs would have been easy to count.

25 MS. LAMORTE: Sure, okay.

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1 THE COURT: So that's not fair. But --

2 MS. LAMORTE: But the --

3 THE COURT: Let me make sure I understand the process.

4 MS. LAMORTE: Sure.

5 THE COURT: Who was it that reviewed -- not by name; I
6 mean by category or by title -- who was this that reviewed
7 every single photograph?

8 MS. LAMORTE: Associate deputy general counsel. And
9 we submitted her declaration. And upon her review --

10 THE COURT: Can we state the name?

11 MS. LAMORTE: Yes, Megan Weiss. It's a publicly filed
12 declaration.

13 THE COURT: And it was not a sample that she did but
14 everything?

15 MS. LAMORTE: Everything. And then she categorized
16 them into three different categories, based on factual issues
17 with respect to the photos, which included the extent of
18 injuries on the detainee, the location of the detainee -- and
19 by that I don't mean country; I mean whether the detainee's on
20 the battle field versus in a hospital or something like that.
21 And then thirdly, the presence of US military personnel and
22 what they were doing in the photographs. So she divided those
23 up into categories.

24 THE COURT: How could she know all that?

25 MS. LAMORTE: She looked at every photograph.

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1 THE COURT: But many photographs don't show anything
2 but the person who was being detained --

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1 And again, this was not a litigation-driven process,
2 your Honor. Again, we had won the sixth motion for summary
3 judgment. There was no appeal. These recommendation memos
4 that you see are not post hoc rationales. They're not
5 litigation-driven rationales. These are what the senior-most
6 people at DOD believed strongly will happen in 2012, if these
7 photographs were released, all of them.

8 THE COURT: What happens if they're identified?
9 What's the harm?

10 MS. LAMORTE: If, what, if the photographs --

11 THE COURT: Individual photographs were identified by
12 some kind of a -- for example, Bates stamp them all. You can
13 have a general description, which can or cannot be classified,
14 and a reason, same as you do with an index. What would be the
15 prejudice?

16 MS. LAMORTE: Your Honor, there's nothing in the
17 statute, the Protected National Security Documents Act that
18 requires a Vaughan index. You had ruled that the statute
19 required an individualized consideration of each photograph.
20 Neither your ruling or the statute describes a particular
21 method for doing that. So you ruled that so long as there's an
22 individualized review and a determination of harm that is made,
23 and that harm is rational, then the secretary may certify the
24 photographs in connection with the sixth motion for summary
25 judgment.

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1 And even in connection with your Honor's ruling on the
2 seventh motion for summary judgment, you never required a
3 Vaughan from the government. And the statute, the PNSDA, does
4 not require a Vaughan either. And so I submit -- and we adhere
5 to our arguments that we had made in connection with both
6 motions, for the reasons stated therein, that Congress did not
7 intend for a Vaughan to be required.

8 And another important point I think about this
9 particular statute that the Court should bear in mind is that
10 there is congressional oversight of this process. So in
11 passing this statute, Congress decided to maintain oversight of
12 the certification process. And after Secretary Panetta issued
13 a certification, that certification was provided to the Speaker
14 of the House, the president of the Senate, the chairman and the
15 ranking members of the House and Senate on Services Committees,
16 other committees. And I will inform the Court that not a
17 single Congressperson or any committee expressed any question
18 or concern about Secretary Panetta's certification.

19 Congress bestowed the Secretary of Defense with this
20 power. Congress can modify it. Congress can take it away.
21 And in response to the 2012 certification, Congress did none of
22 those things.

23 And so the idea that there is a lack of accountability
24 of this process is unfounded. I submit that the process,
25 again, undertaken without litigation in mind, was one that was

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1 deliberate, thorough, taken very seriously by DOD and one that
2 is subject to accountability.

3 THE COURT: Mr. Lustberg?

4 MR. LUSTBERG: Thank you, your Honor. Judge, this
5 Court's opinion -- let me just address that, the issue that
6 you've been discussing with Ms. LaMorte.

7 In your Honor's ruling in this past August, what you
8 said was, what is important is that the government to invoke
9 the PNSDA must prove that the Secretary of Defense considered
10 each photograph individually. But the question there becomes,
11 what does consideration mean? And you were not silent on that
12 point.

13 What you said is, in discussing next steps, the
14 government has failed to submit to this Court evidence
15 supporting the Secretary of Defense's determination that there
16 is a risk of harm and evidence that the Secretary of Defense
17 considered whether each photograph could be safely released.
18 Each photograph.

19 Let's talk about what happened here. What Ms. Weiss
20 did was no such consideration. Yes, she examined each
21 photograph. That's what she did. And then what she did is she
22 took samples of certain types of photographs. How she sampled
23 them is unknown to us, and as far as I know, is unknown to the
24 Court, unless it's in one of the classified declarations.

25 THE COURT: No, I do not know what criteria she used.

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1 MR. LUSTBERG: What she tells us, that there were four
2 criteria that she applied, but she doesn't tell us how those
3 resulted in the groups. What we think --

4 THE COURT: Am I right, Ms. LaMorte?

5 MS. LAMORTE: It was actually three criteria, your

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1 And respectfully, your Honor, you deserve it, notwithstanding
2 that various Congressman may have taken a look at this;
3 because, as your Honor held in August, there is judicial review
4 that is, in fact, applied to the PNSDA, just as it would be to
5 other FOIA exemptions.

6 THE COURT: Well, I ruled that.

7 MR. LUSTBERG: Yes, you did. And I guess --

8 THE COURT: The second question posed by the parties
9 is whether the PNSDA requires the Secretary of Defense to issue
10 an individual certification, read, separate paragraph, and I
11 ruled it requires that.

12 MR. LUSTBERG: In any event --

13 THE COURT: Page 18, Ms. LaMorte, top. Very first
14 sentence of the section.

15 MR. LUSTBERG: So, Judge, if I might, it's very
16 important to understand precisely the process that did take
17 place, because Ms. Weiss is the only person that is identified
18 in all these declarations that have been provided to the Court
19 who reviewed each photograph, period.

20 Now, again, you're quite right that we have no idea
21 how many there are. But we do know how many photographs were
22 sampled to be provided to the various military experts who
23 reviewed them. And let's be clear: It was a sample. And
24 unlike other samples that have been employed in this case and
25 in other FOIA cases, it was not a sample as to which we

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1 understand the methodology. We don't know what was chosen and
2 why. We don't know what percentage of the total photographs it
3 was.

4 THE COURT: We don't know the magnitude -- we don't
5 know the denominator, and we don't know the numerator.

6 MR. LUSTBERG: We might have some sense of the
7 numerator, because it looks to us like somewhere that each of
8 three got between 15 and 30 photographs, each of the three
9 military experts, which means that somewhere between 45 and 90
10 photographs in total, if there was no overlap.

11 So, you're right, we don't know the numerator because
12 we don't know whether there was any overlap. But if there was
13 no overlap, it was between 45 and 90. And we're told by
14 Senator Lieberman, for example, that there were over 2,000
15 photographs. But truly we don't know the denominator. I'm
16 sorry.

17 THE COURT: And take the category of injury. What is
18 the demarcation of injuries? Scratched nose? Wound on the
19 hand? Some serious gash to the body? We don't know.

20 MR. LUSTBERG: Judge, we have no idea whatsoever. But
21 all --

22 THE COURT: In terms of detention, we don't know the
23 detention in a prison camp, detention on the front lines,
24 whether the picture was taken on the capture, whether the
25 picture was taken on detention, what is the relationship

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1 between the location of the person and whatever was involved in
2 the picture. We don't know.

3 MR. LUSTBERG: And most significantly --

4 THE COURT: And in terms of servicemen, if it wasn't
5 someone from the United States that was shown in the picture,
6 was the person someone that was trained by the United States?
7 Was it someone who was doing a delegated act from the United
8 States soldier? We don't know that either.

9 MR. LUSTBERG: Most significantly, your Honor, what we
10 don't know is how any of these factored into a determination of
11 whether it would be safe to release the picture. That is to
12 say, whatever criteria were used, there's no explanation that's
13 been provided to this Court which required it as to why the
14 release of those categories of photos, let alone the individual
15 photos, could in any way endanger the safety of US servicemen,
16 citizens or employees abroad, which is what the statute
17 demands.

18 THE COURT: I observed when I originally reviewed the
19 Abu Ghraib photographs that a number of them required no

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1 sample. We don't know the sample, but then you have to make
2 the ultimate decision: Will release of the items in this
3 sample or some of them endanger US personnel? And it's hard to
4 understand the relationship.

5 Let me ask this of Ms. LaMorte. We could go on with
6 this process, and I could give you more time to satisfy my
7 rule. I have a feeling that we're at a point of, to make up a
8 phrase, a line in the sand.

9 What would you like, Ms. LaMorte? Because I'm not
10 changing my view.

11 MS. LAMORTE: Okay. One moment. (Pause)

12 Your Honor, if you would, I would appreciate a brief
13 opportunity to confer with the client to make sure I'm not
14 making a representation that they're not on board yet. I have
15 my own views on what I believe they may like, but I would like
16 confirmation. And so I'm just asking for one week to submit a
17 letter to the Court as to what -- you know, how we suggest
18 proceeding, or how we would like to proceed.

19 THE COURT: You don't object, do you?

20 MR. LUSTBERG: No to one week, Judge. And obviously
21 we agree with the Court's determination. Not much more I can
22 say.

23 THE COURT: Can you get it to me by noon on
24 February 11?

25 MS. LAMORTE: Yes. That's no problem.

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1 THE COURT: Because I think the Court is off the
2 next -- okay.

3 So I think your letter will say one of two things: If
4 the secretary does not want to certify individuals, individual
5 photographs, he'll say that, along -- you'll have the judgment
6 for plaintiffs and you'll have the ability to appeal. If you
7 want to have time to satisfy my ruling, tell me how much time
8 you need.

9 MS. LAMORTE: Can I ask for a time in the letter? And
10 I will confer with the plaintiffs, if that's the course that we
11 choose to take. And if they object, they can let you know and
12 we can figure out how much time we need.

13 THE COURT: Okay. Any other possibilities? I think
14 there may be others, but you'll identify them in the letter.
15 If we need to get together, we'll do it on short notice.

16 Mr. Lustberg, that's satisfactory?

17 MR. LUSTBERG: Yes, your Honor. I mean, obviously we
18 may have to have further discussion with the Court, if the
19 second avenue is pursued as to what the nature of the
20 disclosure would be. But I think that's probably for another
21 day.

22 THE COURT: Okay. Thank you very much.

23 MR. LUSTBERG: Thank you, your Honor. Good to see you
24 again.

25 THE COURT: So I need to issue an order.

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1 will consult with DOD.

2 THE COURT: The other thing here is that the
3 consequence of what the government is doing is a sophisticated
4 ability to obtain a very substantial delay.

5 Let's say the government takes the position I can
6 satisfy by certifying en gros an order as added by me for the
7 plaintiffs. You appeal. By the time you get to the appeal,
8 maybe two years go by. The issue is not easy. It may be
9 longer. The downside for you is that you can always produce
10 and disclose. And realistically, postponing the day of
11 reckoning of something that is considered to be sensitive is
12 itself a victory, because it postpones an unpleasant decision
13 to a succeeding generation. And then we have successive
14 certifications that are required. I would not want to feel
15 that this is the purpose of the government.

16 MS. LAMORTE: And, your Honor, I just want to --

17 THE COURT: I want to make very clear: You're a
18 soldier here. You're doing what others decree.

19 MS. LAMORTE: I would guess, your Honor. I just want
20 to state for the record that we are not acting in anything
21 other than good faith. I have no reason to believe that the
22 government is taking the positions that it has for purposes of
23 delaying or reckoning or anything like that. And I just want
24 to make that clear for the record that that's not -- I have no
25 even hint or reason to even think that that is what is

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1 motivating our position here.

2 THE COURT: So I'll say this also: When I first
3 decreed that the Abu Ghraib photographs should be released, it
4 was in the midst of a very hot war in Iraq. I had
5 representations by the Chairman of the Joint Chiefs of Staff
6 that I did not follow in terms of my order to disclose. I said
7 some things that our enemies do not need pretexts to aim lethal
8 force against us, and in the aftermath of September 11, 2001,
9 unfortunately an axiomatic statement.

10 But we did not confront an enemy like ISIS before, an
11 enemy whose cruelty and willful attitudes about the common
12 standards of civility are so lacking as to shock everyone's
13 conscience. And I can understand why, from the perspective of
14 a senior official of the United States government, the benefit
15 of the doubt should be given to not produce. Only an
16 institution like the ACLU could concern itself with failures to
17 conform to the FreednamAaa4nform -1.1-1.1329 TD.0012 Tc(7 some things theocaevabourh

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1 extent that it might be embarrassing to government officials.
2 I've thought the strengths of our society and persuasiveness of
3 our ideas required production. The Second Circuit agreed.

4 Basically the conditions now are really not different
5 from the conditions then. We were involved in hostile areas.
6 Our soldiers and our citizens were in danger of their lives,
7 and yet the courts championed openness. I think the same thing
8 is true now.

9 But I have to respect those who have responsibility to
10 safeguard Americans for their points of view as well. And so
11 what I say is not a statement of complete confidence in the
12 correctness of my view. The fallback position is that even
13 though there may not be production, there is accounting in the
14 courts. There is an assurance that if the executive department
15 accounts to the courts and shows what it has done in good faith
16 performance of obligations of law, that society achieves much
17 the same benefits as it could from production of the documents
18 themselves.

19 The government is not allowing itself to account. I
20 think that's a mistake. It's not because I want to see these
21 pictures. I would rather not. I did not enjoy seeing the
22 pictures last time, and I have absolutely no interest to see
23 them again. But as a judge of the court and the government,
24 under laws I feel it's the obligation of the Secretary of
25 Defense to certify each picture in terms of its likelihood or

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1 not to endanger American lives and why.

2 I think that's as much of a statement I can make now.

3 MS. LAMORTE: I appreciate that, your Honor. Thank
4 you.

5 THE COURT: Thank you all.

6 MR. LUSTBERG: Thank you, Judge.

7 (Adjourned)

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