

85C3ACLC CONFERENCE

1 UNITED STATES DISTRICT COURT

1 SOUTHERN DISTRICT OF NEW YORK

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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. SK



24 what it is, and this one is not.  
25 THE COURT: One copy here or do you have a copy?  
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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.

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

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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  
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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 communicatiF1u7

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





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.

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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  
22

MR. SKINNER: It is --

THE COURT: Should be entirely classified and exempt

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.

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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

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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





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

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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  
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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  
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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)

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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

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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 --

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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  
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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  
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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  
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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

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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  
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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?





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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.

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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."

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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

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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.

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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

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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 us

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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.

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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.

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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

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

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  
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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



7 methods, and goes beyond the information that has been

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.  
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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,  
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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.





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.

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.

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.

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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



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

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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  
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3 Court in January, Mr. Durham is considering whether any orders  
4 issued in this case

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

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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

2 motions. So probably --

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