

EXHIBIT 51

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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 ACLU, et al.,

4 Plaintiffs,

5 v.

04 CV 4151 (AKH)

6 DEPARTMENT OF DEFENSE, et al.,

7 Defendants.

8 -----x

New York, N.Y.
January 14, 2011
12:30 p.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN,

12 District Judge

13 APPEARANCES

14 GIBBONS

15 Attorneys for Plaintiffs

15 BY: LAWRENCE S. LUSTBERG

16 ALICIA L. BANNON

16 -and-

17 JAMEEL JAFFER

17 ALEXANDER ABDO

18 Attorneys for Plaintiff ACLU

19 PREET BHARARA

19 United States Attorney for the

20 Southern District of New York

20 TARA LA MORTE

21 AMY BARCELO

21 Assistant United States Attorneys for Defendants

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1 (In open court)

2 MR. LUSTBERG: Lawrence Lustberg and Alicia Bannon
3 from the Gibbons firm on behalf of plaintiffs. And I'd like to
4 introduce Ms. Bannon to the Court. She is the next generation
5 of Gibbons fellows. There have been many that have appeared in
6 this matter.

7 THE COURT: I think you deserve a great deal of merit,
8 Mr. Lustberg, spawning so many capable lawyers to follow you.

9 MR. ABDO: Alexander Abdo and Jameel Jaffer on behalf
10 of ACLU.

11 MS. LA MORTE: Tara La Morte from the U.S. Attorney's
12 Office on behalf of the CIA.

13 THE COURT: The new generation from your office, too.

14 MS. BARCELO: Amy Barcelo from the U.S. Attorney's
15 Office on behalf of the CIA.

16 THE COURT: How are you all?

17 MR. LUSTBERG: Good. How are you, Judge?

18 THE COURT: Be seated, please. I'm glad you're all
19 here, because this case has had so many different features and
20 facets and it has lasted so long, that it tends to overwhelm.
21 Since the interests of full disclosure clash with many
22 governmental interests of maintaining confidentiality, it is
23 the kind of case that can always spawn a next generation of
24 issues.

25 Lest I become the judge on the ACLU/DoD case for the
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1 rest of my career, I thought we must find a way somehow of
2 terminating my responsibility, and passing it on, as you pass
3 on to the next generation of lawyers, the next generation of
4 judge.

5 It is not that I have not found this enormously
6 challenging. And it is not that I don't enjoy the relationship
7 with all of you, because I very much do enjoy it. It's called
8 upon the anguish and talents that are exquisite in the sense
9 they have to be balanced in order to deliver an opinion. And
10 there is a certain conceit of being on the front line of
11 judicial issues in relationship to what has been going on in
12 our nation for the last 15 years or so. So it becomes both a
13 conceit and an awesome responsibility.

14 There are two things I think before me that I'd like
15 to discuss with you. One is what to do with the contempt
16 proceeding. And the second is this last motion that has been
17 put before me by the ACLU filed December 17, 2010.

18 Let's talk about the contempt proceeding first. To
19 set a little context in this. Some time ago, probably about
20 four years ago, I think, there was a phase in the case that had
21 its beginnings in 2004, six years ago, seven years ago, in
22 terms of the rendition policies pursued by our nation. A
23 policy which at first was not mentioned, and more recently has
24 been mentioned in the context of disclosing everything, and
25 then modifying it to disclose only part of it with a very poor

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1 definition of what should and should not be disclosed.

2 One of the items that came up was a notice that there
3 had been video taken of various activities in the rendition
4 process and in the process of questioning people apprehended in
5 different parts of the world. They were to be identified in a
6 disclosure by the government, along with any claim of
7 exemption. The process was short circuited because, as we
8 found out, the video or much of it had been destroyed.

9 In trying to find out how to deal with this subject,
10 there had been an intervening procedure set out when Judge
11 Mukasey became President Bush's attorney general, and he
12 appointed John Durham, the U.S. Attorney of the District of
13 Connecticut, to be a special prosecutor before a grand jury
14 with regard to the issue of what to do with the destruction of
15 videos. At the same time I called for the identification of
16 many of the documents that identified, referred to, and
17 summarized these videos. And they became the subject of
18 proceedings before me resulting in, as I recall, rulings of
19 exemption for practically all the documents with very minor
20 exception, and I think those exceptions are the subject of
21 appeals. Perhaps both sets of rulings are the subjects of
22 appeals.

23 As for Mr. Durham's investigations, they became the
24 subject of stay motions and deferrals from time to time, and at
25 some time late in 2010, there was an article in the press

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1 noting that Mr. Durham had finished his investigation and that
2 the grand jury had been discharged and that there was a
3 recommendation of not prosecuting any of the people involved.

4 So that puts the problem back to me. What do I do
5 about the situation? At some point in the past I expressed a
6 great deal of hesitancy in holding an agency of the United
7 States government, at least the CIA or otherwise, in contempt.
8 Agencies are sometimes held in contempt as a method of
9 obtaining compliance with a judicial decree. But here I'm not
10 obtaining compliance. Perhaps I'm chastising to get better
11 conduct in the future. But that's also in the nature of
12 punishment also. And I don't think it is appropriate for a
13 court to punish an agency of the United States government. It
14 is a very serious step for one of the departments of
15 government, the Judicial, to punish the Executive Department.
16 It is impractical. It couldn't lead to anything. It just
17 leads to senseless conflict.

18 But what about the individuals involved? Should they
19 be in effect brought to the bar of contempt? Do they deserve
20 contempt? Shouldn't we investigate them? I can understand
21 that there will be extraordinary difficulty in doing that,
22 because the CIA rightfully takes the position that its
23 operatives are not to be identified. And as we found out in
24 the case of Valerie Plame, identification can be terribly
25 serious in the way it compromises important government

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1 officials, and even endangers their lives and security. So I
2 don't know that I would want to embark on a procedure that
3 identifies and examines on a judicial record the people who
4 were responsible for the destruction of evidence that should be
5 identified in response to a court order. I could do this ex
6 parte, as it were, but that's not very satisfactory. It could
7 be adversary and in camera, but that also would lead to, in all
8 these complexities and side issues, lead to a Supreme Court
9 determination.

10 So, I don't look forward to engaging in this contempt
11 process. But I also don't look forward to not doing anything,
12 because the judicial order has been flouted, and just as I feel
13 a great hesitancy in chastising the Executive, so the Executive
14 should feel a great hesitancy in not accepting and obeying a
15 court order.

16 So, in my desperation, I thought of something that I
17 want to put to the representatives of the Department of
18 Justice. That is an undertaking by the Investigations
19 Department of the CIA of these individuals who were responsible
20 for the destruction, a review of the process, and some kind of
21 a report to me describing what they had done, and describing
22 procedures that are to be adopted by the agency that makes it
23 clear that this kind of conduct will not be tolerated.

24 That would serve a number of important objectives. It
25 would solve my problems of not wanting to identify and

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1 compromise officials. It would serve my objective of not
2 allowing this flouting of judicial decrees to go unpunished and
3 even unidentified and undescribed, and it might put a fitting
4 end to this phase of the case.

5 So, those are my views and I'd like your comment now
6 or after you've studied it.

7 Maybe Ms. La Morte should go first.

8 MR. LUSTBERG: Okay.

9 MS. LA MORTE: Your Honor, obviously your proposal is
10 something that we would need to discuss with the CIA before I
11 can provide you with any substantive response.

12 The only thing I would say is that obviously your
13 Honor believes that the CIA was not compliant with your order.
14 But your Honor says that you have done nothing about that. And
15 in actuality, your Honor has done a lot with that. It has
16 actually ordered measures that have achieved remedial purposes.

17 So, for example, your Honor ordered the CIA to gather
18 documents reflecting the so-called paragraph 3 and paragraph 4
19 documents. The paragraph 3 documents, if you remember, are the
20 documents that reflect the contents of the destroyed
21 videotapes. That is actually a relief that was requested by
22 the ACLU in their contempt motion.

23 The other thing that your Honor ordered that the CIA
24 made substantial efforts to comply with was to order the CIA to
25 gather documents reflecting the destruction of the videotapes.

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1 The CIA gathered approximately 220 documents that reflected
2 that, and in sum we released 20-something documents reflecting
3 the destruction of the videotapes to the public. And that is
4 precisely the relief that the plaintiffs had requested in this
5 case.

6 THE COURT: How come I don't feel a great sense of
7 accomplishment?

8 MS. LA MORTE: Well, your Honor, I think you should
9 feel a sense of accomplishment. The CIA has made substantial
10 efforts to comply with your orders. The purpose of a contempt
11 proceeding is to make the plaintiffs whole and to put them in
12 the position that they would have been in had this not
13 occurred. And the plaintiffs have said that in their papers
14 and in argument. That's what your Honor intended to do when it
15 issued your April 20, 2009, order with respect to the paragraph
16 3 and 4 documents.

17 As your Honor correctly notes, and you've noted this
18 several times before, the purpose of civil contempt is not
19 punishment. And that led your Honor to conclude you didn't
20 want to hold an entire agency in contempt.

21 So, I would say that your Honor has actually done a
22 lot. Your Honor has, pursuant to your inherent authority to do
23 so, ordered the relief that was requested by plaintiffs. And
24 in fact, your Honor, really the only relief that would remain
25 in the case that we haven't discussed yet, but we would be

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1 willing to discuss relevant to civil contempt, would be
2 attorneys' fees and costs for the contempt motion.

3 THE COURT: What about the individuals who did
4 something that was really wrong?

5 MS. LA MORTE: That was not a relief that was
6 requested by the plaintiffs in this case.

7 THE COURT: It was always in the backs of our minds
8 which we couldn't deal with because of the ongoing grand jury
9 investigation.

10 MS. LA MORTE: That's correct, your Honor. My
11 understanding is that Mr. Durham's investigation encompassed
12 those questions. Now, we don't know the result of that
13 investigation.

14 THE COURT: We do, we do.

15 MS. LA MORTE: Well, we know the end result of the
16 investigation, which is not to bring a criminal prosecution.
17 Of course. I agree with that. That was made public. But I
18 understand that his investigation encompassed the various
19 individuals that were involved. I don't have any more
20 information other than that, but I think the question has been
21 examined by an objective and a neutral person that was
22 appointed by the department specifically for this purpose.

23 THE COURT: But that had a criminal process in mind,
24 and I'm not thinking of a criminal process. I'm thinking also
25 of remedial action within CIA. This kind of destruction never

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1 should have occurred. It tells the Court that the CIA does not
2 trust the judges to have proper regard for the security
3 interest of the United States.

4 MS. LA MORTE: I have --

5 THE COURT: It presumes that just by identifying,
6 production and disclosure will inevitably follow. As the
7 people of this case know, practically all claims of exemption
8 have been respected by the Court. All claims, 100 percent of
9 claims, have been respected, and practically all of them won.

10 So, it's a very serious issue that has arisen, which I
11 don't think has yet been resolved. And that is a proper regard
12 by the CIA for the orders of the court. Maybe it has been
13 dealt with in a quiet way, but not to my satisfaction. I think
14 that's what's left. That's what I have in mind.

15 MS. LA MORTE: Yes, your Honor. I would just say that
16 in the argument that occurred in this case back in 2008, one of
17 the questions posed by your Honor was what would flow from an
18 order of contempt that hasn't already been done. I would
19 submit that the purpose of contempt is not to punish. And your
20 Honor's recognized that too.

21 But in this instance, your Honor has the authority
22 under your inherent powers to order remedial measures, which
23 you have done, and the plaintiffs have also indicated that a
24 finding of contempt is not necessary for you to order remedial
25 measures. That's precisely what was done here.

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1 And the CIA takes this very seriously. And we cannot
2 go back in time and not destroy the videotapes, obviously. But
3 what the CIA has done is it has been proactive, it has been
4 diligent, and it has done everything in its power to compile
5 the documents that you requested and to make as much
6 information as it possibly can available in the public domain.

7 So we can't go back in time and not destroy the
8 videotapes, but on the other hand, the CIA has done everything
9 your Honor has asked and more to try and remedy that situation
10 and to make the plaintiffs whole. And I think any further
11 finding, a finding of contempt would serve no purpose here in
12 light of your remedial orders, other than to punish.

13 THE COURT: Your recommendation is that I terminate
14 the proceedings.

15 MS. LA MORTE: My recommendation, your Honor, is that
16 this Court not engage in a contempt inquiry. And if the Court
17 would like, we could discuss the remaining relief requested by
18 the plaintiffs, which is attorneys' fees and costs.

19 THE COURT: Mr. Lustberg?

20 MR. LUSTBERG: Thank you, your Honor. Before I get to
21 the bottom line of what we would request, let me just make a
22 couple of observations. First, your Honor has always been very
23 clear about your discomfort with the idea of holding an agency
24 in contempt. We've heard that message loud and clear. But
25 that has never been the subject of really full briefing and

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1 discussion, and we would like that opportunity before your
2 Honor makes a final determination that you will not entertain
3 contempt against the agency.

4 We'll turn to the individuals in just a moment. It's
5 correct that certain remedial measures have been undertaken.
6 It is also correct that there are remaining certain issues of
7 remedial measures. And let me be clear, this is all about
8 civil contempt. We are not asking your Honor to punish.
9 Everyone is in complete accord with that. But these sorts of
10 remedial measures that have already been imposed by the Court,
11 and the sorts of remedial measures including attorneys' fees,
12 are those remedial measures that are prototypically part of a
13 civil contempt. The Court would not be punishing, not
14 admonishing. It would in essence be making us whole.

15 We can have discussions with respect to attorneys'
16 fees, but the notion of the Court exploring contempt or
17 exploring sanctions, whichever it is, is appropriate under the
18 law, and may actually, your Honor, give the Court the ability
19 to express its view as to the necessity, as your Honor said,
20 under our system of separation of powers, for agencies to in
21 fact obey orders of a coordinate branch of government, the
22 Judiciary.

23 I think when you say you just don't feel satisfied
24 with it, in part the problem is because there is this sense
25 that that community outrage, as it were -- maybe that's an

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1 overstatement -- of an agency not obeying a court order hasn't
2 quite been stated. And that's really all that we are asking
3 for.

4 Let me be clear. The case law is abundant that courts
5 may hold government agencies in contempt. The Court would not
6 be going out on a limb and breaching the separation of powers
7 in any regard by doing that. In particular that's true --

8 THE COURT: That's an instrumental purpose of
9 achieving compliance.

10 MR. LUSTBERG: There's different types of civil
11 contempt. Again, we are not looking to punish. But
12 compliance, it's a combination of compliance on the one hand,
13 and appropriate civil remedy on the other, including attorneys'
14 fees and costs, and of course we can attempt to settle that and
15 discuss that and so forth.

16 But before the Court were to make a determination to
17 terminate a matter, and just simply based on its discomfort
18 with the idea of holding an agency in contempt, we would like
19 the opportunity to brief it, both with respect to the law which
20 I was just discussing, and by the way with respect to the
21 facts.

22 The government is quite right that certain documents
23 have been revealed and disclosed. That's correct. It is also
24 the case that the content of certain documents has become clear
25 as a result of the entries on Vaughn indices that we've

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1 obtained. A picture is painted, your Honor, of an agency that
2 acted as it did after significant discussion, after significant
3 weighing of the costs and benefits of destroying these
4 videotapes. This was not an impulsive quick discussion at all
5 levels and at the highest levels.

6 THE COURT: Do you think, from what you know, that it
7 was an agency decision to destroy, or that it was a decision of
8 various individuals even flouting the rules of the agency?

9 MR. LUSTBERG: Both. Oh. When given that
10 alternative, this was fundamentally an agency decision. Of
11 course, agencies only act through individuals. And there was
12 dispute among individuals that is painted even in the sort of
13 bare bones version of what we've gotten. There certainly are
14 some individuals whom we can identify and who have been
15 identified publicly, so that the Court doesn't have to be as
16 concerned as it would in a Plame-type situation about revealing
17 the identity of individuals. I'm not going to set forth names
18 on the record today, but we can certainly identify certain
19 individuals who were instrumental in ordering the destruction
20 of documents, who were in meetings regarding the destruction of
21 documents. All of that is a matter of record in the documents
22 that have already been produced to the public and have already
23 been in the press. However, that does not mean that we're in a
24 position today to identify all of the individuals who may have
25 been involved in this. And in fact, based on the documents we

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1 have, I think further inquiry would have to be undertaken in
2 order to do that. We can sit down and talk to the government
3 about a process for doing so.

4 But we would at least like the opportunity to persuade
5 the Court before your Honor were to simply terminate the
6 matter, that the notion of not holding the agency in contempt
7 is not appropriate under this law and these facts and this
8 case.

9 THE COURT: It seems to me I have to oblige both your
10 interests, both yours and the government's, to make a record
11 and to ask for either the termination or the continuation of
12 the judicial process. It shouldn't be my decision without
13 getting advice from both of you. So clearly, your request has
14 to be granted.

15 Let's think of it this way, perhaps. On a certain
16 date, Ms. La Morte will move to terminate the contempt
17 proceeding for the reasons that she's mentioned. And on the
18 same date, you'll move to continue. You'll work out that date
19 together. And then there will be a second round of briefing in
20 opposition to the other motion, perhaps three weeks after that.
21 And maybe one more week or so after that reply, and then I'll
22 rule.

23 I suppose this will give an opportunity to create an
24 historical record of what happened, which also has validity.

25 Then there is this other notion I had, Ms. La Morte,

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1 which I'd like you to pursue, and that is the idea of an
2 internal investigation that would conclude the matter, because
3 I don't think it's really been concluded, ending in some more
4 satisfactory way than we have now, at least to my way of
5 thinking, that a lesson has been learned and applied.

6 MS. LA MORTE: Yes, your Honor. I will certainly do
7 that. One matter I'd like to mention, just one item I'd like
8 to bring to your Honor's attention. I know in your Honor's
9 order, I believe it was in your Honor's order bringing us here
10 today, you indicated you were unsure of the status of
11 Mr. Durham's investigation. So in anticipation of this
12 conference, we had a brief conversation with Mr. Durham.

13 Now, your Honor is aware we are not privy to much
14 information at all. But, if your Honor would like, Mr. Durham
15 would be happy to come in and speak with your Honor. I've been
16 asked to convey that.

17 THE COURT: I think that would be useful. Yes.
18 Please do arrange that, and that would be on a confidential
19 basis, I take it.

20 MS. LA MORTE: Yes, your Honor.

21 THE COURT: It might affect what you are doing. If it
22 did, I would find out how to relate that to you.

23 MS. LA MORTE: Thank you, your Honor.

24 MR. LUSTBERG: For what it's worth, what we understand
25 publicly, and just so this can be by way of backdrop to

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1 whatever that conversation is, which obviously we won't have an
2 opportunity to participate in, our understanding is -- and
3 perhaps we can all get on the same page on this -- that the
4 investigation was concluded with respect to any criminality
5 deriving from the destruction of the videotapes themselves.
6 That there remains an ongoing investigation into potential
7 issues of perjury and obstruction of justice on the one hand,
8 and also into any possible criminal activity that actually was
9 taking place in connection with interrogations on the other.
10 But that the issues that essentially overlap with this
11 application, that is the contemplation regarding the
12 destruction itself, have been resolved, and no prosecutions
13 have been brought.

14 So I'm raising that so the Court can understand what
15 our belief is so --

16 THE COURT: I am not sure I agree with you. I don't
17 know. I think there were two areas of potential criminality
18 that have been discussed publicly, and I don't know to what
19 extent Mr. Durham's investigation -- and I may never know --
20 coincides with that. One is the substantive acts themselves,
21 were they criminal. Is there anything to be done about it. Is
22 it cognizable in the judicial process. That's one series of
23 issues. The other series of issues is the relationship of the
24 actors as against judicial process. It was my understanding
25 that Mr. Durham was focused on the latter set of issues, not

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1 the former.

2 MR. LUSTBERG: Again, our information is only that
3 which is public, and it was in the press and that's our
4 understanding. I'm only raising it to extent we're
5 misunderstanding what occurred, that perhaps we can be apprised
6 in the event that that's possible.

7 THE COURT: One more matter on this. It's always been
8 my purpose to have as much on the public record as I could.
9 So, everything about a grand jury investigation is considered a
10 secret, or almost everything. I'll discuss with Mr. Durham as
11 well what amount of information I can put on to the public
12 record.

13 MR. LUSTBERG: I understand. And the Court did that
14 last time it met with Mr. Durham. It was part of that
15 transcript that was unsealed and we had the opportunity to
16 review.

17 We will consult with the government with respect to
18 the timing of these next steps.

19 THE COURT: Say a month off you give me a stipulation.
20 A month off will be the time to file motions. Three weeks
21 after that for oppositions. 10 days after that for replies.

22 MR. LUSTBERG: Not much to consult about then.

23 THE COURT: You go back and look at the calendar and
24 adjust your dates.

25 MS. LA MORTE: That's fine.

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1 MR. LUSTBERG: That sounds fine to us.

2 THE COURT: Okay. Let's do the motion for summary
3 judgment. The sixth motion for partial summary judgment. Are
4 there any parts that come after that, Mr. Lustberg?

5 MR. LUSTBERG: Pardon me?

6 THE COURT: Are there any more parts?

7 MR. LUSTBERG: Well, Mr. Abdo is going to deal with
8 the issue of the photos. Your Honor, we do appreciate that
9 this matter has gone on for a long time. We do appreciate the
10 Court's desire to bring it to an end. I think that as the
11 Court pointed out at the beginning, at the outset here -- and I
12 want to say we appreciate how much time and attention your
13 Honor has given to this, and I think we all in this room
14 appreciate how much has been accomplished as a result of this
15 litigation. A great deal is known to the public that should be
16 known to the public as a result of what has occurred in this
17 courtroom. And the Court has taken pains to assure that's been
18 done in a way that has not compromised other national
19 interests.

20 So, I think that the nuanced and careful way that this
21 has come about, the proper process, judicial process that's
22 been invoked to do it, has all been a tribute to the
23 participants in this matter, and I know that your Honor wants
24 to bring it to an end, but there are these two remaining
25 things, and we just ask you stick with us a little longer so we

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1 can do that as well.

2 THE COURT: I'll do that. The question was whether
3 this motion for partial summary judgment is the last part.

4 MR. LUSTBERG: Oh. I can't promise that. Mr. Abdo
5 will deal with that.

6 MR. ABDO: This motion for partial summary judgment,
7 the sixth motion asks for --

8 THE COURT: Slower.

9 MR. ABDO: -- the government to fulfill its
10 obligations under FOIA to justify its withholding of the
11 photographs by providing plaintiffs with a declaration that
12 describes in non-conclusory terms the invocation of exemption 3
13 as well as an index that describes as fully as possible on the
14 public record the record withheld.

15 THE COURT: What are the photographs we're talking
16 about?

17 MR. ABDO: We know the photographs to compromise 21
18 photographs that were originally at issue before this Court, 23
19 photographs that were later identified by the government, plus
20 a quote unquote substantial number of additional photographs,
21 all of which describe or all of which depict detainees subject
22 to abuse or subject to investigations pertaining to abuse in
23 what are called CID or ports by the Army.

24 THE COURT: Wasn't that covered by statute that
25 prohibited disclosure?

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1 MR. ABDO: The statute at issue, the Protected
2 National Security Documents Act of 2009, gives discretion to
3 the Secretary of Defense, subject to criteria to withhold
4 records.

5 We think the case law is clear that when statutes give
6 criteria to the Executive through which it can withhold records
7 under FOIA, that this Court has an obligation and a duty not
8 merely to ratify the determinations of the Executive, but to
9 subject those determinations to de novo review. In fact, a
10 very similar situation occurred in the '70s in a case called
11 Long --

12 THE COURT: What you are asking me to do is to require
13 the Secretary to account for the exercise of his discretion not
14 to publish photographs that previously had been ordered to be
15 produced by me.

16 MR. ABDO: That's exactly correct, your Honor.

17 THE COURT: Okay.

18 MR. ABDO: We think at that point plaintiffs would be
19 in a position to determine whether any further proceedings were
20 necessary with respect to the photographs, to answer your
21 earlier question.

22 THE COURT: Ms. La Morte, when will I see your
23 opposition?

24 MS. LA MORTE: Your Honor, Ms. Barcelo is going to be
25 handling --

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1 THE COURT: Ms. Barcelo, when will I see your
2 opposition?
3 MS. BARCELO: We were thinking of March 1st, if that's
4 amenable to the Court.
5 THE COURT: That's fine.
6 MS. BARCELO: Thank you.
7 THE COURT: March 15 for reply.
8 MR. ABDO: That would be great, your Honor.
9 THE COURT: Okay. Thank you all.
10 MR. LUSTBERG: Thank you, Judge. Have a good weekend.
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