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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

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2
3 AMERICAN CIVIL LIBERTIES
3 UNION, et al,

4
4 Plaintiff,

5
5 v.

04 CV 04151

6
6 DEPARTMENT OF DEFENSE, et al,

7
7 Defendant.

8
8 -----x

9 New York, N.Y.
9 August 1, 2011
10 3:20 p.m.

11 Before:

11
12 HON. ALVIN K. HELLERSTEIN,

12
13 District Judge

14 APPEARANCES

15 GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE

15 Attorneys for Plaintiff

16 BY: LAWRENCE S. LUSTBERG, ESQ.

16 AMERICAN CIVIL LIBERTIES UNION

17 Attorneys for Plaintiff

17 BY: ALICIA LORRAINE BANNON

18 JAMEEL JAFFER

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19 U.S. ATTORNEY'S OFFICE, SDNY

20 Attorneys for Defendant

20 BY: TARA MARIE LA MORTE

21 AMY ANN BARCELO

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1 (Case called)

2

3 MR. LUSTBERG: Lawrence Lustberg for the ACLU.

4 MS. LAMORTE: Tara LaMorte with U.S. Attorney's Office
5 for the CIA.

6 THE COURT: All right, Mr. Lustberg.

7 MR. LUSTBERG: Thank you your Honor. Judge, we've
8 been through a very long journey together, as the Court noted
9 last time we were here. And that long journey that we have had
10 in this courtroom is emblematic of the longer journey that our
11 nation has gone through in connection with the matters that
12 have been litigated here.

13 Indeed, today is the 9 year anniversary of the since
14 discredited Bybee and Yoo memos, you may have noted from the
15 papers, which justified much of the abuse and torture that have
16 come to light as a result of this litigation, from
17 waterboarding, to stress positions, to horrific isolation.

18 Throughout, this Court has been extremely sensitive to
19 maintaining its role in this matter. I have sat here time
20 after time, and watched your Honor palpably struggle with the
21 weight of the issues before you, ever cognizant that you were a
22 judge and that you should not put yourself in the position of
23 second guessing the Executive Branch or the Legislative Branch.
24 Just the last time you were hear, you deferred to, really, the
25 Executive and the Legislature in refusing to release or even

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1 require a Vaughn with respect to certain photographs. I know
2 you recall that.

3 Today, we're before the Court because one agency, the
4 CIA has not shown similar respect for the separation of powers
5 that is the essence of our government. Clearly flouting the
6 Court order and even, to this day, refusing to take
7 responsibility by blaming the Court's orders and the vagueness
8 thereof for their actions in destroying videotapes that were
9 clearly covered by this Court's orders, one after another.

10 These were not actions that were taken lightly. They
11 were actions that occurred over a lengthy period of time, and
12 after much consideration at the highest levels of our
13 government, certainly at the highest levels of the CIA.

14 Today we come before the Court and ask that your Honor
15 hold the CIA in contempt. And we do so carefully and
16 thoughtfully. This is not a reaction. And it is not contrary
17 to how it's been labeled, simply, a play for headlines. It is
18 an invocation of a remedy that has existed at law, as we point
19 out in our reply brief in particular, for literally centuries.
20 A remedy that is based upon the notion that anybody, no matter
21 who, is not above the law; that if a Court issues an order,
22 executive agencies, just like private litigants, are required
23 to obey it. And today we ask that the Court have seen that the
24 CIA has not done so, provide appropriate relief in the form of
25 a citation for civil contempt and other sanctions that go along

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1 with that.

2 THE COURT: What's the distinction between a civil
3 contempt and a criminal contempt, and how does that distinction
4 play its role here.

5 MR. LUSTBERG: Yes. That's an interesting question
6 historically, and it's an important one for purposes of this
7 matter.

8 Historically, there was no difference between civil
9 and criminal contempt. That was a distinction that grew up in
10 the 19th century in United States, primarily in order to assure
11 that people who are charged criminally would have certain due
12 process rights, would have the right to counsel, would have the
13 right to invoke their Fifth Amendment, would have all of the
14 trial rights that go along with a criminal contempt, that is an
15 action brought by the State in an effort to imprison someone.

16 Today, the distinction is as follows. A civil
17 contempt has one of two purposes; either to xxx incentivize a
18 party to comply with a court order. And that's when you hear
19 the old adage that a person holds the keys to their own jail
20 cell; that they will remain incarcerated or fines will
21 accumulate until they obey a court order that they are
22 currently disobeying. That of course is not the situation
23 we're in here.

24 But civil contempt does also come -- and this is
25 undisputed between the parties -- has also come to mean a -- to

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1 embody a set of remedies that includes making a party who is
2 affected by the refusal of another party to obey a court order,
3 making them whole. And we have come before the Court asking
4 for certain relief in that regard.

5 Criminal contempt, by contrast is purely punitive.
6 Fines are assessed, imprisonment can be imposed. The idea is
7 that someone willfully -- and that's important -- flouted a
8 court order and, therefore, should be punished.

9 Civil contempt does not require that element of
10 willfulness. It is not even as presumed, it is not required.
11 That's not an element that we are required to show here. And
12 even though we think we could show it, it is simply not
13 required under the law.

14 THE COURT: So one of the things you want to make
15 whole, is that you've spent money uselessly because, arguably,
16 there has been a flouting of the Court's orders and you have
17 spent time and energy to obtain remedial relief.

18 Do I need a contempt citation to justify an awarding
19 of fees to make you whole?

20 MR. LUSTBERG: No, your Honor, you don't.

21 It would be possible for this Court to choose instead
22 to impose sanctions on the CIA for their actions in flouting
23 this Court's order.

24 THE COURT: Under what section?

25 MR. LUSTBERG: It's under the Court's inherent powers

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1 that exist by virtue of your supervision of litigation in your
2 courtroom.

3 THE COURT: Do you agree, Ms. LaMorte?

4 MS. LAMORTE: I agree that the Court has the inherent
5 authority to impose sanctions, remedial sanctions, however.
6 And that's exactly what the Court did in this case.

7 THE COURT: Forget about that, you'll talk about that
8 when you get up.

9 MS. LAMORTE: Sure.

10 THE COURT: But just in response to this particular
11 point.

12 Part of the remedy is to make the plaintiff whole. I
13 don't need any citation of contempt to do that.

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

15 THE COURT: Thank you.

16 Please continue, Mr. Lustberg.

17 MR. LUSTBERG: So the question is, therefore, why
18 should you cite the CIA for contempt. Why should you just not
19 impose sanctions.

20 Well, first of all, there are other remedies that we
21 request by way of being made whole. And those remedies go to
22 the purpose of this litigation. The purpose of this
23 litigation, fundamentally, a Freedom of Information Act case
24 was to gain information; that is, to find out what happened.
25 That was the purpose of this litigation. We have been at it

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1 now for many, many years. And, in doing so, in destroying the
2 videotapes that are here at issue, the CIA has not only flouted
3 this Court's, orders but has fundamentally prevented us from
4 doing that.

5 Now, we have had to engage in other activities as a
6 result of that, but there is more this Court could do by way of
7 remedy in order to find out what happened. There are -- there
8 is documents that it could review in camera or otherwise; there
9 are people who whom it could speak; depositions that we could
10 take. There is any number of ways that the Court could
11 discover what happened. And that is, as well, as your Honor is
12 aware, part of the relief that we seek.

13 But leaving that aside for the moment, let's get right
14 to the guts of the question that the Court has asked. Why
15 civil contempt, as opposed to a sanction.

16 Let me take that question in a couple of parts.

17 First, civil contempt has within it a certain meaning
18 that has evolved over the years. It's a meaning that, like
19 other institutions in our society, have inherent meaning as a
20 result of the legal tradition out of which, in which we all
21 practice.

22 Civil contempt is appropriate when a party is aware of
23 a court order and simply determines not to obey it. It doesn't
24 have to be particularly egregious in the civil context, but
25 that's what it is for.

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1 And when I think to myself, why civil contempt here,
2 the answer quite simply is if not here, when. The facts here
3 are so compelling in terms of the opportunities that the CIA
4 had to correct what was obviously a misapprehension by the
5 plaintiffs and the Court as to the existence of these videos.

6 The facts are clear, even to this day, as to the CIA's
7 failure to accept responsibility for its actions in this
8 regard, although the government goes to great lengths to talk
9 about the remedial programs it has in place now. As we sit
10 here today, one of their arguments is, you know, sorry, we
11 didn't really understand what we were supposed to do.

12 THE COURT: Well, that's a technical argument which
13 goes to the state of mind of those who did not produce. But
14 you can't say that the CIA is indifferent. Look at all of the
15 documents that it has come forward to identify that have
16 touched upon the facts of destruction, look at all of the
17 documents that they have identified that deal with what
18 happened at the time.

19 MR. LUSTBERG: Uh-huh.

20 THE COURT: If it's knowledge that you were seeking,
21 you obtained all that knowledge.

22 MR. LUSTBERG: Not all of it. I mean there is a huge
23 gap in time that we still ask for.

24 But beyond that, let's be clear as to what happened.
25 This was not something that the CIA did out of the goodness of

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1 its heart. Not one single thing was produced to us until we
2 moved for contempt. And, even then, the Court will recall that
3 that contempt citation which -- the contempt at motion
4 initially --

5 THE COURT: We moved pretty quickly.

6 MR. LUSTBERG: We moved quickly in December of 2007.
7 It was not until March of 2009 that it was confirmed as to
8 exactly how many -- what the scope of the misconduct was here
9 in terms of the number of videotapes. It has been a difficult
10 process to extract this information. It's not as if the CIA
11 has acted out the goodness of its heart and painted a complete
12 picture as to what occurred here. Nor, really, is that
13 particularly surprising, as your Honor knows, having watched
14 over this litigation for some years. This has been hard-fought
15 litigation. And this part of it has been hard fought, as well.
16 That's fine.

17 The question of why there should be contempt is quite
18 simply this. This type of behavior by a government agency --
19 and let me parenthetically say, government agencies, much more
20 than private individuals, should be responsible for complying
21 with orders of coordinate branches of government. That is, if
22 a private party disobeyed a Court order, first of all I think
23 there would be much less handwringing over whether to hold that
24 party in contempt, but there won't be as part of it, issues of
25 separation of powers; issues of coordinate branches of

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1 government having the kind of respect for each other that this
2 Court has consistently shown to its coordinate branches of
3 government.

4 Time after time under these circumstances, Courts hold
5 agencies in contempt. Sometimes they don't, that's for sure.
6 But in circumstances like this where the misconduct is so
7 significant, the underlying issues are so unbelievably weighty
8 and of such public interest, the opportunities for compliance
9 are so many, and the conduct takes place over such a long
10 period of time. After all, the videotaping in this case
11 occurred in 2002, it ceased in 2003. The determination to as
12 to whether to destroy the videotapes occurred over a lengthy
13 period between 2002 and, finally in 2005 when it took place.
14 This was not a quick or mistaken type of thing. This was the
15 CIA acting in a way that was considered, and that was -- and
16 that was performed after discussion at, literally, the highest
17 levels of our government, right up to the White House, but
18 certainly at the highest levels of the CIA.

19 At the end of the day, the conduct here is
20 sufficiently egregious so that a citation of contempt will in
21 fact set forth this Court's view, and it should be the view of
22 this Court, that it has been mistreated. That after all of the
23 efforts that it made to bend over backwards and respect its
24 coordinate branches of government, that same respect was not
25 forthcoming from the CIA.

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1 Your Honor, it's --

2 THE COURT: How come I don't feel that?

3 MR. LUSTBERG: You know what? My answer to that is I
4 really -- I really don't know.

5 THE COURT: It's a complication --

6 MR. LUSTBERG: Uh-huh.

7 THE COURT: -- in terms of respective roles.

8 The CIA is not an agency that does things in the
9 public view. It's accountable in a particular way. But it
10 doesn't do things in the public view. Having to account to a
11 judge is not in the normal course of procedure. And I have
12 found that when the order was clear, and when the recourse had
13 been exhausted, that there was full and substantial cooperation
14 with my orders. I have no complaint about that.

15 Sure, I would have preferred that we didn't have to go
16 through these contempt proceedings at all, and what had been
17 requested would be quickly and readily supplied. But that is
18 not in the nature of human conduct, neither in private life,
19 nor in public life. And that's why there are orders, not just
20 requests.

21 But I can't say I feel that the CIA has demeaned the
22 Court, or diminished the Court, or not respected the Court.

23 MR. LUSTBERG: Well, your Honor --

24 THE COURT: I feel, Mr. Lustberg, that, to be candid
25 with you, that these videotapes should have been identified for

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1 the Court order from the beginning, and not the pretext that
2 they were not identified to the Office of Internal
3 Investigation, did not excuse the failure to produce, because
4 the order goes to the agency as a whole.

5 And on the other hand, those who made the production,
6 I believe, did not know of these videotapes. From what I
7 learned, the request to destroy the videotapes was made from
8 the field. And it reached a certain level. And it was
9 approved at a certain level, but not the highest level. And
10 people who were involved in the obligation to produce were not
11 aware of these videotapes. And I, frankly, don't know whether
12 there was, or was not, a knowledge on the part of the people
13 who destroyed the videotapes. I would think that before they
14 destroyed, they should take care to look and see if there is a
15 court order.

16 But the conduct is not something that is made clear on
17 this record. I can't say that, in all, at the end of the day,
18 that the CIA was not compliant. I believe it produced that
19 which it was asked to produce. It produced readily after it
20 was required to produce. And it went through elaborate
21 proceedings before me to decide what should or should not be
22 put out into the public record. At the end of the day, I think
23 you obtained the compliance that you sought, and that to extent
24 that the record can be made public, and even beyond, it has
25 been made public.

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1 MR. LUSTBERG: May I respond in a couple of ways?

2 THE COURT: Sure.

3 MR. LUSTBERG: Thank you, your Honor.

4 First of all, the question is not whether the people
5 who produced materials to us, or that created the Vaughn
6 declarations and so forth for Court, knew about the videotapes.

7 THE COURT: They were also CIA. So when you damn the
8 agency, you are damning these people as well.

9 MR. LUSTBERG: Right. Well, your Honor, it's not --
10 the -- an agency is deemed to know -- the question is, did the
11 people who destroyed the videotapes know about the orders.
12 That's a difficult question, we'll come back to that.

13 But what's not a difficult question, is that the CIA,
14 as an agency, knew about the court orders.

15 THE COURT: I agree with you.

16 MR. LUSTBERG: There can be no question about that.

17 THE COURT: It is corporate knowledge.

18 MR. LUSTBERG: It is --

19 THE COURT: The problem of the CIA in this context is
20 that they deal with compartmentalized knowledge. Part of this
21 entire notion of secrecy depends on a compartmentalization.
22 And breaches that have been known over the years and
23 compromised secret information.

24 In order to preserve secrecy, you have to have a very
25 rigid right to know and need to know criterion. And that very

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1 criterion begs for compartmentalization of knowledge. So,
2 usually, you say knowledge is corporate, everyone has it, the
3 organization is deemed to have it. But with the CIA, that's a
4 very difficult concept.

5 MR. LUSTBERG: And that may be highly relevant to the
6 question of whether any particular individual is in contempt.
7 But it is, as a legal matter, not relevant to the agency. The
8 agency, the agency is deemed to know the orders.

9 And let's talk about the facts, as far as we know
10 them. And granted, your Honor, the facts here are limited by
11 the state of the information that we received. You have it.
12 And you have had the opportunity to review it and you may have
13 had the opportunity to even review it in unredacted form. But
14 in a redacted form, we have taken as much as we can.

15 THE COURT: I did. I have done that.

16 Part of the proceedings -- and I think you would agree
17 with me, Mr. Lustberg, that I have tried throughout these
18 proceedings to put on the public record as much as I, in
19 conscience, could do. And it was always a part of the exercise
20 in camera to ask the government lawyers, is this something that
21 can be put on the record. And if it's not, can we put it in
22 some form that can be made on the public record. And we have
23 done that.

24 MR. LUSTBERG: Yup.

25 THE COURT: I have seen the entire record.

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1 MR. LUSTBERG: Uh-huh.

2 THE COURT: On a sampled basis.

3 MR. LUSTBERG: Uh-huh.

4 THE COURT: And -- and I feel from that that -- and
5 you know from the Vaughn Index, that there has been substantial
6 compliance in the end.

7 MR. LUSTBERG: There has been substantial compliance
8 with respect to two periods. And, again, you'll note that the
9 period from 2003 to 2005 is missing. And that's a critical
10 period, because a lot is going on there.

11 THE COURT: Remind me why it is missing.

12 MR. LUSTBERG: It's missing because initially,
13 although we asked for the entire -- for all of the documents,
14 regarding the destruction of the tapes, your Honor isolated the
15 early period that the -- the period at the time --

16 THE COURT: For administrative convenience.

17 MR. LUSTBERG: And I think for practicality.

18 Later on, I believe -- even Ms. LaMorte will recall --
19 the government actually came forward and said there may be
20 other documents for the later period. And so for the
21 in-between period from 2003 to 2005, there has been no
22 Vaughning. There has been no processing of documents. We
23 have nothing. And that turns out --

24 THE COURT: Well, there is no reason to believe since
25 we saw the beginning and the end, that the middle is not same.

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1 MR. LUSTBERG: Well, the middle is not the same.

2 I mean the story to be told here is -- who knows. I
3 mean I really don't know. I don't know that in the middle
4 there is not going to be documents that reveal that people
5 actually said, hey, you know, that crazy Judge Hellerstein in
6 New York, look what he is doing, let's ignore that order. We
7 don't know what happened in this time period.

8 What we know is that during that time period, your
9 Honor was active. That during that time period you issued your
10 first order in September of 2004. That you issued your second
11 order directly involving the CIA in early 2005 -- and that's
12 the critical part here, Judge.

13 As you pointed out, there was a good deal of
14 litigation as to the CIA's obligations. And this Court ruled
15 sometimes for the CIA, and sometimes against it. But in
16 connection with this particular set of issues, what the Court
17 held in early 2005, was that, that broadly speaking, was that
18 documents that had been part of, or considered in the course of
19 an OIG investigation, were not operational files. They were
20 not part of the operational file --

21 THE COURT: You won that motion.

22 MR. LUSTBERG: We won that motion. And we won that
23 motion --

24 THE COURT: The reason -- just so everybody in the
25 audience understands the context.

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1 There is a special rule under the Freedom of
2 Information Act that applies to the CIA. And that's by act of
3 Congress. The CIA has asked Congress to exempt it from having
4 to identify documents following the Freedom of Information Act
5 request on the ground that it was very time consuming to get
6 the documents, only to find in the end that the Courts would
7 uphold an exemption.

8 Congress made an exception to the exception. And this
9 is the subject of one of my opinions. Congress made an
10 exception to the exception that where documents have been
11 identified or produced or collected in relationship to an
12 investigation, whether performed internally or externally or by
13 Congress, those documents were subject to the ordinary rules of
14 identification for production or for declaration by ruling of
15 exemption.

16 And in response to Mr. Lustberg's motion, I ruled
17 that, first of all, the operational exemption was then
18 applicable, because there had not been a declaration by the
19 director of the agency seeking an exempt status, though it was
20 told to me that one could be quickly supplied. But more
21 important, for substantive reasons, that since there were
22 ongoing investigations by the CIA, documents that were
23 identified or collected in the context of the investigation
24 could be produced for Vaughn declaration purposes.

25 And I so ordered.

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1 And then it turned out, we much later learned, that
2 there were several investigations that was rumored at the time,
3 but there were several investigations. And the investigation
4 that concerned these videotapes, apparently, were not among
5 those that were identified to me.

6 I agree with you, Mr. Lustberg, that that is not a
7 good reason for failure to produce.

8 MR. LUSTBERG: And it's important for purposes of this
9 motion that you actually said one other thing in your
10 February 2006 opinion. And that one other thing -- because
11 you're right, the main issue that was before the Court at that
12 time had to do with the exception to the operational files
13 exception, and whether it applied during the course of the
14 investigation. The CIA argued it had to be over. And you
15 rejected that position.

16 But there is something else you did. The CIA argued
17 at that time that documents that had been part of the
18 investigation but then returned to the operational files,
19 should fall within the operational files exemption. You said
20 no. You said that once they had been in the operational files
21 there would be a marker or some other -- that was your term, I
22 believe -- or some other way of knowing that they had been
23 looked at once before. And once they had been part of the
24 investigation, they remained part of the investigation.

25 The CIA recycles that identical argument today. In

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1 its briefing in this case it argues that the videotapes here
2 were part of the OIG investigation, the Helgeson
3 investigation. But then became -- but then went back into the
4 operational files, and so they were not in the operational
5 files, and so your Honor's order did not cover them. That is
6 wrong.

7 THE COURT: Guess how I'll rule?

8 MR. LUSTBERG: Pardon me?

9 THE COURT: Guess how I'll rule?

10 MR. LUSTBERG: I'm thinking.

11 But the point -- the point of all of it, is that at
12 that time, in early -- in early 2006 -- I'm sorry, early 2005,
13 I -- my years run together. This is in early 2005. And,
14 therefore, before the tapes were destroyed. This Court had
15 directly addressed the same rationales as we're hearing today.
16 And had rejected them. And so this is not a situation where
17 you have an agency that isn't aware of the law and that isn't
18 involved itself at the highest levels.

19 Your Honor, you heard from people --

20 THE COURT: Let's be precise. The involvement of the
21 highest levels was an argument to me that the CIA was not at
22 fault for failing to produce. I don't remember having seen any
23 evidence that people at the highest level of the CIA have
24 instructed, or authorized, or ratified the destruction.

25 MR. LUSTBERG: There is evidence in the record that

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1 Mr. Goss, the director of the CIA, ratified the destruction of
2 the videotapes.

3 THE COURT: It's hearsay evidence --

4 MR. LUSTBERG: It may be, Judge --

5 THE COURT: -- it's not --

6 MR. LUSTBERG: -- and so what you're saying, then --

7 THE COURT: And I don't think that Peter Goss would
8 agree with that.

9 MR. LUSTBERG: Well, we haven't heard -- at least I
10 have not seen --

11 THE COURT: We've not gone into that.

12 MR. LUSTBERG: Right. We have not seen one way or the
13 other.

14 THE COURT: And that's one of the issues you want me
15 to rule on in your favor, that there should be some kind of
16 discovery procedure that looks into that. That's one of the --
17 one of the points I would like to have argued before me. My
18 mind is not made up on that.

19 MR. LUSTBERG: Uh-huh.

20 But regardless of how that comes out, the fact of the
21 matter is that right after -- well, that within months after it
22 had been ordered to produce all responsive records, and within
23 even fewer months after its position with respect to materials,
24 in this case videotapes, but whatever, that were in its
25 operational files had to be -- if they had been part of an

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1 investigation had to be disclosed. Within months of all of
2 that, this same CIA that is deemed to know this Court's
3 records, chose to destroy videotapes that showed, we know,
4 enhanced interrogation techniques and, indeed, torture that --
5 that certainly would have been of great public interest, and
6 were at the guts of what this case was about, of what we were
7 trying to find out here. And in doing that, it -- it took unto
8 itself the judicial role. It said we're not going to take a
9 risk that some Judge is going to order us to do a Vaughn or
10 ultimately to disclose this, we're going to take this into our
11 own hands. Do we know that that was the thought process of any
12 individual? No. What we know is that an agency that had been
13 told what its obligations were chose, after a consideration,
14 not to fulfill that obligation.

15 Government, your Honor, can't survive if that's how
16 our agencies are going to act. It is -- it really -- you know,
17 when you say it doesn't bother you that much, you know, all I
18 can say is is that surprises me. Because it bothers me
19 tremendously.

20 THE COURT: I don't know that I said that, I don't
21 think I said that. Because you know from previous rulings that
22 I was after the CIA --

23 MR. LUSTBERG: Uh-huh.

24 THE COURT: -- to adopt a protocol never to allow that
25 to happen again.

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1 MR. LUSTBERG: Right.

2 THE COURT: And to make it clear to everyone what the
3 obligation was.

4 The whole point of a Vaughn index is that a judge
5 ultimately decides whether something should or should not be
6 produced. It's one thing to identify, another thing to
7 produce.

8 There has to be accountability at every level of
9 government; at the judicial level, the executive level, and at
10 the legislative level. And the CIA is part of that. It must
11 account. And the purpose of the Vaughn Index is to elicit such
12 an accounting.

13 So, clearly, there should have been an identification
14 of these videotapes. And I don't want to mislead anyone, that
15 is my belief, that has been my rule. And I adhere to that rule
16 and I adhere to the other rules that we have been discussing.
17 They should have been identified, no question about it.

18 But to blame the whole CIA for that, I guess you can,
19 in a technical sense. But when we're going into contempt
20 citations, we're going beyond the technical. And, there, I
21 think I depart.

22 MR. LUSTBERG: Your Honor, let me give my best shot at
23 persuading you.

24 THE COURT: You do pretty good.

25 MR. LUSTBERG: Apparently not.

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1 THE COURT: That's why we're both bald.

2 MR. LUSTBERG: At least one of us wasn't when this
3 case began.

4 Judge, the --

5 THE COURT: My grandchildren produced a picture of me
6 when I had hair. Ancient picture, it was yellowing.

7 MR. LUSTBERG: Was it before this case?

8 THE COURT: Well, before.

9 MR. LUSTBERG: Your Honor, the importance of -- it is
10 easy to sort of give the back of the hand to the difference
11 between sanctions on the one hand and contempt on the other.
12 Let me be clear. What's most important is that the story of
13 what occurred here be told. And part of the relief we seek
14 would make that happen. It's also I think --

15 THE COURT: I think it's clear to say, fair to say,
16 that as a result of this case, the public has come to know a
17 great deal of what happened. Partly because of disclosures
18 that were the result of this case, and partly because of the
19 voluntary disclosures by the change of administration. And
20 even before the change of administration. So you have achieved
21 a whole lot.

22 MR. LUSTBERG: And, your Honor, part of the -- and
23 part of the reason why, even in those situations, where
24 materials such as these would not in fact be ordered to be
25 disclosed by the Court -- because the government argues that to

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1 the extent that your Honor did not order disclosure of the
2 paragraph 3 materials which would have summarized what was on
3 the videotapes, you in any event would never have ordered the
4 disclosure of the videotapes themselves. And so all of this
5 they say is harmless error.

6 But the point that you just made is a very important
7 one. The process that an agency goes through in listing
8 materials, in identifying materials, and having a discussion
9 internally and with other agencies about the materials, that
10 process has in this case, and other Freedom of Information Act
11 cases, resulted ultimately in the disclosure of those materials
12 as a matter of good government.

13 Can I say that that would have happened here? No one
14 knows. But we will never know. Because before that process,
15 which is mandated by law could take place, the CIA took it upon
16 themselves. And forget about, you know, which individuals for
17 now. Although I should note that, you know -- and your Honor
18 is aware of this -- that Mr. Rodriguez, whom we point to, was
19 in essence the chief -- he was the Director of Operations for
20 the CIA and the head of the National Clandestine Service; in
21 essence, the chief spy for the CIA, so that -- so it's hard to
22 say that this was not done at the highest levels. So he was
23 the one who ordered the destruction of the videotapes. And
24 that is not disputed, that is in the documents that are before
25 the Court. But, in any event, the point I'm making is that

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1 the -- the CIA might well, if they had gone through the process
2 that is dictated by law, have come to the conclusion that some
3 portion of, or all of these materials should be disclosed. Who
4 knows?

5 But if that had -- but if that process
6 was pretermitted by the action that it took to simply destroy
7 the videotapes. And that type of action is significantly
8 severe that the agency -- not -- perhaps -- Judge, I'm not
9 saying every individual in the agency.

10 And let me interrupt myself to say this, your Honor.
11 You've pointed out that the CIA has turned over a good deal of
12 material in this case. That's good. I'm not sure it's true,
13 but it's good.

14 That the CIA, to the extent that the CIA was
15 cooperative and obeyed court orders, that is a good thing. It
16 does not excuse their failure in this particular circumstance
17 to comply with the clear directive of the Court. They may say
18 that the directive was not clear. But, your Honor, when one
19 looks at it in the context of the litigation that was going on
20 at that time, it is crystal clear. And the CIA was obligated
21 to obey that order, just like any private litigant would. And,
22 in fact, more so, because it's an agency of our government.

23 I'm repeating myself, so I'll stop -- so I think this.

24 THE COURT: Let me --

25 MR. LUSTBERG: Yeah.

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1 THE COURT: -- go through this.

2 MR. LUSTBERG: Okay.

3 THE COURT: You asked me for an order requiring the
4 former CIA official, Jose Rodriguez, to show cause why he
5 should not be held in civil contempt.

6 Is that really an exercise in criminal contempt?

7 MR. LUSTBERG: No, your Honor.

8 THE COURT: Why is it civil contempt? What remedial
9 measure can you obtain from Mr. Rodriguez, who is no longer
10 with the CIA?

11 MR. LUSTBERG: The remedial measure is that the
12 process of ascertaining his -- well, first of all, let me say
13 it would not be unusual in the cases that we have cited to your
14 Honor. It is not unusual for an agency and various agency
15 heads, who are obviously not going to pay the bills or it can't
16 in and of themselves provide information, whatever, to be held
17 in civil contempt, as well. Perhaps -- you know, perhaps he
18 should be held in criminal contempt, that is not our -- that's
19 not within our province, a criminal contempt --

20 THE COURT: What remedial step could be had from that?

21 MR. LUSTBERG: The process of ascertaining Mr.
22 Rodriguez' liability, would cast further light on what actually
23 occurred here. That --

24 THE COURT: What actually occurred was the destruction
25 of videotapes.

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1 MR. LUSTBERG: Well, the question is --

2 THE COURT: The state of mind that he had, has to do
3 with whether he should be punished for it, but that's criminal.

4 MR. LUSTBERG: But this is not punishment.

5 However, let me just say this about civil contempt.
6 Because this comes down in a lot of ways to the guts of it
7 either with respect to CIA or with respect to Mr. Rodriguez.
8 If this Court were to say I hold you, whoever, the CIA let's
9 call it, in contempt. As I said before, that carries layers of
10 meaning than has evolved over generations of jurisprudence.

11 But beyond those --

12 THE COURT: For the purpose of obtaining remedial
13 relief, I would say.

14 MR. LUSTBERG: Pardon me?

15 THE COURT: For the purpose of obtaining remedial
16 relief.

17 MR. LUSTBERG: For the purpose of, for us, of getting
18 remedial relief, for sure. But it's part of every civil
19 contempt finding that there is a certain, I suppose, you know,
20 obloquy that goes on with it that would not be saying nice
21 things about them. Nor, for that matter, I'm sure, would
22 imposing sanctions. But the message should go out in a way
23 that has real meaning for the world. And that real meaning
24 does come from contempt in a way that it does not,
25 respectfully, with sanctions. Because -- because contempt

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1 has --

2 THE COURT: I don't think I should be in --

3 MR. LUSTBERG: Your Honor --

4 THE COURT: -- business.

5 MR. LUSTBERG: -- I think that's the way for centuries
6 that courts have vindicated their authorities.

7 THE COURT: Maybe it is necessary to obtain remedial
8 relief. That's why I ask you, what remedy do you need. You
9 are not getting money from Mr. Rodriguez. You are not getting
10 documents from Mr. Rodriguez. You are not getting a story from
11 Mr. Rodriguez because, obviously, he can't tell you the story,
12 except to extent the story is out. And that's on appeal.

13 I don't know what you can get out of Mr. Rodriguez
14 except to use the civil process to hurt him in the criminal
15 process. And that's not right.

16 MR. LUSTBERG: Well, I have no idea whether there is a
17 criminal process that involves him at all --

18 THE COURT: I don't know either.

19 MR. LUSTBERG: -- but --

20 THE COURT: But it's not my business, unless I want to
21 refer it to a criminal proceeding. And you could argue that, I
22 suppose. And that would be another set of issues. But you're
23 going beyond the civil here.

24 MR. LUSTBERG: Respectfully --

25 THE COURT: If you go into the issue of limited

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1 discovery, you want to go into that period that was in the
2 middle. Not the beginning, not the end, which you already
3 have, but in the middle. I can't see that there is any utility
4 in it. If there were some reference at the end documents to
5 stuff that had happened before that was of some kind of a
6 different nature, maybe. But I read that stuff. And there is
7 no such reference. You could assume consistency from the
8 beginning to the end. Whether the policy was appropriate or
9 misguided or what, is another story. But I don't see any point
10 to getting additional discovery.

11 MR. LUSTBERG: Your Honor, let me say why I think that
12 middle period is so critical. And it may be that this overlaps
13 with the question involving Mr. Rodriguez.

14 The record that is before your Honor, and what we
15 provided, shows that during the period of July 1st, '03 through
16 May 31st, '05, which is the -- that's the gap period that we're
17 talking about, a number of things happened. There was
18 increased media attention during that time period to abuse,
19 torture and abuse abroad. It was the time of the 60 Minutes
20 piece on Abu Ghraib. It was the time of the Washington Post
21 story on the torture memos. There were several deaths of
22 detainees during that time period. Senator Rockefeller from
23 West Virginia asked for information at that time.

24 It strikes one that, as a result, there might well
25 have been internal CIA communications that would explain how

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1 this could have happened. I mean at the end of the day, what
2 we're searching for here is the answer to the question of why
3 was it that the CIA determined to destroy videotapes that were
4 so clearly --

5 THE COURT: Start before. Why was it determined to
6 take videotapes at all; it is not part of CIA protocol.

7 MR. LUSTBERG: But they did.

8 THE COURT: They did.

9 MR. LUSTBERG: At the outset, there was discussion of
10 should we keep them, or should we get rid of them. This was
11 not a matter that was lightly handled. It was something that
12 was discussed, really, from the very outset at the highest
13 levels. According to the information that we have provided to
14 the Court, from the outset of the advent of these interrogation
15 videotapes, Mr. Tenet, the head of the CIA, was discussing
16 whether or not to destroy them. And, ultimately, there was
17 this decision that you should destroy them, shouldn't, went
18 back and forth and, ultimately, that decision was made to
19 destroy them.

20 THE COURT: Ultimately, it was overtaken by the Court
21 order. But if it had been destroyed initially before the Court
22 order, there would be no question that it was --

23 MR. LUSTBERG: There might be question --

24 THE COURT: -- acceptable conduct.

25 MR. LUSTBERG: -- there might be questions someone

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1 other than us would raise as to whether these were public
2 records that could not have been destroyed.

3 THE COURT: There is always a level of discomfort when
4 you destroy a record.

5 MR. LUSTBERG: Right. But at this point, there should
6 have been a really significant level of discomfort. Because
7 this Court had ruled, and it had not just ruled generally as it
8 did in stirring terms in September of '04.

9 THE COURT: What is specifically.

10 MR. LUSTBERG: It specifically, with respect to the
11 CIA operational files and their relationship to ongoing
12 investigations. Your Honor had thought hard about this and
13 addressed it.

14 THE COURT: How much in the way of fees do you want?

15 MR. LUSTBERG: We haven't -- I don't think we have
16 calculated the fees yet, Judge. I think it would be -- would
17 have been presumptuous to come --

18 THE COURT: Mr. Lustberg, I think you have elicited
19 the story. You have gotten all of the documents that touched
20 upon the story, and that touched upon the destruction. The
21 paragraph 3 and the paragraph 4 documents, I think you have
22 gotten full remedy, except for extra money that you incurred in
23 seeking this relief. And although the pictures might have
24 added to words, there are no more pictures to give, and there
25 is nothing to remedy in that respect.

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1 I think my job is to make sure that what you are
2 entitled to, under the law, you get. And I think I have done
3 that. I don't see any point to additional discovery.

4 But let me hear Ms. LaMorte. Maybe she'll change my
5 mind.

6 MS. LAMORTE: Hopefully not, your Honor.

7 THE COURT: I want to be clear, also, Mr. Lustberg, I
8 think what you and your colleagues have done in getting the
9 story to the American public is extraordinary. And without
10 your efforts, I don't think the public would have had the story
11 that it had.

12 Ms. LaMorte.

13 MS. LAMORTE: Your Honor -- your Honor, we've all been
14 grappling with the issue of the destruction of the videotapes
15 for close to 4 years now. And during that time, this Court has
16 on several occasions publically made known its views and
17 concerns about the matter.

18 And I want to emphasize to the Court, that the highest
19 levels of the Agency have paid close attention to this Court's
20 concerns and, as I said the last time we met, took these
21 proceedings with the utmost level of seriousness that they
22 deserve.

23 The Agency, your Honor, has stood up, heard the Court,
24 and taken responsibility here. The Agency has diligently and
25 proactively accomplished everything that civil contempt

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1 properly allows, or has offered to do so. The one remaining
2 item, as your Honor said, is attorney's fees. And the Agency,
3 your Honor, has even gone above and beyond --

4 THE COURT: There is two items; one is that interim
5 period.

6 MS. LAMORTE: Would you like me to address that, your
7 Honor?

8 THE COURT: You'll get to it --

9 MS. LAMORTE: Sure.

10 THE COURT: -- I'll remind you.

11 MS. LAMORTE: I just wanted to note that the agency
12 has even gone above and beyond, by instituting measures that
13 are designed to heighten awareness throughout the Agency of the
14 importance of adhering to judicial orders in the context of
15 preservation and destruction.

16 THE COURT: Has that protocol been made public?

17 MS. LAMORTE: It is still being finalized within the
18 Agency.

19 THE COURT: It is a long time, Ms. LaMorte.

20 MS. LAMORTE: That is correct, your Honor. But these
21 are deliberate and thorough policies. And I note that in the
22 declaration of General Counsel Preston, it said we have
23 overviewed what those policies cover.

24 THE COURT: I would like to write on the subject and
25 attach that protocol to my opinion.

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1 MS. LAMORTE: Your Honor the CIA has no problems with
2 sharing that with the Court. But it actually has not evaluated
3 whether those protocols could be made public. Ordinarily, such
4 protocols would be withholdable under the CIA Act.

5 THE COURT: Why?

6 MS. LAMORTE: Well, they concern the functions of the
7 Agency, your Honor. Generally, the Agency does not make its
8 internal policy public known.

9 THE COURT: Well, it has to do with, not so much with
10 internal policy, but the order of the Court to be fully advised
11 why an order of the Court was not followed, and whether as a
12 matter of the remedial relief the Court seeks, to assure that
13 it's highly unlikely it will ever happen again. I think it is
14 important for the Court to have that assurance. And I think it
15 is important for the public to have that assurance. And one
16 way to do that is by an attachment. If you can't give me the
17 exact language, then I want to have the principles, but I do
18 want it.

19 MS. LAMORTE: I'm sorry, if I can't give you the exact
20 language --

21 THE COURT: Give me the principles. I do want it.

22 MS. LAMORTE: The principles are, your Honor, in
23 General Counsel Preston's declaration. And I can actually
24 overview with you, now, what those principles are.

25 There are two new policies that were adopted by the

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1 Agency, or that are being documented by the Agency. But even
2 before I go into what those policies are, your Honor, I do want
3 to emphasize that this is something that is above and beyond
4 the remedial measures that are necessary in this case under the
5 Court's civil contempt power.

6 But in any event, going to what those policies are,
7 the first policy, your Honor, is designed to ensure that any
8 attempt to destroy records is highlighted and given deliberate
9 consideration by a number of senior government officials,
10 including the general counsel themselves, who is the final
11 decisionmaker on any requests to destroy documents outside of
12 the ordinary course.

13 Now, each request, your Honor, to destroy documents
14 outside of the ordinary course, will be given a thorough legal
15 analysis. And, your Honor, significantly, to the extent that a
16 destruction request implicates civil or criminal litigation,
17 the policy requires coordination with DOJ and any relevant
18 interagency partner. And the idea, your Honor, is to make any
19 decision deliberate and thoroughly examined.

20 THE COURT: And in writing.

21 MS. LAMORTE: As I said, your Honor, this is being --
22 these policies are --

23 THE COURT: In writing, in writing.

24 MS. LAMORTE: What exactly --

25 THE COURT: The decision at the general counsel level

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1 should be in writing.

2 MS. LAMORTE: Yes, your Honor, I believe that the
3 policy does call for the various steps that are necessary in
4 approving a document request to destroy, to be in writing, I
5 believe that is in the policy.

6 Now, the second procedure, your Honor, concerns the
7 issuance and implementation of preservation orders for civil
8 and criminal litigation. So as your Honor is aware, general
9 principles require that whenever litigation is contemplated,
10 that agency, that entities in general should issue preservation
11 orders. And those preservation orders are designed to notify
12 the Agency that documents ought to be preserved; any documents
13 that are potentially relevant to a litigation. And so there is
14 a policy that has been developed as General Counsel Preston
15 explains in his declaration. And, again, your Honor, those
16 internal, those CIA preservation orders that will be issued for
17 various cases will be vetted by DOJ.

18 And, finally, your Honor, General Counsel Preston,
19 just to complete the picture, also talks about the
20 professionalism standdown that the Agency's Office of General
21 Counsel had. And that actually already occurred in June. And
22 the overall purpose of that, your Honor, was to impress upon
23 CIA attorneys their duties and obligations to the Courts as
24 attorneys for the United States. And in addition, those
25 attorneys received training and instruction in the new

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1 procedures to make sure that documents are preserved for civil
2 and criminal litigation.

3 THE COURT: Is that going to be a recurrent practice?

4 MS. LAMORTE: It's intended to be recurrent, your
5 Honor and especially as new hires come on board.

6 Your Honor, I do want to also emphasize to the Court
7 that these measures were not measures that were developed in a
8 vacuum. They were not formed by these proceedings. And in
9 addition, they are the product of a meeting that occurred with
10 the special prosecutor, John Durham and high level members of
11 the agency, including the director of the CIA and the General
12 Counsel himself.

13 And so, your Honor, when I stood in front of this
14 Court on January 14th of this year, I told you that the CIA
15 takes this matter very seriously. And it does. It appreciates
16 the gravity of the issues surrounding the destruction. And in
17 the past three and a half years, your Honor, it's answered to
18 the Attorney General, the special prosecutor, and this Court.
19 And it, itself, has taken responsibility for what has occurred.

20 Now, your Honor, when we last left off, we were
21 talking about the remediation that's already been done in this
22 case pursuant to the law. And, your Honor, overall, there has
23 been an extraordinary amount of remediation that has occurred.

24 Now, as we discussed last time and as we discussed a
25 bit today, the law on civil sanctions is very clear. The

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1 purpose of the civil sanction must be designed either to
2 compensate an injured party or to accord compliance with the
3 court order. Here, your Honor, the CIA has done or offered to
4 do everything virtually that civil sanction allows.

5 Now, first, your Honor, the plaintiff sought
6 reconstruction of the videotapes as a remedy to their
7 destruction. And, indeed, the plaintiffs had said in their
8 papers that this was a very important remedy to them. And that
9 makes sense, your Honor, because as this Court has stated,
10 reconstruction of what was destroyed here in the videotapes, is
11 specifically designed to accomplish the purposes of FOIA, to
12 the greatest extent possible by best approximating the position
13 the parties would have been in had the destruction not
14 occurred.

15 And, thus, your Honor ordered the CIA to compile the
16 so called Paragraph 3 and Paragraph 4 documents, which concern
17 the contents of video tapes and persons and reasons behind
18 their destruction.

19 And your Honor, again, I will note to the Court that
20 this was a burdensome task for the CIA. And they produced 580
21 paragraph 3 documents, and 220 paragraph 4 documents. And it
22 has made, as your Honor noted, as much information as possible
23 available to the public record.

24 And as I think your Honor has realized, as you had
25 stated today, the CIA has been diligent and proactive in

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1 accomplishing these remedies. And in addition, as we have been
2 talking about these, offered to pay the reasonable attorneys
3 fees of the plaintiffs in this case. And that, your Honor,
4 that is the proper purpose of civil contempt. And that is why,
5 your Honor, plaintiffs request for a contempt citation, or
6 anything beyond that, is inappropriate, it would be an abuse of
7 this Court's authority because it would be criminal in nature.

8 Unless the --

9 THE COURT: What about the interim time period that
10 Mr. Lustberg seeks?

11 MS. LAMORTE: Sure, your Honor.

12 Well, when we initially started out with the
13 paragraph 4 documents, this Court had ordered the CIA to
14 compile the paragraph 4 documents for the period during the
15 time that the tapes were created, and a little bit beyond. And
16 acting in good faith, it was the CIA that came to this Court
17 and said, your Honor, the most relevant documents are actually
18 going to be found in this later time period. And it was a time
19 period surrounding when the tapes were destroyed. So we can
20 represent to the Court that the most relevant documents are
21 located in that time period. And moreover, your Honor, as the
22 plaintiffs have noted in their papers, to the extent that the
23 CIA had uncovered any documents from that intervening time
24 period in the course of its search for paragraph 4 documents,
25 it did produce those to plaintiffs.

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1 The plaintiffs have not identified any cause for
2 expanding -- any good cause for spanning the time period. We
3 can represent, as I said before and I don't mean to repeat
4 myself, that we have identified the period where the most
5 relevant documents are contained.

6 So, your Honor, I would submit for that reason,
7 further ordering of the CIA to compile Paragraph 4 documents
8 for the intervening time period would not be a useful thing to
9 do.

10 THE COURT: What about paragraph 3 documents?

11 MS. LAMORTE: We have collected all of the documents
12 that are associated with the content of the videotapes. That
13 is not an issue at all.

14 THE COURT: So it is the Paragraph 4 documents that
15 are limited.

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

17 THE COURT: How much volume would there be if you had
18 to produce for the whole period?

19 MS. LAMORTE: I don't know the volume, your Honor.
20 But I do know that it would be extraordinarily burdensome. I
21 do not --

22 THE COURT: To search for them.

23 MS. LAMORTE: To search for them, yes.

24 But, again, I -- I -- you know, I want to impress upon
25 the Court that we have identified the most critical periods.

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1 THE COURT: Well, you assume that the flurry of
2 documents leading to the actual destruction would be the most
3 relevant.

4 MS. LAMORTE: That is correct, your Honor.

5 THE COURT: Mr. Lustberg feels that the action may
6 have germinated much before that time.

7 MS. LAMORTE: Mr. Lustberg may feel --

8 THE COURT: But if it did, what additional relevance
9 would there be that it took longer for the Agency to destroy
10 them then it might have. I don't know what you gain in public
11 knowledge for that.

12 MS. LAMORTE: I agree, your Honor.

13 The Agency may have made as much nonprivileged
14 information available on the public record as it possibly
15 could.

16 Now, are there other issues that the Court would like
17 me specifically to address?

18 THE COURT: What about the discovery they seek from
19 Jose Rodriguez?

20 MS. LAMORTE: Your Honor, that would be -- any further
21 proceedings, whether against the Agency or individual would
22 serve no remedial purpose whatsoever as your Court has stated
23 earlier today. It would be improper, your Honor, to have
24 further proceedings against any individual for agency.

25 Now, this is actually poignantly illustrated by the

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1 plaintiffs themselves. Every single argument, your Honor, that
2 the plaintiffs make, show that they are simply out to exact
3 retribution on the CIA and those individuals.

4 So, for today -- today, for example, Mr. --

5 THE COURT: I don't think that is correct.

6 MS. LAMORTE: Well, your Honor, today, Mr. Lustberg --

7 THE COURT: Mr. Lustberg wants as full a set of relief
8 as he can get. The question is whether he is entitled to that
9 full extent. I don't need epithets one way or other. It is
10 not useful.

11 MS. LAMORTE: That is correct, your Honor. All I
12 wanted to say --

13 THE COURT: The government, in my opinion, has always
14 been in good faith before me, and so have the plaintiffs.

15 MS. LAMORTE: That's right, your Honor. And I'm not
16 intending to say otherwise.

17 All I wanted to note for the Court was that the
18 purpose for which the plaintiffs are seeking these additional
19 remedies underscore that they are punitive in nature. So all I
20 wanted to say was, today, for example, the plaintiff stood
21 before you and stated that they wanted this additional
22 information, or wanted to hold further proceedings for the
23 Court to be able to express its view that the Court has been
24 mistreated. And in their brief, your Honor, they talk about
25 vindicating the Court, and vindicating the law, and vindicating

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1 the system of justice --

2 THE COURT: Well, I think it's been done, Ms. LaMorte.

3 MS. LAMORTE: I agree, your Honor.

4 And my only point is holding further proceedings would
5 be criminal in nature. And those functions that are identified
6 by the plaintiffs are the functions, are the province of
7 criminal contempt, not civil contempt proceedings.

8 And so, your Honor, we submit that any further
9 proceedings against individuals are not properly before the
10 Court in the context of civil contempt.

11 THE COURT: Other than an epithet, what would be the
12 purpose of holding up actual contempt?

13 MS. LAMORTE: There is no other purpose. As your
14 Honor has stated numerous times in these proceedings --

15 THE COURT: I can award attorneys' fees as a matter of
16 my inherent jurisdiction, is that it?

17 MS. LAMORTE: That is correct, your Honor.

18 THE COURT: What's the citation? Is there one?

19 MS. LAMORTE: There are, yes. I can --

20 THE COURT: It's in your briefs?

21 MS. LAMORTE: It should be in my brief, your Honor.

22 THE COURT: Okay. So you agree with Mr. Lustberg that
23 he should be entitled to attorney's fees.

24 MS. LAMORTE: Yes. And in the last proceeding, the
25 CIA actually offered to pay attorneys's fees.

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1 THE COURT: I do remember.

2 MS. LAMORTE: Yes. And that is part of your inherent
3 authority as the Court.

4 THE COURT: Mr. Lustberg, final words?

5 MR. LUSTBERG: Yes. Thank you, your Honor.

6 I think it's a good thing that the CIA has put into
7 place protocols whereby they will comply with the Court orders
8 in the future. Let me -- I don't think that such protocols
9 should be necessary, particularly for a government agency which
10 is bound to do that in the first place. Beyond that, though,
11 those protocols would not have addressed what occurred here.
12 Because in this case --

13 THE COURT: Would have made it more difficult.

14 MR. LUSTBERG: Well, who knows? Because first
15 things --

16 THE COURT: Would have made -- either they would have
17 had to have been disregarded which would have been to the peril
18 of the official, or they would have made things more difficult
19 to do. Because people would have had to actually think, do we
20 need to produce these. They would have had to have a
21 memorandum arguing perhaps that justification exists for
22 destroying them. That is hard to do.

23 MR. LUSTBERG: Your Honor, the record before this
24 Court shows that precisely those conversations did take place
25 as to whether they should or should not destroy the documents,

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1 and that this was considered by the General Counsel of the CIA
2 at that time. So this was not a situation --

3 THE COURT: Mr. Rizzo --

4 MR. LUSTBERG: -- where a rogue employee --

5 THE COURT: -- Mr. Rizzo takes the position he
6 didn't -- he wasn't -- he didn't know about it.

7 MR. LUSTBERG: The Goss depositions that we said?

8 THE COURT: No. Mr. Rizzo, General Counsel.

9 MR. LUSTBERG: Oh -- not that he didn't know about it,
10 that he disapproved of it. Although there is -- there is --
11 there is disputed accounts on that. There is --

12 THE COURT: One of the benefits of a protocol is that
13 there is a clear line of authority.

14 MR. LUSTBERG: What we know is that very high levels,
15 the top spy did this. This is not some rogue employee going
16 out and --

17 THE COURT: Protocol who have assured that the General
18 Counsel, the highest legal official of the Agency, would have
19 had to sign off.

20 MR. LUSTBERG: If --

21 THE COURT: That's not so easily done.

22 MR. LUSTBERG: If the purpose of the protocols is to
23 urge the CIA to do that which corporations do all of the time,
24 which is to preserve documents in the face of litigation, which
25 is to not destroy things when Courts have ordered it, then I

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1 think that's great.

2 THE COURT: Mr. Lustberg, your fight has been, in
3 part, for accountability.

4 MR. LUSTBERG: Absolutely.

5 THE COURT: This protocol improves accountability.

6 MR. LUSTBERG: And that -- and that is a good thing.

7 THE COURT: And that's why I think it a good thing.

8 MR. LUSTBERG: And we don't disagree it's a good
9 thing. And we're glad that that is going to take place.

10 THE COURT: And had it been in place, you may not have
11 had this.

12 MR. LUSTBERG: Perhaps. And as a matter of law -- and
13 we cite these cases to your Honor in our briefs -- the notion
14 that such improvements have taken place, even greater
15 improvements than these in some of the cases that we cited, is
16 not enough to justify the type of past misconduct that occurred
17 in this case.

18 THE COURT: Yeah, but that's -- that's an epithet.

19 I'm more interested in the function. I feel that you have
20 obtained substantial relief with extra effort. And, for that,
21 you should be compensated.

22 MR. LUSTBERG: And, your Honor, so now you have --

23 THE COURT: You have gotten all of the remedial relief
24 that a Court can give. And I can do that without a citation of
25 contempt.

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1 Bottom line, we are in a dangerous world. We need our
2 spies. We need surveillance. We also need accountability.
3 And I think as a result of this case, perhaps, we recognize the
4 dangerous and difficult and trying jobs of obtaining
5 intelligence from people who don't want to give it. And, at
6 the same time, having proper accountability of each government
7 agency to the law. I think you should take great deal of
8 pride, you and your colleagues, on what you have accomplished.

9 MR. LUSTBERG: Thank you. And --

10 THE COURT: And I don't think you -- I don't think a
11 citation of contempt will add to anything.

12 MR. LUSTBERG: Your Honor, the Court -- if the Court's
13 going to order the relief, it can do so as part of a sanction,
14 or it can do the exact same relief as part of contempt.

15 THE COURT: I'm not going to order the CIA in
16 contempt. I think the CIA has not been contemptuous. In the
17 final analysis, I think these things can happen in any large
18 organization. I see them happen in private life. And, here, I
19 witness it in public life. There are misguided officials,
20 misguided in their belief that everything they do is correct,
21 or that they are motivated to do the correct thing when, in
22 fact, it is not the correct thing. I decline to hold an entire
23 agency in contempt for the mistakes of some of its officials.

24 MR. LUSTBERG: Your Honor, with regard to those
25 mistakes, this gets into the final area, which is the gap

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1 period.

2 It is not just that that gap period will be much of
3 the same. It may be. But to the extent that individuals
4 should be held accountable, that information that we receive
5 about that gap period might well inform the next steps.

6 For example, the Court raised the question of whether
7 there might be a referral for criminal contempt. I would not
8 rule that out. It may depend upon what people are saying
9 during that very high profile period when these issues were
10 being debated.

11 THE COURT: We know from the newspaper that a special
12 prosecutor was appointed, and that he has done it, he had a
13 grand jury, that he has looked into this. And he has declined
14 to recommend criminal proceedings for the destruction of
15 videotapes. I think there is no need to speculate on what else
16 there might be, because it is likely there wouldn't be anything
17 else.

18 I think we have the story. I think if we didn't have
19 the story, I would have seen something in the late documents
20 that would have referred to some event, or some course of
21 dealings, or some set of conversations or communications in the
22 past. There was none. And I don't believe that the
23 extraordinary extensive efforts that -- we'll leave out
24 extraordinary -- the extensive efforts that would be required
25 of the government to search its files, yet again, for an

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1 extensive period of time, is unreasonable and unnecessary. And
2 I decline to order it.

3 MR. LUSTBERG: Okay. Thank you.

4 THE COURT: And please don't be disappointed.

5 MR. LUSTBERG: Oh, I am.

6 THE COURT: Well, you shouldn't be.

7 All right, I will issue a written decision. I would
8 like, Ms. LaMorte, you to write to the Court and give me an
9 estimate of how long it will take to finalize the protocol.

10 I will make comment to the principles that you
11 expressed as the representation of the CIA, but it would be
12 better to have the protocol, as a guide for all conduct in the
13 government, to be attached to this decision.

14 There are six requests for relief by the plaintiff:

15 An order holding the CIA in civil contempt; I decline
16 to issue such an order.

17 An order requiring the former CIA official, Jose
18 Rodriguez to show cause why he should not be held in civil
19 contempt; I decline to issue such an order. What is sought
20 here is something having to do with obtaining facts leading to
21 a criminal contempt, and that's not my job. And, secondly,
22 creating deposition procedures for Mr. Rodriguez and others
23 would be extensive, it would be difficult, it would challenge
24 various kinds of needs for secrecy, particularly guarding the
25 confidence of other people who work for the CIA. And I do not

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1 believe that there is any legitimate goal in this proceeding
2 for such depositions.

3 The third request is the limited discovery, to review
4 all withheld and partially withheld paragraph 4 documents in
5 the sealed proceeding to determine whether any other CIA
6 officials should be ordered to show cause why they should not
7 be held in civil contempt. I think this is for criminal
8 contempt proceedings, and not for civil contempt. There is no
9 more remedial relief that could be ordered from this.

10 Fourth, an order requiring the CIA to identify or
11 produce Paragraph 4 documents for the period between July 1,
12 2003 and May 31st, 2005. Almost a two-year period. A period
13 for which the CIA has not yet been ordered to identify or
14 produce Paragraph 4 documents. For the reasons I expressed, I
15 don't believe there is any useful purpose, and that there is no
16 real likelihood that any more documents of a different nature
17 would arise or be located.

18 Five, an order requiring the CIA and/or responsible
19 CIA officials to pay plaintiff attorney's fees and costs
20 associated with their efforts to obtain responsive documents
21 from the CIA in this lawsuit, including fees and costs
22 associated with this contempt motion, litigation over the
23 Paragraph 3 documents, and plaintiff's efforts to reconstruct
24 the destroyed videotapes and to determine the persons and
25 reasons behind the videotape destruction. This is a very wide

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1 request. And I would not like to see any extensive proceedings
2 arising from this section.

3 I think the effort to obtain some alternative remedy
4 is compensible. I think that the proceedings dealing with all
5 of these different motions also is compensible, but I don't
6 believe that there are many of these proceedings, because most
7 of these were in camera and did not really involve much effort
8 on the part of the plaintiff, except to the extent that items
9 were made public. And I think that's generally where we are.
10 And of course the effort to obtain disclosure is also
11 compensible. My suggestion for this procedure is that Mr.
12 Lustberg and his colleagues make the application. Before
13 filing it, they should give Ms. LaMorte a copy and engage in
14 discussions with Ms. LaMorte and see if there can be some
15 agreement with respect to the compensation. If there is a
16 dispute, it should be tendered to me in a joint letter with the
17 attachment to it constituting the record for me to rule on.
18 That joint letter will follow my individual Rule 2E, would
19 reflect the positions of both sides, so I don't get a series of
20 submissions.

21 Six is all other relief the Court deems just and
22 proper. The only other matter is the protocol, which I believe
23 is very important and will be part of my opinion.

24 So except to the extent granted, the motion is denied.
25 An opinion will issue.

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1 Thank you very much.
2 MR. LUSTBERG: Thank you, your Honor.
3 THE COURT: Have I missed anything, Mr. Lustberg?
4 MR. LUSTBERG: Pardon me?
5 THE COURT: Have I missed anything of what you asked?
6 MR. LUSTBERG: I don't think so, Judge.
7 THE COURT: All right.
8 Ms. LaMorte?
9 MS. LAMORTE: No, your Honor, thank you.
10 THE COURT: All right. Thank you very much.
11 (Adjourned)
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