

UNCLASSIFIED

March 9, 2012

15-DOJ

ACLU v. DOJ

Ex Parte Session²⁹

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MS. LA MORTE: This is Tara La Morte, Assistant United States Attorney for the government. With me is Sarah Normand, also from the U.S. Attorney's Office for the Southern District of New York. We have Amy Barcelo from the Southern District of New York, Jeannette Vargas from the Southern District of New York, and Brian G [redacted] from the CIA.

JUDGE WESLEY: We have Catherine O'Hagan Wolfe who is the clerk of the Second Circuit with us also, and the members of the panel, and Mike Macisso who is a DoJ security information officer.

MR. MACISSO: The classified information security officer. We have a new title.

JUDGE CARNEY: Can I ask what are the positions of Mr. G [redacted] and is Ms. P [redacted] here as well? No.

MR. G [redacted]: I am an attorney with the Office of General Counsel at the Central Intelligence Agency.

JUDGE CARNEY: Great.

JUDGE WESLEY: Ms. La Morte, I don't see a reason for you to stand. Not everyone is here. Jennifer F [redacted] is not here, correct?

MS. LA MORTE: Correct.

JUDGE WESLEY: Everyone else is?

MR. MACISSO: Zabel is not.

JUDGE WESLEY: And Andrew Schilling is not here.

MS. LA MORTE: Correct.

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JUDGE WESLEY: Ms. La Morte.

MS. LA MORTE: May it please the Court. What is at issue here is a textbook example of language that on its face appears entirely innocuous, but in reality reveals a highly sensitive classified intelligence method. That language is [REDACTED] and the intelligence method that that reveals is the intelligence method and activity [REDACTED]

JUDGE CARNEY: Excuse me. I trip on the equation between "method" and "activity." I see the classification statute seems to distinguish between activities or special activities and sources and methods. And therefore, when you say method or activity, I need you to distinguish between those, how you use those words, or explain how you're using them, please.

MS. LA MORTE: Sure. It is an interesting point your Honor brings up because these terms aren't really defined in the executive order. Or some of them are and some of them aren't.

So "intelligence method" is the means by which the CIA carries out its functions. So the reason that [REDACTED]

[REDACTED]

It's in the nature of the method.

JUDGE CARNEY: The nature of the activity is different

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1 as well. And I note the use of the word "activity" being -
2 different from intelligence source or method. The intelligence
3 is gathering or acquiring information, [REDACTED]

4 [REDACTED]

5 [REDACTED] And

6 therefore, I find it difficult to equate them.

7 It seems to me that the agency is relying on the
8 modifier "intelligence" to mean whatever we do within our
9 charter is an intelligence method. But the statute seems to
10 distinguish between activities and methods.

11 So could you address that, please, because this bears
12 obviously on the applicability of Exemption 1 versus Exemption
13 3.

14 MS. LA MORTE: Okay. As I said, methods are the means
15 by which the CIA carries out its functions. So, interrogation,
16 for example, is a method.

17 And activities are the operationalization, if I said that
18 word correctly, probably not, of the CIA's methods. So,
19 examples of activities -- [REDACTED]

20 [REDACTED]

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24 So activities are the operationalization of methods. I am
25 going to avoid that word from now on.

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JUDGE CEDARBAUM: "Operability," how's that.

MS. LA MORTE:

[REDACTED]

The reason it is a method or a means, a way in which the CIA carries out its functions, is because these activities,

[REDACTED]

JUDGE CARNEY:

[REDACTED]

MS. LA MORTE: There are traditional intelligence methods, and your Honor is correct, the traditional activities concern the CIA's collection of information. So that is correct. So we coordinate with foreign liaison services to try and get information from them. We interview sources. We try and recruit sources. We do electronic eavesdropping. And the point of all that is for the CIA to gather information and pass it along to U.S. policy makers who could then decide what, if anything, to do with the information.

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[REDACTED]

[REDACTED]

JUDGE CARNEY:

MS. LA MORTE:

[REDACTED]

But, I guess where the trip up is, is there are certain ways or methods in which the CIA accomplishes that.

[REDACTED] is one of those intelligence things that is both a method and an activity.

JUDGE WESLEY:

[REDACTED]

[REDACTED] having -- excuse me. Nothing like a janitor.

[REDACTED]

[REDACTED]

MS. LA MORTE: That's absolutely correct. So, for example, in the OLC memos, [REDACTED]

[REDACTED] So

that program was a program where the CIA was authorized to capture international terrorists abroad, detain them in foreign countries, and interrogate them using not only standard methods, but enhanced interrogation techniques.

But that detention, that CIA detention and interrogation program, was a program that [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

And that's important because here, the references to

[REDACTED]

contained in the OLC memos reveals

for the first time the existence and the scope

[REDACTED]

[REDACTED]

That has never before been acknowledged, and

would be acknowledged for the first time simply by revealing

[REDACTED]

in the OLC memos.

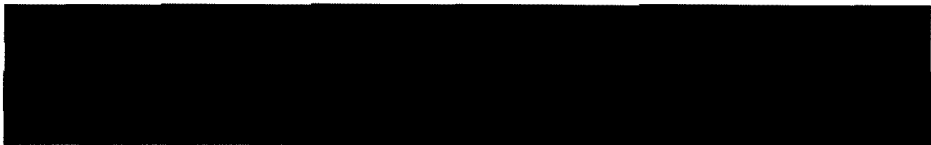
JUDGE CARNEY: Judge Hellerstein rejected the
characterization of that as a method, and said instead this is

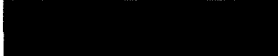
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1 a source of authority. Did he rule on its coverage under
 2 Exemption 1? It looked like there was passing reference to
 3 Exemption 1 from time to time that he could have ruled that it
 4 was exempt as properly classified under Exemption 1.

5 MS. LA MORTE: He certainly could have, your Honor.
 6 It is unclear from the transcripts whether he actually ruled on
 7 Exemption 1.



9
 10  And in the transcript, you can see in
 11 certain instances that Judge Hellerstein does understand that
 12 harms will flow from the disclosure, actual national security
 13 harms will flow from the disclosure of the information.

14 JUDGE CEDARBAUM: Certainly the existence of
 15 Guantanamo was not covert. It was not a secret.

16 MS. LA MORTE: This is not Guantanamo, your Honor.
 17 This has to do with -- the detention and interrogation program
 18 that I'm talking about isn't Guantanamo. It is quote unquote
 19 black sites abroad that were in countries that heretofore have
 20 never been officially acknowledged by the United States.

21 JUDGE CEDARBAUM: You are seeking to withhold a lot of
 22 material from Guantanamo.

23 MS. LA MORTE: The documents at issue in this case,
 24 the references to and the quotes from the OLC memos, don't have
 25 anything to do with Guantanamo.

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1 JUDGE CEDARBAUM: I understand. But there is a lot of ...
2 other material that I saw for the first time this morning.

3 MS. LA MORTE: I'm not precisely sure what material --

4 JUDGE WESLEY: She is talking about the documents
5 relative to the cross appeal, not to the direct appeal.

6 MS. LA MORTE: Oh.

7 JUDGE WESLEY: Could we stay on the direct appeal for
8 a second or two, then perhaps we can move to the issue of the
9 documents, the Vaughn index.

10 Go ahead and finish your thought. Have you finished
11 your thought in response to Judge Carney's question?

12 JUDGE CARNEY: I have a follow up, if I may.

13 So if I understand the government's position, your
14 position is the material redacted from the second and fourth
15 OLC memos was properly exempt under Exemption 1, and that Judge
16 Hellerstein's ruling then was somewhat incomplete in that he
17 rejected and demanded that you use an alternative
18 characterization under -- he rejected it under Exemption 3. He
19 was saying this was a source of authority, not a method. [REDACTED]

20 [REDACTED] But I was perplexed by the
21 absence of an explicit ruling about Exemption 1.

22 MS. LA MORTE: I don't recall an expressed ruling in
23 the transcript about Exemption 1. I think what Judge
24 Hellerstein's thought process was, was that this was a source
25 of authority, and that's it, not an activity, not a method.

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JUDGE WESLEY: He never seemed to connect the fact.

That's the curious -- he never seemed to connect the fact that

[REDACTED]

[REDACTED] That's why it appears in the May 10 and
May 30 OLC memos.

MS. LA MORTE: That's correct. I believe --

JUDGE WESLEY: It is direct connection to it.

MS. LA MORTE: Right: Again [REDACTED]

[REDACTED]

As we said, in the spirit of trying to make as much
information public as possible, in the public we refer to this
as a classified intelligence method. But we've also said in
public, in the declarations, that it is still ongoing, it is
not unique to the detention interrogation program, and it is
unaffected by the President's executive order closing the
detention centers and limiting interrogation techniques to
those contained in the Army Field Manual.

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JUDGE WESLEY: Director Panetta seemed to apply

significant weight to the fact that [REDACTED]

[REDACTED]

MS. LA MORTE: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

JUDGE CEDARBAUM: [REDACTED]

[REDACTED]

MS. LA MORTE: And once that occurs, your Honor, the
ramifications of that could be enormous. So a couple of
examples, or one example, [REDACTED]

[REDACTED]

JUDGE WESLEY: [REDACTED]

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[REDACTED]

MS. LA MORTE:

[REDACTED]

JUDGE CARNEY: If we were to accept that there was an adequate showing of harm, and that this material or the use of [REDACTED] had been properly redacted and classified and therefore redacted, and therefore that this material was protected under Exemption 1, that could just resolve this issue. We don't have to reach Exemption 3.

MS. LA MORTE: Absolutely.

JUDGE CARNEY: Given the discordance between the

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1 statutory use of the word "activity" versus "method." Isn't
2 that correct?

3 MS. LA MORTE: This case can be entirely resolved on
4 grounds of Exemption 1. That's correct. We only need to show
5 one exemption.

6 JUDGE WESLEY: Now I want to move on to some of the
7 issues that Judge Cedarbaum touched on before.

8 It seems to odd to me, he did redact one reference [REDACTED]
9 [REDACTED] and without ever explaining. I don't understand, I
10 don't understand the material difference there.

11 MS. LA MORTE: To be perfectly frank, I don't either.
12 But he did allow us to redact it. And then in a subsequent ex
13 parte session in October, he maintained that that part could
14 still be redacted, and it was never explained why that was --
15 he did recognize the harm, that there would be harm.

16 JUDGE WESLEY: That's why he offered the compromise.
17 He acknowledges the problem, offers the compromise, and then
18 for some reason when the compromise is rejected --

19 JUDGE CARNEY: One more quick question, if I may.

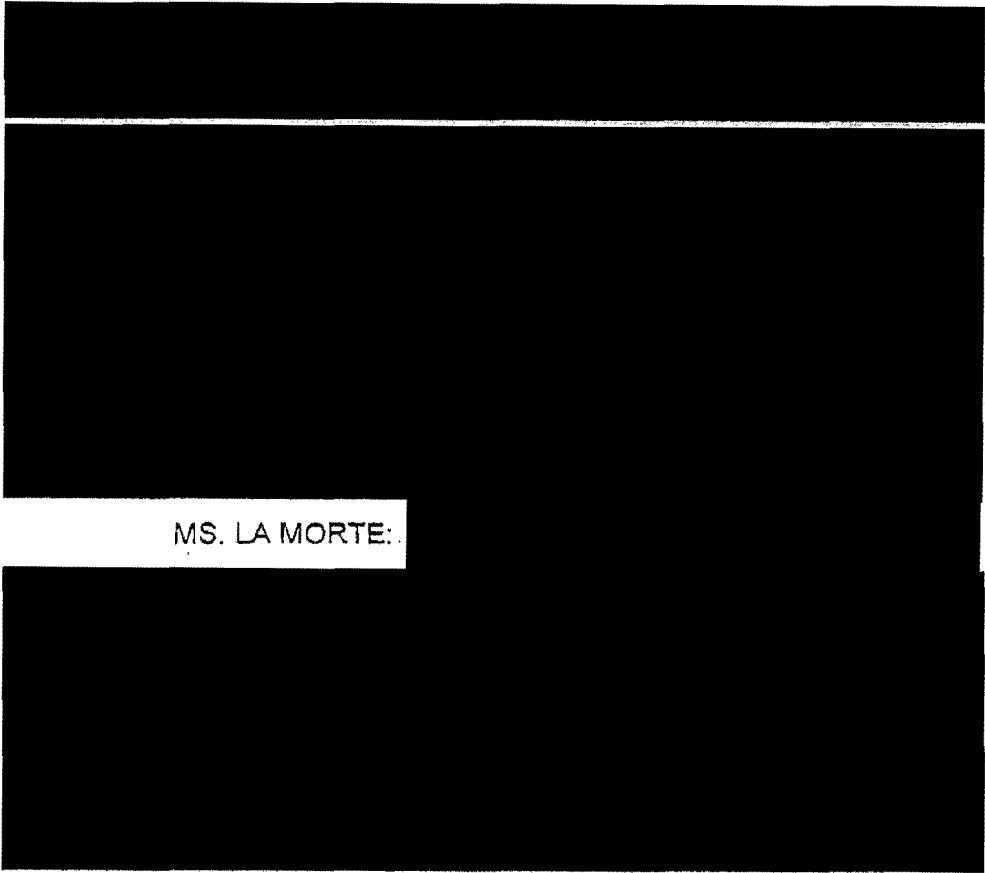
20 JUDGE WESLEY: Of course.

21 JUDGE CARNEY: [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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MS. LA MORTE:

JUDGE CARNEY: Thank you.

JUDGE WESLEY: Let's talk about the ACLU's appeal with regard to the information that's -- and let's go to the photograph. I know there has been some concern about the photograph.

You might briefly restate your position as you did in public, and then give us was there further discussion with Judge Hellerstein about the particulars of the picture itself or in some way connecting the dots in some way about the significance of the picture?

MS. LA MORTE: No. There was no further discussion

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1 with Judge Hellerstein on the photograph beyond what you've
2 seen in the transcripts.

3 JUDGE WESLEY: Judge Hellerstein took it that once it
4 was represented that it was a picture that was taken during a
5 process, during the period of time when Mr. Zubaydah was being
6 interrogated, that that then related to an interrogation
7 technique?

8 MS. LA MORTE: Yes. I think one of the keys is
9 recognizing that the photograph



10 It just
11 has to relate to an intelligence technique, and that's broader.

12 JUDGE CARNEY: That's under what standard?

13 MS. LA MORTE: Wilner v. NSA.

14 JUDGE CARNEY: You are talking to judicial authority
15 rather than statutory authority.

16 MS. LA MORTE: I am talking about judicial
17 construction of the National Security Act as it applies —

18 JUDGE WESLEY: From our court.

19 JUDGE CEDARBAUM: Were there any photographs in
20 Wilner?

21 MS. LA MORTE: No, there were not. No, it was signals
22 intelligence.

23 JUDGE CEDARBAUM: Normally photographs are
24 self-disclosing or revealing, and I finally got to see it this
25 morning. Actually I didn't realize we had it. And I looked at

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it. [REDACTED]

What is it disclosing?

MS. LA MORTE: Your Honor, a person's condition in CIA custody during the time frame that they've been subject to CIA interrogation could reveal a lot of information to our adversaries.

JUDGE CEDARBAUM: It could, but let's look at the particular photograph that you are objecting to.

JUDGE CARNEY: I noted that given the many cables describing the course of the interrogation on and off over months, there were regular descriptions of his physical condition which were confirmed in part by the photograph.

JUDGE CEDARBAUM: [REDACTED]
[REDACTED]

JUDGE CARNEY: [REDACTED]

JUDGE WESLEY: Let's have --

JUDGE CARNEY: Is there -- I wondered whether because the review of the photograph took place in the context of the cables, was that kind of information that the government and Judge Hellerstein might have been considering that would be conveyed by publication of the photograph?

MS. LA MORTE: That's certainly plausible, your Honor. But to be frank, I can't specifically say one way or the other based on the record that I have that that is the case.

JUDGE CARNEY: You were not there.

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1 MS. LA MORTE: No, no, I was not there.

2 JUDGE CEDARBAUM: I looked through all of the
3 annotations to see if there was anything that might connect
4 them to the photograph, and I really saw nothing.

5 MS. LA MORTE: Well, your Honor, the photograph is
6 another example, and this has been well recognized throughout
7 the case law --

8 JUDGE CEDARBAUM: Which case do you rely on that
9 refused to turn over a photograph?

10 MS. LA MORTE: I don't have cases that are specific to
11 a photograph, but the cases that I am talking about which
12 include CIA v. Sims are cases that say the reason, the reason
13 that the courts defer to the CIA's director's judgment about
14 whether something is reasonably likely to reveal an
15 intelligence method, is because the CIA director has a full
16 view of the scene, and is well versed in intelligence. Whereas
17 a judiciary and those of us also that are not well versed in
18 intelligence may not be able to see.

19 JUDGE CEDARBAUM: I understand, but cases are not
20 collections of statements. They are facts. So I take it that
21 there really is no prior case in which the CIA has refused to
22 turn over a photograph which on its face is not so clearly
23 revealing of much, except that the man is at Guantanamo which
24 is a public matter.

25 JUDGE WESLEY: Do we know where he is? We have no

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1 idea where he is.

2 JUDGE CEDARBAUM: If you look on Google.

3 JUDGE WESLEY: I don't look at Google. I look at the
4 record.

5 MS. LA MORTE: He was overseas at an undisclosed
6 location. He was not at Guantanamo when that photograph was
7 taken.

8 JUDGE CEDARBAUM: I see, all right.

9 JUDGE WESLEY: The point is that there may not be a
10 case on photographs, but I take it then that it is your view if
11 the CIA makes a representation that the photograph has a
12 meaning far greater than what we would appreciate, there is
13 some deference due to the CIA's evaluation of that.

14 MS. LA MORTE: Absolutely. This is not just a
15 conclusory, oh, this reveals a lot. We know that the
16 photograph was taken in October of 2002. We know that Abu
17 Zubaydah was subject to the waterboard -- this is public
18 knowledge -- in August of 2002 83 times. We know he was
19 subject to interrogation during this time period. And it is in
20 light of those facts about this particular photograph which
21 makes the CIA director's judgment that it relates to
22 intelligence methods, reveals something about his treatment at
23 the hands of CIA's custody, that is plausible. Therefore,
24 deference would be accorded. This is a photograph that the CIA
25 director himself viewed in the context of his declaration in

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1 this case.

2 JUDGE WESLEY: Questions on anything else?

3 JUDGE CARNEY: The record, absent being able to look

4 at the photograph, is remarkably barren of any description of

5 it or reasons given by the government or expression of reasons

6 by the District Court judge about even the categories of

7 information that it might convey that would warrant protection.

8 So much so that I felt it was difficult to review.

9 Having seen the photograph and given some thought, I

10 have some more thoughts about that, but I am concerned about

11 what one might be able to say that would explain a judgment

12 that it could be produced or not produced given our

13 restrictions on classification.

14 Can you address that concern? Do you know what I'm

15 saying?

16 MS. LA MORTE: I'm sorry.

17 JUDGE WESLEY: Where in the record, what affidavit

18 specifically addresses the photograph or what part of your

19 conversation with Judge Hellerstein addresses the photograph?

20 MS. LA MORTE: Well, I think the issue that your Honor

21 is hitting on is the 65 document sample that was reviewed by

22 CIA Director Panetta was done categorically in the sense

23 that – there isn't a lot of document-by-document

24 distinguishing in that declaration. What it does is it looks

25 at the common features of all of these documents, including the

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1 photograph, which is operational information, and then links
2 certain harms which are set forth in his declarations, and I
3 can give you the JA cites, from the revelation of that
4 operational information.

5 So, let me pull out the declarations.

6 JUDGE WESLEY: Is this in the classified joint
7 appendix?

8 MS. LA MORTE: I'm going to look at first the -- yes,
9 the unclassified joint appendix.

10 JUDGE WESLEY: The unclassified one? I don't have
11 that one with me. It's on my computer. Just go ahead.

12 MS. LA MORTE: Okay. So, I'm looking at JA 584.

13 JUDGE WESLEY: This is unclassified.

14 MS. LA MORTE: Unclassified. And this in paragraph
15 five is where the CIA director is explaining the 65 sample
16 documents that he is looking at including the photograph.

17 And he says "Drafted during the time frame the
18 interrogations were being conducted, these communications are
19 the most contemporaneous documents the CIA possesses concerning
20 these interrogations. In addition to these top-secret
21 communications, there are also small number of miscellaneous
22 documents which include" etc., etc. "and a photograph. These
23 miscellaneous documents, like the operational communications,
24 contain top-secret operational information concerning the
25 interrogations, and were drafted either contemporaneously with

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1 the interrogations or with a viewing of the videotapes."

2 We know as a matter of fact that this photograph was,
3 quote unquote, drafted contemporaneously with the
4 interrogations because it was taken in October of 2002, which
5 is also revealed in the Vaughn that's attached to -

6 JUDGE CEDARBAUM: The photograph is dated actually on
7 the bottom.

8 MS. LA MORTE: I didn't recall that. So there you go.
9 It is actually itself dated.

10 And then JA 1096, unclassified, the September 2009
11 Panetta declaration. He also states that "These categories of
12 documents contain certain details about conditions of the
13 confinement." And then he links these operational documents,
14 which again, the photograph is included as an operational
15 document, with certain harms that can result from release. And
16 those harms include revealing the government's methods. And
17 that's contained on JA 1087 unclassified.

18 JUDGE CARNEY: Can I interrupt for a second. When you
19 refer to it as an operational document, that's a term of art
20 that's a separate basis for exemption under FOIA?

21 MS. LA MORTE: When we say "operational," we mean what
22 the CIA actually did in the field, how they did it, and to what
23 effect. If you look at the OLC memos, for example, and what's
24 revealed there, we have these general descriptions of EIT. You
25 take the waterboard, you put it in an angle etc., etc. When I

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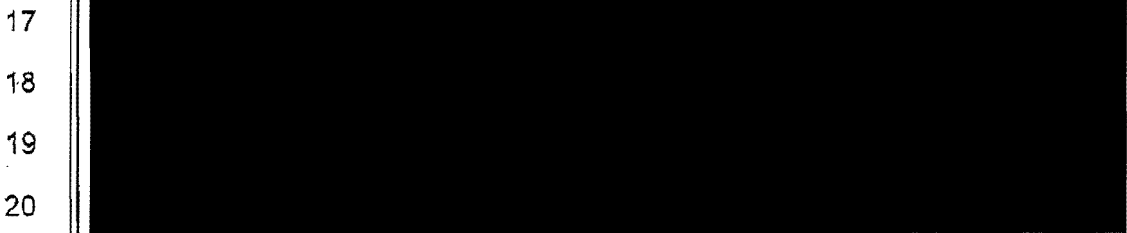
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1 say "operational," what I mean is what actually happened in the
2 field.

3 And the reason that we make that distinction, it is
4 actually a very important distinction, because operational
5 information, which, again, the photograph is included among
6 that, is particularly sensitive information.

7 If our adversaries knew what the CIA actually was able
8 to do in the field and how they actually did it, that provides
9 a certain level of information that's invaluable for an
10 adversary to know. For this reason, countries', including our
11 country's, operational information is considered
12 extraordinarily sensitive.

13 And the concern is that if we are unable to protect
14 what we are considering to be among our most sensitive
15 information, then other countries are not going to trust us to
16 take care of their operational information.



21 If it's shown that we are unable to protect
22 operational information, especially in this case operational
23 information that occurred so close in time to the actual
24 events, then that's going to lead to the demise of
25 relationships with our intelligence partners, our foreign

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1 intelligence partners, as well as a chilling of the willingness
2 of other countries to trust us with their information.

3 JUDGE CEDARBAUM: Is this something you've experienced
4 or is this something you are concerned about?

5 MS. LA MORTE: We are concerned. And I can point the
6 Court to the classified Panetta declaration.

7 JUDGE CEDARBAUM: I understand. Does he give any
8 example, can you give me an example?

9 MS. LA MORTE: Yes. He does give examples.

10 JUDGE CEDARBAUM: [REDACTED]

11 [REDACTED]
12 MS. LA MORTE: Sure. I am going to give the Court a
13 couple of examples.

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 JUDGE WESLEY: I just read it an hour ago.

19 MS. LA MORTE: I can summarize.

20 JUDGE WESLEY: Go ahead and read it.

21 MS. LA MORTE: [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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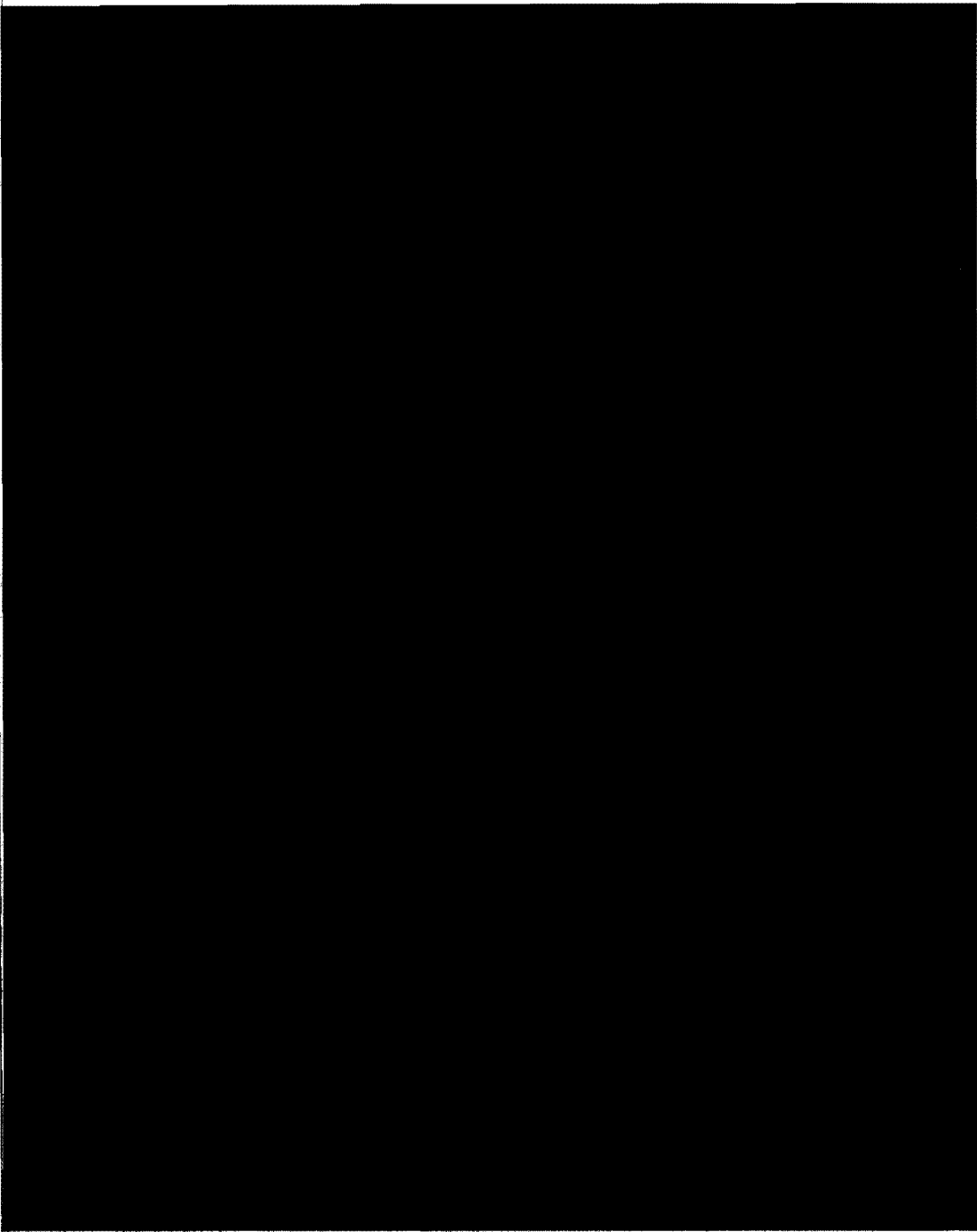
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JUDGE WESLEY: Right.

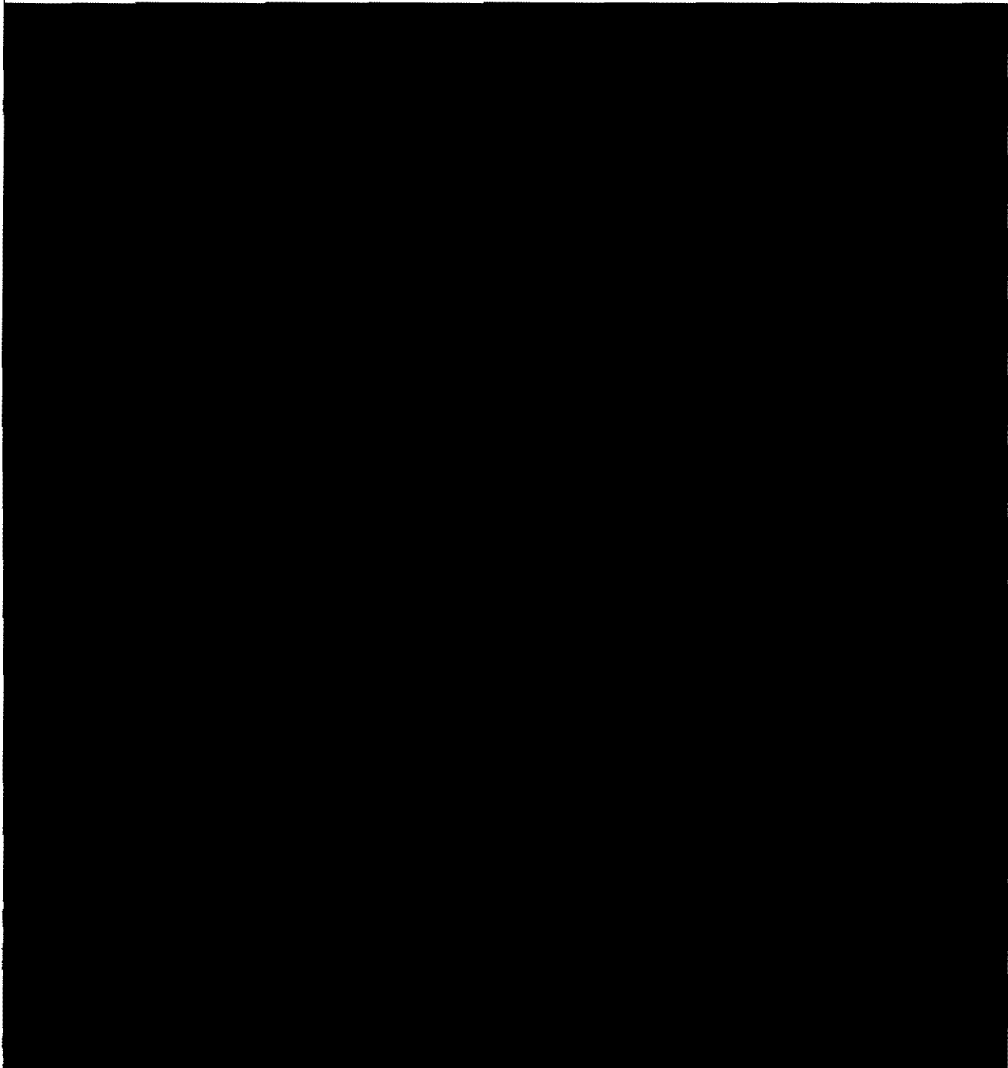
MS. LA MORTE: [REDACTED]



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And one other example I'll point the Court to is in
 the March 2010 Hilton which begins on classified appendix 242.

Let me see if I can find the exact cite. I think it is on CA

248. 



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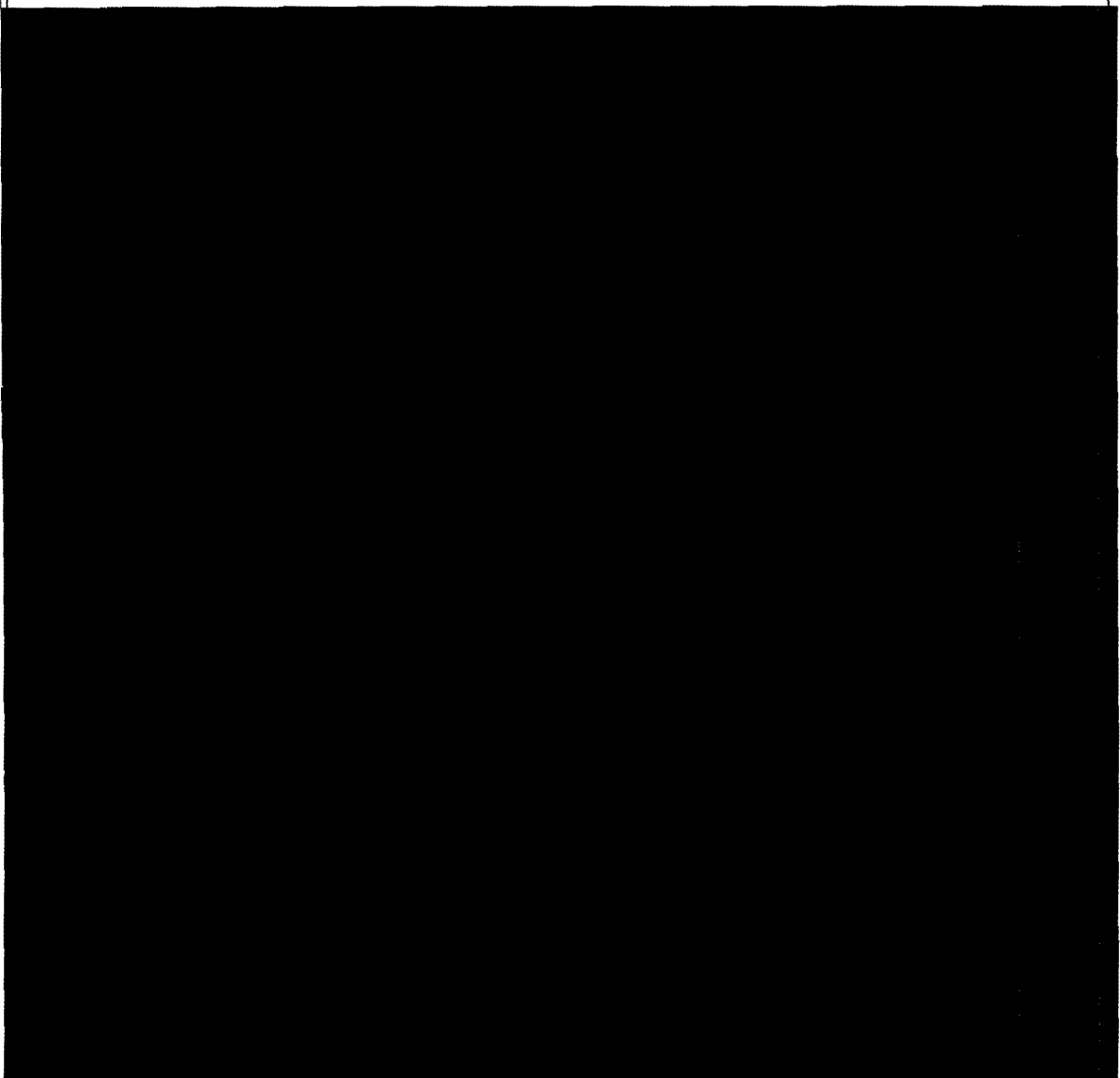
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These are real-world examples that show that what I am saying is not hypothetical, but actually has concrete ramifications in the world.

JUDGE CARNEY: Am I right in understanding that you invoke both Exemption 1 and Exemption 3 to protect the photograph's disclosure?

MS. LA MORTE: Yes, that's correct.

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1 JUDGE WESLEY: Okay.

2 MS. LA MORTE: Can I say one more thing, your Honor?

3 I don't know if your Honor is amenable to this. The one thing

4 I would like to clarify in the public record is, it seemed to

5 be a question what the CIA's position is as to the legality of

6 waterboarding in this case. And the only thing I would say on

7 the public record is we're not conceding or denying it, and our

8 position is it is irrelevant to resolution of the appeal. Just

9 because there seemed to be some confusion. If you don't want

10 me to say that, I won't.

11 JUDGE WESLEY: Your opponent said "conceded." I took

12 exception to that. I didn't see a concession on your part.

13 JUDGE CARNEY: I didn't see a concession.

14 JUDGE CEDARBAUM: In any event, it is your position

15 that even if it is illegal, your position is your position. It

16 is irrelevant. You are saying even if it is illegal, you

17 object to the disclosure.

18 MS. LA MORTE: Correct.

19 JUDGE WESLEY: I certainly saw no concession in the

20 oral argument.

21 MS. LA MORTE: Okay.

22 JUDGE WESLEY: Certainly there may be folks in the

23 public who somehow take that, but I don't know how I can do

24 anything about that.

25 MS. LA MORTE: Sure.

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JUDGE WESLEY: Anything further, Ms. La Morte?

MS. LA MORTE: No, your Honor. Thank you very much.

JUDGE WESLEY: It is now, I have it at 3:25. We will

recess and reassemble in the ceremonial courtroom on the ninth

floor and complete the session.

(Continued on next page)