

Exhibit I

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE JAMES LARSON, MAGISTRATE JUDGE
VIETNAM VETERANS OF AMERICA, ET AL,
PLAINTIFFS,
VS. NO. C-09-0037 CW (JL)
CENTRAL INTELLIGENCE AGENCY, ET AL, PAGES 1 - 45
DEFENDANTS.

SAN FRANCISCO, CALIFORNIA
WEDNESDAY, OCTOBER 27, 2010

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR THE PLAINTIFFS:

MORRISON FOERSTER
425 MARKET STREET
OAKLAND, CALIFORNIA 94105-2482
BY: DANIEL J. VECCHIO, ESQUIRE
TIMOTHY W. BLAKELY, ESQUIRE
GORDON P. ERSPAMER, ESQUIRE

FOR DEFENDANTS:

U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION:
20 MASSACHUSETTS AVENUE, NW
WASHINGTON, DC 20530
BY: KIMBERLY L. HERB, TRIAL ATTORNEY
LILY S. FAREL, TRIAL ATTORNEY
BRIGHAM J. BOWEN, TRIAL ATTORNEY

REPORTED BY: KATHERINE WYATT, CSR, RPR, RMR
OFFICIAL REPORTER, USDC

1 **THE COURT:** ALL RIGHT.

2 **MR. BOWEN:** BRIGHAM BOWEN ON BEHALF OF THE
3 DEFENDANTS.

4 **THE COURT:** ALL RIGHT.

5 OKAY. WE'VE GOT SEVERAL MATTERS ON THIS MORNING. THE
6 FIRST IS THE PROTECTIVE ORDER.

7 I'VE GOT YOUR COMMUNICATION ABOUT WHAT HAD BEEN
8 RESOLVED SINCE THE PAPERS WERE FILED. AND, AS I UNDERSTAND IT,
9 WE'VE GOT ESSENTIALLY THREE ISSUES LEFT. I READ YOUR PAPERS.

10 BASICALLY WHAT I'M GOING TO BE DOING WITH ALL THESE
11 MOTIONS, SINCE THIS IS JUDGE WILKEN'S CASE, WOULD BE ISSUING
12 WRITTEN ORDERS SO THAT YOU'LL HAVE SOMETHING TO REFER BACK TO,
13 AND THEN JUDGE WILKEN WILL UNDERSTAND WHAT OUR THINKING HAS
14 BEEN.

15 SO I'M HAPPY TO HEAR FROM YOU ON ANY OF THESE
16 MATTERS, IF YOU WISH.

17 FIRST DEALING WITH THE PROTECTIVE ORDER, SECTION 7.1
18 (B), 7.3 AND 7.4 AND SECTION 4.3.

19 DO YOU WISH TO BE HEARD?

20 **MR. VECCHIO:** YES, YOUR HONOR. THANK YOU.

21 **THE COURT:** ALL RIGHT.

22 **MR. VECCHIO:** AS WE INDICATED IN THE LETTER
23 YESTERDAY, THE PARTIES CONTINUE TO DISAGREE WITH THE DEFENDANTS
24 PROPOSED 7.3 AND 7.4, WHICH WOULD PLACE ENCRYPTIONS --
25 ENCRYPTION REQUIREMENTS AND LIMIT THE USE OF CERTAIN DESIGNATED

1 MATERIALS THROUGH THE OFFICE OF PLAINTIFFS' COUNSEL HERE IN SAN
2 FRANCISCO.

3 THERE'S NO PRECEDENTS OR JUSTIFICATION FOR THE SCOPE
4 OF THOSE RESTRICTIONS. AND THE PRACTICAL EFFECT IS THAT THEY
5 WOULD RENDER US UNABLE TO MAKE EFFECTIVE USE OF WHATEVER
6 DOCUMENTS ARE SO DESIGNATED.

7 **THE COURT:** WHY IS THAT?

8 **MR. VECCHIO:** WELL, FOR EXAMPLE, ONE OF THE PRIMARY
9 THINGS IS THAT IT WOULD PREVENT PLAINTIFFS' EXPERTS FROM
10 ACCESSING THE DATA ANYWHERE BUT AT PLAINTIFFS' COUNSELS'
11 OFFICES.

12 TO BEGIN WITH, THERE'S VERY FEW EXPERTS IN THESE
13 FIELDS, AS IT IS. THEY AREN'T LOCATED IN CALIFORNIA.

14 **THE COURT:** WHAT KIND OF EXPERTS?

15 **MR. VECCHIO:** EXPERTS, FOR EXAMPLE, THAT WOULD DEAL
16 WITH TOXIC SUBSTANCES, YOU KNOW, THE NATURE OF THE CHEMICALS
17 THAT WERE TESTED AND TEST SUBSTANCES, THINGS OF THIS NATURE.

18 THE IDEA THAT THEY WOULD BE REQUIRED TO FLY OUT TO
19 SAN FRANCISCO IN ORDER TO LOOK AT ANY OF THE DATA IS QUITE
20 SIMPLY UNWORKABLE.

21 **THE COURT:** OKAY.

22 **MS. HERB:** YOUR HONOR, MAY I RESPOND TO THAT POINT?

23 **THE COURT:** HAVE YOU FINISHED WITH THAT ONE?

24 **MR. VECCHIO:** YES, WITH THAT ONE, YOUR HONOR.

25 **THE COURT:** YES, YOU MAY.

1 **MS. HERB:** THE DEFENDANTS HAVE AGREED TO ALLOW
2 PLAINTIFFS TO DISSEMINATE THE INFORMATION IN HARD COPY FORMAT
3 OUTSIDE OF THEIR OFFICES IN SAN FRANCISCO. THE CONCERN WE HAVE
4 IS ABOUT DATA THAT HAS BEEN ENCRYPTED AND IS AVAILABLE ON AN
5 ELECTRONIC FORMAT.

6 BUT IF THEY WANT TO PRINT IT OUT AND SEND IT ANYWHERE
7 IN THE WORLD, THEY ARE WELCOME TO.

8 **THE COURT:** OKAY. WHAT'S YOUR REASONING FOR WANTING
9 TO PROCEED WITH ENCRYPTION?

10 **MS. HERB:** YOUR HONOR, THE DEPARTMENT OF VETERANS'
11 AFFAIRS IS STATUTORILY OBLIGATED TO PROTECT INFORMATION THAT IS
12 KEPT IN AN ELECTRONIC FORMAT.

13 IT'S JUST VERY EASY TO HACK THE INFORMATION, AND THEN
14 DISSEMINATE IT ON A WIDE BASIS. SO THERE IS A STATUTE THAT
15 MANDATES THAT THE DEPARTMENT PROTECTS THAT INFORMATION. IT'S
16 28 -- OR, PARDON ME -- 38 U.S.C. 5725.

17 **THE COURT:** ALL RIGHT.

18 **MS. HERB:** AND THE DEPARTMENT HAS AGREED TO -- WE
19 REALIZE THAT, YOU KNOW, PLAINTIFFS INDICATE THAT IT'S
20 BURDENSOME. AND SO THEY HAVE AGREED TO PROVIDE THE ENCRYPTION
21 KEYS, THE ENCRYPTION SOFTWARE TO MAKE IT EASIER FOR PLAINTIFFS
22 AT PLAINTIFFS' COUNSELS' LOCATION.

23 **THE COURT:** OKAY. DOES THAT TAKE CARE OF YOUR
24 PROBLEM OR NOT?

25 **MR. VECCHIO:** NO, YOUR HONOR, I DON'T BELIEVE IT

1 DOES.

2 FOR ONE THING, WE DON'T HAVE AN IDEA AT THIS POINT AS
3 TO WHAT THIS DATA IS GOING TO BE THAT THE DEPARTMENT OF
4 VETERANS' AFFAIRS CONTEMPLATES PRODUCING IN THIS MANNER.

5 IF IT'S, FOR EXAMPLE, A DATABASE OF INFORMATION, IT
6 COULD BE THOROUGHLY UNWIELDILY TO PRINT UP HARD COPIES. IT MAY
7 BE THAT WE, WITHOUT CONSULTING WITH OUR EXPERTS, ARE NOT ABLE TO
8 DETERMINE IF THERE ARE PARTICULAR PORTIONS OF IT THAT ARE MORE
9 CRITICAL THAN OTHERS.

10 **THE COURT:** WELL, WOULD THAT BE SOMETHING YOU COULD
11 MEET AND CONFER WITH DEFENSE COUNSEL ON IT AS --

12 **MR. VECCHIO:** WELL, YOUR HONOR, WE'VE CONTINUED TO
13 MEET AND CONFER WITH DEFENSE COUNSEL REGARDING THIS ISSUE. AND
14 IT APPEARS THAT WE'RE AT SOMETHING OF A STALEMATE ON THIS ISSUE.

15 **THE COURT:** BUT DID YOU KNOW THAT THEY WERE WILLING
16 TO ALLOW YOU TO USE HARD COPIES BEFORE THIS MORNING?

17 **MR. VECCHIO:** YES, YOUR HONOR. THAT WAS COMMUNICATED
18 TO US.

19 **THE COURT:** OH, OKAY. ALL RIGHT.

20 WHAT ABOUT SECTION 7.1 (B)? DO WE NEED TO DISCUSS
21 THAT?

22 **MR. VECCHIO:** YOUR HONOR, ALL I WOULD SAY ON THAT
23 POINT IS REALLY THAT PLAINTIFFS BELIEVE THAT THE PARTIES SHOULD
24 BE SUBJECT TO RECIPROCAL PROVISIONS IN TERMS OF RESTRICTIONS ON
25 ACCESS TO THE NUMBER OF PEOPLE THAT HAVE ACCESS TO THE DATA.

1 PLAINTIFFS WOULD BE AMENABLE TO NO RESTRICTIONS AT ALL.
2 OTHERWISE, WE BELIEVE THAT THE RESTRICTIONS OUGHT TO GO BOTH
3 WAYS.

4 **THE COURT:** ALL RIGHT.

5 **MS. HERB:** DEFENDANTS BELIEVE THAT WE UNDERSTAND THAT
6 IT'S NOT ENTIRELY RECIPROCAL. WE HAVE AGREED TO ALLOW
7 PLAINTIFFS, THE INDIVIDUALLY NAMED PLAINTIFFS ACCESS TO ANY
8 INFORMATION THAT'S PROVIDED. BUT DEFENDANTS ARE STATUTORILY
9 OBLIGATED BY THE PRIVACY ACT AND HIPPA, TO CONTROL THE
10 INFORMATION OR PROTECT THE INFORMATION.

11 WE'RE WILLING TO DO THAT PURSUANT TO A PROTECTIVE
12 ORDER AND ALLOW NO RESTRICTIONS WITHIN PLAINTIFFS' COUNSEL AND
13 NO RESTRICTION TO THE NAMED PLAINTIFFS.

14 BUT IT'S NOT CLEAR TO US HOW THE ORGANIZATIONAL
15 PLAINTIFFS ARE GOING TO BE AIDING IN THE FACT-FINDING MISSION
16 AND THE PURPOSES FOR WHICH THEY ARE GOING TO BE USING THE
17 INFORMATION.

18 WE'VE REQUESTED INFORMATION ON THAT AND HAVEN'T
19 RECEIVED IT. SO IN LIEU OF THAT WE THINK THAT THERE SHOULD BE
20 REASONABLE RESTRICTIONS ON AT LEAST THE ORGANIZATIONAL
21 PLAINTIFFS.

22 **THE COURT:** OKAY.

23 ANY REPLY?

24 **MR. VECCHIO:** WELL, YOUR HONOR, WE'VE AGREED WE'RE
25 WILLING TO LIMIT THE NUMBER OF PERSONS THAT THE ORGANIZATIONAL

1 PLAINTIFFS THAT HAVE ACCESS TO THE DATA. BUT WE BELIEVE IF WE
2 DO SO, THEN SIMILAR RECIPROCAL RESTRICTIONS SHOULD APPLY TO THE
3 DEFENDANT AGENCY.

4 **MS. HERB:** THE PROBLEM WITH THE AGENCIES IS IF THEY
5 PROVIDE ANY INFORMATION TO US, I THINK ONE OF THE ISSUES WHERE
6 THIS MAY COME UP IS BRUCE PRICE. HE'S ONE OF THE NAMED
7 PLAINTIFFS, AND PLAINTIFFS INDICATE THAT THEY BELIEVE HE HAS A
8 SEPTAL IMPLANT.

9 DEFENDANTS HAVE SEARCHED FOR INFORMATION ON THAT AND
10 HAVEN'T LOCATED ANYTHING. SO IF THEY PRODUCE INFORMATION THAT
11 INDICATES THAT HE MAY HAVE A SEPTAL IMPLANT, WE WOULD HAVE TO
12 PROVIDE THAT TO AGENCY COUNSEL.

13 AND THEN, IT'S FAIRLY COMPARTMENTALIZED. SO A NUMBER
14 OF DIFFERENT AGENCIES WITHIN DOD TO TRY TO ASCERTAIN WHETHER OR
15 NOT MR. PRICE DID, IN FACT, HAVE A SEPTAL IMPLANT.

16 SO A RESTRICTION ON THE NUMBER OF PEOPLE ISN'T REALLY
17 POSSIBLE FOR DOD, BECAUSE IF WE'RE GOING TO ENGAGE IN
18 FACT-FINDING, WE WILL HAVE TO DO THAT THROUGH A NUMBER OF
19 DIFFERENT ENTITIES.

20 **MR. VECCHIO:** IF I MAY, YOUR HONOR?

21 **THE COURT:** YOU MAY.

22 **MR. VECCHIO:** JUST IN RESPONSE TO THAT POINT, I WOULD
23 NOTE THAT THE PROTECTIVE ORDER WOULD PROVIDE DEFENDANTS THE
24 ABILITY TO DESIGNATE WITHIN -- EXPERTS WITHIN THE DEPARTMENTS
25 WHO WOULD HAVE ACCESS TO THE DATA BEYOND ANY RESTRICTIONS HERE.

1 SO THAT THEY ALREADY HAVE THE ABILITY TO DO THAT TO THE EXTENT
2 THAT THEY NEED THAT SORT OF ACCESS.

3 **MS. HERB:** I MEAN, MUCH HAS BEEN MADE IN THIS CASE
4 ABOUT NOT LIMITING THE ABILITY TO ENGAGE IN FACT-FINDING. AND I
5 THINK THERE'S CLEAR PARALLELS HERE BETWEEN PLAINTIFFS' COUNSEL
6 AND THE DEFENDANTS WHO ARE ENGAGING IN THE DOCUMENT SEARCHES
7 HERE AND OUR AGENCY COUNSEL.

8 **THE COURT:** ALL RIGHT. WHAT ABOUT SECTION 4.3? ANY
9 DISCUSSION ABOUT THAT?

10 **MR. VECCHIO:** YOUR HONOR, OUR PRIMARY CONCERN HERE
11 IS, AS WE SAY IN THE PAPERS, IS WITH THIRD PARTIES. WE
12 ANTICIPATE THAT THERE WILL BE THIRD PARTIES WHO WILL PRODUCE
13 DOCUMENTS IN THIS LITIGATION AND WILL WANT TO AVAIL THEMSELVES
14 OF A PROTECTIVE ORDER.

15 AND WE FEEL THAT USING THE NONSTANDARD LANGUAGE OF
16 "COVERED" COULD CAUSE US SOME BUMPS IN THAT ROAD IN TERMS OF,
17 YOU KNOW, MOST PROTECTIVE ORDERS, THE MODEL PROTECTIVE ORDER
18 THEY ALL SAY "CONFIDENTIAL."

19 IT'S QUITE CLEAR. THE STAMP IS AT THE BOTTOM OF THE
20 DOCUMENT. AND GIVEN THE DELAYS WE'VE ALREADY RUN INTO IN
21 DISCOVERY IN THIS CASE, WE'RE JUST TRYING TO HEAD OFF ANY
22 POTENTIAL PROBLEMS WITH THIRD PARTIES DOWN THE ROAD.

23 **MS. HERB:** WE DON'T THINK THAT'S A CONCERN THAT
24 WARRANTS A LOT OF ATTENTION. WE THINK THAT, ONE, THE DEFINITION
25 WILL BE COVERED IN THE PROTECTIVE ORDER ITSELF.

1 I THINK WHAT WE'RE WORRIED ABOUT IS FORMERLY
2 CLASSIFIED INFORMATION. A LOT OF THE DOCUMENTS THAT WILL BE
3 PRODUCED HAVE A "CLASSIFIED" OR A "CONFIDENTIAL" DESIGNATION ON
4 THEM. SO WE THINK THERE'S ACTUALLY AN OPPORTUNITY FOR HERE FOR
5 SOME CONFUSION BETWEEN DOCUMENTS THAT ARE MARKED AS
6 "CONFIDENTIAL" PURSUANT TO A PROTECTIVE ORDER VERSUS MARKED AS
7 "CONFIDENTIAL" BECAUSE THEY USED TO BE CLASSIFIED.

8 **THE COURT:** ALL RIGHT. OKAY.

9 WHERE DOES "CONFIDENTIAL" APPEAR ON THE LATTER OF
10 CLASSIFICATION? IS THAT NEAR THE BOTTOM OR THE TOP?

11 **MS. HERB:** IT DEPENDS ON THE DOCUMENT, YOUR HONOR.
12 USUALLY IT APPEARS ON THE TOP, BUT SOME DOCUMENTS I HAVE SEEN IT
13 ON THE BOTTOM.

14 **THE COURT:** OKAY. ANYTHING ELSE ABOUT THE PROTECTIVE
15 ORDER?

16 **MR. VECCHIO:** NO, YOUR HONOR.

17 **THE COURT:** OKAY. ARE THERE ANY CASES THAT INTERPRET
18 THE STATUTE WHICH YOU CITED, TITLE 38, SECTION 5725?

19 **MS. HERB:** NOT THAT I KNOW OF, YOUR HONOR.

20 **THE COURT:** OKAY. ALL RIGHT. I CAN DEAL WITH THOSE.
21 NOW, LET'S MOVE ON TO THE 30 (B) (6) DEPOSITIONS.

22 IS THAT YOURS, TOO, MR. VECCHIO?

23 **MR. VECCHIO:** YES, YOUR HONOR.

24 **THE COURT:** DO YOU WISH TO BE HEARD?

25 **MR. VECCHIO:** YES, YOUR HONOR. FOR THE MOST PART, I

1 BELIEVE PLAINTIFFS ARE PREPARED TO SUBMIT ON THE PAPERS ON THE
2 30 (B) (6) MOTION. BUT I WOULD NOTE THAT THERE ARE CERTAIN
3 THEMATIC COMPLAINTS THAT APPLY TO THE 30 (B) (6) MOTION THAT
4 ALSO APPLY GENERALLY TO ALL OF THE MOTIONS.

5 THE PARTIES HAVE ARGUED ABOUT THE SCOPE OF THE CASE
6 IN THEIR PAPERS, INCLUDING THE 30 (B) (6) MOTIONS. BUT UNDER
7 EITHER PARTIES' CONCEPTIONS OF THAT THERE ARE A COUPLE OF CORE
8 ISSUES AT THE HEART OF IT.

9 AND ONE OF THEM IS DEFENDANTS' LEGAL DUTIES TO NOTIFY
10 THE TEST PARTICIPANTS OF THE HEALTH EFFECTS, POSSIBLE HEALTH
11 EFFECTS OF THE SUBSTANCES THAT WERE TESTED ON THEM.

12 WE BELIEVE THAT THESE 30 (B) (6) TOPICS, MANY OF THEM
13 ARE DIRECTLY RELEVANT TO THAT ISSUE. PLAINTIFFS HAVE NO INTENT
14 TO SEEK DEPOSITION QUESTIONING THAT DOESN'T ADVANCE THEIR CASE.
15 AND WE BELIEVE THAT 30 (B) (6) WITNESSES ARE GOING TO BE CRUCIAL
16 TO THIS CASE GIVEN THAT, YOU KNOW, AS HAS BEEN MADE ABUNDANTLY
17 CLEAR, IT'S A VERY COMPLEX CASE. THE FACTS STRETCH BACK OVER 40
18 YEARS. MANY OF THE PERCIPIENT WITNESSES ARE DEAD, MANY OF THE
19 DOCUMENTS ARE CRYPTIC.

20 **THE COURT:** WE'RE TALKING ABOUT THE PERIOD 1950 TO
21 1975?

22 **MR. VECCHIO:** THAT'S APPROXIMATELY RIGHT.

23 **THE COURT:** OKAY. IT DOESN'T GO BACK BEYOND THAT?

24 **MR. VECCHIO:** IT ACTUALLY DOES. THERE ARE ISSUES
25 PRIOR TO THAT DATING BACK TO THE '40'S THAT WOULD POTENTIALLY BE

1 RELEVANT HERE, AS WELL AS --

2 **THE COURT:** THE REASON I ASK IS THIS: BY A GREAT,
3 OBSCURE COINCIDENCE MY FATHER WAS AT EDGEWOOD ARSENAL IN 1943 OR
4 SO. AND HE WAS A CHEMIST. SO IF THE NAME LESLIE LARSON TURNS
5 UP ANYWHERE, I WANT YOU TO NOTIFY ME IMMEDIATELY.

6 BUT I'LL SAVE YOU THE TROUBLE OF NOTIFYING HIM ABOUT
7 ANYTHING, BECAUSE HE'S DECEASED. BUT I DID FIND THAT KIND OF
8 CURIOUS.

9 ALL RIGHT?

10 **MR. VECCHIO:** INDEED.

11 **THE COURT:** OKAY. COUNSEL, ANYTHING ON THE 30 (B) (6)
12 ISSUES?

13 **MS. HERB:** WE AGREE WITH MR. VECCHIO THAT THERE
14 ARE -- A LOT OF THE DISPUTES THAT ARE UNDERLYING THE 30 (B) (6)
15 MOTION ARE THE SAME ISSUES THAT UNDERLIE THE RFP'S AND THE
16 DEFENDANTS' MOTION FOR A PROTECTIVE ORDER LIMITING DISCOVERY.

17 I THINK THERE'S SORT OF A CENTRAL DISPUTE AS TO THE
18 SCOPE OF DISCOVERY IN THE WAKE OF JUDGE WILKEN'S ORDER --

19 **THE COURT:** RIGHT.

20 **MS. HERB:** -- ON THE MOTION TO DISMISS. AND I THINK
21 WE WOULD LIKE SOME CLARITY ON THAT. I THINK, BECAUSE WE ARE
22 DEALING WITH VERY OLD DOCUMENTS HERE, AND NO LIVING WITNESSES,
23 WE BELIEVE THAT WE HAVE PROVIDED 13 INDIVIDUALS TO OFFER 30 (B)
24 (6) TESTIMONY. BUT 86 TOPICS, WHEN YOU'RE LOOKING AT A CASE
25 THAT IS LARGELY A DOCUMENT-BASED CASE, 30 (B) (6) TESTIMONY IS

1 NOT GOING TO BE OF PARTICULAR USE.

2 WE HAVE -- YOU KNOW, I THINK THE PLAINTIFFS HAVE
3 POINTED OUT THAT ON THE FACE OF SOME OF THE DOCUMENTS THERE ARE
4 CONTRADICTIONS. THE DEFENDANTS HAVE ACKNOWLEDGED THOSE
5 CONTRADICTIONS. UNFORTUNATELY, LIVING TESTIMONY ISN'T
6 NECESSARILY GOING TO RESOLVE THEM.

7 I THINK OUR DEONENTS WOULD LIKELY SAY ONE DOCUMENT
8 SAYS THIS, A SECOND DOCUMENT SAYS THAT. THEY DON'T HAVE THE
9 ABILITY TO SORT OF RESOLVE THAT BECAUSE THEY ARE LOOKING AT THE
10 SAME DOCUMENTS WE'VE PROVIDED TO PLAINTIFFS.

11 **THE COURT:** ALL RIGHT. WELL, ONE THING THAT'S
12 PERFECTLY CLEAR IS THAT THIS IS A VERY LARGE CASE. THERE IS A
13 HUGE AMOUNT OF MATERIAL THAT COULD BE SOUGHT AND A LARGE AMOUNT
14 THAT COULD BE OBTAINED.

15 AND I THINK WHAT YOU'RE GOING TO HAVE TO DO ON A
16 ROLLING BASIS IS -- JUST A GENERAL OBSERVATION -- BUT IT'S GOING
17 TO BE PART OF OUR SUGGESTIONS IN CONNECTION WITH AT LEAST ONE OF
18 THESE MOTIONS, PARTICULARLY ON THE PLAINTIFFS' SIDE.

19 YOU NEED TO REEVALUATE WHAT YOU NEED CONSTANTLY AS
20 PRODUCTION ROLLS FORWARD IN THIS CASE, AND TRY TO CUT IT BACK AS
21 MUCH AS YOU CAN.

22 I UNDERSTAND THE APPROACH THAT YOU'RE TAKING, BUT YOU
23 HAVE TO RECOGNIZE THE LIMITATIONS ON THE GOVERNMENT'S SIDE, AS
24 WELL, AND THE LIMITATIONS ON THE USEFULNESS OF SOME OF THIS
25 INFORMATION.

1 SO TO THE EXTENT THAT YOU CAN REEVALUATE WHAT YOU ARE
2 REQUESTING AS YOU PROCEED, THAT WOULD CERTAINLY BE APPRECIATED
3 BY ALL SIDES, NOT LEAST OF WHICH IS OURS.

4 I HAVE THIS MUCH PAPER ON THESE FOUR MOTIONS TODAY
5 (INDICATING). AND GIVEN THE LEVEL OF THE DISPUTES, I DON'T
6 THINK THAT'S CALLED FOR.

7 SO IT'S JUST A WORD TO THE WISE AT THIS POINT. I'M
8 NOT PREPARED TO HAMMER ANYBODY RIGHT NOW, BECAUSE I THINK THAT
9 YOU'RE JUST AT THE EARLY STAGES OF THE CASE, AND IT'S GOING TO
10 BE A DIFFICULT ONE. AND I RECOGNIZE THAT AND RESPECT WHAT
11 YOU'RE TRYING TO DO. BUT JUST KEEP THAT IN MIND.

12 ONE ISSUE I DO HAVE ON THIS PARTICULAR MOTION IS
13 WHERE THERE'S CLAIMS OF STATE'S SECRETS PRIVILEGE, IT APPEARS TO
14 ME THAT YOU HAVEN'T REALLY SUFFICIENTLY SPELLED THOSE OUT. SO
15 TO THE EXTENT THAT ANY STATE'S SECRETS PRIVILEGE PROTECTION
16 PERTAIN TO ANY OF THESE REQUESTS, IT WILL BE PART OF OUR ORDER
17 THAT YOU MAKE THOSE MORE SPECIFIC.

18 **MS. HERB:** YOUR HONOR, IF I MAY ON THAT POINT, I WANT
19 TO CITE YOU TO A CASE THAT WE CITED IN OUR BRIEF. IT'S MOHAMED
20 VERSUS JEPPESEN DATAPLAN. I THINK THE CONCERN WITH THE STATE'S
21 SECRETS ISSUE -- AND THIS HAS BEEN ARTICULATED BY OTHER
22 COURTS -- IS THAT IT'S A PRETTY CUMBERSOME PROCESS THAT INVOLVES
23 PRETTY WEIGHTY DECLARATIONS.

24 WE USUALLY HAVE TO GET THE APPROVAL OF THE ATTORNEY
25 GENERAL TO INVOKE THE STATE'S SECRETS PRIVILEGE. SO CASE LAW

1 ONT HIS ISSUE HAS SAID WHEN THERE IS A QUESTION THAT MAY BE
2 ANSWERED AND ADDRESSED PRIOR TO A STATE'S SECRETS ASSERTION, A
3 COURT SHOULD DO SO.

4 AND HERE, I THINK A LOT OF THE DOCUMENTS THAT WOULD
5 BE COVERED BY THE STATE'S SECRETS PRIVILEGE, WE'RE CLAIMING ARE
6 NOT RELEVANT, FOR INSTANCE, A LOT OF THE MKULTRA DOCUMENTS.

7 SO WE WOULD PREFER THAT THE COURT RESOLVE THOSE
8 ISSUES, BECAUSE GETTING A STATE'S SECRETS DECLARATION, GIVEN THE
9 BREADTH OF THE DOCUMENTS THAT ARE AVAILABLE IN THIS CASE AND
10 WHICH COULD BE IMPLICATED --

11 **THE COURT:** ALL RIGHT.

12 **MS. HERB:** -- IT WOULD BE A PRETTY SUBSTANTIAL LIST.

13 **THE COURT:** ALL RIGHT. UNDERSTOOD.

14 **MR. VECCHIO:** YOUR HONOR, IF I MAY, I'M NOT QUITE
15 CERTAIN I UNDERSTAND DEFENDANTS' OBJECTION. WE'RE TALKING ABOUT
16 30 (B) (6) DESIGNEES?

17 **THE COURT:** RIGHT.

18 **MR. VECCHIO:** AND ASSERTING THE STATE'S SECRETS
19 PRIVILEGE OVER DOCUMENTS SEEMS TO ME IS A SEPARATE ISSUE. I
20 WOULD THINK THAT, YOU KNOW, IF, YOU KNOW, DESIGNEES --

21 **THE COURT:** DID YOU INTEND THAT COMMENT TO COVER 30
22 (B) (6)?

23 **MS. HERB:** YES, BECAUSE SOME OF THE ITEMS THAT THEY
24 HAVE ASKED FOR ORAL TESTIMONY ON IS CONCERNING, FOR INSTANCE,
25 THE NAMES AND IDENTITIES OF INDIVIDUALS --

1 **THE COURT:** ALL RIGHT.

2 **MS. HERB:** -- WHICH MAY BE PROTECTED --

3 **THE COURT:** OKAY.

4 **MS. HERB:** -- THAT MAY BE CLASSIFIED.

5 **THE COURT:** ALL RIGHT. WELL, THIS PARTICULAR MOTION
6 WILL BE GRANTED IN PART AND DENIED IN PART. BUT AS I SAID,
7 YOU'LL GET A WRITTEN MEMO SO YOU HAVE A ROAD MAP.

8 OKAY. LET'S MOVE ON TO THE THIRD MOTION, WHICH IS
9 PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS.

10 AGAIN, I'VE READ YOUR PAPERS, AND I'LL BE HAPPY TO
11 HEAR FROM EITHER SIDE.

12 **MR. ERSPAMER:** OKAY. YOUR HONOR, THIS IS MR.
13 ERSPAMER, AND I WOULD LIKE TO TRY TO SYNTHESIZE SOME OF THESE
14 ISSUES AND CRYSTALLIZE THEM FOR THE COURT.

15 I THINK THERE'S A CERTAIN PATTERN IN THE DISCOVERY IN
16 THIS CASE AND THE RESPONSES TO THE DISCOVERY. BUT WITH RESPECT
17 TO THE DOCUMENT REQUESTS WE HAVE TWO FUNDAMENTAL PROBLEMS WITH
18 THE SEARCHES.

19 THE FIRST IS THAT DEFENDANTS, INSTEAD OF WORKING FROM
20 THE FACE OF THE REQUESTS, SUPERIMPOSE THEIR OWN VIEW OF
21 RELEVANCE ON THE CASE AND ONLY LOOK FOR THE DOCUMENTS THAT THEY
22 DEEMED RELEVANT.

23 THERE WAS NOT -- THERE WAS NEVER A GENERAL SEARCH
24 DONE THAT WAS ADEQUATE IN ANY RESPECT. AND IN THEIR OPPOSITION,
25 THEY INTRODUCE THE IDEA OF ONGOING SEARCHES. YOU KNOW, THESE

1 DOCUMENT REQUESTS WERE SERVED OVER A YEAR AGO, THE FIRST
2 DOCUMENT REQUEST. AND NO DOCUMENTS -- ESSENTIALLY NO DOCUMENTS
3 HAVE BEEN PRODUCED SINCE THE ORIGINAL PRODUCTION.

4 SO WE HAVE A VERY, VERY FUNDAMENTAL ISSUE WITH THE --
5 **THE COURT:** ORIGINAL 14,000?

6 **MR. ERSPAMER:** WELL, SINCE THEN. THERE HAVE BEEN A
7 FEW DOCUMENTS PRODUCED OFF THE PRIVILEGE LOG, YOUR HONOR, BUT
8 ESSENTIALLY NOTHING SINCE THAT FIRST TIME.

9 AND WE DISAGREE WITH THE PREMISES BEHIND THE
10 RELEVANCE OBJECTION. THESE PREMISES, SUCH AS THAT THE CIA WAS
11 ONLY INVOLVED IN THE OFTEN PROGRAM ARE JUST INCORRECT, YOUR
12 HONOR. AND WE HAVE DOCUMENTS IN OUR PAPERS TO SHOW THAT THE
13 SCOPE OF THE CIA'S INVOLVEMENT WAS ACTUALLY QUITE BROADER THAN
14 THAT.

15 AND YOU SEE A LOT OF LANGUAGE, YOUR HONOR, IN THE
16 PAPERS, IN THE DECLARATIONS THAT I WOULD CALL:

17 "SPECIFIC DENIALS: WE DID NOT FINANCE THIS
18 PROGRAM."

19 WELL, AS A MATTER OF FACT, IT'S UNDISPUTED THAT THE
20 CIA'S INVOLVEMENT WAS ALMOST ALWAYS INDIRECT IN THESE PROGRAMS
21 BECAUSE THEY USED FRONT ORGANIZATIONS, SO-CALLED "CUTOUTS" TO
22 FINANCE THE ACTIVITIES: FOUNDATIONS, VARIOUS NAMES, MADE-UP
23 NAMES, WHO WOULD OFTEN CONTRACT WITH THE UNIVERSITIES OR THE
24 HOSPITALS WHERE A LOT OF THE RESEARCH WAS DONE.

25 AND OFTEN WITH CONTRACTS BACK FROM THOSE INSTITUTIONS

1 WITH THE ARMY, SO TO COMPLETE THAT LOOP.

2 AND SO IT'S NOT A WORLD OF COMPARTMENT -- TO BORROW
3 COUNSEL'S WORDING -- IT'S NOT A COMPARTMENTALIZED WORLD WE'RE
4 DEALING WITH.

5 IT'S A WORLD OF STEALTH, HIDE YOUR TRACKS, AND GIVE
6 THE AGENCY PLAUSIBLE DENIABILITY.

7 NOW, I DO WANT TO EMPHASIZE THE NUMERICS OF THIS
8 CASE. GIVEN THE BREADTH OF THE PROGRAMS WE'RE TALKING ABOUT,
9 THE TENS OF THOUSANDS OF PARTICIPANTS. WE HAVE TWO MAJOR SITES,
10 BUT WE HAVE 13 ANCILLARY SITES ACROSS THE COUNTRY, SUCH AS ARMY
11 BASES, MOST OF WHICH WERE NEVER SEARCHED.

12 YOUR HONOR, AND WE HAVE A PERIOD OF TIME OF 34 YEARS
13 WITH MASSIVE PROGRAMS THAT THEY SPENT HUNDREDS OF MILLIONS OF
14 DOLLARS ON.

15 IT IS NO SURPRISE THAT THERE ARE GOING TO BE A LOT OF
16 DOCUMENTS. BUT WITH RESPECT TO THE SEARCH ISSUE, I THINK THE
17 OFTEN PROGRAM IS VERY IMPORTANT.

18 AND THIS MAY BE A DETAIL THAT MAY HAVE BEEN LOST IN
19 THE PAPERWORK. BUT OFTEN IS THE ONE PROGRAM --

20 **THE COURT:** OFTEN?

21 **MR. ERSPAMER:** O-F-T-E-N, ALL CAPS, OFTEN.

22 PROJECT OFTEN IS THE ONE PROGRAM WHERE THE CIA ADMITS
23 IT WAS DIRECTLY INVOLVED, OKAY?

24 AND IF YOU LOOK AT THE CAMERESI SUPPLEMENTAL
25 DECLARATION, WE WERE COMPLAINING ABOUT THE 11 BOXES OF DOCUMENTS

1 THAT WERE SENT TO STORAGE WHERE ONLY THE DIRECTOR OF THE CIA AND
2 HIS TOP DEPUTIES COULD GET ACCESS TO THEM. WHAT HAPPENED TO
3 THOSE 11 BOXES OF DOCUMENTS? PROBABLY 25,000 PAGES.

4 WELL, MS. CAMERESI SAYS SHE WENT THROUGH THE 11 BOXES
5 OF DOCUMENTS, AND NONE OF THEM WERE RELEVANT. WE FIND THAT TO BE
6 ESSENTIALLY UNBELIEVABLE IN A CASE THAT IS ONE OF THE KEY
7 PROGRAMS IS OFTEN. THE CIA HAS ADMITTED ITS INVOLVEMENT IN
8 OFTEN.

9 THERE ARE DOCUMENTS THAT DEMONSTRATE THAT. WE HAVE
10 RECEIVED ONLY A VERY SMALL FOLDER OF DOCUMENTS ON OFTEN THAT
11 WERE ATTACHED TO THE INITIAL DISCLOSURES. IT'S ABOUT
12 THREE-QUARTERS OF AN INCH STACK. AND WE HAVE 11 BOXES THAT THEY
13 CLAIM ARE IRRELEVANT, AND NONE OF WHICH APPEAR ON THE PRIVILEGE
14 LOG.

15 I THINK THAT GIVES THE COURT A YARDSTICK FOR THE
16 PROCESS THAT THE DEFENDANTS ARE GOING THROUGH ON THESE DOCUMENT
17 REQUESTS. AND ANOTHER YARDSTICK IS JUST THE PUNY -- IF I CAN SAY
18 THAT, USE THAT WORD, YOUR HONOR -- THE PUNY SIZE OF THE
19 PRODUCTION.

20 WE HAVE A VERY, VERY SMALL PRODUCTION, MOST OF WHICH
21 IS ACCOUNTED FOR BY THE FOIA PUBLIC DOMAIN DOCUMENTS AND THE
22 FILES OF THE INDIVIDUAL PLAINTIFFS. AND WE ALSO HAVE --

23 **THE COURT:** HOW DO YOU KNOW THAT, BY THE WAY?

24 **MR. ERSPAMER:** BECAUSE WE WENT THROUGH THE DOCUMENTS,
25 AND WE HAVE IDENTIFIED THE ONES THAT ARE THE PUBLIC DOMAIN

1 DOCUMENTS THAT WERE PRODUCED IN RESPONSE TO FOIA REQUESTS.

2 **THE COURT:** BY YOU OR BY SOMEBODY ELSE?

3 **MR. ERSPAMER:** SOME PEOPLE IN OUR OFFICE DID THAT,
4 YES. YES. AND THEY WENT THROUGH --

5 **THE COURT:** ALL RIGHT.

6 **MR. ERSPAMER:** AND, YOUR HONOR, I'M FAMILIAR -- WELL,
7 ANOTHER REASON, WHICH I AM FAMILIAR WITH, IS THAT WE OBTAINED
8 SOME DOCUMENTS FROM OTHER SOURCES THAT HAVE NEVER BEEN PRODUCED
9 IN THIS CASE BY THE DEFENDANTS. QUITE A FEW.

10 AND SO WE HAVE A HANDLE ON THIS. SO ONE THIRD-PARTY
11 WITNESS, THE ONE WHO IS DEPOSED SO FAR, DR. KETCHUM, WHO HEADED
12 UP EDGEWOOD, HIMSELF PRODUCED OUT OF HIS OWN FILES THAT HE TOOK
13 WITH HIM AS MANY DOCUMENTS AS THEY HAVE PRODUCED IN THIS CASE.

14 SO THEY HAVE WITHHELD LARGE CATEGORIES OF DOCUMENTS.

15 NOW, ONE OF THE BIG ISSUES IS THEIR VIEW OF RELEVANCE
16 IN THE CASE. AND IT IS TRUE THAT CIVILIANS WERE USED IN THESE
17 PROGRAMS AS GUINEA PIGS, JUST ALONGSIDE THE SOLDIERS. I MEAN,
18 THERE WERE PRISONERS. THERE WERE NURSING HOME PATIENTS. THERE
19 WERE HOSPITAL PATIENTS. THERE WERE STUDENTS USED IN THESE
20 PROGRAMS AS GUINEA PIGS, ALTHOUGH THE PREDOMINATE SOURCE OF
21 MATERIAL WERE ARMY SOLDIERS.

22 REGARDLESS OF WHO WAS USED, IF WE'RE TALKING ABOUT
23 THE SAME SET OF SUBSTANCES, BY THE WAY WHICH NUMBER IN THE
24 HUNDREDS, THE HEALTH EFFECTS CAN BE SHOWN IN CIVILIANS OR
25 PRISONERS JUST THE SAME WAY AS THEY CAN WITH SOLDIERS.

1 AND THE HEALTH EFFECTS IN THIS CASE, AND PARTICULARLY
2 THE APA CLAIMS, THERE IS A CONTINUING DUTY, WHEN NEW KNOWLEDGE
3 IS ACQUIRED, TO IMPART THAT AND NOTIFY THE VICTIMS.

4 THIS IS ACKNOWLEDGED NOT ONLY IN THE CASE LAW, IT'S
5 ACKNOWLEDGED IN ONE OF THE ATTACHMENTS TO THE COMPLAINT PREPARED
6 BY THE DEPARTMENT OF JUSTICE.

7 IT SAYS THAT RIGHT IN THE REGULATIONS THEMSELVES, THE
8 ARMY REGULATIONS, DATING BACK TO THE VERY BEGINNING OF THESE IN
9 19 -- RIGHT AFTER THE WAR IN 1953, WHEN THEY CODIFIED THE
10 NUREMBERG LAW BY REGULATIONS THE DUTY TO NOTIFY AND WARN AND
11 TREAT VICTIMS OF THESE EXPERIMENTS WAS EXPRESSLY ACKNOWLEDGED.

12 SO THE VIEW, THE CRIMPED VIEW OF RELEVANCE -- AND
13 IT'S REALLY BASED ON AN ERRONEOUS ASSUMPTION, YOUR HONOR.

14 **THE COURT:** DO THEY PURPORT TO LIMIT RELEVANCE TO
15 BASED ON SOMETHING THAT JUDGE WILKEN HAS SAID IN THE COURSE OF
16 NARROWING THE SCOPE OF THE CASE OR --

17 **MR. ERSPAMER:** OKAY. WELL, I DON'T BELIEVE JUDGE
18 WILKEN HAS NARROWED THE SCOPE OF THE CASE EXCEPT BY DISMISSING
19 TWO TYPES OF DECLARATORY RELIEF.

20 THE ENTIRE COMPLAINT REMAINS -- ALL THE FACTUAL
21 ALLEGATIONS REMAIN IN THE COMPLAINT. SHE ELIMINATED A CLAIM --
22 TWO CLAIMS FOR DECLARATORY RELIEF. BUT THEY DO NOT AFFECT IN
23 ANY WAY THE SCOPE OF THE RELIEF SOUGHT BY PLAINTIFFS.

24 AND THERE ARE A LIMITED NUMBER OF, LIKE, BIG PICTURE
25 ISSUES IN THE CASE. HEALTHCARE -- I MEAN, HEALTH EFFECTS IS ONE

1 OF THE BIGGEST.

2 WE HAVE TOXIC SUBSTANCES USED HERE RANGING FROM
3 PESTICIDES, NERVE GAS, HUNDREDS OF DIFFERENT TYPES OF DRUGS AND
4 ANALOGUES OF DRUGS, PSILOCYBIN, LSD, A LONG LAUNDRY LIST OF
5 DRUGS. WE HAVE ALL KINDS OF DIFFERENT TYPES OF CHEMICALS THAT
6 WERE ADMINISTERED.

7 AND WE ALSO HAVE A MULTITUDE OF DIFFERENT TYPES OF
8 ADMINISTRATION OF EACH OF THOSE DRUGS. I MEAN, SOME OF THEM WERE
9 IN GAS CHAMBERS. SOME OF THEM WERE INJECTED INTO THE BODY. SOME
10 OF THEM WERE APPLIED TO THE SKIN. SO WE HAVE A NUMBER OF
11 DIFFERENT ISSUES.

12 BUT WITH RESPECT TO THE QUESTION OF THE OVERALL SCOPE
13 OF THE CASE, JUDGE WILKEN'S ORDER DID NOT LIMIT THE SCOPE, THE
14 FACTUAL SCOPE OF THE CASE IN ANY WAY.

15 **THE COURT:** I SEE.

16 **MR. ERSPAMER:** AND THE NATURE OF THE ISSUES TO BE
17 LITIGATED, THE NOTICE ISSUE, WHETHER THEY HAVE TO NOTIFY THE
18 VETERANS, WELL, THAT'S A CONTINUING DUTY. AND AS NEW KNOWLEDGE
19 IS ACQUIRED THEY HAVE TO UPDATE THE NOTICES.

20 AND, YOU KNOW, IT'S INTERESTING, YOUR HONOR,
21 SOMETIMES WHEN YOU SEE THE PAPERS, THE OPPOSITION PAPERS, TO SEE
22 THAT IN THIS CASE THE WOLVERTON DECLARATION ON THE PROTECTIVE
23 ORDER, I BELIEVE MAY PERHAPS INADVERTENTLY DISCLOSE THE REASON
24 WHY THEY DON'T WANT TO NOTIFY THE VETERANS DESPITE THE PASSAGE
25 OF OVER 30 YEARS.

1 SHE SAYS THEY ARE WORRIED ABOUT LAWSUITS. THEY ARE
2 WORRIED THAT PEOPLE -- IF THEY NOTIFY THE SOLDIERS, THAT THEY
3 WILL THINK THERE'S SOME ASSOCIATION BETWEEN THE DISEASES THEY
4 HAVE AND THE CHEMICALS TO WHICH THEY WERE EXPOSED.

5 WELL, I THINK THAT'S KIND OF REVEALING AS TO WHY THEY
6 ARE FIGHTING THIS ISSUE SO MUCH.

7 NOW, ANOTHER BIG THEME OF THEIR OPPOSITION IS:

8 "WELL, WE LOOKED FOR THESE DOCUMENTS IN RESPONSE
9 TO FOIA REQUESTS AND A CONGRESSIONAL INVESTIGATION IN
10 THE '70'S."

11 THAT DOESN'T REALLY GO VERY FAR, BECAUSE, ONE,
12 THERE'S NO SHOWING THAT THEY LOOKED FOR THE SAME THINGS. NUMBER
13 TWO, THERE'S NO SHOWING THAT THOSE INVESTIGATIONS WERE COMPLETE.
14 NUMBER THREE, THE STANDARDS FOR PRODUCTION IN A LAWSUIT VERSUS
15 THE STANDARDS FOR PRODUCTION IN RESPONSE TO A FOIA REQUEST, ARE
16 DIFFERENT.

17 AND HERE WE HAVE SOME ASPECTS, MANY ASPECTS OF THIS
18 CASE THAT ARE DIFFERENT FROM THE ISSUES THAT CONGRESS WAS
19 FOCUSED ON. HERE WE HAVE THE APA DUTY AT ISSUE WITH RESPECT TO
20 HEALTHCARE, FOR EXAMPLE, WHERE NOT ONLY DOCUMENTS THAT PRECEDED
21 THESE EXPERIMENTS ARE RELEVANT, BUT THERE WAS A CONTINUING DUTY
22 POST-1977 BASED UPON NEW INFORMATION TO WARN.

23 AND, FINALLY, AT THE TIME THESE SEARCHES WERE DONE IN
24 THE '70'S, THERE WERE VERY FEW AND PRIMITIVE COMPUTER SEARCH
25 TOOLS AND DATABASES COMPARED TO THOSE THAT EXIST TODAY.

1 NOW, WITH RESPECT TO THE SPECIFIC TOPICS AND THE
2 NUMBER OF REQUESTS, YOUR HONOR, WE GET INTO A PROBLEM IN
3 VIRTUALLY EVERY COMPLEX CASE. I'VE BEEN DOING THIS FOR A LONG
4 TIME, AND IT CUTS ACROSS THE BOARD. IF YOU MAKE GENERAL
5 REQUESTS, YOU GET OBJECTIONS THAT THEY ARE VAGUE AND OVERBROAD.

6 IF YOU MAKE SPECIFIC REQUESTS, YOU STILL GET AN
7 OBJECTION, BUT AT LEAST YOU DEAL WITH THE QUESTION OF VAGUENESS
8 OR GENERAL -- TOO GENERAL AND OVERBREADTH.

9 WHAT WE DID HERE IN THE FIRST SET WAS TO TRY TO DO A
10 NUMBER OF GENERAL REQUESTS THAT WOULD COVER THE TOPICS OF OUR
11 CASE.

12 WE GOT VIRTUALLY NOTHING. WE GOT OBJECTIONS. THE
13 SECOND AND THIRD REQUESTS AS TO WHICH THERE WAS NEVER ANY
14 RESPONSE FILED BEFORE THE PROTECTIVE ORDER WAS FILED, OUR
15 SPECIFIC REQUESTS THAT BASED UPON DOCUMENTS THAT WE FOUND
16 REFERRED TO IN THE OTHER DOCUMENTS WE DID HAVE THAT WE HAD NOT
17 BEEN ABLE TO LOCATE.

18 AND SO THERE ARE A LOT OF VERY SPECIFIC REQUESTS IN
19 THE SECOND AND THIRD SETS OF DOCUMENTS TO DOCUMENTS WE KNOW
20 EXIST GENERALLY BECAUSE THEY ARE REFERRED TO IN OTHER DOCUMENTS.

21 NOW, THIS IS A DIFFICULT CASE FOR DOCUMENTS. THERE'S
22 NO QUESTION IT'S DIFFICULT. AND IT'S DIFFICULT FOR SOME OF THE
23 REASONS THAT HAVE BEEN SAID ALREADY: TIME.

24 BUT THIS IS A CASE WHERE THE CIA, ONE OF THE
25 PRINCIPAL DEFENDANTS, HAS ADMITTED DESTROYING ITS FILES AFTER

1 THE CONGRESSIONAL INVESTIGATION STARTED.

2 SO WE HAVE A NUMBER OF DIFFICULT ISSUES ABOUT WHAT
3 CONCLUSIONS CAN BE DRAWN, IF ANY, FROM THE ABSENCE OF DOCUMENTS
4 IN A PARTICULAR AREA THAT ARE CIA DOCUMENTS.

5 IT'S SOMETHING THE COURT'S GOING TO HAVE TO GRAPPLE
6 WITH AT TRIAL. THE ADMITTED DESTRUCTION OF EVIDENCE WITH
7 KNOWLEDGE OF A PENDING INVESTIGATION AS ORDERED BY THE DIRECTOR
8 OF THE CIA AND ADMINISTERED BY HIS TOP DEPUTY, WHO WAS IN CHARGE
9 OF THIS PROGRAM.

10 THE FACT, HOWEVER, THAT PRIOR SEARCHES WERE DONE DOES
11 NOT ACTUALLY INCREASE THE BURDEN IN THIS CASE, YOUR HONOR. IT
12 ACTUALLY DECREASES THE BURDEN. IF THEY KNOW THAT THEY SEARCHED
13 THE FILES OF THUS-AND-SO AGENCY BACK IN 1977, AND THEY PRODUCED
14 EVERYTHING OUT OF THOSE FILES OR THEY HAVE A SET OF IT, THEY
15 JUST NEED TO PRODUCE THAT SET AGAIN.

16 BUT WHAT THEY DO NEED TO DO IS TO SEE WHETHER OR NOT
17 DOCUMENTS WERE NOT PRODUCED TO CONGRESS -- AND THERE'S THE RUB,
18 PERHAPS. I THINK SOME OF THE STRENGTH OF THIS OPPOSITION IS
19 ASSOCIATED WITH THE FACT THAT PERHAPS NOT A COMPLETE SEARCH WAS
20 DONE IN THE PAST.

21 PERHAPS THERE WERE DOCUMENTS THAT WERE WITHHELD FROM
22 CONGRESS. PERHAPS SOME OF THE TESTIMONY THAT WAS GIVEN TO
23 CONGRESS ABOUT THIS PROGRAM WAS FALSE. AND WE ALREADY BELIEVE
24 THAT TO BE TRUE, THAT SOME OF THE TESTIMONY WAS FALSE.

25 AND THESE ARE REASONS FOR THE LACK OF COOPERATION.

1 BUT, YOUR HONOR, PUTTING THIS ALL TOGETHER, PUTTING
2 THE DOCUMENTS INTO BOXES OF RELEVANCY, THERE'S NO QUESTION THAT
3 THESE DOCUMENTS ARE RELEVANT.

4 THE ANIMAL STUDIES, THEY WERE SUPPOSED TO DO ANIMAL
5 STUDIES BEFORE THEY EXPERIMENTED ON MEN. THEIR OWN FOOTNOTE IN
6 THEIR OWN BRIEF SAYS THAT ANIMAL STUDY RESULTS ARE HIGHLY
7 PREDICTIVE OF HUMAN RESULTS.

8 THAT'S WHY WE HAVE PHASE I AND PHASE II TRIALS FOR
9 DRUGS. THEY USE THEM WITH MICE. I MEAN, THEY USE THEM IN
10 CANCER STUDIES.

11 MOST OF THE REQUESTS HAVE TO DO WITH HEALTH EFFECTS
12 OR THE CONDUCT OF THE TESTS, OR THE NOTIFICATIONS THAT WERE
13 SENT, OR MISREPRESENTATIONS OR INFORMATION OR CONTENT OF THE
14 FORM NOTIFICATIONS --

15 **THE COURT:** ALL RIGHT. WELL --

16 **MR. ERSPAMER:** -- WHICH IS OF CONSENT.

17 **THE COURT:** I AM UNDERSTANDING WHAT THE PROBLEM IS.
18 AND THIS IS GOING TO GO ON FOR AWHILE, SO I THINK IT WILL BECOME
19 MORE CLEAR.

20 I THINK ONE OF THE THINGS THAT HAS TO BE DONE IN THE
21 CONTEXT OF RULING ON THIS PARTICULAR MOTION IS TO TRY TO SET UP
22 SOME KIND OF PROTOCOL WHICH CLARIFIES IN GREATER DETAIL THE
23 EXTENT OF EACH SEARCH SO THAT YOU CAN DETERMINE WHETHER OR NOT
24 THAT'S BEEN EXHAUSTIVE OR NOT.

25 SO THAT'S PART OF WHAT I PLAN TO DO HERE. BUT AT THIS

1 POINT IT'S REALLY DIFFICULT FOR ME TO COVER ALL THE THINGS THAT
2 YOU'RE TALKING ABOUT NOW. I APPRECIATE THE BACKGROUND AND THE
3 CONTEXT INFORMATION, BUT WE'RE JUST GOING TO HAVE TO GO FORWARD
4 WITH A LITTLE BET BETTER APPROACH HERE AND A MUTUAL
5 UNDERSTANDING THAT THE RELEVANCE IS A VERY BROAD CONCEPT HERE.
6 AND THERE'S GOING TO BE A LOT OF MATERIAL TO LOOK FOR.

7 **MR. ERSPAMER:** UM-HUM. CAN I JUST ADD ONE POINT OF
8 OVERLAP WITH THE PRIOR MOTION? THE 30 (B) (6) MOTION INCLUDES
9 REQUESTS FOR WITNESSES TO TESTIFY ABOUT WHERE THEY LOOKED. I
10 THINK IT'S VERY TELLING THAT THEY WOULD NOT PRODUCE ANY
11 WITNESSES TO TELL US WHERE THEY LOOKED AND WHETHER THE SEARCHES
12 WERE COMPLETE.

13 I THINK THAT'S VERY, VERY, VERY TELLING, YOUR HONOR.

14 **THE COURT:** WELL, I HAVE THAT IN MIND.

15 **MR. ERSPAMER:** YES.

16 **THE COURT:** ALL RIGHT.

17 **MR. ERSPAMER:** THANK YOU, YOUR HONOR.

18 **MS. HERB:** YOUR HONOR, MAY I -- I KNOW YOU ARE TAKING
19 THIS UNDER CONSIDERATION, BUT I DO THINK THAT IT'S IMPORTANT TO
20 MAKE A COUPLE OF COMMENTS, IF I MAY.

21 I MEAN, ONE, THE IDEA THAT JUDGE WILKEN'S ORDERS
22 DON'T REALLY CHANGE THE NATURE OF THE COMPLAINT OR ANY OF THE
23 DISCOVERY REQUESTS THAT THEY HAVE SERVED, I THINK, IS REALLY
24 STRETCHING THE BOUNDARIES OF WHAT IS RELEVANT.

25 I MEAN, THEY HAVE SERVED REQUESTS FOR 30 (B) (6)

1 NUMBER 26 -- NUMBER 28:

2 "SUBSTANCES INTRODUCED IN CITIES' RIVERS AND
3 LAKES."

4 HOW CAN THAT HAVE ANY BEARING ON TESTING THAT WAS
5 DONE ON SERVICE MEMBERS?

6 TWO: TO THE DEGREE THAT THEY ARE CLAIMING THAT
7 THERE ARE DOCUMENTS THAT THEY ARE LOOKING FOR INFORMATION ABOUT
8 HEALTH EFFECTS, YOU KNOW, AS WE SAID IN OUR PAPERS THE REQUESTS
9 ARE NOT SO LIMITED. IT'S CLEAR ON THEIR FACE THAT THEY ARE
10 LOOKING FOR INFORMATION ABOUT CONTRACTS, FINANCIAL SUPPORT,
11 PLANNING, MEETINGS. SO IT'S CLEAR THAT THEY ARE SEEKING A MUCH
12 BROADER INVESTIGATION THAN JUST LOOKING AT HEALTH EFFECTS.

13 THEY ALSO MAKE, I THINK, SOME CHARACTERIZATIONS OF
14 THE FACTS THAT, YOU KNOW, WE'RE KIND OF GETTING USED TO, BUT
15 THAT ARE NOT ACCURATE. I MEAN, WITH REGARD TO THE ANCILLARY
16 SITES THERE HAVE BEEN TESTS AT OTHER FACILITIES AND OTHER
17 LOCATIONS. BUT IT'S IMPORTANT TO NOTE THAT EDGEWOOD ARSENAL HAS
18 BEEN THE HOME BASE FOR THE ARMY AND THE DEPARTMENT OF DEFENSE.

19 THE CENTERS FOR INFECTIOUS DISEASES, CHEMICAL
20 RESEARCH AND BIOLOGICAL SUBSTANCES, DEFENDANTS ARE ENTITLED TO
21 LOOK WHERE RECORDS MAY BE REASONABLY LOCATED.

22 THE DEPARTMENT OF DEFENSE, THERE'S NO WAY FOR AN ARMY
23 BASE TO GET A CHEMICAL AND TEST IT IN THE FIELD. THEY DON'T HAVE
24 INDEPENDENT ACCESS TO THESE CHEMICALS.

25 SO -- PARDON ME. SO IF A SITE WANTED TO DO TESTS,

1 THOSE DOCUMENTS WOULD HAVE TO GO THROUGH EDGEWOOD ARSENAL. AND
2 THAT IS WHERE WE'RE BEEN LOOKING: EDGEWOOD ARSENAL, ABERDEEN
3 PROVING GROUND, FORT DETRICK. THESE ARE THE PLACES AT WHICH WE
4 WERE LIKELY TO FIND RECORDS.

5 WITH REGARD TO THE NONSERVICE MEMBER TESTING, AGAIN,
6 YOU KNOW, MOST OF -- WE TALK ABOUT THIS IN OUR PAPERS SOME. BUT
7 THEIR REQUESTS ARE NOT LIMITED ON THEIR FACE TO HEALTH EFFECTS.

8 THEY ASK FOR SORT OF "THE EXISTENCE OF, THE IDENTITY
9 OF CONTRACTS."

10 THEY TALK A LOT ABOUT THESE CUTOUPS. THERE IS ONE
11 ALLEGATION IN THE COMPLAINT ABOUT A CUTOUP. AND IT'S ABOUT THAT
12 THEY FUNDED TESTING AT GEORGETOWN UNIVERSITY HOSPITAL, NOT ON
13 SERVICE MEMBERS.

14 SO THE IDEA THAT GIVEN THAT THERE'S BEEN BROAD
15 INVESTIGATIONS, SOME OF THE MOST FAMOUS INVESTIGATIONS IN
16 CONGRESSIONAL HISTORY: THE KENNEDY COMMISSION, THE PIKE
17 INVESTIGATION, THOSE WERE VERY, VERY BROAD INVESTIGATIONS INTO
18 ALL ASPECTS OF CIA TESTING ON ANY INDIVIDUAL.

19 THE IDEA THAT WE HAVE TO PRODUCE EVERY DOCUMENT
20 RELATED TO THOSE INVESTIGATIONS IS REALLY, REALLY PREPOSTEROUS.

21 THE CIA LOOKED AT A NUMBER OF SUBSTANCES, A NUMBER OF
22 TESTS. IT DID TESTS ON POLYGRAPHS. IT DID HYPNOSIS TESTS. AND
23 A LOT OF THEIR DISCOVERY REQUESTS WOULD GO INTO SORT OF THE
24 BREADTH OF THE PROGRAMS THAT HAVE NO BEARING ON EVEN CHEMICAL
25 SUBSTANCES, LET ALONE THE SUBSTANCES THAT WERE USED AT EDGEWOOD.

1 THE DEPARTMENT OF DEFENSE HAS ADMITTED THAT IT HAS
2 TESTED BETWEEN 250 AND 400 CHEMICALS. THE CIA HAS SAID IT
3 CONTEMPLATED TESTING ONE. AND THEY WANT THE CIA TO SEARCH FOR
4 400 CHEMICALS?

5 THERE'S NO EVIDENCE THE CIA TESTED ANYTHING IN THAT
6 MAGNITUDE.

7 I ALSO WANT TO CORRECT HIS CHARACTERIZATION OF A
8 CONVERSATION WE HAD WITH MR. VECCHIO AFTER MR. ERSPAMER LEFT THE
9 LAST MEET AND CONFER ABOUT WHY WE WANTED TO -- WHY WE EXPRESSED
10 SOME RELUCTANCE ABOUT NOTIFYING SOLDIERS. WE'RE NOT HIDING THE
11 BALL HERE.

12 WE EXPRESSED THIS TO MR. VECCHIO. THIS IS NOT A
13 CONCERN THAT'S ISOLATED WITH THE TEST SUBJECTS HERE. IT'S THAT
14 WHEN YOU TELL SOMEBODY -- IF YOU WERE GOING TO GO IN FOR A SHOT
15 TOMORROW, AND THE DOCTOR SAID TO YOU "THIS IS GOING TO HURT,"
16 YOU KIND OF WINCE A LITTLE BIT BEFORE YOU GET THE SHOT.

17 IT'S THE SAME THING. IF YOU GO IN -- AND MR.
18 ERSPAMER HAS SAID HE'S GOING TO CHALLENGE. THE DEPARTMENT OF
19 DEFENSE HAS DONE PRETTY EXTENSIVE STUDIES ON THE LONG-TERM
20 HEALTH EFFECTS. MR. ERSPAMER HAS INDICATED THAT HE WANTS TO
21 CHALLENGE THOSE. AND WE HAD SOME CONCERN THAT THERE MIGHT BE
22 REPRESENTATIONS TO TEST SUBJECTS THAT SAY:

23 "YOU WERE TESTED WITH THIS SUBJECT (SIC). HERE
24 ARE THE KNOWN HEALTH EFFECTS OF THAT SUBSTANCE."

25 AND SO TO THE DEGREE THAT WE'RE PUTTING BACK AT ISSUE

1 A QUESTION OF, YOU KNOW, WHAT ARE THE HEALTH EFFECTS OF THESE
2 SUBSTANCE, I EXPRESSED TO MR. VECCHIO AT THE TIME SOME
3 RELUCTANCE TO SORT OF REPRESENT THAT TO PLAINTIFFS, BECAUSE IT
4 MAY ULTIMATELY PREVENT US FROM GETTING TO A RESULT HERE.

5 SO THAT WAS THE CONCERN THAT WAS ARTICULATED. WE
6 WEREN'T HIDING THE BALL. WE SAID IT IN A MEET AND CONFER
7 DISCUSSION. MR. ERSPAMER WAS NOT THERE. HE HAD ALREADY LEFT.
8 AND SO TO NOW CHARACTERIZE IT AS WE'RE AFRAID OF LAWSUITS, I
9 THINK, IS REALLY UNFAIR.

10 **THE COURT:** WELL, I DIDN'T REALLY PAY MUCH ATTENTION
11 TO THAT COMMENT, SO IT'S NOT GOING TO BE MATERIAL TO ANY
12 DECISION HERE.

13 **MS. HERB:** AND IF I MAY MAKE ONE COMMENT ABOUT OFTEN,
14 BECAUSE I THINK THAT IS SORT OF OF BEARING. HE TALKS ABOUT SORT
15 OF THESE 11 BOOKS. ONE, I THINK IT'S IMPORTANT TO MENTION THAT
16 OFTEN HAD OTHER PURPOSES BEYOND JUST CHEMICAL TESTING. SO THAT
17 IS LIKELY WHY SOME DOCUMENTS HAVE NO BEARING.

18 TWO, HE REFERS TO THESE 11 BOXES THAT WERE SENT TO
19 STORAGE. THE BOXES THAT WERE SENT TO STORAGE WERE ACTUALLY SENT
20 TO STORAGE PRIOR TO THE CONGRESSIONAL INVESTIGATIONS.

21 SO WHEN THE CONGRESS DECIDED THAT IT WAS GOING TO
22 START INVESTIGATING THE CIA ACTIVITY, THE CIA ACTUALLY CALLED
23 BACK ALL THE MATERIALS THAT HAD BEEN SENT TO STORAGE AND DID A
24 THREE-YEAR EXAMINATION OF ALL THE DOCUMENTS THAT IT HAD IN ITS
25 POSSESSION FROM ALL THE VARIOUS SITES. AND THOSE ARE THE

1 DOCUMENTS THAT WERE INVESTIGATED AND RESULTED IN THE ULTIMATE
2 CONCLUSIONS THAT WERE PRESENTED TO CONGRESS AND IN THE DOCUMENTS
3 THAT WE HAVE DELIVERED HERE.

4 SO THE CIA IS NOT HIDING THE BALL. IT'S NOT HIDING
5 DOCUMENTS. IT HAS LOOKED IN LOCATIONS. AND THESE DOCUMENTS --
6 SO TO THE DEGREE THAT THERE WERE DOCUMENTS THAT WERE SENT TO
7 OTHER LOCATIONS, THOSE DOCUMENTS HAVE NOW BEEN PULLED BACK, WERE
8 PULLED BACK IN THE '70'S PURSUANT TO CONGRESSIONAL
9 INVESTIGATIONS.

10 **THE COURT:** ALL RIGHT.

11 **MR. ERSPAMER:** YOUR HONOR, I COULD SAY MORE, BUT
12 PERHAPS YOU'VE HEARD ENOUGH ON THIS. BUT IF I COULD SAY A FEW
13 THINGS VERY BRIEFLY?

14 **THE COURT:** WELL, I SUPPOSE SO. BUT KEEP IN MIND,
15 YOU KNOW, WE'RE GOING TO -- I'M GOING TO HAVE TO TRY TO GET YOU
16 REORIENTED ON THIS ONE, BOTH SIDES.

17 **MR. ERSPAMER:** YES.

18 **THE COURT:** AND WE'RE GOING TO HAVE TO MOVE FORWARD
19 FROM THERE. AND I DON'T EXPECT THIS TO BE THE END OF IT. SO IF
20 YOU FEEL COMPELLED TO SAY SOMETHING ELSE --

21 **MR. ERSPAMER:** YOUR HONOR, I THINK IT'S -- WE CAN
22 LEAVE IT HERE. IT'S JUST GOING TO BE RESPONDING TO SOME OF THE
23 POINTS.

24 **THE COURT:** ALL RIGHT.

25 **MR. ERSPAMER:** CAN I JUST SAY ONE THING, THOUGH?

1 JUST ONE THING. AND I'LL KEEP IT UNDER A MINUTE.

2 THE OFTEN SERIES OF DOCUMENTS IS VERY IMPORTANT TO
3 UNDERSTAND WHAT WAS DONE IN THE DISCOVERY PROCESS IN THIS CASE.
4 THERE'S NO DISPUTE THAT THE 11 BOXES CONTAIN CLINICAL RECORDS OF
5 VETERANS AT EDGEWOOD. THEIR OWN DOCUMENT SAYS THAT. AND THAT'S
6 CITED IN OUR REPLY.

7 AND THESE ARE CLINICAL RECORDS OF EDGEWOOD SOLDIERS
8 WHO WERE EXPOSED TO BZ, ONE OF THE MOST POTENT, INCAPACITATING
9 AGENTS KNOWN TO MAN. AND IT DIDN'T PRODUCE ANYTHING FROM THOSE
10 11 BOXES.

11 THAT IS CLEAR. AND I'LL JUST LEAVE IT AT THAT.

12 THANK YOU, YOUR HONOR.

13 **THE COURT:** ALL RIGHT. OKAY.

14 THEN, THAT MOTION IS SUBMITTED, AS WELL. AND AS I SAY
15 YOU'LL RECEIVE A DETAILED WRITTEN ORDER.

16 NOW, LET'S MOVE ON TO THE FOURTH MOTION FOR
17 SANCTIONS. AND LET ME TELL YOU A LITTLE BIT MORE ABOUT MY
18 THINKING HERE.

19 I DON'T LIKE IMPOSING SANCTIONS. I DO IT VERY
20 RARELY. AND I UNDERSTAND NOT JUST FROM MY OWN PRACTICE AS A
21 LAWYER, BUT PRESIDING OVER DISPUTES LIKE THIS FOR OVER 13 YEARS
22 NOW, GENERALLY, UNTIL CONVINCED OTHERWISE, I'M GOING TO LET THE
23 LAWYERS RUN THEIR OWN LITIGATION. AND I EXPECT YOU TO PROJECT
24 EACH OTHER'S POINT OF VIEW ON VIRTUALLY EVERYTHING AND PROJECT
25 WHAT THE COURT'S GOING TO DECIDE ABOUT MOSTLY EVERYTHING IN THE

1 COURSE OF RESPONDING TO DISCOVERY REQUESTS.

2 I DON'T LIKE THE TERM "HIDE THE BALL." I DON'T LIKE
3 AD HOMINEM ACCUSATIONS BACK AND FORTH. THERE'S NO WAY FOR ME TO
4 RESOLVE A DISPUTE LIKE THAT.

5 I EXPECT YOU TO REPRESENT THE GOVERNMENT WITH HONOR
6 AND THE FULL IMPORT OF THE WEIGHT OF YOUR POSITION HERE. AND ON
7 THE OTHER SIDE, I EXPECT THE PLAINTIFF TO COMPORT ITSELF WITH
8 THE RIGHTEOUSNESS OR ASSERTED RIGHTEOUSNESS OF ITS POSITION.

9 ALSO, THIS IS NOT MY CASE IN THE FINAL ANALYSIS. IT'S
10 JUDGE WILKEN'S CASE. AND GENERALLY I WOULD PREFER TO RESERVE
11 SANCTIONS TO THE TRIAL JUDGE. AT SOME POINT, I MAY MAKE A
12 RECOMMENDATION TO THE TRIAL JUDGE ABOUT WHAT SHE MIGHT CONSIDER
13 IN THIS PARTICULAR CASE.

14 BUT AT THIS POINT, I'VE ONLY SEEN YOU TWICE. THIS IS
15 A MUCH HEAVIER DEAL THAN THE FIRST ONE, I MUST SAY. THE FIRST
16 MOTION, IN MY MIND, WAS ABSOLUTELY UNNECESSARY. AND THE
17 OBJECTIONS WERE FRIVOLOUS.

18 I DON'T SEE THAT SAME ALTITUDE HERE. AND I
19 APPRECIATE YOUR PREPARATION. SO HAVING SAID THAT, I'M NOT
20 INCLINED TO GRANT SANCTIONS AT THIS POINT.

21 TO THE EXTENT THAT I DISCOVER ABUSES ON AN ONGOING
22 BASIS, I WILL BE REPORTING TO JUDGE WILKEN AND PROBABLY LEAVE IT
23 UP TO HER TO DECIDE WHAT TO DO ABOUT IT.

24 I CERTAINLY DON'T FEEL LIKE I'VE GOT ANY AUTHORITY TO
25 ORDERED ISSUE PRECLUSION SANCTIONS.

1 MONEY, YOU KNOW, WHAT ARE WE TALKING ABOUT? THE
2 UNITED STATES GOVERNMENT? WHAT WOULD BE A FINANCIAL SANCTION
3 THAT WOULD HURT ANY MORE THAN EVERYTHING ELSE?

4 **MR. ERSPAMER:** YOUR HONOR, COULD I SAY A FEW WORDS?
5 AND I UNDERSTAND WHERE THE COURT'S COMING FROM.

6 OUR CONCERN HAS BEEN THIS CASE HAS BEEN BASICALLY
7 STOPPED IN ITS TRACKS FOR A YEAR. THE WHOLE DISCOVERY PROCESS
8 HAS BROKEN DOWN. WE HAVEN'T OBTAINED ANY DOCUMENTS.

9 WE DID EXTENSIVE MEET AND CONFER SESSIONS, AND THE
10 ONLY TIME -- AND ONE COMMON CHARACTERISTIC WITH RESPECT TO EVERY
11 ONE OF THESE MOTIONS IS THERE AS NO CHANGE IN POSITION
12 SUBSTANTIVELY UNTIL AFTER THE MOTIONS WERE FILED.

13 THEY ARE REQUIRING US TO FILE MOTIONS ON EVERY SINGLE
14 DISCOVERY REQUEST. AND THERE ARE MORE COMING, INCLUDING THE
15 FOLLOW-ON ON THE INTERROGATORIES.

16 AND IT IS EXPENSIVE. THIS IS A PRO BONO CASE. A
17 TREMENDOUS AMOUNT OF TIME HAS GONE INTO THE EFFORT TO BRING
18 THESE MOTIONS BEFORE THE COURT. AND MOST OF THE CHANGES IN
19 POSITION THAT YOU SEE REFLECTED IN THE PAPERS OCCURRED AFTER THE
20 MOTIONS WERE FILED.

21 THEY FORCED US TO FILE THESE MOTIONS. AND THERE'S
22 SOMETHING JUST FUNDAMENTALLY UNFAIR ABOUT THAT. AND I THINK
23 THAT'S WHAT RULE 37 SAYS WHEN IT AUTHORIZES SANCTIONS WHEN
24 SOMEONE'S POSITION HAS NOT BEEN SUSTAINED. AND IT'S THE
25 POSITION THEY TOOK BEFORE THE MOTIONS WERE FILED THAT IS THE

1 MOST IMPORTANT POSITION.

2 **THE COURT:** WELL, I UNDERSTAND THAT FULLY, AND THAT
3 TYPE OF SITUATION IS DEFINITELY COVERED BY RULE 37. FROM NOW ON
4 I WILL HAVE THAT VERY CLEARLY IN MIND. AND IF THERE APPEAR TO
5 ME TO BE VIOLATIONS OF CLEARLY STATED RULES AND PRINCIPLES THAT
6 WE'VE SET FORTH IN HOW THE DISCOVERY IS GOING TO GO FORWARD, YOU
7 WILL GET SANCTIONS.

8 **MR. ERSPAMER:** ALL RIGHT. THANK YOU, YOUR HONOR.

9 **THE COURT:** ANY COMMENT OR --

10 **MS. HERB:** YOUR HONOR, NO. I THINK YOU'VE TOUCHED ON
11 THE FACT THAT THERE IS A CLEAR DISPUTE AS TO DISCOVERY THAT
12 SHOULD GO FORWARD. I THINK THAT THE DELAY HAS BEEN BORNE OUT OF
13 THAT DISPUTE.

14 I DON'T THINK THE DELAY HAS GONE ON FOR A YEAR. THE
15 PARTIES AGREED TO STAY DISCOVERY PENDING THE COURT'S ORDER ON
16 THE MOTION TO DISMISS. WE ALSO AGREED TO STAY DISCUSSIONS ON A
17 PROTECTIVE ORDER AND NOT TO RESUME THOSE UNTIL AFTER -- UNTIL
18 AFTER A MOTION TO DISMISS. SO, YOU KNOW, I THINK THAT THERE IS
19 A LEGITIMATE DISPUTE HERE. I DON'T AGREE WITH HIS
20 CHARACTERIZATION THAT --

21 **THE COURT:** WELL, I'M GOING TO GIVE EVERYBODY THE
22 BENEFIT OF THE DOUBT UP TO NOW AND WITH SPECIFIC REGARD TO THE
23 SECOND AND THIRD REQUESTS FOR PRODUCTION, THERE'S A QUESTION
24 ABOUT WHETHER OR NOT THERE WAS A TIMELY OBJECTION FILED OR A
25 MOTION PENDING. I'M GOING TO FIND THAT THERE WAS A MOTION

1 PENDING BY IMPLICATION, AND SO WE WILL LET THAT ONE GO AT THIS
2 POINT.

3 ALL RIGHT?

4 **MR. ERSPAMER:** OKAY.

5 **MS. HERB:** THANK YOU, YOUR HONOR.

6 **MR. ERSPAMER:** THANK YOU, YOUR HONOR.

7 **THE COURT:** YOU'RE WELCOME. SO ALL MATTERS ARE UNDER
8 SUBMISSION. WE WILL GET YOU AN ORDER --

9 **MS. HERB:** DID YOU WANT TO SEPARATELY --

10 **THE COURT:** -- AS SOON AS POSSIBLE.

11 **MS. HERB:** -- TALK ABOUT THE MOTION FOR PROTECTIVE
12 ORDER LIMITING THE SCOPE OF DISCOVERY, OR DO YOU THINK THAT --
13 DEFENDANTS FILED A SEPARATE MOTION THAT SORT OF TALKS ABOUT SOME
14 OF THE OTHER ISSUES THAT WE'VE DISCUSSED HERE IN THIS CASE:
15 HEALTH EFFECTS, ANIMAL TESTING, NONSERVICE MEMBER TESTING. WE
16 SUBMITTED BRIEFS ON THAT.

17 I THINK THOSE ISSUES ARE SORT OF UNDERLYING A LOT OF
18 THE OTHER DISCOVERY DISPUTES.

19 **THE COURT:** WELL, UNFORTUNATELY, I DON'T HAVE THAT.

20 **MS. HERB:** IT WAS, I THINK, DOCKET 141? OR 140?

21 **MS. FAREL:** 140.

22 **MS. HERB:** 140 WAS OUR MOTION.

23 **THE COURT:** ALL RIGHT. WELL, I DON'T HAVE ANY BENCH
24 MEMORANDUM ON THAT, SO I'M NOT PREPARED TO EVEN GUESS AT
25 SOMETHING INTELLIGENT TO SAY ABOUT THAT, SO --

1 **MS. HERB:** OKAY.

2 **THE COURT:** -- YOU CAN EITHER SUBMIT IT ON THE
3 PAPERS, OR YOU CAN GIVE ME A BRIEF IDEA OF WHAT THE MOTION
4 REQUESTS.

5 **MS. HERB:** YOUR HONOR, I THINK IT LOOKS A LOT LIKE
6 WHAT WE'VE BEEN DISCUSSING HERE. IT'S ABOUT SORT OF THE SCOPE
7 OF DISCOVERY. WE BELIEVE THAT THERE HAVE BEEN BROAD
8 INVESTIGATIONS IN THE PAST. WE CITE SOME CASE LAW TO THE EFFECT
9 THAT WHEN THERE HAVE BEEN PAST CONGRESSIONAL INVESTIGATIONS
10 THAT THERE SHOULD BE SOME TAILORING OF DISCOVERY REQUESTS AND
11 RESPONSE TO THAT TO NOT DUPLICATE THE EFFORTS THAT HAVE BEEN.

12 SO I THINK THAT'S ONE ISSUE. WE DO TALK ABOUT THE
13 NONSERVICE MEMBER AND THE ANIMAL TESTING.

14 AND DEFENDANTS' POSITION IS THAT NONSERVICE MEMBER
15 TESTING ISN'T RELEVANT TO THIS LITIGATION. WE DO RECOGNIZE THAT
16 PLAINTIFFS ARE PARTICULARLY INTERESTED IN GETTING INFORMATION ON
17 THE HEALTH EFFECTS. AND WE ARE WORKING TO THAT END. THE
18 DEPARTMENT OF THE ARMY HAS AGREED TO GO AHEAD AND SEARCH FOR
19 HEALTH EFFECTS INFORMATION.

20 ONCE YOU ENTER A PROTECTIVE ORDER WE ACTUALLY
21 ANTICIPATE THAT WE WILL BE PRODUCING A NUMBER OF DOCUMENTS THAT
22 ARE TECHNICAL REPORTS THAT CAN'T BE PRODUCED BECAUSE THEY ARE
23 TECHNICAL INFORMATION, BUT THEY DO TALK A LOT ABOUT THE RESULTS
24 OF THE SERVICE MEMBER TESTING THAT WAS CONDUCTED AT EDGEWOOD.

25 BUT NONSERVICE MEMBER TESTING WAS OF A VERY DIFFERENT

1 KIND. A LOT OF IT WAS REALLY LOOKING AT HEALTH EFFECTS AS IT
2 RELATED TO THE BEHAVIORAL EFFECTS. IT WAS SORT OF THE LARGER
3 PURPOSE OF THE TEST PROGRAMS AND NOT LOOKING AT SORT OF LONGER
4 TERM HEALTH EFFECTS.

5 THAT'S ACTUALLY WHY THE DEPARTMENT OF DEFENSE HAS HAD
6 TO COMMISSION SEPARATE STUDIES FOR LONG-TERM HEALTH EFFECTS.

7 SO WE THINK NONSERVICE MEMBER TESTING IS NOT RELEVANT
8 HERE, PARTICULARLY GIVEN THE AGE OF THE DOCUMENTS, THE AGE OF
9 THE TESTING PROGRAMS AND WHAT HAS ALREADY BEEN PRODUCED.

10 **THE COURT:** ALL RIGHT.

11 **MR. BLAKELY:** YOUR HONOR, IF I MAY, THE MOTION THAT
12 DEFENDANTS FILED FOR A PROTECTIVE ORDER IN FRONT OF YOUR HONOR
13 IS THEIR SECOND EFFORT TO FORCE ALL DISCOVERY BY FILING A MOTION
14 FOR PROTECTIVE ORDER. THEY FILED A MOTION FOR PROTECTIVE ORDER
15 IN FRONT OF JUDGE WILKEN ASKING TO STAY ALL DISCOVERY FOR A
16 YEAR.

17 THAT MOTION WAS SUPPORTED BY THE SAME KILPATRICK
18 DECLARATION, BY THE SAME CAMERESI DECLARATION THAT THEY FILED IN
19 SUPPORT OF THIS MOTION NOW.

20 JUDGE WILKEN FOUND THAT THEY HADN'T SUSTAINED THEIR
21 BURDEN THEN, AND THEY HAVEN'T SUSTAINED THEIR BURDEN NOW,
22 EITHER, YOUR HONOR.

23 I'M PARTICULARLY CONCERNED, AND WE ARE PARTICULARLY
24 CONCERNED BY THE SCOPE OF THE RELIEF THAT THEY SEEK. THEIR BRIEF
25 ON PAGE 24 AND THE PROPOSED ORDER THAT THEY SEEK, YOUR HONOR,

1 SIMPLY SAYS:

2 "THE FOLLOWING CATEGORIES OF INFORMATION ARE
3 EXCLUDED FROM DISCOVERY."

4 THERE ARE TEN CATEGORIES OF INFORMATION THAT THEY
5 HAVE IDENTIFIED THAT THEY WANT EXCLUDED WHOLLY FROM DISCOVERY IN
6 THIS ACTION, YOUR HONOR.

7 I'M PREPARED TO SPEAK ABOUT ALL TEN OF THOSE, NONE OF
8 WHICH IS APPROPRIATE. FRANKLY, YOUR HONOR, THE CATEGORIES THAT
9 THEY HAVE PROPOSED WOULD INSTILL IN THIS LITIGATION FURTHER
10 COMPLEXITY, FURTHER DISPUTES, AND THEY ARE INTERMIT AND
11 UNWORKABLE.

12 I THINK EVERYTHING, YOUR HONOR, GOES BACK TO WHAT THE
13 APA CLAIMS ARE BEFORE THE COURT. JUDGE WILKEN HAS ALREADY HELD
14 THAT DEFENDANTS' OWN REGULATIONS REQUIRE THEM -- AND I'M GOING
15 TO READ THIS:

16 "TO NOTIFY TEST SUBJECTS ABOUT THE EFFECTS UPON
17 THE HEALTH OR PERSON WHICH MAY POSSIBLY COME FROM
18 PARTICIPATION IN THE EXPERIMENTS."

19 DEFENDANTS' OWN REGULATIONS REQUIRE THAT NOTIFICATION
20 TO EXTEND BEYOND PARTICIPATION IN THE EXPERIMENT, IF THERE IS
21 NEWLY ACQUIRED INFORMATION.

22 WHAT THAT MEANS, YOUR HONOR, IS THAT ANY INFORMATION
23 THAT DEFENDANTS HAVE ABOUT POSSIBLE HEALTH EFFECTS FROM WHATEVER
24 SOURCE IS RELEVANT.

25 THAT MEANS IF THEY HAVE INFORMATION ABOUT POSSIBLE

1 HEALTH EFFECTS FROM ANIMAL TESTING, THAT INFORMATION IS
2 RELEVANT.

3 THAT MEANS IF THEY HAVE INFORMATION ABOUT POSSIBLE
4 HEALTH EFFECTS FROM THE OPERATIONAL USE OF THESE CHEMICALS IN
5 THE FIELD, THAT INFORMATION IS RELEVANT.

6 THAT MEANS, YOUR HONOR, THAT IF THEY HAVE INFORMATION
7 ABOUT POSSIBLE HEALTH EFFECTS FROM STUDIES THAT THEY
8 COMMISSIONED FROM UNIVERSITIES ON THESE SUBSTANCES, THAT
9 INFORMATION IS RELEVANT.

10 IT GOES DIRECTLY TO THE CORE OF THEIR DUTIES UNDER
11 THE APA TO PROVIDE NOTICE TO THE TEST SUBJECTS OF POSSIBLE
12 HEALTH EFFECTS RELATING TO THEIR PARTICIPATION IN THESE
13 EXPERIMENTS.

14 MS. HERB MENTIONED TWO SPECIFIC CATEGORIES THAT I
15 WOULD LIKE TO RESPOND TO. SHE MENTIONED NONSERVICE MEMBER
16 TESTING. SHE SAID THAT NONSERVICE MEMBER TESTING WAS FOR A
17 DIFFERENT PURPOSE.

18 IF THERE WAS TESTING DONE ON HUMANS WITH THE SAME
19 SUBSTANCES ADMINISTERED TO SOLDIERS IN THESE PROGRAMS, THEN
20 HEALTH INFORMATION RELATED TO WHAT HAPPENED TO THOSE OTHER
21 HUMANS EXPOSED TO THOSE SAME SUBSTANCES CLEARLY IS RELEVANT
22 HERE.

23 FOR EXAMPLE, YOUR HONOR, IN PROJECT OFTEN, WHICH
24 YOU'VE HEARD ABOUT OFTEN TODAY, IT'S CLEAR THAT EXPERIMENTS WERE
25 ALSO DONE ON PRISONERS FROM HOLMESBURG PRISON. INFORMATION THAT

1 DEFENDANTS LEARNED ABOUT THE HEALTH EFFECTS OF THE SUBSTANCE
2 USED IN THAT PROGRAM ADMINISTERED TO PRISONERS IS RELEVANT TO
3 WHETHER OR NOT THEY HAVE SATISFIED THEIR DUTIES UNDER THE APA TO
4 INFORM THE SOLDIERS OF THE POSSIBLE HEALTH EFFECTS RELATED TO
5 THOSE EXPOSURES.

6 ERSPAMER DECLARATION EXHIBIT B, YOUR HONOR, IN
7 SUPPORT OF OUR OPPOSITION, SHOWS A CONTEMPORANEOUS DOCUMENT FROM
8 THE ARMY AT THE TIME THAT SAYS THAT THE ARMY USED PRIVATE
9 INSTITUTIONS, UNIVERSITIES TO EXPAND THEIR RESEARCH
10 CAPABILITIES.

11 THEY HAD CONTRACTS WITH UNIVERSITIES WHO DID HUMAN
12 TESTING USING SOME OF THE SAME SUBSTANCES AS PART OF UNIVERSITY
13 PROGRAMS. INFORMATION THAT THE DEFENDANTS LEARNED ABOUT THE
14 POSSIBLE HEALTH EFFECTS FROM THOSE PROGRAMS THAT HAD INVOLVED
15 TESTING ON HUMANS CLEARLY IS RELEVANT TO THEIR APA DUTIES HERE.

16 SO I DISAGREE WITH MS. HERB'S ASSERTION THAT
17 NONSERVICE MEMBER TESTING IS IRRELEVANT. AND THE RELIEF THAT
18 THEY ARE SEEKING THROUGH THIS PROTECTIVE ORDER CANNOT BE APPLIED
19 HERE.

20 SHE ALSO MENTIONED ANIMAL TESTING.

21 **THE COURT:** I GET THE POINT.

22 **MR. BLAKELY:** I WOULD REPEAT THE SAME THING, YOUR
23 HONOR.

24 **THE COURT:** ALL RIGHT.

25 **MS. HERB:** CAN I MAKE JUST ONE COMMENT? I THINK WHAT

1 MR. BLAKELY IS SAYING SORT OF HIGHLIGHTS ANOTHER DISPUTE THAT IS
2 SORT OF UNDERLYING THE HEALTH EFFECTS, AND THAT'S SORTS OF WHAT
3 SHOULD WE BE SEARCHING FOR WITH HEALTH EFFECTS?

4 SO I JUST WANT TO HIGHLIGHT THIS AS MAYBE ANOTHER
5 ISSUE FOR YOUR CONSIDERATION. I THINK WE'RE DEFINING "HEALTH
6 EFFECTS" DIFFERENTLY. AND SO SOME CLARIFICATION FROM THE COURT,
7 I THINK, WOULD BE BENEFICIAL.

8 I THINK UNDER PLAINTIFFS' READING OF "HEALTH EFFECTS"
9 THEY WANT EVERY BLOOD PRESSURE READING, EVERY TEMPERATURE
10 READING, EVERY TIME THAT, YOU KNOW, LSD WAS ADMINISTERED, EVERY
11 TIME THERE WAS A HALLUCINATION. THEY BELIEVE THAT GOES TO
12 HEALTH EFFECTS.

13 WE DON'T REALLY READ THAT AS BEING ENCOMPASSED IN THE
14 NOTICE CLAIM, BECAUSE WHAT WE'RE TALKING ABOUT HERE IS PROVIDING
15 SERVICE MEMBERS WITH NOTICE OF THE HEALTH EFFECTS THAT ARE TO BE
16 EXPECTED IN THE LONG-TERM. THAT'S HOW WE'RE READING IT.

17 WE READ JUDGE WILKEN'S ORDER AS SAYING THAT THEY
18 DON'T HAVE -- OR PARDON ME -- THAT THE SERVICE MEMBERS DO NOT
19 HAVE -- THAT IF WE WERE TO TELL THEM THAT:

20 "40 YEARS AGO YOU WERE ADMINISTERED A SUBSTANCE
21 THAT MAY HAVE INCREASED YOUR HEART RATE," THAT
22 PROBABLY DOESN'T DO THEM A LOT OF GOOD.

23 SO WE WOULD PREFER THAT -- AND WE THINK IT WOULD BE
24 INCREDIBLY BURDENSOME. THE CIA, I THINK, IN ONE OF THEIR
25 DECLARATION SAYS TO TERM INFORMATION ON HEALTH EFFECTS ON JUST

1 ONE SUBSTANCE WOULD BE A THREE-MONTH INVESTIGATION. SO IF WE
2 COULD NARROW HEALTH EFFECTS TO LONG-TERM HEALTH EFFECTS --

3 **THE COURT:** DON'T THEY ALL HAVE TO BE IN ONE PLACE?
4 WOULDN'T THERE JUST BE A SINGLE FILE FOR EACH SUBJECT? AND
5 COPYING THE WHOLE FILE, REGARDLESS OF THE LEVEL OF DETAIL, WOULD
6 ACTUALLY SAVE YOU MORE TIME THAN IT WOULD TO GO THROUGH IT AND
7 SEARCH FOR LONG-TERM EFFECTS.

8 **MS. HERB:** WELL, YOUR HONOR, I THINK A LOT OF THE
9 REPORTS THAT WE HAVE ARE, IN FACT, JUST SHORT-TERM EFFECTS. THE
10 NUMBER OF PARTICIPANTS WHO EXPERIENCED HALLUCINATIONS; WHETHER
11 THE DRUG HAD AN INCAPACITATING EFFECT. SO THE REPORTS THAT WE
12 HAVE ARE OF A SHORT-TERM NATURE.

13 AND SO WE'VE BEEN INTERPRETING --

14 **THE COURT:** SO YOUR PEOPLE ARE MAKING JUDGMENTS ABOUT
15 WHETHER OR NOT THAT WOULD BE RELEVANT IN TERMS OF WHETHER THEY
16 HAVE TO TURN IT OVER?

17 **MS. HERB:** NO, A LOT OF THAT THE DEPARTMENT OF ARMY
18 IS PREPARING TO TURN OVER SUBJECT TO THE PROTECTIVE ORDER THAT'S
19 TECHNICAL INFORMATION.

20 **THE COURT:** ALL RIGHT. OKAY. WELL, I APOLOGIZE FOR
21 NOT BEING QUITE UP TO SPEED ON THAT ONE. IF I NEED FURTHER
22 BRIEFING OR ARGUMENT WE WILL LET YOU KNOW.

23 **MR. BLAKELY:** OKAY.

24 **THE COURT:** OKAY. ALL MATTER ARE SUBMITTED, THEN.
25 THANK YOU VERY MUCH FOR THE DEGREE OF CARE YOU HAVE SHOWN TO

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THIS MORNING'S ARGUMENT AND PREPARATION OF YOUR PAPERS.

MR. ERSPAMER: THANK YOU, YOUR HONOR.

MR. BLAKELY: THANK YOU.

(THEREUPON, THIS HEARING WAS CONCLUDED.)

CERTIFICATE OF REPORTER

I, KATHERINE WYATT, THE UNDERSIGNED, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED BY ME INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS.

I FURTHER CERTIFY THAT I AM NOT OF COUNSEL OR ATTORNEY FOR EITHER OR ANY OF THE PARTIES IN THE FOREGOING PROCEEDINGS AND CAPTION NAMED, OR IN ANY WAY INTERESTED IN THE OUTCOME OF THE CAUSE NAMED IN SAID CAPTION.

THE FEE CHARGED AND THE PAGE FORMAT FOR THE TRANSCRIPT CONFORM TO THE REGULATIONS OF THE JUDICIAL CONFERENCE.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS 16TH DAY OF NOVEMBER, 2010.

/S/ KATHERINE WYATT