

Exhibit 74

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM,)	
MOHAMED AHMED BEN SOUD,)	
OBAID ULLAH (as personal)	
Representative of)	
GUL RAHMAN),)	
)	
Plaintiffs,)	
)	No. CV-15-296-JLQ
Versus)	April 22, 2016
)	Spokane, Washington
JAMES ELMER MITCHELL and)	
JOHN "BRUCE" JESSEN,)	
)	Pages 1 - 90
Defendants.)	

TRANSCRIPT OF PROCEEDINGS

MOTION TO DISMISS

BEFORE THE HONORABLE JUSTIN L. QUACKENBUSH

APPEARANCES:

For the Plaintiff:	AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
	BY: La Rond Baker Attorney at Law
	901 Fifth Avenue, Suite 630 Seattle, WA 98164
	AMERICAN CIVIL LIBERTIES UNION FOUNDATION
	BY: Dror Ladin Steven M. Watt Hina Shamsi
	Attorneys at Law
	125 Broad Street, 18th Floor New York, New York 10004

1 For the Defendant: BETTS, PATTERSON & MINES, P.S.
Mitchell & Jessen BY: Christopher W. Tompkins
2 Attorney at Law
701 Pike Street, Suite 1400
3 Seattle, WA 98101

4 BLANK ROME LLP
BY: Henry F. Schuelke III
5 James T. Smith
Attorneys at Law
6 600 New Hampshire Ave. NW
Washington, DC 20037

7 For the United States: DEPARTMENT OF JUSTICE
8 BY: Andrew I. Warden
Attorney at Law
9 20 Massachusetts Avenue NW
Washington, DC 20530

10
11 COURT REPORTER: Mark A. Snover, RPR, CSR
12 P. O. Box 1633
Spokane, WA 99210-1633
13 (509) 458-3434

14 Proceedings recorded by mechanical stenography, transcript
15 produced by computer.
16
17
18
19
20
21
22
23
24
25

1 MR. LADIN: Okay.

2 THE COURT: But that's a factual void that seems to
3 exist at the current stage of this case, no discovery having
4 been completed.

5 MR. LADIN: Certainly, Your Honor.

6 But I don't think that discovery would actually aid in
7 resolution of whether there's a political question.

8 THE COURT: I disagree.

9 MR. LADIN: Okay.

10:15AM 10 The reason I say that, Your Honor, if, if I may?

11 THE COURT: Well --

12 MR. LADIN: Is, again, this is about defendants'
13 conduct and whether defendants' conduct ever involved a member
14 of the military would not, would not change the basis of
15 liability for the complaint.

16 THE COURT: And if all their conduct -- I realize
17 there's an allegation that one of the defendants actually went
18 to Afghanistan and participated in the interrogation, but
19 setting that aside.

10:16AM 20 If the activities of the defendants were putting
21 together a program for enhanced interrogation, in quotes,
22 "enhanced interrogation," that they can be held responsible for
23 the decision made by the Executive Branch as to whether or not
24 to utilize the recommended enhanced interrogation procedures.

25 And assuming that those enhanced interrogation

1 procedures constitute, quote -- and I read that discussion in
2 the briefs where you disagree about the definition of torture,
3 but I guess I refer back to my friend Potter Stewart, who always
4 is quoted, concerning that wonderful quote, concerning
5 pornography.

6 MR. LADIN: Yes, Your Honor. I think we all know it
7 when we see it.

8 When we have, you know, captives hung naked from their
9 arms for days, I think that we know what we see.

10:17AM 10 THE COURT: But my, this last hypothetical I've given
11 you is that the -- assuming the defendants in the United States
12 put together -- and as I read the pleadings, they started out
13 at, what you people from around here don't know, we used to call
14 the Survival School, where they trained military types as to how
15 to deal with torture when captured.

16 But assuming that their activities were here in the
17 Eastern District of Washington, and they put together the
18 proposals as to what can be done and methods that can be
19 utilized and gave it to the other party to the contract, the
10:18AM 20 CIA; and the CIA then reviewed it and made the decision on
21 whether or not to utilize those programs.

22 MR. LADIN: Yes, Your Honor.

23 THE COURT: Where does that leave the liability of the
24 defendants, who didn't make the final decision on whether or not
25 to utilize the torturous enhanced interrogation?

1 MR. LADIN: Right.

2 Well, Your Honor, the Ninth Circuit explained in Doe
3 versus Nestle, right, which is a case involving aiding and
4 abetting, and in this case what happened is the defendant --

5 THE COURT: Well, what's your position on my
6 hypothetical?

7 MR. LADIN: If I understood your hypothetical
8 correctly, and please tell me if I don't, Your Honor, you're
9 asking, if the defendants only made the decisions to put
10:19AM 10 together a torture program, package it and sell it, but didn't
11 decide who would be subjected to it, would they still be liable?

12 THE COURT: Or whether or not to utilize it.

13 MR. LADIN: Right. Whether or not to utilize it.
14 They said, here it is.

15 THE COURT: Yes. Here's an option.

16 MR. LADIN: Here's an option.

17 Your Honor, they would be liable. And the reason, the
18 reason I bring up that Doe versus Nestle case is because the
19 basis of liability there is aiding and abetting liability, which
10:19AM 20 is a recognized form of -- oh, I'm sorry.

21 THE COURT: I spent a lot of my legal career on aiding
22 and abetting issues. And I assure you that no one would ever be
23 convicted of aiding and abetting by setting forth, here's
24 options that you can utilize.

25 MR. LADIN: Your Honor, it's not just saying, here's

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF WASHINGTON)

: Reporter's Certificate

COUNTY OF SPOKANE)

I, Mark A. Snover, a Registered Professional Reporter and Official United States District Court Reporter;

DO HEREBY CERTIFY:

That the foregoing transcript contains a true and accurate transcription of my shorthand notes of all requested matters held in the foregoing captioned case.

Further, that the transcript was prepared by me or under my direction.

DATED this 26th day of April, 2016.

/s/ Mark A. Snover

MARK A. SNOVER, RPR, CSR

OFFICIAL U. S. COURT REPORTER