

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, et al.,

Plaintiffs,

vs.

JAMES E. MITCHELL and JOHN
JESSEN,

Defendants.

No. CV-15-0286-JLQ

ORDER RE: MOTION TO TAKE
JUDICIAL NOTICE

BEFORE THE COURT is Defendants' Motion to Take Judicial Notice (ECF No. 165) and Motion to Expedite (ECF No. 167). The parties agreed to an expedited briefing schedule and Response and Reply briefs have been filed. (ECF No. 184 & 186). The Motion was submitted without oral argument.

I. Discussion

Defendants invoke Federal Rule of Evidence 201 and request the court take judicial notice of three facts: 1) a terrorist attack occurred on September 11, 2001 in the United States; 2) the 9/11 attacks were planned and carried out by the terrorist group al-Qaeda; and 3) 2,996 people were killed and over 5,000 people injured. (ECF No. 165, p. 1). Plaintiffs' Response states they do not dispute the truth of these three facts, but they do dispute the relevancy to this proceeding. (ECF No. 184, p. 2). Plaintiffs contend they had "absolutely nothing to do with the 9/11 crimes" and argue Defendants' purpose in invoking 9/11 is "to inflame the jury and prejudice it against the Plaintiffs." (*Id.*). Plaintiffs argue the facts are not relevant under FRE 401, and to the extent they are relevant they are more prejudicial than probative under FRE 403. Defendants in Reply argue the events of 9/11 provide background context and suggest that if not for the 9/11

1 attacks the CIA's detention and interrogation program (the "Program") would not have
2 been created. (ECF No. 186, p. 2).

3 The Motion to Expedite (ECF No. 167, p. 2) states: "Good cause exists to expedite
4 consideration of the pending Motion because an expedited decision will give the Parties
5 certainty as that information about which the Court will take judicial notice in
6 conjunction with the Defendants' forthcoming Motion for Summary Judgment."
7 However, portions of the parties' briefing focus on the prejudicial impact such evidence
8 may have on a jury. Plaintiffs do not dispute the truth of the three facts set forth *supra*
9 and do not dispute they are "generally known" within the meaning of FRE 201. Rather,
10 the dispute concerns the relevance and whether the three facts are more prejudicial than
11 probative. Defendants argue the 9/11 attack provides background context and helps
12 explain why the Program was created and what it was designed to achieve. Plaintiffs
13 argue the 9/11 attack "has no bearing on the immunity question ... the question is whether
14 the government could have itself lawfully performed the specific acts here alleged of
15 Defendants." (ECF No. 184, p. 5).

16 The court's preliminary impression is the three facts have some minimal relevance
17 to the claims herein, at least as background context. However, the question of if, and in
18 what manner they would be presented to a jury is a more complicated question which
19 would require Federal Rule of Evidence 403 balancing and other considerations. The
20 court need not address that question, as the instant inquiry is for purposes of summary
21 judgment.

22 **IT IS HEREBY ORDERED:**

- 23 1. Defendants' Motion to Expedite (ECF No. 167) is **GRANTED**.
24 2. Defendants' Motion to Take Judicial Notice (ECF No. 165) is **GRANTED IN**
25 **PART** and **RESERVED IN PART**. The court will take judicial notice of the three facts
26 for the purposes of the pending Motions for Summary Judgment. The court will reserve
27 on the question of whether it would be appropriate to take judicial notice and instruct on
28 the three facts at a jury trial. If this matter proceeds to jury trial, the parties can further

1 address the question in their consolidated Motion in Limine and at the Pretrial
2 Conference.

3 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and
4 furnish copies to counsel.

5 **DATED** this 31st day of May, 2017.

6 s/ Justin L. Quackenbush
7 JUSTIN L. QUACKENBUSH
8 SENIOR UNITED STATES DISTRICT JUDGE
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