

The Honorable Justin L. Quackenbush

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

SULEIMAN ABDULLAH SALIM,
MOHAMED AHMED BEN SOUD,
OBAID ULLAH (as personal
representative of GUL RAHMAN),
Plaintiffs,

vs.

JAMES ELMER MITCHELL and
JOHN "BRUCE" JESSEN,

Defendants.

NO. 2:15-CV-286-JLQ

STIPULATION RE DISCOVERY

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2 The Court has ordered the parties to propose a plan “concerning both the
3 procedure for discovery and scope.” ECF No. 40 at 18. In response to that order,
4 Plaintiffs Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud, and Obaid
5 Ullah (as personal representative of Gul Rahman) (“Plaintiffs”), Defendants
6 James Elmer Mitchell and John “Bruce” Jessen (“Defendants”), and the United
7 States (collectively “the Parties”), through their respective counsel of record,
8 stipulate:

9 **Procedural Background**

10 1. This case involves allegations of torture and abuse by three former
11 detainees in the Central Intelligence Agency’s (“CIA”) former detention and
12 interrogation program. The plaintiffs allege that the two defendants in the case
13 (James Mitchell and John “Bruce” Jessen) were contractors for the CIA and, in
14 that capacity, designed, implemented, and participated in the detention and
15 interrogation program.

16 2. The United States has filed a Statement of Interest with respect to its
17 interest in the potential for disclosure of information which implicates privileged
18 or classified information or may otherwise impact national security.

19 3. Defendants moved to dismiss Plaintiffs’ complaint *inter alia* for lack
20 of subject-matter jurisdiction based on the political question doctrine and for
21 derivative sovereign immunity (“Defendants’ Motion”). Defendants’ Motion was
22 argued on April 22, 2016.

23 4. The Court denied Defendants’ Motion. The Court instructed the
24 Parties to propose a plan “concerning both the procedure for discovery and
25 scope” by May 23, 2016. ECF No. 40 at 18–19.

Discovery

5. Discovery shall focus on (1) the roles of Defendants and others in designing, promoting, and implementing the methods alleged in the Complaint, as related to Plaintiffs, including whether Defendants “merely acted at the direction of the Government, within the scope of their authority, and that such authority was legally and validly conferred,” ECF No. 40 at 14; and (2) Plaintiffs’ detention, rendition, interrogation and alleged resulting injuries.

6. A primary source for this Discovery will be the United States. Such information shall be requested from the United States through *Touhy* (*United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)) requests or such other procedure as the Parties may agree. *Touhy* requests directed to the Central Intelligence Agency and Department of Justice shall be served on counsel for the United States, who will communicate the requests to the appropriate agency contacts. In the event a party intends to submit a *Touhy* request to an agency of the United States other than the Central Intelligence Agency or Department of Justice, the party shall notify counsel for the United States, who will confer with the agency and inform the requesting party whether counsel for the United States will accept service on behalf of the agency. Upon request from a party, counsel for the United States will confer with the appropriate agency contacts and provide the requesting party with information regarding the status of any pending *Touhy* requests.

Classified Information and National Security

7. The United States asserts that Defendants possess information which is considered classified by the United States. In addition, the United States asserts that Defendants are subject to non-disclosure agreements related to their

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2 consulting work in connection with the former detention and interrogation
3 program. Defendants assert that they must be able to share all information and
4 fully confer with their counsel about their consulting work in connection with the
5 former detention and interrogation program, including all aspects of their
6 involvement and participation, and have a Constitutional right to do so.

7 8. Defendants assert that the United States must take action necessary
8 to permit Defendants to share all information and fully confer with their counsel
9 about their consulting work in connection with the former detention and
10 interrogation program, which may include providing security clearances to
11 Defendants' counsel or other actions which will enable Defendants to confer fully
12 with their counsel. The United States has provided Defendants with
13 classification guidance regarding the categories of information Defendants may
14 share with their attorneys consistent with Defendants' non-disclosure agreements.
15 The guidance explains, among other things, the categories of unclassified
16 information concerning the CIA's former detention and interrogation program
17 that Defendants may share with their attorneys. One of Defendants' attorneys has
18 previously been granted a Top Secret security clearance to assist the Defendants
19 in other matters, and the United States will consider requests by Defendants'
20 attorneys for additional security clearances upon request, including an
21 explanation why additional attorneys require security clearances and access to
22 classified information.

23 9. The United States asserts that, although various categories of
24 information related to the former detention and interrogation program have been
25 declassified, other categories of information or documents that may or may not be
relevant to the claims and defenses of the parties to this litigation are currently and

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2 properly classified pursuant to Executive Order 13526, Classified National
3 Security Information, 75 Fed. Reg. 707 (Dec. 29, 2009), and otherwise protected
4 from disclosure. The United States further asserts that the disclosure of such
5 information or documents reasonably could be expected to cause serious and in
6 some cases exceptionally grave damage to the national security of the United
7 States. The United States therefore reserves its right to object or to seek
8 appropriate protections to prevent the disclosure of such information in the event
9 it is sought by Plaintiff or Defendants in this case.

10 10. The following is a list of categories of information that the United
11 States asserts is classified national security information related to the former
12 detention and interrogation program, and therefore may not be the subject of
13 discovery in this matter:

- 14 a. Identities of current or former CIA employees or contractors
15 involved in the detention and interrogation program (*e.g.*, names,
16 pseudonyms, physical descriptions, or other identifying information),
17 with the exception of any current or former CIA employee or
18 contractor whom the United States has officially acknowledged as
19 associated with the detention and interrogation program.
- 20 b. The locations of CIA Stations and Bases, including facilities or
21 detention sites used by the CIA as part of the detention and
22 interrogation program, including the name of any country or city in
23 which the detention site was located or information about the
24 operation of the facility that would tend to reveal its location.
- 25 c. Identities of any foreign intelligence service, including its personnel
or agents, involved in the detention and interrogation program or the

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2 capture, rendition, detention, or interrogation of detainees in the
3 detention and interrogation program.

4 d. Identities of human intelligence sources who assisted the CIA in
5 executing or administering the detention and interrogation program
6 (*e.g.*, names, pseudonyms, physical descriptions, or other
7 identifying information).

8 e. The content and source of information provided to detainees in the
9 detention and interrogation program during the course of
10 interrogations, debriefings, and interviews.

11 f. Names, code words, or other identifiers used in the detention and
12 interrogation program to refer to individuals, detainees, CIA
13 stations or bases, or CIA detention facilities.

14 g. Information regarding the questions posed to detainees in CIA or
15 foreign liaison debriefing or interrogation sessions and the answers
16 the detainees provided, including the intelligence requirements or
17 gaps that the CIA or foreign liaison services sought to fill by
18 questioning the detainees.

19 h. Information regarding the capture of detainees in the detention and
20 interrogation program, including any involvement by a foreign
21 liaison services.

22 i. Information regarding the transfer or rendition of a detainee to the
23 extent that information would reveal a foreign liaison service's
24 involvement in the operation or the location of the operation,
25 including the length of any trips and the arrival, departure, layover,
and final destination locations involved in the transfer.

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- 2 j. Dissemination-control information, including routing and
- 3 administrative information, contained within documents that the
- 4 CIA uses to track and control information.
- 5 k. Information regarding the nature of any alleged classified work
- 6 performed by defendants as part of non-detention and interrogation
- 7 related contracts with the CIA.

8 11. The United States acknowledges that the following categories of

9 detention and interrogation program information are not classified and may be

10 the subject of discovery, subject to appropriate objection:

- 11 a. The fact that the detention and interrogation program was a
- 12 covert action program authorized by the President of the United
- 13 States, and that the detention and interrogation program was
- 14 authorized by a Memorandum of Notification issued by the
- 15 President on September 17, 2001.
- 16 b. The names and descriptions of authorized enhanced
- 17 interrogation techniques that were used in connection with the
- 18 detention and interrogation program, and the specified
- 19 parameters within which the interrogation techniques could be
- 20 applied.
- 21 c. The authorized enhanced interrogation techniques as applied to
- 22 the 119 individuals, including Plaintiffs, as described in
- 23 Appendix 2 of the Executive Summary officially acknowledged
- 24 to have been in CIA custody.
- 25 d. Information regarding the conditions of confinement as applied
- to the 119 individuals, including Plaintiffs, mentioned in

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2 Appendix 2 of the Executive Summary officially acknowledged
3 to have been in CIA custody.

4 e. Information regarding the treatment of the 119 individuals,
5 including Plaintiffs, mentioned in Appendix 2 of the Executive
6 Summary officially acknowledged to have been in CIA custody,
7 including the application of authorized enhanced interrogation
8 techniques on the individuals.

9 f. Information regarding the conditions of confinement or treatment
10 during the transfer or rendition of the 119 individuals, including
11 Plaintiffs, mentioned in Appendix of the Executive Summary
12 officially acknowledged to have been in CIA custody.

13 g. Allegations of torture, abuse, or mistreatment by the 119
14 individuals, including Plaintiffs, mentioned in Appendix 2 of the
15 Executive Summary officially acknowledged to have been in CIA
16 custody.

17 12. Defendants recognize the national security concerns and non-
18 disclosure concerns expressed by the United States, and agree to explore ways in
19 which information relevant to the claims or defenses asserted can be provided
20 subject to the limitations expressed by the United States, including redaction of
21 documents, the use of pseudonyms, or other methods. However, Defendants
22 reserve the right to seek production of documents and information which the
23 United States asserts are classified or subject to Defendants' non-disclosure
24 agreements should Defendants and the United States not be able to reach
25 agreement on ways in which discoverable information can be provided subject to
the limitations expressed by the United States. The United States reserves its

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2 right to object or to seek appropriate protections to prevent the disclosure of
3 classified, protected, or privileged information, or information subject to
4 Defendants' non-disclosure agreements, in the event it is sought by Plaintiffs or
5 Defendants in this case.

6 13. Plaintiffs assert that this litigation may proceed without the
7 categories of information identified by the government in paragraph 10, none of
8 which, Plaintiffs assert, is necessary to resolution of this lawsuit. Plaintiffs do not
9 agree with the United States that all such information is properly classified.
10 Plaintiffs specifically disagree that their own thoughts, memories, and
11 experiences, which arise from their personal and involuntary subjection to the
12 CIA's detention and interrogation program, may be lawfully classified or
13 suppressed. Because Plaintiffs assert the categories of information identified by
14 the government in paragraph 10 are unnecessary to this litigation, Plaintiffs agree
15 to the government's restriction on using or seeking those categories of
16 information as part of this lawsuit. Should Plaintiffs' assessment of the need in
17 this litigation for information identified in paragraph 10 change, Plaintiffs will
18 seek modification of this stipulation in accordance with the procedures set forth in
19 paragraph 18.

20 14. Plaintiffs and Defendants agree to serve the United States with a
21 copy of all notices of deposition and to inform the attorneys for the United
22 States regarding the scheduling of any depositions. Attorneys for the United
23 States and representatives from appropriate Government agencies may
24 attend all depositions and proceedings in this case and may make objections
25 they deem necessary to prevent the unauthorized disclosure of privileged or
classified information. If an attorney for the United States asserts an

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2 objection to prevent the disclosure of classified, protected, or privileged
3 information, or information subject to Defendants' non-disclosure agreements,
4 the witness shall be precluded from responding to any question to which
5 objection is made pending further order of the Court.

6 15. In the event the United States asserts an objection during a
7 deposition or proceeding based on privilege or classification that precludes a
8 witness from responding to a question, the United States and the party
9 requesting the information shall meet and confer after the deposition or
10 proceeding to discuss whether the requesting party intends to pursue access to the
11 information and, if so, whether the information can be provided in an alternative
12 form that would resolve the United States' privilege or classification objection.
13 In the event the United States and requesting party are unable to reach an
14 agreement on providing the requested information in an alternative form, the
15 proper procedural vehicle for the requesting party to seek judicial relief is a
16 motion to compel pursuant to Federal Rule of Civil Procedure 37.

17 16. Defendants acknowledge that they possess information which the
18 United States contends is classified and/or subject to non-disclosure
19 agreements with the CIA. If Defendants intend to file any pleading or serve
20 any discovery response which contains information they reasonably believe
21 the United States would contend is classified and/or subject to a non-
22 disclosure obligation, Defendants shall provide the pleading or discovery
23 response to the United States for review prior to service or filing. Defendants'
24 disclosure of information to the United States pursuant to this review
25 procedure shall not be deemed to waive any claim Defendants may have that
the information submitted is subject to the work product protection or

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2 attorney-client privilege, or estop Defendants from designating the
3 information submitted as subject to the work product protection or attorney-
4 client privilege at a later date. The United States agrees to review the
5 information submitted by Defendants in a reasonable period of time,
6 recognizing that the time required for review will vary depending a variety of
7 factors, including the volume and complexity of the information submitted as
8 well as any upcoming litigation deadlines. In the event the United States has
9 not completed its review within ten (10) business days, the United States shall
10 provide Defendants with an estimated time for completion.

11 17. In the event information submitted by the Defendants to the
12 United States for review is necessary for a filing or discovery response
13 imposed by this Court or the Federal Rules of Civil Procedure, and such
14 information is undergoing review by the United States at the time
15 Defendants' filing or discovery response is due, Defendants' filing or
16 discovery obligation shall be tolled during the period of time while the United
17 States reviews Defendants' submission.

18 18. Any Party may seek modification of any aspect of this Stipulation by
19 agreement of all parties, or, failing agreement, by motion to the Court.
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DATED this 23rd day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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